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Anthony J. Sebok

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The Inauthentic Claim

Anthony J. Sebok*

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It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

-Oliver Wendell Holmes¹

I. INTRODUCTION

This Article takes a critical look at the persistence of legal doctrines that prohibit or limit property rights in litigation. The Article focuses on prohibitions on assignment and maintenance. Assignment of personal injury tort claims is prohibited throughout the United States, while the assignment of other claims, such as fraud and professional malpractice, is prohibited in a large number of states. Maintenance, in which a stranger provides something of value to a litigant in order to support or promote the litigation, is prohibited in varying degrees in the United States.²

These doctrines might seem quite independent of each other at first glance, but as I will demonstrate below, their persistence in U.S. law is due to their reliance on a common conceptual claim about the very nature of law. This claim asserts first, that there is a quality, separate from and in addition to legal validity, which confers “authenticity” to a lawsuit, and second, that a lawsuit which fails to be “authentic” cannot be recognized by a court, regardless of the positive social consequences of allowing such suits.³ The claim does not presuppose that “inauthentic” lawsuits are more likely to be spurious,

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. See *infra* Part III.

3. This is, in effect, the argument of the United States Chamber of Commerce against the expansion of a market in lawsuits in the U.S. See U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES* 4 (2009) [hereinafter *SELLING LAWSUITS*] (discussing that although practices like third-party litigation financing increase plaintiff's access to the courts, they also “increase the overall litigation volume, including the number of nonmeritorious cases filed, and thus effectively reduce (not increase) the level of justice in the litigation system”).

fraudulent, or frivolous. What distinguishes the theory of the inauthentic claim from more familiar theories about the conditions which lead to fraudulent lawsuits is that it asserts that *a court cannot even hear a suit based on allegations known to be true and legal theories known to be valid because actions taken by the claimant corrupted or polluted the claim.*⁴ While there might be some version of a complex consequentialist argument behind the assumption that “inauthentic claims” must be prohibited, or, at the very least, limited, this Article will leave it for others to develop that argument.⁵ I will, instead, take seriously those who believe that inauthentic claims are, as a matter of history or principle, inconsistent with the common law’s values and traditions.⁶

A. *The Lawsuit as Property*

The law permits ownership in ways that are more sophisticated and complex than in the past. Sometimes the sophistication of our legal and economic theories outstrips our common sense, as the recent experience with the securitization of subprime mortgages tends to demonstrate.⁷ But in general, the history of property theory over the past century has been a story of increasing complexity bringing increasing opportunity and wealth creation.⁸ It seems unlikely that

4. Concerns over inauthentic claims are therefore distinguishable from concerns over fraudulent claims brought by unscrupulous attorneys in the mass litigation context. See Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96 (noting that the federal court silica litigation raised “great red flags of fraud”). See generally Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513 (2007) (describing problems with litigation screenings); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289 (2006) (same); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221 (2008) (same).

The theory of the inauthentic claim parallels the equitable defense of “unclean hands.” See 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(2) (2d ed. 1993) (discussing how the unclean hands defense is closely related to other equitable defenses and equitable concerns over hardship, because any conduct the chancellor may consider to be unethical or improper might suffice to bar the plaintiff’s claim, even if the conduct is not actually illegal). The difference is that, whereas unclean hands focuses on actions taken *before* a claim ripened into legal sufficiency, the theory of the inauthentic claim targets actions taken *after* a claim has ripened into legal sufficiency.

5. See *infra* Part V, which provides a quick tour of the reasons why I think consequentialist arguments against the commodification of lawsuits lack empirical support.

6. See *infra* Part IV.

7. Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1126–28 (2009).

8. Jeremy Adelman, *Property Rules or the Rule of Property? Carol Rose on the History, Theory, and Rhetoric of Ownership*, 21 LAW & SOC. INQUIRY 1041, 1041–43 (1996).

even the critics of today's "hyper-market" society would like to return to an era when land could not be divided into interests or used to secure mortgages, or firms could not be sold off as shares in corporations with limited rights and obligations, or debt obligations could not be transferred from the original obligor to another party whom the debtor never met.⁹ Often each new form of property is created by someone looking to take advantage of a previously unseen and unexploited market opportunity. Typically innovations in property are permitted to the extent that they do not induce fraud. Sometimes after the fact they are subject to regulation if their benefits are outweighed by their costs, economic or social.

