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Volume 101 | Number 2

Article 6

1-1-2023

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SOCIAL JUSTICE AND THE STRUCTURE OF THE LITIGATION SYSTEM*

YOTAM KAPLAN** & ITTAI PALDOR***

Substantive rights are meaningless if they cannot be enforced. Access to justice is thus at the heart of any legal system. If access to justice is effectively denied, the legal system becomes an empty vessel. Regrettably, in the United States, most people are currently denied effective access to the litigation system. Litigation is costly, and individual litigants encounter high barriers in their attempts to vindicate their rights. They often face repeat players—powerful corporate litigants who frequent the court system and enjoy economies of scale in litigation. Growing wealth gaps mean that individual litigants face extremely unfavorable odds in litigation, and simply cannot afford to assert their rights. For members of vulnerable and marginalized social groups, these problems are especially acute. Social justice requires equal and effective access to the litigation system, regardless of race or socioeconomic status. Without such equal access, the litigation system is not a system of justice, but a tool of oppression: large corporations and well-off parties can use the litigation system to abuse poorer individuals, knowing that these members of society will not be able to afford vindication.

This Article develops a novel regime that secures equal access to the litigation system through two rules that govern litigation costs. First, we suggest allowing onetime litigants to set a cap on the overall investment in litigation when they face professional, repeat litigants. Second, we suggest allowing individual litigants to set a cap on the amount the vindicated party will be reimbursed for when trial is over. These two caps assure equal and effective access to the litigation system, satisfying the fundamental requirements of social justice. We show that these rules are not unfair to well-off parties. They assure that all parties will always be able to litigate if their cases have merit, and that their rights will always be fully protected if they win. We discuss the implementation of this regime in practice, and illustrate the justifications for this method with

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reference to social and distributive justice, efficiency, and the broader goals of the litigation system.

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INTRODUCTION

Suppose you are being sued by a large corporation. The corporation claims that one of your recent social media posts violates its intellectual property rights¹ or that you defaulted on a loan.² It seeks \$5,000 in damages. You never expected to face such a mighty adversary in court. You are fairly certain that you are in the right and that the claim is frivolous, but you also know that taking the case to court will cost you far more than \$5,000. Worse still, you fear the

1. See Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) [hereinafter Balganesh, *Copyright Infringement Markets*] (highlighting the ubiquity of frivolous copyright suits by corporations against individuals).

2. See Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121, 132 (2018) (describing how debt collection firms abuse the litigation process to collect invalid debt).

corporation will litigate aggressively, further driving up your litigation costs. You know you cannot go toe-to-toe with a financial giant and you have no real option of defending yourself in court. Therefore, you must yield to the firm's unjustified demand. Unfortunately, this example is highly typical of contemporary civil litigation.³ Faced with the prospect of taking on a mighty adversary, most Americans give up on their rights rather than asserting them in court.⁴ Of course, this is especially true for poorer members of society.⁵

This phenomenon represents a colossal failure of the litigation system: the system effectively offers no protection to private individuals and to the most vulnerable members of society. Social justice demands that effective access to the litigation system be equal and available to all. But this is not only a matter of social justice. It is also a matter of efficiency. The litigation system's key goal—arriving at the correct legal outcome—requires a clash between parties that are roughly equal and can effectively make their respective cases. In this Article, we offer a simple way to achieve these goals without compromising wealthier parties' ability to litigate effectively. According to our proposal, if you are indeed sued as described above, you will have the power to set a reasonable cap on litigation expenditures, say at \$200, and *both* parties will then only be allowed to spend up to this amount on the case. With this mechanism in place, and knowing that asserting your rights in court can only be as costly as \$200, you will defend your rights. Thus, the litigation playing field will be leveled and fair.⁶ In this Article, we spell out the details of our proposal and show that it better serves the declared purposes of the litigation system.

The starting point for our analysis is simple: access to the justice system is a prerequisite for upholding substantive rights.⁷ Rights are meaningless in real life if the judicial process is not accessible to those whose rights have been violated.⁸ For example, a tortfeasor's liability for damages is inconsequential if the victim cannot enforce her right to compensation.⁹ Similarly, a consumer

3. See Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 69 FORDHAM L. REV. 1785, 1785 (2001) [hereinafter Rhode, *A Roadmap for Reform*].

4. See *id.*

5. See *id.*

6. The numerical examples throughout this Article offer a stylized illustration of our argument. Specific sums and numbers have been chosen with ease of comprehension in mind and are not necessarily meant to be realistic.

7. See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1314–21 (2012) [hereinafter Parchomovsky & Stein, *Relational Contingency of Rights*] (explaining that the realization of legal rights depends on the costs of vindicating these rights through the court system).

8. See *id.* at 1314; Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) (stating that legal duties are simply predictions regarding possible legal sanctions).

9. See Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1728 (2012) (explaining that civil remedies give legal recognition to the fact that a duty was violated); Yotam Kaplan, *In Defense of Compensation*, 70 ALA. L. REV. 573, 581 (2018) (describing a coordinated campaign by well-organized commercial defendants to limit the reach and scope of tort law).

sued for nonexisting credit card debts will find herself forced to pay these debts if she cannot afford to litigate and defend herself.¹⁰ More broadly, a right-holder will find that her right is worthless if she cannot assert it in court.¹¹

Yet, for most people, access to the court system is now the exception rather than the rule.¹² This phenomenon stems from rising litigation costs,¹³ widening income gaps,¹⁴ and the changing structure of the litigation battlefield.¹⁵ In short, poorer litigants increasingly find themselves facing off against wealthy corporate rivals,¹⁶ whom they are ill-equipped to meet as adversaries.¹⁷ Corporate litigants, such as insurance companies, tech giants, debt-collecting firms, and other large corporations, use their multiple advantages over individual litigants to reshape the litigation playing field in their favor.¹⁸ These professional litigants can easily carry out stubborn litigation campaigns that

10. See Arbel, *supra* note 2, at 130–38 (describing abuse of litigation processes by debt collection firms).

11. See Kaplan, *supra* note 9, at 575 (highlighting the necessary role of civil remedies as an essential element of any legal system).

12. See *id.* at 581.

13. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (explaining the centrality of enforcement costs for a general philosophy of rights). For the economic analysis of this issue, see generally Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) [hereinafter Shavell, *Suit, Settlement, and Trial*] (comparing litigation and settlement decision-making under four methods of allocating legal costs); Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (examining a model of parties' litigation and settlement decisions under imperfect information).

14. See generally THOMAS SHAPIRO, *TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE* 14–15 (2017) (discussing the recent rise of wealth inequality in the United States).

15. See generally Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986) (discussing the new challenges presented by complex civil cases and their effects on civil procedure); Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541 (1989) (prescribing a novel judicial approach to managing mass litigation); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) (describing the need for judicial techniques designed to manage complex cases); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) (outlining the development of case management as a cost-cutting device); The Honorable Sam C. Pointer, Jr., *Complex Litigation: Demonstration of Pretrial Conference*, 6 REV. LITIG. 285 (1987) (providing an example of complex litigation).

16. Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1322–24 (2017) [hereinafter Parchomovsky & Stein, *Empowering Individual Plaintiffs*].

17. Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1314, 1318.

18. See F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 470 (2006) ("Because these 'haves' know that they are repeat players on the defense side of the tort system, they have a common motive to reduce costs by reducing the amount of their potential liability in tort by changing tort law in ways that favor defendants."). See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (arguing that the mass production of arbitration clauses results in an erasure of rights since consumers and employees do not arbitrate despite being obliged to do so).

tremendously increase their opponents' litigation costs.¹⁹ By doing so, professional corporate litigants can make the option of litigation unprofitable, and therefore irrelevant, for most people.

As a result, far too many Americans are effectively forced to forgo their legal rights.²⁰ This is especially true for members of vulnerable and marginalized social groups.²¹ Lower-income households are most likely to find themselves unable to fund lengthy litigation campaigns and vindicate their rights.²² Members of racial minorities similarly suffer disproportionately from their inability to access the litigation system.²³ Furthermore, professional litigants can easily identify members of marginalized groups and target them. Insurers, for example, have an abundance of data on the income of the insured, and banks have similar data on customers.²⁴ These corporations can thus strategically invest in litigation against adversaries who are unable to bear the costs of prolonged litigation.²⁵

These power inequalities are exacerbated by the inherent advantages that repeat litigants enjoy.²⁶ Corporations litigate regularly, meaning that they have long-term interests in the litigation of each case.²⁷ Repeat litigants invest strategically in litigation not only with the intent of overwhelming their current adversary, but also for reasons that have to do with their broader interest in the litigation process.²⁸ Specifically, corporate litigants are heavily invested in their reputation. First, a corporate litigant fears the reputational cost associated with a ruling against it, which may harm its future business.²⁹ Second, many

19. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331.

20. See Rhode, *A Roadmap for Reform*, *supra* note 3, at 1785 (“Millions of Americans lack any access to the [justice] system, let alone equal access. An estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two- to three-fifths of middle-income individuals, remain unmet.”); Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1330 (showing the decline in private plaintiffs’ ability to vindicate their rights through the legal system).

21. See Rhode, *A Roadmap for Reform*, *supra* note 3, at 1785; Arbel, *supra* note 2, at 139.

22. See Sara Stenberg Greene, *Race, Class and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1265–66 (2016).

23. See *id.* at 1268–69.

24. Insurers have been accused of using a computer program colloquially known as “Colossus” to systematically underpay personal-injury claimants. See “Colossus’ Class Action Costing Defendants More than \$293 Million,” LEGAL NEWSLINE (Aug. 2, 2007), <https://legalnewsline.com/stories/510629228-colossus-class-action-costing-defendants-more-than-293-million> [https://perma.cc/33MK-DFJY]. Such claimants are typically bootstrapped for cash, and thus cannot afford protracted litigation. *Id.*

25. See *id.*

26. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331.

27. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 99–101 (1974) (explaining the ability and incentive of repeat litigants to invest in litigation beyond the net expected value of the individual case).

28. See *id.*

29. See Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1213–21 (2016) (showing that litigation produces information that is then used by market players to decide on their future actions).

corporate litigants have a strong incentive to establish a reputation as tough opponents to deter future parties from facing them in court.³⁰ Individual litigants, by contrast, typically consider only the expected value of the case at hand.

This means that when corporate and private litigants meet on the litigation battlefield, they are fighting entirely different wars. Corporate litigants have a strong incentive to invest in a given case far beyond what an individual litigant would. This dynamic has devastating consequences for individual litigants. The imbalanced *incentives* exacerbate the problem brought about by imbalanced financial *abilities*, further deterring individual litigants. Equally important, even when a private individual chooses to litigate, this imbalance contradicts a fundamental assumption on which the litigation system is based: a fair competition between equal parties,³¹ which is supposed to produce truthful, factual, and legal findings.³² A battle between a heavyweight fighter seeking to establish its reputation as a tough opponent and an inexperienced lightweight adversary is not likely to produce either the truth or the correct legal outcome.

The present Article offers a solution to this problem and proposes a socially just litigation structure that serves the poor and the rich equally while assuring that all can assert their rights in court. To achieve this goal, we suggest a novel regime for governing litigation costs. Our proposed regime combines two key elements, or two types of caps, designed to secure access to justice.

The first is an overall cap on investment in litigation. This cap is suggested for all cases in which one party is an individual, onetime litigant and the other is a repeat professional corporate litigant. In such cases, we propose that the onetime litigant be allowed to set a cap on the total amount each party is allowed to invest in litigating the case. Both parties are then limited by this amount. Limiting a party's ability to invest as it deems appropriate may seem odd. After all, we do not normally regulate private entities' expenditure. But justice and vindication in legal disputes are not commodities that should be allocated based on willingness or ability to pay for them. The adversarial process is a regulated competition designed to arrive at a just and truthful outcome. Vindicating a

30. In this respect, repeat litigants are analogous to incumbent monopolies who may prey on a new entrant to deter future entry into the market by obtaining a reputation of an aggressive monopolist. See generally Philip Areeda & Donald F. Turner, *Predatory Pricing and Related Prices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (analyzing the economic underpinnings of predatory pricing); RICHARD A. POSNER, *ANTITRUST LAW* 202 (2d ed. 2001) (discussing exclusionary practices—including tying, predatory price cutting, vertical mergers, exclusive dealings, and refusals to deal—that allow organizations to gain or maintain monopoly power).

31. See Earl Johnson, Jr., *The Justice System of the Future: Four Scenarios for the Twenty-First Century*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 183, 185 (Mauro Cappelletti ed., 1981).

32. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035–42 (1975).

party based on its willingness to overspend is, in fact, the opposite of justice.³³ The first cap thus restores the adversarial promise of a battle between equals that will result in a just and truthful outcome.

In addition, we propose that the vindicated party be awarded costs at the end of trial, in contrast to the current regime. But we also propose a cap on the award of costs at the end of trial. This mechanism is suggested for all cases in which litigation takes place between parties of disparate financial means. Under this proposed cap, at the beginning of trial the poorer party would set the maximum amount of costs for which the vindicated party would be reimbursed. This rule prevents the well-off party from depriving the poorer party of justice through strategic investment.³⁴ At the same time, this suggested rule allows the less affluent party (as well as the wealthier party) to recover all costs that are not excessive.

Combined, these two caps offer an optimal solution to the problem of litigation costs and assure equal access to justice. Under our solution, a litigant will *always* find it worthwhile to litigate a case if she has at least a fifty percent chance of winning,³⁵ and the winning party will *always* be made whole following the litigation process.

The two caps achieve different, although closely related, purposes. The *total* cap on expenditure safeguards against the repeat player's ability to obtain a favorable but unjust outcome owing to the unlevelled playing field. This is why the cap should be applied whenever one litigant is a repeat litigant and the other a onetime litigant. The cap on fee awards safeguards against manipulation of the less affluent litigant's costs and assures full reimbursement of the vindicated party. This cap should therefore be applied whenever one litigant is wealthier than the other. The two caps can be applied jointly or separately. In the all-too-familiar case of an impoverished, onetime litigant combatting a well-off repeat player, both caps should be applied.

33. See, e.g., *Heller v. Doe*, 509 U.S. 312, 332 (1993) ("At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him."); *Goldberg v. Kelly*, 397 U.S. 254, 268–71 (1970); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1744 (2022) ("Accuracy is one of the chief lodestars of the civil justice system, whether one examines positive law or normative theories about the appropriate goals of civil justice policymaking."); Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1320–21.

34. Such strategic investments can include tactics such as delaying the litigatory practice, routinely employed by repeat litigants. See JAY M. FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* 5–7 (2010); Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1346–47.

