The Market For Torts: An Imperfect Alternative

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"The truth is sometimes a poor competitor in the market place of ideas – complicated, unsatisfying, full of dilemmas, always vulnerable to misinterpretation and abuse."
-George F. Kennan

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This Note applies the theory of comparative institutional analysis to evaluate the trade-offs from permitting the assignability of personal injury tort claims and the sanctioning of markets in such claims. I assess the trade-offs for three aspects of the tort system: compensation for victims, deterrence of inefficient risk-taking, and judicial economy. I outline the mechanisms through which assignability could affect these aspects and conclude that additional empirical evidence is needed before the net effect of assignability on these aspects can be properly quantified. Finally, I provide a rudimentary framework to guide the collection of the empirical evidence needed to assess the net effect of assignability on these aspects.

INTRODUCTION

Marketization[1] is controversial. Warfare, both academic and actual, has raged over the marketization (or socialization) of nearly every aspect of human existence,[2] or its entirety,[3] for centuries.[4] The assignability, and therefore marketization, of personal injury tort claims has been a particularly volatile arena, with a spectrum of policy approaches as diverse as the geographical and historical settings in which they have been implemented. Critics have traditionally decried the maintenance of a market for torts as inhumane, inefficient, and sinister.[5] Beyond general skepticism about the assignability of a personal *chose in action,*[6] opponents of the marketization of personal injury tort claims contend such a policy is uniquely noxious and would be harmful to both tort victims and society as a whole.[7] Proponents contend the

1. For the purposes of this Note, I adopt the definition of marketization as the act or process of "entering into, participating in, or introducing a free market economy." *Marketization*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/marketization [https://perma.cc/SKW8-YSNG] (last visited June 11, 2019). For a contemporary discussion of marketization trends and their relationship with the law, see Robin Paul Malloy, *Law, Market, and Marketization*, 1 U. OF BOLOGNA L. REV. 166 (2016).

2. For an argument for the marketization of personal injury tort claims, see Isaac Marcushamer, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543 (2005); Paul Bond, *Making Champerty Work: An Invitation to State Action,* 150 U. PA. L. REV. 1297, 1297–1341 (2002). . For an argument for the socialization of such claims, see Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 642 (1985). For a similar argument for marketization in the context of fraud claims, see Teal E. Luthy, *Assigning Common Law Claims for Fraud,* 65 U. CHI. L. REV. 1001, 1008 (1998).

3. *See* KARL Marx, CAPITAL VOLUME III: THE PROCESS OF CAPITALIST PRODUCTION AS A WHOLE 248–49 (Friedrich Engels ed., 1894) (concluding the socialization of nearly every aspect of economic production is inevitable).

4. For a discussion of the market for tort claims existing under Roman law and its eventual prohibition in 506 A.D., see Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 65–66 (1935).

5. *E.g.*, Huber v. Johnson, 68 Minn. 74, 78 (1897) ("The general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and pervert the remedial processes.").

6. *See* J.B. Ames, *The Disseisin of Chattels. III. Inalienability of Choses in Action*, 3 HARV. L. REV. 337, 337–46 (1890) (discussing the inalienability of *choses in action* and the historical roots of the prohibition in English common law).

7. *See* Gammons v. Johnson, 76 Minn. 76, 80–81 (1899) (identifying a "systematic scheme to hunt up claims" for profit as being a course of conduct so obnoxious to public policy that a worse course of conduct "cannot be well imagined").

arguments marshalled against a market for personal injury tort claims are specious, or at least resolvable through regulation.[8] Proponents further identify a number of social benefits from the implementation of a market for torts, including: 1) increasing access to justice and compensation for tort victims; 2) encouraging efficient levels of risk-taking through effective deterrence; and 3) improving judicial economy.[9] Opponents reply that any benefit derived from marketization will be outweighed by the cost. Assessing the tradeoffs between allowing or outlawing the assignment of personal injury tort claims is fundamentally a question of institutional choice, requiring comparative institutional analysis.[10] In this Note, I survey the academic ordnance deployed in the struggle surrounding the marketization of personal injury tort claims and conclude that there has been a failure to adequately engage in comparative institutional analysis. I then apply the comparative institutional analytic framework to the dynamics of participation between individual tort victims represented by attorneys and hypothetical commercial claim purchasers to reach some theoretical conclusions as to how the agreed-upon goals of the tort system would be affected by allowing the assignability of personal injury tort claims.[11]

HISTORICAL OVERVIEW

The notion that the just resolution of legal disputes ought to involve only the litigants and a neutral arbiter has been commonplace and persistent in the development of western legal thought.[12] Suspicion about the involvement of

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8. *See* Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 329–49 (1987) (arguing that potential issues in the implementation of a market for torts are resolvable through regulation).

9. *Id.* (concluding the identified social benefits of a market for torts outweigh the cost).

10. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–13 (1994) (defining the comparative institutional analytic framework and explaining its importance); Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, 2013 WIS. L. REV. 607, 609–11, 625–28 (2013) (discussing Komesar's comparative institutional analytic framework and applying it to global governance). To properly assess tradeoffs, one should address two issues in parallel: goal choice and institutional choice. Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 361 (2018). The commentators I discuss generally agree the goals served by the tort system are 1) compensation to victims, 2) deterrence of tortious conduct, and 3) minimizing the social cost of administering the tort system (judicial economy).