Notwithstanding the feeling that sometimes we live in a hyper-market where everything and anything can be bought and sold, there persist limitations on what can be turned into property, or more properly, what forms of property the law will respect by enforcing through injunction and/or money judgment the right to exclude and transfer that is inherent in property.¹⁰ Most famous are examples of limitations on ownership and exchanges in which the body is treated as chattel: voluntary slavery, or the sale of one's own organs or reproductive capabilities (surrogacy).¹¹ The law is replete with such restrictions, although sometimes the limitations are conceptualized under the rubric of the regulation of conduct and not the prohibition of a form of property. One could describe laws that prohibit the possession of a controlled substance (for example, drugs or alcohol) as a prohibition of property rights in those things.¹² Or one could describe

9. O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 471 n.38 (2004).

10. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

[T]hat is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen

Endorsed: The state

Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

11. See, e.g., William Boulier, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 713 (1995) (discussing federal and state prohibition on the sale of human organs).

12. Barclay Thomas Johnson, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1048–49 (2002).

laws that prohibit prostitution as a prohibition of property rights in one's own sexual capacities.¹³

The wisdom of the prohibitions on property in the body have been debated, but the tenor of that debate seems quite different from debates over whether to prohibit credit-default swaps or subprime mortgages, to take just two recent controversial examples.¹⁴ When people argue over whether to permit a market in surrogacy or organs, the debate sometimes turns on consequentialist arguments (for example, whether such markets exploit the poor), but it often turns on conceptual arguments about the limits of commodification, human dignity, and the ethics of markets.¹⁵ Debates about the prohibition of most other market innovations are typically conducted on just the consequentialist level. Should credit-default swaps be prohibited (or limited)? The answer depends on the estimates that can be reasonably made today as to the likely effect of permitting a market in these instruments that treats them as property, as opposed to, for example, an insurance contract.¹⁶ Should subprime mortgages be prohibited (or limited)? The answer lies in the predictions experts offer as to the likely effect of permitting a market in these instruments compared to the effect of pricing higher risk borrowers out of the housing market.¹⁷ Sometimes debates over certain property rights will take on moral dimensions, especially in the area of land-use regulation,¹⁸ but even in the area of consumer credit, where limitations on exchanges of money were once justified under religiously rooted doctrines of usury, the active debate over whether to permit a market in loans for consumers without any limitations on the absolute rate of interest is conducted on a consequentialist basis. The questions typically asked by legislatures when debating laws to limit "usurious" lending concern its effect on the poor and less-educated, and, by extension, whether the limits cost society overall more than would be gained by allowing

13. Robert W. McGee, *Essay: Some Thoughts on the Relationship Between Property Rights and Immigration Policy*, 42 CLEV. ST. L. REV. 495, 506 (1994).

14. Jeremy A. Blumenthal, "To Be Human": A Psychological Perspective on Property Law, 83 TUL. L. REV. 609, 610–21, 633–35 (2009); Alan M. White, *The Case for Banning Subprime Mortgages*, 77 U. CIN. L. REV. 617, 642–44 (2008).

15. Michelle Bourianoff Bray, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 212–20, 239–43 (1990).

16. Robert F. Schwartz, *Risk Distribution in the Capital Markets: Credit Default Swaps, Insurance and a Theory of Demarcation*, 12 FORDHAM J. CORP. & FIN. L. 167, 181–200 (2007).

17. John A.E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 446–51.

18. Kimberly M. Watt, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-Kelo Northwest*, 43 IDAHO L. REV. 539, 558–72 (2007).

lenders to make any deal they wish with fully informed, freely choosing borrowers.¹⁹

In other words, restrictions on property in U.S. law can be characterized as follows. First, the historical trend has been to have fewer restrictions. Second, where restrictions persist or are adopted, the rule has been that they are justified on consequentialist grounds. The exception to the rule is that they may be justified on conceptual or moral grounds, often having to do with a deeply felt revulsion at the commodification of the human body. These two principles fit well with the United States' historical commitment to markets and pragmatism when it comes to law (private law, at least).