35. This does not mean that parties will have to litigate. Rather, when they settle the case out of court, the settlement payment will reflect the true value of the parties' rights. See Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982) (presenting the familiar argument that parties will choose to settle their cases out of court if they can accurately estimate the outcome of litigation); see also *infra* note 217 and accompanying text.

The proposed method is designed to adapt the litigatory process to the current reality of inequalities between litigants. It is meant to take the institutions of litigation from the classic nineteenth century world of *Hadely v. Baxendale*³⁶ (two private parties litigating against one another) into the twenty-first century world of *Rudgayzer v. Google*³⁷ (an individual facing a tech giant). Our proposed method rectifies the access-to-justice problem presented by these inequalities.

Importantly, our proposal does not undermine wealthier adversaries' rights in any way. Quite the contrary. In addition to securing impecunious parties' access to justice, the proposal also holds a promise of a truthful outcome from the litigation process and ensures full exercise of legal rights, all of which are necessary to assure substantive justice³⁸ and efficiency.³⁹ The litigation system, through its adversarial structure, supports a search for truth.⁴⁰ The "sporting theory of justice"⁴¹ embodies the idea that a truthful, factual, and legal outcome emerges through fair competition between opposing litigants. If each self-interested party presents its case to the best of its ability,⁴² truthful information is generated.⁴³ This theory of justice depends critically on a fair competitive event.⁴⁴ If there is a systematic gap between the parties' resources, abilities, and incentives that is too great, it would be naïve to expect a truthful outcome to emerge from their clash.⁴⁵ Our proposal restores the promise of a fair litigatory process, thereby allowing for the production of truthful results. However, it does not in any way disadvantage wealthier parties or repeat

36. [1854] 156 Eng. Rep. 145, 151 (Ex.).

37. No. 13 CV 120, 2014 WL 12676233, at *1 (E.D.N.Y. Feb. 10, 2014).

38. See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) [hereinafter Weinrib, *Corrective Justice*] (explaining that justice requires reparation following the violations of rights).

39. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2–3 (2004) [hereinafter SHAVELL, ECONOMIC ANALYSIS OF LAW] (explaining the requirements of efficiency as a goal of the legal system).

40. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 914 (2011–2012) (explaining that "[t]he adversary system operates on the fundamental belief that the best way to ascertain the truth is to permit adversaries to do their best to prove their competing version of the facts," but contesting the implicit underlying assumption of equality in the context of criminal proceedings); Johnson, *supra* note 31, at 193–94.

41. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906).

42. See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1874 (2002) (noting that in adversarial adjudication, equal participation is "important . . . because it is thought to contribute to accurate and acceptable dispute resolution").

43. See Frankel, *supra* note 32, at 1042.

44. See Johnson, *supra* note 31, at 185. In other words, our proposal may indeed make it more difficult for repeat litigants to win their cases, but will not thereby harm their equal rights to fair access to the litigation system. The reason for this is, of course, that repeat litigants, like any type of litigant, have a right to have their claims heard by the court, but they do not have the *right* to an unfair advantage in litigation in a way that can distort truthful outcomes.

45. See *id.*

litigants. Both should have no problem in asserting their rights and can be expected to triumph when they are the meritorious party.

Our proposal significantly reduces the overall costs of litigation. In this, our proposal enjoys an advantage over other existing schemes, such as the legal aid project, that aim to solve the problem of imbalance between litigants by financing litigation for the poor.⁴⁶ We argue that such efforts are misguided because they do not rectify the imbalance between the parties, and at the same time increase the overall investment in litigation, instead of decreasing it. Such schemes are thus politically unattainable and economically unsustainable.

The remainder of the Article is structured as follows: Part I describes the costs of litigation and explains the unique role of these costs within the framework of the access-to-justice problem,⁴⁷ emphasizing that the costs of litigation are a barrier not only for potential plaintiffs but also for potential defendants.⁴⁸ Part II continues the discussion by detailing existing solutions to the problem of unequal litigation resources and highlighting their inadequacies. Part III develops our proposed double-cap system and shows that the proposed system guarantees substantive justice and efficiency. Part III also shows that our proposal satisfies the fundamental requirement of social justice—securing access to the legal system for all, while also lowering the overall costs of litigation. Part IV discusses practical aspects of implementing our proposal. A short conclusion follows.

I. THE COSTS OF LITIGATION

This part delineates the problem of inequality in litigation resources and highlights the role of litigation costs as a barrier to substantive justice. First, this part introduces the unique characteristics of litigation costs that set them apart from other barriers to justice. It then proceeds to explain how these costs can be manipulated to prevent individual litigants from accessing the court system and vindicating their rights. We end this part with a simple numerical example to motivate the analysis going forward.

A. *Litigation Costs as a Unique Barrier to Justice*

At times, access to justice is balanced against competing values, resulting in a formal rule limiting access to the court system.⁴⁹ A prominent example is

46. See *infra* Section II.C.

47. See *infra* Section I.A.

48. See *infra* Section I.B; see also Wilf-Townsend, *supra* note 33, at 1708 (surveying the problem of massive repeat plaintiffs).

49. E.g., the laches defense, developed in case law, which allows the dismissal of a claim if the party arguing for the defense can show a lack of diligence on behalf of the opposing party in pursuing the case and can also show prejudice to itself. *Costello v. United States*, 365 U.S. 265, 282 (1961); see also *Brown v. County of Buena Vista*, 95 U.S. 157, 159 (1877).

the statute of limitation.⁵⁰ Victims are allowed only a limited time to uphold their rights in court because would-be defendants have a legitimate interest in certainty⁵¹ and should not be required to save evidence indefinitely or defend themselves against outdated claims.⁵² Such limitations on access to justice reflect a deliberate balancing of values by the legislature or by some other political agent vested with this balancing task.⁵³ Such limitations are not the focus of the present Article. For our purposes, we may consider such direct limitations justifiable.

At other times, the state places indirect limitations on plaintiffs' access to justice, a prominent example being court fees. Although these fees are not designed to limit plaintiffs' access to justice,⁵⁴ they increase the costs of litigation for plaintiffs, placing an additional burden on them.⁵⁵ Despite being indirect, such limitations are similar to the statute of limitation for purpose of our argument. They are consciously imposed by the state. Plaintiffs' access to justice is knowingly limited because the costs of the judiciary must be borne by someone and policymakers find it justifiable to impose a portion of these costs on those using this public service (and presumably benefitting from the litigation process they initiated).⁵⁶ Court fees also weed out some frivolous lawsuits.⁵⁷ Court fees are thus the outcome of a deliberate value-balancing act conducted by the political agent vested with the task of balancing access to justice, funding of the judiciary, and thwarting frivolous lawsuits.⁵⁸ Both direct and indirect limitations on access to justice knowingly imposed by the state are part of the institutional design of the court system and can be assumed, for our purposes, to be justifiable.

50. See CALVIN W. CORMAN, *LIMITATION OF ACTIONS* 4 (1991) ("Statutes of limitations often foreclose judicial actions by virtue of expiration of allotted time."); H.G. WOOD, *A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY* 1 (Dewitt C. Moore ed., 4th ed. 1916) ("Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced . . ."). See generally *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) (surveying developments in statutes of limitations and discussing the doctrine of laches and contractual limitations).

51. See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 474–77 (1997).

52. See Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 132–34 (1955) (discussing the purposes of civil statutes of limitation).

53. See Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 616–18 (2008) (analyzing the way the statute of limitation balances competing values).

54. 28 U.S.C. §§ 1911–1914.

55. See Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 272–74 (1985) (discussing the effect of court fees on indigent litigants and the possibility that such litigants will be unable to access the court system).

56. *Id.* at 269–72.

57. See *id.* at 270–71.

58. On mechanisms for weeding out frivolous lawsuits (although challenging the very concept), see generally Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633 (2010).

But indigent parties also face an unintended obstacle to justice—the costs incurred in the course of litigation. These costs include attorneys’ fees and third-party expenses that litigants must bear. With the costs of litigation constantly rising,⁵⁹ such costs may be prohibitive and force parties to forgo their substantive rights entirely. Alternatively, parties may be forced to try to vindicate their rights less effectively—using less-qualified lawyers than their opponent, retaining less-competent experts, and so on.

This obstacle features three unique characteristics that set it apart from the kinds of barriers discussed thus far. First, costs affect both plaintiffs and defendants. Court fees are borne solely by plaintiffs, and the statute of limitation limits only plaintiffs’ ability to bring lawsuits, not defendants’ ability to defend against them.⁶⁰ Litigation costs, however, are borne by both parties. Although access to justice is intuitively associated with those whose rights have been violated (would-be plaintiffs), it is equally important for those who have *not* infringed the rights of others (would-be defendants).⁶¹ A powerful demonstration of repeat plaintiffs’ ability to intimidate defendants is libel and defamation lawsuits, some of which are intended as silencing actions.⁶²

A second unique feature of litigation costs is that their amount is not part of the institutional design of the court system. Litigation costs are not set by the state, and thus hold no promise of a calculated balancing of values by an impartial agent. Consequently, the difference between litigation costs’ effects on the well-off and on the impecunious have not been accounted for and no balance has been conducted. This means that often enough, impecunious litigants will not be vindicated simply because their adversary invested excessive amounts that they could not afford to match. To use a typical example,

59. See Lawrence M. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in ACCESS TO JUSTICE AND THE WELFARE STATE 251, 258 (Mauro Cappelletti ed., 1981) (“Litigation had also become terribly expensive. No one decided, deliberately, to raise the price of law. This simply happened or evolved over the years. The reasons hardly matter. Access to the courts for relief against mistakes and injustices of the state became very, very costly. . . . Quality, of course, is always expensive. A well-trained, professional body of judges costs money. . . . The legal profession is now highly professional, as well. . . . Good lawyers have become extremely expensive.”). See generally MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* (1977) (providing a sociological explanation of the reasons for the rise in litigation costs); Richard L. Abel, *The Rise of Professionalism*, 6 BRIT. J.L. & SOC’Y 82 (1979) (reviewing the conditions that contributed to the rise in the costs of professional legal services); Richard L. Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117 (explaining lawyers’ interest in costly litigation).

60. 28 U.S.C. § 1658. For the general applicability of the statute, see *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 373–83 (2004).

61. On the classification of rights (in the context of a negative right), see John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NW. U. L. REV. 900, 920–21 (1995).

62. E.g., David L. Hudson, Jr., *How Trump and Nunes Use Defamation Lawsuits To Silence Their Critics*, FIRST AMENDMENT WATCH (June 30, 2020), <https://firstamendmentwatch.org/how-trump-and-nunes-use-defamation-lawsuits-to-silence-their-critics/> [<https://perma.cc/HV9P-QBYL>].

tort victims are often less privileged than would-be defendants—most frequently insurers.⁶³ And individual defendants are regularly far less capable of funding litigation than a bank suing them. Under such conditions, the actual costs of litigation represent the brute force of the stronger party and not a deliberate choice regarding the appropriate level of access to justice.

The third, and most problematic, characteristic of litigation costs is that they may be strategically manipulated by the opposing party. A defendant may strategically invest in litigation to increase the plaintiff's costs of litigating. This may force indigent litigants into unfair settlements or deter them from bringing suit altogether.⁶⁴ Scholars have drawn attention to a practice known as the “three Ds”—“deny, delay, defend”—whereby insurers attempt to drag out payment in the hope of draining victims' resources, ultimately forcing them into lowball settlements.⁶⁵ In some cases, plaintiffs do not bring suit at all because they anticipate that defendants will try to drive up their costs.⁶⁶ The “three Ds” deny *plaintiffs* access to justice (through defendants' strategic investment). The twin phenomenon of *defendants* who cannot defend themselves effectively when sued by repeat plaintiffs has recently also been shown to be extremely prevalent.⁶⁷

Unfiled meritorious lawsuits (or unpursued defenses) and lawsuits settled for less than their true value bring about two closely related types of harm. First, corrective justice is effectively denied when victims do not bring lawsuits and do not receive compensation they are entitled to. Would-be defendants get away scot-free with injustice, and victims are worse off than they should be under the law. Second, deterrence is compromised. Potential wrongdoers, aware that they will not be held fully accountable for the harm they inflict because many victims will not pursue their rights, do not take socially desirable measures to prevent or reduce harm.⁶⁸ If the “three Ds” practice is widespread,

63. This is a longstanding phenomenon. See John A. Appleman, *Joinder of Policyholder and Insured as Parties Defendant*, 22 MARQ. L. REV. 75, 75–81 (1938) (focusing on the problems of these wealthy defendants as well); Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1200, 1210 (2016) (describing political controversy surrounding tort litigation as pitting “consumers and trial attorneys against professional, commercial, and business interests”).

64. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 419–20 (1973).

65. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1346–47; FEINMAN, *supra* note 34, at 5–7.

66. See Francis J. Mootz III, *Protecting Victims from Liability Insurance Companies That Add Gratuitous Insult to Grievous Injury*, 17 J. GENDER RACE & JUST. 313, 314–19 (2014) (providing support for the contention that these tactics are commonly employed, focusing chiefly on liability insurers litigating against third-party claimants).

67. See Wilf-Townsend, *supra* note 33, at 1709–10.

68. See Posner, *supra* note 64, at 402–08.

as studies suggest,⁶⁹ victims are systematically undercompensated. Knowing that this is the case, potential wrongdoers are under-deterred.

B. *The Disparate Effects of Litigation Costs*

Litigation costs affect different types of litigants differently. Two systematic imbalances stem from these effects. First, wealthier litigants have an inherent advantage over impecunious litigants. Second, repeat litigants have an advantage over onetime litigants. We elaborate on each of these in order.

1. Wealthy v. Poor Litigants

The costs of litigation have become a grave social justice concern. The ability of underprivileged litigants to access the justice system is in decline.⁷⁰ The high costs of litigation are a recurring theme in legal scholarship,⁷¹ with scholars emphasizing the unequal burden these costs impose on members of vulnerable groups.⁷² Some litigants enjoy easy access to the courts, but others find that they lack the means, financial and otherwise, to access the legal system.⁷³

The growing wealth gap makes it easier for richer litigants to abuse their economic superiority and heighten barriers to justice for their impecunious opponents. Naturally, the wider the wealth gap, the easier it becomes for richer litigants to abuse the process. Moreover, the wealth gap is already extremely large and constantly increasing.⁷⁴ The ratio of the income of an average CEO to that of an average employee has increased more than seventeen-fold in the last fifty years, from 20:1 in 1965 to 354:1 in 2012.⁷⁵ More generally, wealth inequality is currently at historic highs,⁷⁶ with the top 1% of Americans holding

69. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1347.

70. Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1314.

71. See generally HOLMES & SUNSTEIN, *supra* note 13 (discussing the cost of defending and asserting rights in the court system); Shavell, *Suit, Settlement, and Trial*, *supra* note 13 (offering an economic account of the incentives to sue and settle); Bebchuk, *supra* note 13 (highlighting the importance of information asymmetries for the inducement of settlement).

72. Stenberg Greene, *supra* note 22, at 1269–70.

73. See Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1314, 1318.

74. For a comprehensive study, see Jonathan Heathcote, Kjetil Storesletten & Giovanni L. Violante, *The Macroeconomic Implications of Rising Wage Inequality in the United States*, 110 J. POL. ECON. 681, 708–16 (2010).

75. Deborah Hargreaves, *Can We Close the Pay Gap?*, N.Y. TIMES (Mar. 29, 2014, 2:30 PM), http://opinionator.blogs.nytimes.com/2014/03/29/can-we-close-the-pay-gap/?_php=true&_type=blogs&hp&rref=opinion&r=0 [<https://perma.cc/BVX2-V3GZ>].

76. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 430–70 (Arthur Goldhammer trans., 2014).

more than 30% of the wealth, and the bottom 50% owning only 2.8%.⁷⁷ At the same time, costs of litigation are unimaginable. By some estimates, in some areas “costs of \$100,000 per month are commonplace and bills of \$1 million per month are not rare” in significant commercial litigation.⁷⁸ On average, impecunious litigants find it extremely difficult to handle a case against wealthier adversaries.⁷⁹

Under these circumstances, many private litigants do not find it worthwhile to protect their rights in court.⁸⁰ For example, in torts, only about two percent of accident victims (typically individual litigants) sue for

77. *DFA: Distributional Financial Accounts: Distribution of Household Wealth in the U.S. Since 1989, Wealth by Wealth Percentile Group*, BD. GOVERNORS FED. RESERVE SYS. (Sept. 23, 2022), <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:129;series:Net%20worth;demographic:networth;population:all;units:shares> [<https://perma.cc/U7TK-5E9C>]. Income inequality has received significant attention in both national politics and literature. See generally Dave Boyer, *Obama To Use State of the Union as Opening Salvo in 2014 Midterms*, WASH. TIMES (Jan. 26, 2014), <http://www.washingtontimes.com/news/2014/jan/26/Obama-to-focus-state-of-the-union-address-on-incom/> [<https://perma.cc/AV8E-KRR2>] (highlighting income inequality as a major focus of the Obama administration); EDWARD N. WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* (2002) (discussing the development of income inequality over time); LISA A. KEISTER, *WEALTH IN AMERICA* (2000) (analyzing theory and data of household wealth distribution from the 1960s to the 1990s); James B. Davies, Susanna Sandström, Anthony Shorrocks & Edward Wolff, *The Global Pattern of Household Wealth*, 21 J. INT'L DEV. 1111 (2009) (examining global trends in wealth distribution).

78. Alan L. Zimmerman, Fiona McKenna, Daniel J. Bush & Cheryl Kaufman, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, 12 N.Y.U. J.L. & BUS. 635, 643–44, 655 (2016).

79. See CONSORTIUM ON LEGAL SERVS. & THE PUB., A.B.A., *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE* vii–viii (1996); CONSORTIUM ON LEGAL SERVS. & THE PUB., A.B.A., *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS* 23–25 (1994); ROY W. REESE & CAROLYN A. ELDRED, INST. FOR SURV. RSCH. AT TEMPLE UNIV., *LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY* 25–26 (1994) (explaining why individuals did not seek relief from the civil justice system by noting that cost concerns were cited twice as frequently by low-income individuals as compared to moderate-income individuals).

80. It is difficult to assess precisely what percentage of would-be litigants are forced to forgo their rights. But there is evidence that this unfortunate phenomenon is common in many areas. See Rhode, *A Roadmap for Reform*, *supra* note 3, at 1791–94 (discussing categories of litigants and categories of cases in which litigants are typically dependent on assistance to bring their case, but are not eligible for such assistance); Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIA. L. REV. 111, 113 (1991) (indicating similarities in the case of tort victims). Note, additionally, that the use of contingency fees does not solve this problem. Contingency fees are used to solve liquidity problems by allowing plaintiffs to pay attorney fees only in case of success in court. Yet, the more fundamental problem is that the cost of a suit is often simply too high, meaning the suit has a negative net value. In such cases, no contingency payment will suffice to give the lawyer an incentive to take the case. Similar problems persist in class actions, where potential compensation amounts are too low to give plaintiffs' attorneys a proper incentive. See, e.g., Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004); *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1070 (Del. Ch. 2015); Zimmerman et al., *supra* note 78, at 643.

compensation and take insurers to court.⁸¹ Tort victims sue only when the expected compensation amounts outweigh the costs of litigation,⁸² which is not often the case. The failure to sue in tort law is highly representative of the dynamic between individual and corporate litigants.⁸³ The failure of private litigants to assert their rights does not stem from irrationality; indeed, it is perfectly rational, and represents the prohibitive costs of litigation.⁸⁴

2. Repeat v. Onetime Litigants

Litigation costs also have a disparate effect on repeat litigants and onetime litigants. This effect is different from the previous one. Even disregarding disparities in wealth, the high costs of litigation systematically favor professional litigants—repeat players in the court system—over private individuals, who are mostly onetime players.⁸⁵

First, well-organized, repeat litigants such as insurance companies, hospitals, product manufacturers, and financial institutions enjoy ready access to litigation resources.⁸⁶ They employ in-house attorneys and have standing arrangements with large law firms for the provision of routine legal services.⁸⁷ They typically enjoy friendly payment arrangements and pay for legal services on a lenient, retainer-fee basis.⁸⁸ Conversely, private individuals are typically

81. See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 3 (2002).

82. Hylton, *supra* note 80, at 113 (explaining how the costliness of litigation can bar plaintiffs from suing). Scholars have suggested that under special circumstances, tort plaintiffs may be able to bypass this limitation, for instance if they enjoy an informational advantage or if their expenditure on litigation occurs in stages. See Lucian Arye Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 448 (1988); Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats To Sue*, 25 J. LEGAL STUD. 1, 5–9 (1996); see also Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1299–1315 (2006) (demonstrating that negative-value suits may have some value for plaintiffs if the legal regime is structured specifically to support this goal).

83. See Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448–52 (1987) (surveying the literature); see also David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1088–92 (2006).

84. See Hylton, *supra* note 80, at 113; see also Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1345.

85. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331.

86. See Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1344–45; Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331, 1335 (noting that asymmetric litigation costs “are not randomly distributed among litigants; nor are they randomly distributed among all legal domains,” but “[r]ather, they arise from a systemic advantage of certain classes of litigants over others”).

87. See Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331; Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1344. See generally *Gen. Dynamics Corp. v. Superior Ct.*, 876 P.2d 487, 491 (Cal. 1994) (en banc) (showing that the use of in-house counsel is common and explaining its economic advantages for corporations).

88. Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1318, 1344.

onetime litigants with no direct access to such resources.⁸⁹ They are usually billed based on a steeper fixed hourly basis.⁹⁰ Consequently, repeat litigants' access to legal services is less expensive than onetime litigants' access.⁹¹

Repeat litigants also enjoy economies of scale in litigation.⁹² They repetitively face the same legal dilemmas and procedures, and can easily optimize their decision-making processes. Decisions such as when to settle, litigate, hire experts, and so on, are thus much less costly for repeat litigants. Repeat litigants can also reuse much of their investments by using templates and forms (e.g., letters, briefs, legal research, expert opinions) in multiple cases.⁹³ Onetime litigants, by contrast, bear costs that repeat litigants do not face, such as collecting and analyzing information about the merits of their case to decide whether or not to approach an attorney.⁹⁴ Private litigants must also search for, and meet with, potential attorneys, along with negotiating fees and terms of employment. The costs of doing so can be significant. Such differences are an inevitable byproduct of economies of scale that repeat litigants enjoy.⁹⁵ Therefore, for a repeat litigant, the marginal cost of one additional case is negligible.⁹⁶ For a private litigant, one case is often one too many.

A second form of inequality between private and corporate litigants has to do with the long-term interests of repeat litigants in the litigation process. Specifically, the repeat litigant is often combatting more than its current opponent. A loss may encourage future litigants to file a lawsuit against the repeat player. For example, if an airline loses a lawsuit for late arrival, additional passengers from the same flight may file similar lawsuits (even if the findings in the first case are not binding on the defendant in future cases).⁹⁷ In such

89. See *id.* at 1344; Hubbard, *supra* note 18, at 453–54 (“Because defendants in tort disputes tend to have more wealth than plaintiffs, they have an advantage in the litigation.”).

90. See Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1344.

91. See Galanter, *supra* note 27, at 98 (noting the economies of scale advantages of repeat defendants).

92. Economies of scale exist when the average total cost of production declines with each additional unit. See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 272–73 (6th ed. 2009).

93. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331; see, e.g., Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions*, 40 J. LEGAL STUD. 205, 221 (2011) (highlighting the advantages of economies of scale in large law firms); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 494 (2007) (explaining the advantages of leveraging the economies of scale and scope of transactional lawyers, including the repetitive use of materials).

94. See Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1331.

95. See *id.*

96. See *id.* at 1332.

97. Rulings are generally not binding in future cases, because future plaintiffs are not the same plaintiffs as in the first lawsuit, so the ruling does not create *res judicata*. See Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 302–03 (1929). For the irregular case in which *res judicata* affects future

cases, the repeat defendant should be willing to invest more in the case at hand than the private plaintiff.

Another reason for the parties' disparate willingness to invest in a specific case is the corporate litigant's reputation as an aggressive adversary. This issue is closely related to the previous one, but it differs in one important respect: the repeat player is fending off future lawsuits that are entirely unrelated to the case at hand. Returning to the airline example, even if the airline is not concerned with lawsuits filed by additional passengers who were on the flight in question, the airline knows that mishaps will occur in the future as well. The airline may want to signal to future plaintiffs and to the legal community that filing a lawsuit against it in any matter—lost luggage, canceled flights, and so on—will be extremely costly and burdensome for the plaintiff. Insurance companies are a prototypical example of a repeat player who is concerned with its reputation. Often, losing a given lawsuit does not directly affect the insurer's liability in future cases. But its reputation is affected.⁹⁸ Considering the enormous number of suits a repeat litigant like an insurance company faces, establishing a reputation as a tough litigator is crucial, and it justifies an immense investment in those few cases that do end up being litigated.⁹⁹ As a common practice, commercial litigants employ a variety of delay tactics—such as the “three Ds”

cases filed by plaintiffs who were not party to the first lawsuit (in the context of *parens patriae* lawsuits), see Gabrielle J. Hanna, Comment, *The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1957–58 (2017).

98. As mentioned above, *supra* note 30, repeat litigants are, in this respect, similar to incumbent monopolies preying on new entrants. In the context of predation, there is controversy over the question of whether predation indeed occurs, and assuming it does, whether antitrust law should deal with it. Some argue that a game theory analysis suggests that a monopolist cannot regularly establish a reputation. If the incumbent cannot prey on all future entrants, its threat is not credible, and the reputation becomes worthless. If it cannot prey on the last entrant (or on any specific entrant or entrants) because its resources have been depleted, or because that entrant is wealthier, it has no reason to prey on the one-before-last entrant. It consequently has no reason to prey on the entrant before that entrant, and so on. Knowing this, even those on whom the incumbent *can* prey realize that it is irrational for it to do so. Others argue for the opposite approach. See, e.g., Reinhard Selten, *The Chain Store Paradox*, 9 THEORY & DECISION 127, 134–46 (1978); John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 294 (1980); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264–65 (1981); David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253, 253–54 (1981); Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280, 281 (1982); David Easley, Robert T. Masson & Robert J. Reynolds, *Preying for Time*, 33 J. INDUS. ECON. 443, 445–46 (1985). The controversy may be ignored in the current setting because the repeat litigant will often find that it has enough resources to combat all future onetime litigants if it needs to.

99. See Galanter, *supra* note 27, at 99.

described earlier and the “boxing gloves” subsequently described¹⁰⁰—for exactly this purpose.¹⁰¹

* * *

Thus, corporate litigants can outplay impecunious individuals for two related reasons: first, they can cheaply raise their opponents’ costs, and second, they are willing to invest in each case more than the case is worth individually. Litigation between private individuals and corporations is commonplace.¹⁰² And professional corporate litigants are currently growing more powerful and more sophisticated, making it nearly impossible for individual litigants to vindicate their rights.¹⁰³

Access to justice thus remains an unfulfilled promise for the vast majority of individuals, certainly for members of marginalized groups.¹⁰⁴ Millions of Americans are effectively barred access to the legal system,¹⁰⁵ with racial minorities suffering the most.¹⁰⁶ This phenomenon demonstrates a fundamental failure of the litigation system, following the collapse of the key assumption on which this system is based: the (more or less) equal power of the litigating parties. Even in those few cases in which private litigants decide to take a matter to court, the belief that the adversarial process will yield a just result is highly optimistic. This carries dire consequences for a legal system founded on the protection of individual rights. Without effective access to justice for individual litigants, such protection becomes meaningless.¹⁰⁷

To clarify, the problem we discuss is not one of *interim* funding, a formidable problem in its own right.¹⁰⁸ Interim funding is a problem that has to do with poorer parties’ inability to bear the costs of litigation *even assuming they*

100. See *infra* note 115; see also Mootz, *supra* note 66, at 318 (describing what was apparently a carefully calculated scheme by an insurer to subject claimants to “unnecessary and oppressive litigation”).

101. See Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 510–11 (2008) (showcasing tactics used by repeat defendants to drag out trials and increase litigation costs); see also *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1319 (1999) (“[C]ompanies often wear down their opponents by dragging out legal proceedings.”).

102. See Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1335.

103. See Rhode, *A Roadmap for Reform*, *supra* note 3, at 1785; Kaplan, *supra* note 9, at 581; Wilf-Townsend, *supra* note 33, at 1708–10.

104. See Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL’Y REV. 369, 402 (1998); David C. Leven, *Justice for the Forgotten and Despised*, 16 TOURO L. REV. 1, 6–7 (1999).

105. DEBORAH L. RHODE, ACCESS TO JUSTICE 13 (2004) [hereinafter RHODE, ACCESS TO JUSTICE].

106. See *id.* at 3–4.

107. See, e.g., David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1918–20 (2014) (highlighting the crucial role of individual litigants in civil litigation).