11. "Before one can engage in any form of [comparative institutional analysis], one must define . . . what is meant by an 'institution.'" Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383, 388 (2013). For this Note, I consider the following definition, first articulated by Douglass North, to be the most useful in weighing the tradeoffs of allowing the assignability of personal injury tort claims:

> Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.

Id. at 389 (quoting DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990)).

12. *See* Radin, *supra* note 4, at 48.

extrinsic parties in legal disputes can be traced to the ancient Athenians.[13] The ancient Athenians encountered many forms of legal interference or subversion, but the most typical and most reviled was the supporting of claims against political or economic competitors for extrinsic purposes. Athenian law referred to this interference as *sykophanteia*, or sycophancy.[14] Successfully prosecuting a claim in ancient Athens afforded the prosecutor substantial political capital, and often material reward. This led to manipulation of the system for political or personal purposes.[15] Suspicion of interference by extrinsic parties was carried on in the Roman tradition, which legislated against *calumnia*, the Roman equivalent of *sykophanteia*. The Roman law broadly defined *calumnia*[16] to prohibit nearly all activities considered to be perversions or manipulations of the justice system, including what English law would later differentiate as maintenance, champerty, and barratry.[17] The prohibition on *calumnia*, like the Athenian approach to *sykophanteia*, was meant to dissuade the subversion of the legal system for obnoxious purposes. Notably, *calumnia* laws did not prohibit the sale of personal injury tort claims, prior to the initiation of a lawsuit,[18] until 506 A.D. when the profit incentive for the buying of claims was removed by the constitution of Emperor Anastasius.[19]

In medieval Europe the Roman skepticism toward speculative forms of legal interference persisted, flowing in part from its close association with the sin of usury.[20] This attitude was carried forward into the common law of England, which explicitly prohibited maintenance, champerty, and barratry.[21] English jurists identified four primary purposes served by the prohibition of these

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13. *Id.* at 49.

14. *Sykophanteia* refers to an Athenian legal concept and is unrelated to the modern English word "sycophant." *Id.* at 51.

15. While the Athenians viewed *sykophanteia* with distrust, Athenian law did not in fact prohibit the transfer of all or part of a *property interest* in a claim since this gave the third party a real interest in the dispute, rather than a purely extrinsic one, which mollified the Athenians primary concern. The issues with marketization later identified by the Romans and English related to speculation and litigiousness were not prevalent in ancient Athens. *See id.*

16. "Calumniators are 1) those who without authorization bring actions (in the name of another) with which they have no concern, 2) those who after losing their suit by a just determination, attempt to bring the action again, 3) those who seek or file claims in court for property, that does not belong to them, 4) those who under the pretense of aiding the Treasury, plan to acquire the property of other persons and do not suffer law-abiding citizens to be at peace, and 5) those who by bringing false charges against an innocent person undertake to arouse the wrath of the governmental authority against them. Such persons are all driven into exile." *Id.* (quoting Codex Theodosianus 9, 39, 3.)

17. *Id.* at 53.

18. This distinguished early Roman law from ancient Athenian law, which allowed the transfer of an interest in a claim at any time. *Id.* at 54.

19. *Id.* at 55. Under the new constitution, an assignee could only recover an amount equal to or less than the consideration paid to the assignor for the claim. This change developed because of complaints that plaintiffs were being induced to sell their claims for far below their true value.

20. *Id.* at 61.

21. "[P]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." *In re* Primus, 436 U.S. 412, 424 n.15 (1978).

activities: (1) discouraging speculation, which is thought to promote frivolous litigation; (2) the personal nature relationship view of lawsuits;[22] (3) protecting the weaker parts of society from being abused through the legal system; and (4) preventing the rich and powerful from using the legal system to satisfy personal vendettas.[23] This last purpose was a product of feudal institutions whereby the nobility would engage in "private war" through legal mechanisms by giving material support (maintenance) to their retainers in disputes with their political or economic competitors without consideration of the merits of the dispute.[24] The first three arguments are frequently deployed against the assignability of personal injury claims today.[25]

American jurists were quick to recognize the inapplicability of the English rationale to their context.[26] Either by statute or judicial decision, several jurisdictions in the early United States began liberalizing the common law restrictions on assignability.[27] A diversity of approaches emerged and solidified across jurisdictions, culminating in four basic approaches to the doctrine of maintenance and champerty in American jurisprudence. These approaches are: (1) no recognition of laws prohibiting maintenance and champerty; (2) only lawyers are subjected to laws prohibiting maintenance and champerty; (3) some claims may be assigned, but others may not; and (4) the full prohibition of maintenance and champerty is in effect.[28] Even jurisdictions that have taken the first approach have limited or prevented the development of a market for personal injury tort claims. For example, Texas has expressly permitted the assignment of tort claims since at least 1889,[29] but barratry law forbids the solicitation of such claims.[30] Other jurisdictions permitting assignment of tort claims prevent the development of a market by prohibiting the purchasing of tort claims by market participants.[31] At least two jurisdictions followed the Roman approach and restricted the ability of assignees to

22. *See* Ames, *supra* note 6, at 337–46.

23. *See* Marcushamer, *supra* note 2, at 1551.

24. Maintenance in England was a "means by which powerful men aggrandized their estates and the background was unquestionably that of private war." *See* Radin, *supra* note 4, at 64. Maintenance in this manner is analogous to the *sykophanteia* and *calumnia* addressed by the Athenians and Romans respectively.