The exception to this general approach to commodification in law is U.S. law's resistance to allowing property rights in lawsuits.²⁰ My review of the history of the common law reveals that a party may "inauthenticate" a legally sufficient claim in one of two ways: either by (1) impermissibly transferring the claim to a third party (assignment) or (2) receiving improper aid from a stranger to the case (maintenance). This Article brings these two prohibitions under a single moniker in order to illuminate and challenge the common prejudice that motivates them. Because limitations on assignment have been lifted in vast areas of the private law in the last century, modern lawyers have tended to stop thinking about it. This, I believe, is a mistake. Although limitations on assignment have been greatly reduced, the theory of the inauthentic claim still casts a long shadow over the common law, both in the area of assignment and especially in the area of maintenance, where limitations sweep far more broadly across the different departments of the common law.

In this Article, I will demonstrate that the theory of the inauthentic claim depends on an incoherent and indefensible dichotomy between a claim that arises "naturally" (for example, on its "own bottom"²¹), and a claim that arises "unnaturally." The theory of the inauthentic claim relies on this dichotomy to explain why courts dismiss certain claims when the person who is "really" bringing the

19. Diane Hellwig, *Exposing the Loansharks in Sheep's Clothing: Why Re-regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567, 1574–80, 1600–10 (2005).

20. This is not a new observation. See Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 816–21 (1916), and Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 71–72 (1936), for a criticism of restrictions on assignment and maintenance by the Legal Realists in the early twentieth century.

21. See *Wallis v. Duke of Portland*, (1797) 30 Eng. Rep. 1123 (Ch.) 1128; 3 Ves. Jun. 494, 502. This expression will be discussed in more detail *infra* Section III.B.4.

claim is not the person who suffered the wrong for which the redress is sought. This idea has its roots in the commonplace corrective justice insight that a wrong creates an obligation on the part of the wrongdoer to repair.²² I believe, however, that it is a mistake to read into corrective justice an essential hostility to the free alienability of lawsuits.

The theory of the inauthentic claim, and the putative corrective justice rationale behind it, has not been clearly identified before, although both the assignment of lawsuits and maintenance have been studied and debated by lawyers, judges, and scholars over the past two centuries. In this Article, I will argue that there is a theory of the inauthentic claim embedded into the common law, that it relies on a mistaken interpretation of corrective justice, and that if it is abandoned, there would be no a priori reason, rooted in either corrective justice or public policy, to oppose assignment or maintenance.

B. An Example: MNC Credit Corp. v. Sickels

The 1998 Virginia Supreme Court case *MNC Credit Corp. v. Sickels* involved the assignment of a legal malpractice claim.²³ Defendant attorneys drafted documents for their client, a subsidiary corporation, involving the return of a residential development cash bond posted by the subsidiary. The entire cash bond was not returned to the subsidiary, it seems, due to a mistake the lawyers made in drafting the documents. The subsidiary assigned all its interests, rights, and obligations to its parent. The parent corporation filed suit against the defendant law firm alleging that it committed legal malpractice in drafting the documents for the subsidiary. The Virginia Supreme Court held that under Virginia common law, legal malpractice claims and legal services contracts are not assignable.

The Court based its decision, in part, on the need to preserve the unique relationship between lawyer and client, and this Article will not discuss that part of its decision.²⁴ The section of the decision

22. See *infra* Section IV.B.

23. *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 332 (Va. 1998).

