

# On the Alienability of Legal Claims

by Michael Abramowicz\*

*Courts have become increasingly skeptical about rules restricting plaintiffs' ability to sell legal claims, and legal commentators have argued that markets for claims would be efficient, moving claims to those who can prosecute them most efficiently. Claim sales intuitively might appear to present a clash of economic and philosophical arguments, with perceived efficiency benefits coming at the expense of societal commitments to values other than efficiency. In this Article, Professor Abramowicz argues that economic and philosophical arguments do point in opposite directions, but in the reverse directions from what one might expect. A range of philosophical and other noneconomic considerations, such as concerns about commodification, corrective justice, legal ethics, and procedural justice, pose no significant problems for claim sales. There is, however, a significant economic problem. Markets for legal claims face a particularly strong adverse selection effect, because a prospective purchaser must consider not only why the plaintiff wishes to dispose of the claim, but also why the plaintiff cannot obtain a better deal from the defendant. Thus, even a regime permitting alienation might result in very few claim sales, and many of those may be motivated by prospective inefficiencies, such as attempts to manipulate the path of legal doctrine. If, however, in some legal context plaintiffs managed to overcome this adverse selection problem, so that claim sales became the norm, the economic concern would be eliminated. But philosophical concerns would reemerge, as this Article shows by using a hypothetical mandatory alienation regime as a heuristic device.*

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## INTRODUCTION

In recent years, a number of legal commentators have argued against restraints on the alienation of legal claims.<sup>1</sup> A regime without such restraints would permit plaintiffs to sell their claims to third parties, effectively allowing the transfer of litigation risk from plaintiffs to others.<sup>2</sup> Courts increasingly have tolerated claim sales and have begun to view restraints on alienation skeptically.<sup>3</sup> The Massachusetts Supreme Judicial Court, for example, concluded in 1997 that it would no longer recognize the common law doctrines of barratry, maintenance, and champerty,<sup>4</sup> which prohibited, respectively, a stranger to a controversy from inciting litigation, assisting in prosecuting litigation, or agreeing to take over litigation.<sup>5</sup> These doctrines

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<sup>1</sup> See, e.g., Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435 (1995) (describing how permitting a market in tort claims could achieve some of the goals of tort reform movements); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485 (1992) (arguing for permitting claim sales except in certain circumstances, such as where they might lead to harassment of a defendant); Marc A. Shukastis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987) (arguing that plaintiffs should be allowed to sell personal injury claims); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002) (urging the legalization of champerty, subject to regulatory oversight and to certain exceptions); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529 (1996) (offering economic and fairness arguments in support of claim sales); Teal E. Luthy, Comment, *Assigning Common Law Claims for Fraud*, 65 U. CHI. L. REV. 1001 (1998) (arguing that fraud claims should be alienable).

<sup>2</sup> The most radical of these proposals would allow plaintiffs to sell unmatured tort claims for wrongs that have not yet occurred. See Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989). Cooter's insight is that markets for unmatured tort claims could produce in effect no-fault insurance. The sale of rights to unmatured claims could constitute at least partial consideration for the purchase of insurance, and in the event such a claim matured, the insurer could waive the right to the claim in exchange for payment from the potential defendant. See, e.g., *id.* at 384 ("[S]uppose that drivers sell some of their rights to recover for tortious automobile accidents to their own insurance company, [which] waives these rights in exchange for payment from the insurance companies of other drivers. This series of private agreements would create a regime of no-fault auto insurance."). Cooter's article focuses on matured rather than unmatured tort claims. For criticisms of Cooter's proposal, see Steven P. Croley, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1810 (1995); Charles J. Goetz, *Commentary on 'Towards a Market in Unmatured Tort Claims': Collateral Implications*, 75 VA. L. REV. 413 (1989); and Alan Schwartz, *Commentary on 'Towards a Market In Unmatured Tort Claims': A Long Way Yet to Go*, 75 VA. L. REV. 423, 423-24 (1989).

<sup>3</sup> For a review of litigation trends, see Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REF. 57 (1999-2000).

<sup>4</sup> *Saladini v. Righellis*, 687 N.E.2d 1224, 1224 (Mass. 1997).

<sup>5</sup> The classic article discussing these doctrines is Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).

collectively form one of two legal obstacles to the development of legal claims markets.<sup>6</sup> The second obstacle is a refusal by some courts to enforce contracts purporting to sell choses in action,<sup>7</sup> especially for those that, if not assigned, would not survive the death of their original owners.<sup>8</sup> Courts have generally shown more willingness to allow assignment of contract claims than of tort claims,<sup>9</sup> and within the latter category of claims, more willing to allow assignment of property damage claims than of claims for personal injury.<sup>10</sup>

Businesses devoted to purchasing and prosecuting claims remain legally problematic, at best.<sup>11</sup> Even in the Massachusetts case abolishing the common law prohibitions, the court noted mysteriously in dicta that its decision would not legalize “the syndication of lawsuits.”<sup>12</sup> New Jersey is another state that has no bar on champerty,<sup>13</sup> but there, tort claims are not assignable.<sup>14</sup> In Texas, the state that has perhaps gone furthest to allow claim sales, legal claims are generally assignable<sup>15</sup> and the doctrine of champerty has been abolished,<sup>16</sup> but barratry remains a criminal offense,<sup>17</sup> and the courts have found that certain classes of cases, such as malpractice,<sup>18</sup> are not

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<sup>6</sup> Although champerty may be enforced criminally, some courts have allowed defendants to raise the defense that a claim was champertously assigned, in effect using champerty doctrine to void assignments. *See generally* L.S. Tellier, Annotation, *Assertion of Defense of Champerty in Action by Champertous Assignee*, 22 A.L.R.2d 1000 (1952).

<sup>7</sup> *See, e.g.*, *Tiernan v. Jackson*, 30 U.S. (5 Pet.) 580, 597 (1831) (“The general principle of law is, that choses in action are not at law assignable.”). The common law prohibited assignment of any legal claim, but equity traditionally allowed assignment of contractual claims. *See, e.g.*, *Kansas Midland R. Co. v. Brehm*, 39 P. 690 (Kan. 1895). The rules in many jurisdictions have loosened considerably, especially in contract cases. *See, e.g.*, *Bouchard v. People’s Bank*, 594 A.2d 1 (Conn. 1991) (allowing assignment of a chose in action).

<sup>8</sup> *See generally* R.D. Hursh, Annotation, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 § 2 (1955 & Supp. 2000) (summarizing the rule and citing cases). For an example of a survival statute, see TENN. CODE ANN. § 20-5-102 (West Supp. 2002) (providing that all civil actions, “except actions for wrongs affecting the character of the plaintiff,” shall survive the plaintiff’s death).

<sup>9</sup> *See* W.W. Allen, Annotation, *Validity of Anti-Assignment Clause in Contract*, 37 A.L.R.2d 1251 (1954 & Supp. 2000).

<sup>10</sup> *See* W.W. Allen, Annotation, *Assignability of Claim in Tort for Damage to Personal Property*, 57 A.L.R.2d 603 § 4 (1958 & Supp. 2000).

<sup>11</sup> For a survey of the current status of champerty law in all of the states, see Bond, *supra* note 1, at 1333-41.

<sup>12</sup> *Saladini*, 687 N.E.2d at 1227 n.7. Martin suggests that this dicta may mean that “it is permissible for one person, like Saladini, or one business entity to support someone else’s lawsuit, but it may not be permissible for a group, i.e., a syndicate, to do the same thing.” Martin, *supra* note 3, at 61. A slightly different interpretation would be that the court reserves the right to prevent the operation of a business devoted to purchasing legal claims, in contrast to a situation in which a particular business buys a single claim.

<sup>13</sup> *See* *Bouvier v. Baltimore & N.Y. Ry.*, 51 A. 781, 784 (N.J. 1902). For more recent sources, see Dobner, *supra* note 1, at 1549 n.93.

<sup>14</sup> *See* N.J. STAT. ANN. § 2A:25-1 (2000) (making contractual choses in action only assignable).

<sup>15</sup> *See* TEX. PROPERTY CODE ANN. § 12.014(a) (Vernon 2001) (“[A]n interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing.”); *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex. 1987).

<sup>16</sup> *See, e.g.*, *Perry v. Smith*, 231 S.W. 340, 341 (Tex. Comm’n App. 1921).

<sup>17</sup> TEX. PENAL CODE ANN. § 38.12(a)(1) (West 2002) (making it an offense to “knowingly institute[] a suit or claim that the person has not been authorized to pursue”); *see also* *Medlock v. Comm’n for Lawyer Discipline*, 24 S.W.3d 865 (Tex. App.—Texarkana, 2000) (upholding discipline against an attorney accused of barratry). *Medlock* involved a lawyer who solicited business from a recent accident victim. It is not clear whether the Texas courts would uphold a barratry finding against a lawyer

assignable. There is no apparent political lobby agitating for increasing alienation of claims, and the future of alienability is thus uncertain. This Article's purpose is not to predict whether alienation will become more commonplace, but rather to consider the normative question of whether legal claims generally should be alienable. Many of the arguments, however, turn out to depend, in part, on such a prediction. If alienation of claims is relatively rare in a particular jurisdiction, moral and other noneconomic considerations should not pose barriers to sales of claims, but the economic considerations are closer. If, by contrast, alienation were widespread, claim sales would pose little economic danger, but noneconomic objections might become more serious.

The existing literature on sales of claims relies primarily on economics, yet it might intuitively seem that while allowing claim sales would promote efficiency, it would be problematic on philosophical or other noneconomic grounds. Many people at least have this intuition about other surprising proposals for market ordering: Deregulating the adoption market might improve the ability of prospective adoptive parents and birth mothers to arrange transactions that are both mutually beneficial and likely to improve the babies' welfare,<sup>19</sup> but such sales might commodify parent-child bonds.<sup>20</sup> I will argue, however, that this intuition is backward when applied to the occasional sale of legal claims.

As long as claim sales are voluntary, they should not serve to further commodify the legal system, even if we accept the standard account of commodification theory. A principal concern of commodification theory is that commodification by some in effect will produce commodification among all, with a single baby sale, for example, diminishing the value of all parental relationships. Claim sales, at least on a modest scale, would likely have the opposite effect, if any at all, by making claims not sold seem less motivated by financial concerns.

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who engaged in similar conduct but offered to purchase a claim instead of to serve as a lawyer.

<sup>18</sup> See *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 393-94 (Tex App.—Houston 1997, writ dismissed by agreement) (explaining the public policy grounds for the exception, emphasizing “the personal nature of the attorney-client relationship, and the confidentiality of that relationship”). Some courts in other states have restricted assignment of malpractice claims to parties who were adversaries in the underlying litigation. See, e.g., *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991). Texas has a related bar, preventing an alleged tortfeasor from accepting assignment of plaintiff's claim against a joint tortfeasor as part of a settlement with the plaintiff. See *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988).

<sup>19</sup> See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Landes and Posner are cautious about the implications of their analysis, suggesting only “the possibility of taking some tentative and reversible steps toward a free baby market.” *Id.* at 347. The Article has often incorrectly been identified as allowing a “free market” in babies. For a more recent view by Judge Posner on the regulation of the adoption market, see Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

<sup>20</sup> See, e.g., Neil Duxbury, *Law, Markets and Valuation*, 61 BROOK. L. REV. 657, 685-86 (1995); Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 349-51 (1991).

Similarly, the voluntariness of claim sales helps to insulate them against other noneconomic attacks. Corrective justice, for example, is not offended by alienation, either by plaintiffs of their entitlements or by defendants of their obligations, because the means by which tortfeasors rectify the wrongful losses they impose is not important. If a plaintiff chooses to have a loss rectified in the market, or a defendant pays another to take on a future liability, corrective justice would be satisfied. Similarly, voluntary sales of claims do not violate either the rules or principles of legal ethics, at least in the absence of a conflict of interest. Nor are voluntary sales of claims psychologically problematic. While theories of procedural justice emphasize the importance of control and participation in litigation, a voluntary decision to alienate a claim is no more worrisome than a voluntary decision to settle one.

The economic balance, however, is more complicated. The economic theory of alienability provides no case against permitting claim sales, and prior commentators have noted several benefits. Most notably, claim sales can allow plaintiffs to obtain judgments more quickly, and such sales can allow those who are most capable of handling the risks and challenges of a litigation to do so. Claim sales, however, might well be rare because litigants' information about their own cases is likely to cause an adverse selection problem, and indeed the rarity of retroactive liability insurance<sup>21</sup> for defendants suggests that even if permitted, only a few claim sales may occur. That the market would not be robust might seem only to discount the potential economic benefits of claim sales, but a market in which only a few claims are sold may be problematic. Claims sold are not likely to be a random sample of all claims, and indeed those claims sold may be among the most likely to present problems that will offset any efficiency benefits that they provide. In particular, these claims may have disproportionately negative effects on legal process, the development of precedent, and settlement.

The primary ambition of this Article is thus to flip the intuition that alienation of legal claims is problematic philosophically, but not economically. It considers philosophical and other noneconomic arguments related to claim sales in Part I, and the economic considerations related to such sales in Part II. An additional thought experiment, however, involves imagining a world

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<sup>21</sup> Perhaps the most famous reverse insurance transaction involved the insuring of the 1980 MGM Grand Hotel fire, which killed 85 people. Although the insurance was purchased after the disaster, there was still intense litigation over the scope of the insurance coverage. See Myrna Oliver, *MGM Grand Set to Battle Its Insurers—Case Expected to Last 8 to 10 Months, Cost \$342,000 a Day to Try*, L.A. TIMES, Mar. 18, 1985, at 1. The incident underscores that insurers who issue retroactive insurance should wonder why the defendant seeks to purchase it. See *infra* Part II.C.1.

in which claim sales are the norm rather than the exception, and Part III does this by considering an extreme, a legal world with a mandatory alienation regime that *requires* parties to alienate their claims. In this world, the intuition flips back. With everyone selling claims, the adverse selection problem would disappear, as asymmetric information would not cause the market to unravel. Noneconomic considerations, however, would reemerge, as claim sales would no longer be voluntary. The question then becomes whether a market with pervasive, but not mandatory, claims sales would sufficiently coerce litigants to alienate claims so as to present the same difficulties.

### I. NONECONOMIC CONSIDERATIONS

This section considers four possible noneconomic justifications for opposing claim sales—commodification theory, corrective justice, legal ethics, and procedural justice—and rejects each in turn. While the first two of these are moral concerns, the third and fourth are predominantly legal and psychological, respectively, though both of these theories have philosophical underpinnings as well. Space limitations, of course, prevent full treatment of all the disputes concerning the proper conception of each of these areas. My methodology is thus to focus on the leading accounts of the relevant areas, with consideration of implications of variant approaches restricted primarily to the footnotes. In applying the standard academic account of these views, I do not intend to endorse these accounts or even to enter the debate about whether these approaches are normatively superior to welfare economics.<sup>22</sup> The ultimate goal is simply to show that, as traditionally formulated, the most formidable apparent objections to claim sales are not powerful.

#### A. *Commodification*

It is both astonishing and revealing that no commentator appears to have considered whether bars against transfer of legal claims cohere with other restraints on alienability, such as rules preventing the sale of organs, children, and sexual services.<sup>23</sup> The small literature urging the

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<sup>22</sup> For a comprehensive argument that welfare economics provides a better approach than “fairness” and related concerns for the analysis of law, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). For a response from the author of one of the primary theories that will be applied here, see Jules Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003) (reviewing the book version of the article, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002)).

<sup>23</sup> Two commentators come close. First, Marc Shukaitis considers briefly whether “there is something distasteful about buying or selling personal injury tort claims.” Shukaitis, *supra* note 1, at 345. In a footnote, Shukaitis cites the inalienability literature, such

sale of legal claims conceives itself as connected to discussions of either tort reform or some more narrow problems in particular areas of law.<sup>24</sup> Meanwhile, the philosophical literature on inalienability and commodification does not explicitly discuss sales of legal claims. Yet, it is hard to imagine an inalienability rule of more immediate relevance for the legal system than the bar on selling most legal claims. The logical work to consider first in evaluating alienability is that of Margaret Jane Radin, the most forceful proponent of inalienability for certain forms of property.<sup>25</sup> Although Radin nowhere considers the alienability of legal claims, a brief review of her analysis will allow for development of the strongest possible argument against alienation and then a refutation of that argument.

While sympathetic to Marxist concerns that “people themselves, not just their institutions, must change in order to live without the market,”<sup>26</sup> Radin suggests that the Marxist case is doomed by what she dubs the “problem of transition.”<sup>27</sup> If the world is not now the noncommodified ideal, then acquiescence to evolutionary decommodification may reinforce the legitimacy of commodification more generally,<sup>28</sup> while an attempt at revolutionary decommodification, i.e. the position that any decommodification that is possible should be attempted, “may wreak injustice.”<sup>29</sup> Radin worries, however, that commodification may at times be problematic. Radin critiques, for example, economists who “conceive[] of rape in terms of a

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as it was at the time. *Id.* at 345 n.74. The concern that sale may be distasteful is an important one, and Shukaitis’s observation in response to the concern, that “a market in tort claims may seem unnatural to many people simply because a market does not exist now,” *id.* at 346, may be on the mark. Shukaitis, however, does not confront any other individual arguments in favor of inalienability. Second, Adam Scales notes that Margaret Radin’s concerns about commodification might be relevant to assessing the practice of settlement factoring, which is a form of claim alienation designed for tax purposes. See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 952-53, 57. Scales does not, however, analyze whether Radin’s analysis condemns settlement factoring or claim sales more broadly.

<sup>24</sup> See, e.g., Choharis, *supra* note 1, at 491-500 (suggesting that claim sales can serve an aggregation function and thus serve as an alternative to class actions).

<sup>25</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*].

<sup>26</sup> *Id.* at 1872 (citing Karl Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER 193 (R. Tucker 2d ed. 1984)).

<sup>27</sup> *Id.* at 1875.

<sup>28</sup> Radin explains:

The evolutionary approach harbors a transition problem because it does not address how we can progress toward noncommodification using existing social structures and conceptual schemes that are thought to be artifacts of commodification. Partial decommodification in the context of a continuing implicit commitment to a dominant market order may mean that any deviations from the market order will only reinforce commodification, by being seen merely as exceptions that prove the market rule.

*Id.* at 1875-76. Radin does not explain just how partial decommodification would be “exceptions that prove the market rule,” and the assertion that changing the world by decommodifying a particular form of property could in effect increase commodification seems strange. Perhaps Radin’s worry is again rhetorical, that those who seek partial decommodification are necessarily conceding to the legitimacy of other commodifications. Yet, if proponents of partial decommodification emphasized that they hoped to advance decommodification further, it is hard to see how a victory could be a defeat.

<sup>29</sup> *Id.* at 1876.

marriage and sex market,” because “market rhetoric conceives of bodily integrity as a fungible object.”<sup>30</sup> The problem with rape is not just that its cost is, with such high probability, likely to be greater than its benefits as to justify an overinclusive ban on rape,<sup>31</sup> but that rape effectively changes the nature of a person, for “[b]odily integrity is an attribute and not an object.”<sup>32</sup> A woman who is raped has not simply lost something compensable in dollars but has effectively become a different person.<sup>33</sup> Market rhetoric “transforms our world of concrete persons . . . into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable ‘objects’” and thus “reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.”<sup>34</sup>

Thus, although in an ideal world, “market-inalienability would protect all things important to personhood,” in our nonideal world, “it may sometimes be better to commodify incompletely than not to commodify at all.”<sup>35</sup> The public policy inquiry depends, first, on an assessment of whether or not a particular form of property should be conceived of as important to personhood, and if so, second, on an assessment of whether there are reasons to allow alienability nonetheless. She asks rhetorically, “If some people wish to sell something that is identifiably personal, why not let them?”<sup>36</sup> Then, she offers three justifications: “a prophylactic

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<sup>30</sup> *Id.* at 1880.

<sup>31</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 238 (5th ed. 1998) (“[S]ome rapists derive extra pleasure from the fact that the woman has not consented. For these rapists, there is no market substitute . . . and it could be argued therefore that [rape] should not be punished if the sum of satisfactions to the rapist . . . exceeds the victim’s pain and distress.”); see also RICHARD A. POSNER, *SEX AND REASON* 365-71 (1995) (further developing Posner’s views on rape).

<sup>32</sup> Radin, *Market-Inalienability*, *supra* note 25 at 1881.

<sup>33</sup> Radin clarifies that “someone who is raped is [not] changed into a completely different person.” *Id.* at 1881 n.118. She argues, “[W]e must have a way of conceptualizing our understanding both that she is different afterwards, so that we recognize that she has been changed by the experience, and simultaneously that she is the same afterwards, or else there would be no ‘she’ that we can recognize to have had the experience and been changed by it.” *Id.* This concession, while probably necessary, leaves a loose thread in Radin’s argument. Radin’s argument that bodily integrity and money are incommensurable seems to flow from her premise that no amount of money could compensate for a loss in bodily integrity, because the person who receives the money is not the same as the person that originally existed. In other words, the person who was victimized is irretrievably lost and cannot be recovered. This is an appealing argument, for the same reason that a baby killer cannot compensate by bringing a new child, even a hypothetical one with the same genes, into the world. Once Radin admits that the victim’s underlying identity remains the same, the question arises why changing one aspect of a person’s identity should be seen as fundamental.

<sup>34</sup> *Id.* at 1885. Thus, Radin concludes, “universal market rhetoric does violence to our conception of human flourishing.” *Id.*

<sup>35</sup> *Id.* at 1903.

<sup>36</sup> *Id.* at 1909. The section containing and responding to this question is entitled “Methods of Justifying Market-Inalienabilities.” *Id.* This orientation is perplexing, because it might seem that once we have determined that something is important to personhood, the burden of justification should be on the advocate of alienability. Radin does address justifications for alienability in the context of considering justifications for inalienability, so her approach to presentation does not technically affect the validity of her argument. Nonetheless, it is interesting that Radin’s arguments themselves seem close to embracing market rhetoric, or at least economic reasoning. Economists could classify each of the arguments she identifies as reflecting some sort of market failure. This may suggest that Radin is not opposed to economic reasoning per se, only that she is opposed to the market rhetoric that often accompanies such reasoning, but this interpretation would significantly dull her criticism of economic arguments. See, e.g., *supra* note 31 and accompanying text (discussing an economic argument that Radin seems to be criticizing



argument, assimilation to prohibition, and a domino theory.”<sup>37</sup> The prophylactic argument is that the sale of an item of property integral to personhood might create a presumption that the sale is coerced, even if it is theoretically possible for an uncoerced sale.<sup>38</sup> The prophylactic argument, however, may be “deeply troubling,” for example, if the individual who wishes to alienate the property is being coerced by poverty and “we then do not provide the would-be seller with the goods she needs or the money she would have received.”<sup>39</sup> The prohibition argument is simply that there might be a “moral requirement” that a good, such as love, friendship, or sexuality, not exist in a commodified form, for example because the commodification “creates and fosters an inferior conception of human flourishing.”<sup>40</sup> Finally, the domino theory is relevant where “the commodified and noncommodified versions of some interactions cannot exist,” for example if “the existence of some commodified sexual interactions will contaminate or infiltrate everyone’s sexuality so that all sexual relationships will become commodified.”<sup>41</sup>

Though this is but a crude summary of Radin’s theory, it is sufficiently deep to allow development, and then scrutiny, of a case for the inalienability of legal claims. Legal claims may be important to personhood, because the possession of a legal claim may be constitutive of identity. There is no shortage of tales of individuals who have fought hard to vindicate a position in litigation, and not just for monetary return. Pursuing a litigation to its conclusion may be an integral part of a healing process for those who perceive themselves to be victims of wrongs. The possession of a legal claim may serve as a substitute for whatever is lost as a result of the wrong, and if what is lost is not commensurable in money, then mere monetary compensation will not serve as an acceptable substitute.

Moreover, the argument continues, each of the three arguments in favor of preventing sale of property integral to personhood applies. The prophylactic argument applies because there is a strong possibility that a plaintiff’s decision to sell a legal claim will be coerced. An initial inability to obtain satisfactory legal representation, or immediate financial demands, for example,

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on the merits of the argument).

<sup>37</sup> *Id.*

<sup>38</sup> For example, “selling oneself into slavery [is] so destructive of personhood that we would readily presume all instances of it to be coerced.” *Id.* at 1910.

<sup>39</sup> *Id.* at 1910. “Thus, this aspect of liberal prophylactic pluralism is hypocritical without a large-scale redistribution of wealth and power that seems highly improbable.” *Id.* at 1911.

<sup>40</sup> *Id.* at 1912.

<sup>41</sup> *Id.* at 1913.

may coerce a plaintiff to sell her legal claim. In addition, the prohibition argument applies because it is morally problematic that a plaintiff who sells a legal claim is not merely selling something that she owns, but is compromising the legal system itself. Finally, the domino theory applies because, if legal claims are exchangeable like securities, they will be viewed in much the same way as securities, rather than as representing moral claims against wrongdoers. Thus, the sale by one plaintiff of a legal claim may contaminate the aspect of legal claims central to personhood for everyone else. Sale of legal claims would inject market rhetoric into the legal system, which would come to be seen as something little different from the Treasury or the Social Security Administration, as a governmental body serving a fundamentally economic function. This shift in the general view of the legal system inevitably would affect perceptions of individual claims, and worse, of individuals holding such claims.

