Most patent scholars agree that the Patent and Trademark Office grants too many invalid patents and that these patents impose a significant tax upon industry and technological innovation. Although policymakers and scholars have proposed various ways to address this problem, including better ex ante review by patent examiners and various forms of ex post administrative review, district courts invalidating patents in litigation remain a core defense against bad patents.

This article analyzes a previously unidentified impediment to the use of district courts to invalidate patents. Nearly every patent lawsuit rises or falls on one of two defenses: invalidity or noninfringement. Invalidity and noninfringement are distinct legal and factual issues that are usually analyzed separately by scholars. Yet as the article explains, the two issues are closely related, creating a series of tradeoffs and asymmetries that lead many patent defendants to focus on noninfringement instead of invalidity. The net effect of these tradeoffs and asymmetries is that patent defendants often have an incentive to argue noninfringement instead of invalidity, leading courts to invalidate fewer patents than they should. This exacerbates the problem of invalid patents, making it harder for individuals and companies to create new products and services.

The article concludes by proposing three reforms to help restore the balance between invalidity and noninfringement. First, eliminating the elevated burden of proof for invalidity would remove one significant asymmetry that makes it harder to prevail on invalidity. Second, a bifurcation rule giving defendants the option to defer infringement issues until after validity has been decided would help litigants develop coherent trial narratives while allowing them to focus on validity issues early in a case. And third, a new cause of action for an accounting, brought against industry competitors by a litigant that successfully invalidates a patent, would help eliminate the collective-action problem posed by invalidity’s public-good nature.