

Article

On the Alienability of Legal Claims

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INTRODUCTION

In recent years, a number of legal commentators have argued against restraints on the alienation of legal claims.¹ 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.² Courts increasingly have tolerated claim sales and have begun to view restraints on alienation skeptically.³ 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,⁴ which prohibit a stranger to a controversy from, respectively, inciting litigation, assisting in prosecuting litigation, and agreeing to take over litigation.⁵ These doctrines collectively form one of two legal obstacles to the development of legal claims markets.⁶ The second obstacle is a refusal by

1. 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 J. Shukaitis, *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).

2. 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 385 ("[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."). For criticisms of Cooter's proposal, see Steven P. Croley & Jon D. Hanson, *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 (1989).

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

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

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

6. 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 & Supp. 2000) (discussing such cases).

some courts to enforce contracts purporting to sell choses in action,⁷ especially for those that, if not assigned, would not survive the death of their original owners.⁸ Courts have generally shown more willingness to allow assignment of contract claims than of tort claims⁹ and, within the latter category, more willingness to allow assignment of property damage claims than of claims for personal injury.¹⁰

Businesses devoted to purchasing and prosecuting claims remain legally problematic at best.¹¹ 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.”¹² New Jersey is another state that has no bar on champerty,¹³ but there, tort claims are not assignable.¹⁴ In Texas, the state that has perhaps gone furthest to allow claim sales, legal claims are generally assignable,¹⁵ and the bar on champerty has been lifted,¹⁶ but barratry remains a criminal offense,¹⁷ and

7. *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.*, *Kan. Midland Ry. Co. v. Brehm*, 39 P. 690, 691 (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).

8. *See generally* R.D. Hursh, Annotation, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2D 500 (1955 & Supp. 2000) (summarizing the rule and citing cases). For an example of a survival statute, see TENN. CODE ANN. § 20-5-102 (1994) (providing that all civil actions, “except actions for wrongs affecting the character of the plaintiff,” shall survive the plaintiff’s death).

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

10. *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).

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

12. *Saladini v. Righellis*, 687 N.E.2d 1224, 1227 n.7 (Mass. 1997). Susan 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 reserved 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.

13. *See* *Bouvier v. Balt. & N.Y. Ry. Co.*, 51 A. 781, 785 (N.J. 1902). For more recent sources, see Dobner, *supra* note 1, at 1549 n.93.

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

15. *See* TEX. PROP. CODE ANN. § 12.014(a) (Vernon 2004) (“[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. Jenkins*, 739 S.W.2d 19, 22 (Tex. 1987).

16. *See, e.g.*, *Perry v. Smith*, 231 S.W. 340, 342 (Tex. Comm’n App. 1921).

17. TEX. PENAL CODE ANN. § 38.12(a)(1) (Vernon 2003) (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. 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

the courts have found that certain classes of cases, such as malpractice,¹⁸ are not assignable. With no apparent political lobby agitating for increasing alienation of claims, the future of alienability is 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 economic considerations might. 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 babies' welfare,¹⁹ but such sales might commodify parent-child bonds.²⁰ 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 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 will, in effect, produce commodification among all—with a single baby sale, for example, diminishing the value of all parental relationships. Because legal claims, unlike babies, are generally already seen as largely financially motivated, permitting claim sales would

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

18. See *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 393-94 (Tex. App. 1997) (emphasizing "the personal nature of the attorney-client relationship, and the confidentiality of that relationship" in explaining the public policy grounds for the exception). Some courts in other states have placed limits on the 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 a plaintiff's claim against a joint tortfeasor as part of a settlement with the plaintiff. See *Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988).

19. 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 advocating a "free market" in babies.

20. See, e.g., Neil Duxbury, *Law, Markets and Valuation*, 61 BROOK. L. REV. 657, 685-86 (1995).

likely have the opposite effect, if any at all, by making claims not sold seem less motivated by financial concerns. 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 is 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 equivocal. The economic theory of alienability does not disfavor 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 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. Indeed, the rarity of retroactive liability insurance for defendants suggests that, were claim sales permitted, only a few might 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 may be among the most likely to present problems that will offset any efficiency benefits they provide. In particular, these claims may have disproportionately negative effects on the 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. Part III presents a helpful thought experiment by considering an extreme: a legal world with a mandatory-alienation regime. In this world, the intuition flips back. With everyone selling claims, the adverse selection problem would disappear, because asymmetric information would not cause the market to unravel. Noneconomic considerations, however, would reemerge, because claim sales would no longer be voluntary. The question then becomes whether a market with

pervasive, but not mandatory, claim sales would sufficiently coerce litigants to alienate claims so as to present the same difficulties.

I. NONECONOMIC CONSIDERATIONS

This Part considers four possible noneconomic justifications for opposing claim sales—commodification theory, corrective justice, legal ethics, and procedural justice—and rejects each in turn. A desire for brevity prevents 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.

The ultimate goal is simply to show that, as traditionally formulated, the apparently most formidable objections to claim sales are not powerful. This analysis, of course, leaves open the possibility that there is some other noneconomic consideration that renders alienation problematic. Many of us, after all, seem to share an intuition that there is *some* moral problem with claim alienation, and intuitions often find theoretical support upon deeper reflection. I cannot pretend to have canvassed all of moral theory in search of support for this intuition, and it is possible that some moral or other theory besides those that I explore here, whether currently existing or as yet undeveloped, might condemn claim alienation. But the modes of analysis that I consider are not straw men either. Concerns about commodification, corrective justice, legal ethics, and procedural justice largely explain the intuition against claim alienation, and yet these concerns do not condemn the practice.

A. *Commodification*

It is both surprising and revealing that no commentator appears to have considered whether bars on transfer of legal claims cohere with other restraints on alienability, such as rules preventing the sale of organs, children, and sexual services.²¹ The small literature urging the sale of legal

21. 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, and cites two works about alienation, *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

claims conceives itself as connected to discussions of either tort reform or more narrow problems in particular areas of law.²² 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.²³ 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.²⁴ 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.

Radin argues that commodification may at times be problematic. She critiques, for example, economists who “conceive[] of rape in terms of a marriage and sex market,” because “market rhetoric conceives of bodily integrity as a fungible object.”²⁵ The problem with rape is not just that it constitutes a theft of services,²⁶ but that it effectively changes the nature of a person, for “[b]odily integrity is an attribute and not an object.”²⁷ Someone who is raped has not simply lost something compensable in dollars but has effectively become a different person. 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.”²⁸ Radin worries that if the world is not now the noncommodified ideal, then acquiescence to evolutionary decommodification may reinforce the legitimacy of commodification more generally,²⁹ while an attempt at revolutionary

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, 957. Scales does not, however, analyze whether Radin’s analysis condemns settlement factoring or claim sales more broadly.

22. 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).

23. The conceptualization of lawsuits as a form of property is not new. See, e.g., Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7 (2003) (arguing that potential takings suits against the government are a form of property that should pass with the underlying property).

24. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

25. *Id.* at 1879-80.

26. For a summary of the economic approach to rape, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 238 (5th ed. 1998).

27. Radin, *supra* note 24, at 1880-81.

28. *Id.* at 1885. Thus, Radin concludes, “universal market rhetoric does violence to our conception of human flourishing.” *Id.*

29. Radin explains,

decommodification, i.e., the position that any decommodification that is possible should be attempted, “may wreak injustice.”³⁰

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.”³¹ The public policy inquiry depends first on an assessment of whether or not something should be conceived of as important to personhood and, if so, on an assessment of whether there are reasons to allow alienability nonetheless. Radin concedes that “[t]here is no algorithm or abstract formula to tell us which items are (justifiably) personal.”³² The answer depends in part on whether “someone may subjectively identify herself” with an item,³³ but a “moral judgment is required in each case.”³⁴ This judgment depends on the item having “an appropriate connection to our conception of human flourishing” and on the relationship with the item forming “part of an appropriate understanding of freedom, identity, and contextuality.”³⁵ The relationship between people and their homes, for example, is justifiably personal because it “permits self-constitution within a stable environment.”³⁶

With respect to whether to allow alienation of items that are justifiably personal, Radin asks rhetorically, “If some people wish to sell something that is identifiably personal, why not let them?”³⁷ Then, she offers three justifications for inalienability: “a prophylactic argument, assimilation to prohibition, and a domino theory.”³⁸ The prophylactic argument is that the sale of an item of property integral to personhood might create a

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 seen as “exceptions that prove the market rule,” and the assertion that decommodifying a particular form of property could in effect increase commodification seems strange. Perhaps her worry is again rhetorical, that those who seek partial decommodification are necessarily conceding 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.

30. *Id.* at 1876 (explaining, for example, that attempting to decommodify the tort system without providing an alternative means of redressing the injuries of tort victims would be unjust).

31. *Id.* at 1903.

32. *Id.* at 1908.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1909.

38. *Id.*

presumption that the sale is coerced, even if an uncoerced sale is theoretically possible.³⁹ For example, “selling oneself into slavery. . . [is] so destructive of personhood that we would readily presume all instances of it to be coerced.”⁴⁰ The prohibition argument is simply that there might be a “moral requirement” that a good not exist in a commodified form, for example, because the commodification “creates and fosters an inferior conception of human flourishing.”⁴¹ For Radin, “love, friendship, and sexuality” are possible examples of goods that morally should not be commodified.⁴² Finally, the domino theory is relevant where “the commodified and noncommodified versions of some interactions cannot coexist.”⁴³ 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,”⁴⁴ then commodification should not be allowed. The domino theory is thus the obverse of the prohibition theory. While the prohibition theory “focuses on the importance of excluding from social life commodified versions of certain ‘goods,’” the domino theory “focuses on the importance for social life of maintaining the noncommodified versions.”⁴⁵

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. The psychological dimension of her analysis—that someone subjectively identifies himself with an object—seems straightforwardly satisfied. There is no shortage of tales of individuals whose identities become bound up with a legal dispute and who seek a favorable result in litigation not merely because of the practical consequences but also as a form of vindication. At the least, because legal claims connect with an individual’s past acts, they seem at least as constitutive of identity as tangible objects such as homes, which Radin recognizes as justifiably personal. No other form of property seems likely to have as profound a psychological effect as a lawsuit on self-constitution, because the success of many lawsuits depends, at least in theory, on the rightfulness or wrongfulness of the litigants’ conduct. With respect to the moral dimension, pursuit of a legal claim may be seen as advancing human flourishing. At least in our democratic society, political identification and participation are encouraged, and pursuit of justice through the courts may

39. *Id.* at 1910.

40. *Id.*

41. *Id.* at 1912.

42. *Id.*

43. *Id.* at 1913.

44. *Id.*

45. *Id.*

be a means by which an individual justifiably asserts the freedom provided to her by law.

Moreover, the theory would go, each of the three arguments in favor of preventing the 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, 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. The legitimacy of the legal system depends on legal claims not being perceived as purely mercenary instruments. 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, 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, making them seem of no greater moral import than lottery tickets, and in turn those holding the claims would appear to be mere speculators or investors rather than moral agents.

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. Legal claims may well be important to personhood. Because of the moral dimension of adjudication, litigants may define themselves as much by their lawsuits as by any other form of property, and at least the criteria that Radin provides are vague enough to allow a plausible argument for counting legal claims as important to personhood. Nonetheless, a legal claim is an inherently transient form of property, lasting only as long as the lawsuit. In this sense, Radin's observation about houses—that they “permit[] self-constitution within a stable environment”⁴⁶—cannot apply. No legal regime could function if lawsuits never ended. Eventually, a legal claim must be replaced with something else. Sometimes that will be a favorable judgment, at other times an unfavorable one. For the relationship between a legal claim and personhood to matter to the legal system, the judgment that replaces the legal claim

46. *Id.* at 1908.

must somehow allow any self-constitution that has occurred through the litigation process to continue.

One might argue that the means by which legal claims are resolved are integral to personhood. The resolution of a legal claim in a court of law, with a decision by a judge or jury, might be 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. If the essence of a legal claim with respect to personhood is a judicial determination, then the conclusion of a case leaves the claim intact. This argument, though, ignores the fact that the psychological effect of a judgment may depend on its content. Litigation does not build identity merely because litigants identify themselves as litigants, in the same way as football players may come to identify themselves as football players whether they win or lose any particular game. To the extent that litigation affects identity, it is largely because litigants identify themselves by virtue of the particular positions they have advanced. Because a legal system must be able to reject litigant claims, the system always threatens the destruction of the property that may constitute personhood. Even a winning litigant is left with a judgment rather than a claim, and while this might have been her preference, the legal system cannot avoid ending the relationship between person and property.

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.⁴⁷ 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.⁴⁸ Radin recognizes that the prophylactic argument in general may be deeply troubling. For example,

47. 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 (footnote omitted). 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.

48. See *infra* note 270 and accompanying text (assessing the possibility that legal claim sales might be coerced).

it would be troubling to prevent an individual from alienating property if that individual 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.”⁴⁹ A utopian society might afford all people enough resources that they would never be coerced into selling a legal claim, but in the absence of this achievement, preventing those without resources from selling claims will not necessarily advance the cause of personhood.

To assess the prohibition argument, we must first supply an argument that the existence of commodification in the legal realm fosters an inferior conception of human flourishing. Perhaps the strongest such argument along these lines is that commodification of the legal system may intrude on its role in advancing corrective justice. Because I consider corrective justice below, I will not confront that argument now. Even if that or some other argument suggested that the legal realm ideally should not be commodified, however, market rhetoric is already pervasive in the legal system. At least, Radin would label legal markets as reflecting “incomplete commodification,” a phrase that she also applies to the realms of work and housing.⁵⁰ While she argues that regulation, such as labor law and tenant protections, may be appropriate for incompletely commodified goods, Radin does not deny the appropriateness of markets in such goods. If allowed, legal claim sales could not be blamed for the conceptualization of legal claims in financial terms, because market rhetoric already infuses the relationship between individuals and their claims.

Finally, the domino theory—that “commodification for some means commodification for all”⁵¹—seems inapplicable in the context of legal claims. Allowance of sales of a kind of property may have two opposing effects. First, the mere possibility of sales may adversely affect the personhood of even those who don’t sell, but, second, it may make those who refuse to sell seem and feel less driven by financial considerations relative to those who do choose to sell. In a baby sales market, the first effect would likely outweigh the second. Baby sales might make kept babies appear more cherished relative to sold babies, but the creation of any baby sales might make all babies seem less cherished than they would in a world without sales. Legal claims, however, are already partially commodified, because even if someone pursues a claim for nonfinancial reasons, successful pursuit of a claim for money damages results in the transfer of money. Thus, the second effect seems likely to outweigh the

49. Radin, *supra* note 24, 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.

50. *Id.* at 1917-21.