Some may already believe this argument to be made of straw, and although I have tried to make it as sturdy as possible, I agree that it has substantial holes. Perhaps the most significant objection is that a legal claim is an inherently transient form of property, lasting only as long as the lawsuit. Even if there are litigants whose identities are tied up with their legal claims, there is nothing the legal system can do for them, for the change to personhood will happen eventually. Thus, if the personhood argument is to be salvaged, the *means* by which legal claims are resolved must be integral to personhood. Perhaps the resolution of a legal claim in a court of law, with a decision by a judge or jury, is critical to preserving personhood, because it is the promise of judicial or jury decisionmaking that separates a legal claim from other contingent assets, such as stocks which depend on individual companies' economic performance. Courts however, often resolve claims pretrial, for example, on a motion to dismiss or through summary judgment, and such dispositions are not reserved for frivolous claims. If the promise of judicial or jury decisionmaking was a serious concern, our existing legal system would be in need of substantial reform. Most seriously, the practice of settlement means that the vast majority of cases will not be resolved by a court, but by the parties. Sale of a legal claim is presumably similar to settlement, which is just a sale by the plaintiff to the defendant, in its effect on personhood.

Even if legal claims are important to personhood, the arguments that an individual should not be allowed to trade off personhood for other goods are weak. The prophylactic argument is

weak, for the same reason that Radin concludes that laws banning prostitution are problematic.<sup>42</sup> If litigants are coerced into selling claims, then the nature of the coercion is presumably economic because sales of legal claims on the basis of other forms of coercion, such as physical coercion, would presumably be invalidated under standard contract law principles.<sup>43</sup> A plaintiff will always have the option of not pursuing a legal claim, so an inalienability rule may lead to some litigants abandoning their claims without compensation. The prohibition argument, that alienation of a claim may be immoral, hardly allows for easy analysis, though my consideration below of corrective justice theory provides one way of conceptualizing this argument.<sup>44</sup>

Finally, the domino theory—that “commodification for some means commodification for all”<sup>45</sup>—seems precisely backwards in the context of legal claims. Legal claims are already at least partially commodified,<sup>46</sup> because even if the reason someone pursues a claim is not financial, successful pursuit of a claim for money damages results in the transfer of money. If some plaintiffs sell out, the plaintiffs who choose not to sell out will likely be seen as more vigorous litigants and perhaps as more committed to obtaining a judgment in court. Moreover, plaintiffs who do sell out might need to cooperate with purchasers in pursuing their claims, and plaintiffs’ willingness to do so, despite the irrelevance of subsequent proceedings to them personally, might suggest that they have a nonmonetary interest in the case. Similarly, defendants who alienate their claims, and nonetheless vigorously defend themselves, may be seen as doing so for other than financial reason alone.<sup>47</sup> The domino theory might make sense if the ultimate goal of litigation was to receive an apology and no money from the defendant, and

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<sup>42</sup> Radin calls this problem the “double bind.” She argues:

Often commodification is put forward as a solution to powerlessness or oppression, as in the suggestion that women be permitted to sell sexual and reproductive services. But is women’s personhood injured by allowing or by disallowing commodification of sex and reproduction? The argument that commodification empowers women is that recognition of these alienable entitlements will enable a needy group—poor women—to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood.

*Id.* at 1915-16. She ultimately concludes, “I think we should now decriminalize the sale of sexual services in order to protect poor women from the degradation and danger either of the black market or of other occupations that seem to them less desirable.” *Id.* at 1924.

<sup>43</sup> See *infra* notes 278-280 and accompanying text (assessing the possibility that legal claim sales might be coerced).

<sup>44</sup> See *infra* Part I.B.

<sup>45</sup> Radin, *Market-Inalienability*, *supra* note 25 at 1917.

<sup>46</sup> This contrasts, for example, to markets for babies, because babies are generally thought not to be commodified at all. *Id.* at 1925-26. Radin notes that while “[p]erhaps babies could be incompletely commodified, valued by the participants to the interaction in a nonmarket way, even though money changed hands ... it seems too risky in our nonideal world.” *Id.* at 1926.

<sup>47</sup> A defendant may defend its activities for reputational reasons, which in themselves might be financial, especially if the defendant is a corporation. Interestingly, studies suggest that the civil cases against corporations can be as damaging to corporations as criminal ones. See Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 414-15 (1991).

some plaintiffs, somehow, were able to turn their claims into money, but the domino theory does not make sense in a legal system, like ours, that is oriented towards money judgments rather than apologies.<sup>48</sup>

Even if there was an argument that the importance of legal claims to personhood might justify the inalienability of some claims, the argument seems tenuous, even ridiculous, when applied to all claims. To take an extreme, even though corporations in court on an issue of contract law or even public law may claim to find support in significant moral and legal principles, we all accept that, for the most part, corporations are seeking to maximize their own welfare.<sup>49</sup> The assertion that a corporation's legal claim might be important for personhood seems far-fetched, or at least a description of the unusual, rather than the usual, case. Even when venturing beyond corporations to lawsuits brought by or against individuals, many lawsuits, personhood just isn't supremely important for many cases that are the bread-and-butter of the courts, and the recognition that courts may have important symbolic roles in human affairs should not blind us to the reality that courts also serve a practical function that often is more important. Thus, if any proposal to reform the courts is thought to endanger personhood, an assessment should be made of the kinds of cases that the proposal would affect. Criminal and quasi-criminal cases, for example, may be of greater import for personhood than insurance cases.

In sum, even accepting the philosophical argument that property may be important to personhood and, therefore, that inalienability rules sometimes may be justified, this argument does not apply convincingly to legal claims. My point, of course, is not that Radin is wrong, but that even if she is correct, application of her framework to legal claims supports permitting alienability if there is some reason other than personhood to do so. Indeed, I suspect that Radin herself might agree with this analysis. Though Radin does not discuss legal claims directly, she does discuss Richard Abel's proposal for a tort system that would protect personhood by not allowing damages for pain and suffering, which commodify the "unique experience" of

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<sup>48</sup> For an economic and evolutionary psychology analysis of whether the legal system should encourage apology, see Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002).

<sup>49</sup> Some scholars have urged that corporations take into account constituencies other than shareholders, but there is broad agreement as a positive matter that corporations generally seek to maximize shareholder value. *See generally* Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409 (2002) (considering the extent to which corporate law permits privatized firms to make decisions that would benefit constituencies other than shareholders); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992) (justifying statutes allowing directors to consider interests other than wealth maximization and explaining how such statutes might be enforced).

individuals.<sup>50</sup> Radin labels “the proposal troubling and its agenda unjust.”<sup>51</sup> She explains, “To deny money damages, inadequate though they may be, seems to compound the injury to tort victims under the present social structure, in which we have not put into practice other measures that would take care of them in better ways or prevent their injuries in the first place.”<sup>52</sup> Similarly, if alienation of claims benefits plaintiffs (or defendants) without impairing the goals of the legal system, then seeking to protect personhood may compound plaintiffs’ injuries (or defendants’ claims of injuries) in the absence of a better system for addressing them.

### *B. Corrective Justice*

The possibility that alienation of a legal claim offends personhood does not exhaust the range of potential philosophical concerns about alienation of legal claims. Perhaps the most obvious objection is that alienation of legal claims may offend corrective justice.<sup>53</sup> Though views on the content of corrective justice vary, corrective justice is both a descriptive and a normative theory of tort law, challenging the economic approach that emphasizes the minimization of all forms of accident costs.<sup>54</sup> Alienation of legal claims might seem to offend corrective justice by interfering with the relationship between plaintiffs and defendants. If a plaintiff alienates a legal claim, the defendant may end up paying as a result of his actions, but the money paid will not go to the plaintiff. Similarly, and perhaps of greater concern, if a defendant alienates a legal claim, the plaintiff may end up receiving money in a judgment or settlement, but the check will not be written on the defendant’s account. Once either party alienates a legal claim, the connection between the plaintiff and the defendant is severed. The question is whether this severance offends corrective justice.

To answer this question, we must consider several possible conceptions of corrective justice, because even theorists who are committed to corrective justice over the economic

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<sup>50</sup> Radin, *Market-Inalienability*, *supra* note 25 at 1876 (citing Richard Abel, *A Critique of American Tort Law*, 8 BRITISH J. L. & SOC’Y 199, 207 (1981)).

<sup>51</sup> *Id.* at 1877.

<sup>52</sup> *Id.*

<sup>53</sup> Corrective justice theory springs from Aristotle’s analysis in Book V of the *Nicomachean Ethics*. For an exploration of the Aristotelian conceptions, as well as an argument that the content of corrective justice is dependent on judicial practical wisdom, see Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249 (2000).

<sup>54</sup> The classic statement of this position is GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970). Calabresi, however, allows for the possibility that justice may place requirements on the tort system apart from cost minimization. *See id.* at 26 (“Apart from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”).

approach have not agreed upon the content of corrective justice. The view that alienability need not offend corrective justice may be seen most easily by adopting what Jules Coleman, the leading philosopher of corrective justice,<sup>55</sup> has called the “annulment conception of corrective justice.”<sup>56</sup> Although Coleman himself has withdrawn his prior endorsement of this view,<sup>57</sup> some other theorists continue to see it as more attractive than Coleman’s later approach,<sup>58</sup> and so it is a useful starting point. Under the annulment view, corrective justice “specifies grounds of recovery and liability; it does not specify a particular mode of rectification.”<sup>59</sup> The annulment theory, however, “gives no one in particular any special reason for acting, for annulling wrongful gains or losses.”<sup>60</sup> Thus, on this view, while a victim of a wrongful loss has a claim to repair, corrective justice does not necessarily require that the wrongdoer who caused the loss rectify it.<sup>61</sup> Because the annulment conception does not establish any special relationship between a wrongdoer and a victim, alienability of legal claims does not offend it.<sup>62</sup>

Coleman currently subscribes to what he calls the “mixed conception of corrective justice,”<sup>63</sup> which combines the annulment conception with the relational conception of corrective justice. The relational view, advocated by Ernest Weinrib,<sup>64</sup> focuses directly on the relationship between a wrongdoer and a victim, and specifies “a framework of rights and responsibilities

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<sup>55</sup> Cf. Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. IN L. 107, 126 (2001) (calling Coleman “the most prominent tort theorist to have adopted” the emerging consensus view on corrective justice).

<sup>56</sup> For an articulation of this view, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992).

<sup>57</sup> See JULES L. COLEMAN, RISKS AND WRONGS 306 (1992).

<sup>58</sup> See, e.g., Matthew H. Kramer, *Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman’s Theory of Corrective Justice*, 16 QLR 279, 279-80 (1996).

<sup>59</sup> COLEMAN, *supra* note 57 at 306.

<sup>60</sup> *Id.* at 309.

<sup>61</sup> The problem Coleman perceived in the annulment view is that corrective justice becomes indistinct from distributive justice. Coleman explains:

Corrective and distributive justice are distinct principles of justice. That just means that typically they give individuals different kinds of reasons for acting. But if we accept the annulment thesis, this is not how corrective and distributive justice differ. For, as I have characterized it, the annulment view appears to hold that justice requires that a certain state of the world be brought about, not that anyone in particular has a special reason in justice for bringing it about. And this is precisely the way we think about distributive justice. Therefore, in terms of their reason-giving properties, corrective justice is indistinguishable from distributive justice.

*Id.* at 310.

<sup>62</sup> One step is needed to justify this conclusion. The annulment conception is not empty; it does require that “[w]rongful gains and losses cannot be annulled so as to create other wrongful gains or losses.” *Id.* at 306. Thus, if alienation of legal claims leads to new wrongful gains or losses, then it could offend corrective justice.

<sup>63</sup> *Id.* at 318-24; see also Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992).

<sup>64</sup> See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 514-26 (1989); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 444-50 (1987).

between individuals”<sup>65</sup> in order to restore equality between them. It thus seems that the relational approach would provide a more promising route to assessing and problematizing alienability. According to Coleman, however, the relational conception is incomplete, as “[t]he existence of a loss is not necessary to trigger claims based on corrective justice, nor is the point or purpose of corrective justice to annul or eliminate a loss.”<sup>66</sup> The problem with the relational view, Coleman argues, “is that it cannot take us from ‘repairing the wrong’ to ‘repairing the losses.’”<sup>67</sup> Thus, if Steven and Michelle both drive negligently, but only Steven’s negligence causes a car crash injuring David, the relational conception by itself does not explain why Steven, but not Michelle, should pay damages to David.<sup>68</sup> Though the relational account demands repairing of the wrong, it cannot explain why the wrongdoer who causes an injury must pay damages, rather than, for example, requiring that both wrongdoers “make a public statement conveying the judgment that they were wrong to treat others as means to their ends.”<sup>69</sup> The relational view, taken alone, thus offers no challenge to alienability, for it does not specify how a wrong is to be repaired.

The mixed conception, however, corrects this limitation of the relational view and, therefore, might seem to pose a more substantial objection to alienability. According to the mixed conception, “the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible.”<sup>70</sup> If the wrongdoer is the defendant, and the victim is the plaintiff, then the alienation of a legal claim might seem to prevent the defendant from repairing the wrongful loss suffered by the plaintiff. Instead, the defendant will simply pay off someone who has already repaired the plaintiff’s wrongful loss, or a third party previously paid off by the defendant will repair the plaintiff’s wrongful loss, depending on whose claim is alienated. Or, if both claims are alienated, the culmination of the process will be one third party making a payment to another. The question is what, once one accepts the mixed conception’s notion that

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<sup>65</sup> COLEMAN, *supra* note 57 at 314.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 320.

<sup>68</sup> *See id.* at 321-22.

<sup>69</sup> *Id.* at 321.

<sup>70</sup> *Id.* at 324. Coleman initially starts with a broader principle, including a duty to repair the wrong as well as a duty to repair the wrongful loss: “Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions.” *Id.* Coleman explains: “The duty to repair the wrong follows from the relational view; the importance of wrongful losses to the demands of corrective justice is the remnant of the annulment view: thus, the ‘mixed’ view.” *Id.* Coleman, however, then argues that the reparation of the wrong itself is the concern of retributive justice, not corrective justice. *Id.* at 325. The mixed view in the final analysis is thus “mixed” not because it sums up the duties suggested by the annulment and relational views, but because it combines the annulment view’s emphasis on wrongful losses with the relational view’s emphasis on the connection between the wrongdoer and the victim.

corrective justice imposes a duty on a wrongdoer to repair a loss, counts as fulfillment of the duty to “repair.” Even with alienability, the wrongdoer pays and the victim receives, but the repair is not direct.

Although Coleman does not define the word “repair,” he distinguishes the basis of a duty to repair losses from “the permissible ways of implementing the duty.”<sup>71</sup> In explaining this distinction, Coleman offers a hypothetical in which Donald Trump “volunteers to pay all my debts of repair.”<sup>72</sup> If this occurs, “all claims against me are extinguished,”<sup>73</sup> and corrective justice is not violated. Corrective justice is not concerned with retribution against the decisionmaker,<sup>74</sup> but with wrongful losses, and if a third party decides to rectify a loss while absolving a wrongdoer of responsibility, then there is no longer a loss for the wrongdoer to rectify.<sup>75</sup> Similar logic explains Coleman’s conclusion that a social scheme of no-fault insurance need not violate corrective justice.<sup>76</sup> It would not offend the mixed conception of corrective justice for a defendant to pay a third party to assume the responsibility for a wrongful loss allegedly caused by the defendant.<sup>77</sup> At the same time, Coleman indicates that allowing those who have not suffered wrongful losses to recover from defendants who have acted wrongfully is

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<sup>71</sup> *Id.* at 327.

<sup>72</sup> *Id.* at 389; *see also id.* at 327-28 (“Therefore, it does not follow from the fact that one is required to make repair as a matter of corrective justice that any institutional arrangement (or mode of rectification) that discharges that duty in some other way (for example, through the general tax office) would be unjust.”).

<sup>73</sup> *Id.*

<sup>74</sup> Gerald Postema explains, “Retributive justice concerns the wrong, the wrongdoer’s culpability, and the appropriate response of the public. Corrective justice focuses on the victim’s loss and the claim to repair for that loss; it is not concerned with punishing, blaming, or exculpating the injurer, or with rectifying the wrong.” Gerald J. Postema, *Risks, Wrongs, and Responsibility: Coleman’s Liberal Theory of Commutative Justice*, 103 *YALE L.J.* 861, 875 (1993). A plausible response is that even if it makes sense to compartmentalize retributive justice from corrective justice for analytic purposes, it is no defense of a practice to conclude that it violates retributive justice but not corrective justice. Nonetheless, while a full argument is beyond my scope here, retributive justice seems much less relevant than corrective justice to alienability, because criminal law usually accommodates the goals of retributive justice.

<sup>75</sup> *But see* Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 *UCLA L. REV.* 143, 144 (1990) (arguing that the resources to compensate victims must come from the wrongdoers).

<sup>76</sup> Coleman explains:

The New Zealand plan neither affronts corrective justice, nor is its existence irrelevant to corrective justice....

The reason [a victim who receives no-fault compensation] has no claim in corrective justice to repair is that there exists some other mechanism through which the costs of accidents are to be allocated. That means that whether or not corrective justice in fact imposes moral duties on particular individuals is *conditional* upon the existence of other institutions for making good victims’ claims to repair. The capacity within a particular community of corrective justice to impose the relevant *moral* duties depends on the existence of certain *legal* or *political* institutions or social practices.

COLEMAN, *supra* note 57 at 402; *see also id.* at 404 (“[A]lthough corrective justice is private justice—justice between the parties—whether or not it imposes obligations between the parties depends on other social, political and legal practices.”). Coleman originally assessed no-fault compensation in Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 *J. PHIL.* 473 (1974).

<sup>77</sup> Nothing in Coleman’s hypothetical depends on Trump’s agreeing to assume the debt without compensation. *Cf.* COLEMAN, *supra* note 57, at 402-04 (emphasizing that Trump’s action was voluntary, but not that it was taken without monetary or other compensation).



unproblematic, for example, when the plaintiffs are effectively acting as private prosecutors.<sup>78</sup> If it is permissible under corrective justice to rectify a wrong before the wrong has even occurred by hiring a third party, then purchase by a third party of a plaintiff's claim is surely permissible.

That alienability of legal claims does not offend Coleman's mixed conception of corrective justice is also apparent from Coleman's observation that "[i]mplementing corrective justice requires a set of substantive liability rules" as well as "administrative rules establishing burdens of proof and evidence."<sup>79</sup> Such rules "provide the best chance of practically implementing corrective justice under less than ideal circumstances."<sup>80</sup> Even if corrective justice imposes demands on the substantive content of tort law, it has little to say about the form of the institutions used to achieve those substantive goals. Corrective justice does not, for example, dictate whether judges should be given lifetime tenure, though it is possible that some institutional arrangements might be better suited for implementation of corrective justice than others. Neither permitting nor requiring alienation of legal claims is an institutional change that is relevant to corrective justice. Consider an institution just like our current tort system, but in which, after a judgment was rendered, the defendant was required to make a payment to the court and the court made a payment to the plaintiff. Even if this made a difference in some cases, for example by ensuring payment to victims of judgment-proof defendants,<sup>81</sup> it would not offend corrective justice. A defendant would still be fulfilling his duty to repair the plaintiff's wrongful losses within a particular institutional framework. A regime allowing alienability is similar in the sense that the defendant does not make payment to the plaintiff directly.<sup>82</sup>

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<sup>78</sup> Coleman hypothesizes a situation in which a manufacturer has failed to provide an optimal warning, but the particular victim never read the warning and thus was not harmed by its imperfections. Even though the victim has no right in corrective justice to compensation, a cause of action granting the victim compensation "provides him with an incentive to litigate" and "act[] as a private regulator." *Id.* at 387. For a broader assessment of who should pay for a victim's loss according to corrective justice when the wrongdoer cannot pay, see Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347 (1990).

<sup>79</sup> *Id.* at 395.

<sup>80</sup> *Id.* For an exploration of this aspect of Coleman's theory, see Gerald J. Postema, *Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice*, 103 YALE L.J. 861, 883-86 (1993) (reviewing COLEMAN, *supra*).

<sup>81</sup> Christopher Schroeder argues that the existence of judgment-proof defendants means that "[a]n effectively implemented liability for risk system would extract many little payments from individuals rather than waiting for isolated large demands." Schroeder, *supra* note 75 at 475.

<sup>82</sup> A difference is that alienability may allow a defendant to pay an amount that is different from the amount the plaintiff receives, because of the uncertainty of judicial outcomes. Even in our existing system, however, the payment of attorneys' fees means that the defendant's total expenditures on litigation will not all be in the form of an income transfer to the plaintiff. *See, e.g.*, JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 1991) (noting that legal expenses have dwarfed recoveries in the asbestos context). A plaintiff who must pay a portion of an award to an attorney does not receive full compensation for a wrongful loss. Whether alienability will make such gaps smaller or larger is a question of empirics and theory, but it is not a question of

I have based my conclusions that alienability is consistent with corrective justice on Jules Coleman's evaluation of corrective justice. This leaves my conclusion open to the objection that alienability may be inconsistent with some other conception of corrective justice,<sup>83</sup> and that conception may happen to be the correct one.<sup>84</sup> I could not eliminate this objection fully by enumerating each conception of corrective justice, because it may be that no one has developed the proper conception of corrective justice. Indeed, one response to the apparent compatibility of corrective justice and inalienability would be to conclude that conceptions of corrective justice should be modified to account for the intuition that alienation of claims violates corrective justice. For example, Coleman might modify his conception by placing more emphasis on the institutions implementing tort law, instead of focusing solely on the substantive content of that law.<sup>85</sup> Nonetheless, that alienability is consistent with corrective justice as presently conceived at least casts doubt on the possibility that our society has not allowed alienability because of concerns about corrective justice. The intuitions and judgments that philosophers believe explain our tort practice generally do not seem to be related to alienability, let alone to condemn it.

### C. *Legal Ethics*

Another objection to alienability is that it might change the role of the lawyer, from a professional to a mere profit maximizer. The objector might concede that there is already much in modern legal practice about which to despair, with profit motive a central element in the

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relevance to corrective justice.

<sup>83</sup> For example, Susan Randall's approach to corrective justice emphasizes the fact-finding process and thus, if accepted, might provide more powerful arguments against alienation. See Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1 (1993). Similarly, Catharine Pierce Wells's pragmatic account emphasizes the role of the jury. See Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402-08 (1990).

<sup>84</sup> Coleman argues that different conceptions of corrective justice are not all that different. "All viable accounts of corrective justice, whatever their substantive disagreements are committed to the centrality of human agency, rectification, and correlativity." Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995). But see Matthew S. O'Connell, Note, *Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law*, 85 GEO. L.J. 1717, 1718 (1997) ("[T]here are vast differences among theories of corrective justice . . ."). The only one of the concepts Coleman cites that might seem relevant to whether a defendant must make a compensatory payment directly to a plaintiff is rectification. Yet I can see nothing in any account of corrective justice that would distinguish that account from Coleman's in such a way to make a difference in this respect.

<sup>85</sup> On the other hand, it might be that the existence of an institution permitting alienability of legal claims would itself change the nature of corrective justice. Coleman concludes that although corrective justice's content is objective, in that one account of corrective justice may be more accurate than another account, corrective justice itself may "depend[] on human practices, beliefs and evidence." Coleman, *supra* note 84 at 22; see also *id.* at 22-23 ("For me, the content of corrective justice depends on the practices in which it figures, but it is not fully fixed by how I or anyone else happens to regard it."). Thus, even if it were the case that alienability is inconsistent with corrective justice, as best currently conceived, allowing alienation of legal claims might be a sufficiently significant change to contemporary practice that this institution might have ramifications for the practice of corrective justice. But *cf. id.* at 24 (arguing that even if corrective justice is fixed by current practices, some current practices may be inconsistent with corrective justice, because "truth outruns the practice").

organization of large law firms and in the prosecution of civil cases.<sup>86</sup> Allowing alienability, however, would not just be an incremental shift toward profit maximization. Alienation of legal claims would destroy the heart of the ethical rules by effectively eliminating the attorney-client relationship.<sup>87</sup> Under current ethical rules, the attorney is at least obligated to confront her client before making significant decisions,<sup>88</sup> and it is the agency relationship that distinguishes attorneys from business executives who seek merely to advance their own personal interests. Alienation of legal claims, however, would allow attorneys to own claims, thus freeing the attorneys of the necessity of agency. In a world in which legal claims are mere commodities, it is hard to see how attorneys could be anything but commodities as well.

The beginning of a reply is in the recognition that, placing aside bans on champerty and maintenance, prosecution by an attorney of a suit in his own interests does not violate ethical rules. That is, while it may be illegal for an attorney to purchase someone else's tort claim, a lawyer who is himself injured may bring a suit on his own behalf, just as an attorney, or anyone else for that matter, may choose to defend himself in a criminal case.<sup>89</sup> Many ethical rules are intended to ensure that an attorney act in a client's interest, rather than in a self-interested way.<sup>90</sup> Eliminating the incentive incompatibility between a lawyer and a client is not an evasion of such rules, but a satisfaction of them. Purchase of a claim by a lawyer forces the lawyer to internalize all the benefits and costs of resolving the claim. A lawyer in such a position will not work unnecessarily hard to increase billable hours, and will not work too little because he has little stake in the outcome. Thus, if the relevant ethical rules are seen as a mechanism for ensuring the loyalty of lawyers to their clients,<sup>91</sup> once the purchase of a claim is completed, there can be little concern that the ethical rules have been violated.

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<sup>86</sup> Even many who accept that profit is an important criterion in law firm decisionmaking urge that law firms also pay attention to the value of "professionalism." See, e.g., Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles as Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133 (1999) (considering different approaches to managing "hybrid" organizations like law firms that seek to maximize profit and also to pursue other objectives).

<sup>87</sup> Some commentators are concerned that other developments, in particular the increasing provision of legal services without face-to-face contact, might erode the attorney-client relationship. See, e.g., Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

<sup>88</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2002).

<sup>89</sup> See *Faretta v. California*, 422 U.S. 806, 814 (1975).

<sup>90</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) (prohibiting conflicts of interest with current clients).