24. *Id.* at 333–34. I briefly address the argument that the assignment of tort suits between clients and their attorneys are especially dangerous below. See *infra* text accompanying note 29. This argument uses the attorney-client relationship as a device to limit the client's rights after that relationship has been allegedly violated by the attorney. For this reason, many courts have rejected the position adopted by the Virginia Supreme Court. See *infra* note 103.

which illustrates the concept of the inauthentic claim is contained in a long paragraph quoted from a 1976 California case:

The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. . . . The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system . . .²⁵

First, the court suspected that the assignment of legal malpractice claims would promote “unjustified” claims. If by “unjustified” the court meant carelessly researched or drafted, it is not clear why this would be the case, since purchasers of lawsuits would be expected to be especially careful at selecting only the strongest claims.²⁶ Second, the court suspected that the assignment of legal malpractice claims would produce an increase in such claims. Even if this were true, why would this be a bad thing? If the malpractice claims that would be assigned were not fraudulent and reflected claims based on valid law, why would it be a bad thing for these cases to increase in number, since that would mean that more legal wrongs would be repaired and more wrongdoers held to account?²⁷ Third, the court suspected that the assignment of legal malpractice claims would encourage champerty, which is a species of maintenance. Strictly speaking, champerty occurs where a stranger offers to support a party’s litigation costs in exchange for a payment contingent on the outcome of the case.²⁸ The court could not have meant champerty in its literal form, since an assignment puts the third party in the shoes of the party who originally had the right to bring the lawsuit, but I think that a fair reading of the Virginia Supreme Court’s language

25. *Id.* at 333–34 (quoting *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976)).

26. The degree to which investors can choose relatively stronger cases depends, in part, on their willingness to invest early in search costs. See STEVEN GARBER, *RAND INST. FOR CIVIL JUSTICE, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN* 24 (2010) (discussing how due diligence processes will reduce costs associated with adverse selection and moral hazard).

27. *N.H. Ins. Co. v. McCann*, 707 N.E.2d 332, 337 (Mass. 1999); Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 *TEX. L. REV.* 481, 494, 496 (2003).

28. *BLACK’S LAW DICTIONARY* 262 (9th ed. 2009).

reflects its larger concern with the idea that strangers to a lawsuit should not profit off of a lawsuit's resolution. Why this should be a cause for concern is one of the subjects of this Article.

Fourth, the court suspected that the assignment of legal malpractice claims would force attorneys to "defend themselves against strangers."²⁹ The motivation behind this worry is unclear. By definition, an assignment puts a third party in the shoes of the assignor. An assignment of a contract claim alleging that a builder failed to perform satisfactorily puts the defendant builder in the position of having to defend against a stranger. It is unclear why the concern raised by the court does not cut against the assignment of *all* contracts, a practice that had been accepted throughout the same period of time when the assignment of tort claims (especially claims deemed "personal" to the claimant) were prohibited.³⁰ Why exactly this distinction was drawn is another subject of this Article.

Fifth, the court suspected that the assignment of legal malpractice claims would mean an increase in such claims that may create a burden on the court system. This is a nuanced version of the second argument above. Again, it is not clear why an increase in the workload of the court system is an argument against assignment if the claims were not fraudulent and reflected a set of wrongs that we would otherwise qualify for redress in the tort system. The consequence of increased caseloads might force society to consider an increase in resources devoted to civil justice, or resources devoted to reducing the injury-producing activity, or, if neither of those were possible, to consider a rational and fair system to ration judicial resources among all parties with civil suits (leading, inevitably, to the adoption of non-litigation compensation systems).³¹ Unless there is an

29. *MNC Credit Corp.*, 497 S.E.2d at 333.

30. Furthermore, although the party in interest may be a "stranger," the *claim* is not that of a stranger's. The claim is grounded in the injury suffered by the person with whom the defendant had the original relationship that gave rise to the claim for redress. So the lawsuit does not require the defendant to encounter anything alien or strange.

31. The portion of social resources dedicated to the resolution of legal claims can vary tremendously even among liberal democracies, and are the result (in part) of collective decisions about judicial resources, legal aid, and indirect methods of funding civil litigation (e.g., the contingency fee or legal insurance). See Erhard Blankenburg, *Civil Litigation Rates as Indicators for Legal Culture*, in *COMPARING LEGAL CULTURES*, 41 (David Nelken ed., Dartmouth 1996); Erhard Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, 28 *LAW & SOC'Y REV.* 789 (1994) (discussing how the absence or presence of institutions at the pretrial stage filtering disputes explains the difference in litigation frequency between the Netherlands and West Germany); Erhard Blankenburg, *Studying the Frequency of Civil Litigation in Germany*, 9 *LAW & SOC'Y REV.* 307, 310-18 (1975) (exploring the potential ecological, economic, and social factors

independent reason to treat tort suits that have been assigned with a hostility not shown to other tort suits, or other suits in general, the fifth argument is specious.