51. *Id.* at 1917.

first. Permitting sales would make litigants generally seem only slightly more driven by money, but the plaintiffs who choose not to sell would likely be seen as more vigorous litigants and perhaps as more committed to obtaining a judgment in court.⁵²

Perhaps the most serious problem with justifying bans on claim sales on the grounds that they threaten personhood is that we already allow some forms of claim alienation. If settlement is seen as the alienation of a plaintiff's claim to the defendant, then alienation is a common means by which claims are resolved. The same might be said about claim alienation by defendants. Once society tolerates liability insurance and thus allows defendants to agree in advance to alienate claims, it is hard to see the problem with alienation of claims filed against the defendants. One might defend settlement yet condemn alienation. Perhaps one might argue that it is more damaging to personhood to allow sale of a continuing legal claim than to allow resolution through settlement of a claim, or one might argue that alienation in advance is acceptable because personhood cannot attach to that which does not yet exist. But these distinctions have little psychological or moral resonance, and affording the opposing litigant a monopoly on claim alienation might be worse for personhood than allowing a free market in alienation. Of course, one might condemn both settlement and alienation. It is difficult, though, to identify sufficient differences between the permitted and the prohibited forms of claim alienation that would harmonize the disparate treatment. Any claim that legal procedure generally seeks to protect personhood thus seems specious.

Even if there were an argument that the importance of legal claims to personhood might justify bars on some forms of claim alienation, the argument seems tenuous, even ridiculous, when applied to all types of 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. The assertion that a corporation's legal claim might be important for personhood seems farfetched, or at best a description of the unusual case. Even when venturing beyond corporations to lawsuits brought by or against individuals, personhood just isn't supremely important for many cases that are courts' bread and butter, and the recognition that courts may have

52. Of course, a decision not to sell also might be financially motivated, especially given adverse selection. The analysis, however, does suggest a modest proposal: that plaintiffs should be allowed to give all or part of their legal claims to charity, regardless of whether legal claim sales are generally allowed. Even such a rule, however, might present some problems. *See infra* Subsection II.C.2.b (noting that claim sales might facilitate the manipulation of the path of precedent by ideologically motivated litigants).

important symbolic roles in human affairs should not blind us to the reality that they 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 relatively great importance for personhood,⁵³ and perhaps litigants should not be allowed to alienate claims for child support, because the understanding that a child is being supported by a parent may be as important as the money itself.

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. Radin's own work supports the 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 individuals.⁵⁴ Radin states that "[m]any people will find the proposal troubling and its agenda unjust."⁵⁵ 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."⁵⁶ Similarly, if alienation of claims benefits plaintiffs (or defendants) without impairing the goals of the legal system, then seeking to protect personhood by disallowing alienability may compound plaintiffs' injuries (or defendants' claims of injustice) in the absence of a better system for addressing them.

53. Perhaps the intuitively least attractive form of alienation would be to allow criminal defendants to pay others to serve their prison terms. Economists have generally found imprisonment justified largely because of the possibility that criminal defendants will be insolvent and thus unable to pay the optimal level of fines. *See, e.g.*, POSNER, *supra* note 26, at 247 (conceding, however, that imprisonment may be justified even for defendants who could pay optimal fines because it "prevents the criminal from committing crimes (at least outside of prison!) for as long as he is in prison"). This argument implies that, at least in the absence of recidivism concerns, defendants should be allowed to pay others to serve their prison terms—or, even better, given the public costs of incarceration, to pay the state an equivalent amount. Commodification theory provides a possible answer to the economic critique of imprisonment. The argument, however, would focus not on the personhood of the alienator but presumably on that of the victim or the inmate.

54. Radin, *supra* note 24, at 1876 (citing Richard L. Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199, 207 (1981)).

55. *Id.* at 1877.

56. *Id.*

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, the moral theory of tort law.⁵⁷ Though views on its content 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.⁵⁸ 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 the plaintiff. Similarly, 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, and the foundation for an argument that it might emerges from the principle of what Ernest Weinrib has called "correlativity."⁵⁹ Weinrib identifies correlativity as one of two critical elements of his juridical conception of corrective justice and accurately notes that it is the one element about which scholars of corrective justice have largely come to agree.⁶⁰ "Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered."⁶¹ Construed literally, Weinrib's

57. 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).

58. The classic statement of the economic approach 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.").

59. *See, e.g.*, Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 *THEORETICAL INQUIRIES L.* 107 (2001).

60. *Id.* at 107 (noting that the other element is "personality, i.e., the idea of purposiveness regardless of one's particular purposes"). Among the works that Weinrib identifies as endorsing at least some variant of correlativity are ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 *IOWA L. REV.* 427 (1992); Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in *TORT THEORY* 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); and Martin Stone, *On the Idea of Private Law*, 9 *CANADIAN J.L. & JURISPRUDENCE* 235 (1996).

61. Weinrib, *supra* note 59, at 118.

formulation would appear to present no bar to alienability. When a plaintiff sells a legal claim, her right remains the basis of the defendant's duty, and the scope of that duty depends on the infringement the plaintiff suffered, even if the defendant's duty is not to the plaintiff. Weinrib's work itself does not, however, provide the best source for determining whether alienability is consistent with correlativity. Weinrib finds corrective justice to be embodied in tort liability alone,⁶² rather than in both tort liability and ordinary extralegal moral practices. He says little about the institutions that administer tort liability, except where those institutions themselves affect the content of tort doctrine.⁶³

Jules Coleman's work lends itself more easily to analysis of whether institutions offend corrective justice. Coleman derives the requirements of corrective justice from informal moral practices, and only then assesses whether the law is an institution that embodies corrective justice.⁶⁴ The view that alienability need not offend corrective justice may be supported most easily by adopting what Coleman has called the "annulment conception of corrective justice."⁶⁵ Although Coleman himself has withdrawn his prior endorsement of this view,⁶⁶ at least one theorist continues to see it as more attractive than Coleman's later approach,⁶⁷ and it serves in any event as 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."⁶⁸ The annulment theory, however, "gives no one in particular any special reason for acting, for annulling wrongful gains or losses."⁶⁹ 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.⁷⁰ Because the

62. See, e.g., *id.* at 132 & n.32 (comparing Weinrib's approach to Coleman's).

63. For example, in Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985), Weinrib laments the intrusion of insurance principles into tort decisions, such as those creating strict products liability as a means of creating an insurance regime. Yet he explicitly notes that his position is not inconsistent with the replacement of tort law with some other institution, such as no-fault insurance. *Id.* at 687.

64. See JULES L. COLEMAN, RISKS AND WRONGS 478 n.1 (1992).

65. For an articulation of this view, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 365 (1992).

66. See COLEMAN, *supra* note 64, at 306-11. This withdrawal contributed to Weinrib's conclusion that a consensus on correlativity had emerged. See Weinrib, *supra* note 59, at 128-29, 132.

67. See, e.g., Matthew H. Kramer, *Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman's Theory of Corrective Justice*, 16 QUINNIPIAC L. REV. 279, 279-80 (1996).

68. COLEMAN, *supra* note 64, at 306.

69. *Id.* at 309.

70. The problem Coleman perceived in the annulment view is that corrective justice becomes indistinct from distributive justice. Coleman explains that

[c]orrective 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.

annulment conception does not establish any special relationship between a wrongdoer and a victim, alienability of legal claims does not offend it.⁷¹

Coleman currently subscribes to what he calls the “mixed conception of corrective justice,”⁷² which partially integrates correlativity, or what Coleman terms Weinrib’s “relational conception of corrective justice,” into the annulment conception.⁷³ Coleman argues that Weinrib’s direct focus on the relationship between a wrongdoer and a victim specifies “a framework of rights and responsibilities between individuals”⁷⁴ in order to restore equality between them.⁷⁵ According to Coleman, 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.”⁷⁶ The limitation of the relational view, Coleman argues, “is that it cannot take us from ‘repairing the wrong’ to ‘repairing the losses.’”⁷⁷ 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.⁷⁸ 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.”⁷⁹ At least on Coleman’s view, then, Weinrib’s approach offers no challenge to alienability, for it does not specify how or by whom a wrong is to be repaired.

Coleman’s mixed conception, on the other hand, offers an account of what sufficiently repairs losses. According to the mixed conception, “the

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.

71. One step is needed to justify this conclusion. The annulment conception 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.

72. *Id.* at 318.

73. *Id.* at 318-24; see also Coleman, *supra* note 60.

74. COLEMAN, *supra* note 64, at 314.

75. For the most developed explanations of Weinrib’s view, see Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 444-50 (1987); and Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 514-26 (1989).

76. COLEMAN, *supra* note 64, at 314.

77. *Id.* at 320.

78. See *id.* at 320-23.

79. *Id.* at 321.

duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible.”⁸⁰ The alienation of a legal claim might seem to prevent the wrongdoer from repairing the loss for which she is responsible. Instead, she will simply pay off someone who has already repaired the plaintiff’s wrongful loss, or a third party she previously paid off 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, on the mixed conception’s account, qualifies as fulfillment of the duty to “repair.” 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.”⁸¹ In explaining this distinction, Coleman offers a hypothetical in which Donald Trump “volunteers to pay all [Coleman’s] debts of repair.”⁸² If this occurs, “all claims against [Coleman] are extinguished,”⁸³ and corrective justice is not violated. Corrective justice is not concerned with retribution against the decisionmaker⁸⁴ but with wrongful losses. If a third party decides to rectify a loss while absolving a wrongdoer of responsibility, then there is no longer a loss for the

80. *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. *Id.* He explains that “[t]he 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.

81. *Id.* at 327.

82. *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.”).

83. *Id.* at 389.

84. Gerald Postema explains that “[r]etributive 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) (reviewing COLEMAN, *supra* note 64). 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 we generally rely on criminal law, not the tort system, to effectuate the goals of retributive justice.

wrongdoer to rectify.⁸⁵ Similar logic explains Coleman's conclusion that a social scheme of no-fault insurance need not violate corrective justice.⁸⁶ 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. At the same time, Coleman indicates that allowing those who have not suffered wrongful losses to recover from defendants who have acted wrongfully is unproblematic, as when the plaintiffs are effectively acting as private prosecutors.⁸⁷ 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 matured claim is surely permissible.

Coleman's account draws a distinction between the principles of corrective justice and its institutional realization. "Implementing corrective justice," Coleman observes, "requires a set of substantive liability rules" as well as "administrative rules establishing burdens of proof and evidence."⁸⁸ Such rules "provide the best chance of practically implementing corrective justice under less than ideal circumstances."⁸⁹ Thus, Coleman does not rule out that institutional arrangements may affect how well corrective justice is realized, but such an assessment does not concern the scope of corrective justice itself. Under this conception, corrective justice does not address alienability, though it is possible that some institutional arrangements might be better suited for implementation of corrective justice than others.

85. *But see* Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 143-44 (1990) (arguing that the resources to compensate victims must come from the wrongdoers).

86. Coleman writes,

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 64, 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.").

87. Coleman hypothesizes a situation in which a manufacturer has failed to provide an optimal warning, but the particular victim injured by the manufacturer's product 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 to "act[] as a private regulator." *Id.* at 387. *See generally* 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).

88. COLEMAN, *supra* note 64, at 395.

89. *Id.*

One commentator has urged that corrective justice indeed should be concerned about the process by which torts claims are adjudicated.⁹⁰ Susan Randall notes that scholars of corrective justice “focus on the substantive morality of tort law rules,”⁹¹ but she insists that modern tort law can be justified “as a matter of corrective justice (if at all) because it permits individualized assessments of responsibility through the interplay between its generalized standards and its processes.”⁹² As with other corrective justice scholars, Randall seeks to formulate a descriptive account of current practice, but she also draws normative implications. In particular, she worries that various tort reform proposals “would limit or eliminate the litigants’ ability to participate in decision-making.”⁹³ Randall explains this concern by citing to the psychological literature on procedural justice.⁹⁴ Her analysis thus implicitly identifies significant potential objections to claim alienability, but I consider procedural justice below, and whether these considerations are interior to corrective justice need not concern me. Placing aside procedural justice concerns, 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 organization of large law firms and in the prosecution of civil cases.⁹⁵ Allowing alienability, however, would not just be an incremental shift toward profit maximization. Rather, it would destroy the heart of the ethical rules by effectively eliminating the attorney-client relationship.⁹⁶ Under current

90. Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1 (1993). For a related argument, see Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990). Wells focuses specifically on the practice of having a jury decide tort cases as central to corrective justice. *Id.* at 2393-410.

91. Randall, *supra* note 90, at 3-4.

92. *Id.* at 4.

93. *Id.* at 46.

94. *Id.* at 36 & nn.137-40.

95. 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).

96. 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

ethical rules, the attorney is at least obligated to consult with her client before making significant decisions,⁹⁷ 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 profit maximizers as well.

Prosecution by an attorney of a suit in his own interest, however, does not violate ethical rules. 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.⁹⁸ Many ethical rules are intended to ensure that an attorney act in a client's interest rather than in a self-interested way.⁹⁹ 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 it. A lawyer in such a position will not work unnecessarily hard to increase billable hours nor 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,¹⁰⁰ once the purchase of a claim is completed, there can be little concern that the ethical rules have been violated.

There are several potential objections to this line of reasoning. First, the argument is predicated on the belief that lawyers who own claims 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.¹⁰¹ 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, 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

relationship. See, e.g., Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

97. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2004).

98. See *Faretta v. California*, 422 U.S. 806 (1975).

99. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (generally prohibiting conflicts of interest with current clients).

100. Many commentators urge that ethical rules should 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).

101. See, e.g., *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting).

purchases provide. The intuition behind the adage is likely not that self-interest inherently clouds judgment. After all, all lawyers are presumably self-interested, 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. This will be particularly true 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 she is acting in her own interests. The practice of lawyers engaging in self-dealing could hurt the reputation of the profession.¹⁰² The argument may seem overstated, at least absent fraud—most people would recognize the possibility that a lawyer seeking to purchase a claim, no less than someone seeking to purchase a car, might be taking advantage of them—but recognition would not be sufficient to prevent abuse.¹⁰³ Moreover, we may care more about whether lawyers are taking advantage of clients than about whether car buyers are taking advantage of sellers. The legal context, though, offers a familiar (if sometimes expensive) solution: requiring independent representation.¹⁰⁴ 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

102. 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).