<sup>91</sup> Many commentators urge that ethical rules seek to make lawyers more than mere hired guns. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 15-29 (1994) (discussing and critiquing the "lawyer as hired gun" model).

There are several potential objections to this line of reasoning. First, the argument is predicated on the belief that lawyers who own a claim will act in their own interests. Though consistent with economic theory, this assertion may well not be true. The old adage is that a lawyer who represents himself has a fool for a client.<sup>92</sup> Being a good lawyer requires detachment, and even someone who believes that he will benefit from purchasing a claim and prosecuting it himself may turn out to be badly wrong. If the adage is true, perhaps there is an argument for paternalism,<sup>93</sup> and inalienability is the paternalistic solution. The argument for paternalism, however, seems weak, and not just because any disadvantage from lack of perspective is balanced by the incentive alignment that claim purchases provide. The intuition behind the adage is likely not that self-interest inherently clouds judgment. After all, all lawyers are presumably self-interested, for example, because success in one case will bring some measure of fame and fortune, and it seems hard to believe that the best lawyers are those who have the least at stake in prosecuting their cases. Rather, the intuition is that a disinterested lawyer will be more attuned to the litigation's objective and less concerned with peripheral issues such as vindication or reputation. Peripheral issues, of course, would not affect someone who owns a claim arising from events in which she had no stake. Thus, a lawyer who purchases from a stranger a claim for money damages may not be a fool to prosecute it herself.

Second, even if it is ethically acceptable for a lawyer to prosecute a claim once she has purchased it, the purchase itself may be problematic. The purchase will be particularly problematic if a lawyer purchases a claim from his own client, or perhaps from an unrepresented person, because the client may infer wrongly that the lawyer is giving disinterested legal advice when in fact the lawyer is acting in her own interests. This argument seems to be overstated, at least absent fraud. Even a relatively unintelligent layperson would recognize the possibility that a lawyer seeking to purchase a claim, no less than a driver seeking to purchase a car, might be taking advantage of him. Perhaps self-awareness would not be sufficient to prevent abuse,<sup>94</sup> and

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<sup>92</sup> See, e.g., *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting).

<sup>93</sup> Behavioral economists, who consider theories that economic actors may not always be rational profit-maximizers, do not view paternalistic arguments for government intervention in markets as inherently unsatisfactory. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475 (1998) (noting that behavioral economics raises questions about paternalistic policy because behavioralism undermines claims about revealed preferences).

<sup>94</sup> One argument is that tort victims may apply a high discount rate and thus accept low offers for claims. Luthy responds to this criticism by arguing that “[i]f the victim believes the value of his expected judgment decreases by a certain percentage for each additional day that he has to wait for it, he should be free to act accordingly.” Luthy, *supra* note 1, at 1015. An additional argument is that even victims with high discount rates will want to maximize their returns and thus seek out the private parties

whether self-dealing is successful or not, the practice of lawyers engaging in it could hurt the reputation of the profession.<sup>95</sup> The law, though, has an easy solution for such situations: requiring independent representation.<sup>96</sup> More drastically, one might prevent lawyers from purchasing claims, or at least from purchasing claims that they plan to prosecute or defend themselves. In such a regime, one could purchase a claim and have one's own lawyer prosecute it, thus allowing the benefits of moving claims to relatively risk-averse parties without necessarily eliminating agency costs. My point is not that such a regime should be adopted,<sup>97</sup> but that if concerns about shysters are sufficiently weighty, there are potentially effective solutions.

Third, the ethical rules may be concerned not only with clients, but also with the integrity of the courts. Lawyers who are prosecuting their own claims might have a greater incentive to commit a fraud upon the court, for example by fabricating evidence, or less dramatically by seeking to misrepresent it. The ethical rules provide incentives for lawyers to act honestly, but these incentives are balanced by opportunity for financial and reputational gain. Increasing the amount at stake for attorneys in a given suit may well increase attorneys' incentive to perform well, as argued above, but it may do so too much. Greater rewards make the potential risks less weighty in the moral decisionmaking process.<sup>98</sup> The problem with this argument is that if these are the concerns of the legal system, then the legal system should be quite different from how it is now. Perhaps there should be rules preventing lawyers from being overly invested in any one case,<sup>99</sup> but there are not. Moreover, perhaps we should prevent lawyers from bringing cases on their own behalf, but we do not. The danger of fraud seems at least as likely in a case in which a lawyer is interested both personally and financially as in a case in which only dollars are at issue.

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willing to pay the most for claims.

<sup>95</sup> It is not clear, however, that the increasingly commercial orientation of law firms is responsible for the low reputation of the profession. One commentator has argued that decreasing elitism and the ascent of postmodern thought are responsible. See Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 308-11 (2000).

<sup>96</sup> Cf. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.8(2) (requiring a lawyer entering into a business transaction with a client to give the client "a reasonable opportunity to seek the advice of independent legal counsel").

<sup>97</sup> Choharis argues that one benefit of claims markets is that they would reduce lawyers' market power and control. See Choharis, *supra* note 1, at 445; see also Luthy, *supra* note 1, at 1020 (considering this argument).

<sup>98</sup> A separate argument is that lawyers may have reduced moral scruples in a regime that allows alienation of legal claims. It is hard to see, however, why this should be. Perhaps an alienability regime, by commodifying legal claims, makes money seem all the more important.

<sup>99</sup> This might be difficult to do, but one way to approximate this effect would be to encourage large law firms to make each lawyer's welfare depends on a diversified portfolio of cases. If anything, however, large law firms are generally seen as more of a threat, than as a boon, to professional ethics. See, e.g., Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985) (discussing concerns about large law firm practice).

One might argue that the rule is responsive to an adverse selection problem,<sup>100</sup> that lawyers who buy claims are disproportionately likely to be bad apples. Yet there seems little reason that purchasers of legal claims should have worse ethics than anyone else,<sup>101</sup> and if they did, alienability might make unethical lawyers easier to identify and to police.

Fourth, alienability may offend legal ethics precepts, not because alienation of claims will lead to abuses, but because the attorney-client relationship itself has benefits. In *The Lost Lawyer*,<sup>102</sup> Anthony Kronman rejects a purely instrumental view of the attorney's role.<sup>103</sup> The ideal lawyer is a "lawyer-statesman,"<sup>104</sup> and such lawyers "agree that their responsibilities to a client go beyond the preliminary clarification of his goals and include helping him to make a deliberately wise choice among them."<sup>105</sup> Even accepting this argument, however, alienability of legal claims need not be inconsistent with it. Clients, after all, hire lawyers not just as litigators, but also, more broadly, as counselors. Clients may continue to rely on lawyers to obtain advice, including advice about whether to sell a legal claim, and such advice might reflect both financial and other considerations. Of course, clients might not hire lawyers for such advice, but clients also may choose, in the present system, to hire lawyers who will not help them deliberate; after all, Kronman believes that the modern lawyer is "lost,"<sup>106</sup> perhaps irrevocably so.<sup>107</sup> Alienation of legal claims may reduce the time period in which clients engage with their

<sup>100</sup> See *infra* Part II.C.1 (discussing adverse selection in claims markets).

<sup>101</sup> The best argument might be that fraud is easier to accomplish when working alone than when working with a client, because of the danger that the client will have moral qualms about misrepresentation by a lawyer. At least with respect to minor deceptions, however, this belies human experience, there being few examples of clients turning in their lawyers, except when they themselves have been victimized. Moreover, the original protagonist in a legal drama will be more likely to identify fraudulent attorney behavior on her behalf that she discovers if she no longer has a financial interest in the claim.

<sup>102</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

<sup>103</sup> Kronman characterizes his view of an attorney's role as follows:

The narrow view insists that a lawyer is merely a specialized tool for effecting his client's desires. It assumes that the client comes to his lawyer with a fixed objective in mind. The lawyer then has two, and only two responsibilities: first, to supply his client with information concerning the legal consequences of his actions, and second, to implement whatever decision the client makes, so long as it is lawful. The client, by contrast, does all of the real deliberating. He decides what the goal shall be, and whether it is worth pursuing given the legal costs his lawyer has identified.

*Id.* at 123.

<sup>104</sup> Kronman adopts this phrase from an article written by Chief Justice William Rehnquist. See William H. Rehnquist, *The Lawyer Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986).

<sup>105</sup> KRONMAN, *supra* note 102, at 129. Kronman later adds that lawyers are useful not only in counseling impetuous clients, but also in advising clients who may not know their own goals. "In many cases, it is only through a process of joint deliberation, in which the lawyer imaginatively assumes his client's position and with sympathetic detachment begins to examine the alternatives for himself, that the necessary understanding can emerge." *Id.* at 133.

<sup>106</sup> While Kronman does not reject the possibility that the decline of the lawyer-statesman is a demand-side phenomenon, he attributes the decline of the lawyer-statesman primarily to changes in law schools, law firms, and courts. *Id.* at 165-352.

<sup>107</sup> *Id.* at 368-75 (acknowledging that the ideal may be lost). Conceivably, a radical institutional change could improve the prospects of the lawyer-statesman, at least given Kronman's despairing conclusion that it is "highly unlikely that the country's largest firms will ever regain their earlier respect for the lawyer-statesman ideal." *Id.* at 378.

attorneys, just as the settlement of a case means that the parties will no longer have opportunity to seek the advice of their lawyers about the case. Clients' and lawyers' failure to usefully deliberate together, however, is no more traceable to alienation than any lack of deliberation today is traceable to settlement.

#### *D. Procedural Justice*

Accuracy and cost are not the only relevant considerations in the design of a legal system. Also relevant is whether litigants are satisfied with the process, an evaluation that may depend in part on factors like accuracy and cost, but also may depend on whether the litigants perceive the system as fair. Psychologists John Thibaut and Laurens Walker were the first to recognize the independence of what they called "procedural justice" from traditional considerations of accuracy and cost,<sup>108</sup> and legal scholars like Jerry Mashaw have argued that adjudicative systems should take into account the "dignitary" interests of participants.<sup>109</sup> Though scholars have not articulated how much of a tradeoff between dignitary values and accuracy is tolerable,<sup>110</sup> if procedural justice is an important part of the balance, an alienation regime might at first glance appear problematic. After all, an alienability regime presumably reduces the percentage of cases that are resolved by trial-like procedures,<sup>111</sup> and if such procedures are the paradigm of what litigants view as respecting their dignity, then sales of claims would come at the expense of procedural justice. Because alienation is voluntary, the loss of procedural justice is presumably worth it to the alienator, but procedural justice nevertheless appears to be something that is sacrificed by alienation.

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<sup>108</sup> JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). A later work is E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>109</sup> See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 132-44 (1983); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 169-218 (1985); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

<sup>110</sup> As Colin Diver notes, the dignitary values that Mashaw identifies are not "self-defining" or "sufficiently robust to withstand attack from the encroaching welfare state without reinforcement from some 'prudential' argument that requires courts somehow to balance a set of fuzzily-specified secondary values." Colin S. Diver, 94 YALE L.J. 1529, 1534 (1985) (reviewing MASHAW, *DUE PROCESS*, *supra* note 109). As Mashaw himself has noted, "[t]o rethink participatory process rights in terms that make them meaningful at the level of self-definition or in terms of the desire for community may be, necessarily, to make them nonjusticiable." MASHAW, *DUE PROCESS*, *supra* note 109, at 180.

<sup>111</sup> *But see infra* Part II.C (noting barriers to claim sales that may prevent markets in claims from emerging).

The argument that alienation offends procedural justice, however, assumes that only trial-like procedures can produce feelings of procedural justice. The justness of the market for claims, however, must be independently evaluated.<sup>112</sup> Many markets, after all, are seen by participants as procedurally fair. When I buy a used car, I may be suspicious of the seller, and I may even end up concluding that I got a bad deal, an accuracy concern, but I am unlikely to conclude that the system was procedurally unsatisfactory. One can imagine other systems for distributing used cars—for example, a governmental agency that assigns used cars to the individuals whom such cars will most benefit—yet I would conjecture that such a system would result in participants’ sensing less procedural justice than they do in the present system. By itself, this cannot be an argument that sales of legal claims would maximize procedural justice. Perhaps markets will maximize procedural justice for certain types of transactions, and governmental entities, like courts, will do so for other types of transactions. The analogy emphasizes, however, that a mandatory alienation regime would not simply eliminate a process in order to produce procedural justice, rather such a regime would replace the present process with a new process, and the procedural justice merits of the new process would need to be evaluated and compared with those of the existing system.

A conclusive assessment of whether alienation produces more or less procedural justice than the present system demands an empirical analysis, but an analysis of the procedural justice literature provides suggestive evidence. An important experimental conclusion of the procedural justice literature is that litigants will rate relatively favorably systems in which they are given a fair amount of voice and control,<sup>113</sup> even independent of the effect of this control on the trial outcome. A litigant who is given a chance to tell her story will feel better about the process than one who is not given such a chance, even if the court treats the litigant’s story as irrelevant to its eventual disposition. Alienation of a claim will deprive a litigant of the chance to tell the story to

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<sup>112</sup> It might be possible to imagine an experiment assessing such a market. One problem, however, is that laboratory subjects’ assessments of whether the procedure is fair may reflect what the subjects believe they *should* say, rather than how fairly they believe they were, in fact, treated, so an actual experiment may be more useful than a laboratory one. Cf. Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. REV. 1211, 1212 (1989) (reviewing LIND & TYLER, *supra* note 109) (noting objections to reliance on laboratory results to assess fairness).

<sup>113</sup> See, e.g., Robert J. Bies & Debra I. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676 (1988); Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987). Procedural justice theorists distinguish “process control,” which entails the ability to voice one’s story and opinion, from “decision control,” which entails some control over the result, and some argue that fairness judgments depend as much on process control as on decision control. See, e.g., LIND & TYLER, *supra* note 109, at 94-106, 186, 206-17.



one type of decisionmaker, a judge. But alienation provides a new class of neutral decisionmakers, potential purchasers of legal claims. A litigant will be able to tell her story to these decisionmakers, and these decisionmakers will have an incentive, different from the judge's but no less significant, to listen to that story. In addition, the litigant may have some control over the process by which a decision is made. For example, a litigant can choose which potential purchasers she will consider. In addition, a litigant may be able to choose the form in which the litigant presents information to the court. From the perspective of process control, alienation appears superior to procedural justice.

This analysis, however, may seem to miss the point. Perhaps what is important is not voice and control per se, but voice and control in a certain kind of forum. Certainly, a litigant who is interrupted and told that she may make her statements in the hallway during a court recess will not feel as justly treated as one who is allowed to present a story before a judge. Perhaps the formalism and dignity of a trial are what make litigants feel that their statements are being taken into account. Indeed, there is evidence that litigants assign higher procedural justice ratings to trial and arbitration than to bilateral settlement negotiations.<sup>114</sup> Even though the litigant has ultimate control over settlement negotiations, and even though either the litigants or their lawyers presumably tell the litigant's side of the story in such settlement negotiations, even litigants who agree to settlements do not emerge feeling favorable to the process.<sup>115</sup> Just as these results suggest that decisions made in the shadow of the law may not be equal to decisions made by courts themselves,<sup>116</sup> so too, might one argue, that decisions made in the market may not be equal in quality to decisions made in the present judicial system.

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<sup>114</sup> See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 965-66 (1990); see also Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585 (1987) (identifying dissatisfaction with settlement in divorce cases). These findings were responsive to assertions by other commentators that parties would generally feel better about settlement than about adjudicatory processes. See, e.g., Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

<sup>115</sup> Lind et al. conclude:

Apparently, what has been overlooked in previous analyses of the likely reactions of litigants to traditional trial procedures is the considerable importance that litigants attach to being treated with respect and dignity. It has been widely assumed in both policy-oriented and academic discussions of trial procedures that the formality and ritual of trial disturb and confuse litigants. Given our findings, it seems likely that these very features of trial enhance, rather than diminish, the apparent fairness of the procedure.

Lind et al., *supra* note 114, at 981.

<sup>116</sup> The results also may be a product of self-selection, as the population of litigants who choose to settle may be different from the population of litigants who proceed to trial. Lind et al. consider this possibility as follows:

[A] litigant might have refused settlement and gone to arbitration, settlement conference, or trial because he or she already regarded the third-party procedure as fairer. Similarly, a litigant might have settled prior to a third-party procedure because he or she viewed the third-party procedure as unfair. For a number of reasons, however, we do not

The weakness of this argument is that the choice is not between resolution in the market and resolution in a court, at least not in a traditional court proceeding. Because most cases settle, the typical choice is between market resolution and settlement. There are good reasons to think that litigants would react better to alienating claims to third parties than to settlements. Third parties will have strong incentives to treat litigants with dignity and respect. If a third party doesn't treat litigants with respect, after all, the litigants can refuse to cooperate with that third party; this is how consumers react to disrespect in markets for goods and services.<sup>117</sup> In bilateral settlement negotiations, by contrast, the adversary has an incentive to challenge the litigant's account, and respectful treatment will not necessarily be rewarded. In addition, while both market and settlement negotiations would be informal, the litigant who can listen to bids from multiple third parties may feel more in control than a litigant who participates in an arm's length negotiation. Perhaps the settlement process can be cathartic, but the voice and process control that it provides are less than what an alienability regime would offer. If the dignity of the courtroom is generally an unachievable means of instilling confidence that the government has heard the litigant's claims, the litigant may find more solace in negotiation with neutral third parties than with adversaries. Of course, adoption of an alienability regime would not prevent the litigants from achieving a settlement before either party alienates its claim; settlement, after all, is a form of claim alienation, with each side alienating its position to the other. But because settlement is more common than trials, alienation would more often substitute for settlement between the initial parties than it would substitute for trials, and the apparent superiority of alienation to settlement is, thus, particularly relevant.

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think that such "self-selection" into procedures can account for any of our major findings. Self-selection of this sort would logically lead to favorable, but equal, ratings of the third party-procedures and their respective settlement procedures, because each procedure would be rated by litigants predisposed to favor that procedure....

*Id.* at 964-65. Parties that settle may be different from parties that go to trial for reasons other than the parties' ex ante perceptions of the fairness of the systems. Economic theory, after all, suggests that settlement is not a random occurrence. For example, litigants may be more inclined to settle if they believe that their adversaries would litigate the case aggressively, imposing high litigation costs on them. Such litigants may be relatively dissatisfied with the fairness of settlement, feeling that the outcome depended on bargaining power as much as on the merits. Such litigants, however, might be even more dissatisfied with the outcome of trials if their cases had gone to trial. Another selection story points in the opposite direction. Because cases that are tried represent those in which there is the greatest differential in ex ante assessments by the parties, positive evaluations of trial relative to settlement understate the procedural justice qualities of trial. These competing stories are difficult to weigh, however, and the inferences that Lind et al. draw from their data must be even more tentative than they make them out to be.

<sup>117</sup> Such responses can be particularly effective when groups of consumers who believe that they have been disrespected combine to boycott a product. Cf. Andre L. Smith, Comment, *Consumer Boycotts Versus Civil Litigation: A Rudimentary Efficiency Analysis*, 43 *How. L.J.* 213 (2000) (arguing for the effectiveness of boycotts in changing corporate practices). The ability of groups to respond to disrespect through a boycott might help avert the possibility that third-party alienators would discriminate against plaintiffs on the basis of race or other irrelevant characteristics, even in the absence of any legal bar on such discrimination.

## II. THE ECONOMICS OF CLAIM ALIENATION

A. *The Economics of Inalienability*

In modern economics scholarship, inalienability receives little attention and little encouragement. Economic science, after all, is grounded in the belief that markets are ordinarily efficient as a result of the “invisible hand,”<sup>118</sup> and even where market failures occur, the typical response recommended by economists will be the imposition of an appropriate tax.<sup>119</sup> Legally minded economists have considered rules of inalienability, but even the most significant article on the subject treats it almost as an afterthought. Guido Calabresi’s seminal article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*,<sup>120</sup> receives considerable attention for its distinction between property rules and liability rules, and there remains a lively scholarly literature on the choice between these two approaches to protecting entitlements.<sup>121</sup> Despite its presence in the title, inalienability receives relatively little attention.<sup>122</sup> Moreover, while Calabresi and Melamed state that some restrictions on alienability may be justified as a second-best solution, their evaluation of inalienability rules seems unenthusiastic, designed more to identify possible reasons than to justify existing rules.

The most important economic basis for inalienability that Calabresi and Melamed identify is externalities. One might, for example, prevent a sale of land to a polluter on the ground that the polluter’s activities would affect not only the polluter, but also the seller’s neighbors.<sup>123</sup> Because “freeloader and information costs” may make it “practically impossible” for neighbors to persuade the potential seller not to sell,<sup>124</sup> inalienability may be the most

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<sup>118</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (Roy Hutcheson Campbell et al. eds., Liberty Fund Glasgow 1981) (1776).

<sup>119</sup> Taxes to counter negative externalities are often called Pigouvian taxes, after A.C. PIGOU, A STUDY IN PUBLIC FINANCE (3d ed. 1947).

<sup>120</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>121</sup> Significant recent contributions to this literature include Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); and Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219 (2001).

<sup>122</sup> In the key section of the article discussing the various types of rules, Calabresi and Melamed note that they “discuss inalienability separately.” Calabresi & Melamed, *supra* note 120, at 1106. They devote less than five pages to the topic, *see id.* at 1111-15, not an insignificant number, but a small number considering that Calabresi and Melamed’s analysis is probably the seminal economic work on inalienability.

<sup>123</sup> Calabresi and Melamed colorfully explain: “For instance, if Taney were allowed to sell his land to Chase, a polluter, he would injure his neighbor Marshall by lowering the value of Marshall’s land.” *Id.* at 1111.

<sup>124</sup> *Id.* at 1111.

efficient result.<sup>125</sup> This argument has an obvious flaw. If there was a concern that pollution might create externalities, why not address the pollution, either by taxing or banning it, rather than the sale of the land to a polluter? It seems, at the least, odd to create a rule to ban a transfer of property as a proxy for banning the activity.<sup>126</sup> Presumably, it would be possible to develop a more narrowly tailored solution to the problem. Even if there were some parties that categorically should be barred from ownership, creating a rule barring anyone from selling or purchasing an entire class of assets, on the basis of what buyers might do with those assets, should require a strong reason to suspect that buyers are much more likely than the original owners to impose negative externalities.

It may at first seem plausible to construct such an argument for legal claims. There may be externalities in lawsuits, costs or benefits to those who are not parties, such as negative externalities imposed upon third parties summoned to appear before the court or positive externalities from improved deterrence.<sup>127</sup> There is, however, little reason to think that barring sales of claims would reduce the negative externalities or increase the positive externalities from legal claims. Of greater concern is the possibility that one party might impose a cost on the other party. Settlement negotiations are akin to a bilateral monopoly problem,<sup>128</sup> or in multi-party cases an empty core bargaining game.<sup>129</sup> A party may try to obtain leverage in such negotiations by making unreasonable discovery demands on other parties.<sup>130</sup> Or, a party may litigate a case to the

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<sup>125</sup> In the absence of such costs, the Coase Theorem would apply to a regime permitting alienation, and it would not matter to which party the entitlement was given. *See generally* POSNER, *supra* note 31 at 55 -58 (discussing the Coase Theorem).

<sup>126</sup> Perhaps there might be some circumstances justifying such an approach, at least in theory. Suppose, for example, that various properties abutted a river. Suppose further that we know now that there is currently no pollution of the river, but if there was pollution, it would be impossible to determine who caused the pollution. An inalienability rule may then be the only way of maintaining the status quo of no pollution.

<sup>127</sup> *See, e.g.*, Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99 (1999) (discussing both types of externalities).

<sup>128</sup> For an explanation of the bilateral monopoly problem, see Richard D. Friedman, *Antitrust Analysis and Bilateral Monopoly*, 1986 WIS. L. REV. 873, 878-83.

<sup>129</sup> A bargaining game has an empty core if for any resolution of the game, there always exists some hypothetical agreement that a majority of those bargaining could enter into that would make them better off. For example, if a fixed sum of money is to be split among three people by majority vote, then no outcome is stable. For example, if *A* and *B* each agree to take half and cut out *C*, then *C* can offer *A* or *B* a higher percentage to cut out the other. Similarly, an agreement that all would share equally is not stable, because any two participants could then decide to cut out the third. In practice, of course, parties are often able to reach agreements in empty core bargaining games, often through equal apportionment, but the instability of all possible agreements can lead to negotiation failure. For an elegant introduction to empty core bargaining games, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS 54-58 (2000).

<sup>130</sup> A request for discovery imposes costs on an opponent that makes settlement more attractive relative to trial, and thus increases the bargaining power of the requestor. *See generally* Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 768-71 (1995) (describing how asymmetric costs in the discovery process may affect settlement).

hilt, expending more money on the prosecution of the case than the amount of money at stake ordinarily would demand, in order to force the other party to do similarly. Doing so might allow a party to establish a reputation for aggressive litigation that will help it obtain settlements in other cases.<sup>131</sup> Parties purchasing claims might be more likely to act in this way, the argument goes, because their reputational capital will be more at stake.

This story, however, has significant flaws. First, although it is plausible that parties purchasing claims will be more frequent litigants than original claimants, lawyers will be repeat players regardless of whether parties are repeat players, and parties may tie lawyers' hands by selecting lawyers with reputations for aggressiveness.<sup>132</sup> Second, more frequent players are not necessarily unusually obstreperous. The theoretical intuition is that a frequent litigant cannot achieve a reputation for toughness by spending heavily in just one case, but must maintain the strategy across a number of cases. Though a frequent aggressive litigant will be able to threaten credibly, the same litigant will not be able to bluff, which is a cheaper approach and one that may be as effective, especially with risk-averse opponents.<sup>133</sup> The empirical observation is that insurance companies, the paradigmatic example of frequent litigants, often settle claims, rather than seek a reputation for aggressiveness by fighting all claims to the end.<sup>134</sup> Third, litigation may be less personal when it involves third parties, and parties concerned solely with money will be less likely to inflict gratuitous injury on an opposing party. In sum, while we cannot *a priori* eliminate the possibility that purchasers of legal claims would be less desirable than the original claimants, there seems little reason that this should be the case.