108. See Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 237–39 (2014).

are ultimately made whole. They simply cannot endure litigation because of their financial inferiority. The problem of interim funding has been partially addressed through market mechanisms. Litigation funders¹⁰⁹ and contingency fees¹¹⁰ are both examples of market mechanisms that allow plaintiffs to borrow (from a third party or from their attorneys) to fund promising litigation.¹¹¹ Similarly, the law sometimes recognizes plaintiffs' right to receive interim payments from defendants.¹¹² Interim funding has also attracted scholarly attention. Parchomovsky and Stein have suggested expanding the use of interim payments so that, much like temporary restraining orders, temporary compensation becomes available to plaintiffs on a large scale.¹¹³ The problem discussed here is different. The obstacle we address in this Article focuses on the end game: for a private indigent litigant, the expected value of the lawsuit may fall below its expected costs. Even if interim funding is readily available for all plaintiffs—an optimistic assumption, undoubtedly—the problem discussed here will persist.

3. Litigation Costs—An Illustration

To assist the analysis going forward, this section briefly illustrates the problem of unequal access to justice using a stylized example describing a legal dispute between a private individual and a seasoned corporate litigant. We also use the example to outline our proposed solution. We expand on each element of the issue in the following parts.

Example 1: Emma was injured in a car accident. The insurance company dealing with the claim is willing to pay Emma \$30,000, although Emma feels this sum is hardly sufficient to cover the harms she suffered. Emma consults a lawyer, who estimates that if Emma sues the insurer, she has a 60% chance of securing an additional \$70,000, for a total payment of \$100,000. The lawyer also estimates that litigation will be costly, as the insurer is likely to make every effort to avoid paying. In particular, the lawyer estimates that the insurer will invest up to \$60,000 in litigating the case, and that Emma will have to follow the insurer's level of investment (otherwise her chances of winning the case will plummet).

Example 1 captures the common dynamic described above. The insurer makes a lowball settlement, coupled with a threat to litigate aggressively if the

109. Litigation funders are the focus of Avraham and Wickelgren. *See id.* at 235–36.

110. *See* Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 245–46 (2010).

111. Numerous deficiencies of both contingency fees and third-party funding have been identified. *See* Avraham & Wickelgren, *supra* note 108, at 234–35; Zamir & Ritov, *supra* note 110, at 246–47. But as explained, these are beside the point for current purposes.

112. *See* Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1314–21.

113. *See id.*

offer is not accepted. The insurance company, the repeat corporate litigant, is willing to invest in litigation beyond the net worth of the case. Standing alone, Emma's case is not worth fighting from the insurer's perspective. The expected benefit to the insurance company is \$28,000 ($40\% \times \$70,000$) which is clearly not worth the cost of a stubborn litigation campaign—\$60,000. But given its broader interests, the insurance company will file multiple motions, retain experts, and appeal rulings, if need be, to avoid losing the case.¹¹⁴ It will thereby send a clear message to many others in Emma's position: accept the offer you were made, and do not dare ask for more.¹¹⁵ This message is worth millions for the company in future claims, and the company is willing to invest accordingly.

At the same time, for Emma, the onetime litigant, the case is worth only the sum of this one individual claim, so she cannot afford to invest the same amounts as the insurer. Emma will find it unprofitable to sue, which is precisely what the insurance company wanted. To sue the insurance company, Emma will need to invest \$60,000 in litigating the case, for a mere 60% chance of receiving \$70,000. In short, this is a \$60,000 investment for an expected reward of only \$42,000, meaning that the suit has a negative value from Emma's perspective. Emma will therefore refrain from suing.¹¹⁶ This is the only rational decision from her perspective: suing makes absolutely no pragmatic sense.¹¹⁷ Note further that Emma's case is meritorious from a social perspective: more likely than not, she indeed deserves a payment of \$100,000.

Emma's example is highly representative. Research shows that the median cost of litigating a civil case is between \$43,000 and \$122,000.¹¹⁸ As mentioned,

114. For a formal illustration of this, see Posner, *supra* note 64, at 437–38.

115. A real-life case against insurers demonstrates this neatly. Evidence produced in a case against Allstate in the 1990s suggests that Allstate sent a clear message to those choosing to litigate, but also offered carrots to those who accepted Allstate's offers. See David Dietz & Darrell Preston, *Home Insurers' Secret Tactics Cheat Victims, Hike Profits*, CONSUMER WATCHDOG (Oct. 13, 2007, 5:00 PM), <https://www.consumerwatchdog.org/home-insurers-secret-tactics-cheat-victims-hike-profits> [https://perma.cc/Q3VR-4DTG]. Those who accepted offers were to be treated with "good hands," whereas those who chose to litigate would meet boxing gloves. *Id.*

116. Of course, when deciding whether or not to sue, plaintiffs do not know the exact probability of success (assumed in *Example 1* to be sixty percent). Yet, to make this decision, they must make some rough estimate of this probability. This is the dynamic reflected in *Example 1*. See Steven Shavell, *The Social Versus the Private Incentive To Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334–39 (1982) (offering a formal model describing parties' decision whether or not to litigate their cases).

117. Hylton, *supra* note 80, at 113 (showing that the costliness of litigation can bar plaintiffs from suing).

118. See Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CASELOAD HIGHLIGHTS 1, 7 (2013), https://www.srln.org/system/files/attachments/CSPH_online2.pdf [https://perma.cc/R879-8RLX]; see also Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, WALL ST. J. (July 24, 2017, 5:09 PM), <https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572> [https://perma.cc/48Z9-TNWE (dark archive)] ("[I]ncreasing litigation costs have made many lower-value cases too expensive to pursue . . .").

only about 2% of tort victims currently try their luck in court.¹¹⁹ Almost all will simply settle for whatever amount is offered to them, deterred by the extreme costs of litigation.¹²⁰ These patterns are a direct result of the litigation tactics employed by insurers and other large corporate litigants, such as the “three Ds” described earlier.¹²¹ Using these tactics, insurers stubbornly refuse payment, offer lowball settlements, and make sure procedures are expensive and lengthy, to push private litigants to accept these lowball settlements.¹²² Due to these strategies and the high costs of bringing suits, tort lawsuit filings declined more than 80% from 1993 to 2015.¹²³

Example 1 also illustrates a closely related fundamental problem—the unfair outcome of the litigatory process, even when it is initiated. Suppose that Emma belongs to the 2% of tort victims who do file claims. Since the \$60,000 investment in litigation makes the claim highly unprofitable, Emma decides not to invest this amount. She hopes to obtain justice without this superfluous investment. Under these circumstances, the legal process is prone to reach an incorrect outcome, as Emma is unable to argue her case effectively in the face of her opponent’s high level of investment. The justification for the adversarial litigation system is based on the assumption that it offers a fair competition between more or less equal parties,¹²⁴ to produce just and truthful outcomes.¹²⁵ Yet this assumption is outdated and no longer describes the litigation landscape, now characterized by a massive imbalance between heavyweight professional champions and lightweight amateur opponents. When the litigation process becomes such a fight, the adversarial system loses almost all hope of yielding a just and truthful outcome. This in turn exacerbates the first problem. A vicious cycle is created: individuals find it unprofitable to pursue their rights because the net value of claims becomes negative through strategic investment, while the same imbalance simultaneously reduces these individuals’ chances of winning the case if they do file a lawsuit, making lawsuits even less likely.

As we show in Part II, the problems illustrated in Emma’s example—the inaccessibility of the legal system for underprivileged individuals, and the tilting of the process against them even when they do access the system—persist under all existing rules governing fee awards and are not solved by existing schemes geared at facilitating access to justice.

119. See *supra* note 81 and accompanying text.

120. See *supra* note 82 and accompanying text.

121. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1346–47; FEINMAN, *supra* note 34, at 5–7.

122. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1346–47; FEINMAN, *supra* note 34, at 5–7.

123. Palazzolo, *supra* note 118, at 7.

124. See Johnson, *supra* note 31, at 185.

125. See Frankel, *supra* note 32, at 1042–43.

II. EXISTING RULES

When a proceeding—whether an interim motion or the case in its entirety—comes to an end, the rules governing the award of costs come into play. Below we survey the two existing rules and show that both allow parties to strategically incur costs and impose these on the opposing party. We begin with the American rule, in which the perils of this kind of strategic behavior are straightforward. We then show that, counterintuitively, under the British rule this problem is exacerbated. Following this analysis, we survey other legal mechanisms designed to mitigate the problem and point out the limitations of these mechanisms.

A. *The American Rule*

Under the rule governing the award of costs in the United States,¹²⁶ colloquially referred to as the “American rule,”¹²⁷ each litigant bears its own litigation costs, regardless of the outcome of the case.¹²⁸ The American rule allows a party to drive up its opponent’s total costs of litigation, as long as the party is willing to incur similar costs itself. This possibility clearly benefits richer parties. A rich party can typically endure expenses that its opponent cannot. This asymmetry in ability to absorb costs places a hurdle on impecunious parties’ path to justice and allows wealthier litigants to effectively drive their opponent out of litigation. To illustrate the problem, consider *Example 2* below:

Example 2: Liam uploads an original music video to social media. The video goes viral. Days later, Liam is sued by a media company claiming that Liam’s video infringes on the company’s intellectual property rights. The company sues for damages of \$10,000. Liam’s lawyer estimates that Liam has a 70% chance of prevailing if he litigates the case, but this will cost Liam at least \$8,000. The company can litigate the case for \$1,000.

Example 2 is highly representative of intellectual property (“IP”) litigation.¹²⁹ In a perfect world of zero litigation costs,¹³⁰ Liam will defend

126. The rule was recently upheld by the Supreme Court. See *Peter v. NantKwest, Inc.* 140 S. Ct. 365, 368 (2019); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 557 (2014).

127. John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can’t Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1096–97 (1991).

128. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 253–54 (1975); Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327 (2013) (describing the American rule).

129. See Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 543 (2003).

130. Such a hypothetical world of zero enforcement costs is structured after the famous example of the “Coasean World” of zero transaction costs. See Robert C. Ellickson, *The Case for Coase and Against “Coaseanism,”* 99 YALE L.J. 611, 612–13 (1989) (clarifying this oft-misunderstood term).

himself against the lawsuit in court, and the truth of the matter—whatever it may be—will come to light. More likely than not (a 70% chance) Liam did nothing wrong, and the court will rule he need not pay a thing. In such a world, legal rights, both positive and negative, are fully exercised. But the analysis changes dramatically if it takes into account the costs of litigation. It is relatively inexpensive for firms that routinely enforce IP rights to handle such claims,¹³¹ but it is relatively costly for private parties to defend against such suits.¹³² Under the American rule, the grim reality is that Liam has no choice but to pay the company \$10,000. Liam has a theoretical option to litigate, but the net value of this option is a negative \$1,000 (paying \$8,000 for a 70% chance of avoiding a payment of \$10,000).

This outcome is unjust because Liam, more likely than not, did not infringe on the IP rights of the company. The outcome in *Example 2* is not only unjust, it is also inefficient.¹³³ If people like Liam know that companies can easily sue them for IP infringement, and that they will simply have to pay if such a claim is filed, they will be discouraged from creating new content.¹³⁴ Creativity and innovation will suffer.¹³⁵ More broadly, it means that the problem of access to justice can create overdeterrence, preventing individuals from undertaking socially beneficial projects for fear of being sued by large firms. This illustrates the importance of access to justice for would-be defendants, not only would-be plaintiffs.

The problem is further exacerbated by the perverse incentives that this system creates for repeat litigants. Firms that can inexpensively engage in IP litigation have a strong incentive to use suits like the one against Liam as profit engines, knowing that individual defendants often find it unprofitable to defend themselves. Such firms employ in-house attorneys who send cease-and-desist

131. Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 723 (2013) [hereinafter Balganesh, *The Uneasy Case Against Copyright Trolls*] (showing that professional IP plaintiffs can easily lower their litigation costs and file harassment lawsuits that onetime defendants find difficult to oppose).

132. Balganesh, *Copyright Infringement Markets*, *supra* note 1, at 2280 (“To individual, small-business, or noncommercial creators, all of whom are intended beneficiaries of copyright, copyright litigation remains an unaffordable proposition.”).

133. *See id.* (explaining that, due to the costliness of litigation, users and creators are “all too reluctant to defend themselves in court when threatened with an infringement lawsuit, and go to extreme lengths to avoid the risk of being sued, even when their actions are fully defensible under copyright’s fair use doctrine”); Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1837 (2007) (describing the detrimental effects of “patent trolling” and excessive IP litigation on innovation); Miriam Marcowitz-Bitton, Yotam Kaplan & Maayan Perel, *Recoupment Patent*, 98 N.C. L. REV. 481, 486 (2020) (explaining that patent trolls use the threat of costly and protracted litigation to force alleged infringers to pay licensing fees they do not owe); Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 75–91 (2014) (describing the harmful effects of copyright trolling).

134. *See* Magliocca, *supra* note 133, at 1837.

135. *Id.* at 1819, 1837.

letters and file these claims.¹³⁶ Private parties like Liam, however, have no regular access to the court system and must hire a lawyer to represent them in the individual case,¹³⁷ paying their attorneys as onetime clients.¹³⁸ Professional IP litigants specialize in aggressive enforcement of IP rights to produce a profit.¹³⁹ Some firms, colloquially referred to as “copyright trolls,” build their entire business model around such suits, and develop special skills for buying and inexpensively enforcing IP rights.¹⁴⁰ Similar dynamics exist in other areas of IP law, for example with “patent trolls,” entities specializing in purchasing and aggressively litigating patent rights.¹⁴¹ And as a recent study has shown, repeat litigants that use litigation as a profit engine are commonplace in additional areas of law, not only in the IP arena.¹⁴² Naturally, these business models translate into a wide gap in litigation capabilities, and into a classic access-to-justice problem.¹⁴³

We now turn to survey the existing alternative to the American rule, the British rule, which seems to offer a solution to the problem. As we show, on careful reflection, the British rule does not solve the problem. In fact, it may actually exacerbate it.