103. One argument is that tort victims may apply a high discount rate and thus accept low offers for claims. Teal 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 would want to maximize their returns and thus would seek out the private parties willing to pay the most for claims.

104. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(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").

adopted,¹⁰⁵ 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 prosecuting their own claims might have a greater incentive to commit a fraud upon the court, such as fabricating evidence or, less dramatically, seeking to misrepresent it. The ethical rules provide incentives for lawyers to act honestly, but these incentives are balanced by opportunities for financial and reputational gain. Increasing the amount at stake for attorneys in a given suit may well increase their incentives to perform well, as argued above, but it may induce them to go too far. Greater rewards could make the potential risks less weighty in the moral decisionmaking process.¹⁰⁶ The legal system, however, does not generally seek to remove the mere possibility that lawyers might be tempted into unethical conduct, such as by preventing lawyers from having any role in managing client funds and property.¹⁰⁷ To the contrary, it regulates lawyer conduct and imposes severe sanctions for violating ethical rules. There seems no justification for a prophylactic rule barring acquisition of claims simply because such acquisition might lead to marginal increases in the temptation to violate ethical rules.

Moreover, there is little empirical basis for the claim that lawyers' greater personal investment in claims would result in a marked increase in fraud. If this were so, then we would expect the legal system to respond. Perhaps there should be rules preventing lawyers from being overly invested in any one case,¹⁰⁸ 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. If legal ethics rules do not prevent self-representation in such cases, they should not prevent it in cases that would present less risk of fraudulent activity. One might argue that a rule prohibiting lawyers from purchasing claims is responsive to adverse selection, 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

105. Peter 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 1021 (discussing Choharis's argument).

106. 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.

107. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15 (allowing lawyers to participate in safekeeping property and regulating the means by which they do so).

108. 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 depend on a diversified portfolio of cases.

else,¹⁰⁹ and if they did, alienability might make unethical lawyers easier to identify and police.

Fourth, alienability may offend legal ethics precepts not because it will lead to abuses but because the attorney-client relationship itself has benefits. In *The Lost Lawyer*, Anthony Kronman rejects a purely instrumental view of the attorney's role.¹¹⁰ The ideal lawyer is a "lawyer-statesman,"¹¹¹ 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 deliberatively wise choice among them."¹¹² 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 they also may choose, in the present system, to hire lawyers who will not help them deliberate.¹¹³

Finally, one might contend that alienation of legal claims is objectionable because it may reduce the time period in which clients engage with their attorneys. But if this is a concern, then settlement should also be discarded. The settlement of a case means that the parties will no longer have the opportunity to seek the advice of their lawyers about it. This does not qualify even as a sound argument against settlement, however, because the purpose of legal ethics rules is not to mandate increased lawyer-client

109. 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.

110. Kronman characterizes this 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.

ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 123 (1993).

111. *Id.* at 11. Kronman adopts this phrase from Chief Justice Rehnquist. See William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986).

112. KRONMAN, *supra* note 110, at 129. Kronman 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.

113. 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. See *id.* at 165-352.

contact. Even to the extent that greater lawyer-client contact would be beneficial, the goal should be to encourage consultation before clients make decisions, not after they make decisions that lead to litigation. Similarly, while an inalienability rule might be seen as having the salutary effect of increasing lawyer-client contact, there are other, more direct routes to that goal with a greater chance of affecting primary conduct by clients.¹¹⁴

D. *Procedural Justice*

The previous Sections have considered normative bases for assessing an alienability regime. Even if an alienability regime does not offend any principle of morality or jurisprudence, however, people might find it offensive. Psychological dissatisfaction with a regime that permits alienability itself might provide a normative basis for prohibiting alienation. Moreover, we have already seen that under one view, corrective justice depends on whether litigants perceive the adjudicative system to be just, and the implications of commodification theory¹¹⁵ and legal ethics¹¹⁶ also may depend in part on psychological reactions. Psychological satisfaction with an alienability regime, however, is not easily analyzed, because it is an empirical question about a largely nonexistent practice. Different people presumably would react to the regime differently, and it would surely lower the esteem in which some people hold the justice system. Because the tastes of third parties for an alienation regime are not susceptible to empirical measurement, the best we can do is assess how litigants themselves would likely perceive that regime. To accomplish a preliminary analysis of this question, we can consider the literature on litigant satisfaction with the present adjudicative system and tentatively extrapolate.

This literature recognizes that accuracy and cost may not be the only relevant considerations in the design of a legal system. Psychologists John Thibaut and Laurens Walker were the first to recognize the independence of

114. For example, damages might be increased when a liable defendant acted without having first received an opinion from counsel that the defendant's actions would be acceptable. Patent law takes this approach, though the Federal Circuit is revisiting the issue. *See* *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 344 F.3d 1336 (Fed. Cir. 2003) (per curiam); Michael Abramowicz, *A Unified Economic Theory of Noninfringement Opinions*, 14 *FED. CIR. B.J.* 241 (2004) (explaining the role of noninfringement opinions in increasing deterrence and reducing the incidence of litigation).

115. The assessment of whether property is important to personhood appears to have a psychological dimension. *See supra* text following note 45. Commodification theory is a theory about *personhood*, and it thus depends on the behavioral traits of people.

116. Legal ethics is concerned with maintaining the appearance of the legitimacy of the system of justice, as well as with maintaining a system of justice that is in fact legitimate. *Cf., e.g.*, *MODEL CODE OF JUDICIAL CONDUCT* Canon 2 (2000) ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."). If alienation advanced a perception that the legal system was illegitimate, that itself would count as a reason to ban the practice.

what they called “procedural justice” from traditional considerations about the adjudicative process,¹¹⁷ and legal scholars like Jerry Mashaw have argued that adjudicative systems should take into account the “dignitary” interests of participants.¹¹⁸ Though scholars have not articulated how much of a tradeoff between dignitary values and accuracy is tolerable,¹¹⁹ 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, 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.

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 must be independently evaluated. 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 systems would result in participants sensing less procedural justice than they do in the present system.

By itself, this analogy 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. There may exist a perception that governmental resolution is appropriate for legal claims, while market resolution is appropriate for used cars. The analogy emphasizes, however,

117. 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).

118. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 169-221 (1985); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) [hereinafter Mashaw, *Administrative Due Process*]; Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

119. 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, *The Wrath of Roth*, 94 YALE L.J. 1529, 1534 (1985) (reviewing MASHAW, *supra* note 118). As Mashaw himself has noted, “To 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 render them nonjusticiable.” MASHAW, *supra* note 118, at 180.

that an alienation regime would not eliminate a process perceived as producing procedural justice. Rather, such a regime would supplement 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. As long as litigants would retain the right not to alienate, the existence of an alienation option would not necessarily be perceived as illegitimate, even by those who regard traditional adjudication as a right, particularly if the alienation regime itself is procedurally fair.

An important experimental conclusion of the procedural justice literature is that litigants will rate favorably systems in which they are given a fair amount of voice and control,¹²⁰ even independent of the effect of this control on the trial outcome.¹²¹ 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.¹²² A litigant who is given a chance to tell her story will often feel better about the process than one who is not, even if the court treats her story as irrelevant to its eventual disposition.

Alienation of a claim deprives a litigant of the chance to tell her story to one type of decisionmaker, a judge. But alienation provides a new class of indifferent decisionmakers, potential purchasers of legal claims. A litigant will be able to tell her story to these decisionmakers, and they will have an incentive, different from the judge’s but no less significant, to listen. In addition, the litigant may have some control over the process by which a decision is made. For example, she can choose which potential purchasers she will consider. In addition, a litigant may be able to choose the form in which she presents information to the potential alienators. Moreover, a

120. See, e.g., Robert J. Bies & Debra L. 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, 370-71 (1987).

121. Some commentators have criticized these conclusions, along with other significant conclusions of the procedural justice literature. See, e.g., Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 391 n.253 (1994) (offering numerous criticisms, including that participants in the relevant studies were given no meaningful control and that other data suggests that participants prefer adjudication through the use of advocates); Mashaw, *Administrative Due Process*, *supra* note 118, at 888 n.15 (arguing that the studies have not “isolate[d] perceptions of process . . . other than [their] potential to provide a favorable outcome” and concluding that “their account of what is at work in a favorable or unfavorable perception of processes seems rather muddled”). If indeed procedural justice only concerns considerations of accuracy and cost, then there would be no procedural justice objection to alienability. To make the case against alienability as strong as possible, I will assume that procedural justice is indeed independent of these concerns and that litigants do value process control.

122. See, e.g., LIND & TYLER, *supra* note 117, at 94-106, 186, 206-17.

regime permitting alienability does not affect a litigant's right to take a claim to trial, so the alienability regime only expands her choice set, affording additional means of controlling the litigation but still allowing her the traditional means of adjudication. From the perspective of process control, alienation appears superior to traditional adjudication.

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 his 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.¹²³ Even though litigants have ultimate control over settlement negotiations, and even though either they or their lawyers presumably tell their side of the story in such settlement negotiations, even litigants who agree to settlements do not emerge feeling particularly favorable toward the process.¹²⁴ Just as these results suggest that decisions made in the shadow of the law may not be equal to decisions made by courts themselves,¹²⁵ so too, one might argue, decisions made in

123. 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).

124. Lind and his coauthors 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 123, at 981.

125. 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 who proceed to trial:

[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 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 who settle may be different from parties who go to trial for reasons other than their ex ante perceptions of the fairness of the systems. Economic theory, after all, suggests that settlement does not occur randomly. 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

the market may not be equal in quality to decisions made in the present judicial system.

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 will react better to alienating claims to third parties than they would to settlements. Third parties will have strong incentives to treat litigants with dignity and respect. If a third party does not do so, after all, the litigant can refuse to cooperate with that third party; this is how consumers react to disrespect in markets for goods and services. In bilateral settlement negotiations, by contrast, the adversary has an incentive to challenge the litigant's account, and respectful treatment is not necessarily 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 one 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, for reasons such as expense, litigants will ordinarily forgo the dignity of the courtroom, they 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 settlements are more common than trials, alienation would more often substitute for settlements between the initial parties than for trials, and the apparent superiority of alienation to settlement is thus particularly relevant. This argument admittedly leaves open the possibility that a world without settlement might be superior in procedural justice terms to one that allows settlement, but once settlement exists, alienability provides an additional option for avoiding trial, without adversely affecting the right to trial.

that the outcome depended on bargaining power as much as on the merits. They might have been even more dissatisfied with the outcome, however, if their cases had gone to trial. Another selection story points in the opposite direction. Because cases 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 and his coauthors draw from their data must be even more tentative than they make them out to be.

II. THE ECONOMICS OF CLAIM ALIENATION

A. *The Economics of Inalienability*

In modern economics scholarship, inalienability receives little attention or encouragement. Economic science, after all, is grounded in the belief that markets are ordinarily efficient as a result of the invisible hand, and even where market failures occur, the typical response recommended by economists is the imposition of an appropriate tax.¹²⁶ Legally minded economists have considered rules of inalienability, but even the foundational article on the subject treats it almost as an afterthought. Guido Calabresi and A. Douglas Melamed's article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*¹²⁷ 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. Despite its presence in the title, though, inalienability receives relatively little attention.¹²⁸ 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.

Nonetheless, the arguments that Calabresi and Melamed suggest on behalf of inalienability are the most general and salient, and so it is worth considering their analysis first. The most important economic basis for inalienability they identify is externalities. One might, for example, prevent a sale of land to a polluter on the ground that his activities would affect not only him but the neighbors.¹²⁹ Because "freeloader and information costs" may make it "practically impossible" for neighbors to persuade the potential seller not to sell,¹³⁰ inalienability may be the most efficient result.¹³¹ 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 odd, at the least, to create a rule to ban a transfer of property as a proxy for

126. Taxes to counter negative externalities are often called Pigouvian taxes, after A.C. PIGOU, *A STUDY IN PUBLIC FINANCE* (3d ed. 1947).

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

128. Calabresi and Melamed devote fewer than ten pages to the topic, *see id.* at 1111-15, 1123-24—not an insignificant number, but small considering that their analysis is probably the seminal economic work on inalienability.

129. *See id.* at 1111.

130. *Id.*

131. 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.

banning the activity.¹³² Even if there were some parties who 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 strong reasons to suspect that buyers are much more likely than the original owners to impose negative externalities and that the government will not be able to monitor activity adequately.

There may be externalities in lawsuits, such as costs imposed upon third parties summoned to appear before the court or benefits to third parties from improved deterrence.¹³³ 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 would fail to internalize the costs that it imposed on the other. Settlement negotiations are akin to a bilateral monopoly problem or, in multiparty cases, an empty core bargaining game.¹³⁴ A party may try to obtain leverage in such negotiations by making unreasonable discovery demands on other parties.¹³⁵ Or, a party may litigate a case to the hilt, expending more money on its prosecution of the case than the amount at stake ordinarily would demand, in order to force the other party to do the same. This might allow a party to establish a reputation for aggressive litigation that will help it obtain settlements in other cases. Parties purchasing claims might be more likely to act in this way, the argument goes, because their reputational capital will be more at stake.

132. 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 it. An inalienability rule may then be the only way of maintaining the status quo of no pollution.

133. 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).

134. 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. 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: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 54-58 (2000).

135. A request for discovery imposes costs on an opponent that make settlement more attractive relative to trial and thus increases the bargaining power of the requestor. See 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).

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, and parties may select lawyers with reputations for aggressiveness.¹³⁶ 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 endanger her ability to threaten credibly by bluffing, because every once in a while a bluff will be called. For infrequent litigants, bluffing may be a cheaper and equally effective approach, especially with risk-averse opponents. 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.¹³⁷ 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 eliminate the possibility that purchasers of legal claims would be more litigious than the original claimants, there seems little reason for this to be the case.

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 tailored approach would be to estimate the amount of the externality, perhaps as a function of legal expenditures, and charge claim purchasers that amount, just as other externalities are addressed through taxes. I do not mean to advocate a tax on claim sales. If it is desirable to crack down on certain abusive practices in litigation, charging only people who sell their legal claims is a woefully under- and overinclusive means to accomplishing this. Many litigants who do not sell their claims are

136. An argument that such selection would be ineffective in intimidating opposing litigants into settlement is that lawyers have ethical duties to clients, including the duty to present them with settlement offers. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2004). 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 rely heavily on advice of counsel in determining whether to settle a case.