25. English jurists at the time identified mitigating the threat of maintenance as the chief purpose served by prohibiting the assignment of personal claims. See Lampet's Case, 10 Co. Rep. 46, 48 (1613), for Lord Coke's discussion of the purposes served by prohibiting the assignment of claims.

26. *See* Radin, *supra* note 4, at 68; *see also* Schomp v. Schenck, 40 N.J.L. 195, 202 (1878) (concluding there was no prohibition of champerty in New Jersey because "the entire doctrine of maintenance was the product of a state of society very different from that which now exists, or has ever existed, in this state").

27. *See, e.g.*, THE CODE OF PROCEDURE OF THE STATE OF NEW YORK; FROM 1848 TO 1871, at 77–78 (identifying assignees as real parties in interest with standing to bring a lawsuit as early as 1848).

28. See Marcushamer, *supra* note 2, at 1553–65, for a survey of how these four approaches emerged in various jurisdictions.

29. *See* Mallios v. Baker, 11 S.W.3d 157, 172 (Tex. 2000) (Enoch, J., concurring).

30. *See* Barratry and Solicitation of Professional Employment, TEX. PENAL CODE ANN. § 38.12 (West 2013).

31. *See, e.g.*, N.Y. JUD. §§ 488–489 (McKinney 2006).

recover more than the consideration paid to the tort victim, thereby eliminating the profit incentive of a purchaser.[32]

THE CASE FOR MARKETIZATION

Modern proponents of the marketization of personal injury tort claims assert a variety of beneficial effects would flow from establishing a market for torts. These include increasing the amount of compensation tort victims receive, deterring tortfeasors from inefficient risk-taking, and reducing burdens on the courts.

1. Increased Compensation

The sharpest weapon in the proponents' arsenal is the argument that marketization of personal injury claims increases compensation for tort victims, particularly those victims precluded from litigation in the status quo by economic or informational constraints.[33] The argument's appeal is intuitive. Increasing the ability of wrongfully injured parties to recover compensation from wrongdoers, particularly those victims precluded from doing so in the status quo through no fault of their own, clearly advances the interests of justice. Proponents contend marketization of personal injury claims would affect the ability of tort victims to recover compensation in two ways: (1) increasing the value of compensation tort victims receive and (2) increasing tort victims' access to compensation.[34]

The cornerstone of this contention is the different market positions occupied by tort victims and claim purchasers in terms of risk aversion, time sensitivity, and transaction costs. First, the tort victim is expected to be relatively more risk averse than a commercial claim purchaser because individuals tend to be more risk averse than commercial enterprises.[35] The difference in risk aversion between businesses and individuals places downward pressure on total compensation because it gives tortfeasors (which are more commonly insured corporate entities than individuals) greater bargaining power.[36] Marketization levels the playing field.

Second, the tort victim does not have the luxury of time. Many tort victims immediately need money to pay for medical bills, replace lost wages, and cover living expenses. The tort victim who cannot afford the time required to acquire and enforce a judgment against the tortfeasor will either be forced to settle the claim for a reduced sum or forego the claim completely if the tortfeasor insists on litigating.[37]

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32. *See* City of Detroit v. Bridgeport Brass Co., 28 Mich. Ct. App. 54 (1970); D'Angelo v. Cornell Paperboard Prods. Co., 19 Wis. 2d 390 (1963).

33. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–44 (1960), for an explanation of how many welfare-maximizing reallocations are often forgone because of the transaction costs involved in bargaining.

34. *See* Shukaitis, *supra* note 8, at 329–437.

35. *See id.* at 335 n.39 (citing H. RAIFFA, DECISION ANALYSIS 52 (1968)).

36. A bargaining situation between a risk-averse tort victim and a risk-neutral tortfeasor favors the tortfeasor who can threaten the victim with the uncertainty of litigation. *Id.* at 336.

37. It may be helpful to conceptualize a settlement as the selling of the victim's right to a judgment against the tortfeasor. This illuminates the status quo as essentially equivalent to a

The tortfeasor, on the other hand, benefits directly from delay.[38] The commercial claim purchaser should have a reduced need for timely compensation, thereby strengthening their bargaining position.

Third, tort victims face transaction costs that a commercial claim purchaser can avoid or mitigate. For example, claim purchasers can hold a diversified portfolio of claims. A diversified portfolio of claims is worth more than the sum of the expected monetary value of the individual claims because diversification reduces some of the risk associated with the claims.[39]

Another way transaction costs are lower for claim purchasers is that they would have an advantage in valuing tort claims relative to tort victims. For example, a purchaser might specialize in automobile accident claims or medical malpractice claims in much the same way that law firms do today. The claim is more valuable to the expert purchaser than to the tort victim because the purchaser's knowledge or experience allows her to value the claim more precisely and to recover a larger judgment in court.[40]

A final way that purchasers could experience reduced transaction costs is through economies of scale.[41] A purchaser can invest in his or her own legal staff to process claims rapidly and efficiently, thereby reducing the costs of litigating claims. A purchaser of claims would also maintain an advantage over traditional law firms, who are ethically obligated to fully represent the interest of every client, by selectively pursing those claims which are more profitable or likely to succeed.[42] To summarize the effect on compensation, one proponent concludes that "the net effect of a well-functioning market would be to raise the compensation received by

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monopsonized market where the tortfeasor holds the exclusive right to purchase tort claims against them. A monopsony provides the buyer with a significant advantage in bargaining power. See William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LIT. 86, 86–112, 87–89 (1997), for an explanation of basic monopsony models.