There seem to be five arguments contained in this passage. I think the most interesting arguments are (3) and (4): the common law prohibition against certain forms of maintenance (for example, champerty) and the argument that the civil justice system should only concern itself with claims that are brought "personally"—that is, that are brought by the person actually harmed. These two arguments, I will argue below, are really one and the same. Aside from certain consequentialist grounds for the prohibition against champerty, which were based on empirical conditions that even the courts that uphold the prohibition today admit are anachronistic, the prohibition of champerty is rooted in a claim about what is necessary and essential in a lawsuit in tort or contract. According to this argument, there is something special about these suits such that a stranger to the accident may not possess any form of property interest in the claim for legal redress generated by the accident, and the burden of proof for any deviation from this principle lay with the party seeking to create this new form of property.

In this Article, I will argue that the concern over the possibility that a stranger to an accident may be the "true" force behind a lawsuit which brings a wrongdoer into the civil justice system is an expression of the principle of the inauthentic claim. This Article, therefore, will try to explain the attractiveness of decisions like *MNC Credit Corp.* by examining the history of the concept of the inauthentic claim and the content of the concept. I recognize, of course, that the concept may lack rational content, or might be based on ideals and concerns that were relevant and persuasive at one point in the history of the common law but not today. Still, as Holmes said, you have to pull the dragon out of its cave in order to kill it.³² This is an exercise in dragging.

This Article has five parts. Part I is the Introduction. Part II reviews the current state of the law of assignment, which involves a

influencing the difference in litigation rates between urban and rural districts in Western Germany). Of course, at some point a society may decide that adversarial legal methods for evaluating claims are simply not worth the cost, and move to various forms of social insurance or strict liability. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1084 (1972) (noting that the strict liability approach is more likely than either the classical negligence calculus and its mirror image to accomplish "a minimization of the sum of accident costs and of accident avoidance costs").

32. Holmes, *supra* note 1.

review of multiple jurisdictions' exceptions to the general principle that choses in action are freely assignable. I provide a history of the gradual liberalization of the rule against assignment, without which the current state of the law would be incomprehensible. In Part III, I review the current state of the legal doctrines that limit maintenance. This will require a review of multiple jurisdictions' common law and statutory material, producing a taxonomy of the patchwork of laws concerning maintenance in the United States today. In Part IV, I review arguments from history and jurisprudence in favor of the theory of the inauthentic claim. I will argue that the idea that redress in private law must *mirror* the relationship that gave rise to the wrong misapplies the corrective justice theorist's insight that a wrongdoer's obligation to repair is based on a relational wrong done to the victim (and not, for example, to society at large).³³ In Part V, the Conclusion, I will briefly consider the role of empirical research and public policy concerns in the historical and contemporary debate over the liberalization of the law of assignment and maintenance. It may be the case that the liberalization of the rules concerning maintenance would harm the civil litigation system, either because third parties will exploit the original claimholders, or because it will increase the number of meritless or socially inefficient lawsuits.³⁴ My treatment of these policy arguments will be to take them at face value; that is, this Article will not attempt to prove that there may be no good consequentialist arguments to limit the property interests that citizens can take in litigation. This Article will conclude merely that any current restrictions on assignment and maintenance should be based on empirical evidence that the social costs of any given class of maintenance or assignment relationship outweigh their social benefits.³⁵ The Article will end by taking note of the existence of

33. See *infra* Section IV.B.

34. See, e.g., Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007) (discussing the "potentially dilatory" impact upon settlements that litigation loan agreements have by forcing litigation and the potential victimization of litigants by third parties with superior bargaining power when entering into such agreements); Paul H. Rubin, *Third Party Financing of Litigation* (Third Party Financing of Litigation Roundtable, Searle Ctr., Nw. Univ. Law Sch. Sept. 24–25, 2009), available at http://www.law.northwestern.edu/jep/symposia/JEP_CJ_2009_Rubin.pdf (discussing the external costs of allowing sale of legal claims including increased litigation costs and inefficient substantive law).