137. One possible reason for this, however, is that state law sometimes permits sanctions against insurance companies that fail to settle coverage disputes. See, e.g., Thomas P. Billings, *The Massachusetts Law of Unfair Insurance Claim Settlement Practices*, 76 MASS. L. REV. 55, 66 (1991). Another explanation is that it is costly to challenge fraudulent or exaggerated claims, and so insurance companies respond by only offering contracts that systematically undercompensate the insured. See Keith J. Crocker & Sharon Tennyson, *Insurance Fraud and Optimal Claims Settlement Strategies*, 45 J.L. & ECON. 469, 470 (2002) (arguing that this is particularly true in contexts in which it is easier for claimants to exaggerate losses, as a way of deterring fraud).

aggressive, and presumably some claim purchasers would be eager to minimize litigation costs and work cooperatively. Nonetheless, it would make more sense to allow claim sales and impose a tax on frequent litigants than to bar claim sales altogether, because it is repeat-player purchasers who prompt the possibility of greater aggressiveness. If a tax seems like a blunt response to the hazard of litigation abuse, a ban on alienation is even blunter. There are myriad proposals to reduce litigation abuse,¹³⁸ and while these approaches may have problems, a prohibition on claim sales seems among the least tailored remedies.

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 seeing slaves, paupers, or persons who die because they have sold a kidney."¹³⁹ Calabresi and Melamed label this category of cases as involving "moralisms,"¹⁴⁰ and this word helps explain why the argument is unlikely to be applicable to the sale of legal claims. We have already considered and rejected the moral arguments against claim sales, and concern that people might be bothered by any perceived immorality in such sales seems like an even smaller problem. Sale of legal claims might well make some people uncomfortable, but this discomfort seems like a small public policy consideration, even within the realm of concerns about the legal system.

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.¹⁴¹ Yet there is little reason to

138. 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).

139. Calabresi & Melamed, *supra* note 127, at 1112.

140. *Id.*

141. 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." *Id.* at 1113-14. This is distinguished from "self paternalism," in which a person is precluded from selling an asset as a way of vindicating his earlier desire to tie his hands and prevent a later sale. *Id.* at 1113. 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

think this argument applicable to sale of legal claims. 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 sellers need protecting could be made in any market setting. It is particularly inappropriate here 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 produce babies and richer those who through some nonmarket device get free an ‘unwanted’ baby.”¹⁴² This distributional argument seems weak in the absence of a reason to care especially about those who can cheaply produce babies, but one might worry if claim alienation benefited the rich at the expense of the poor. If anything, however, claim alienation should disproportionately benefit the poor by making it more feasible for the liquidity constrained to undertake litigation.

Calabresi and Melamed, of course, do not have the last word on the economics of inalienability. Susan Rose-Ackerman has offered a rich and detailed elaboration of inalienability,¹⁴³ while Richard Epstein has offered some theories of his own in commenting on Rose-Ackerman’s work.¹⁴⁴ Rose-Ackerman begins by offering a taxonomy of entitlements that structures her later analysis. Entitlements may differ with respect to “the question of who may hold the entitlement,” namely “(a) anyone, (b) only some specified groups, (c) everyone simultaneously, or (d) no one.”¹⁴⁵ Entitlements also may differ with respect to whether the law may impose restrictions on the exercise of the entitlement, by permitting, requiring, or forbidding some activity.¹⁴⁶ Finally, entitlements may differ with respect to whether transfers through sale and gift are permitted.¹⁴⁷ In the case of a

potential defendant would engage in an act, such as committing a tort, leading to the plaintiff 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.

142. *Id.* at 1114. Calabresi and Melamed argue that the possibility “suggests that direct distributional motives may lie behind asserted nondistributional grounds for inalienability.” *Id.*

143. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

144. Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

145. Rose-Ackerman, *supra* note 143, at 933.

146. *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.*

147. With this category, there are four possibilities, because whether sales are permitted or forbidden may be independent of whether gifts are permitted or forbidden. For example, Rose-

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;¹⁴⁸ and, most relevantly, that the claim cannot be bought or sold.¹⁴⁹

Given this taxonomy, the most relevant of Rose-Ackerman's explanations for inalienability can be applied: imperfect information. 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," she writes, "then ideally one would design a collection system that gives contributors an incentive to reveal any past cases of hepatitis."¹⁵⁰ 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 those 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.¹⁵¹ The analogy implies, however, that if we want only plaintiffs with good claims to bring lawsuits, we should allow transfer of claims through gift. Indeed, because 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,¹⁵² and it might succeed at weeding out frivolous claims. But the distance between such a scheme and existing legal practice suggests that inalienability rules cannot be explained as intended to limit the courts to altruistic lawsuits, though it is plausible that inalienability rules decrease the incidence of frivolous suits.

Another analogy is to the Homesteading Acts,¹⁵³ which allowed settlers to acquire land for a small fee if they worked the land for five years but which prohibited sales or gifts of the land within that five-year period. Rose-Ackerman's explanation for this approach, as opposed to a straight

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.

148. *See, e.g.,* *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (8th Cir. 1979) (discussing the equitable doctrine of laches).

149. *See supra* text accompanying notes 7-8.

150. Rose-Ackerman, *supra* note 143, at 945-46.

151. *See infra* Subsection II.C.1.

152. For example, plaintiffs might be required to donate those lawsuits they wished to alienate to a government corporation that would then auction them 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 she derived some utility from helping the public or at least from hurting the alleged wrongdoer.

153. Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed 1976); Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

auction,¹⁵⁴ is a network externality story.¹⁵⁵ Each inhabitant produced benefits for other inhabitants,¹⁵⁶ just as each owner of a VCR produces benefits for other owners by encouraging the development of video stores.¹⁵⁷ 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.¹⁵⁸ Although I consider later whether allowing alienability of claims is likely to have an adverse effect on precedent,¹⁵⁹ once again completion of the analogy reveals its flaws.¹⁶⁰ Our legal system does not penalize litigants for settling before trial or give bonuses to those 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 if the total costs of litigation were lower,¹⁶¹ and this belief seems consistent with the operation of the legal system.

154. 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) (arguing that it became increasingly difficult for the government to sell land in remote and inhospitable areas).

155. 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*, J. ECON. PERSP., Spring 1994, at 133 (evaluating the definition of network externalities). Rose-Ackerman characterizes the story as a prisoners' 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 143, at 958.

156. The benefits produced by an increased number of settlers included assistance in emergencies, sharing of labor and equipment, and population concentration that permitted greater political and economic power. Rose-Ackerman, *supra* note 143, at 957-58.

157. See, e.g., Lemley & McGowan, *supra* note 155, at 592 (discussing network effects in the VCR market).

158. Marcel Kahan and Michael Klausner have emphasized network externalities in the choice of corporate form and contract terms, because 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).

159. See *infra* Subsection II.C.2.b.

160. The analogy may be normatively flawed as well. Epstein argues that no inalienability rule was needed to ensure efficient land use because less restrictive alternatives existed, like selling only large parcels so that speculators would internalize the costs of overly slow development. Epstein, *supra* note 144, at 989.

161. It may well be that society would like lower litigation costs but would rather achieve this objective through fewer suits being brought than through a smaller percentage of cases being tried. Nonetheless, the absence of incentives to bring cases to trial at least suggests that under current conditions, settlement should not be discarded. Those who decry settlement thus seem to be advocating a minority viewpoint. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised"); cf. Leandra Lederman, *Precedent Lost: Why*

Rose-Ackerman also defends the inalienability aspects of voting rules and mandatory jury service. Voters cannot sell their votes;¹⁶² venirepersons cannot hire others to take their spots on a jury. The concern is that allowing alienation of votes and jury service would affect not only seller and purchaser but also society at large.¹⁶³ The point, which lies at the intersection of economic and democratic theory, describes a negative consequence of rent-seeking behavior. Even if the purchasing of votes entails relatively few transaction costs, thus meaning that there is no direct rent-seeking effect, the danger is that those votes might be used for personal benefit at the expense of economic efficiency more broadly. Allowing vote sales might be more efficient than allowing lobbying, but there is at least the possibility that vote sales would lead to inefficient results that would not be achievable with other forms of rent seeking.

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 and thus a negative externality. The problem with this argument is that our legal system is adversarial; it is based on the premise that litigants 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.¹⁶⁴ 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 they 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

Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 NOTRE DAME L. REV. 221 (1999) (constructing a model illustrating the cost of settlement in terms of the production of precedent).

162. 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).

163. Rose-Ackerman explains that "the value of a representative democracy depends upon citizens making responsible, well-informed choices." Rose-Ackerman, *supra* note 143, 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, she 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.

164. Private prosecution does occur in some other countries, such as the United Kingdom. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 365-66 (1986).

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.¹⁶⁵ 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.¹⁶⁶ In game-theoretic terms, parties in an iterated relationship may be able to resolve disputes relatively cheaply because of their mutual interest in cooperating beyond the context of any particular dispute.¹⁶⁷ Such reasoning may in turn justify default rules, such as the general rule that easements in gross are inalienable.¹⁶⁸ This reasoning, however, does not appear to justify inalienability of tort claims involving parties who 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, so 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*

1. *Alienation by Plaintiffs*

A simple argument for allowing plaintiffs to sell claims for money damages is that they will be able to recover more quickly.¹⁶⁹ Instead of waiting for the litigation process to conclude, a plaintiff can receive cash from anyone willing to buy the claim and may use such cash either to pay

165. The construct of the hypothetical contract is often used in tort theory for contexts in which ex ante contracting would be impractical. See, e.g., Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 357-60 (1988).

166. Epstein, *supra* note 144, at 982.

167. 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 a contracting party would temper its 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.

168. Epstein, *supra* note 144, at 984. Epstein acknowledges, however, that “there is some question whether the prohibition is necessary to protect the interest of the landowner.” *Id.*

169. See, e.g., Choharis, *supra* note 1, at 444.

for the costs being sued for or for other purposes. It might seem that plaintiffs should be indifferent between receiving an immediate payment and receiving a later one, as long as the court provides for pre- and postjudgment interest. Even jurisdictions that provide for such interest, however, do not tailor the amount of interest awarded to a particular plaintiff's discount rate.¹⁷⁰ Some tort plaintiffs face liquidity problems, particularly if they face unexpected bills attributable to the tort, such as medical expenses, and their discount rate may be higher than the prejudgment interest rate. As 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.¹⁷¹ Sale of a claim, of course, does not eliminate any of these risks, but merely transfers them to another party. A tort claim, however, will often 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 to that on the seller. Even if there were 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, because the plaintiff and purchaser would have to negotiate a fee that benefited both.

The plaintiff's reduction in risk may represent an increase in the accuracy of the legal system in providing compensation to tort claimants. One advocate of allowing sales 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."¹⁷² By chance, some juries may be more sympathetic to a plaintiff than others, in determining both the validity of the plaintiff's claim and the size of the award. Similarly, different judges (or even the same judge on different days) may resolve the same legal issue

170. See, e.g., TEX. FIN. CODE ANN. § 304.003 (Vernon 1998 & Supp. 2004-2005) (explaining the calculation of postjudgment interest).

171. The inconsistency of both punitive 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).

172. Choharis, *supra* note 1, at 468.

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 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 be expected to decide. If accuracy is defined as what the average decisionmaker would decide,¹⁷³ sales of claims may well produce more accurate results than complete litigation.

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 their expected value. Perhaps buyers will systematically fail to notice some feature of the claim that may affect its value, even though that feature ultimately would be discovered in litigation. Buyers, however, will have incentives to price claims accurately, particularly if there are many prospective buyers of a claim. Plaintiffs will have incentives to share any information that might show that their claims are more valuable than otherwise might be thought, and buyers will have incentives to seek out claim weaknesses. Sometimes, some information that would affect claim valuation in a trial might not be revealed, 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.”¹⁷⁴ Because purchasers are likely to be parties who can prosecute legal claims efficiently, the net value of the claim is higher with those purchasers than when tort victims prosecute the claim 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.”¹⁷⁵ The opportunity to alienate a claim to any third party rather than only to the defendant should make the plaintiff better off or at least no worse off, absent plaintiff irrationality. Although sale prices might be lower than judgments, the difference presumably would reflect the cost of prosecution, including risk.

An opponent of alienability might argue that plaintiffs can already achieve many of the benefits of selling claims by hiring attorneys on

173. 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).

174. Choharis, *supra* note 1, at 480.

175. *Id.* at 481 (footnote omitted).

contingency fee.¹⁷⁶ Indeed, hiring of contingency fee counsel reduces the risk to plaintiffs of bringing litigation, because at least the plaintiffs need not worry about losing the lawsuit and being out attorney's fees. Contingency fees, however, do not eliminate the risk of litigation altogether, or even very much. Moreover, markets for contingency lawyers exhibit little price competition, in part because litigants may interpret a low contingency fee as a signal of a low-quality lawyer.¹⁷⁷ In addition, contingency fees can create tensions between optimal strategies for the lawyer and the client.¹⁷⁸ A lawyer may have a greater incentive to settle a case if he will bear the cost of preparing the case¹⁷⁹ or a lesser incentive if he is less risk-averse than the client,¹⁸⁰ and the incentives will cancel out only by happenstance.¹⁸¹ Professional responsibility rules seek to ensure that a lawyer will act in the client's best interest, 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 new owner of the claim will be acting entirely in her own interest.¹⁸² Although she may hire a lawyer to actually prosecute the claim rather than pursuing 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 them. The process of seeking out a contingency fee lawyer may provide some information to plaintiffs about whether they have viable claims, as contingency fee lawyers will reject claims 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

176. Cf. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 631-32 (1995) (noting parallels between contingency fees and claim sales and suggesting that nonlawyer competition through claim sales may reduce problems associated with contingency fees).

177. See Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 101-02 (2003).

178. See, e.g., Painter, *supra* note 176, at 670-78.

179. See, e.g., Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 200-02 (1987); Andre L. Smith, Comment, *Consumer Boycotts Versus Civil Litigation: A Rudimentary Efficiency Analysis*, 43 HOW. L.J. 213, 226 (2000).

180. 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, 110-11.

181. 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).