38. To understand how tortfeasors are categorically benefitted by delay, imagine a tortfeasor who will become subject to a $1,000,000 judgment in the future. By investing the money in the interim, let's say at a 10% interest rate for convenience, every month of delay saves the tortfeasor $8,333. *See* DAVID R. HENDERSON, PRESENT VALUE, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008). This incentive to delay also reduces the incentive for tortfeasors to settle until the entry of judgment against them. Prejudgment interest is sometimes available, but it is hardly universal. Michael K. Brown, *The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases*, 16 U.S.F. L. REV. 325, 325–26 (1982); *see also* Bean v. Pacific Coast Elevator Corp., 234 Cal. App. 4th 1423, 1430–31 (2015) (holding plaintiff was not entitled to prejudgment interest for costs).

39. Shukaitis, *supra* note 8, at 336.

40. *Id.* at 337.

41. *See* Frederick T. Moore, *Economies of Scale: Some Statistical Evidence*, 73 Q. J. ECON. 232, 232–45 (1959) (explaining how economies of scale reduce the marginal cost of production).

42. An additional example of how claim purchasers would have an advantage over traditional law firms can be seen in cases where there are many claims against a single defendant. An attorney would be obligated to consider each claim individually and represent that individual claimant's interest, but a claim purchaser could negotiate with the defendant and settle a bundle of claims at a discount. Essentially, such an arrangement would allow for the spontaneous formation of plaintiff classes based on economic efficiency with minimal, if any, judicial involvement and would avoid the issues associated with certification. *See* Marcushamer, *supra* note 2, at 1580.

tort victims towards the expected value of a claim discounted at a market interest rate appropriate for the riskiness of a diversified portfolio of personal injury tort claims."[43]

Beyond increasing the value of compensation to tort victims, proponents of personal injury tort marketization contend doing so would allow tort victims currently precluded from prosecuting their claim to receive compensation. Many tort victims never receive compensation because they do not pursue their claims.[44] Even some tort victims who are not categorically prevented from pursuing their claims by economic or informational constraints fail to do so; perhaps concluding the discounted expected value of the claim is less than the expected cost of prosecuting it. Presumably, there is also a swathe of claims not brought simply because the tort victim is unaware of her ability to recover, and/or because she cannot afford the expected cost of prosecution. Competing claim purchasers would have a market incentive to provide tort victims with information about their legal rights to pursue compensation as part of the solicitation process. Furthermore, tort victims currently precluded from compensation by economic constraints would be able to immediately monetize their claim by selling it to a claim purchaser. Marketization can potentially reduce or eliminate these barriers to compensation for tort victims.

2. Deterrence

A second argument commonly deployed by proponents of marketization is that facilitating the prosecution of tort claims deters tortfeasors from engaging in inefficient levels of risky activity.[45] In an idealized free market analysis, parties who engage in risky activity are deterred from engaging in marginally inefficient levels of activity by the imposition of the costs of liability on those parties best able to prevent the harm.[46] The effectiveness of the deterrence relies on the consistent enforcement of the liability rules. As noted above, many tort claims are never prosecuted for a variety of reasons. Marketization of personal injury tort claims would increase the total number of meritorious claims that are successfully prosecuted, which in turn should incentivize parties engaging in risky activity to do

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43. Shukaitis, *supra* note 8, at 337. See also Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), for a broader discussion of how regular litigants ("repeat players") interact differently with legal mechanisms than the typical "one shot" tort victim.

44. *See* Marc A. Franklin, Robert H. Chanin & Irving Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 34 (1961).

45. See Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 671 (1975), for an explanation of how one goal of the tort system is to minimize both accident costs and accident prevention costs through "optimal deterrence."

46. For an analysis of which rules provide optimal deterrence in a given case, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

so only when it is optimal. Proponents typically consider this a socially beneficial side-effect, or positive externality, of marketization.

3. Judicial Economy

The third and final argument propounded by proponents of marketization that I will discuss is how marketization would affect judicial economy. One hypothesis is that marketization will increase the number of cases that settle before trial. The logic is simple: as discussed above, claim purchasers should have relatively higher bargaining power than tort victims. When there is parity in bargaining power between parties in a lawsuit, pre-trial settlement becomes substantially more probable. An assignee or purchaser of a tort claim who has a superior bargaining position will thus be able to demand a more efficient settlement price than the typical tort victim.[47]

Judicial economy might also benefit because of a reduction in the number of meritless claims being filed. The knowledgeable claim purchaser, driven by a profit incentive, would not buy flimsy claims. Doing so would simply be a bad investment. The claim purchaser acts as a sort of market-mechanism gatekeeper for the judicial system, only bringing those claims with a reasonable expectation of profitability and informing tort victims holding meritless claims of their value by choosing not to purchase them. A tort victim who is unable to find a buyer for their claim will be unlikely to bring it themselves since they are more aware of their odds of success.