B. *The British Rule*

Under the British rule, the losing party pays the vindicated party’s costs of litigation.¹⁴⁴ Thus, the British rule ostensibly overcomes the problem of access to justice: if the impecunious party has a meritorious case, it will be vindicated, and all its expenses will be reimbursed by the affluent party.¹⁴⁵ Underprivileged litigants therefore have little reason not to follow suit when

136. See Galanter, *supra* note 27, at 98, 115.

137. See Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1344.

138. See *id.*

139. See Balganes, *The Uneasy Case Against Copyright Trolls*, *supra* note 131, at 723.

140. *Id.* (“A copyright troll refers to an entity that acquires a tailored interest in a copyrighted work with the sole objective of enforcing claims relating to that work against copiers in a zealous and dogmatic manner. Not being a creator, distributor, performer, or indeed user of the protected work, the copyright troll operates entirely in the market for copyright claims. With specialized skills in monitoring and enforcing copyright infringement, the troll is able to lower its litigation costs, enabling it to bring claims against defendants that an ordinary copyright owner might have chosen not to.”); see Greenberg, *supra* note 133, at 53.

141. Magliocca, *supra* note 133, at 1810 (describing the phenomenon of patent trolling).

142. Wilf-Townsend, *supra* note 33, at 1709 (describing the business practice of purchasing third-party debts and using litigation against the debtors as a profit engine).

143. Greenberg, *supra* note 133, at 128 (describing the harmful effects of copyright trolling).

144. Donohue, *supra* note 127, at 1093–94.

145. Indeed, this intuitive argument was originally made by Posner in an early survey of law and economics scholarship: “For example . . . the failure to require that the losing party to a lawsuit reimburse the winner for his litigation expenses appears to be highly inefficient, and no economic explanation for this settled feature of American procedure has been suggested or is apparent.” Richard A. Posner, *Economic Approach to Law*, 53 TEX. L. REV. 757, 765 (1975).

their affluent adversary tries to force them into additional expenses. Anything they are forced to spend as a result of their opponent's strategy will ultimately be reimbursed.

This argument, however, ignores an important, inherent element of litigation: its uncertainty. When uncertainty is incorporated into the analysis, the problem can be shown to not only persist, but to be aggravated. Ex post, vindicated parties are indeed made whole under the British rule. But, ex ante, the rule imposes a potential additional cost on the indigent party. When engaging in litigation, each party must consider the possibility that it will ultimately be ordered to bear its opponent's costs (and, of course, not be reimbursed for its own costs).¹⁴⁶ This additional expected cost may be prohibitive, and at the very least may pressure underprivileged litigants into suboptimal settlements. To illustrate this problem, consider *Example 3* below:

Example 3: Noah is being sued by a debt collection company for \$1,000, including high interest. Noah paid the debt years ago, but neglected to save any proof of doing so. Noah's lawyer estimates the battle will be rough, but that, more likely than not, Noah will be able to prevail in court. In particular, Noah will have to invest \$500 for a 55% chance of winning the case. The firm has a strong incentive to deter litigants and will invest \$900 in litigating its claim.

First, notice that in this case, the firm is willing to invest \$900 for a 45% chance of collecting a debt of \$1,000 (an expected value of \$450). This seems like a strange assumption if one considers only Noah's alleged debt. Yet this is not irrational stubbornness on the part of the firm, but rather a carefully crafted strategy. As explained, the reason the firm is willing to invest this sum, and is intent on winning the suit at all costs, has little to do with Noah and his debt, and everything to do with other debtors and the reputation of the firm as a tough collector. Debt collection is a multimillion-dollar industry,¹⁴⁷ with specialized firms buying and aggressively collecting consumer debt through the threat of litigation.¹⁴⁸ Large percentages of these suits have no merit, as debt collectors knowingly buy "stale" debts or claims backed by little or no evidence.¹⁴⁹ As part of their aggressive collection policy, firms like the one in *Example 3* want to make sure that debtors pay when issued a demand, and know there is no point in trying to litigate and contest the debt. A stubborn litigation policy sends this message perfectly. Thus, *Example 3* illustrates a typical

146. For a formal model incorporating these calculations, see Shavell, *Suit, Settlement, and Trial*, *supra* note 13, at 25–28.

147. See Arbel, *supra* note 2, at 132.

148. See *id.*; Wilf-Townsend, *supra* note 33, at 1709.

149. See Arbel, *supra* note 2, at 132 (describing how debt collection firms abuse litigation institution to collect invalid debt).

dynamic, in which the corporate litigant is willing to invest heavily to deter potential future adversaries.

Returning to the details of *Example 3*, notice that under the American rule Noah will choose to defend against this claim because he needs to invest \$500 for a 55% chance of avoiding a payment of \$1,000. Handling the claim has a positive expected value of \$50 under the American rule.

Conversely, if the British rule is applied, Noah will not try to defend himself. If he is vindicated on the merits, he will be made whole for expenses incurred; that is, the plaintiff will compensate him for the \$500 he spent. But Noah has a 45% chance of losing, in which case he will have to bear not only his costs (\$500), but also the firm's costs of \$900 (in addition to paying the \$1,000 debt). There is thus a 45% chance that the lawsuit will end up costing Noah \$2,400. Accordingly, if Noah defends himself, he faces a net expected cost of \$1,080,¹⁵⁰ which means he is better off simply paying the \$1,000 the company demanded. In other words, under the British rule, the net value of Noah's defense is negative \$80, despite the fact he is more likely than not to win his case.

This example illustrates how the access-to-justice problem may be exacerbated by the British rule. Noah has access to justice under the American rule, but not under the British rule. The reason for this is that under the British rule parties must account for the potential liability for the opposing party's costs. They are effectively denied the choice between investing additional resources in litigation and refraining from this investment. Under the American rule, Noah, the private litigant, can decide to curb his expenses by refusing to follow the defendant's investment. In *Example 3*, under the American rule, there is nothing that compels Noah to invest \$900 in litigation if he does not want to. He may, for example, decide not to sift through voluminous documents with which the firm flooded him within the framework of document disclosure. Alternatively, he may limit his expenditure to \$100, \$200, or \$300 by opting to have a legal intern or a paralegal, rather than an associate or a partner, review the documents. To be sure, such a decision comes at a cost. It may lower Noah's chances of winning the case. But, as harsh as the choice may be, the American rule affords the disadvantaged party the *option* of capping the investment in litigation. Under the British rule, if Noah loses, he *must* bear the plaintiff's cost of \$900, whether or not he thinks this investment is worthwhile.

More generally, under the British rule, a party can do nothing to avoid the risk of ultimately bearing the opposing party's superfluous costs. By investing enough in unessential litigation-related expenses, corporate litigants can drive

150. $45\% \times \$2,400 = \$1,080$.

up the private party's expected litigation costs, thereby further heightening the barriers to justice.¹⁵¹

A possible solution to the risks posed by the British rule is subjecting the award of costs to court discretion. Rather than a rigid rule, according to which the losing party pays all of the winning party's expenses, the losing party may be made liable only for costs that the court deems reasonable and appropriate.¹⁵² This would seem to alleviate the concern that the impoverished party will be held accountable for unimaginable amounts. But on closer examination, such court discretion offers no solution to the problem for two main reasons. First, such a system offers litigants no certainty. An individual litigant cannot know *ex ante* which of the opposing party's expenses and costs will be found reasonable by the court and which will not. There is a likelihood that the court will find each dollar spent by the corporate litigant justified. Court discretion complicates the basic calculation because each cost has a different probability of being found justifiable. But the result remains the same as with a rigid British rule: the individual litigant cannot be certain of the outcome and must account for the possibility of bearing her opponent's costs. This expected cost may be prohibitive and can easily be manipulated by the corporate litigant.

Second, court discretion is a double-edged sword. Although it may safeguard the individual litigant against bearing exceptionally outlandish costs strategically incurred by the corporate litigant, it introduces the risk that the individual litigant herself will not receive full remuneration for her own costs, even if she is vindicated on the merits. If the court finds some of her costs to be excessive, she will not be made whole.

Ultimately, despite its intuitive appeal, the British rule is far from a panacea to the problem of underprivileged parties' access to justice. Indeed, it may do more harm than good in this respect.¹⁵³ On closer examination, both rules may—and do—place impecunious litigants at a significant disadvantage, leaving them at the mercy of the richer party. Neither rule fulfills the promise of justice for all, and both deny impecunious litigants access to justice.

C. *The Legal Aid Approach*

The previous sections illustrated the grave implications of the gap in resources between litigating parties. The traditional approach for solving this problem has been to assist the less privileged party and provide her the support

151. See Shavell, *Suit, Settlement, and Trial*, *supra* note 13, at 11; Posner, *supra* note 64, at 419–20.

152. Indeed, the assumption, sometimes implicit, is that only reasonable costs are awarded. See Donohue, *supra* note 127, at 1102.

153. For a similar depiction of the difference between the two rules, see *id.* at 1107–09. Donohue raises the possibility that an agreement between parties to apply the British rule instead of the American rule is impermissible under statutes prohibiting gambling (a view ultimately rejected). See *id.* at 1111–13.

that will allow her to bring her case to court and ensure “parity between litigants.”¹⁵⁴ These types of solutions are typically grouped under the broad title of “legal aid” projects, aimed at providing resources (financial and other) to promote social justice in the litigatory context.

Civil legal aid was high on the political agenda during the second half of the twentieth century, especially between the 1950s and the 1980s.¹⁵⁵ During these decades, governments worldwide launched civil legal aid projects and financed them through public funds.¹⁵⁶ Governmental legal aid programs were first introduced in Britain in 1949,¹⁵⁷ and in the Netherlands, the United States, Canada, Australia, New Zealand, France, Sweden, Finland, and Germany in the following years.¹⁵⁸ During these early decades, civil legal aid programs experienced exponential growth, with budgets often doubling from year to year.¹⁵⁹ During these years, legal aid attracted not only funds, but also wide scholarly interest.¹⁶⁰

These trends, however, have since been reversed,¹⁶¹ and in the last decades public funding for legal aid programs has been cut by a third.¹⁶² Currently, government policies in the United States do not afford underprivileged litigants a general right to civil legal aid.¹⁶³ The decline of the legal aid approach is not surprising. Since the 1980s, the world economy has experienced a shift away

154. See Johnson, *supra* note 31, at 185.

155. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 475 (1985) [hereinafter Abel, *Law Without Politics*].

156. See *id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See generally JEREMY COOPER, PUBLIC LEGAL SERVICES: A COMPARATIVE STUDY OF POLICY, POLITICS AND PRACTICE (1983) (using comparative legal analysis to evaluate the possible effects of establishing an independent civil legal services commission in the United Kingdom); BRYANT GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION (1980) (studying the role of “neighborhood law offices,” run by activist lawyers, located in lower-class areas, and financed by the state, in providing legal aid to the poor); INNOVATIONS IN THE LEGAL SERVICES (Erhard Blankenburg ed., 1980) (offering a collection of chapters studying the legal needs of the poor, alternative forms of legal services, and the legal status of such services); JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION (1982) (offering a case study of the experiences of lawyers representing poor clients throughout the political and economic changes of the twentieth century); PERSPECTIVES ON LEGAL AID: AN INTERNATIONAL SURVEY (Frederick H. Zemans ed., 1979) (surveying the state of legal aid systems in fifteen areas of the world and comparing constitutional and philosophical goals of different nations regarding legal aid programs).

161. See RHODE, ACCESS TO JUSTICE, *supra* note 105, at 3.

162. *Id.*

163. See generally Abel, *Law Without Politics*, *supra* note 155 (reviewing the rise and fall of civil legal aid); Houseman, *supra* note 104 (surveying changes in civil legal assistance and proposing a new system for achieving equal justice); Kent Roach & Lorne Sossin, *Access to Justice and Beyond*, 60 U. TORONTO L.J. 373 (2010) (explaining the difficulties in adding the middle class to “access to justice initiatives”).

from the welfare state of the postwar era.¹⁶⁴ As part of this shift, legal aid projects lost political support and their funds have dried out.¹⁶⁵ Naturally, this is a political issue,¹⁶⁶ but it also exposes an inherent weakness in the legal aid scheme. Legal aid is costly—usually very costly.¹⁶⁷ Support for legal aid depends on political trends and is therefore necessarily unstable. More generally, any solution that requires constant public funding is inherently vulnerable to budget cuts, and is therefore unsustainable.

Perhaps even more importantly, legal aid may be pouring fuel on the fire of the disparity between well-off repeat litigants and impecunious onetime players. A well-off repeat player will continue to find it profitable to outdo its private adversary because it is concerned with future cases as well. As it can likely spend far more than any amount its opponent will receive from legal aid, public funding will only increase the total costs of litigation in such circumstances: in *Example 3*, even if Noah is somehow able to receive \$900 from legal aid, the company will simply increase its investment so that handling the lawsuit remains unprofitable for Noah. Legal aid is helpful when impoverished litigants cannot afford costs that are justifiable given the value of the case, but it does not address the problem of strategic investment by the wealthier party.

D. *Class Action Lawsuits*

Class actions are another mechanism that can bridge the gap between repeat corporate litigants and private ones. Repeat defendants (like hospitals, banks, and manufacturers) face multiple potential plaintiffs. In many cases, each individual plaintiff will find it unprofitable to sue and meritorious claims will

164. See Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152, 188 (2010) (showing that the increase in economic inequality in the United States in recent decades is the outcome of political maneuvering and party politics).

165. RHODE, ACCESS TO JUSTICE, *supra* note 105, at 3.

166. See Abel, *Law Without Politics*, *supra* note 155, at 479–80.

167. See *id.*

not be filed. A class lawsuit can group all these claims together¹⁶⁸ and facilitate access to justice.¹⁶⁹

But class actions do not provide a solution to the problem we describe above for several reasons. First, class actions are helpful only when individual *plaintiffs* (with a similar cause of action) face repeat *defendants*. They do not address the problems individual defendants face when they are sued by repeat plaintiffs. As we demonstrated using *Examples 2* and *3* above, this is a major concern. Repeat plaintiffs, such as debt collecting companies or copyright trolls, abuse their litigation advantages to sue individuals with little ability to access the court and defend themselves. Class actions offer no remedy for this problem.

Second, class actions are available only for highly specific types of claims¹⁷⁰ and are considered inappropriate in most types of suits. A prerequisite for certifying a class action is that the issues raised by the individual claims are common to all class members.¹⁷¹ This is known as the “commonality” requirement,¹⁷² which is generally not met under many of the circumstances discussed here. For example, an insurance company typically faces countless claims filed by individual plaintiffs, but each of these claims is for a different sum and based on different facts. Therefore, they cannot be grouped together. Similarly, mass torts are usually considered inappropriate for class aggregation,¹⁷³ as such claims involve individual issues that will have to be

168. *Deposit Guar. Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) (“A class action is the more efficient procedure for determining liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit.”), *vacated*, 569 U.S. 1015 (2013); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (noting that class actions “protect the rights of persons who might not be able to present claims on an individual basis” (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983))).