35. See GARBBER, *supra* note 26, at 45 ("It is also wise to be skeptical of one-size-fits-all policy responses . . . [t]o different types of [markets in lawsuits] It seems implausible that widely applicable policies will be widely effective in promoting social objectives.").

commercial enterprises that are investing in litigation in Europe and Australia, and will recommend further avenues for research.³⁶

C. Assignment and Maintenance Defined

Modern commentary often blends together the legal doctrines that place limits on assignment and maintenance.³⁷ It is important to keep the two sets of limitations separate notwithstanding the fact that fear of maintenance has always been the most common justification for limitations on assignment.³⁸ If that justification were abandoned, one could still have restrictions on maintenance in a world where there were no limitations on assignment. This is, in fact, the very state of affairs towards which U.S. law has been moving over the past century.

An assignment is the act of transferring to another all or part of one's property, interest, or rights.³⁹ While the early common law rejected all assignments of a cause of action, regardless of whether it was based in contract or tort, that restriction eventually shrank until courts could state the modern rule was that "assignability of things [in action] is now the rule; non-assignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party"⁴⁰ The exceptions will be described in this Section.

Maintenance is the "assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case [or] meddling in someone else's litigation."⁴¹ Champerty is a

36. My arguments do nothing more than establish the need for careful policy-based research to draw boundaries and rules for a market in lawsuits. One recent publication that takes up this challenge is Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053.

37. EDMOND H. BODKIN, *THE LAW OF MAINTENANCE AND CHAMPERTY* 6–7 (1935) ("Inseparably bound up with the historical development of the law of maintenance, although totally distinct from that law in origin, is the doctrine of the non-assignability of choses in action.")

38. *Id.* at 7–8 ("[M]aintenance was in fact assigned by the Courts as the reason for the non-assignability of choses in action.")

39. 6 AM. JUR. 2D *Assignments* § 1 (2010).

40. *Webb v. Pillsbury*, 144 P.2d 1, 3 (Cal. 1943) (quoting 3 CAL. JUR. *Assignments* § 5 (1921)). In addition, most states will not permit the assignment of breach of contract claims that are "purely personal in nature," such as promises of marriage. 6 AM. JUR. 2D *Assignments* § 52 (2010).

41. BLACK'S LAW DICTIONARY 1039 (9th ed. 2009). Barratry is also a species of maintenance: it is the practice of *frequently* exciting or stirring up suits in others. In other words, someone who

species of maintenance. Champerty is “[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds.”⁴² The chief difference between maintenance and champerty is that the maintainer is not rewarded for his support of the litigant.⁴³

Although it is hard to imagine why someone might support another’s civil litigation except for profit, cases do occasionally arise in the courts. For example, in *Toste Farm Corp. v. Hadbury, Inc.*, the defendant was a law firm that had negligently prepared legal documents for a third party.⁴⁴ The third party sued the plaintiff in a related matter. The plaintiff alleged that the defendant offered to finance the third party’s suit—including the legal fees of another law firm hired to prosecute the suit—in the hope that if the third party received a settlement from the suit “he would not pursue a malpractice claim against” the defendant.⁴⁵ The Rhode Island Supreme Court agreed that, assuming the plaintiffs’ allegations were true, the plaintiff had stated an actionable claim for maintenance but not champerty.⁴⁶

In the early twentieth century some courts interpreted the prohibition on maintenance very broadly. In *In the Matter of the Estate of Gilman*, Judge Cardozo said that “maintenance inspired by charity or benevolence” could be legal but not “maintenance for spite or envy or the promise or hope of gain.”⁴⁷ What Cardozo called maintenance in case of “the promise of gain” is today simply called champerty.⁴⁸ As we will see in Section III.B, some courts never took

engages in maintenance or champerty once has not committed barratry, but may nonetheless have violated the prohibition on champerty or maintenance.

42. *Id.* at 262.