A final argument in favor of judicial economy is that marketization would resolve conflicts of interest inherent to contingency fee and hourly fee arrangements that inhibit settlement.[48] Neither contingency fees nor hourly fees perfectly motivate an attorney to act in the tort victim's economic interest.[49] Transferring the right to recovery to a claim purchaser essentially amounts to a 100% contingency fee arrangement in exchange for a fixed sum. The claim purchaser may then hire an attorney to pursue his claim, but unlike the typical tort victim, the purchaser would have the knowledge and expertise to efficiently direct the efforts of an hourly fee attorney.[50] Thus, marketization would improve the odds of settlement by more efficiently aligning the incentives of the attorney representing the claim with the holder of the claim. Proponents conclude the net effect of these mechanisms is to improve judicial economy relative to the status quo.

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47. Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 704 (2001).

48. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

49. Shukaitis, *supra* note 8, at 338–39 (explaining how fully shifting recovery rights from a tort victim to a claim purchaser eliminates any misalignment of incentives between the tort victim and the purchaser).

50. *Id.* at 340.

THE CASE AGAINST MARKETIZATION

Opposition to the assignability of personal injury tort claims[51] has been vigorous. Contrary to the proponents, opponents contend marketization would harm tort victims, increase burdens on the judiciary, be offensive to society, and be impossible to implement.

1. Harm to Tort Victims

Opponents of marketization contend a tort victim would receive less compensation if she were able to sell her claim.[52] The unsophisticated tort victim, having no concept of the value of her claim, is vulnerable to being coerced into selling it too cheaply. The claim purchaser, whose profit is derived from the difference between the price paid for a claim and its true value,[53] has every incentive to pay as little as possible for the claim. The "quick-talking purchaser" could apply high-pressure tactics to close a sale before the tort victim could understand the value of her claim or to negotiate with other claim purchasers to determine the competitive market price.[54]

Another reason opponents offer for how marketization will reduce compensation for tort victims is that a claim purchaser would be unable to capture the sympathy of a jury in the same way as a true tort victim.[55] Because the claim purchaser would not be able to recover as much as the true victim, and because the claim purchaser has an incentive to pay the true victim as little as possible, the total compensation tort victims receive would be reduced. Another way opponents claim marketization would harm tort victims is that it would increase undesirable

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51. Although personal injury tort claims remain unassignable in many American jurisdictions, and markets for torts are restricted in them all, the historical trend has been toward allowing the assignability of claims previously held to be inalienable such that the contemporary default position is that a claim is considered assignable unless its assignment is expressly prohibited. Most jurisdictions, where assignability of personal injury tort claims is prohibited, determining the assignability of such claims is contrary to public policy. *E.g., Webb v. Gittlen,* 174 P.3d 275, 277 (Ariz. 2008). For a brief discussion of the history of assignability trends in American jurisprudence, see Jennifer K. McDannell, *Assignability of Legal Malpractice Claims*, 14 ALASKA L. REV. 141, 144–48 (1997). *See also* 6 AM. JUR. 2D *Assignments* § 7 ("there is a general right to assign common law and statutory rights unless there is an express prohibition in a statute or a showing that an assignment would clearly offend an identifiable public policy").

52. Radin, *supra* note 4, at 55.

53. I assume the true value of a claim is the amount awarded to the claimant by a trial on the merits. In an actual tort market, most claims would be liquidated for an amount other than the true value because parties will settle much more frequently than they will demand a trial on the merits. Thus, a claims purchaser's profit in most cases will in fact be derived from the difference between the price paid by the seller and the price (settlement) paid by the defendant. A claim purchaser's willingness to pay (or a defendant's willingness to settle) is primarily a function of their assessment of the claim's true value.

54. Shukaitis, *supra* note 8, at 347.

55. *See* S. Farm Bureau Cas. Ins. v. Wright Oil Co., 454 S.W.2d 69, 70 (Ark. 1970) ("[T]he considerations urged to a jury in a personal injury case are of such a personal nature that an assignee cannot urge them with equal force.")

harassment.[56] Personal injury tort victims are in a uniquely vulnerable position because of their recent tragedy or loss. Opponents argue that subjecting victims to the harassing solicitations of professional claim purchasers is simply inhumane.

2. Judicial Economy

Opponents of marketization also reach a contrary conclusion on the issue of judicial economy. They contend allowing a market for torts would increase both the volume and duration of litigation. This contention seems consistent with the proponents' claim that marketization would allow the prosecution of many claims which are precluded from prosecution in the status quo. A similar contention is that settlement will be reduced precisely because a risk-neutral professional claim purchaser will be more resistant to delay and therefore be unwilling to settle for as low a price as the original tort victim.[57]

Beyond these potential increases in litigation from the effective implementation of marketization, opponents argue claim purchasers would still increase the volume of litigation compared to tort victims because they would flood the courts with meritless claims.[58] Concern over speculative claim purchasers flooding the courts with meritless claims has strong historical roots[59] that have carried over into American jurisprudence.[60] In fact, historical evidence indicates these concerns are not completely unfounded.[61]

A secondary concern raised by opponents is that marketization of personal injury tort claims would spur a flurry of litigation around the contracts between tort victims and claim purchasers.[62] Plaintiffs have a substantial incentive to dispute the

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56. For further discussion of victim harassment and a critique of the contemporary ethical rules governing how attorneys solicit tort victims, see Alexander Schwab, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603 (2011).

57. Proponents typically agree that a short-run effect of marketization will be an increase in the volume of litigation but contend the long-run effect will be a net reduction. *See* Shukaitis, *supra* note 8, at 343–44.