182. The price of the claim will, of course, reflect the cost of prosecuting it. One recent commentator has suggested that courts setting attorney's 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).

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 who can maximize its value, taking into account the value of the third party's time. A contingency percentage offered, by contrast, is not necessarily a good indication of the likelihood of success of a particular contingency fee lawyer.¹⁸³ Contingency fees are remarkably constant in particular geographic regions across lawyers,¹⁸⁴ and there is thus no obvious relationship between fees and lawyer quality.¹⁸⁵ 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.¹⁸⁶

Sale of legal claims also may produce more efficient lawyering than contingency fees because purchasers of large claims may be able to obtain financing more easily than contingency fee lawyers.¹⁸⁷ 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 assume. Although large risks are commonplace in the world of business, where, for example, venture capitalists are willing to suffer a number of losers in exchange for one winner, lawyers in firms may not be well diversified. Professional responsibility rules may limit the ability of law firms to securitize claims or to obtain other forms of speculative financing.¹⁸⁸ Because the purchasers of legal claims would be prosecuting those claims on their own behalf, these restrictions presumably would not apply. A corporation could easily be established to prosecute a single large claim, and its shares could even be publicly traded, to further facilitate

183. Contingency 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. See Brickman, *supra* note 177, at 96-97 (discussing the difficulty that contingency fee plaintiffs face in choosing lawyers).

184. Brickman, *supra* note 177, at 78-86 (discussing the uniformity of contingency fee pricing).

185. Better, or more reputable, lawyers tend to earn more money not because they charge higher contingency fees but because they take on more valuable cases. See Michael Abramowicz, *How Lawyers Compete*, REGULATION, Summer 2004, at 38, 39. The contingency fee system thus depends on clients identifying the best lawyers and lawyers identifying the best clients, but does not itself promote the efficient allocation of clients to lawyers.

186. Prospective assignees, meanwhile, are unlikely to purchase claims with 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.”).

187. Choharis, *supra* note 1, at 444-45.

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

diversification of 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 salaries rather than contingency fees to lawyers—but the possibility of such financing might increase the net receipts of many plaintiffs.

Such creative financing might be particularly important in mass litigation involving many plaintiffs suing a single or small number of defendants. One justification for the class action device is that it serves to consolidate claims within a single law firm. A concern that the Supreme Court has voiced about class actions is that when the same lawyer serves different plaintiffs, she will face conflicts of interest and may treat the plaintiffs inequitably.¹⁸⁹ One answer to this dilemma is subclassing,¹⁹⁰ 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 related claims, assuming this 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 be no concern with conflicts of interest, because claim owners would press only claims that they owned. Competition among purchasers would limit the risk that some plaintiffs would be treated better than others for reasons extrinsic to the merits of their claims. Claim sales thus may allow for efficient prosecution of claims when the class action device is unavailable due to conflict of interest.

These considerations all suggest that the sale of claims should be allowed because it would benefit plaintiffs. Defendants, unless vindictive, should not mind that the sale of a legal claim allows a plaintiff to transfer risk. Nevertheless, if transfers of claims allow plaintiffs to obtain better representation or to bring claims that otherwise would not be worth bringing, defendants are made worse off (though they might be better off in a regime that also allowed defendants to alienate claims). It might thus seem that 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 analyzing benefits to plaintiffs provides an incomplete analysis, but it does not counter any of the arguments for the sale of claims.

Moreover, the goal of the legal system is not to benefit plaintiffs and defendants equally but to compensate plaintiffs and deter potential

189. See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997).

190. See, e.g., *id.* at 626; *SEC v. Drexel Burnham Lambert Group* (*In re Drexel Burnham Lambert Group*), 960 F.2d 285 (2d Cir. 1992) (approving settlement involving subclasses).

tortfeasors who later become defendants. Allowing the sale of claims may increase deterrence if some plaintiffs who do not wish to bring legal actions themselves are willing to sell their claims. This may 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,¹⁹¹ they generally do not depend on the probability of detection and prosecution,¹⁹² so encouraging the filing of all claims may be a more feasible way of improving deterrence, one goal of a legal system. 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.

2. Alienation by Defendants

Although the literature to date has focused only on alienation by plaintiffs, the arguments apply also to alienation by defendants, i.e., to payments by defendants to third parties to take over their claims. There are two significant caveats, though both arguments suggest only that the benefits of alienation may be somewhat smaller for defendants, not that benefits do not exist. First, defendants on average may face lesser liquidity constraints than plaintiffs, at least in tort cases. Second, the defendant may be able to spend the sum of money whose ownership the plaintiff has called into question, at least until a final judgment orders the defendant to pay the money to the plaintiff. Where the defendant's liquidity is at issue, however, the plaintiff may have limited ability to stop the defendant from spending the money, pursuant to the provisional remedies of attachment and garnishment.¹⁹³

Translation of most of the specific reasons discussed above to the defendant context verifies the intuition that defendants also could benefit

191. This can occur, commentators have argued, if the punitive damages multiple is the inverse of the probability of detection. See, e.g., Robert D. 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).

192. See W. Kip Viscusi, *Punitive Damages: How Jurors Fail To Promote Efficiency*, 39 HARV. J. ON LEGIS. 139, 159-63 (2002) (finding that mock jurors cannot reliably follow jury instructions that require them to use the multiplier approach).

193. See generally LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 598-601 (3d ed. 2004) (providing an overview of the use of these provisional remedies).

from alienation. Just as plaintiffs might benefit from recovering money more quickly, so too might defendants benefit from the potentially faster resolution of claims in the market than in litigation. Facing a lawsuit with an uncertain judgment may hamstring a corporation's ability to obtain financing in the capital markets, because lenders may be concerned that their loans will end up going to pay the plaintiffs and that the defendant will be unable to repay them. In some cases, a corporation that alienates a claim may be able to demonstrate to creditors that it will succeed in avoiding bankruptcy. Even for corporations not on the verge of bankruptcy, litigation may represent a significant risk that is difficult to diversify, just as legal claims represent significant assets in plaintiffs' portfolios. The amount sought by any individual plaintiff may be small relative to the assets of a defendant, but if many plaintiffs bring similar suits against the defendant, then its losses from the suits are likely to be correlated. To the extent that a defendant's liability may depend especially on the decision of a single court, because it might set a significant precedent, for example, alienation may increase the accuracy of the finding of the defendant's liability, just as with the plaintiff's.¹⁹⁴ In addition, alienation will steer defendants' as well as plaintiffs' claims toward those who can represent them most efficiently. Alienation by defendants thus might harm plaintiffs, just as the reverse is true, but a goal of the legal system is to avoid overdeterrence and thus to encourage meritorious defenses, and the same arguments for making litigation more efficient apply.

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 Subsection 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 might otherwise think, but the argument is also important because it is likely to make other economic problems with alienability more severe.¹⁹⁵ In particular, the danger that alienation of claims might interfere with legal process or discourage settlement, as explained in Subsections 1 and 2, is 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 produce

194. See *supra* notes 172-173 and accompanying text.

195. 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.

considerable benefits, costs might exceed benefits in the thin trading markets that adverse selection problems are likely to produce.

1. *The Lemons Problem*

a. *The Theoretical Problem*

A market for claims is likely to be beset by an adverse selection or “lemons” problem.¹⁹⁶ Just as potential sellers of used cars have better information about the quality of their vehicles than can be assessed easily by other parties,¹⁹⁷ so too do the original parties to a dispute have unique access to information about their claims. Thus, if alienation is allowed, parties who choose to alienate their claims will not be a random sample of all parties, but those who 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 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 those 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 steeper price discounting by buyers, more owners deciding not to alienate their claims, and so on.

Adverse selection can cause markets to unravel completely,¹⁹⁸ or the effect can be more modest, with an equilibrium in which some cases are alienated and some cases are not. 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. Similarly, 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 is commonplace.¹⁹⁹ A party might, for example,

196. The seminal article is George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

197. *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.”).

198. *Id.* at 490.

199. 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.

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.

A purchaser of a legal claim could insist that the alienator promise to turn over all relevant information and agree to pay appropriate damages for failure to turn over such information.²⁰⁰ This would limit the possibility that an alienator could hide a smoking gun. Such contracts, however, might be difficult to draft and enforce. If a plaintiff is to reduce the risk of uncertainty from trial, she could not retain all risk that new information might affect the value of the claim. The plaintiff at least presumably would want to limit such an agreement to information that she knew about. Knowledge, however, may be difficult to verify *ex post*, and much knowledge about the strength of a case consists of intuitions and inferences rather than hard facts. In this sense, the market for legal claims again would be like the market for used cars. A car owner might know whether the car is a lemon, but such knowledge might be difficult for a subsequent purchaser of a car to prove.

Aggravating the adverse selection problem in the legal context is that one form of alienation is permitted—settlement. A third party who purchases a plaintiff's claim not only must 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 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. Even if the third party strongly believed that the defendant was wrong or unwilling to settle for other reasons, the fact of the defendant's prior reluctance to settle 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

200. See *infra* text accompanying note 255 (discussing this issue in the context of a mandatory-alienation regime).

money to verify legal claims, such as by investigating background facts and soliciting affidavits before agreeing to alienation. Such verification, however, is likely to be expensive, and the cost may be prohibitive if the original party retains the right not to alienate the claim at all.²⁰¹

b. *A Simulation Model*

Adverse selection is thus likely to pose a substantially more severe obstacle to alienation than asymmetric information generally poses to settlement. There may, however, be some cases in which third parties are more optimistic than the litigants from whom they would alienate, or in which third parties have substantial advantages in litigation costs. Perhaps in these circumstances, the adverse selection problem can be overcome. To better evaluate the relevant dynamics, I designed a relatively simple simulation featuring a plaintiff, a defendant, and a third party who play a litigation game.²⁰²

Each time the game is played, the computer chooses, from a uniform distribution between 0 and 1, the probability that a decisionmaker would eventually find for the plaintiff, as well as the actual case outcome based on this probability. The players do not know these numbers, but each estimates, with some error, the probability. In some fraction of cases, the plaintiff or the defendant has secret information about the likely outcome of the case, and that party's estimate then moves halfway to the actual outcome (0 or 1). In the game, each player selects a price for the claim based on her optimal strategy.²⁰³ If the defendant's price is the highest, then the claim is settled at that price, and no litigation costs are incurred. If the third party's price is the highest, then the claim is alienated at that price, and the third party and the plaintiff bear fixed litigation costs. If the

201. 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).

202. The C++ source code for this simulation is available on request from the author.

203. Optimality is determined by an iterative process repeated over 200 rounds. In each round, each player plays the game 5000 times and tests out three strategies for announcing a price based on the estimate: a baseline strategy, a strategy to announce a slightly higher price than the baseline, and a strategy to announce a slightly lower price than the baseline. (Each player also has a separate set of strategies for situations in which she has received secret information.) The most effective of these strategies becomes the player's new baseline, and this baseline strategy is then used against the other players when they choose their strategy in each round. This approach does not guarantee a unique equilibrium for any given set of parameters, because each player's strategy depends on the strategy of other players. As a result, the entire simulation must be run repeatedly to produce relatively consistent results.

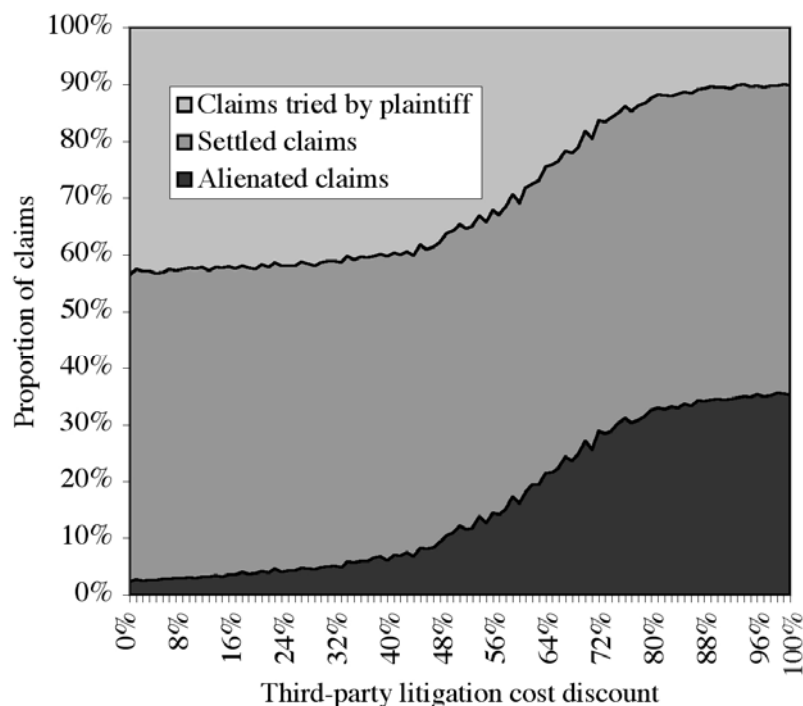
plaintiff's price is the highest, there is no settlement or alienation, and the plaintiff and the defendant thus bear litigation costs.

Figure 1 illustrates the result of the simulation for one set of plausible parameters.²⁰⁴ The *x*-axis represents the litigation-cost discount of the third party; at the left of the *x*-axis, the third party bears the same litigation cost as the plaintiff or the defendant, while at the right of the *x*-axis, the third party bears no litigation cost at all. The *y*-axis reflects the proportion of cases that are tried by the plaintiff, settled, or alienated and tried by the third party. The figure reveals that alienation indeed is rare, though not entirely absent, when the litigation costs of the third party are comparable to those of the plaintiff and the defendant. Only when the third party's litigation costs fall to about half of those of the plaintiff and the defendant does the alienation rate rise dramatically, largely without decreasing the settlement rate. It would be hazardous, of course, to infer too much from such a simple simulation.²⁰⁵ The simulation, however, demonstrates how adverse selection can thwart third-party alienation, as well as how very strong third-party advantages may at some point create a tipping point where alienation becomes quite common.

204. In this simulation, the lawsuit was worth 1.00 to the plaintiff if the plaintiff won. The plaintiff and defendant each bore litigation costs of 0.10 if the case was settled. The plaintiff and the defendant had a 0.2 probability (each independent of the other's probability) of having secret information about the case; thus, if a plaintiff's initial estimate were 0.5 in a case that the plaintiff in fact would win, then twenty percent of the time secret information would increase the plaintiff's estimate to 0.75. Placing aside the cases in which the plaintiff or the defendant has secret information, each of the three parties estimates the probability with a noise factor that produces an average absolute error in the estimate of the plaintiff's success of 0.10. To produce Figure 1, the simulation was run 100 times and the results averaged.