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<sup>131</sup> See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525-27 (1994) (noting that law firms may cultivate and acquire reputations for being either aggressive or conciliatory).

<sup>132</sup> An argument that hand-tying would be ineffective is that lawyers have ethical duties to clients, including the duty to present settlement offers to the clients. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2000). It is an empirical question how much such ethical rules restrain attorneys from acting aggressively, but my suspicion is that the effect is modest, at least where a client has chosen an attorney specifically for aggressiveness. The lawyer's duties are difficult to police, in part because clients will rely heavily on advice of counsel in determining whether to settle a case.

<sup>133</sup> One way that a litigant might bluff is by hiring an aggressive attorney, only to change attorneys should the litigation proceed. Gilson and Mnookin assume that it is cheap to change lawyers after the complaint is filed but before litigation begins. See Gilson & Mnookin, *supra* note 131, at 523-24. If this was so, then it would be difficult for a party to bind itself by choosing a lawyer, because the opponent would recognize that the initial lawyer choice is meaningless. I am skeptical, given the considerable amount of research that filing a complaint in practice requires, that changing is cheap at this stage.

<sup>134</sup> One possible reason for this, however, is that state law sometimes provides for the possibility of sanctions against insurance companies that fail to settle coverage disputes. See Thomas P. Billings, *The Massachusetts Law of Unfair Insurance Claim Settlement Practices*, 76 MASS. L. REV. 55, 66 (1991) (discussing such a statute).

Even if it were true that purchasers of legal claims impose more negative externalities, or produce more expensive litigation than other parties, a total prohibition on claim sales is not a narrowly tailored response. A more appropriate response would be to estimate the amount of the externality, perhaps as a function of legal expenditures, and charge those who purchase claims that amount, just as other externalities are addressed through taxes. This may seem like a silly proposal, for if it is desirable to crack down on certain abusive practices in litigation, charging only people who sell their legal claims is a woefully underinclusive and overinclusive response; many litigants who do not sell their claims are aggressive, and presumably some purchasers of claims would be eager to minimize litigation costs and work cooperatively.<sup>135</sup> At the least, it would make more sense to allow claim sales and impose a tax on frequent litigants, because it is repeat player purchasers that prompt the possibility of greater aggressiveness. The silliness, of course, is precisely my point, for if this tax proposal is superior to a total prohibition on claims, but there are superior alternatives to the tax proposal, those alternatives are by transitivity superior to a total prohibition. There are a myriad of proposals to reduce litigation abuse,<sup>136</sup> and while these approaches may have problems, a prohibition on claim sales is such a blunt option that it is hard to believe that it is the best alternative.<sup>137</sup>

Though the possibility that an inalienability rule might be responsive to a potential externality is probably the most significant economic argument with respect to legal claims, Calabresi and Melamed consider several other arguments for inalienability generally. A related argument is that the sale itself might produce a negative externality, because third parties' utility might be impaired by observation of the sale or its result. "If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed," they argue, "simply because Marshall is a sensitive man who is made unhappy by

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<sup>135</sup> See *infra* text accompanying note 238.

<sup>136</sup> One significant debate examines and compares the American and British rules for allocating legal costs. See generally James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995) (analyzing the impact of a loser pays rule on the merit of filed claims and the level of litigation).

<sup>137</sup> An advocate of inalienability might contend that even if it was possible to enact an inalienability rule, it might not be possible to enact a complementary provision reducing the cost of litigation. Strong organized interests, such as trial lawyers, presumably would oppose efforts to rein in spending on cases across the board. Cf. Albert R. Hunt, *The Bogus Tort-Reform Case*, WALL ST. J., Mar. 6, 2003, at A13 (conceding that trial lawyers have influenced the political debate on tort reform, though attacking reform proposals on the merits). The existing legal system should thus be compared with one in which claim sales are permitted, not one in which claim sales are permitted and the entire legal system is reformed. On this view, a prohibition on claim sales is a second-best solution to the dangers that claim sales pose, considering the opposition to various forms of tort reform. It would, however, presumably, be possible to enact a law permitting claim sales and imposing some legal restraint on just those claims, assuming that it was possible to enact a law permitting claim sales in the first place. Thus, the prohibition on claim sales is, at best, a third-best solution.

seeing slaves, paupers, or persons who die because they have sold a kidney.”<sup>138</sup> Calabresi and Melamed label this category of cases as involving “moralisms,”<sup>139</sup> and this word helps explain why the argument is unlikely to be applicable to the sale of legal claims. Any moral argument about alienation of legal claims is *de minimis*,<sup>140</sup> and concern that people might be bothered by any perceived immorality in such sales seems like an even smaller concern. Sale of legal claims might well make some people uncomfortable, at least when they think about the issue, but this discomfort seems like a small public policy consideration, even within the realm of concerns about the legal system.<sup>141</sup>

Other arguments offered by Calabresi and Melamed for inalienability are less applicable to legal claims. They note, for example, that paternalism may justify inalienability, if individuals who would sell an entitlement would not be acting in their own self-interest.<sup>142</sup> Yet there is little reason to think that individuals would make decisions not in their own self-interest. It is conceivable that purchasers might try to induce plaintiffs to sell claims for lower than the market rate, or to induce defendants to pay the purchasers more than they would need to pay someone else to take on the claim, but the argument that litigants need protecting could be made in any market setting. It is particularly inappropriate in this setting, because the relatively high value of legal claims would give litigants strong incentives to find a good deal. Calabresi and Melamed also note that an inalienability rule might be defended on distributional grounds; for example, a rule barring sale of babies might be made because it “makes poorer those who can cheaply

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<sup>138</sup> Calabresi & Melamed, *supra* note 120, at 1111-12. They elaborate: “Again Marshall could pay Taney not to sell his freedom to Chase the slaveowner; but again, because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible.” *Id.* at 1112. Liability rules will not work because of the difficulty of objectively measuring the cost to Marshall. *Id.*

<sup>139</sup> *Id.* at 1112.

<sup>140</sup> See *supra* Parts I.A-I.B.

<sup>141</sup> More broadly, it seems hard to imagine any context in which discomfort itself could justify an inalienability rule. Any “discomfort” about kidney sales seems by itself a relatively trivial concern when compared to the arguments for and against kidney sales. There may be an argument that the commodification of kidney sales may be problematic for society, but that concern is not simply that people are unhappy as a result of the public policy choice. Discomfort with public policy itself seems a circular and ultimately unimportant basis for making public policy. Of course, discomfort is difficult to measure, so arguments about it cannot be refuted with logic alone.

<sup>142</sup> This type of argument is what Calabresi and Melamed call “true paternalism,” describing a situation in which “a person may be better off if he is prohibited from bargaining.” Calabresi & Melamed, *supra* note 120, at 1114. This is distinguished from “self paternalism,” in which a person is precluded from selling an asset as a way of vindicating the person’s earlier desire to tie his hands and prevent a later sale. Conceivably, someone might want to tie his hands to prevent a later sale of a legal claim if purchasers of legal claims prosecuted claims less aggressively than the claimant himself could be expected to. By tying his hands, the potential plaintiff would reduce the chance that the potential defendant would engage in an act, such as committing a tort, leading to the plaintiff’s having a legal claim. Though conceivable under certain sets of circumstances, the hypothetical at most suggests that people should be able to opt out irrevocably from a regime allowing sale of legal claims.

produce babies and richer those who through some nonmarket device get free an ‘unwanted’ baby.”<sup>143</sup> Yet this argument does not seem to apply to legal claims, since the end result of a legal claim sale, like the end result of a trial where money damages are at stake, is the potential transfer of money.

Calabresi and Melamed, of course, are not the last word on the economics of inalienability, and Susan Rose-Ackerman has offered a rich and detailed account of inalienability,<sup>144</sup> while Richard Epstein has offered some theories of his own in commenting on Rose-Ackerman’s work.<sup>145</sup> Rose-Ackerman describes a taxonomy of entitlements which will permit us to understand better the nature of rules prohibiting alienability of legal claims. First is “the question of who may hold the entitlement,” namely “(a) anyone, (b) only some specified groups, (c) everyone simultaneously, or (d) no one.”<sup>146</sup> Second, the law may impose restrictions on the use of property, by permitting, requiring, or forbidding some activity.<sup>147</sup> The third issue is whether transfer through sale and gift are permitted.<sup>148</sup> In the case of a legal claim, the current rule in most jurisdictions with respect to a personal tort claim is that only someone who has a cause of action can possess the claim, that some activities (like prosecuting the claim) may be required,<sup>149</sup> and most relevantly, that the claim cannot be bought or sold.<sup>150</sup>

Given this taxonomy, the most relevant of Rose-Ackerman’s explanations of inalienability can be applied. Rose-Ackerman notes that a defense of the “modified inalienability” rule for blood may be a function of imperfect information. “If it is difficult for hospitals to judge whether blood contains the damaging hepatitis virus,” Rose-Ackerman writes, then ideally one would design a collection system that gives contributors an incentive to reveal

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<sup>143</sup> *Id.* at 1114. Calabresi and Melamed argue that the possibility “suggests that direct distributional motives may lie behind asserted nondistributional grounds for inalienability.” *Id.* at 1114. The distributional case in the baby-selling context seems weak; even if the benefited group is wealthier, it is not concentrated and therefore unlikely to be able to control legislative outputs effectively. The weakness of the arguments they provide for inalienability may reveal that Calabresi and Melamed are generally skeptical of inalienability.

<sup>144</sup> Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

<sup>145</sup> Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

<sup>146</sup> Rose-Ackerman, *supra* note 144, at 933.

<sup>147</sup> *Id.* at 934. Rose-Ackerman breaks this category down further by recognizing that more than one activity might be relevant for a particular entitlement. For example, she discusses “a zoning law in a community that also regulates historic buildings,” thus preventing certain kinds of changes to the building while also affirmatively requiring historic preservation. *Id.*

<sup>148</sup> With this category, there are four possibilities, since whether sales are permitted or forbidden may be independent of whether gifts are permitted or forbidden. For example, Rose-Ackerman labels cases in which sales are forbidden but gifts are permitted (such as the donation of a kidney) as “modified inalienability.” *Id.* at 935.

<sup>149</sup> *See, e.g.*, *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (1979) (discussing the equitable doctrine of laches).

<sup>150</sup> *See supra* note 8.



any past cases of hepatitis.”<sup>151</sup> A similar informational problem might be present in the case of lawsuits. If someone can sell a lawsuit, then the profit motive may lead even individuals with poor claims to bring suits. An answer to this objection depends in part on whether the market for sale of claims will be worse than the legal system itself at identifying bad claims.<sup>152</sup> The analogy implies, however, that if we wanted only plaintiffs with good claims to bring lawsuits, we should allow transfer of claims through gift. Indeed, since profit is a motive in litigation even without the sale of claims, we should perhaps consider allowing lawsuits only where a plaintiff has given the lawsuit away without consideration. It is possible to imagine such a scheme,<sup>153</sup> and it might succeed at weeding out frivolous claims, but the distance between such a scheme and our existing legal practice suggests that inalienability rules cannot be explained as intended to limit the courts to altruistic lawsuits.

Another analogy is to the Homesteading Acts,<sup>154</sup> which allowed settlers to acquire land for a small fee if they worked the land for five years. These acts prohibited sales or gifts of the land within the five-year period.<sup>155</sup> Rose-Ackerman’s explanation for this approach, as opposed to a straight auction,<sup>156</sup> is a network externality story.<sup>157</sup> Each person inhabiting the land produced benefits for other inhabitants,<sup>158</sup> just as each owner of a videocassette recorder produces benefits

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<sup>151</sup> Rose-Ackerman, *supra* note 144, at 945-46. In supporting this argument, she cites RICHARD TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

<sup>152</sup> See *infra* Part II.C.1.

<sup>153</sup> For example, plaintiffs might be required to donate lawsuits to a government corporation that would then auction the lawsuits off to the highest bidder. A plaintiff, even if reimbursed for the costs of donating the claim (such as appearing in court), presumably would donate such claim only to advance the cause of justice, not for personal gain. That is, a plaintiff donating a claim presumably would be doing so because the plaintiff derives some utility from helping the public or at least from hurting the wrongdoer. Cf. Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002) (considering how the law should respond to the existence of enmity between litigants). Of course, a plaintiff might use the possibility of such a donation to extract a settlement, but such threats ordinarily would have little credibility, because the donation of the claim would extinguish the plaintiff’s interest.

<sup>154</sup> Homestead Act, 43 U.S.C. §§ 161-302 (2002); The Enlarged Homestead Acts of 1909 and 1913, 43 U.S.C. §§ 164, 169 & 218 (2002).

<sup>155</sup> *Id.*

<sup>156</sup> For an alternative explanation of why auctions and other sales gave way to homesteading, see Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 414-15 (1995).

<sup>157</sup> Rose-Ackerman does not characterize it as such, because the literature on network externalities arose after her article, but her argument is prescient. See generally Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998) (discussing the implications of network externalities for antitrust and other areas of law); S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133 (1994) (evaluating the definition of network externalities). Rose-Ackerman characterizes the story as representing a prisoner’s dilemma. “Everyone is better off if all settle than if no one settles, but if others settle, then it is best for each person to wait until others have overcome the initial hardships.” Rose-Ackerman, *supra* note 144, at 958.

<sup>158</sup> “It is difficult to be a pioneer in an empty land,” Rose-Ackerman writes. “Life is easier with neighbors who can help in emergencies, share farm equipment, and assist in capital projects such as construction.” Rose-Ackerman, *supra* note 144, at 957. Rose-Ackerman also suggests that homesteaders may have provided benefits to individuals not in their immediate community: “The people attracted to the territory by this program both made future economic development easier and aided the political

for other owners by encouraging the development of video stores.<sup>159</sup> Litigation may have network externality properties, because, for example, the development of precedent in one case may allow for easier resolution of a dispute in another.<sup>160</sup> Although I will consider later whether allowing alienability of claims is likely to have an adverse effect on precedent,<sup>161</sup> once again completion of the analogy reveals its flaws.<sup>162</sup> Our legal system does not penalize litigants for settling before trial or give bonuses to litigants who take their claims to trial. While it is conceivable that such policies might be appropriate, the prevailing belief seems to be that our legal system would benefit from fewer rather than more cases actually tried,<sup>163</sup> and this belief seems consistent with the operation of the legal system.

Rose-Ackerman's discussions of voting rules and mandatory jury service are more relevant, because of her invocation of democratic theory. Voters cannot sell their votes,<sup>164</sup> even though "in a direct democracy in which choices are made by unanimous consent, the buying of votes does assure choices that benefit all citizens given the existing distribution of resources."<sup>165</sup> Similarly, one cannot hire someone else to take one's spot on a jury.<sup>166</sup> The concern is that

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ambitions of the original residents who sought to move their territories toward statehood." *Id.* at 958. Similarly, one might argue, the homesteaders facilitated development of lands further west or in less desirable adjacent locations.

<sup>159</sup> See, e.g., Lemley & McGowan, *supra* note 157, at 592 (discussing network effects in the videocassette recorder market).

<sup>160</sup> Marcel Kahan and Michael Klausner have emphasized network externalities in the choice of corporate form and contract terms, as a decision by one firm to make a particular choice confers a network benefit on other firms making the same choice. See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). But see Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79 (2001) (arguing that the popularity of the LLC form relative to the LLP form is inconsistent with the Kahan-Klausner hypothesis).

<sup>161</sup> See *infra* Part II.C.2.b. As Rose-Ackerman recognizes, "even this limited defense of vote selling does not survive the move to a representative system making choices by majority rule." Rose-Ackerman, *supra* note 144, at 963.

<sup>162</sup> The case may be normatively flawed as well. Epstein argues that no inalienability rule was needed to ensure efficient land use:

To be sure, there may be some difficulty in getting isolated individuals to settle in the plains, but this hardly justifies the set of inefficient rules that, in sharp opposition to the first possession rules at common law, required individuals to remain on their claims indefinitely in order to perfect title. It seems likely that some less restrictive alternative could have met the joint demands of national security and efficient land use. For example, the government could have sold off the lands in large plots (say several square miles or more) to speculators who thereafter would have to internalize all the costs of letting the land go into use slowly.

Epstein, *supra* note 144, at 989.

<sup>163</sup> But see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised"); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlement?*, 75 NOTRE DAME L. REV. 221 (1999) (constructing a model illustrating the cost of settlement in terms of the production of settlement).

<sup>164</sup> For a general theory helping to explain the prohibition on selling of votes, see Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111 (2000). See also Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994).

<sup>165</sup> Rose-Ackerman, *supra* note 144, at 963.

<sup>166</sup> "First, jury duty is seen by many of a duty of citizenship that people should not be able to opt out of because of better private opportunities elsewhere." *Id.* at 965.

allowing alienation of votes and jury service would affect not only the seller and purchaser, but also society at large.<sup>167</sup> One might similarly argue that litigants are providing inputs into a process, and allowing a sale of a claim might corrupt that process, resulting in worse decisions for society as a whole. The problem with this argument is that our legal system is adversarial; it is based on the premise that litigants acting in their own interests will adequately represent their own interests. The argument may explain why we do not allow private prosecution of criminal cases; prosecutors are supposed to represent social interests rather than the interest of achieving a maximum sentence.<sup>168</sup> Similarly, the argument provides an easy explanation for laws against bribing judges. But, given a system in which litigants already have incentives to pursue their financial interests, it is difficult to understand on economic grounds why litigants should be prevented from alienating their claims to parties whose interests would exist solely as the result of the economic transaction.

These arguments all proceed on the basis that litigants themselves would prefer to be able to alienate their claims. Yet, one might argue, potential adversaries might prefer in some circumstances to agree not to allow alienation of claims, as manifested in contractual bars on claim assignment. Just as private parties are sometimes willing in contract to limit assignability, perhaps the ban in the tort context reflects a hypothetical contract that potential tortfeasors and victims would have agreed to if given the chance.<sup>169</sup> Epstein, for example, observes that in a contractual context, “[t]he promisee is a known quantity chosen and selected by the promisor,” and “[e]ven if the legal system gives the promisor the same rights against the promisee’s assignee, the value of those rights still may be reduced by the assignment,” because the promisor loses “informal leverage” against the assignee.<sup>170</sup> In game theoretic terms, parties in an iterated

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<sup>167</sup> The voting paradox suggests that voters obtain no value from their votes, because of the very small probability that any individual voter will determine the result of the election. See, e.g., KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2-3 (2000). Rose-Ackerman explains that “the value of a representative democracy depends upon citizens making responsible, well-informed choices.” Rose-Ackerman, *supra* note 144, at 963. This concern may be sufficient to outweigh the competing concern that “voting is an individual, private act that should not be examined too closely by the state.” *Id.* Similarly, Rose-Ackerman states that the legal process “itself might be undermined if juries were staffed entirely by volunteers.” *Id.* at 965. Those who would agree to serve on a jury, for payment from the government or from others, might not be representative of the community as a whole.

<sup>168</sup> Private prosecution does occur in some other countries, such as England. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 365-66 (1986).

<sup>169</sup> The construct of the hypothetical contract is often used in tort theory for contexts in which ex ante contracting would be impractical. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 357-60 (1988) (engaging hypothetical contracts analysis for tort liability).

<sup>170</sup> Epstein, *supra* note 144, at 982.

relationship may be able to resolve disputes relatively cheaply because of their mutual interest in cooperating beyond the context of any particular dispute.<sup>171</sup> Such reasoning may, in turn, justify default rules, such as the general rule that easements in gross are inalienable.<sup>172</sup> This reasoning, however, does not appear to justify inalienability of tort claims involving parties that have not had a chance to contract with each other. It is precisely in such cases that parties will be least likely to have dealings with each other unrelated to the lawsuit, and so establishment of a default rule preventing alienation cannot be presumed to be what the parties would have desired had they had an opportunity to contract on the issue.

### *B. The Affirmative Economic Case for Alienability*

The simplest argument for allowing plaintiffs to sell claims for money damages is that a plaintiff will be able to receive recovery more quickly.<sup>173</sup> Instead of waiting for the litigation process to conclude, a plaintiff can receive cash as soon as the plaintiff can find someone to buy the claim, and the plaintiff may use such cash either to pay for the costs being sued for or for other purposes. It might seem that plaintiffs should be indifferent to receiving an immediate payment and to receiving a later payment, as long as the court provides for prejudgment and postjudgment interest.<sup>174</sup> Even jurisdictions that provide for such interest, however, do not tailor the amount of interest awarded to a particular plaintiff's discount rate.<sup>175</sup> Some tort plaintiffs will face liquidity problems, particularly if they face unexpected bills attributable to the tort, such as medical expenses,<sup>176</sup> and their discount rate may be higher than the prejudgment interest rate. As

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<sup>171</sup> Cf. David M. Kreps et al., *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 J. ECON. THEORY 245, 245-47 (1982) (suggesting that cooperation may be possible even in a game with a finite number of periods). A problem with this theory as applied to assignability is that if such parties should be able to resolve disputes effectively because of the danger of impairing relations, then they should be able to do so before a party assigns a claim. If contracting parties would temper their aggressiveness in resolving a particular dispute because of a desire to ensure friendly relations on other issues, then surely such a party would not make an irrevocable assignment of a claim, which presumably would damage relations if the assignee were an aggressive litigator.

<sup>172</sup> Epstein, *supra* note 145, at 984. Epstein acknowledges, however, that "there is some question whether the prohibition is necessary to protect the interest of the landowner." *Id.*

<sup>173</sup> See, e.g., Choharis, *supra* note 1, at 444.

<sup>174</sup> See generally Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 359 (1996) (describing the operation of prejudgment and postjudgment interest).

<sup>175</sup> See, e.g., TEX. FIN. CODE ANN. § 304.003 (Vernon 2003) (explaining the calculation of postjudgment interest).

<sup>176</sup> See Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 381 (1994) ("A tort typically depletes partially or completely the victim's liquid assets, as she must pay for medical expenses, substitute for lost wages, and otherwise compensate for the loss.").

long as the purchaser of the claim has a lower discount rate, a sale moves the claim to a higher-valuing owner.

Equally significantly, a plaintiff's decision to sell a claim eliminates the risk to the plaintiff, at least if the claim is sold in its entirety. Claims may be uncertain because the law is unclear, because facts are unknown, or because it is unclear how a judge or jury would apply the law to the facts.<sup>177</sup> Sale of a claim, of course, does not eliminate any of these uncertainties, but merely transfers them to another party. A tort claim, however, will often in effect be a significant asset in a plaintiff's portfolio, while a purchaser of tort claims may be able to diversify, for example, by purchasing a variety of different tort claims, some of which will be more successful than others. Plaintiffs will surely pay a premium, in the form of a reduction in the amount received, for moving the risk onto the purchasers of the claims. But in a competitive market, the premium should be equal to the burden of the risk on the purchaser, rather than on that of the seller. Even if there was a monopoly purchaser of legal claims, the risk premium would ordinarily be between the burden of the risk on the plaintiff and the burden of the risk on the purchaser, given that the plaintiff and purchaser would have to negotiate a fee.

The plaintiffs' reduction in risk may represent an increase in the accuracy of the legal system in providing compensation to tort claimants. One advocate of allowing sale of tort claims has noted that the resolution of a claim at trial "may be very idiosyncratic, with jury awards varying considerably for similar injuries."<sup>178</sup> By chance, some juries may be more sympathetic to a plaintiff than others, both in determining whether or not the plaintiff has a valid claim and in determining the size of an award. Similarly, different judges (or even the same judge on different days) might resolve the same legal issue differently, and different judges may make different decisions on how the parties are allowed to present evidence. Even a claim that is settled may reflect the identity of the judge who has been assigned to hear the case. The price at which a claim is sold, assuming it is sold before a judge is selected, will reflect an expected value of the judgment, and it will thus be an average of what different decisionmakers would decide. If

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<sup>177</sup> The inconsistency of both punitive damage assessments and compensatory damage assessments, especially for nonpecuniary harms, has produced proposals for systematizing damages decisions. See, e.g., David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995).

<sup>178</sup> Choharis, *supra* note 1, at 468.

accuracy is defined as being what the average decisionmaker would decide,<sup>179</sup> sales of claims may well produce more accurate results than complete litigation of them.

The improvement in accuracy from eliminating decisionmaker bias, of course, must be balanced with any market imperfections that may cause the price of claims to deviate from the expected value of the claims. Perhaps buyers of a claim will fail to notice some feature of the claim that may affect its value, even though that feature ultimately would be discovered in litigation. Uniformity in results attributable to sale of claims may indicate that similarly treated plaintiffs are being treated similarly, but it also could indicate that differently treated plaintiffs are being treated similarly, with the relevant differences ignored. If, for example, buyers of claims relied solely on police reports, without considering other evidence that might affect claim values, they might misprice automobile accident claims. Buyers, however, would have incentives to price claims accurately, particularly if there are many prospective buyers of a claim. Plaintiffs would have incentives to share any information that might show that their claims are more valuable than otherwise might be thought, and buyers have incentives to seek out claim weaknesses. Sometimes, some information that would affect claim valuation in a trial might not be revealed to buyers and sellers, but this is a problem of settlement as well, and at least prices will reflect estimates of how much claims would be worth given available information.