58. Such claims are also known as "nuisance suits." The crux of the nuisance suit is that for many defendants, the considerable time, expense, and possible publicity engendered by real world litigation frequently make it more advantageous to settle a claim regardless of its true value. In an ideal, costless judicial system, a defendant would never be willing to settle a groundless suit. The real judicial system is neither ideal nor costless.

59. *See* Brown v. Bigne, 28 P. 11, 12 (Or. 1891) (quoting Lords Blackstone and Coke on the dangers of involving disinterested parties in speculative litigation).

60. "The general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and pervert the remedial processes." S.J. Brooks, *Champerty and Maintenance in the United States*, 3 VA. L. REV. 421, 427 (1916) (quoting Huber v. Johnson, 70 N.W. 806 (1897)).

61. *See* McCloskey v. San Antonio Traction Co., 192 S.W. 1116 (Tex. Ct. App. 1917); McCloskey v. San Antonio Pub. Serv. Co., 51 S.W.2d 1088, 1088 (Tex. Ct. App. 1932) (finding there was overwhelming evidence establishing that appellant had, for years, made a business of "trampling upon the laws as to barratry in Texas"). For further discussion of McCloskey's saga, see Shukaitis, *supra* note 8, at 342–43. For a similar story from Minnesota, see Brooks, *supra* note 60, at 426–32.

62. *See* Bond, *supra* note 2, at 1312.

contract in the event of any unexpected windfall acquired by the claim purchaser. Claim purchasers may also be induced to litigate against tort victims when their assessment of a claim's true value is made under false representations by the tort victim.

3. Undesirable Commodification[63]

One ground upon which the marketization of personal injury tort claims is sometimes opposed is that it fosters undesirable commodification in a way that is offensive to society.[64] Some courts, when presented with the issue, simply concluded that a market for torts offends public sentiment so gravely as to outweigh any benefits it may otherwise create. For example, the Supreme Court of Arkansas criticized the notion of a market for torts, opining that to allow such a market would be to sanction "a profitable traffic in human pain and suffering."[65] A Kentucky Court of Appeals reached a similar conclusion while finding personal injury claims unassignable, stating that to hold otherwise would "permit one's pain and suffering to become a matter of speculation."[66] Federal courts have been equally wary. As one district court judge argued in the context of a bankruptcy proceeding:

> In our view to allow such a claim, either by way of creditor's bill or petition in bankruptcy, to pass freely to one not directly involved in the pain and suffering usually attendant upon such accidents would be to unfeelingly minimize the extent to which the injured person is reduced, physically, psychologically, and as to future earning capacity, by such accidents. This Court, if it allowed such claims to pass freely in these ways, could be encouraging a market in the pain and suffering of unfortunate persons and the law neither does, nor should it, encourage so callous and barbaric a practice.[67]

In short, the notion of visibly predicating the profitability of an industry on the magnitude of human suffering tends to cause feelings of discomfort.

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63. This argument against assignability is unrelated to the agreed-upon goals of the tort system identified above because it relies on a determination that a market for torts is unacceptable regardless of any net benefits it may create. Since there is no tradeoff to weigh, I do not address it in my application of the comparative institutional analytic framework to the assignability of personal injury tort claims. This should not be construed as a judgment that this argument is without merit.

64. For further discussion of socially undesirable commodification in the context of human organs, see Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57 (1989).

65. S. Farm Bureau Cas. Ins. v. Wright Oil Co., 454 S.W.2d 69, 70 (Ark. 1970)

66. Wittenauer v. Kaelin, 15 S.W.2d 461, 462 (1929).

67. *In re* Schmelzer, 350 F. Supp. 429, 437 (S.D. Ohio 1972).

4. *Implementation Challenges*[68]

Effectively implementing a market for personal injury tort claims presents several unique challenges, including assuring participation of the victim and resolving information asymmetries. Prosecuting a personal injury tort claim typically requires the active participation of the victim throughout the proceeding. Opponents of marketization argue this unique aspect of personal injury claims undermines the feasibility of implementing a market for torts, because there is no reasonable way to assure the participation of the victims after they have sold their claims. A claim purchaser would need substantial cooperation from an unmotivated tort victim to successfully prosecute the claim. The claim purchaser may also need access to documents or confidential information that remains in the control of the tort victim, beyond requiring her presence and testimony during the trial.

Personal injury claims also present unique information asymmetry problems.[69] The critical issue here, when examined from either the perspective of the buyer or seller of the claim, is how the true value of the claim is estimated. The tort victim has access to information about the true value of the claim which the claim purchaser does not. To exacerbate this problem, the tort victim has an incentive to mislead the claim purchaser as to the true value of the claim so as to inflate its price. Ironically, and inversely to the quick-talking claim purchaser discussed above,[70] the unsophisticated claim purchaser can be induced into purchasing an unmeritorious claim for more than its true value, or at least at a price too high to defray the cost of prosecuting the claim. Opponents of marketization conclude these problems make implementing a market for personal injury claims prohibitively difficult.