205. In experimenting with parameters, increasing the accuracy of the parties' ability to estimate the probability of the plaintiff's victory led to the increase in alienation visible in Figure 1 occurring with more modest litigation-cost discounts for the third party; reducing estimate accuracy had the reverse effect. Thus, when parties can estimate case outcomes relatively well, and there is therefore only a small probability of asymmetric valuations, only a relatively modest third-party litigation-cost advantage is needed to simulate creation of a market for alienation. Increasing the proportion of cases in which the plaintiff and defendant possessed secret information tended to flatten out the curve in Figure 1. That is, there was more alienation than in Figure 1 in cases in which third parties had litigation costs almost as high as the litigants, and there was less alienation than in Figure 1 in cases in which third parties had much lower litigation costs than the litigants.

FIGURE 1. A SIMULATION ANALYSIS OF ALIENATION



c. Empirical Clues

How robust a market would be, given the abolition of restrictions on alienation, is an empirical question and currently an 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 Massachusetts and Texas, provides the most powerful evidence that abolition of restrictions would not lead to robust claim markets. This evidence, however, is equivocal, because of the absence of clear law authorizing business associations actively to seek out legal claims for purchase.²⁰⁶ As noted earlier, in Massachusetts, the courts have seemed to suggest that

206. One context in which alienation may occur increasingly frequently is in shareholder derivative suits. The Delaware Court of Chancery recently allowed the assignment of legal claims concerning a merger from an unidentified number of minority shareholders to a single minority shareholder. See *In re Emerging Commc'ns, Inc. S'holders Litig.*, No. CIV.A. 16415, 2004 WL 1305745, at *29 (Del. Ch. May 3, 2004, revised June 4, 2004). The assignment, however, occurred before the merger agreement, see *id.* at *1, potentially alleviating asymmetric information concerns.

syndication of lawsuits might be legally problematic,²⁰⁷ and the prospect of barratry prosecutions might deter creation of such a business in Texas.²⁰⁸ Even if there are strong reasons to suspect that such a business would withstand legal scrutiny, the risk might make it inadvisable to start one. The business that succeeds in such a legal challenge would bear the cost of litigation, but presumably would not be able to prevent other businesses from free riding on its litigation successes.²⁰⁹ It is thus difficult to determine whether the current absence of alienation in relatively friendly jurisdictions is a result of adverse selection or of legal uncertainty.

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*. Purchase of liability insurance is common despite adverse selection, but asymmetric information is likely to be greater when a legal claim has already arisen. In principle, a company could sell insurance on a particular claim, thus allowing a defendant to reduce the risk of litigation by transferring it onto a relatively risk-neutral party, but such transactions seem rare. With retroactive insurance, the price of policies would depend on the facts of individual cases, and insurance companies would agree to defend claims and pay damages in exchange for receiving the policy premium.²¹⁰ I have found no statutes prohibiting retroactive insurance, and there are at least occasional purchases of retroactive insurance, typically in the form of reinsurance by insurance carriers that face losses.²¹¹ The only liability insurance widely available, however, excludes causes of action that arose before the insurance was purchased.²¹²

Perhaps the most famous example of the purchase of retroactive insurance reveals both the unique circumstances in which it is likely to be purchased and the hazards involved. After a 1980 fire in Las Vegas's MGM

207. See *supra* note 12 and accompanying text.

208. See *supra* notes 15-18 and accompanying text.

209. This may be an example in which the prospect of second-mover advantages has deterred the creation of a business. See F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 708-10 (2001) (noting that second-mover advantages may provide a justification for patent protection). Patent protection appears unlikely because the idea of buying legal claims is "obvious" in the patent law sense. Cf. Choharis, *supra* note 1, at 479-91 (identifying the possibility that a business "Torts 'R' Us" might buy legal claims, thus potentially destroying nonobviousness and thereby preventing subsequent issuance of a business method patent on buying legal claims).

210. Liability insurance policies generally impose on the insurer a duty to defend. See, e.g., *Beckwith Mach. Co. v. Travelers Indem. Co.*, 638 F. Supp. 1179 (W.D. Pa. 1986).

211. See, e.g., Andrew Bolger, *Fast Fix for a Complex Deal*, FIN. TIMES, Sept. 11, 2001, Survey: Reinsurance, at VI (reporting that Berkshire Hathaway had secured a \$2.4 billion retroactive reinsurance premium for a major U.K. company).

212. See, e.g., KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 395 (3d ed. 2000) (providing a sample commercial general liability coverage policy covering only bodily injury or property damage during the policy period).

Grand hotel killed more than eighty people,²¹³ the insurer purchased reinsurance.²¹⁴ Given concerns about adverse selection, it should not be surprising that liability was considered certain, but the original insurer faced some risk from uncertainty about when payouts would occur.²¹⁵ For a retroactive insurance contract to be consummated, there must be enough uncertainty to justify the administrative expense of the purchase of insurance, but little danger of asymmetric information, and the uncertainty about payout dates thus made this litigation seem to be a good candidate for retroactive insurance. Eventually, however, the reinsurance contract led to a protracted and expensive coverage dispute.²¹⁶ Issuers of retroactive insurance will presumably want to protect themselves from adverse selection with carefully drafted contract language, but sometimes even careful drafting will not prevent coverage disputes.

The absence of retroactive 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 retroactive insurance for defendants. Large corporations, for example, may be relatively risk-neutral, especially because they are generally held by shareholders in diverse portfolios,²¹⁷ and such corporations may more often be defendants than plaintiffs, especially in tort suits.²¹⁸ 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 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. There will, however, be some cases that do not settle, if one party has an

213. See Pamela G. Hollie, *Hundreds Are Injured as Blaze Traps 3,500 on the Upper Floors*, N.Y. TIMES, Nov. 22, 1980, at A1.

214. See Marilyn Ostermiller, *Changing the Rules for Discounting*, BEST'S REV., June 1997, at 34, 35.

215. *Id.*

216. 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, § 4 (Business), at 1.

217. 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).

218. 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 might seem to suggest that defendants are simply less risk-averse and would fully alienate claims 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).

unrealistic expectation of the likely judgment, for instance.²¹⁹ If there were a competitive retroactive 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 profitably do so. Similarly, it is possible that third parties considering purchases of plaintiffs' tort claims would not believe that they could make better offers than defendants and still make a profit.

Placing the asymmetric information problem aside, the absence of a retroactive insurance market is surprising given the dynamics of settlement negotiations. Consider a case in which the plaintiff and the defendant each privately estimate the expected liability at \$1,000,000 and the cost of litigating 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.²²⁰ This case is one that should settle, given that both parties will be better off settling than litigating, the plaintiff for any settlement over \$900,000 and the defendant for any settlement up to \$1,100,000. If a defendant were uniquely able effectively to alienate a claim by purchasing insurance from a relatively risk-neutral insurance company—for simplicity, a company that also would need to pay litigation costs of \$50,000 if the suit went to trial but no costs 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 it should thus be able to capture a greater portion of the surplus from settlement, \$25,000 more if the settlement were in the middle of the range in either scenario. If the insurance market were competitive, the defendant would in effect be able to capture this entire surplus. Defendants thus have a strong incentive to alienate claims. Their failure to do so is thus all the more puzzling and suggests that asymmetric information may well be a serious problem.

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

220. 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.

2. *Effects on the Legal Process*

a. *Cooperation*

The simplest argument that alienability would interfere with the legal process is that once a claim is alienated, the alienator has 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."²²¹ Similarly, a defendant might pay a third party to assume responsibility for only ninety percent of any subsequent judgment. In addition, a seller and purchaser might require cooperation by contract, providing a cause of action in the event of noncooperation.²²² Liability insurers require cooperation,²²³ suggesting that a contractual approach may be adequate.

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. Cooperation may be a euphemism for perjury. A plaintiff who claims high pain-and-suffering damages ordinarily may have an incentive to exaggerate the pain suffered when testifying,²²⁴ 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,²²⁵ and violators face

221. Shukaitis, *supra* note 1, at 340. Shukaitis argues that "[s]o 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.* 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.

222. "[S]uch cooperation clauses are routinely found in standard insurance contracts, which raise the mirror problem with the defense of claims." *Id.*

223. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Davies*, 310 S.E.2d 167 (Va. 1983) (reporting a case in which the liability insurer refused to pay on the basis of the insured's lack of cooperation).

224. 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, 62-67 (1991).

225. *See, e.g., FED. R. CIV. P.* 45.

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.

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 of perhaps 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 to be complex. Many of these claims will demand cooperation from a different set of potential witnesses—experts. The parties in the best position to buy claims will be those who have the greatest confidence that they have cooperative 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.²²⁶ 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.²²⁷ 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 suits involving alienated claims.

226. See, e.g., Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 *YALE L.J.* 1535 (1998).

227. Direct solicitation of clients generally violates ethical rules. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2004).

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,²²⁸ because those appealed may be different from those not appealed, and because judges may selectively decide which cases to craft written opinions for.²²⁹ The 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.²³⁰ While some degree of path dependency may be unavoidable, it may be particularly problematic if litigants can manipulate the path of decisionmaking.²³¹ Concern about the possibility of such manipulation, Maxwell Stearns has argued, helps to explain modern standing doctrine.²³² If interest groups can determine when lawsuits are brought, they may be able to manipulate the path of the law, and legal institutions may have evolved various means of preventing such manipulation. Perhaps the bar on alienating legal claims is one such mechanism.

Allowing alienation of legal claims might permit interest groups to determine when decisions are rendered and perhaps also to determine who will render them.²³³ An interest group, for example, might purchase a claim specifically because a case presents a particular issue, and the group believes that aggressive litigation of the issue in that particular court is likely to create a favorable precedent. The interest group might especially seek to purchase claims in which the opponents' lawyers are unlikely to be

228. 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, resulting in a pool of appellate cases that may not mirror the pool of tried cases).

229. 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).

230. 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).

231. Frank Cross has argued that rational litigants who are repeat players have strong incentives to settle unfavorable cases and litigate vigorously those with favorable facts, distorting precedent. See Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000).

232. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1350-59 (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).

233. There is substantial empirical evidence to suggest that litigants 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).

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.²³⁴ 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 precedent. More disturbingly, a litigant might assume a position in a litigation contrary to his own beliefs or interests and then purposely 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. The adversarial system gives the opposition incentives to identify factual situations in which a particular resolution of a legal issue may lead to results 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 presenting the same issue but with different facts. And even when a litigant does identify such a case and is able to convince the owner to alienate it, she may be disappointed by which case is decided first. After all, the litigant's opponents may have precisely the opposite incentives as she does with respect to the order in which the cases are presented.

Similar possibilities for manipulation exist already. Interest groups can seek to find test cases that will allow for incremental development of doctrine in a way that will favor their long-term interests.²³⁵ 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 an unfavorable Supreme Court adjudication.²³⁶ Presumably, the legal

234. 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.

235. *See, e.g.*, Lederman, *supra* note 161, at 239.

236. This occurred in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997) (No. 96-679). For an argument that

system might address such interference by criminalizing such activity, holding parties who engage in such activity in contempt of court, or disallowing collusive settlements.²³⁷ That the legal system generally does not address 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. Purchasing claims offers more direct potential to influence the law and at lower cost, because the claims themselves are valuable assets. Alienability also may help interest groups force courts to make merits decisions relatively early. Once again, these problems might seem de minimis if robust markets for claims emerged, because only a small percentage of alienated cases would represent attempts at path manipulation. But if adverse selection makes markets thin, then cases will be alienated only in exceptional circumstances. If a desire to manipulate case law is a significant such circumstance, then the costs of allowing such manipulation may be large relative to the benefits of 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, however, adoption of a rule allowing the alienation 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.²³⁸ Alienation of claims, however, is most likely to occur when the claim purchaser values the claim at a higher level than either its initial holder or her opponent. 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 bid against one another, because the most optimistic of the potential purchasers is likely to win the claim.

the settlement was improper, see Roger Clegg, Op-Ed, *What Are Civil Rights Leaders Afraid Of?*, WALL ST. J., Nov. 24, 1997, at A23.

237. 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. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). This case provides some restraint on parties who wait until after cases are resolved and then settle if the judgment is adverse, where the settlement is conditional on an agreement to vacate the judgment.

238. See, e.g., Loewenstein et al., *supra* note 219, at 135-40.

This danger is an example of the “winner’s curse”²³⁹ 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.

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, learn to discount their bids by its estimated size.²⁴⁰ If such a rational response occurs, those who purchase claims will not systematically get bad deals. 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 he concludes that he likely did not know about certain information, he 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. In particular, alienability might produce a relative increase in precedents in areas of law that are relatively clear. These cases may be relatively likely to be alienated because information asymmetry is less of a danger when the law is clear,²⁴¹ 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

239. The winner in an auction is “cursed” because she is likely to be the party who most overbid. *E.g.*, RICHARD H. THALER, *The Winner’s Curse*, in *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 50 (1992).

240. *See* Kenneth Hendricks & Robert H. Porter, *An Empirical Study of an Auction with Asymmetric Information*, 78 *AM. ECON. REV.* 865, 879-82 (1988) (testing this prediction).

241. Informational asymmetry presumably would ordinarily be about facts, but it could also be about law. Someone might be particularly eager to sell a claim after a complex legal analysis revealed that the claim probably would not succeed. Moreover, when the law is clear, that will often be because of established bright-line rules, making factual ambiguity less of a concern. On the other hand, plaintiffs generally may not seek to alienate cases in which the law is clear, because they may face less risk from such cases. So, the net effects are difficult to determine.

small, if alienation significantly reduces the chance of settlement, the overall effect on the pool of precedents could be large because taking litigation all the way to trial and appeal is ordinarily so rare.²⁴²

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, and this consideration might offset the reduction in settlement traceable to information problems. If plaintiffs and defendants both alienate claims, then litigation might often involve repeat players who have an incentive to cooperate and possibly to trade across cases, also increasing settlement. Some litigants might refuse on principle to settle with their adversaries but be willing to alienate claims to third parties, and those third parties might be able to obtain settlements. Yet again on the other hand, some litigants might settle because they do not psychologically want to face trial, and alienation might allow transfer of claims to those less afraid of confrontation, decreasing settlement.