Advocates of permitting plaintiffs to sell claims argue that “the sale of tort claims will almost always provide tort victims with greater compensation than would be available under the present tort system.”<sup>180</sup> The theory is that, because purchasers of legal claims are likely to be parties that can prosecute the legal claims efficiently, the net value of the claim is higher with those purchasers than when the tort victims prosecute the claims themselves. For example, “where claims are too small to litigate independently, claimants will be able to sell them to investors who can consolidate them and pursue the claims economically.”<sup>181</sup> The assertion that tort awards will be higher is ultimately empirical, as, even placing aside the premium that a plaintiff will pay for risk transfer, the costs of the transfer of a claim must be balanced against any benefits. Nonetheless, as long as the transfer of a claim is of relatively low cost, efficiencies

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<sup>179</sup> See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 531-32 (2002) (noting that the averaging function of group decisionmaking tends to dampen errors attributable to idiosyncratic assessments).

<sup>180</sup> Choharis, *supra* note 1, at 480.

<sup>181</sup> *Id.* at 481.

in prosecution are likely to produce a net gain in the size of claims recovered by plaintiffs. In any event, there is no reason to conclude that plaintiffs would sell tort claims for a small fraction of their value. Although sale prices would be lower than judgments, the difference presumably would reflect the cost of prosecution, including risk.

An opponent of sale of legal claims might argue that plaintiffs already may achieve many of the benefits of selling claims by hiring attorneys on contingency fee.<sup>182</sup> Indeed, hiring of contingency fee counsel reduces the risk to plaintiffs of bringing litigation, because at least the plaintiffs will not need to worry about losing the lawsuit and being out attorneys' fees. Contingency fees, however, do not eliminate the risk of litigation altogether, or even very much. In addition, contingency fees can create tensions between optimal strategies for a lawyer and a client.<sup>183</sup> A lawyer may have a greater incentive to settle a case if the lawyer will bear the cost of preparing the case,<sup>184</sup> or a lesser incentive if the lawyer is less risk-averse than the client,<sup>185</sup> and the incentives will cancel out only by happenstance.<sup>186</sup> Professional responsibility rules seek to ensure that a lawyer will act in the client's best interest,<sup>187</sup> and those rules may, to some extent, align incentives, but they are surely imperfect. If a legal claim is sold in its entirety, however, the owner of the claim will be acting entirely in her own interest.<sup>188</sup> Although she may hire a lawyer to actually prosecute the claim, rather than pursue it pro se, she will presumably be in the business of buying claims and thus be in a better position to monitor the lawyer and reduce the danger of agency costs.

The legal claims market is also likely to steer claims to the lawyers who are best suited to bring the claims. The process of seeking out a contingency fee lawyer may provide some

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<sup>182</sup> Cf. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 632 (1995) (noting parallels between contingency fees and claim sales, and suggesting that nonlawyer competition through claim sales may reduce problems associated with contingency fees).

<sup>183</sup> See, e.g., *id.* at 670-78.

<sup>184</sup> See, e.g., Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 200-02 (1987); Smith, *supra* note 117, at 226

<sup>185</sup> For a discussion of how relative risk aversion affects contracting between lawyers and clients, see George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 110-111.

<sup>186</sup> For an analysis of how contingency fee arrangements affect claim values, see Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53, 59-61 (1996).

<sup>187</sup> See *supra* note 90 and accompanying text.

<sup>188</sup> The price of the claim will, of course, reflect the cost of prosecuting it. One recent commentator has suggested that courts setting attorney fees should do so by reference to markets for legal claims, recognizing that private arrangements may reflect optimal decisions on attorney compensation. See George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 627-30 (2000).

information to plaintiffs about whether they have viable claims, as contingency fee lawyers will reject claims that are not worth their effort. In a market for legal claims, the prices that buyers offer would provide plaintiffs with an assessment of the value of their claims and an indication of which third parties are best situated to prosecute the claims. Though it will not always be the best lawyer who offers the most for a claim—top attorneys will not waste their time on claims that they consider trivial—the third party who purchases a claim is presumably the party that can maximize its value, taking into account the value of the third party’s time in prosecuting the claim. A contingency percentage offered, by contrast, is not necessarily a good indication of the likelihood of success by a particular contingency fee lawyer,<sup>189</sup> for a plaintiff will have difficulty evaluating whether to accept a lower contingency fee from a better lawyer, even if the plaintiff knows who the better lawyer is. Though contingency fees may help assure that claims are efficiently assigned to lawyers, a market for legal claims is likely to accomplish this task better.<sup>190</sup>

Sale of legal claims also may produce more efficient lawyering than contingency fee lawyering because purchasers of large claims may be able to obtain financing more easily than contingency fee lawyers.<sup>191</sup> The market for contingency fee lawyers is effectively restricted to firms that can afford large risks, and the size of contingency fees reflects the risks that their lawyers are assuming. Although large risks are commonplace in the world of business, where venture capitalists are willing to suffer a number of losers in exchange for one winner, lawyers in firms may not be as well diversified as venture capitalists. Professional responsibility rules may limit the ability of law firms to securitize claims or to obtain other forms of speculative financing.<sup>192</sup> Because the purchasers of legal claims would be prosecuting those claims on their own behalf, these restrictions presumably would not apply. A corporation easily could be established to prosecute a single large claim, and shares of the corporation could even be

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<sup>189</sup> Contingent fees may help a lawyer signal to a client that the lawyer believes the client’s case is relatively strong. *See* Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 624 (1993) (considering criminal cases in particular, but offering a generalizable point). They do not, however, signal the lawyer’s quality to the client in the same way that hourly fees do.

<sup>190</sup> Prospective assignees, meanwhile, are unlikely to purchase claims that have a relatively low probability of success. *See* Luthy, *supra* note 1, at 1011 (“[O]n a case-by-case basis, an assignee should have even stronger incentives to seek meritorious claims than would a lawyer working on contingency; if she should lose the suit, the assignee will lose not only her time and litigation expenses but also whatever consideration she provided to the assignor.”).

<sup>191</sup> Choharis, *supra* note 1, at 445.

<sup>192</sup> The relevant prohibition is that on champerty. *See, e.g.*, Martin, *supra* note 3, at 79-83 (describing legal support firms and their legal status).



publicly traded, meaning that the ultimate owners of the corporation would be able to diversify their risk. The corporation could then hire lawyers to accomplish the prosecution. Naturally, not every claim purchase would accord with this approach—buyers would have to weigh the costs of such financing as well as the agency costs of paying salary to lawyers rather than contingency fees—but the possibility of such financing might increase the return of many plaintiffs.

Such creative financing might be particularly important in mass litigation, involving a large number of plaintiffs suing a single or small number of defendants. One justification for the class action device is that it serves to consolidate claims with a single law firm. A concern that the Supreme Court has voiced about class actions is that when the same lawyer serves different plaintiffs, the lawyer will face conflicts of interest and may treat the plaintiffs inequitably.<sup>193</sup> One answer to this dilemma is subclassing,<sup>194</sup> which allows different lawyers to represent different groups of plaintiffs, but even this tool will be effective only when the significant distinctions among plaintiffs are easily measured. If individual plaintiffs could sell legal claims, purchasers would have an incentive to buy large numbers of similar claims, assuming that prosecution of large numbers of similar claims produces economies of scale. Subclassing would likely naturally develop as different firms specialized in different types of plaintiffs' claims, but even if it did not, there would not need to be a concern with conflicts of interest, as claim owners would press only claims that they owned. Because purchasers would have to convince plaintiffs to sell claims to them, rather than to some other purchaser or to none at all, purchasers would not be able to treat some plaintiffs better than others. Claim sales thus may allow for efficient prosecution of claims when the class action device would not be available for conflict-of-interest reasons.

These considerations all suggest that permitting sale of claims should be allowed because it would benefit plaintiffs. Defendants, of course, might dislike a rule allowing plaintiffs to sell their claims, if it makes it easier for plaintiffs to bring claims. Defendants, unless vindictive, should not mind that sale of a legal claim allows a plaintiff to transfer risk. Nevertheless, if transfer of a claim allows a plaintiff to obtain better representation or to bring a claim that otherwise would not be worth bringing, defendants are made worse off. It might thus seem that

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<sup>193</sup> See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

<sup>194</sup> See, e.g., *id.* at 626; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992) (approving settlement involving subclasses).

many of the benefits to plaintiffs are offset by the cost to defendants and that the reforms are more or less a wash. This criticism shows that merely analyzing benefits to plaintiffs provides an incomplete analysis, but it does not provide a counter to any of the arguments for allowing a sale of claims. The legal system, after all, is designed to make it possible for people to bring grievances. Presumably, if it were possible to wave a magic wand and make litigation costless without any other adverse effects, the wand would be waved, and the wand should similarly be waved to make litigation cheaper. Though there may be an argument that the legal system works best when the costs to the parties are roughly equal, there is no reason that costs would not be roughly equal after the sale of a claim to a buyer who would become the new plaintiff.

Moreover, the goal of the legal system is not to benefit plaintiffs and defendants equally, but to provide compensation for plaintiffs and deterrence for potential tortfeasors who later become defendants. Allowing sale of claims may increase deterrence, if some plaintiffs who would not wish to bring legal actions themselves are willing to sell their claims. This might be the case if some potential plaintiffs are averse to the risks inherent in the legal process or simply cannot find a suitable attorney to bring a claim. When victims fail to bring claims against those who have violated the standard of care and caused injury, the injurers will not internalize the costs, so an innovation that facilitates the filing of legitimate claims may produce social benefits. Although punitive damages in theory might be able to ensure perfect deterrence even if only some claims are brought,<sup>195</sup> punitive damages generally do not depend on the probability of detection and prosecution,<sup>196</sup> and so encouraging the filing of all claims may be the only way to move the legal system closer to perfect deterrence. The legal system should be concerned about frivolous claims and about the danger that innocent defendants may be forced to spend money in defense, but prohibiting sale of claims is as likely to discourage meritorious as nonmeritorious claims for a given amount.

All of the arguments for allowing plaintiffs to sell their claims, in any event, militate equally toward permitting defendants to pay a third party to assume the burden of a claim for money damages. Defendants also would benefit from resolving litigation more quickly and from

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<sup>195</sup> This can occur, commentators have argued, if the punitive damages multiple is the inverse of the probability of detection. See, e.g., Robert Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149-53 (1989); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

<sup>196</sup> See W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON LEGIS. 139 (2002) (finding that mock jurors cannot even reliably follow jury instructions that require them to use the multiplier approach).

transferring the risk of litigation to third parties. If the sale of claims produces more accurate resolution of claims for plaintiffs, then so too, for plaintiffs, might the price that a defendant pays to rid itself of a claim be closer to what an average judge or jury would decree than would a decision by an actual judge or jury. If the parties being paid to take on the burden of defending a claim are more efficient defenders than defendants, then defendants might end up paying less in total than otherwise would be required. Some of these benefits, of course, might be smaller if defendants, in general, are larger than plaintiffs. Large corporations, after all, are relatively risk-averse and well situated to defend themselves efficiently. This may explain why the literature has focused on sale of claims by plaintiffs rather than on alienation of claims by defendants. Plaintiffs and defendants, however, come in all sizes, and the theoretical arguments in favor of permitting alienation apply equally well to both.

### *C. The Economic Counterargument*

This section builds a set of economic arguments suggesting drawbacks of an alienability regime that may offset the advantages discussed above. The first problem, documented in Part II.C.1, is that asymmetric information about the quality of legal claims may make sales of claims rare. This argument might appear merely to indicate that the benefits of claim alienation are smaller than one otherwise might think, but the argument also is important because it is likely to make other economic problems with alienability more severe.<sup>197</sup> In particular, the dangers that alienation of claims might interfere with legal process or discourage settlement, as explained in Parts II.C.1-2, are likely to be more serious when only a relatively small number of claims are alienated. The ultimate economic balance is thus uncertain. While robust legal claims markets might well produce considerable benefits, costs might well exceed benefits in the thin trading markets that adverse selection problems are likely to produce.

#### *1. The Lemons Problem*

A market for claims is likely to be beset by an adverse selection or “lemons” problem.<sup>198</sup> Just as potential sellers of used cars have better information about the quality of their vehicles

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<sup>197</sup> At least one commentator has argued that assignment of claims should be permissible even if a deep market for claims does not develop. See Luthy, *supra* note 1, at 1024.

<sup>198</sup> The seminal article is George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

than can be assessed easily by third parties,<sup>199</sup> so too do the original parties to a dispute have unique access to information about their claims. Thus, if alienation is allowed, parties that choose to alienate their claims would not be a random sample of all parties, but those that anticipate that buyers will most overvalue their claims relative to other claims. Although unable to value individual claims accurately, buyers will recognize that the claims that are being alienated are generally of lower quality than other claims, just as used car buyers recognize that used cars being sold are generally worse than used cars not being sold. Buyers will discount their offers correspondingly. This discounting will mean that some claim owners who believed, because of asymmetric information, that their claims would be valued highly relative to the universe of all claims, will decide not to alienate their claims after all. This phenomenon will tend to make the pool of claims being alienated even worse, leading to a bigger price discounting by buyers, more owners deciding not to alienate their claims, and so on.

Adverse selection could cause the market to unravel completely,<sup>200</sup> or the effect could be more modest, with an equilibrium in which some cases are alienated and some cases are not.<sup>201</sup> There is a used car market, after all, but presumably not as robust a market as there would be if used cars could be objectively, accurately, and costlessly valued. Presumably, if alienation of legal claims were allowed, some legal claims would be alienated. There are reasons, however, to think that the market in legal claims would be thin. Even more than with used cars, a legal claim is a form of property in which asymmetric information will be commonplace.<sup>202</sup> A party might, for example, suspect that a particular witness will give damaging testimony, or it might simply know a number of tangential details about a transaction that cumulatively would justify a belief that a court would not be favorable. Even if this is true in only a relatively small percentage of cases, the effect might be enough to limit alienation of claims significantly.

Aggravating the adverse selection problem in the legal context is that one form of alienation is permitted—settlement. A third party that purchases a plaintiff’s claim must not only

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<sup>199</sup> *Id.* at 489 (“After owning a specific car . . . the car owner can form a good idea of the quality of this machine; i.e., the owner assigns a new probability to the event that his car is a lemon.”).

<sup>200</sup> *Id.* at 490 (“[I]t is quite possible to have the bad driving out the not-so-bad driving out the medium driving out the not-so-good driving out the good in such a sequence of events that no market exists at all.”).

<sup>201</sup> There are two possible equilibria in an insurance market with adverse selection. In a separating equilibrium, different consumers purchase different policies, while in a pooling equilibrium, all consumers are, in effect, forced to purchase the same policy. See GEOFFREY A. JEHLE & PHILIP J. RENY, *ADVANCED MICROECONOMIC THEORY* 341 (2d ed. 2001).

<sup>202</sup> For an analysis of the impact of asymmetric information on litigation and settlement, see Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75 (1993).

worry that the plaintiff might withhold information, but also must wonder why the defendant did not offer a better deal than the third party. The defendant, after all, also is likely to have an informational advantage over the third party. Third parties are likely to purchase claims only when they expect to be able to make a profit from doing so, even taking into account the costs of researching and developing the claim. In such situations, however, a defendant would ordinarily have an incentive to offer a more attractive deal than the third party if the third party was not overpaying. The third party would recognize that if the plaintiff accepts the third party's offer to purchase the claim, the plaintiff was unable to get a better deal from the defendant, indicating that in any consummated transaction, the defendant, who has better information than the third party, will believe that the third party overpaid. It gets even worse. Even if the third party strongly believed that the defendant was wrong, the fact of the defendant's confidence means that settlement is less likely than it usually is, and the greater-than-normal expected cost of litigation makes the claim even less valuable.

Third parties, of course, could spend money to verify legal claims, for example by investigating background facts and by soliciting affidavits, before agreeing to alienation. Such verification, however, is likely to be expensive, and the cost may be particularly prohibitive if the original party retains the right not to alienate the claim at all.<sup>203</sup> Spending money to investigate a claim is harder to justify, the lower the probability that the third party will be able to enter into a contract to alienate the claim. Investigation, moreover, may be more difficult to achieve when information is not within the plaintiff's possession. For example, if the defendant needs to be deposed, then the plaintiff would need to conduct such discovery. (It is possible to imagine a rule that allows third parties to conduct independent discovery, but this could be duplicative and burdensome.) Once the plaintiff conducts discovery to provide information to third parties, however, there is less benefit from sale of the plaintiff's claims. A claim sale is far less likely to effect a transfer to the party able to prosecute the litigation most cost effectively when the claim sale occurs immediately before trial. At that point, most claims have settled anyway, many of the costs of litigation have already been incurred, and the effort required by the purchaser's lawyers to learn the facts of the case will be particularly costly.

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<sup>203</sup> A standard result of auction theory is that bidders depress their bids to take into account not only the cost of investigating the particular auction, but also the probability that the investigation will not lead to a completed purchase. *See, e.g.*, Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 *Nw. U. L. REV.* 423, 450-52 (1993).

How robust a market would be given the abolition of restrictions on alienation is an empirical question, and a currently unanswerable one. The relative rareness of alienation of tort claims in states that appear to have only minimal legal barriers to such alienation, such as Texas, might be a function of natural market pressures or of whatever restrictions on claim alienation exist. There is, however, one critical datum suggesting that impediments to a robust market in legal claims might be severe: the absence of alienation of claims by *defendants*. Existing rules on sales of claims do not prevent defendants from purchasing insurance, with the price of policies dependent on the facts of individual cases,<sup>204</sup> and with the agreement providing that the insurance company would defend the claim.<sup>205</sup> Yet the only liability insurance widely available excludes causes of action that arose before the insurance was purchased.<sup>206</sup> In principle, a company could sell insurance on a particular claim, thus allowing defendants to reduce the risk of litigation by transferring it onto a relatively risk-neutral party, but such transactions seem to occur rarely.

The absence of insurance for defendants does not necessarily mean that there would be few purchases of plaintiffs' claims because the pool of plaintiffs and the pool of defendants may be different. Perhaps there is simply no demand for insurance for defendants.<sup>207</sup> Large

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<sup>204</sup> It is conceivable that plaintiffs could also purchase insurance policies. For example, a plaintiff with a claim with a 50% chance of being worth \$100 and a 50% chance of being worth \$200 might like to be able to obtain insurance that would guarantee a total receipt of \$150 exactly, disregarding any administrative fees. The plaintiff could achieve this result by paying \$50 for a policy that will pay \$100 if and only if the plaintiff's claim turns out to be worth just \$100. If the plaintiff's claim turns out to be worth \$100, the plaintiff will receive an additional \$50 net (\$100 minus the \$50 price of the insurance), and if the plaintiff's claim turns out to be worth \$200, the plaintiff will receive this less the \$50 price of the insurance. Either way, the plaintiff would end up with \$150. It would also be possible to structure such a policy when there are more than two different possible outcomes. Suppose, for example, that there is a one-third chance of each of three possible outcomes: judgments of \$100, \$200, and \$300. The plaintiff might like to ensure exactly a \$200 recovery. The plaintiff would then pay \$100 for a policy that would pay \$200 in the case of a \$100 judgment and \$100 in the case of a \$200 judgment. The question is why plaintiffs do not generally purchase such insurance as an alternative to alienating their claims. One possibility is that the same market problem that exists with defendants prevents such alienation. *But cf.* LawFinance Group, Inc. at <http://www.lawfinance.com> (last visited Apr. 11, 2003) (providing a financing service for lawsuits that achieves much the same effect). An alternative possibility is that courts would likely recognize such insurance contracts as being exactly equivalent to sale of a claim and thus void the contracts on that basis. That presumably would not be a problem with defendant's insurance, because defendants are already often covered by insurance and because the law does not clearly prevent defendants from alienating their claims.

<sup>205</sup> Liability insurance policies do generally impose on the insurer a duty to defend. *See, e.g.,* Beckwith Machiner Co. v. Travelers Indem. Co., 638 F. Supp. 1179 (W.D. Pa. 1986) (discussing the duty to defend).

<sup>206</sup> *See, e.g.,* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 395 (3d ed. 1999) (providing a sample commercial general liability coverage policy, providing that only bodily injury or property damage during the policy period is covered).

<sup>207</sup> Absence of an insurance market, or the existence of a relatively small insurance market with very high prices, may indicate either lack of demand or a market failure. For example, a persistent debate in the law-and-economics literature is whether individuals would purchase insurance against pain and suffering, which some argue is relevant to whether courts should award pain-and-suffering damages. Both sides of the debate agree that the absence of an insurance market does not necessarily mean that people would not be willing to pay actuarially fair rates for such insurance. Compare Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1835-96 (1995) (identifying market obstacles to marketing of pain-and-suffering insurance and suggesting that there is some evidence that consumers would demand such insurance), with W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 MICH. L. & POL'Y REV. 141, 147 (1996) (expressing skepticism about the optimal insurance rationale for pain-and-suffering

corporations, for example, may be relatively risk-neutral, especially because they are generally held by shareholders in diverse portfolios,<sup>208</sup> and such corporations may be defendants more often than plaintiffs, especially in tort suits.<sup>209</sup> Nonetheless, even if a relatively high proportion of defendants would not benefit from alienating claims, the total number of defendants is so large that there must be a large absolute number of defendants who are sufficiently risk-averse that they would pay some fee to liquidate their uncertain liabilities. Of course, defendants can liquidate their uncertain liabilities, regardless of the alienation regime, by settling with plaintiffs, but there will be some cases that do not settle, for example because one party has an unrealistic expectation of the likely judgment.<sup>210</sup> If there was a competitive insurance market, defendants would purchase insurance whenever insurance companies offered a better deal than plaintiffs. The absence of such a market indicates that insurance companies and other third parties believe that they cannot make better offers than plaintiffs and still make a profit. Similarly, it is possible that third parties considering purchases of plaintiffs' tort claims will not believe that they can make better offers than defendants and still make a profit.

The failure of an insurance market to exist is surprising, placing the asymmetric information problem aside, given the dynamics of settlement negotiations. Consider, for example, a case in which the plaintiff and the defendant each privately estimate liability at \$1,000,000 on average and the cost of litigating the lawsuit at \$100,000 each. Suppose that for each party, this \$100,000 includes \$50,000 in attorney expenses and \$50,000 in risk cost attributable to the uncertainty of the litigation outcome.<sup>211</sup> This case is one that should settle,

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damages, but acknowledging that because existing pain-and-suffering insurance "is not actuarially fair," "it is useful to inquire what people would purchase if markets worked perfectly").

<sup>208</sup> Managers of corporations, however, may not be risk-neutral, and corporations as a result may sometimes seek to diversify risk even though such diversification is not necessary for their shareholders. *See generally* Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 BELL J. ECON. 605 (1981) (noting that managerial risk-aversion may help explain conglomerate mergers).

<sup>209</sup> One datum consistent with this theory is that both plaintiffs and defendants may hire their lawyers by contingency fee but it is far rarer for defendants to do so. Because contingency fees are a form of partial claim alienation, this datum might seem to suggest that defendants are simply less risk-averse and would alienate claims fully less often than plaintiffs. There are, however, alternative explanations for the relative rarity of defendants' contingency fee agreements, focusing on the difficulty of negotiating them. *See* Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 87-88 (1997).

<sup>210</sup> *See, e.g.,* George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) (explaining how mutual optimism may promote settlement).

<sup>211</sup> That is, independent of attorney's fees, each party would be willing to pay \$50,000 to avoid the risk attributable to uncertainty. Even if each side has a subjective assessment of the average judgment that will result from the trial, this prediction may be erroneous, either because a party has misestimated the average judgment or because of essentially random factors such as the identity of the jury ultimately chosen. A risk-averse litigant would be willing to spend at least some money to avoid this uncertainty and receive the average expected judgment.

given that the plaintiff will be better off settling than litigating for any settlement over \$900,000, and the defendant will be better off settling than litigating for any settlement up to \$1,100,000. If a defendant was uniquely able effectively to alienate a claim by purchasing insurance from a relatively risk-neutral insurance company, say for simplicity a company that also would need to pay litigation costs of \$50,000 if the suit went to trial but no cost attributable to uncertainty, the settlement range would become smaller, from \$900,000 to \$1,050,000. The insurance company would be in a better bargaining position than the defendant would have been in, and the insurance company should thus be able to capture a greater portion of the surplus from settlement, \$25,000 more if the settlement is in the middle of the range in either scenario. If the insurance market was competitive, the defendant should in effect be able to capture this entire surplus. The complete absence of a competitive insurance market means that the lemons problem must dwarf this surplus, including under the “lemons” heading the cost that insurance companies would bear to investigate legal claims before insuring defendants against them.