THE NEED FOR COMPARATIVE INSTITUTIONAL ANALYSIS

The proponents of marketization assure us implementing a market for torts would improve outcomes for tort victims, benefit society by deterring tortious conduct, and reduce the burden of litigation on the judicial system. Opponents of marketization insist the opposite: that implementing a market for torts would diminish outcomes for tort victims, increase the burden of litigation on the judicial system, and be an overall detriment to society. It is logically impossible for both sides' arguments to be true on all fronts. How can these arguments be reconciled? The tension between proponents and opponents of the marketization of personal

68. It would be remiss of me to not acknowledge the proponents' response to these arguments. Proponents generally respond to the following arguments with one of two straightforward answers: 1) the private parties can contract in a way that avoids the problem; or 2) market mechanisms will resolve the problem. For a more detailed explanation of how specialized contracts or market mechanisms might obviate the challenges for implementation discussed here, see Marcushamer, *supra* note 2, at 1600–04.

69. For a discussion of how information asymmetries affect the behavior of economic actors within the context of settlement negotiations, see Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984).

70. Although the seller's perspective (the problem of the quick-talking claims purchaser) is addressed in the section discussing potential harm to tort victims, it is also a problem of information asymmetry.

injury tort claims reflects a more fundamental malfunction: a failure by each to engage in comparative institutional analysis. "In a world of institutional alternatives that are both complex and imperfect, institutional choice by implication, simple intuition, or even long lists of imperfections is deeply inadequate."[71] Rather than a simple recitation of the inadequacies of assignability, or the extolling of its virtues, the policy must be weighed against the relative merits of the available alternative institutions in each instance before any conclusions may be reached as to its desirability. What follows is an attempt to weigh the tradeoffs between assignability and non-assignability by examining the dynamics of participation between hypothetical claim purchasers and tort victims represented by attorneys.[72]

1. Tradeoffs for Victims

The effect of assignability on the amount of compensation received by tort victims is the most contentious and salient consideration in this debate. If one rule clearly outstrips the other on this point, it will be determinative for many as to the preferable public policy. It is for this reason that the bulk of my analysis will focus on the effect on tort victims' compensation under each institutional arrangement. I proceed by comparing each purported effect of assignability on victims' compensation asserted by opponents and proponents to the relative merits of the alternative institution.

a. Risk Aversion and Time Sensitivity

Variation in risk aversion between a given tortfeasor and the party prosecuting a claim against it skews the liquidated value of a claim away from the true value of the claim because, *ceteris paribus*, the parties will make different assessments of the claim's true value. Proponents contend the risk-averse tort victim is at a structural disadvantage when pitted against the corporate defendant, and the commercial claim purchaser will be less risk averse and bargain more effectively with the tortfeasor.[73] From a comparative perspective, this purported benefit of assignability is tempered by the ways attorneys share the risk of litigation and buoy the risk aversion of tort victims. Contingent fee arrangements shift some risk from the victim to the attorney, who will only receive fees in the event a settlement or judgement is reached. Furthermore, personal injury attorneys will typically advance the non-fee costs of litigation without interest. As a technical matter, clients are ultimately responsible for these costs, but in practice, attorneys rarely pursue

71. KOMESAR, *supra* note 10, at 6.

72. This analysis itself is inherently inadequate for determining the institution *best* suited for the achievement of the agreed-upon goals of the tort system because it fails to consider all the available institutional alternatives. *See, e.g.*, Sugarman, *supra* note 2, at 555. It merely seeks to show whether assignability is *less* well suited for the achievement of the agreed-upon goals of the tort system than non-assignability.

73. The widespread use of liability insurance makes it so that a tortfeasors liability is much more likely to be assumed by a corporate defendant regardless of the identity of the tortfeasor.

repayment from their clients if they are unable to settle the claim or acquire a judgment. Without quantifying these effects, it is difficult to conclude that the marginal reduction in risk aversion would measurably increase the ultimate value of the claim, and therefore the compensation received by the victim.

The issue of time sensitivity produces a different result. Increased time sensitivity reduces bargaining power in the context of tort claims. As discussed above, tortfeasors are not only insensitive to time, but are in fact categorically benefitted by delay.[74] A contingent fee arrangement does little to alleviate the immediate financial needs of a tort victim. The availability of health and unemployment insurance mitigate this need, but immediate payment from a claim purchaser would serve this need more effectively.

b. Transaction Costs

The commercial claim purchaser would probably have some advantages over a personal injury attorney in terms of transaction costs, but the likely benefit to the tort victim is mixed. The purchaser's ability to hold a diversified portfolio of claims does not clearly outweigh the ability of a law firm to do the same.[75] The same is true for the purported advantage held by a claim purchaser in assessing the value of tort claims. The expert knowledge needed to value such a claim is precisely the sort of knowledge held by plaintiff-side attorneys. The purported benefits from economies of scale also would seem to inure as easily to the attorney as they would to the claim purchaser. The ability of a purchaser to selectively pursue more profitable claims is only superior to an attorney's ability to do so if the assessment of the claim's profitability changes after the beginning of the attorney-client relationship. Prior to the formation of this relationship, attorneys can sort out those claims which they consider to be a waste of time as easily as a claim purchaser would.[76] The primary advantage a claim purchaser would have over firms in terms of transaction costs occur in cases where the purchaser holds several claims against a single defendant.[77] Since the claim purchaser, unlike an attorney, would not have an ethical obligation to pursue each claim individually, they would be able to settle bundles of claims at a discount. Finally, although it may be obviated by clever contracts, it would seem the need for the continued participation of the tort victim in most suits will create substantial transaction costs for claim purchasers.

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74. *See supra* note 38 and accompanying text.