The problem 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 turn out to be small, however, and my purpose is to suggest that any experiments with permitting alienation would need to be monitored closely, not 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, *Marbury v. Madison*. 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 anticlimax 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

242. One study found that 7% of cases are tried, while another 15% are terminated by a judicial ruling such as summary judgment, and another 9% 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).

train in the optimal location in boxing,²⁴³ ineffective attorneys in law.²⁴⁴ 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 give advice and watch. 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 by the names of the parties.

This convention rests 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 one in which it 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 evaluate 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. They have thus not considered whether a market could acceptably substitute for judges and juries in valuing legal claims. Because the original parties to 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 could do justice as to the original parties in a litigation. Relevant economic considerations include how accurate the market is likely to be in evaluating claims and how costly the market process itself would be.

243. 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 his loss to Hasim Rahman in a championship bout).

244. 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 Simpson's acquittal); 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 in part to unethical practices by defense counsel).

Mandatory alienation is a particularly useful heuristic for assessing 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 depends 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 would continue to apply if a robust market for some type of claim were to develop.

This Part argues that the arguments would no longer apply. Section A reconsiders the economic arguments. Not only would a mandatory-alienation regime make the economic concerns discussed above far less significant, it would also 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 was alienated and perhaps other information as well. Whether these virtues would be 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 was rare. The economic analysis thus suggests that if pervasive alienation can overcome adverse selection, the market is likely to be a strong substitute for a court system for those claims that are alienated.

Section B, however, suggests that noneconomic concerns would become more serious in a mandatory-alienation regime. Once claim sales were no longer voluntary, arguments about commodification, corrective justice, legal ethics, and procedural justice would at least 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,²⁴⁵ if alienation is financially attractive, there is, in effect, a tax on those who choose not to alienate. If that tax were so high that someone could not afford trial, it seems fair to consider alienation coerced, but the coercion might be lessened 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 addresses the adverse selection problem. Some degree of adverse selection would remain if settlement were still permitted, but potential buyers would no longer wonder why the seller wished to sell. It is a familiar point from analysis of insurance that compulsory insurance eliminates any danger that adverse selection will cause the market to unravel.²⁴⁶ Thus, mandatory alienation may be necessary for the purported advantages of alienation, such as enabling plaintiffs to obtain judgments and defendants to liquidate liabilities more quickly, to materialize. Mandatory alienation would not eliminate the other economic problems associated with alienation. It would still be 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 were 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 had a particularly rosy view of the case, so the danger that alienation might frustrate settlement would be reduced.

Ordinarily, eliminating an option makes a person worse off (or at least no better off), and it might seem that if a party did not want to alienate a legal claim, the legal system must be making her worse off by requiring alienation. A duty to alienate could make a litigant better off, however, even though it would restrict her options. The reason is that such a duty furnishes a sufficient explanation for the individual's decision to alienate. The decision to alienate a claim ordinarily conveys negative information about the claim's value, but removing the option means that no negative information is conveyed. There would be no stigma in trying to alienate a claim if everyone were required to do so, and thus a rule requiring

245. I provide a brief introduction. *See infra* note 270 and accompanying text.

246. *See, e.g.*, Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 DUKE ENVTL. L. & POL'Y F. 293, 312-13 (2002) (noting that requiring purchase of environmental insurance would reduce adverse selection problems).

alienation would make better off parties who would alienate their claims anyway and parties who would not alienate solely because of the negative information that a decision to alienate 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 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 prospective interest of the third parties, as well as competition among them to value claims accurately, would drive this process. Properly conceived, a rule mandating alienation would not save disputants from litigation, but it would transform how they experienced litigation. For the initial litigants, the market would in effect become what is now the trial. The economic viability of the rule would depend on the nature of both this shadow legal process and the legal process that would remain.

One benefit of mandatory alienation is that it would help to neutralize any systematic bias of decisionmakers. For example, if courts are systematically biased toward plaintiffs in insurance claim litigation,²⁴⁷ mandatory alienation would offer a solution.²⁴⁸ It may be difficult 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.²⁴⁹ With

247. See KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 101-32 (1986). My argument 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.

248. This example is particularly interesting because it is possible that insurance companies could require mandatory alienation in insurance contracts. See ABRAHAM, *supra* note 212, at 32-37 (describing the drafting of insurance contracts). Perhaps the absence of such contracts suggests that insurance companies are skeptical that mandatory alienation has any benefits, but the apparent absence of any prior mandatory alienation suggests that companies may not have even considered it. It is also possible that insurance companies would avoid requiring mandatory alienation because it might lead to negative publicity and legislative or judicial overrides.

249. 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.

mandatory alienation, by contrast, a jury's decision would have no immediate effect on the policyholder or the insurance company, and there is no inherent reason for the jury to favor one party over another. The jury thus could simply do its job by interpreting the contract without preference.

The premise of this argument is that a court is more likely to arrive at the best answer to a legal dispute when the decision does not directly affect any of the parties to that dispute. This may be counterintuitive, because achieving a just result is presumably high among the concerns that a court takes into account.²⁵⁰ The fact that the original parties to a dispute would not be involved in litigation, however, does not mean that judges and juries would be unconcerned with justice. To the contrary, they would still be concerned with achieving justice, but the transfer of claims to third parties means that they would 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, would be tempered by the recognition that the party would not be affected directly. Thus, if juries cared at all about the *ex ante* benefits of fostering an environment in which contracting parties can expect their agreements to be honored, they would be less likely to be biased in interpreting such agreements when their decisions would have immediate effects only on claim purchasers.

If the post-alienation trials that would occur in a mandatory-alienation regime would eliminate certain biases, then competitive forces should prevent such biases from affecting claim prices.²⁵¹ For mandatory alienation to be justified, however, the market must not only resolve legal claims without bias, it must also resolve them relatively accurately.²⁵² 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 would be the same as with a regime in which alienation is optional: asymmetric information. Litigants may have a

See generally AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 264-65, 279 (1982) (discussing interpersonal comparisons of utility).

250. A judge's perception of justice may, of course, not be congruent with her perception of legal correctness. *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").

251. Competition does not always eliminate bias in labor markets, given the existence of a taste for discrimination. *See, e.g.*, GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 43-45 (2d ed. 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.

252. 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).

great deal of information about their cases, while third parties have less. If there were a mandatory-alienation requirement, asymmetric information would not prevent a market from forming, but it could result in sale prices differing from the amount a plaintiff would receive if permitted to take the case to court.

Even in a mandatory-alienation regime, however, plaintiffs would have incentives to share information with potential purchasers. At the least, a plaintiff would have an incentive to share with a third party any information that would make the third party tend to believe that the claim was more valuable than others. Thus, a plaintiff with an unusually severe accident would be eager to make a physician's report available to a potential purchaser. Moreover, once it was 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 were hiding information. They might do so not only by spontaneously producing documents, but also by responding to third parties' requests for information. While this 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.²⁵³

The information third parties acquire would not necessarily be all the information that might be relevant to a decision about a claim's likely 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.²⁵⁴ It might seem that private contractual arrangements could effectively deter fraud. Plaintiffs, for example, might bond their claims by agreeing to pay any damages attributable to information not released.²⁵⁵ The problem is that such agreements would 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 original litigants and claim purchasers, they would need to do so carefully to ensure that the agreements were not simply a mechanism to opt out of the mandatory-alienation requirement.

253. 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*, 3 AM. L. & ECON. REV. 320 (2001).

254. 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 themselves from exaggerated claims.” *Id.*

255. See *supra* text accompanying note 200.

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 would deceive even a careful buyer, but there is no reason to fear that such fraud would be pervasive. As long as there remained the possibility of criminal sanctions, alienators would 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 would merely transfer the time at which there was an incentive to fabricate or withhold evidence. If penalties for fraud in the legal claims market were as severe as for perjury at trial, the claims market would be no more likely to reward deceit or punish its absence than our existing legal system.

Placing fraud aside, there remains a separate problem that 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 him that it had no merit. Even where litigation was inevitable, a defendant might share some of its evidence because it worried that a claim purchaser would be particularly hesitant to settle a claim at a loss. A defendant also might cooperate with a third party because it might hope that the party would choose to take over the defendant's claim rather than the plaintiff's. Indeed, it seems likely that third parties would consider taking over claims from either side, given that the costs of researching one potential transaction would 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 have no contact with the defendant, especially if the plaintiff intended to reveal information that could be useful in surprising the opponent at trial.

Even if, in a particular case, a third party had to rely entirely on information in the plaintiff's possession to evaluate the claim, there is a strong argument that this would not produce excessively inaccurate results. 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 its negligence caused one of the plaintiffs' illnesses, but neither knows which one. If risk-averse, the plaintiffs presumably will 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 will prove attributable to a defendant's negligence is a way of completing such a hypothetical contract.²⁵⁶ The mandatory-alienation system thus can be seen as one that compensates tort plaintiffs for their wrongful losses but then redistributes compensation to create an insurance scheme based on the uncertainty of information unavailable to the plaintiff.

This defense is limited, however, because a litigant may have knowledge that only information in the possession of an adversary could verify. 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 his information would suggest is deserved. The mandatory-alienation process thus could not 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 will 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 transferring a claim at an early stage may promote efficiency. If claims were sold 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. An adverse selection problem, however, might beset any attempt to transfer claims before discovery, as litigants who feared that discovery would undermine their claims would be most likely to seek to alienate their claims early. Perhaps a compromise would be to allow limited discovery before alienation,²⁵⁷ so that a litigant could obtain the information that it believed was most likely to be useful, especially information that it already knew existed.

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.

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

257. Litigants, for example, might be allowed to use only a limited number of their interrogatories before alienation. *Cf.* FED. R. CIV. P. 33(a) (allowing parties only twenty-five interrogatories in the absence of permission of the court or written stipulation).

Third parties might well be likely to prosecute litigation more efficiently than the original parties.²⁵⁸ The economic account of settlement suggests that the identity of the parties litigating a claim should not matter, because whether settlement occurs is a 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 those that don't may reflect litigant obstinacy and collateral consequences of litigation as much as financial calculation. Third parties who buy legal claims have strong incentives to settle the claims, because ongoing litigation decreases their 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 who faced each other in a number of lawsuits might achieve economies of scale and promote settlement by negotiating the various claims together.²⁵⁹

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 receiving less and defendants paying more to alienate their claims because of post-alienation 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, would not simply lead to litigation costs being paid early in a lump sum, because such a regime would entail additional costs. For a claim purchaser to make a profit, her initial costs of researching a claim also would have to be compensated, and this expense too would be passed on to the original parties. Indeed, in a competitive market, the alienating party would 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 of all third parties who considered purchasing the claim.²⁶⁰

The total cost of mandatory alienation would depend in part on the complexity of the issues. The more complex the case, the more difficult the claim would be to value. Third parties seeking to maximize profits would spend money on investigating claims until the marginal cost of doing so

258. A significant caveat is that the winner's curse problem, which might reduce settlement, still applies.

259. Ordinarily, a lawyer courts an ethical violation by trading off cases of different clients in settlement negotiations. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2004) ("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 gives informed consent The lawyer's disclosure shall include the existence and nature of all the claims . . ."). This would cease to be a concern, however, if there were no clients being represented.

260. *See supra* note 201.

exceeded the marginal benefit. With greater uncertainty, the marginal benefit of increased investigation would be higher, because of the chance that further investigation, whether of a legal or a factual issue, would lead to a substantial change in the estimated probability of the claim's success. Not all types of uncertainty are of equal significance. If additional information seemed unlikely to improve the chance that a claim would prevail, then little money would be invested in investigating the claim. For example, when the outcome in a case depends on a subjective application of the law to a particular set of facts, uncertainty may be great but not particularly costly in a mandatory-alienation regime. In contrast, cases dependent on complex analysis of rules or precedents may have more costly uncertainty, if a preliminary analysis of those rules or precedents could reach an incorrect answer.²⁶¹

The costs of the mandatory-alienation process would also rise with the number of potential purchasers. More third parties would mean a lower probability that any one would ultimately be able to purchase the claim, and thus greater research costs would be 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 resulting additional accuracy. 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 to 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.²⁶² Not only may we end up with too much stock market research, but much of it may end up being redundant.

The market for legal claims would likely develop responses to these inefficiencies, however, in the mandatory-alienation context.²⁶³ A firm with a reputation for offering fair prices, for example, might enter into an arrangement in which a plaintiff would have to reimburse its research costs

261. On the relationship between legal complexity and uncertainty, see Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 7 (1992).

262. 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).

263. 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* (2004) (unpublished manuscript, on file with author).

if she rejected the firm's eventual offer.²⁶⁴ 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 was to them, with greater accuracy more appealing to relatively risk-averse parties but coming at a higher cost. Similarly, a litigant who anticipated benefiting 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 would thus likely be low and exist only when an original party decided that the benefits of redundancy exceeded the costs. In addition, any research that the third party who eventually purchased the claim conducted would not be wasted, as he could then use that information in the subsequent litigation. Even though his research costs ultimately would be paid by the original parties, those costs might lead to reduced litigation costs. Thus, the only significant costs from researching claims would be those attributable to third parties who did 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 would 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. Lawyer quality, however, is difficult to measure,²⁶⁵ and 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, such as the size of a firm's advertisement in the telephone directory or the beauty of its offices. 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.²⁶⁶ 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

264. 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 revealed that the claim was not worth as much as expected.

265. Martindale-Hubbell offers a rudimentary rating system based on surveys. See Martindale-Hubbell, Lawyer Ratings, <http://www2.martindale.com/company/ratings.html> (last visited Dec. 11, 2004).