## 2. *Effects on Legal Process*

### a. *Cooperation*

The simplest argument that alienability would interfere with the legal process is that once a claim is alienated, the alienator will have little incentive to cooperate in the prosecution or defense of the lawsuit. Prosecuting a suit, on this view, depends not solely on legal skill, but also on access to facts and evidence, which may be uniquely in the possession of the original parties to the suit. Defenders of alienability regimes have suggested that a purchaser could combat this problem by purchasing a right to only a portion of a claim. “A purchaser thus might purchase only 90 percent of the claim, leaving the tort victim with 10 percent at risk as an incentive to cooperate in pursuing the claim.”<sup>212</sup> Similarly, a defendant might pay a third party to assume responsibility for only 90 percent of any subsequent judgment. Presumably, if cooperation was an issue, parties would negotiate to leave one party with a sufficient percentage, which might depend on the factual circumstances, so that the original party would have incentives to stay

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<sup>212</sup> Shukaitis, *supra* note 1, at 340.



involved.<sup>213</sup> In addition, a seller and purchaser might require cooperation by contract, providing a cause of action in the event of noncooperation.<sup>214</sup>

Even if such arrangements could not assure full post-alienation cooperation, a lack of cooperation need not hamper the legal system in cases affected. Indeed, there is a strong argument that lack of cooperation might *benefit* the legal system, at least if cooperation is a euphemism for perjury, or less drastically for shading facts in testimony in a direction that would tend to benefit the litigant. A plaintiff who claims high pain-and-suffering damages ordinarily might have an incentive to exaggerate the pain suffered when testifying,<sup>215</sup> but there is less incentive to lie if the victim will no longer be affected by the court's judgment because the plaintiff is now a claim purchaser. Other forms of cooperation in litigation, such as information sharing, may be important, but the legal system should be able to overcome noncooperation. The courts, after all, routinely use subpoena powers to force unwilling individuals to provide information of interest,<sup>216</sup> and violators face sanctions including contempt of court. The litigating parties could seek information from the original parties just as they could from third parties, and any incentives to be uncooperative with the opposing party should be no higher than before.<sup>217</sup>

Nonetheless, use of compulsion is expensive and inefficient. The possibility of noncooperation thus worsens the adverse selection problem, especially because knowledge of whether the original litigant will cooperate is asymmetric. Those who see alienation as an opportunity to reduce their involvement in the litigation are most likely to alienate their claims, and a resulting tendency will be that litigated cases are particularly likely to be lemons involving noncooperating litigants. There is, however, a countervailing tendency that is perhaps of even greater concern. The cases in which plaintiffs are likely to alienate their claims will tend to be those in which the original litigant's cooperation will be less of an issue. Because straightforward claims are more likely to be settled than alienated, the cases in which alienation occurs are likely

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<sup>213</sup> Shukaitis argues, "So long as the tort victim and the purchaser have some stake in the outcome of the case, each has incentive to cooperate in its prosecution." *Id.* at 340. This is, of course, a simplification. Whether a party will have an *adequate* incentive to cooperate depends on the marginal costs of cooperation, including time costs, as well as on the marginal benefits of cooperation.

<sup>214</sup> "[P]urchasers could require tort victims to cooperate as a condition of purchase; such cooperation clauses are routinely found in standard insurance contracts, which raise the mirror problem with the defense of claims." *Id.* at 340.

<sup>215</sup> It is difficult to obtain objective, verifiable appraisals of certain types of losses, such as pain and suffering. See Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 63 (1991).

<sup>216</sup> See, e.g., FED. R. CIV. P. 45.

<sup>217</sup> John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 518 (2000) (noting that existing discovery sanctions are "too paltry" to induce lawyers to cooperate effectively in discovery).

to be complex. Many of these claims will demand cooperation from a different set of potential witnesses—experts. The parties that are in the best position to buy claims will be those who have the greatest confidence that they have cooperating experts.

Although expert witnesses serve a useful role in an adversary system, they pose dangers. Some scholars have worried that courts are ill-equipped to resolve battles among experts,<sup>218</sup> and others have cautioned that litigants may be able to find experts who can make any position seem plausible to jurors.<sup>219</sup> An alienability regime increases the likelihood of a match between a litigant's position and an expert who will take that position, because an alienability regime allows lawyers, who may have contacts with experts, to seek out clients, rather than the reverse. An alienability regime's tendency to move claims to those who can best prosecute them ordinarily would seem like a social benefit, but the assessment is at least closer once we consider the possibility that the parties in the best position to resuscitate weak claims may be those best positioned to make a bad case sound good. Perhaps it is already easy for any litigant to find an expert who will take any position, but it currently may be difficult for litigants to assess how effective these experts will be. An alienability regime would allow someone who has gamed the system in one case to do so in others as well. If access to experts is one of the few factors that can overcome the adverse selection barriers to alienation, such access may be worrisome in a significant percentage of lawsuits involving alienated claims.

*b. Precedent*

A second possibility is that alienability might affect the legal system adversely by changing the pool of cases about which appellate decisions are rendered and from which rules of precedent are created. Even under our existing legal system, appellate cases may not be representative of the broader universe of disputes, because cases that go to trial may be different from cases that settle,<sup>220</sup> because cases that are appealed may be different from those that are not appealed, and because judges may selectively decide which cases to craft written opinions.<sup>221</sup> The

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<sup>218</sup> See, e.g., Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998).

<sup>219</sup> See, e.g., PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

<sup>220</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (providing a model of settlement in which plaintiffs win half of the cases tried, even if there is no such evenness in the broader pool of cases filed).

<sup>221</sup> For a criticism of summary decisions without opinions, see Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995).

selection of cases for appellate litigation is important not only because some issues may be resolved sooner than others, but also because the law itself may be path dependent.<sup>222</sup> While some degree of path dependency may be unavoidable, it may be particularly problematic if litigants can manipulate the path of decisionmaking.<sup>223</sup> Concern about the possibility of such manipulation, Maxwell Stearns has argued, helps in explaining modern standing doctrine.<sup>224</sup> If interest groups can determine when lawsuits are brought, they may be able to manipulate the path of the law,<sup>225</sup> and legal institutions may have evolved various means of preventing such manipulation. Perhaps the bar on alienating legal claims is one such institution.

Allowing alienation of legal claims might permit interest groups to determine when decisions are rendered and perhaps also to determine who will render those decisions.<sup>226</sup> An interest group, for example, might purchase a claim specifically because a case presents a particular issue, and the interest group believes that aggressive litigation of the issue in that particular court is likely to lead to creation of a favorable precedent. The interest group might especially seek to purchase claims in which the opponents' lawyers are unlikely to be effective. One plausible reason for such lack of effectiveness would be that the immediate financial stakes are small, and the resulting asymmetry in the stakes if such claims are purchased makes it more likely that the interest group will succeed in the litigation.<sup>227</sup> Similarly, a litigant, whether an interest group or not, might find a case that presents the same legal issue as the case in which it is involved, but with better facts. The litigant might then purchase that claim and attempt to ensure that it is resolved by the courts first. Conversely, a litigant might be concerned about a case with worse facts and purchase that claim simply to settle it and thus avoid the possibility of an adverse

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<sup>222</sup> See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

<sup>223</sup> Frank Cross has argued that rational plaintiffs, who tend to be repeat players, settle unfavorable cases and litigate vigorously those with favorable facts, producing a negative effect on precedent. See Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000).

<sup>224</sup> See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1355-56 (1995) (arguing that while standing doctrine does not eliminate path dependence, it helps ensure that path dependence depends on fortuity rather than on litigants' choices).

<sup>225</sup> Saul Levmore has argued that interest groups tend to act where cycling and related aggregation anomalies exist. See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259 (1999).

<sup>226</sup> There is substantial empirical evidence to suggest that litigants generally engage in forum shopping. See, e.g., Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999).

<sup>227</sup> Asymmetric stakes sometimes can increase the likelihood of settlement. See, e.g., Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567, 574 (2000). This logic, however, does not apply where the asymmetry results from different levels of concern about the precedent established by the court.

precedent. More disturbingly, a litigant might assume a position in a litigation contrary to the litigant's own beliefs or interests and then purposefully offer bad arguments in favor of that position, in the hope of achieving a useful precedent in another case.

Some obstacles, however, might frustrate attempts to manipulate precedent through claims purchases. While the strength of facts in a particular case could influence appellate decisions on issues relevant both to those facts and to very different ones, appellate judges often recognize that they are making decisions that will affect a variety of different factual scenarios.<sup>228</sup> The adversary system gives the opposition incentives to identify factual situations in which a particular resolution of a legal issue may lead to results that seem less intuitively attractive than in the existing case. Moreover, it is quite a bit of trouble to purchase another suit simply out of a desire to control which of two factual situations is presented to a court first. It is unlikely that a litigant will be able to identify another case likely to reach the courts before its own case and presents the same issue, but with different facts, even though the court had never addressed that issue before. And even when a litigant does identify such a case, and is able to convince the owner of the claim to alienate it, the litigant may be disappointed by which case is decided first. After all, the litigant's opponents may have precisely the opposite incentives as the litigant with respect to the order in which the cases are presented.

Similar possibilities for manipulation exist in our current legal system. Interest groups can seek to find test cases that will allow for incremental development of doctrine in a way that will favor the interest groups' long term interests.<sup>229</sup> Third parties, moreover, can facilitate settlements by giving money to a party, even in cases that have already been docketed by the Supreme Court, in order to avoid a Supreme Court adjudication that might be unfavorable to such third parties.<sup>230</sup> Presumably, the legal system might address such interference, for example, by criminalizing such activity, by holding parties that engage in such activity in contempt of court, or by disallowing collusive settlements.<sup>231</sup> That the legal system generally does not address

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<sup>228</sup> The analogical reasoning process that judges typically use leads judges to consider the cases at hand by reference both to past and potential future controversies. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 757 n.61 (1993).

<sup>229</sup> See, e.g., Lederman, *supra* note 163, at 239 (noting that "the test case can be chosen on the basis of particularly favorable facts" and that "interest groups can influence the order that cases reach the Supreme Court").

<sup>230</sup> This occurred in *Piscataway Township Board of Education v. Taxman*, 521 U.S. 1117 (1997). For an argument that the settlement was improper, see Roger Clegg, *What Are Civil Rights Leaders Afraid Of?*, WALL. ST. J., Nov. 24, 1997, at A23.

<sup>231</sup> The Supreme Court has addressed what some saw as a particularly egregious form of interference, ruling that a settlement of a case awaiting appeal does not justify vacatur of the judgment. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). This case thus provides some restraint on parties that wait until after cases are resolved and then settle if the

such interference may suggest that the consequences are small. Permitting alienation of claims, however, would make manipulation of the path of decisions far easier than it is today. Paying off litigants to drop cases is expensive and serves only to delay decisionmaking. Purchased claims offer a more direct potential to influence the law and at lower cost because the claims themselves are valuable assets. Scholars like Cass Sunstein have argued that courts should seek to take small steps in decisionmaking,<sup>232</sup> but alienability may help interest groups force courts to make decisions relatively early. Once again, these problems may seem *de minimis* if robust markets for claims emerged. If an ability to manipulate precedent is one of the few factors sufficient to overcome the barriers to alienation, then the costs of allowing such manipulation may be large relative to the benefits of allowing alienation.

*c. Settlement*

Attempts at path manipulation could either reduce settlement, as litigants seek to place issues before the courts, or increase settlement, as litigants seek to prevent courts from rendering decisions. Even without deliberate path manipulation, adoption of a rule allowing the alienability of claims could affect settlement rates. The standard economic theory of litigation indicates that cases will settle when parties' estimates of the probability of success and expected judgment are not too far apart.<sup>233</sup> Alienation of claims, however, is most likely to occur when the claim purchaser is relatively optimistic about the claim, and in particular more optimistic than either the initial holder of the claim or the opponent of the holder of the claim. Thus, those who purchase claims (or accept money to take them on) are less likely to be willing to settle. The problem may be more severe when several potential purchasers of a claim bid against one another, as the most optimistic of the potential purchasers is likely to win the claim. This danger reflects the "winner's curse"<sup>234</sup> that threatens all auctions. The application of the curse, however, has consequences not only for the winner, but also for the legal system as a whole. The thinner the market for claims overall, the more serious the winner's curse problem is likely to be in individual cases.

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judgment is adverse, where the settlement is conditional on an agreement to vacate the judgment.

<sup>232</sup> See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

<sup>233</sup> See, e.g., Loewenstein et al., *supra* note 210.

<sup>234</sup> The winner in an auction is "cursed" because the winner is likely to be the party that most overbid. See Richard H. Thaler, *The Winner's Curse*, in *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 50-52 (1992) (describing the winner's curse).

A standard response to winner's curse problems is that rational bidders will take the winner's curse into account and, at least over time, will learn to discount their bids by the estimated size of the curse.<sup>235</sup> If such a rational response occurs, those who purchase claims will not systematically get bad deals in doing so. Settlement, however, is likely to be reduced as a result of the winner's curse, even with rational discounting of claim values to adjust for the curse. The discount that an auction bidder applies to overcome the winner's curse reflects the amount by which overbidding is likely in general. Even if this discount is enough so that an auction winner will not overvalue a claim, the untailed nature of rational discounting means that an auction winner's best estimate of the claim value will be subject to considerable uncertainty. The auction winner may have won simply by virtue of better information about how the courts are likely to rule, and even if the auction winner concludes that it likely did not know about certain information, it will not know whether such information is more or less important than in the typical case. With a high variance estimate of claim value, auction winners will likely spend more time researching claims. Moreover, they will be more hesitant to settle, because of the greater possibility that the adversary will take advantage of the auction winner's informational disadvantage.

The possibility of reduced settlement with alienated claims is of concern not only because of the corresponding increase in the cost of litigation, but also because cases that do not settle are more likely to set precedents. Presumably, the number of precedents created would not change much, if at all, assuming that precedent production depends more on supply-side than on demand-side factors,<sup>236</sup> but the types of precedents produced might be different. In particular, alienability might produce a relative increase in precedents in areas of law that are relatively clear. These are the cases most likely to be alienated because information asymmetry is less of a danger when the law is clear, but once alienation occurs, the analysis suggests that a smaller percentage of these cases will settle than otherwise would without alienation. Even assuming the number of alienated claims is small, if alienation of a claim significantly reduces the chance of

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<sup>235</sup> See Kenneth Hendricks & Robert H. Porter, *An Empirical Study of an Auction with Asymmetric Information*, 78 AM. ECON. REV. 865, 882 (1988) (testing this prediction).

<sup>236</sup> One reason this might be true is that judges, even on the appellate courts, have considerable freedom to decide which cases deserve to have precedential value. *Cf. Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (finding constitutional a Ninth Circuit rule prohibiting citation to unpublished opinions). If a set of cases that ordinarily would receive detailed treatment disappears from court dockets, judges presumably will respond, at least in part, by writing more detailed opinions in other cases. Although it would be difficult to test the assertion empirically, in my estimate, judicial productivity in a given period of time does not depend on how interesting the cases before the courts are.

settlement, the overall effect on the pool of precedents could be large because taking litigation all the way to trial is ordinarily so rare.<sup>237</sup>

The magnitude of these effects is difficult to predict, and there might be countervailing considerations. Perhaps parties in the best position to be claim purchasers will be those who are particularly skilled at achieving settlements,<sup>238</sup> and this consideration might offset the reduction in settlement traceable to information problems. The problem, however, is precisely that the effects are so difficult to predict. My argument is not that adverse selection dooms economic arguments in favor of permitting alienation of legal claims, but that it adds considerable complications, and that these problems conceivably could be severe relative to the benefits that claim alienation would provide. Such problems might not be more severe, however, and my purpose is to suggest that any experiments with permitting alienation would need to be monitored closely, not to suggest that society should not dare to experiment.

### III. MANDATORY ALIENATION

In law, as in boxing, the names of the parties become the name of the event. Ali-Frazier,<sup>239</sup> *Marbury v. Madison*.<sup>240</sup> Perhaps this is just convention, but it reflects that in the end, a civil suit ends with a judgment, dictating how the defendant must act with respect to the plaintiff. As in boxing too, the main event often seems like a sideshow, with pretrial maneuvering by lawyers or pretrial decisionmaking by judges turning the trial into an anticlimactic fight that rarely lives up to the hype. Any result but a definitive knockout leaves the decisionmaker open to claims of bias or folly, and even a definitive victory may be seen as the product of seemingly irrelevant circumstance—failure to train in the optimal location in boxing,<sup>241</sup> ineffective attorneys

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<sup>237</sup> One study found that seven percent of cases are tried, while another fifteen percent are terminated by a judicial ruling such as summary judgment, and another nine percent settle after a ruling on a significant motion. See Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986).

<sup>238</sup> Gilson and Mnookin argue that commercial litigation tends to be contentious because the absence of repeat interactions makes cooperative behavior less likely. See Gilson & Mnookin, *supra* note 131, at 534-37. Alienation may offer a partial escape, as alienation might be particularly likely when the potential alienator believes that it will be able to cooperate relatively well with the litigation opponent, for example because of repeated interaction with that opponent.

<sup>239</sup> While dashes are usually used to separate the names of the combatants in boxing matches, sometimes an abbreviation for “versus” is used instead, as in legal cases. See, e.g., BBC Sport, *The Generation Game*, at [http://news.bbc.co.uk/sport1/hi/funny\\_old\\_game/1189246.stm](http://news.bbc.co.uk/sport1/hi/funny_old_game/1189246.stm) (last visited July 10, 2003) (discussing the recent “Ali v. Frazier” fight between the daughters of the original participants).

<sup>240</sup> 5 U.S. (1 Cranch.) 137 (1803).

<sup>241</sup> See, e.g., Ken Jones, *Amateurish View on Altitude Proves Lewis’ Downfall*, INDEPENDENT (London), Apr. 26, 2001, at 24 (blaming favorite Lennox Lewis’s failure to train at high altitude for Lewis’s loss to Hasim Rahman in a championship bout).

in law.<sup>242</sup> The metaphor, though, cannot be stretched too far, for in boxing, eventually the combatants are alone together in a ring, the trainers and promoters left to mere advice giving and spectating. The same cannot be said of law, where the trial may never occur and where, even if it does, the lawyers take center stage. And yet we persist in referring to lawsuits with the names of the parties.

This convention lies on a sound foundation in a legal system in which claim alienation is rare, for whatever their involvement, the parties are bound by the court's judgment. It is possible, though, to imagine an opposite regime, one in which the parties never have a stake once a case reaches trial. In a mandatory alienation regime, parties would be required to alienate their legal claims. That is, a plaintiff would be forbidden from initiating a lawsuit on her own behalf and instead would be required to sell the legal claim to a third party. Similarly, a defendant would be required to pay off a third party to assume the burden of any judgment. Settlement could occur in a mandatory alienation regime both before and after alienation. So far, this Article has considered the possibility of alienation in a world of trial, but the mandatory alienation regime allows a comparison between a world in which the final outcome of an unresolved dispute for the litigants is trial and a world in which the final outcome is alienation.

The mandatory alienation hypothetical turns out to have some surprising benefits, but it seems unlikely that any legislature would enact it. My purpose is solely to use this hypothetical as a heuristic to facilitate an evaluation of how the market would perform as a legal system. Previous scholars considering restraints on alienation have failed to consider the dynamics of a market for tort claims, in effect taking the market prices for claims as exogenous. The commentators have thus not considered whether a market could serve as an acceptable substitute for judges and juries in valuing legal claims. Because the original parties to a litigation would never be directly affected by a judicial decision in a world of mandatory alienation, the construct forces us to consider whether claim sales can do justice as to the original parties in a litigation.

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<sup>242</sup> Many analysts, for example, second-guessed the result of the O.J. Simpson trial by blaming the outcome on one set of attorneys or the other. *See, e.g.*, JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* (1996) (arguing that ineffectiveness by prosecutors led to the acquittal of O.J. Simpson); Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 *MCGEORGE L. REV.* 291, 299-317 (1998) (attributing the outcome to unethical practices by defense counsel). Claims that attorneys are inadequate or unprepared also figure in debates on legal policy, particularly with respect to the death penalty. *See, e.g.*, *Reform Ideas for Death Penalty Panel*, *CHI. SUN-TIMES*, June 13, 2000, at 27.



Relevant economic considerations include how accurate the market is likely to be in evaluating claims and how costly the market process itself would be.

Mandatory alienation is a particularly useful heuristic for constructing an assessment of a world in which alienation is pervasive but not universal. Although this Article has shown that there are substantial nonlegal obstacles to development of robust markets for claims, it is possible that these obstacles could be overcome in some contexts. If there is some substantial number of claims for which the advantages of alienation outweigh the disadvantages attributable to adverse selection, then adverse selection might be less of a problem for other claims. Perhaps asymmetric information is relatively unimportant for some areas of law, because the legal outcome will depend little on eyewitness testimony or credibility determinations. The same arguments that show how a market for claims could unravel also indicate that if some critical number of claims were alienated, the market could unravel back up again. The mandatory alienation hypothetical assumes away the challenges that might block formation of a robust claim market and focuses attention on the market itself. The resulting question is whether the various arguments developed in Parts I and II continue to apply if a robust market for some type of claim were to develop.

This part of the Article argues that the arguments no longer apply. Part III.A reconsiders the economic arguments. Not only would a mandatory alienation regime make the economic concerns discussed above far less significant, but it also would have other virtues. Although a full empirical analysis is impossible without experimentation, the market likely would price claims relatively accurately, considering at least information in the possession of the party whose claim is alienated and perhaps other information as well. Third party purchasers would have strong incentives to anticipate how judges or juries would evaluate claims, and the original parties would have some incentive to share information with such third parties. Whether these virtues are sufficient to overcome the economic vices of mandatory alienation is uncertain, but the virtues would, for the most part, exist without the vices of a permissive alienability regime in which alienation became pervasive. The economic analysis thus suggests that if pervasive alienation can overcome the adverse selection problem, the market is likely to serve as a strong substitute for a court system for those claims that are alienated.

Part III.B, however, suggests that noneconomic concerns would become might become more serious in a mandatory alienation regime. Once claim sales are no longer voluntary, arguments about commodification, corrective justice, legal ethics, and procedural justice, at least, would become more powerful. A caution is that there is a meaningful moral difference between a world in which alienation is required and one in which almost everyone voluntarily alienates claims. A final philosophical assessment of a successful alienability regime may thus depend on the extent to which alienation is coerced. Although a full philosophical analysis of coercion is beyond the scope of this Article,<sup>243</sup> if alienation is financially attractive, there is in effect a tax on those who choose not to alienate. If that tax was so high that no one could afford trial, it seems fair to consider alienation coerced, but the coercion might be less with a lower effective tax and a lower resulting alienation rate.

*A. The Economics of Mandatory Alienation*

The most obvious virtue of a mandatory alienation regime is that it solves the adverse selection problem. It is a familiar point from analysis of insurance that compulsory insurance eliminates any danger that adverse selection will cause the market to unravel.<sup>244</sup> Thus, mandatory alienation may be a necessary requirement for the purported advantages of alienation, such as enabling plaintiffs to obtain judgments and defendants to liquidate liabilities more quickly, to materialize. Mandatory alienation does not eliminate the other economic problems associated with alienation. It is still possible, for example, that alienation would facilitate interest group manipulation of the path of legal decisions, but it would no longer be the case that such attempts at manipulation would exist in a relatively high percentage of cases alienated. Similarly, while mandatory alienation would still help to match claims and experts, it would no longer be the case that alienated cases are particularly likely to be those in which litigants ordinarily would not be able to find persuasive experts to adopt their positions. Finally, alienated cases would no longer be those in which the purchaser has a particularly rosy view of the case, so the danger that alienation might frustrate settlement is reduced.

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<sup>243</sup> I provide a brief introduction *infra* notes 277-280 and accompanying text.

<sup>244</sup> See, e.g., Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 DUKE ENVTL. L. & POL'Y FORUM 293 (2002) (noting that requiring purchase of environmental insurance would address adverse selection problems).

Ordinarily, eliminating an option that a person would have makes a person worse off (or at least no better off), and it might seem that if a party would not want to alienate a legal claim, the legal system must be making that party worse off by requiring alienation. In this context, however, the logic need not apply, because the duty to alienate a claim furnishes a sufficient explanation for the individual's decision to alienate it. The decision to alienate a claim ordinarily conveys negative information about the claim's value, but the removal of the option means that no negative information is conveyed. There will be no stigma in trying to alienate a claim if everyone is required to do so, and thus a rule requiring alienation will make better off both parties that would alienate their claims anyway and parties that would not alienate their claims solely because of the negative information that a decision to alienate a claim would convey. The only litigants who could be worse off are those who would choose not to alienate their claims even in a hypothetical world in which there was no negative signal associated with the alienation decision.

The enactment of a rule mandating alienation of legal claims, whether in one area of the law or more generally, would not merely affect individual parties or cases, but rather would change the nature of litigation more broadly. The market mandate would create third parties who in effect would become judges of the underlying claims. The following analysis thus does not consider whether any particular party would benefit from mandatory alienation, nor does it attempt to sum up the winners and losers in search of a net gain or loss. Rather, it evaluates mandatory alienation as a market process that resolves the claims of the original litigants in a dispute. The combination of the neutrality and the prospective interest of the third parties, as well as the competition among them to value claims accurately, would drive this process. Properly conceived, a rule mandating alienation of legal claims would not save disputants from litigation, but it would transform how they experience litigation. For the initial litigants, the market would in effect become what is now the trial. The economic viability of the rule depends both on the nature of this shadow legal process as well as on that of the legal process that would remain.

One benefit of mandatory alienation is that it would help to neutralize any systematic bias by decisionmakers. For example, if courts are systematically biased toward plaintiffs in insurance claim litigation,<sup>245</sup> mandatory alienation would offer a solution.<sup>246</sup> It may be difficult

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<sup>245</sup> See ABRAHAM, *supra* note 206, at 100-32 (discussing the phenomenon of "judge-made insurance"). There is some evidence that concern about the tort liability crisis has made juries less sympathetic than judges toward plaintiffs. See Philip G. Peters, Jr.,

for a jury to focus on the terms of an insurance contract when a policyholder has suffered a serious injury. Regardless of whether the jury believes that the insurance company has acted appropriately, there is a redistributive temptation to take a few dollars out of the company's deep pockets.<sup>247</sup> Such a bias, of course, is unlikely to benefit policyholders once *ex ante* effects are taken into account. Such bias will result in contracts that rely on bright-line rules rather than more flexible standards, as long as juries are more willing to take advantage of the latter than to ignore the former.<sup>248</sup> In addition, such bias increases the price of insurance, forcing policyholders to obtain more comprehensive policies than they otherwise might choose and worsening adverse selection of a more traditional kind. With mandatory alienation, by contrast, a jury's decision will have no immediate effect on the policyholder or on the insurance company, and there is no inherent reason for the jury to favor one party over another. The jury thus may seek simply to do its job by interpreting the contract without preference.