43. “[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.” *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 273 (S.C. 2000) (quoting *In re Primus*, 436 U.S. 412, 424 n.15 (1978)).

44. 798 A.2d 901 (R.I. 2002).

45. *Id.* at 904.

46. *Id.* at 906. Note that the distinction between maintenance and champerty did not turn on the law firm’s motive in helping to fund the case brought by the third party (which was self-interested) but on the absence of an agreement between the third party and the law firm to share in the proceeds from the suit brought by the third party and paid for by the law firm.

47. 167 N.E. 437, 439 (N.Y. 1929).

48. *Gilman* involved maintenance by the party’s own lawyer, which may have made it especially obnoxious to Cardozo, although today such an arrangement—the contingency fee—is the one form of maintenance that is universally accepted in every part of the United States. In fact, the first efforts to loosen the limitations on champerty came out of the struggle to introduce

the view that maintenance “inspired” by the promise of profit was impermissible, while other courts came to move from Cardozo’s position towards a much more permissive position.⁴⁹ How this change came about, and its relationship to the earlier loosening of limitations on assignment across virtually the entire United States during the nineteenth century, will take up most of the next Part.

II. THE CURRENT LAW ON ASSIGNMENT

Today, the original common law rule of non-assignability has been almost fully abandoned.⁵⁰ Exceptions do persist, however. The leading test of assignability is whether or not the cause of action survives the death of the plaintiff and can be taken up by his estate or a representative appointed by law; if the cause of action survives, it is assignable.⁵¹

A. Personal Injury

The most important current limitation, universally enforced except in Texas,⁵² and to a lesser extent Mississippi,⁵³ prohibits the

the contingency fee. See James E. Moliterno, *Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules*, 16 GEO. J. LEGAL ETHICS 223, 229 (2003) (discussing how the contingent fee, “a particular form of ‘maintenance by champerty,’” arose in the United States); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 639–40 (1995) (discussing how contingent fees were eventually excepted from the doctrine of champerty).

49. See, e.g., *Brown v. Bigne*, 28 P. 11 (Or. 1891).

50. See *Osuna v. Albertson*, 184 Cal. Rptr. 338, 345 (Ct. App. 1982) (discussing how “the tendency of modern jurisprudence strongly favors the assignability and the survivability of things in action”); *McKenna v. Oliver*, 159 P.3d 697, 699 (Colo. App. 2006) (discussing how Colorado law generally favors the assignability of claims, with the exception being causes of action for invasion of privacy); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 236 (Iowa 2001) (“[T]he law now generally favors the assignability of choses in action, and courts have permitted the assignment of insurance policies under statutes providing for the assignment of contracts in exchange for a money payment.”); *Lemley v. Pizzica*, 36 Pa. D. & C.2d 327, 330 (Ct. Com. Pl. 1964) (“The trend of judicial decisions as to the assignability of certain causes of action is to enlarge, rather than to restrict the causes that may be assigned.”); *Wis. Bankers Ass’n v. Mut. Sav. & Loan Ass’n of Wis.*, 291 N.W.2d 869, 876 (Wis. 1980) (discussing how the principle of assignability exemplifies a trend of increasing commercial flexibility, shared by the courts and legislature).

51. 6 AM. JUR. 2D *Assignments* § 49 (2010).

52. See *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d 19, 22 (Tex. 1987) (“[A] cause of action for damages for personal injuries may be sold or assigned [in Texas].”).

53. “By statute, Mississippi eventually changed the common law and held that [a]ny chose in action or any interest therein, after suit has been filed thereon, may be sold or assigned the same as other property, whether such cause of action or any interest therein was heretofore