169. George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. BRIEF 24, 24 (2012) (explaining that class actions aim to compensate plaintiffs whose claims are too small to be brought individually and to deter wrongdoers by aggregating small claims and enabling private enforcement).

170. For example, to qualify as a class action, a claim must satisfy the four requirements under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy of representation) and a requirement that the putative class satisfy all the elements of one subdivision of Rule 23(b)—(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3). See ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 23–25, 30–133 (4th ed. 2012).

171. *Id.* at 44–45.

172. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015).

173. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746–47 (5th Cir. 1996) (rejecting a nationwide class action against tobacco companies). Mass torts also involve high individual damage awards; thus, the absence of class treatment will not impede the ability of individual claimants to seek justice.

litigated separately.¹⁷⁴ Even if the rule were changed to allow more lawsuits to be aggregated, the problem would persist. Some lawsuits would still be dissimilar enough that they could not be tried as class actions. And even if one were to allow aggregating claims to adjudicate the common issues and then separate the claims for individual litigation of the separate issues, the problem would be reintroduced one step removed, when these individual elements of the lawsuit were tried.

Third, the use of class actions has been severely restricted in recent years, both by rulings narrowing the scope of class actions themselves¹⁷⁵ and by rulings that allow other legal mechanisms, such as arbitration clauses, to block such suits.¹⁷⁶ Following these developments, class actions against corporations are now extremely difficult to file, let alone win.¹⁷⁷ Scholars have shown that the new limitations effectively eliminate the ability to aggregate small claims and might mark the demise of class action lawsuits.¹⁷⁸

174. See *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188–89 (8th Cir. 1982); *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982).

175. See *Wal-Mart Stores*, 564 U.S. at 360 (restricting the remedies available in (b)(2) class actions to exclude individual monetary relief); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011) (restricting the conditions under which any class action can be certified); Arthur H. Bryant, *Class Actions Are Not Yet Dead*, NAT'L L.J. (June 20, 2011), <https://www.law.com/nationallawjournal/almID/1202497707930/> [<https://perma.cc/W2XJ-6XV5>] (“The U.S. Supreme Court’s 5-4 decision in *AT&T v. Concepcion* is a disturbing example of judicial activism that makes it easier for corporations to enforce mandatory arbitration clauses banning class actions, cheat consumers and workers out of millions and keep almost all of the money.”).

176. See Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015) (arguing that the Supreme Court decisions permitting corporations to opt out of class action liability through the use of arbitration clauses bring about the effective elimination of class actions against businesses).

177. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 729 (2013) (arguing that courts have been systematically limiting plaintiffs’ ability to bring class action lawsuits, “thereby undermining the compensation, deterrence, and efficiency functions of the class action device”).

178. See Fitzpatrick, *supra* note 176, at 199; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (“[T]he Supreme Court’s ruling suggests that many—indeed, most—of the companies that touch consumers’ day-to-day lives can and will now place themselves beyond the reach of aggregate litigation. These companies include telephone companies, internet service providers, credit card issuers, payday lenders, mortgage lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services. And that is just consumers. Employees, too, will find themselves unable to band together and seek legal redress.”); Jean R. Sternlight, *Tsunami: AT&T Mobility L.L.C. v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (“The U.S. Supreme Court’s five-to-four decision in *AT&T Mobility L.L.C. v. Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.”); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 767 (2012) (“In *AT&T Mobility L.L.C. v. Concepcion*, the Supreme Court potentially allowed for the evisceration of class arbitration, and indeed most class actions, in consumer and employment settings”); Editorial, *Gutting Class Actions*, N.Y. TIMES (May 13, 2011), <https://www.nytimes.com/2011/05/13/opinion/13fri1.html> [<https://perma.cc/8WWM-ZYL9> (dark archive)] (“The Supreme Court’s 5-to-4 vote in *AT&T Mobility v. Concepcion* is a devastating blow to

Fourth and finally, class actions raise a host of issues relating to the agency problem between class members and class representatives.¹⁷⁹ This inherent conflict of interest makes class actions highly controversial, and significantly reduces their efficacy as a tool for vindicating individuals' rights.¹⁸⁰ Our proposal, leaving all litigation-related decisions with the individual litigant who internalizes their full costs and benefits, does not suffer from these drawbacks.

E. *Other Reform Proposals*

The problems of inequality in litigation have not escaped the attention of policymakers and scholars who have made proposals for reform with an eye at mitigating the issues of access to justice. Yet, these proposals do not offer a comprehensive solution. For example, in addition to their suggestion regarding interim payments and temporary compensation,¹⁸¹ Parchomovsky and Stein have also suggested implementing a host of measures that would bring lawsuits to conclusion swiftly (fast-track litigation),¹⁸² increase plaintiffs' expected return on lawsuits through enhanced damages,¹⁸³ and make it easier for plaintiffs to prevail through burden shifting.¹⁸⁴ But as Parchomovsky and Stein point out,¹⁸⁵ their mechanisms are not fully developed. They are a call for future research, not workable mechanisms.

More importantly, even if the mechanisms suggested by Parchomovsky and Stein were adopted, they would not offer a comprehensive solution. They would indeed lower the expected costs of litigation for plaintiffs in certain cases and increase the expected value of litigation for plaintiffs in others. This would undoubtedly be an improvement to the current situation. But there would still be many cases in which the expected costs exceed the expected value of

consumer rights."); Erwin Chemerinsky, Opinion, *Supreme Court: Class (Action) Dismissed*, L.A. TIMES (May 10, 2011), <https://www.latimes.com/opinion/la-xpm-2011-may-10-la-oe-chemerinsky-class-action-20110510-story.html> [<https://perma.cc/2S8J-GZXM>] ("The effect of the Supreme Court's decision is to make it far less likely that corporations engaged in even massive fraud will be held accountable when many people lose a little."); David Schwartz, *Do-It-Yourself Tort Reform: How the Supreme Court Quietly Killed the Class Action*, SCOTUSBLOG (Sept. 16, 2011, 10:52 AM), <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/> [<https://perma.cc/6FHD-WD28>] ("*Concepcion* is the culmination of twenty-five years of Supreme Court arbitration jurisprudence that has turned the FAA into a do-it-yourself tort reform statute.").

179. See Harel & Stein, *supra* note 80, at 71 ("The class attorney's egoistic incentive is to maximize his or her fees—awarded by the court if the action succeeds—with a minimized time-and-effort investment. This objective does not align with a both zealous and time-consuming prosecution of the class action, aimed at maximizing the amount of recovery for the class members.").

180. See *id.*

181. See Parchomovsky & Stein, *Relational Contingency of Rights*, *supra* note 7, at 1314–21.

182. Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1352–53.

183. *Id.* at 1361.

184. *Id.* at 1360.

185. *Id.* at 1363.

litigation. And because the corporate litigant can strategically affect the cost-benefit analysis of the private indigent plaintiff, it can be expected to do so. An affluent defendant will indeed be exposed to higher expected costs if enhanced damages are available. But this simply means that it must impose additional costs on the plaintiff (or, under the British rule, incur additional costs that the plaintiff may ultimately be ordered to pay) to make the case unprofitable. Therefore, the problem will persist.

Finally, Parchomovsky and Stein's suggestions are aimed only at power imbalances disfavoring *plaintiffs*.¹⁸⁶ Their tentative proposals would alleviate underprivileged *plaintiffs'* access to justice.¹⁸⁷ But these suggestions, even if they are further developed, will do nothing to solve the problem of underprivileged *defendants*,¹⁸⁸ as illustrated in *Examples 2* and *3*.

III. CAPPING LITIGATION COSTS

We now turn to spell out the proposed regime that allows private litigants to place two types of caps on litigation expenses. First, we describe the operation of the fee-shifting cap. This rule takes the form of a cap on the amount to be awarded to the vindicated party. The cap is designed to assure that parties are fully reimbursed for justified costs, while preventing the affluent litigant from using its superior financial means to deter the less affluent litigant from upholding its rights. The fee-shifting cap should be applied in all cases in which a less affluent party is identified. Second, we propose a cap on total investment in litigation. This cap is designed to balance the litigation battlefield when a repeat litigant meets a onetime player. The cap ensures a competition between equals that is likely to bring about a just and truthful outcome. When both imbalances are prevalent—that is, when an affluent litigant that is also a repeat player litigates against a onetime litigant that is also poorer—as is often the case, both caps should be applied.

We also explain the advantages of the proposed regime and the justifications for it, and address additional issues that require attention—the application of the rules to interim procedures, identification of the less affluent party, the timing of the cap-setting process, and the method by which the choice is communicated.

A. *The Fee-Shifting Cap*

This section describes the cap on the reimbursement of litigation expenses. The rule we propose is a simple one: at the end of a proceeding, the vindicated party is awarded costs, which are borne by the losing party (similar to the British

186. *Id.* at 1326.

187. *Id.* at 1352.

188. *Id.* at 1363–64.

rule); the key element of our proposal is the cap on the award of these costs. At the beginning of a proceeding, when the lawsuit is *filed*, the less affluent party sets the maximum amount that will ultimately be awarded to the vindicated party at the end of trial.

This rule assures that the vindicated party—whether it is the affluent party or the poorer party—is fully reimbursed for its justified costs. It is thus superior to the American rule, which leaves the vindicated party out of pocket even when its costs are justified. At the same time, the proposed rule allows the less affluent party to limit its exposure to the opposing party’s superfluous costs. In this respect, the proposed rule is superior to the British rule, which puts the less affluent party at a potentially limitless risk.

If the poorer party’s chances of winning are favorable, she may set the maximum award of costs at a relatively high amount. As an extreme illustration, if she is certain that she will prevail in trial, she will not limit the award at all (or set the cap at an unrealistically high amount), thereby effectively applying a pure British rule to the case. She is not intimidated by the risk of bearing her opponent’s redundant costs, because she faces no risk of losing. The British rule holds a promise of making her whole and carries no risk.

In the more realistic setting in which a litigant cannot be certain of the outcome, the poorer litigant may set a fee-shifting cap that covers her costs, but disallows her opponent to indirectly further raise her expected costs (because of the risk that she will ultimately bear these costs). For example, if she expects to spend \$1,000 on litigation, she can set the cap at that amount, thereby avoiding the risk that she will be forced to bear costs of, say, \$5,000 which her opponent may incur. She may even elect to set a cap that does not cover all of her own expected costs. This is, in essence, an insurance policy. Although she denies herself the option of being made whole, she safeguards herself against bearing the opposing party’s costs exceeding the cap.

Example 2 illustrates the rule’s advantage over the American rule. In this example, Liam had a 70% chance of successfully defending himself against a \$10,000 claim. Liam’s cost of litigating the case was \$8,000. His adversary, the copyright troll, could litigate for \$1,000. Recall that under the American rule Liam would not litigate, because he would not invest \$8,000 for a 70% chance of saving \$10,000. He would simply pay the copyright troll \$10,000.

Now, let us consider what happens if the proposed rule is applied and Liam can cap his exposure to his opponent’s costs. He may then shield himself from extreme costs in case of a loss, while allowing himself to nonetheless recoup all, or most, of his costs in case of a victory. Suppose Liam caps the award of costs at \$7,000. If he wins, he will be reimbursed for \$7,000 of the \$8,000 he spent on litigation. His net litigation costs will be only \$1,000 (and, of course, he will save the \$10,000 for which he was sued). If Liam loses, he will bear his costs of \$8,000 and the plaintiff’s costs of \$1,000. He will also pay the \$10,000 for which

he was sued. His total cost in case of a loss will be \$19,000. Thus, if Liam chooses to litigate, he faces a 70% chance of spending \$1,000 and a 30% chance of paying \$19,000, for an overall expected cost of \$6,400.¹⁸⁹ This means Liam gains \$3,600 by taking the case to court (facing an expected cost of \$6,400 instead of a certain cost of \$10,000). He will therefore choose the socially desirable option of defending himself.

As mentioned, *Example 2* demonstrates the advantage of the proposed rule over the American rule. Under the American rule, the indigent party has no chance of recovering any of its expected costs. This means that many meritorious suits and defenses will not be filed. The proposed rule eliminates this problem by allowing the private litigant to recoup its justified investment in litigation on one hand, and cap its exposure on the other.

Importantly, a party whose chances of success are over 50%—that is, a party who has a meritorious lawsuit (or defense)—will always find it profitable to pursue its rights under the proposed rule if its overall investment in litigation is lower than the expected value of the case. In *Example 2*, even if we assume Liam's chances of success are only 51% instead of 70%, he will still litigate the case.¹⁹⁰

Now consider *Example 3*, which demonstrates the advantage of the proposed rule over the British rule. In *Example 3*, Noah, the defendant, was sued for \$1,000 by a debt collecting company. Noah had to invest \$500 to litigate, the firm invested \$900, and Noah had a 55% chance of winning. Here, the problem is different from the problem in *Example 2*. It is not that economies of scale give the firm an advantage, but simply that the firm is willing to invest inordinate amounts in the case to protect its reputation as a tough litigant. Under these circumstances, Noah cannot take the case to court if the British rule is applied. He faces a 45% chance of losing, in which case he pays not only the alleged debt of \$1,000, but also both parties' litigation costs (\$500 + \$900). His total cost in case of a loss is \$2,400, making the expected cost of his defense \$1,080.¹⁹¹ He is better off simply paying the firm.

Conversely, under the proposed rule, Noah will cap the award of costs at \$500. Now, if he loses the case, with a probability of 45%, he must only pay \$2,000 (\$1,000 for the debt, plus the \$500 he incurred in costs and \$500 for his opponent's costs), instead of \$2,400. This means that if Noah defends himself, he faces an expected cost of only \$900,¹⁹² so Noah will take the case to court rather than pay \$1,000. The analysis of *Example 3* illustrates the advantage of

189. $(70\% \times \$1,000) + (30\% \times \$19,000) = \$6,400$.

190. If his chances of success are 51%, he has a 51% chance of paying \$1,000 for which he will not be reimbursed, and a 49% chance of paying \$19,000. The total cost of litigation is $(51\% \times \$1,000) + (49\% \times \$19,000) = \$9,820$, which is less than \$10,000.

191. $45\% \times \$2,400$.

192. $45\% \times \$2,000$.

the proposed rule over the British rule. In cases like *Example 3*, the private litigant is deterred from litigating because the British rule introduces the risk of bearing the other party's litigation costs. Because corporate litigants litigate aggressively and stubbornly, such costs can be steep. The proposed rule eliminates this risk, allowing the private litigant to set a cap on the amount of costs to be awarded.