The premise in this argument is that a court will be more likely to arrive at the best answer to a legal dispute when the decision will not directly affect any of the parties to that dispute. This may be counterintuitive, because achieving a just result between the parties is presumably high among the concerns that a court maximizes.<sup>249</sup> The original parties to a dispute will not be affected if they have already transferred their rights and obligations to a third party. In effect, the litigation for them will have already been completed, and only third parties will be

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*Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1294-95 (1999) (reporting results of studies). Evidence from actual jury deliberations in tort cases, however, suggests that jurors often want to know whether parties are insured, suggesting less concern about extracting money from insurance companies than from individuals. *See* Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1958); Shari Seidman Diamond, Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1889-95 (2001). My argument in any event does not depend on the direction of the bias. If courts exhibited a bias in favor of large insurance companies, mandatory alienation similarly could help.

<sup>246</sup> This example is particularly interesting because it is possible that insurance companies could require mandatory alienation in insurance contracts. *See* ABRAHAM, *supra* note 206, at 32-37 (describing the process by which insurance contracts are drafted). Perhaps the absence of such contracts suggests that insurance companies are skeptical that mandatory alienation has any benefits, but the absence of any prior known consideration of mandatory alienation suggests that companies may not have even considered mandatory alienation. It is also possible that insurance companies would avoid requiring mandatory alienation because it might lead to negative publicity and legislative or judicial overrides.

<sup>247</sup> Such a temptation need not be irrational. If utility is a logarithmic function of wealth, then it will often seem to advance social welfare *ex post* for many individuals to pay a little to offset the injury of one, at least placing aside the problem of interpersonal aggregation of utility. *See generally* AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 264-65, 279 (1982) (discussing interpersonal comparisons of utility).

<sup>248</sup> The absence of pain-and-suffering insurance, *see supra* note 207, can be understood as a result of a market context in which bright line rules are difficult to craft, and an expectation that juries would generally award high damages contributes to market unraveling.

<sup>249</sup> *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 118 (1995) (acknowledging that "views concerning the public interest undoubtedly affect judicial preferences, just as they affect voter preferences"); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (attempt to show empirically that Supreme Court justices tend to vote on the basis of their attitudes toward public policy issues).

involved. This, however, does not mean that judges and juries will be unconcerned with justice. To the contrary, judges and juries will still be concerned with achieving justice, but the transfer of claims to third parties means that they will be concerned only with the precedential effect of their decisions broadly conceived, not with economic redistribution between the original parties. Any sympathy for an individual party, when in tension with the requirements of law and the demands of public policy, will be tempered by the recognition that the party will not be affected directly. Thus, if juries care at all about the *ex ante* benefits of fostering an environment in which contracting parties can expect their agreements to be honored, they are less likely to be biased in interpreting such agreements when their decisions will have immediate effects only on claim purchasers.

If the post-alienation trials that occur in a mandatory alienation regime eliminate certain biases, then competitive forces should prevent such biases from affecting claim prices.<sup>250</sup> For mandatory alienation to be justified, however, the market must not only resolve legal claims without bias, but it also must resolve them relatively accurately.<sup>251</sup> That is, the prices at which claims are alienated must be sufficiently close to their underlying value to advance the goals of the legal system. The principal impediment to an efficient market is the same as with a regime in which alienation is optional: asymmetric information. Litigants may have a great deal of information about their cases, while third parties have less. If there is a mandatory alienation requirement, asymmetric information will not prevent a market from forming, but it could result in sale prices differing from the amount that a plaintiff would receive if permitted to take the case to court.

Suppose, for example, that buyers had no information whatsoever about the legal claims that they were purchasing. Then, even supposing that this total absence of information did not lead to the filing of frivolous complaints,<sup>252</sup> every plaintiff would receive the same amount of money, regardless of the strength of the plaintiff's claim. A plaintiff who broke a toenail would

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<sup>250</sup> Competition does not always eliminate competition in labor markets, given the existence of a taste for discrimination. *See, e.g.*, GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 43-45 (1971). Any taste that jurors might have for discrimination in favor of plaintiffs, however, seems unlikely to affect market sales of claims should mandatory alienation succeed in leading jurors not to act on such biases.

<sup>251</sup> For an explanation of the importance of accuracy in adjudication, see Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191 (1996).

<sup>252</sup> *See generally* Robert G. Bone, *Modeling Frivolous Suits*, 14 U. PA. L. REV. 519, 529-33 (1997) (offering different definitions of "frivolous," including definitions that define a suit as frivolous where the plaintiff has no reason to believe that the defendant is liable).

be treated the same as one who lost an arm.<sup>253</sup> If a goal of the legal system is to provide plaintiffs compensation for their injuries, this would be unacceptable. Similarly, with alienation for defendants, if defendants were able to find third parties to assume the burden of litigation independent of the strength of particular claims, the deterrence function of tort law would be lost. Whatever the goals of the legal system, as long as these goals require payments and awards that reflect the underlying merits of claims, a mandatory alienation regime will be inadequate if market prices fail to reflect distinctions that would emerge at trial.

Complete indifference to distinctions among claims would not result, however, because plaintiffs alienating claims would have incentives to share information with third parties. At the least, a plaintiff will have an incentive to share with a third party any information that would make the third party tend to believe that the claim is more valuable than other claims. Thus, a plaintiff with an unusually severe accident would be eager to make a physician's report available to a defendant. Moreover, once it is in the interest of some plaintiffs to make available information, other plaintiffs would have an incentive to do so as well, lest buyers conclude that they are hiding information. The more plaintiffs that make available information, the more other plaintiffs will have an incentive to make available information as well. They might do so not only by spontaneously producing documents, but also by responding to third parties' requests for information. While this unraveling effect might not lead every plaintiff to reveal every relevant document, economists have recognized that the dynamics of such markets may make relying on the information of interested parties a relatively efficient procedure.<sup>254</sup>

The information that third parties acquire will not necessarily be all the information that might be relevant to making a decision about how much a claim is likely to be worth. For one thing, plaintiffs seeking to alienate their claims might commit fraud, by fabricating documents, giving false statements about the events pertinent to the lawsuit, or withholding relevant documents while claiming to have produced them.<sup>255</sup> It might seem that private contractual

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<sup>253</sup> Cf. *MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 229 (1994) ("Loss of an entire toenail is insignificant; loss of an entire arm tragic.").

<sup>254</sup> See, e.g., Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986); see also CHRIS WILLIAM SANCHIRICO, *RELYING ON THE INFORMATION OF INTERESTED—AND POTENTIALLY DISHONEST—PARTIES* (UVA Law School, Legal Studies Working Paper No. 00-12, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=259815](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=259815) (last visited April 14, 2003).

<sup>255</sup> See, e.g., Luthy, *supra* note 1, at 1017 ("Courts also have suggested that the prohibition on assignment is necessary because without it assignors will exaggerate their injuries or overstate the strength of their cases in the hope of persuading others to purchase their claims."). Luthy counters that repeat player assignees "should be in a good position to learn how to protect

arrangements could serve as an effective deterrent to fraud. Plaintiffs, for example, might bond their claims by agreeing to pay any damages attributable to information not released. The problem is that such agreements undercut the mandatory alienation regime, because they would leave the original litigants exposed to the risk of litigation. A claim sale with a warranty is in effect not a complete sale of the claim. If the courts were to enforce agreements between the original litigants and claim purchasers, they would need to do so carefully to ensure that the agreements are not simply a mechanism by which parties opt out of the mandatory alienation requirement.

Fraud, however, need not be a greater problem in this context than in any other market. Companies planning to merge engage in due diligence by searching each other's files for relevant information, and presumably some form of such due diligence would occur in a mandatory alienation regime as well. There is always a danger of elaborate frauds that will deceive even a careful buyer, but there is no reason to fear that such fraud would be pervasive. As long as there remains the possibility of criminal sanctions, alienators will have incentives to limit their sales pitches to spin rather than lies. This is, of course, what keeps our existing legal system honest, or at least from moving too far in the other direction. A mandatory alienation regime merely transfers the time at which there is an incentive to fabricate or withhold evidence. If penalties for fraud in the legal claims market were as severe as those for perjury at trial, the claims market should be no more likely to reward deceit or punish its absence than our existing legal system.

Placing fraud aside, there remains a separate problem; third parties might not be able to access information in the possession of the adversaries of those whose claims they seek to purchase. Defendants might choose to cooperate with prospective purchasers of a plaintiff's claim, however. By doing so, they might discourage a third party from buying a claim by convincing the third party that it has no merit. Even where litigation is inevitable, a defendant might share some of its evidence because it worries that a claim purchaser will be particularly hesitant to settle a claim at a loss.<sup>256</sup> A defendant also might cooperate with prospective purchasers, because it might hope that the prospective purchasers will choose to buy the

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themselves from exaggerated claims.”).

<sup>256</sup> This is a possible consequence of loss aversion. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 121 (1996).

defendant's claim rather than the plaintiff's. Indeed, it seems likely that prospective purchasers would consider buying claims from either side, given that the costs of researching one potential transaction will be small after having researched the other. Some defendants, however, might nonetheless choose not to cooperate with prospective purchasers of plaintiffs' claims, and vice versa. A plaintiff, for example, might insist that a potential buyer not have contact with the defendant, especially if the plaintiff intends to reveal information that could be useful in surprising the opponent at trial.

Let us suppose that, in a particular case, a third party must rely entirely on the information in the plaintiff's possession to evaluate the claim, retaining the assumption that the plaintiff is not deliberately misleading the third party. Would this produce excessively inaccurate results? There is a strong argument that it would not. Lack of information effectively serves an insurance function. Imagine two plaintiffs who sustained identical serious illnesses after participating in a medical experiment, and suppose each plaintiff knows that the defendant has in its possession information indicating that the defendant's negligence caused one of the plaintiff's illnesses, but neither knows which one. If risk-averse, the plaintiffs presumably would wish to agree to share the award that one will receive. Restrictions on claim alienation in our existing legal system might preclude this, and the facts in the real world are rarely sufficiently stark to make such contracts possible. But paying off plaintiffs in proportion to the probability that their injuries would prove to be attributable to a defendant's negligence is a way of completing such a hypothetical contract.<sup>257</sup> The mandatory alienation system thus can be seen as one that compensates tort plaintiffs for the wrongful losses that they have incurred, but then redistributes compensation to create an insurance scheme based on the uncertainty of information unavailable to the plaintiff.<sup>258</sup>

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<sup>257</sup> Similarly, negligent defendants might hypothetically agree to contracts that would require probabilistic payments based on whether their negligence in fact caused victims' injuries.

<sup>258</sup> A deontologist might disagree on the ground that even if it were justifiable to create such an insurance scheme, this is *not* an insurance scheme, but simply a form of legal procedure that functions similarly to one. If someone has a *right* to compensation for a wrongful loss, the argument goes, that individual's right has been violated if the person receives only half compensation even if the individual hypothetically would have purchased an insurance contract achieving the identical result. In the extreme case, my reasoning would suggest that everyone with an illness should receive a portion of the compensation that would go to the smaller number of individuals that have a legal claim as a result of their contracting the illness. My answer to this objection is that there is nothing unjust about this second social insurance scheme in theory, though implementation details would doom it in practice. If mandatory alienation accomplishes a useful insurance function in the same step as it determines liability awards, then we should not see this insurance function as an undesired product but as integral to the scheme. Ultimately, the objection implies that it is problematic to accomplish in one step two functions that ordinarily would be performed sequentially, but I can see no reason to reject a scheme that performs both together.



This defense is limited, however, because a litigant may have unverifiable information about information that is in the possession of an adversary. For example, one of the plaintiffs in the above hypothetical might know from personal recollection that the defendant was negligent and that a videotape in the defendant's office is likely to prove it. If claim purchasers cannot verify the existence of the videotape before formal discovery, the plaintiff will not receive as much compensation as the plaintiff's information would suggest is deserved. The mandatory alienation process thus cannot claim to achieve results that are accurate as to all information in the possession of the litigant whose claim is being alienated. Information that a litigant knows but cannot prove to third parties absent discovery would not be adequately factored into claim prices.

Of course, it is possible to imagine a mandatory alienation regime that allowed for some discovery. One approach would be to require alienation only after discovery has occurred. A problem with this approach is that it would often be more efficient for a claim to be transferred at an early stage. An adverse selection problem, however, might beset any attempts to transfer claims before discovery, as litigants who fear that discovery will tend to undermine their claims would be most likely to seek to alienate their claims early. If claims are alienated only just before trial, many of the benefits of alienation, such as allowing plaintiffs to receive damages early and encouraging consolidation of related claims for discovery, would be lost. Perhaps a compromise would be to allow limited discovery before alienation,<sup>259</sup> so that a litigant could seek to obtain the information that it believes is most likely to be useful, especially information that the litigant already knows exists. Even with such a compromise, the information that claim purchasers have would not be as extensive as the information that later would materialize should a case go to trial, but at least it would ensure that litigants could obtain verification of knowledge for which they otherwise would not have proof.

A mandatory alienation regime thus could be expected to achieve a level of accuracy approaching that obtained by trial, but if it is to be appealing relative to a world of trial, it must reduce the cost of litigation. Indeed, third parties are likely to prosecute litigation more efficiently than the original parties. The economic account of settlement suggests that the identity of the parties litigating a claim should not matter, because whether settlement occurs is a

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<sup>259</sup> Litigants, for example, might be allowed to use only a limited number of their interrogatories before alienation. *Cf.* FED. R. Civ. P. R. 33(a) (allowing parties only 25 interrogatories, in the absence of permission of the court or written stipulation).

function of the parties' estimates of the expected award and the cost of litigation. Yet in a litigation universe in which the vast majority of cases settle, many of the few cases that don't settle may reflect litigant obstinance and collateral consequences of litigation as much as financial calculation. Third parties that buy legal claims will have strong incentives to settle the claims, for ongoing litigation will decrease the third parties' profits. Moreover, third parties might be better positioned to agree to forms of alternative dispute resolution, for example, by entering into multilateral agreements to resolve a wide variety of claims through such channels. Even in the absence of such agreements, third parties that face each other in a number of lawsuits might achieve economies of scale and promote settlement by negotiating the various claims together.<sup>260</sup>

The alienation process itself, however, might be costly. It might seem initially that those who alienate legal claims are saved the cost of litigating cases, but of course they pay for litigation costs indirectly, with plaintiffs alienating claims receiving less for their claims and defendants paying more to alienate their claims because of postalienation litigation costs. Whether these costs are lower or higher than actual litigation costs would have been depends on the third parties' efficiency in resolving claims. Adoption of a mandatory alienation regime, however, does not simply lead to litigation costs being paid early in a lump sum, because such a regime entails additional costs. For a claim purchaser to make a profit, the claim purchaser's initial costs of researching a claim also must be compensated, and this expense too will be passed onto the original parties. Indeed, in a competitive market, the alienating party will be forced to pay not only for the research costs of the purchaser of the claim, but also for an amount equivalent to the research costs for all third parties that considered purchasing the claim. This is because claims buyers must cover their costs not only for investigations that ultimately lead to claims purchases, but also for investigations that fail to lead to such purchases, because some other third party ends up offering a better deal.<sup>261</sup>

The total cost of mandatory alienation will depend in part on the complexity of the issues. The more complex the case, the more difficult it will be to value a claim. Third parties seeking to

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<sup>260</sup> Ordinarily, a lawyer courts an ethical violation by trading off cases of different clients in settlement negotiations. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . ."). This would cease to be a concern, however, if there were no clients being represented.

<sup>261</sup> *See supra* note 203.

maximize their profits will spend money on investigating claims until the marginal cost of doing so exceeds the marginal benefit. With greater uncertainty, the marginal benefit of increased investigation will be higher, because there is some chance that further investigation, whether the investigation is of a legal issue or a factual one, will lead to a substantial change in an estimation of the probability of the claim's success. As this analysis indicates, not all types of uncertainty are of equal significance. If a claim is seen as having a fifty percent chance of prevailing, but additional information seems unlikely to change that estimate, then little money will be invested in investigating the claim. The types of cases in which uncertainty is generally seen as greatest, those in which the outcome will depend on a subjective application of the law to a particular set of facts, may not be those in which uncertainty is likely to be most costly in a mandatory alienation regime. Indeed, cases dependent on analysis of rules or precedents may have more uncertainty in the relevant sense, if the rules or precedents are sufficiently complex that a preliminary analysis could reach an incorrect answer.<sup>262</sup>

The costs of the mandatory alienation process will also be higher, the greater the number of potential purchasers. More third parties means a lower probability that any one will ultimately be able to purchase the claim and thus greater research costs are passed along to the original parties in the form of less attractive deals. Indeed, the total amount of research could be in excess of a social optimum, as the marginal benefit to a third party of engaging in additional research might be greater than the marginal social benefit of the additional accuracy this will ensure. Moreover, much of the research undertaken could be redundant, with each third party independently forced to learn about the lawsuit and conduct appropriate research. The situation is analogous to the stock market, in which the total amount of research conducted may be above the social optimum, because a trader who can identify mispricing can profit the entire amount of the mispricing, even though the social value of research in terms of ensuring efficient allocation of a marginal dollar of social resources is considerably less than a dollar.<sup>263</sup> Not only may we end up with too much stock market research, but also much of that research is redundant.

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<sup>262</sup> On the relationship between legal complexity and uncertainty, see Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992).

<sup>263</sup> See Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 563-67 (1971) (reaching this insight); Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 667-71 (1995) (explaining the insight in more detail).

The market for legal claims would likely develop responses to these inefficiencies, however, in the mandatory alienation context.<sup>264</sup> A firm, for example, with a reputation for offering fair prices might enter into an arrangement in which a plaintiff would have to reimburse its research costs if the plaintiff rejects the firm's eventual offer.<sup>265</sup> Indeed, different third parties might offer different tradeoffs between cost and accuracy in assessing claims, and thus the original parties might be able to choose how important accuracy is to them, with greater accuracy coming at a higher price. Similarly, a plaintiff or a defendant that believes it would benefit from competitive offers could agree to communicate with only a small number of third parties, with more competition again coming at a higher price. The cost of redundant research is thus likely to be low and to exist only when an original party decides that the benefits of redundancy exceed the costs.<sup>266</sup> In addition, any research that the third party that eventually purchases the claim conducts is not wasted, as the third party can then use that information in the subsequent litigation. Even though research costs ultimately will be paid by the original parties, the research costs by the third party that purchases the claim may lead to reduced litigation costs. Thus, the only significant costs from researching claims will be costs attributable to those who do not eventually buy the claims, and the market should be efficient in keeping such costs relatively low.

Even this is an overstatement of the costs of the mandatory alienation approach, however, because the creation of the market will reduce search costs and agency costs. In the existing legal regime, those who wish to sue, and those who find themselves the unfortunate recipients of a legal complaint, must find lawyers. One can find a lawyer quickly, for example, by seeking a reference from a local bar association.<sup>267</sup> Lawyer quality, however, is difficult to measure,<sup>268</sup> and

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<sup>264</sup> Commentators have identified market responses in traditional security markets. *See, e.g.*, Yoram Barzel et al., *The Role of IPO Syndicates in Precluding Excess Search* (2000) (unpublished manuscript, on file with author).

<sup>265</sup> An alternative approach would allow the firm to purchase a call option to buy the claim at a prespecified price. Such an arrangement might deter other third parties from researching, while still giving the option owner the chance to negotiate for a better price if its investigation reveals that the claim is not worth as much as expected.

<sup>266</sup> Allowing for competition, though costly, may make sense when no single third party has a sufficiently good reputation for fairness. The government and firms in the private sector face similar tradeoffs whenever they use competitive bidding to obtain a service instead of simply choosing a firm. Indeed, the government in many contexts directly reimburses government contractors' bid and proposal costs as indirect expenses, although auction theory suggests that the government would pay for such costs regardless of whether it reimbursed the costs directly. *See* 48 C.F.R. 352.216-72 (2002); L. ANDERSON, *ACCOUNTING FOR GOVERNMENT CONTRACTS, FEDERAL ACQUISITION REGULATION* § 14.04, at 14-12 (1989).

<sup>267</sup> *See, e.g.*, IllinoisLawyerFinder.com, at <http://www.illinoislawyerfinder.com/> (last visited July 10, 2003).

<sup>268</sup> Martindale-Hubbell offers a rudimentary rating system based on surveys. *See Lawyer Ratings*, at <http://www2.martindale.com/company/ratings.html> (last visited July 10, 2003).

consumers of legal services may spend time choosing among different possible representatives, considering factors including education, past success, and fee structure. Of course, litigants may simplify their search by relying on proxies, including the size of a firm's advertisement in the telephone directory or the beauty of a firm's offices.<sup>269</sup> Efforts by law firms to make themselves seem more attractive should count in search costs too, for part of such expenses are surely passed along to clients.<sup>270</sup> Moreover, proxies can be misleading, and litigants may sometimes make poor choices in selecting lawyers. The lawyers may not be the best ones to handle the particular type of claim—perhaps not competent enough, perhaps too expensive—or they might not be sufficiently loyal to their clients, pursuing their own interests at their clients' expense.

The creation of a mandatory alienation regime would not eliminate search costs, but it could reduce them significantly. Litigants would still need to contact potential purchasers of their claims and if they desired to limit the number bidding on their claims, would need to do some research on the purchasers. But, once the field is narrowed down to a small number, the largest bid is all the litigant needs to know. Law firms will have incentives to determine what types of claims they are best suited to handle, with the market directing higher quality legal services to cases with greater complexity and greater stakes. Such bidding is not possible in a legal system that makes legal claims inalienable,<sup>271</sup> and it may be impractical in an alienation-optional regime. Moreover, the alienation of legal claims largely eliminates agency costs,<sup>272</sup> because the purchasers will have appropriate incentives to balance the costs of legal expenses with their benefits in terms of increasing or decreasing the expected judgment. Because litigants pay for agency costs either in the form of higher legal fees or lower judgments, their elimination may offset or even surpass the costs of a mandatory alienation regime. Thus, a mandatory alienation regime may be particularly advisable in contexts where agency and search costs are high.

The ultimate comparison, of course, is an uncertain one, and only an experimental mandatory alienation program could potentially reduce these uncertainties. My purpose,

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<sup>269</sup> The Supreme Court has emphasized the informational value of advertising for professional services. *See, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (considering pharmacy advertising). A study of lawyer advertising indicates that consumers believe such advertising to be more informative than lawyers believe it to be. *See Who Likes Lawyers Ads?*, 74 A.B.A. J. 28 (1988).

<sup>270</sup> *But see* *Bates v. State Bar*, 433 U.S. 350, 377 (1977) (doubting claims that advertising would increase the cost of legal services, noting that advertising may increase competition).

<sup>271</sup> *See supra* note 189 and accompanying text.

<sup>272</sup> *See supra* note 188 and accompanying text.

however, is not to argue that a mandatory alienation regime would be superior to the existing regime, but merely to show that such a regime is more attractive from an economic perspective than one might expect. The ultimate point, though, is that a world in which voluntary alienation becomes quite common despite adverse selection problems might be an attractive one indeed. If sufficiently common, a decision to alienate legal claims would carry little negative informational value, and the litigant could expect compensation that reflects at least information in the litigant's possession about the value of the claim. The principal potential drawbacks of the mandatory alienation regime are the danger that a litigant would be forced to alienate a claim despite unverifiable knowledge, or the danger that a litigant would alienate a claim even when the expense of the alienation process is relatively high, but these would not be concerns in a voluntary alienation regime that somehow overcomes adverse selection. The analysis of Part II suggests that this may be a pipe dream, but if it is a pipe dream come true, economists should have little complaint.

*B. Noneconomic Considerations Revisited*

*1. Commodification*

The analysis above of whether commodification theory would disapprove of claim alienation was divided into two questions: first, whether alienation was corrosive of personhood; and second, whether an individual should be allowed to trade personhood for other goods.<sup>273</sup> The second inquiry no longer presents a possible escape when alienation is mandatory, so focus on the first is sufficient. If resolution of claims by a judge or jury is important to the personhood of a litigant, then the removal of any possibility of such resolution may be relevant. Although pretrial resolutions of cases, whether involuntarily made by judges or voluntarily made by mutual consent, suggest that formal resolution in court cannot be a requirement if our judicial system is to be justified; the *possibility* of such resolution is another matter. In our existing legal system, a litigant who states a valid claim (or defense) and can survive summary judgment has the right to a trial. Perhaps this right is important not only to the personhood of those who exercise it, but more broadly also to litigants who settle. A claim that a lawsuit isn't about the money becomes

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<sup>273</sup> See *supra* Part I.A.

far less plausible when the contingent right to trial is lost,<sup>274</sup> even to a litigant who would accept a settlement in lieu of an authoritative judicial resolution that directly would have impacted the parties. If the ability plausibly to make such a claim, or at least to convince oneself that a lawsuit is not about the money, is important to personhood, then mandatory alienation poses a greater threat to personhood than permissive alienation.

I do not mean to imply that mandatory alienation *necessarily* will impinge on personhood. The claim is not an *a priori* philosophical one, but rather a contingent empirical one. The empirics depend both on economics and psychology. After all, if the argument in Section III.A is correct, then a regime of mandatory alienation might be quite successful at pricing claims, and perhaps such success would bring a perception of legitimacy, and this perception of legitimacy in turn would provide an alternate foundation for, or defense of, personhood. Moreover, commodification is possible only because mandatory alienation may prevent someone from pursuing personhood by filing or defending a lawsuit. Mandatory alienation, however, might have the reverse effect. Someone who otherwise might not be able to afford a lawsuit might now be able to initiate a claim, and someone who could not afford to defend one alone now might find someone else who is willing to do so. In addition, mandatory alienation may provide an opt-out mechanism that adverse selection otherwise would make practically unavailable. Such an opt-out mechanism could preserve personhood if litigation itself could be destructive of it. Such a possibility requires little philosophical imagination, for if it is plausible that individuals define themselves through litigation, then it also is plausible for litigation to threaten self-definition.