75. "[A]s contingent fee lawyers, we are in the business of managing portfolio risk." David A. Hyman, Bernard Black & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1593 (2015) (quoting Bill Daniels, *Ten Tips for Making Partner in a Plaintiff's Firm*, PRACTICAL PRACTITIONER (July 2007)).

76. In fact, firms appear to do exactly that. Firms reject significant numbers of potential clients at the first consultation, and substantial numbers of cases that make it through the first screening do not result in representation. In medical malpractice cases, research shows attorneys accept less than 10% of initial inquiries. *Id.* at 1594.

77. *See* Marcushamer, *supra* note 2, at 1580 and accompanying text.

c. Access to Compensation

It is well recognized that many tort victims never receive compensation because, for a variety of reasons, they do not pursue their claim.[78] How assignability makes it easier for currently precluded victims to receive compensation is less clear. Some victims who do not pursue claims are unaware of their right to compensation. Proponents identify correctly that a claim purchaser has a market incentive to provide information to potential victims about their right to compensation but fail to articulate how advertising by plaintiff-side attorneys is any worse at doing so. Some tort victims, particularly those who are extremely time sensitive, would benefit from the ability to immediately monetize their claim. However, it is unclear how immediate monetization allows previously uncompensated victims to become compensated since the claims which are most likely to be immediately monetized are also those claims most likely to be eventually compensated through representation by an attorney.[79]

d. Harm to Victims[80]

As noted by the opponents, irrevocable assignment of the entire interest in a claim presents a serious risk of the tort victim being swindled. The claim purchaser will have every incentive to acquire the interest in the claim for as little as possible. Furthermore, shifting all the risk of failure to the claim purchaser means the victim will receive a reciprocally reduced amount of compensation. Finally, the tendency for a claim's true value to be obscured at the outset places downward pressure on the claim purchaser's willingness to pay, even under competitive market conditions. The net effect on total compensation will depend on the magnitude of any efficiency gains from reduced transaction costs outweighing the downward pressure from the shifted risk and information barriers.

2. Tradeoffs for Society

The primary social benefit proponents claim from a market for torts is that it will help deter tortfeasors from engaging in inefficient levels of risky activity. Tort liability for personal injury claims already has a limited deterrent effect.[81] To increase socially beneficial deterrence, it is not enough to simply increase the number of claims brought. Rather, there must be an increase in the number of *meritorious* claims brought. Insofar as meritorious claims that are unable to be prosecuted under non-assignability will be brought by commercial claim purchasers, there will be a socially

78. *See* Sugarman, *supra* note 2, at 592–94.

79. "Quite commonly, albeit not always, institutions move together. When one institution is at its best or worst, the alternative institutions are often at their best or worst." KOMESAR, *supra* note 10, at 23.

80. I do not discuss the potential for victim harassment in this section because it does not implicate compensation. Suffice it to say, I see no reason to conclude harassment from a claims purchaser would occur at a rate different than harassment from a personal injury attorney.

81. *See* KOMESAR, *supra* note 10, at 165.

beneficial increase in deterrence. As discussed above, this conclusion is not clearly established. Furthermore, insofar as assignability might increase the number of *unmeritorious* claims brought, it will create inefficient levels of deterrence. In cases where a single tortfeasor has injured several victims, a claim purchaser may have relatively less incentive than an attorney to ensure the individual claims are meritorious in the hope that the defendant will settle bad claims along with the good as part of a bundled settlement.[82]

3. Tradeoffs for Judicial Economy

Assignability is unlikely to benefit judicial economy. Proponents correctly state that assignability could increase the odds of settlement by increasing bargaining power parity between the parties to litigation. Where a claim purchaser has bargaining power that is superior to that of the victim represented by an attorney, it will increase the odds of settlement. Whether this would in fact occur is unclear.[83] The more likely way that assignability would benefit judicial economy is through the resolution of the conflicts of interest inherent to contingency fee and hourly fee arrangements that inhibit settlement.[84] However, these gains are more than likely to be offset by litigation surrounding the assignment contracts. As observed by the opponents, plaintiffs have a substantial incentive to dispute the contract in the event of an unexpected windfall, such as a bad faith insurance claim. The complex contracts used to ensure the continued participation of tort victims will also produce litigation that will weigh against any gains from assignability.

CONCLUSION

The theoretical conclusions I have reached here cannot be treated as definitive. Rather, it is my hope that this Note provides the framework to guide further empirical analysis assessing the real-world impacts of the tradeoffs I have identified. The true effect on compensation cannot be known without quantifying how the increased efficiencies potentially enjoyed by a claim purchaser compare to the downward pressure of shifted risk and information barriers on assignment price. The true effect on deterrence cannot be known without quantifying how assignability affects the number and merit of claims brought. The true effect on judicial economy cannot be known without quantifying how the increased odds of settlement compare to the increased volume of litigation surrounding assignment contracts. Without a more searching examination of these questions, we remain in the dark as to whether assignability is truly preferable to non-assignability for

82. *See* Marcushamer, *supra* note 2, at 1580.

83. One proponent concludes "[t]hat the assignee would have the superior bargaining position is an economic observation. An assignee would not purchase a claim from a tort victim if the former could not 'get a better return' on the claim. In other words, no one knowingly bets on a losing team." Morgan, *supra* note 47, at 704 n.180. The key word in this statement is "knowingly."

84. *See supra* note 48 and accompanying text.

personal injury tort claims, let alone whether a market for torts is superior to the panoply of institutional alternatives.