To generalize, once the less affluent party is allowed to set a cap on the amount of costs to be awarded, that party will always choose to litigate the case when the expected value of the case exceeds that party's trial costs *and* the chances of success are greater than fifty percent (i.e., the suit or defense is meritorious). Whenever these conditions are met, the less affluent party may set the cap at the full amount of its expected cost or at some portion of these costs and the lawsuit will be worth filing or defending against.¹⁹³ Of course, this does not mean that the case will actually be litigated. It simply means that the less affluent party will litigate if needed, which in turn means that the affluent party will agree to settle for an amount that reflects the merits of the case, and not its ability to litigate aggressively. This rule thus improves on both the American and the British rules.

B. *Capping Overall Investment*

The previous section showed that a cap on the amount of costs awarded at the end of trial ensures private litigants can access the court system whenever they have a chance of at least fifty percent of winning their case, *and* when the expected value of the case is higher than their litigation costs.

There may be cases, however, in which a different problem challenges the parties' equal access to the legal system. This is the case when the private litigant has a chance of more than fifty percent of winning her case, but her *own* costs of bringing the case to court are too high as a result of her opponent's strategic investment. The problem here is not the risk of ultimately paying the wealthy party's litigation costs. The problem is that by investing in litigation, the corporate litigant directly forces its opponent to incur additional costs in order to maintain her chances of prevailing, thereby making litigation prohibitively costly for her.

For example, the corporate adversary may raise a dispute over a point that requires expert testimony. It may then retain an expert on the matter. As a repeat player, its costs of submitting an expert opinion are relatively low—it can provide the expert with a template it has from similar cases and can obtain favorable rates. This forces the onetime litigant to retain an expert at a much

193. Mathematically, this is attributable to the fact that the *aggregate* of the parties' respective chances of success on the merits is, by definition, 100%. At the same time, excessive (strategic) investment by the affluent party cannot create a risk for the impecunious party.

higher cost. Ultimately, the repeat litigant can invest heavily to make it prohibitively costly for the private litigant to access the court.¹⁹⁴ The private litigant need not always follow suit. The excessive investment may not increase the affluent party's chances of success, or may increase them only marginally, so that the private litigant will simply refrain from the additional investment. In such cases, the first cap suggested—the cap on the award of costs at the end of trial—will suffice. But there are many cases in which the strategic investment forces the private litigant to follow suit, otherwise her chances of success will diminish significantly. In such cases, some additional element is necessary to assure that the private litigant's meritorious claim is brought.

To illustrate this problem, consider again *Example 1* in which Emma, the victim of a car accident, had a 60% chance of securing a payment of \$70,000 from her insurer. Recall also that the insurer was expected to invest \$60,000 in litigating the case, and that Emma would have to make an equal investment to maintain her chances of winning the case. Under these assumptions, no cap on the award of costs will allow Emma's suit to reach the court, despite the fact that her suit has merit. Under the American rule, Emma will have to invest \$60,000 for a 60% chance of receiving \$70,000, which is an investment of \$60,000 for an expected gain of \$42,000. Emma will therefore choose not to sue. Under the British rule, Emma faces a 60% chance of winning \$70,000 (an expected gain of \$42,000) but also a 40% chance of paying both parties' litigation costs of \$120,000 (for an expected cost of \$48,000). Because the expected cost is higher than the expected gain, Emma will refrain from suing under the British rule as well. If the rule proposed in the previous section is applied and a cap is set at any amount lower than \$60,000, the suit is even less profitable for Emma because her reimbursement in case of a win (which is the more likely outcome) decreases.¹⁹⁵

Thus, in cases like *Example 1*, in which the costs of the private litigant are directly manipulated by the repeat litigant and the repeat litigant invests far beyond the expected value of the case, some additional element is necessary to provide effective access to justice for the individual litigant. We introduce this element by offering a rule allowing the individual litigant to set an overall cap on the total amount each party is allowed to invest in litigating the case.

194. See Bahaar Hamzehzadeh, *Repeat Player vs. One-Shotter: Is Victory All That Obvious?*, 6 HASTINGS BUS. L.J. 239, 241 (2010).

195. Assume, for example, that Emma caps the award of costs at \$40,000. If she invests \$60,000, she faces a 60% chance of winning \$70,000 and being reimbursed for \$40,000 of her expenses. Because \$20,000 of her litigation costs will not be reimbursed, her total gain will be \$50,000 (\$70,000 – \$20,000). If she loses (40% chance), she will pay for \$40,000 of the insurer's litigation costs and will still bear her own costs of \$60,000 for a total of \$100,000 in costs. Thus, the expected value of the suit is a negative \$10,000 ($60\% \times \$50,000 - 40\% \times \$100,000$), instead of just a negative \$6,000 under the British rule.

The goal of this cap is to allow the private litigant to meet the repeat corporate litigant on more or less equal ground, thereby increasing the chances of a just and correct outcome. To illustrate, assume that in *Example 1*, Emma sets the overall cap at \$10,000, which she feels is an amount that allows her to adequately present her case. If Emma, the onetime litigant, can present her case for this amount, the insurer can certainly do so for that amount (or less). Justice has not been compromised in any way. But the insurer's strategic investment in litigation, which would have prevented Emma from bringing the case, has been curbed. This barrier to justice has now been lifted.

As noted above, the overall investment cap, to be set by the private litigant, is not always required. In many cases, the fee-shifting cap will suffice. The overall investment cap is helpful in litigation settings in which a private, onetime litigant encounters a repeat corporate litigant, such as an insurance company or a debt collecting firm. These are the situations in which one party both enjoys economies of scale and is willing to invest beyond the value of the case.

The overall investment cap raises one practical issue, which is securing compliance. An affluent party that wants to overspend on a case may attempt to circumvent the cap by paying its attorney indirectly for services. For example, the affluent party may pay its attorney only the allowed amount, but then participate in funding an office retreat at a cost of millions of dollars. This will effectively circumvent the cap. If the cap is circumvented, the litigation process will again be tilted unfairly. But an easy fix for this concern already exists. A mechanism that curbs undisclosed side payments in litigation is already in place and works well in class actions. This mechanism can be adopted in the current setting. Briefly, when class actions settle, there is a concern that class counsel and class plaintiff may sell out all class members in return for payments made to counsel and the named plaintiff by the defendant.¹⁹⁶ To protect against this, parties *and their attorneys* are required to file affidavits detailing any payments, including any side payments, made by the defendant.¹⁹⁷ The threat of perjury (which has even more severe consequences for an attorney, who may be disbarred if convicted of perjury) generally suffices to ensure that no undisclosed side payments have been made. The same mechanism can be put into place in the current context.

As explained, the two caps serve different but closely related purposes. The fee-shifting cap, which caps the amount payable to the vindicated party, safeguards against *indirectly* raising the indigent party's costs. The *total* cap on

196. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600–05 (1997); see also Ittai Paldor, *Lawyers on Auction—Protecting Class Members*, 89 U. CIN. L. REV. 344, 355–57 (2021).

197. FED. R. CIV. P. 23(e)(3).

expenditure, when applicable, safeguards against the repeat player's ability to *directly* drive up the onetime litigant's costs.

C. *Advantages and Justifications*

The proposed rule, combining both caps, ensures that the private litigant will always be able to litigate her case if it has merit (i.e., if the chances of winning exceed fifty percent). The proposed rule also ensures that the indigent party will always have the option of being made whole in case she wins.

This ensures that the requirements of substantive justice are met.¹⁹⁸ Formal legal rights are set by the legislature and the judiciary to protect values such as freedom, autonomy, bodily integrity, privacy, property, and so on.¹⁹⁹ If people cannot enforce their rights, these rights lose their meaning,²⁰⁰ and the values underlying them are similarly eroded.²⁰¹ If an individual cannot defend herself against a suit for a debt she in fact already paid (recall *Example 3*), her property right is disregarded. Under our proposed rule, this is never the case, as a party will always defend itself if it has a meritorious defense, and will always pursue its right if it has a meritorious claim.

Our proposed rule ensures not only substantive justice, but also efficiency.²⁰² Under-enforcement of legal rights can cause inefficiency in the form of under-deterrence or over-deterrence.²⁰³ Consider, for example, a case like *Example 1*, in which a victim suffered as a result of an accident. If accident victims cannot enforce their right to compensation, injurers are free to harm others without repercussions. This means that injurers are under-deterred. They have insufficient incentives to invest in precautions and prevent accidents.²⁰⁴ If victims have the ability to enforce their rights, as they do under our proposal, this problem is eliminated, and deterrence is restored.

Symmetrically, cases like *Example 2* present the possibility of *over*-deterrence, where an innocent party is sued for allegedly violating the right of another. If innocent parties cannot protect themselves against frivolous suits,

198. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1–6, 20–21, 145–203 (1995) (offering a theory of corrective justice according to which civil law actions are designed to reverse wrongs and thereby facilitate just outcomes); Weinrib, *Corrective Justice*, *supra* note 38, at 349.

199. See Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1320.

200. See Smith, *supra* note 9, at 1728–29.

201. See Parchomovsky & Stein, *Empowering Individual Plaintiffs*, *supra* note 16, at 1330.

202. See generally SHAVELL, *ECONOMIC ANALYSIS OF LAW*, *supra* note 39, at 2–3 (offering efficiency as a generally applicable touchstone for the desirability of legal rules); Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1306–07 (2015) (describing the standard assumption in the law and economics literature, according to which rules ought to be designed to maximize efficiency).

203. See Mitchell A. Polinsky & Steven M. Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (“[T]o achieve appropriate deterrence, injurers should be made to pay for the harm their conduct generates . . .”).

204. See *id.*

they will be *over*-deterred and take excessive precautions simply to avoid the possibility of being the target of a nonmeritorious claim. For example, artists and content creators will refrain from producing new art out of fear of being wrongfully sued for violating others' IP rights.²⁰⁵ If parties can always defend themselves against suits, as they can under our proposal, this problem is solved and over-deterrence is eliminated. Generalizing these examples, our proposal serves the goal of efficiency by guaranteeing full protection of legal rights. Efficiency requires that individuals and firms behave in a way that maximizes total social welfare;²⁰⁶ for this purpose, the law is designed to force actors to internalize negative effects of their conduct.²⁰⁷ If legal rights are not fully protected, actors are not held liable for wrongful conduct, and therefore have no incentive to behave efficiently.²⁰⁸ Our proposal ensures that legal rights are fully enforced, and consequently provides optimal incentives for prospective litigants.

The proposed rule is justified not only because of its contribution to social justice and efficiency, but also for its contribution to the fundamental value of truth. The litigation system is an institutional mechanism designed to produce truthful results.²⁰⁹ Litigation is not merely a tool for parties to clash with each other, but a regulated competition in which a fair and equal battle between opposing legal claims is expected to generate truthful factual and legal findings.²¹⁰ The adversarial system is based on the assumption that truth will emerge from the parties' arguments and counterarguments.²¹¹ But this assumption is only valid if the parties are more or less equal in their ability to litigate and present their arguments in court.²¹² If one party is heavily financed whereas the other can barely afford legal representation, there is no reason to assume that the outcome will reflect the truth.²¹³ This is clearly demonstrated in *Examples 1–3* above, in which the merit or truthfulness of the underprivileged litigant's claim was silenced when this private litigant was unable to access the court. Our proposal solves this problem by reintroducing equality and fairness into the litigation system, and by ensuring that the parties meet each other as equals.

205. See Magliocca, *supra* note 133, at 1837.

206. See SHAVELL, *ECONOMIC ANALYSIS OF LAW*, *supra* note 39, at 2–3.

207. See Omer Y. Pelled, *The Proportional Internalization Principle of Private Law*, 11 J. LEGAL ANALYSIS 160, 161 (2019).

208. *Id.*

209. See Frankel, *supra* note 32, at 1042.

210. *See id.*

211. See Findley, *supra* note 40, at 914.

212. See Johnson, *supra* note 31, at 185.

213. *See id.*

Our proposal is also advantageous because it lowers the overall costs of litigation. At present, courts are heavily overloaded.²¹⁴ Much of this is attributable to excessive litigation²¹⁵—preliminary motions, disclosure motions, and the like—that litigants engage in, at least in part, for strategic reasons.²¹⁶ Currently, litigants have a perverse incentive to increase their investment in litigation, simply to outdo the other party; the more one party invests, the more the other party must invest to prevail. A cap on investment in litigation, as we propose, limits this waste. In this sense, our proposal has merit even without the assumption of a gap in the wealth and resources of the parties. It disincentivizes excessive investment in litigation. By lowering litigation costs, our proposal offers a new direction and a much more appropriate approach than some existing solutions. Thus, under the legal aid approach, the traditional solution is to help the less affluent party invest *more* in litigation; conversely, we propose ways for inducing the more affluent party to invest *less*. This is preferable for several reasons. First, as explained, lowering excessive investment in litigation is, in itself, beneficial because this investment is a social waste. Second, and closely related, our proposal is easy and inexpensive to implement. By comparison, legal aid initiatives require constant financial support and inevitably collapse when this support runs out or when programs become less popular politically.

Note further that our proposal makes it worthwhile to bring any meritorious claim to court, but does not *require* doing so to promote justice and efficiency. It therefore need not contribute to an increase in the overall number of litigated cases. Instead, parties will settle their disputes under the shadow of a credible threat of litigation,²¹⁷ thereby assuring that settlements are fair and reflect the respective strength of the parties' case. Perhaps paradoxically, by guaranteeing that it will be profitable to file meritorious lawsuits, the proposal reduces the need to actually litigate.

214. See generally Alessandro Martinuzzi, *Taking Justice Seriously: The Problem of Courts Overload and the New Model of Judicial Process*, 8 CIV. PROC. REV. 65 (2017) (analyzing procedural legislation in multiple countries aimed at the problems of unreasonable delays in the court systems and poor access to justice); see also Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 386–90 (2003) (“[F]ederal courts are heavily burdened with constantly full dockets.”).

215. See Stephen E. Morrissey, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 COLUM. L. REV. 1765, 1810 (1995).

216. See Zimmerman et al., *supra* note 78, at 640–48.

217. See Cooter et al., *supra* note 35, at 225; John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296 (1973) (developing the theory that litigation occurs when parties differ in their evaluation of the expected outcome of trial and will choose to settle out of court otherwise). See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (expanding the basic model of litigation); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 434–41 (2d ed. 1977) (offering a summary of the model); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (offering a similar account in the context of criminal cases).