Perhaps the strongest argument that commodification brought by mandatory alienation threatens the legal system would focus not on the litigants themselves, but on the societal perception of the legal system. Charles Nesson has argued that our legal system seeks to impose appropriate behavioral messages by convincing the public that judgments are about what happened, rather than about the evidence of what happened.<sup>275</sup> This argument has serious flaws

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<sup>274</sup> Litigants frequently remark to journalists that they are not bringing claims because they want money. See, e.g., Mary Hannigan, *A Penny for Your Thoughts*, IRISH TIMES, Mar. 18, 2002, at P52 (noting such a comment in a lawsuit brought after a tossed coin struck a girl in the head, allegedly inducing headaches); *Money, or the Truth?*, ROCKY MTN. NEWS, Sept. 15, 2002, at 7E (“When they say it’s not about the money, it’s probably about the money.”). Perhaps litigants make these remarks merely to encourage sympathetic public opinion. It is also possible, however, that the litigants believe it and have a better self image as a result of believing it, especially in wrongful death cases.

<sup>275</sup> See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

as positive analysis,<sup>276</sup> but Nesson's broader point, that legal form is relevant to the public's acceptance of the system as a whole, seems plausible. A system in which a few claims are sold, or many claims are settled, seems unlikely to undermine that acceptance, for the right to proceed to trial produces a backstop that remains visible. Perhaps mandatory alienation would remove that backstop from public view, as trials that are only about the money and no longer include the initial litigants would lack drama. Confidence in the legal system accordingly might decline, and if such confidence is necessary to our individual, or at least to our shared, identity, fears of commodification are well-grounded.

The difficult question is whether a regime permitting but not requiring alienation might impinge on personhood if alienation became so common that pursuit of a claim to trial became rare. If such pursuit was rare, it presumably would be because of its expense, and indeed considerable expense likely would need to be attached to traditional trying of cases before the adverse selection impediments to claim markets could be overcome. If that is so, there is an argument that alienation, though voluntary, is coerced.<sup>277</sup> The meaning of coercion is contested.<sup>278</sup> Consider, however, the following "first approximation" offered by David Zimmerman: "*P* coerces *Q* only if he changes the range of actions open to *Q* and this change makes *Q* considerably worse off than he would have been in some relevant baseline situation."<sup>279</sup> Translated to a policy context,<sup>280</sup> a policy that gives an option might nevertheless be coercive if it makes the recipient of the option worse off.

Permissive alienation might not be coercive under this definition because it is not the option to alienate that coerces. Rather coercion results from any inherent flaws in the justice system that makes alienation so relatively attractive. Once permissive alienation becomes commonplace, however, there might be reduced pressure to ensure the feasibility of pursuing a legal case to trial, just as the existence of plea bargaining may allow and indeed encourage lawmakers to impose a more severe sentence on defendants who insist on trial than we would

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<sup>276</sup> See, e.g., Ronald J. Allen, *Rationality, Mythology, and the 'Acceptability of Verdicts' Thesis*, 66 B.U. L. REV. 541 (1986); Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986);

<sup>277</sup> Owen Fiss has asserted that settlement sometimes may be coerced, although he does not consider the nature of coercion in making the claim. See Fiss, *supra* note 163, at 1075.

<sup>278</sup> The most prominent account of coercion is Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD 447 (S. Morgenbesser et al. eds., 1969).

<sup>279</sup> David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFAIRS 121, 124 (1981).

<sup>280</sup> For a discussion of coercion in political agreements, see Margaret Gilbert, *Agreements, Coercion, and Obligation*, 103 ETHICS 679 (1993).



accept in a world without plea bargaining.<sup>281</sup> Thus, adoption of a permissive alienation option may indirectly be coercive if it substitutes for other forms of legal reform, as proponents have advocated.<sup>282</sup> Permissive alienation also might indirectly prove coercive if alienation by many stigmatizes the few who refuse to alienate, for example by leading jurors to mistake a litigant's tenacity for an indication that others thought the claim economically valueless. My point, however, is not so much to conclude that permissive alienation *would* be coercive, let alone to determine whether the benefits of permissive alienation would justify such coercion, but merely to establish that commodification concerns that are absent when alienation is rare are greater when it is common.

## 2. *Corrective Justice*

Voluntary alienation by a defendant of a claim does not offend corrective justice, because nothing in corrective justice requires that a wrongdoer directly repair wrongful losses, instead of indirectly repairing them, for example, through insurance.<sup>283</sup> Similarly, a plaintiff's decision to have wrongful losses rectified by a third party claim purchaser does not violate corrective justice, because corrective justice is satisfied as long as wrongful losses are repaired, regardless of whether the wrongdoer directly pays for the loss. Similar arguments could be used to defend a mandatory alienation regime, but these arguments would be weaker. A mandatory alienation regime means that a wrongdoer will never directly rectify a victim's loss, but the amount the wrongdoer pays, and the amount the victim receives, will be indirectly related since both amounts will reflect predictions of the same possible trial.<sup>284</sup> If we could be confident that wrongful losses would be repaired, and that the market process imposed no new wrongful losses by forcing payments by those wrongfully accused of wrongdoing, corrective justice would be satisfied. The problem is that, at least in the absence of a discovery regime, the alleged wrongdoer's payment will depend only on evidence in the wrongdoers' possession that third

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<sup>281</sup> On the coerciveness of plea bargaining, see Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1968); and Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

<sup>282</sup> See Choharis, *supra* note 1 (arguing that alienation may help accomplish tort reform).

<sup>283</sup> See *supra* Part I.B.

<sup>284</sup> Heidi Hurd argues that there is only an "uninteresting, if not genuinely trivial" distinction between a system in which payment is direct and one in which payment is indirect. See Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 57 (1991).

parties can identify and verify, and the amount the victim receives will similarly depend only on evidence in its possession.

I argued above that this need not be troubling from an economic perspective, and indeed that asymmetric judgments may better advance economic objectives, because each side's outcome would not depend on the happenstance of information unknown to it.<sup>285</sup> Market resolution, however, may be more troubling from a corrective justice standpoint,<sup>286</sup> because corrective justice demands repair of the wrongful losses that a tortfeasor has caused and no other losses.<sup>287</sup> One might still argue that mandatory alienation satisfies corrective justice by emphasizing Coleman's point that corrective justice requires "administrative rules establishing burdens of proof and evidence."<sup>288</sup> If mandatory alienation is the system that best implements corrective justice, even though each litigant's outcome may be unaffected by information in the other side's possession, then mandatory alienation may satisfy corrective justice. One might argue, however, that a system that has an evidentiary framework that makes little effort to ensure that all available evidence is considered does not "provide the best chance of practically implementing corrective justice,"<sup>289</sup> and, therefore, does not satisfy it even if it advances other objectives.

To see the problem of one-sided evidence more clearly, consider a hypothetical from Leo Katz,<sup>290</sup> based on the movie *The Morning After*.<sup>291</sup> After a night of drinking that she no longer remembers, a woman wakes up with a dead body and a gun with her fingerprints on it. A prosecutor investigating the case would like to place her in jail for some time in any event, because he suspects her of other crimes. It later turns out that there is a film of the events locked

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<sup>285</sup> See *supra* notes 256-258 and accompanying text.

<sup>286</sup> Ernest Weinrib notes, "In holding the defendant liable to the plaintiff, the court is making not two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same from the defendant), but a single judgment that embraces both parties in their interrelationship." Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. L. 107, 116 (2001). Weinrib claims that there is an emerging consensus that this correlativity is a necessary feature of corrective justice. *Id.* at 116-19. For a further analysis of this issue, with a focus on the acceptability of no fault insurance, see Jeffrey O'Connell & Christopher J. Robinette, "Choice Auto Insurance": *Do Theories of Justice Require Linkage Between Injurers and the Injured?*, 1997 U. ILL. L. REV. 1109 (1997).

<sup>287</sup> An important debate in corrective justice theory concerns whether corrective justice theory should be concerned with wrongful losses only, as in Coleman's mixed conception, or in wrongful losses and wrongful gains, as in Coleman's original conception. One commentator, however, has suggested that wrongful losses and gains should coincide, once a suitable definition of gains is developed. See Kramer, *supra* note 58 at 285 -93. This position, however, would not resolve the problem posed here, for there would still be no direct connection between the amount paid by the wrongdoer and the amount received by the victim.

<sup>288</sup> COLEMAN, *supra* note 57 at 395.

<sup>289</sup> *Id.*

<sup>290</sup> LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 188 (1996).

<sup>291</sup> See *THE MORNING AFTER* (Warner Bros. 1986).

in a safety deposit box. Should we allow the woman and the prosecutor to agree to a plea bargain in which she will be charged with a lesser offense, with the film to be viewed only after the bargain is complete?<sup>292</sup> Katz answers no,<sup>293</sup> because “whatever the evidence finally reveals, we are 100 percent certain to regret our present decision to let the plea bargain go through,” and a “decision we are certain to regret a moment from now should presumably not be made.”<sup>294</sup> Just as the legal system should not tolerate this plea bargain, one might argue, it should not allow for a plaintiff’s recovery or the defendant’s liability to be resolved based only on the information in the possession of one party. If the legal system is obliged to open the safety deposit box, so too is the legal system obliged to consult the other party’s evidence.

Assume that Katz’s analysis is correct.<sup>295</sup> The difficult question is whether the argument survives the translation from criminal law to tort law.<sup>296</sup> What the hypothetical labels as immoral is not the defendant’s decision to accept the plea bargain, but the prosecutor’s offer of it. If we change the hypothetical and suppose that the defendant, but not the prosecutor, has seen the tape,

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<sup>292</sup> Both parties would agree to the deal, Katz assumes, because “neither side wants to be exposed to the not insignificant risk that the evidence might not turn out ‘well.’” KATZ, *supra* note 290, at 189.

<sup>293</sup> “[E]ven those who ordinarily have no problem with plea bargains,” Katz concludes, “must have qualms.” *Id.* Though Katz does not explain the difference between this situation and an ordinary plea bargain, the difference is presumably that an ordinary plea bargain is based on uncertainty about how a decisionmaker would respond to evidence, rather than uncertainty about what the evidence itself will be. But not any evidentiary uncertainty will be sufficient to make an otherwise acceptable plea bargain unacceptable. To see why, suppose that the defendant remembers her act and the prosecutor similarly knows the defendant is guilty because of an inadmissible confession, but neither is sure whether the tape in fact includes footage of the murder. In this case, the plea bargain seems morally acceptable. The original hypothetical illustrates a case in which there is uncertainty about what happened but no uncertainty about the quality of the evidence; in the revised hypothetical, there is uncertainty about the quality of evidence, but no uncertainty about what happened. Thus, Katz’s hypothetical troubles us not because bargaining about whether to consider evidence is inherently wrong, but because willful blindness to the truth is wrong, at least in the context of the hypothetical. To conclude that bargaining not to consider evidence is wrong in the civil context, we cannot rely on the wrongness of bargaining about evidence *per se*. Rather, we would need to find that willful blindness is wrong in the civil context as well.

<sup>294</sup> *Id.*

<sup>295</sup> A problem with the hypothetical lies in the defendant’s lack of knowledge of whether she in fact committed the crime. This makes perfect sense in criminal law terms, given the principle that voluntary drunkenness does not absolve a defendant of responsibility, and the principle that a defendant need not remember committing a crime to be responsible for it. *See, e.g., State v. Corgain*, 663 P.2d 773, 776 (Ore. Ct. App. 1983). But our intuitions about the acceptability of bargaining away factual uncertainty might be different with slightly different facts. Suppose that a bank teller suffered a heart attack while the defendant perpetrated a bank robbery. The jurisdiction is one that has the felony murder rule as well as the year-and-a-day rule, so that the teller’s death would constitute murder if it occurs within a year and a day of the crime. The teller remains in a coma eleven months after the crime, and he might or might not die before the year is out. We do not yet know what crime has been completed. Yet resolving the case with a plea bargain rather than waiting does not seem morally wrong.

This suggests that we are worried only about decisions to ignore facts that are currently knowable. Yet if this is true, it is hard to see why we should not make a decision now to ignore all facts in all future criminal cases that are like the facts in the hypothetical. Thus, even if Katz is correct that the prosecutor should not offer the plea bargain in the particular case, it may make sense to enact a rule that in all cases like the hypothetical, the evidence should be inadmissible. My point is not that such a rule would make sense, but that this hypothetical alone cannot do all of the work, even in the criminal context.

<sup>296</sup> Katz explicitly premises his hypotheticals on the criminal law context, observing that “although both tort and criminal law care about culpability, tort law only uses it to determine whether the defendant is liable, not how heavy that liability should be.” KATZ, *supra* note 290, at 189. This distinction does not directly explain why a plea bargain should be treated differently from a civil settlement, however.

the prosecutor's decision to offer a plea bargain before seeing the tape seems just as troubling as before.<sup>297</sup> (A smart prosecutor would not do this, because the defendant would accept the offer only if the tape was incriminating, but this is beside the point; it would be immoral for even a stupid prosecutor.) The prosecutor's offer is immoral because the result is either that the tape will show that the defendant did not commit the murder, and is thus effectively being punished for other crimes that the government does not have evidence to prove beyond a reasonable doubt, or it will show that the defendant did commit the murder and is thus being punished insufficiently. These failures to impose the retributively proper amount of punishment,<sup>298</sup> moreover, are completely avoidable. The immorality is in the prosecutor's forgoing of what the legal system deems the best result based on a private suspicion that the legal system deems irrelevant.

A public prosecutor must act in the best interests of society and not for the sole purpose of maximizing penalties. A private litigant, however, is not so ethically restricted. Suppose that we change the hypothetical in a different way, so that the woman wakes up next to an unconscious victim of a battery who also has no memory of the circumstances, and the case is a civil one between the woman and the victim. We would have little trouble with these parties' resolving their differences without seeing the tape, agreeing with each other that whatever happened, it is best to move on and to compromise. The victim does not act morally wrongly in deciding that some compensation for his injury is better than none and that he does not want to risk the possibility that the tape identifies someone else (perhaps someone who is judgment proof) as the culprit. That the victim could assure the "correct" outcome by insisting on viewing the tape does not make the decision not to do so wrong, because the victim is bargaining away his own rights. As long as we do not conceive of retribution as a purpose of the civil law,<sup>299</sup> a decision by private parties not to seek out the truth seems quite different from a similar decision

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<sup>297</sup> Katz might disagree with this analysis. He states that the plea bargain is "problematic" because it "involve[s] contracting out of one's just deserts." *Id.* This implies that the defendant's decision to accept a plea bargain also would be immoral, perhaps because the defendant should own up to her conduct. In any event, Katz's focus on "just deserts" indicates a restriction of the analysis to the criminal context.

<sup>298</sup> That is, the punishment that is consistent with commission of whatever crimes the government can prove beyond a reasonable doubt is retributively proper. The proper amount of punishment is not achieved in the former example because of the principle that it is better that many guilty men go free than that one innocent man be wrongfully imprisoned. *See generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (offering a complete and humorous history of this maxim). A more difficult case would be presented if the prosecutor *knew* that the defendant was guilty, perhaps because of an inadmissible confession, but would not be able to obtain a conviction. Once again, however, the legal system does not allow a conviction in such circumstances for a reason, such as to fulfill the protection against self-incrimination.

<sup>299</sup> *See* Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CAL. L. REV. 231, 277 (2001) ("Though a dominant justification for penalties in criminal law, retribution is hardly ever invoked as a civil justice value. Indeed, it may well be because retribution is so closely associated with criminal law that it seems an ill fit for civil concerns.").

by a prosecutor in a criminal matter, and the justification for the court's refusal to honor the agreement disappears.

Even so, a requirement that parties alienate their claims is different, because the decision to alienate in such a regime is not voluntary. The criminal law hypothetical thus may be more applicable than the civil law one. A system that seeks to achieve corrective justice cannot decouple defendants' duties and plaintiffs' rights even if most plaintiffs and defendants would agree in a hypothetical contract to such decoupling because it serves an insurance function. Corrective justice demands that defendants repair wrongful losses that they have caused, not wrongful losses that they think they might have caused, and it demands the repair of plaintiffs' wrongful injuries, not just those injuries that appear to be wrongful based on information in the plaintiffs' possession. Of course, as I argued above,<sup>300</sup> a voluntary disclosure or a partial discovery regime could allow much evidence in others' possession to affect the prices at which claims are alienated. If so, such discovery might be enough to make a mandatory alienation regime the best way of implementing corrective justice. Unlike the economist who balances benefits and costs, however, the advocate of corrective justice would not tolerate a significant cost in achieving corrective justice merely because there are offsetting economic benefits if corrective justice could be achieved better through some other regime.<sup>301</sup> Of course, the case that corrective justice is satisfied might be easier when the regime in question is a permissive alienation regime in which alienation becomes common. The issue of coercion once again would become critical,<sup>302</sup> but corrective justice remains at least more problematic if alienation is common, rather than rare.

### 3. *Legal Ethics*

A statute instituting mandatory alienation in some contexts presumably would raise no technical ethical problems. Either the statute explicitly could permit lawyers to purchase claims, trumping any existing rules, or it could prohibit lawyers from purchasing claims, in which case purchasers of claims would need to hire lawyers independently. Mandatory alienation, however, would further erode lawyer-client relationships and would thus accentuate concerns like

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<sup>300</sup> See *supra* note 254 and accompanying text.

<sup>301</sup> See, e.g., Coleman, *supra* note 56, at 431 ("One problem with imposing corrective injustices in order to annul greater wrongful losses is that it threatens to turn corrective justice into a form of efficiency.").

<sup>302</sup> See *supra* notes 277-280 and accompanying text.

Kronman's.<sup>303</sup> It is possible that some clients alienating claims would hire a lawyer to assist in their presentations to potential claim purchasers, but many clients might choose to forego the expense, recognizing that a competitive bidding process would give the bidders incentives to obtain the relevant information. The problem would be less severe with a permissive alienation regime in which alienation is common, but any amount of alienation would weaken lawyer-client ties. If alienation becomes the norm, many litigants might never hire lawyers, and without legal advice, they would take what they could receive, but the legal system would be less comprehensible. Whether or not this represents a substantial cost, widespread alienation makes more serious problems that seem modest when alienation is rare.

#### 4. *Procedural Justice*

That mandatory alienation is more likely than permissive alienation to threaten litigants' psychological perceptions of procedural justice is straightforward. A regime that permits alienation increases the options available to litigants and thus presumably increases litigants' ability to control the process. Mandatory alienation removes this option and, therefore, necessarily decreases process control, even if mandatory alienation conceivably might provide more process control than an inalienability regime. Mandatory alienation is particularly worrisome in a lawsuit in which a finding or admission of wrongdoing or innocence is as important to the litigants as any money involved, because a process that necessarily reduces to money may prove unsatisfying. Parties that will not alienate because they care about something other than the direct financial consequences of the judgment are differently situated from those who would alienate their claims but for the existence of the lemons problem. Even if every other litigant in the world alienated claims, for example, a newspaper concerned more about its reputation than about money might prefer to keep control over a libel litigation, either directly or indirectly.

Even parties that would prefer not to alienate their claims for nonfinancial reasons, however, conceivably could benefit from a mandatory alienation regime, as long as that regime required *both* parties to alienate their claims. Often, in a litigation where one party cares about the result for reputational as well as financial reasons, the other party will be concerned about

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<sup>303</sup> See *supra* KRONMAN, *supra* note 102.

nonfinancial factors as well. In such a case, the total amount that the parties spend on litigating the case would be greater than the financial stakes would warrant. The increased spending might increase the accuracy of the adjudication, which one or both parties *ex ante* might favor. In many cases, however, the litigation expenses will be largely offsetting, and a mandatory alienation regime might provide an indirect way of binding both parties to spend an amount on litigation proportional to the financial stakes. This is principally an economic benefit, but it also improves procedural justice one, because a less expensive litigation may allow both parties to retain process control.

There will, however, be cases in which one party cares more about the reputational implications of the case than the other. Many such cases will settle, as the party that places more value on whether there is an admission of wrongdoing gives financial concessions in exchange for a favorable resolution of this issue.<sup>304</sup> Some such cases, however, will not settle, for example, because the defendant takes the position that it will not pay a cent or admit any wrongdoing.<sup>305</sup> The interest of the litigants who care about more than financials in such asymmetrical reputational stakes cases may argue against a mandatory alienation regime, because mandatory alienation deprives such litigants of autonomy in controlling the lawsuit. The legal system plausibly is concerned not just with money, but also with reputation, both in absolving civil defendants accused of wrongdoing, and in condemning those who are guilty of wrongdoing. Forcing alienation may interfere with this function, particularly if third parties enter into a settlement that does not send a clear message about the relevant decision.<sup>306</sup>

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<sup>304</sup> In rare instances, an admission of wrongdoing may be sufficient to satisfy public prosecutors. *See, e.g.*, Richard B. Schmitt et al., *Admission of Wrongdoing Short of a Guilty Plea Might Satisfy Prosecutors*, WALL ST. J., Apr. 4, 2002, at A3.

<sup>305</sup> This is particularly likely where the defendant is the party that cares more about its reputation. In a libel case, for example, a newspaper might arrange a settlement in which it admits no wrongdoing, or a newspaper might refuse even a nominal settlement on the basis of principle. *Cf.* William Glaberson, '60 Minutes' Case Part of a Trend of Corporate Pressure, *Some Analysts Say*, N.Y. TIMES, Nov. 17, 1995, at B14 (noting that many news organizations have backed away from past strategies of vigorously fighting all libel cases). It would be quite odd to have a settlement in which the newspaper paid money and the plaintiff admitted that the newspaper story was accurate, as the payment of money would seem to undermine the agreed-upon declaration of accuracy.

<sup>306</sup> On the other hand, such asymmetric reputational stakes cases also provide an economic argument for a mandatory alienation regime. If a litigant will litigate a case more vigorously than the financial stakes justify, then a potential adversary concerned only with the financial stakes might be discouraged from litigation. While any litigant would like the adversary to expect vigorous litigation, a party with a strong interest in reputation will, in effect, be able to threaten such vigor credibly. If we assume that the legal system's goals are generally advanced by parties bringing any valid legal claims that they have, then the discouragement of such suits is problematic, especially if a reputational loss attributable to identification of wrongful conduct is viewed as a social benefit. Mandatory alienation would eliminate the problem, because the original litigants would recognize that both third parties would spend money in proportion to the financial interests at stake. Thus, even if the reputational effects of litigation are an important part of the system, indirectly forcing both parties to spend money in proportion to the financial stakes may advance the goals of the system by equalizing the playing field.

Thus, both in cases that are solely about money and in cases in which one or both litigants cares about the expressive effect of the court's judgment,<sup>307</sup> mandatory alienation may decrease process control and prevent litigants from pursuing their goals through the legal system. Similarly, one might argue that a permissive alienation regime in which litigants generally decide to alienate their claims because of the heavy cost of litigation effectively removes an option, at least relative to a permissive alienation regime in which trial is economically more feasible. The difficult comparison for procedural justice is between a permissive alienation regime in which alienation is common and an inalienability regime, especially if the reason that alienation becomes common is that the permissive alienation regime makes trial less attractive, for example, because the need to maintain trial as an economically feasible option declines. In such a case, alienability arguably does not enhance the options of litigants, but changes them, and the comparison depends on whether the market or trials are more successful at promoting procedural justice.<sup>308</sup>

The balance may depend on how frequent trial would be in an inalienability regime. If hearings for deprivation of welfare benefits are frequently held and are successful in instilling feelings of procedural justice,<sup>309</sup> then a switch to a permissive alienation regime may thwart procedural justice. Arguably, this is so even if hearings are no less convenient and available than before. That litigants may be willing to accept immediate payment over the chance to tell their story does not mean that a system that allows them to do so necessarily provides greater procedural justice. If, however, hearings are inconvenient and rare in the inalienability regime and claimants routinely settle with the government before any hearings, then a regime of permissive alienability, by giving claimants an option other than settlement, may increase litigants' options and thus litigants' process control. A procedural justice evaluation of an alienability regime, therefore, depends not only on whether such a regime coerces litigants,

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<sup>307</sup> See generally Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (discussing expressive theories of law); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (same).

<sup>308</sup> See *supra* text accompanying note 112.

<sup>309</sup> The opinion that frequent welfare benefits hearings increase claimants' feeling of procedural justice is not, however, universal. For a summary of arguments that *Goldberg v. Kelly*, 397 U.S. 254 (1970), was not successful in achieving dignity for welfare applicants, see Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 25-26 (1997) (noting that *Goldberg* led to "more uniform and less discretionary" welfare policy, resulting in a bureaucracy many see "as being both sterile and ineffective").



assuming that it does at all, but also on how much coercion would exist in an inalienability regime.

#### IV. CONCLUSION

It is common to conclude theoretical inquiries about legal procedure with a recommendation for further empirical work. I will not do so. Further legislative and judicial developments could mean the elimination of barriers to alienation in one or more jurisdictions, and such an experiment would help test this Article's prediction that robust markets for claims will not develop. But resolution of this prediction will not be sufficient to determine the acceptability of alienation. If this Article's prediction is accurate, only occasional alienations would result, and while the net costs might exceed the net benefits, as long as alienation is rare, the total effects are likely to be small. If this Article's prediction is wrong, for example, because claim purchasers can litigate cases so efficiently that the adverse selection obstacle is overcome, the economic concerns about claim alienation disappear. If the theories underlying the noneconomic concerns are accepted, however, then the noneconomic concerns would be weightier and conflicting, but the experiment would be unlikely to help assess these concerns or determine how to weigh them against the incommensurate economic benefits.