266. *But see* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 377 (1977) (expressing doubt that advertising would increase the cost of legal services and noting that advertising may increase competition).

enough, perhaps too expensive—or they may 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 of bidders, would need to do some research on the purchasers. But, once the field was narrowed down to a small number, the largest bid would be all the litigant needed to know. Law firms would 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, and it may be impractical in an optional-alienation regime. Moreover, the alienation of legal claims would largely eliminate agency costs, because the purchasers would have appropriate incentives to balance the costs of legal expenses with their benefits in terms of increasing or decreasing the expected judgment. Because litigants would pay for agency costs in the form of either higher legal fees or lower judgments, their elimination might offset or even surpass the costs of a mandatory-alienation regime. Thus, a mandatory-alienation regime might be particularly advisable when 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, 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 is that a world in which voluntary alienation becomes quite common despite adverse selection problems might be an attractive one. If sufficiently common, a decision to alienate legal claims would carry little negative informational value, and the litigant could expect compensation that reflected at least information in her 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 she would alienate a claim even when the expense of the alienation process was relatively high, but these would not be concerns in a voluntary-alienation regime that somehow overcame 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 is corrosive of personhood, and second, whether an individual should be allowed to trade personhood for other goods. The second inquiry no longer presents a possible escape when alienation is mandatory, so a focus on the first is sufficient. If resolution of claims by a judge or jury is important to the personhood of a litigant, then removing any possibility of such resolution might inappropriately commodify. Although pretrial resolutions of cases, whether made involuntarily by judges or voluntarily 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 also more broadly to litigants who settle. A claim that a lawsuit isn't about the money becomes far less plausible when the contingent right to trial is lost,²⁶⁷ even for a litigant who would accept a settlement in lieu of an authoritative judicial resolution. If the ability plausibly to make such a claim, or at least to convince oneself thereof, is important to personhood, then mandatory alienation poses a greater threat to personhood than permissive alienation.

That it poses a greater threat does not mean that it poses a great threat. The commodification claim is not an a priori philosophical one, but rather a contingent empirical one. The empirics depend on both economics and psychology. After all, if the argument in Section 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, which would in turn provide an alternate foundation for, or defense of, personhood. Moreover, the concern is that mandatory alienation may prevent someone from effecting personhood by filing or defending a lawsuit. It might, however, 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

267. Litigants frequently remark to journalists that they are bringing claims for reasons other than money. See, e.g., Mary Hannigan, *A Penny for Your Thoughts*, IRISH TIMES, Mar. 18, 2002, at C3 (noting such a comment in a potential suit on behalf of a girl who was struck in the head by a tossed coin, allegedly inducing headaches).

willing to do so. Thus, if maintaining a lawsuit in some form is important to preserving personhood, mandatory alienation might help.

In addition, mandatory alienation may provide an opt-out mechanism that adverse selection otherwise might make practically unavailable. Some may, like Learned Hand, “dread a lawsuit beyond almost anything else short of sickness and death.”²⁶⁸ Lawsuits can be ugly, and traded accusations may upset a litigant’s self-conception as a decent or righteous person. If it is plausible that individuals define themselves through litigation, then litigation may also have the capacity to threaten self-definition. Alienation of legal claims might preserve personhood by limiting this threat to self-conception.

Perhaps the strongest argument that commodification brought by mandatory alienation would threaten the legal system would focus not on the litigants themselves, but on society’s perception of the legal system. The system may be structured to maximize its educative role and thus to foster the perception of legitimacy.²⁶⁹ Civil litigation seems likely to be of far less importance than criminal litigation in this respect, but let us suppose that the behavioral messages sent by civil litigation are important too. A system in which a few claims are sold or many claims are settled seems unlikely to undermine the educative role of civil litigation, because there will still be some trials with the original claimants as participants, and it takes only a few to convey the needed behavioral messages. Mandatory alienation might remove that backstop from public view, as trials that were only about the money and no longer included the initial litigants would lack drama and limit litigation’s behavioral messages. Confidence in the legal system accordingly might decline. Though concern about institutional legitimacy does not fit squarely into Radin’s theory, one might argue that belief in the legitimacy of our legal institutions is part of our collective personhood. If so, commodification is arguably problematic.

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 were rare, it presumably would be because of its expense. Indeed, considerable expense likely would need to be attached to traditional trying of cases before the

268. Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, Address Before the Association of the Bar of the City of New York (Nov. 17, 1921), in 3 JAMES N. ROSENBERG ET AL., *LECTURES ON LEGAL TOPICS, 1921-1922*, at 89, 105 (1926).

269. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). *But see, e.g.*, Ronald J. Allen, *Rationality, Mythology, and the “Acceptability of Verdicts” Thesis*, 66 B.U. L. REV. 541 (1986) (arguing that Nesson’s thesis is not descriptively accurate); Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986) (arguing that the hearsay rule is inconsistent with Nesson’s argument).

adverse selection impediments to claim markets could be overcome. If that is so, there is an argument that alienation, though voluntary, is coerced.²⁷⁰

Permissive alienation might not be coercive because it is not the option to alienate that coerces. Rather, coercion results from any inherent flaws in the justice system that make alienation so relatively attractive. Once permissive alienation becomes commonplace, however, there may be reduced pressure to ensure the feasibility of pursuing a legal case to trial, just as the existence of plea bargaining may encourage lawmakers to impose a more severe sentence on defendants who insist on trial than we would accept in a world without plea bargaining.²⁷¹ Thus, adopting a permissive-alienation option might indirectly be coercive if it substituted for other forms of legal reform, as proponents have advocated.²⁷² Permissive alienation also might indirectly prove coercive if alienation by many stigmatized the few who refused to alienate, such as 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 as to establish that commodification concerns are greater when alienation is common than when it is rare.

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 through, for example, insurance. 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. Similar arguments could be used to defend a mandatory-alienation regime, but these arguments would be weaker. A mandatory-alienation regime would mean that a wrongdoer would never directly rectify a

270. Owen Fiss has asserted that settlement may often be coerced, although he does not consider the nature of coercion in making the claim. Fiss, *supra* note 161, at 1075. The most prominent account of coercion is Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440 (S. Morgenbesser et al. eds., 1969). See also David Zimmerman, *Coercive Wage Offers*, 10 *PHIL. & PUB. AFF.* 121, 124 (1981) ("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.").

271. 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).

272. See Choharis, *supra* note 1, at 443-47 (arguing that alienation may help accomplish tort reform).

victim's loss, but the amount the wrongdoer paid and the amount the victim receives would be indirectly related, because both would reflect predictions of the same possible trial.²⁷³ 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 falsely accused of wrongdoing, corrective justice would be satisfied. The problem is that, at least in the absence of an effective discovery regime, the alleged wrongdoer's payment would depend only on evidence in his possession that third parties could identify and verify, and the amount the victim received would similarly depend only on evidence in her 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 will not depend on the happenstance of information unknown to it. Market resolution, however, may be more troubling from a corrective justice standpoint, because corrective justice demands repair of the wrongful losses that a tortfeasor has caused and no other losses. 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."²⁷⁴ 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,"²⁷⁵ 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 Katz²⁷⁶ based on the movie *The Morning After*.²⁷⁷ 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 in a safety deposit box. Should we allow the woman and the prosecutor to agree to a plea bargain in which she will be

273. 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 it is indirect. Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 57 (1991).

274. COLEMAN, *supra* note 64, at 395.

275. *Id.*

276. LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 188 (1996).

277. *THE MORNING AFTER* (Warner Bros. 1986).

charged with a lesser offense, with the film to be viewed only after the bargain is complete?²⁷⁸ Katz answers no,²⁷⁹ 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.”²⁸⁰ Just as the legal system should not tolerate this plea bargain, one might argue, it should not allow for a plaintiff’s recovery or a 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 it obliged to consult the other party’s evidence.

Assume that Katz’s analysis is correct. The difficult question is whether the argument survives the translation from criminal law to tort law. 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, the prosecutor’s decision to offer a plea bargain before seeing the tape seems just as troubling as before.²⁸¹ (A smart prosecutor would not do this because the defendant would accept the offer only if the tape was incriminating.) The prosecutor’s offer is immoral because the tape will either show that the defendant did not commit the murder and is thus being punished excessively, or that she did commit the murder and is being punished insufficiently. These failures to impose the retributively proper amount of punishment,²⁸² moreover, are completely avoidable. The immorality is in the prosecutor forgoing what the legal system deems the best result based on a private suspicion that the system deems irrelevant.

278. 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 276, at 189.

279. “[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. 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. Thus, 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*.

280. *Id.*

281. 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 she 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.

282. Assuming that the punishment that is consistent with commission of whatever crimes the government can prove beyond a reasonable doubt is retributively proper.

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 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 his decision not to do so wrong, because he is bargaining away his own rights. As long as we do not conceive of retribution as a purpose of the civil law,²⁸³ a decision by private parties not to seek out the truth seems quite different from a similar decision 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. 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. Corrective justice demands that defendants repair wrongful losses that they have caused, not those 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.

The corrective justice problem would emerge because mandatory alienation would solve the adverse selection problem. In a regime in which alienation was voluntary and occasional, it would be rare for the alienation price to exclude significant information not available to the alienating litigant. Claims in which there was a strong possibility that the other party had undisclosed information would be unlikely to be alienated as a result of adverse selection. Litigants sometimes would not have any inkling of what evidence might be in the possession of their opponents, but they would have trouble convincing third parties that they really lacked such knowledge. The cases in which opponents might have information about a case would tend to be the same ones in which third parties were worried about whether litigants’ desire to alienate reflected knowledge that their

283. 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.”).

cases were lemons. But if alienation were mandatory or common, claims would be alienated based on one-sided evidence, and thus the corrective justice concerns about one-sided evidence would become more serious.

Of course, as I have argued, a voluntary disclosure or partial discovery regime could allow much evidence in others' possession to affect the prices at which claims are alienated.²⁸⁴ If so, such discovery might be enough to make a mandatory-alienation regime the best way of implementing corrective justice. Unlike a market economist, however, an advocate of corrective justice may not tolerate a significant cost in achieving corrective justice merely because of offsetting economic benefits.²⁸⁵ Of course, the case that corrective justice is satisfied might be easier when the regime in question is a permissive-alienation one in which alienation becomes common. The issue of coercion once again would become critical, but corrective justice would remain at least more problematic if alienation were common, rather than rare.

3. *Legal Ethics*

A statute instituting mandatory alienation would not necessarily raise formal ethical problems. Either it could explicitly permit lawyers to purchase claims, trumping any existing rules, or it could prohibit lawyers from purchasing claims, in which case purchasers would need to hire lawyers independently. Mandatory alienation, however, would further erode lawyer-client relationships and thus accentuate concerns like Kronman's.²⁸⁶ 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 forgo the expense, recognizing that a competitive bidding process would give bidders incentives to obtain the relevant information. The problem would be less severe with a permissive-alienation regime in which alienation was common, but any amount of alienation would weaken lawyer-client ties. If alienation became 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 is a substantial cost, widespread alienation would exacerbate problems that seem modest when alienation is rare.

284. See *supra* note 253 and accompanying text.

285. See, e.g., Coleman, *supra* note 60, 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.").

286. See KRONMAN, *supra* note 110.

4. *Procedural Justice*

That mandatory alienation would be more likely than permissive alienation to threaten litigants' psychological perceptions of procedural justice is straightforward. A regime that permits alienation increases litigants' options and thus, presumably, their ability to control the process. Mandatory alienation would remove this option and, therefore, necessarily decrease process control, even if it conceivably might provide more process control than an inalienability regime. Mandatory alienation would be particularly worrisome in a lawsuit in which a finding or admission of wrongdoing or innocence was as important to the litigants as any money involved, because a process that necessarily reduced to money might prove unsatisfying. Parties who would not alienate because they care about something other than the direct financial consequences of the judgment are differently situated from those who would alienate but for the lemons problem. Even if every other litigant in the world alienated claims, for example, a plaintiff genuinely pursuing a case for dignitary reasons might prefer to keep control over a litigation, even at financial expense. On the defense side, a newspaper concerned more about its reputation than about money, for example, might not want to lose control over its defense of a libel suit.

Even parties who would prefer not to alienate their claims for nonfinancial reasons, however, conceivably could benefit from a mandatory-alienation regime, as long as it required *both* parties to alienate their claims. Often, in litigation where one party cares about the result for reputational as well as financial reasons, the other party will be concerned about nonfinancial factors as well. In such a case, the total amount that the parties spend on litigating will be greater than the financial stakes warrant. A mandatory-alienation regime, however, might provide an indirect way of binding both parties to spend on litigation in proportion to the financial stakes. This is principally an economic benefit, but it also would improve procedural justice, because less expensive litigation might allow both parties to retain more process control than litigation that became complex, especially if the additional spending was on procedural wrangling rather than on substance.

There would, however, be cases in which one party cared more about the reputational implications of the case than the other. Many such cases would settle, as the party who placed more value on an admission of wrongdoing would give financial concessions in exchange for a favorable resolution of this issue.²⁸⁷ Some such cases, however, would not settle, for

287. In rare instances, an admission of wrongdoing may be sufficient to satisfy public prosecutors. See, e.g., Richard B. Schmitt et al., *U.S. May Be Open to Andersen Settlement*;

example, because the defendant might take the position that it would not pay a cent or admit any wrongdoing.²⁸⁸ 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 would deprive such litigants of autonomy in controlling the lawsuit. The legal system plausibly is concerned with reputation as well as money, both in absolving civil defendants of wrongdoing and in condemning those guilty of wrongdoing. Forcing alienation may interfere with this function, particularly if third parties were to enter into a settlement that did not send a clear message about the relevant decision.²⁸⁹

Thus, in both cases that are solely about money and those in which one or both litigants care about the expressive effect of the court's judgment, 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 social need to maintain trial as an economically feasible option declines. In such a case, alienability arguably does not enhance the options of litigants, but it changes them, and the comparison depends on whether the market or trials are better at promoting procedural justice.

Admission of Wrongdoing Short of a Guilty Plea Might Satisfy Prosecutors, WALL ST. J., Apr. 4, 2002, at A3.

288. This is particularly likely where the defendant is the party who cares more about its reputation. In a libel case, for example, a newspaper might arrange a settlement in which it admits no wrongdoing, or it might refuse even a nominal settlement on 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).

289. 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 credibly threaten such vigor. If we assume that the legal system's goals are generally advanced by parties bringing any valid legal claims they have, then discouraging 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.

The balance may depend on how common trials would be in an inalienability regime. If hearings for deprivation of welfare benefits are frequently held and successful in instilling feelings of procedural justice,²⁹⁰ 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 were inconvenient and rare in the inalienability regime and claimants routinely settled with the government before any hearings, then a regime of permissive alienability, by giving claimants an option other than settlement, might increase litigants' options and thus their process control. A procedural justice evaluation of an alienability regime, therefore, depends not only on whether such a regime coerces litigants, assuming that it does at all, but also on how much coercion would exist in an inalienability regime.

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 because, for example, 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 determine how to weigh them against the economic benefits.

290. 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), did not succeed 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").