IV. IMPLEMENTING THE DOUBLE CAP SYSTEM

In Part III, we showed that our proposal will secure substantive justice and efficiency, restore the promise of a truthful outcome of the litigatory process, and guarantee access to justice for the less well-off. In this part, we discuss some practical elements of our proposal and explain how the double cap system can be implemented in practice.

A. *Applying the Cap to Both Parties*

One may wonder whether it is justified to impose the caps on both parties. After all, the concern addressed by both caps is the affluent party's superior ability to invest in litigation, and the repeat litigant's strategic investment in litigation. Why would there need to be a cap on the less affluent, onetime, litigant's expenditure? The response to this is that in order to assure that the proposed regime achieves its goals, investment by *both* parties must be capped. This is most obvious with respect to the second cap, the overall cap on investment in litigation. Capping only the repeat litigant's investment will allow the onetime litigant to cap its rival's investment, while she herself faces no limitation. The onetime litigant could intentionally set a cap at an amount that will not enable her adversary to obtain adequate legal representation. This would tilt the litigation process in the opposite direction. The overall cap on investment in litigation must thus apply to both parties.

Similarly, the fee-shifting cap must also be applied to *both* parties' costs. Capping only the wealthy party's award at the end of trial reintroduces the problem of strategic investment. The less affluent party, whose liability for its opponent's costs has been capped, may then invest in litigation to raise its opponent's costs. The opponent, although wealthier, may then find it more profitable to settle the case because its costs will never be recovered. The parties would again meet on unequal grounds. Such outcomes are undesirable from a social perspective. They may effectively deny the more affluent party access to justice and encourage frivolous lawsuits (or meritless defenses) against that party.

A closely related question is why a *cap* on the award of costs is superior to the setting of a *fixed* amount. It may seem desirable to allow the less affluent party to set a fixed amount to be awarded to the vindicated party rather than a cap. If the less affluent party estimates *ex ante* that a given amount of costs is justified and should be awarded, why would the adjudicator need to consider the question of actual costs *ex post*? Despite the initial appeal of a fixed-amount proposal, it is important that parties be compensated only for expenses actually incurred. A rule according to which the less affluent party sets a fixed amount to be awarded to the vindicated party will allow her to turn the litigation process into a gamble by setting an amount that exceeds her costs. Clearly, this might

make the entire litigation process a facade for a gamble, in which the merits of the case become incidental. For example, the less affluent defendant may set costs at \$5 million in a dispute over \$10,000. The dispute itself becomes nothing more than a pretense for the main gamble. The object of the rule is to guarantee access to justice, not to allow parties to turn the process into a wager. A second strategic concern is that the less affluent party may set the fixed award at an amount she herself does not have (and definitely has no intention of spending). This would make her practically judgment-immune if she loses. The opposing party would be exposed to a loss, but not to an equivalent gain. Therefore, the award of cost at the end of trial must be limited to *actual* expenditure and the less affluent party must be allowed to set a cap, not a fixed amount.

B. *Interim Motions*

Similar to the current method of awarding costs (in jurisdictions in which the British rule applies and costs are awarded),²¹⁸ our proposed method can—and must—be applied not only to the lawsuit as a whole, but also to each of its discrete phases. The less affluent litigant and the onetime litigant must be allowed to set a cap for each motion. Otherwise, motions may be filed strategically to raise that party's costs. From a social justice perspective, investment in filing redundant interim motions may in fact be even more troubling than other types of strategic investment in litigation. Unlike superfluous costs incurred *within* the framework of a proceeding (such as retaining additional law firms, additional experts, and the like), which the less affluent party may choose not to follow, redundant motions *force* additional costs on the less affluent party (and on the onetime litigant). A party cannot simply decide not to respond to a motion for fear of losing the motion *in absentia*.²¹⁹ Therefore, the less affluent party and the onetime litigant must be allowed to set a cap not only for the main proceeding, but also for each interim motion separately. And because one does not know in advance how many interim motions will be filed and in which matters, it is important to allow the impecunious (and the onetime) litigant to set such a cap for each motion, if and when it is filed. This will prevent the strategic filing of many meritless interim motions.

Applying the cap on the award of costs only to the process in its entirety is also unfair because the identity of the party vindicated in the main proceedings may be different from the identity of the party vindicated in the various interim motions. The party ultimately vindicated on the merits of the

218. Donohue, *supra* note 127, at 1093–94.

219. FED. R. CIV. P. 27(a)(3).

case may have lost numerous interim motions.²²⁰ There is little reason to award the vindicated party costs for those lost motions, in which it clearly inflicted unjustified costs on its opponent.

Therefore, the caps must be set for each separate phase of litigation. The correct way to apply the caps is to allow the less affluent party and the onetime litigant to set a separate cap for every motion filed. There must also be a separate cap for the main proceedings. The residual expenses of the legal proceedings—those incurred outside the framework of specific motions—will typically be the more significant expenses. The time and effort spent on the main issue under dispute, as well as the cost of bringing many witnesses by each party, is likely to exceed the amount spent on various motions.

Setting several caps within the framework of a single legal proceeding does not necessitate a cumbersome or lengthy process. As shown below,²²¹ for reasons that have to do with courts' behavioral biases, we propose setting the cap by way of a simple notice given to the more affluent party by the less affluent one (or to the repeat litigant by the onetime litigant). Even if several such notices are required in the course of a proceeding, this calls for no more than several emails.

C. *The Timeframe*

A closely related issue is the question of timing. It is important that the caps be set as early as possible. The caps for the main proceedings must be set immediately after the filing of the claim and the caps for each interim motion must be set immediately after the motion is filed.

With respect to the cap on the overall expenditure on litigation, the reason for this is straightforward. The cap must be set at the beginning of the process, or the parties will not know what they are allowed to spend.

With respect to the cap on the award of costs, the explanation is slightly more nuanced. It may be tempting to suggest that the less affluent party be allowed to set the caps at a later stage. The later the cap is set, the more information the party has regarding actual costs, and the more accurately it will be able to calibrate the cap. But this is a vice, not a virtue. Allowing a party to set the cap at a later stage will introduce the problem of strategic conduct by the less affluent party (who sets the cap). The object of the rule is to level the playing field, not tilt it unfairly against the more affluent litigant.

The strategic setting of the cap *ex post* may manifest itself in two closely related ways. First, if the party setting the cap is allowed to set it at a later stage,

220. The interim motions may have been entirely meritless or may simply have been lost, although they had merit. In either case, the party vindicated in the final ruling may be different from the party vindicated in the various interim motions.

221. See *infra* Section IV.D.

it will set the cap based on its ex post information regarding its chances of success. As the process progresses, parties have better information about their chances of being vindicated: they know how witnesses came across; what evidence was produced; which party made more compelling arguments regarding certain legal issues, etc. If the party setting the cap estimates that its chances are not favorable, for example, because its witnesses were not credible, it will set the cap at a small amount, depriving the opposing party of being made whole for justified expenses. Conversely, if it estimates that its chances of success are favorable, it will set the cap at a higher level, so that costs that it would not have deemed reasonable behind the veil of ignorance become awardable.

Second, and closely related, the ex post problem introduces an ex ante problem. Because the party setting the cap knows ex ante that it will have the option to set the cap at a later stage, it can conduct itself with this fact in mind, while the opposing party must decide which expenses to incur without knowing whether it has a chance of recovering them, and without knowing what expenses it may be liable for. Such a rule would give the less affluent party an *option* to recover expenses when it estimates, toward the end of the process, that it is likely to triumph, and refrain from paying expenses when it realizes it has done badly.

Although a decision made at the early stages of a proceeding inevitably entails an element of uncertainty, the less affluent party can, with the aid of its attorney, make an educated decision based on the expected costs of the process. Given the serious strategic concerns associated with an ex post decision, we suggest that the less affluent party be allowed to set the cap only at the beginning of the process, when it makes its first filing with the court.²²²

D. *Direct Notice to the Opposing Party*

Finally, we address a particular aspect of the application of our proposed method: its confidentiality. It is important that the court not be made aware of the amount of the cap on the award of costs. Due to behavioral biases, notifying the court of this amount may cause the court to award costs at an amount higher or lower than it otherwise would have,²²³ which in turn might undermine the

222. Practically, this means that when the less affluent party initiates a proceeding, it must notify the opposing party of its choice immediately when filing the claim or the motion, as relevant. This way, the opposing party knows what the cap is before it even begins to work on the case. When the opposing party initiates the proceeding, the less affluent party must notify of its decision when filing its Statement of Defense, or response to the motion.

223. The most obvious of these is the anchoring effect, which may cause the court to “anchor” to the amount set as the cap and automatically award that amount. On the robustness of the anchoring effect and its broad implications, see Adrian Furnham & Hua Chu Boo, *A Literature Review of the*

function of the entire mechanism. The cap must therefore be set by way of notice to the well-off opponent. We propose that the cap be kept confidential, and that the parties argue before the court regarding the award of costs as if no cap has been set. After a ruling (including a ruling on costs) has been handed down, the parties adjust the actual amount in accordance with the cap that was set (if the cap is lower than the costs awarded by the court). The process in its entirety can be completed without the involvement of the court.

This feature of the proposed mechanism also entails an additional important benefit: it requires few judicial resources, if any. The court remains largely uninvolved, and neither party needs to ever do more than send a notice to its adversary specifying the amount of the cap. The only dispute that may arise concerns the question of *which* party has the right to set the cap; that is, which party is less affluent and which party is the onetime player. We address this issue below. As explained below, a simple mechanism that requires practically no judicial resources can be put in place to settle such disputes, if they arise.

E. *Identifying the Less Affluent Party*

A final question to be addressed is the identification of the less affluent party and the onetime litigant. Naturally, both parties will prefer to be the party setting the cap. It is important to guarantee that the right party is allowed to set the cap: the indigent party for the cap on the award of costs, and the onetime litigant for the overall cap. At the same time, it is important to make the process of identifying the party that is allowed to set the cap a simple one. A complicated rule calling for a balancing of different factors might itself bring about disputes regarding the identification of the impecunious party or the onetime litigant.

The overall cap is intended to level the playing field between onetime (often marginalized) litigants and repeat players. We suggest looking at the number of lawsuits each of the parties has been involved in during the years preceding the lawsuit at hand. If one of the parties has been involved in more than ten lawsuits on average in the three years preceding the year in which the case was initiated, that party should be considered a repeat litigant. Of course, the mere fact that one party is a repeat litigant does not automatically mean that its opponent is not a repeat litigant. When both parties are repeat litigants, the overall cap should not be applied. For example, a bank suing another bank should not be allowed to limit the defendant's total expenditure on litigation. To prevent the cap from being abused by litigants who are repeat players

Anchoring Effect, 40 J. SOCIO-ECON. 35, 35–37 (2011). But other biases may be at play as well. See generally EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS (2018) (reviewing a variety of different behavioral effects, including anchoring).

themselves, we suggest that a party be allowed to set the cap only if it has not been a party to more than five lawsuits on average in the three years preceding the year in which the case was initiated (and its opponent *is* a repeat litigant).

The second cap, the cap on the award of costs, should be applied whenever one litigant is significantly poorer than the other.²²⁴ A simple way to identify the less affluent party is by looking at the last available tax filings. Tax filings are generally credible. It is a criminal offense to file inaccurate statements,²²⁵ and there is therefore little concern in relying on the parties' filings in this regard.²²⁶ Moreover, a study published by the Internal Revenue Service in 2022 found that ninety-three percent of American taxpayers consider it a civic duty to pay their fair share of taxes and that eighty-nine percent agree with the statement that everyone who cheats on their taxes should be held accountable.²²⁷ Eighty-seven percent of taxpayers find it unacceptable to cheat on taxes, a percentage that has been relatively stable for a decade.²²⁸ The party whose income in the preceding year was lower should be the one to set the cap.

Again, the caps are not mutually exclusive. In the frequent scenario of a marginalized onetime player facing a repeat litigant with means at its disposal, both caps can be set by the impecunious, onetime litigant. The first cap will serve to ensure a balanced battle that produces a just and truthful outcome. The second cap will prevent strategic investment on the part of the well-off litigant.

CONCLUSION

This Article addresses the problem of unequal access to the litigation system. Private litigants are typically onetime players, as most individuals do not regularly engage in litigation. Therefore, they find it expensive to uphold their rights in court and often forgo doing so. Conversely, repeat litigants, typically large corporations, enjoy easier access to the litigation system and to litigation resources. Such litigants can easily manipulate the other party's litigation costs, enjoy economies of scale in litigating cases, and also invest in litigation far in excess of the value of a particular case. For all these reasons, litigation between onetime, private litigants and repeat, professional corporate litigants, is starkly imbalanced. This imbalance means that the litigation system fails in its core mission: protecting rights and producing truthful outcomes. It

224. When both parties are similarly situated financially, there is no need to apply the cap on the award of costs. Naturally, a litigant's income will never be *exactly* equal, but a cap is required only when income differences are quite extreme, as between a large corporation and a low-income individual.

225. 26 U.S.C. §§ 7204–07.

226. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(E)(iii) (U.S. SENT'G COMM'N 2018) (promulgating guidelines in the closely related context of relying on tax assessments).

227. I.R.S. DEP'T OF THE TREAS., PUB. 5296, COMPREHENSIVE TAXPAYER ATTITUDE SURVEY 2021 (CTAS) EXECUTIVE REPORT 5, 14 (2022).

228. *Id.* at 14–15.

is therefore time to update the rules governing the allocation of costs to fit the modern *Rudgayzer v. Google* world of litigation.²²⁹

We propose to solve this problem through a novel regime for regulating the costs of litigation. Our solution does not grant the financially weaker party an unfair advantage, but sets a fair and equal cap on litigation costs, bringing the required investment for litigating a case within the reach of private litigants. This solution is justified in light of the goals and purposes of the litigation system, which is founded on the assumption of parity between plaintiffs and defendants, a parity that supports the emergence of truthful outcomes. Our proposal reestablishes this parity by limiting *both* parties' investment in litigation and by allowing both parties to recover costs, while at the same time allowing the less affluent party to set a cap on reimbursement payments the vindicated party is entitled to. We show that this proposed regime assures litigants will *always* find it profitable to litigate meritorious cases and will always be made whole, including reimbursement for justified expenses, if vindicated. Our proposal thus assures both justice and efficiency.

229. *Rudgayzer v. Google, Inc.*, No. 13 CV 120, 2014 WL 12676233, at *1 (E.D.N.Y. Feb. 10, 2014).