assignment of causes of action for personal injuries.⁵⁴ This is based on the common law maxim *actio personalis moritur cum persona* (“a personal cause of action dies with the person”).⁵⁵ The enduring influence of *actio personalis* today is hard to explain since the advent of survivorship statutes in the nineteenth century essentially suspended the common law doctrine; now tort claims survive the death of the plaintiff and can be maintained by a set of persons named in the statute, usually members of the plaintiff’s family.⁵⁶ Survivorship laws posed a challenge to the historical limitation on the assignment of personal injury claims: If they now survived, why couldn’t they be assigned? Almost all courts still refused to permit the assignment of personal injury claims, but split on the reason for maintaining the prohibition.⁵⁷ Most states adopted what has been called the “equivalency principle”: the test of whether a cause of action could be assigned was whether it survived in common law, that is, prior to the passage of the survivorship statutes.⁵⁸ The equivalency principle treated *actio personalis* as evidence of a principle in the common law that certain causes of action lacked some essential quality which made their assignment impossible.⁵⁹ Other states

assignable under the laws of this state or not.” *Kaplan v. Harco Nat’l Ins. Co.*, 716 So. 2d 673, 676 (Miss. Ct. App. 1998) (quoting MISS. CODE ANN. § 11-7-7 (1972)).

54. Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 330 (1987).

55. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 354 (2d ed. 2008). *Actio personalis* worked in both directions—the death of the tortfeasor put an end to the plaintiff’s suit also. As Blackstone put it, “neither the [heirs of the deceased] plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.” 3 WILLIAM BLACKSTONE, *COMMENTARIES* *302.

56. In 1846 the English Parliament passed Lord Campbell’s Act, which created causes of action for wrongful death and allowed designated representatives of the deceased plaintiff to maintain the plaintiff’s causes of action for personal injury; that is, it abrogated *actio personalis*. The various states of the United States soon followed. GOLDBERG ET AL., *supra* note 55, at 357; *see, e.g.*, *Nelson v. Dolan*, 434 N.W.2d 25 (Neb. 1989) (describing operation of state survival statute).

57. Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 689–90 (2001).

58. Shukaitis, *supra* note 54, at 331; Harold R. Weinberg, *Tort Claims as Intangible Property: An Exploration from an Assignee’s Perspective*, 64 KY. L.J. 49, 69 (1975); *see, e.g.*, *In re Schmelzer*, 350 F. Supp. 429, 431 (S.D. Ohio 1972), *aff’d*, 480 F.2d 1074, 1077 (6th Cir. 1973) (“[G]oals of the Bankruptcy Act can hardly be achieved if the trustee is permitted to take over the bankrupt’s unliquidated claims for serious personal injuries.”).

59. Weinberg, *supra* note 58, at 71.

rejected the equivalency principle.⁶⁰ For these states, survivability turned out to be only one policy factor to be weighed against other policy factors.⁶¹ If, after summing and weighing these factors, the assignment of a cause of action named in a survival statute was contrary to public policy, it would not be permitted.⁶²

Many states adopted the equivalency principle after the American Revolution; the United States Supreme Court cited it approvingly in 1828.⁶³ The equivalency principle began to attract criticism as well.⁶⁴ The chief problem with the principle was with the "essential quality" allegedly lacking in causes of action which did not survive in the common law.⁶⁵ Pomeroy said that the torts which survived in common law (and thus were assignable even after the passage of the survivorship laws) involved injury to real and personal property and fraud or deceit; while those which did not survive at common law, and thus were not assignable, were torts to the person or character and which gave rise to only personal injury, emotional distress, or loss of reputation unaccompanied by special damages.⁶⁶ In both England and the United States, the missing quality had to do with the target of the defendant's tortious act—torts causing injury to property survived while torts causing injury to the person (the body,

60. See, e.g., *Warner v. Flack*, 278 Ill. 303, 309 (1917) ("[A]ssignability and heritability of rights are not always, though usually, coexistent. Rights may pass by descent which cannot be assigned.").

61. *Farm Bureau Cas. Ins. Co. v. Wright Oil Co.*, 454 S.W.2d 69, 72 (Ark. 1970); *Notarian v. Plantation AMC Jeep, Inc.*, 567 So. 2d 1034, 1035 (Fla. Dist. Ct. App. 1990); *Goldfarb v. Reicher*, 171 A. 149, 150 (N.J. 1934); *Travelers Indem. Co. v. Rader*, 166 S.E.2d 157, 161 (W. Va. 1969).

62. See, e.g., *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 327 (Ariz. Ct. App. 1996); *Town & Country Bank of Springfield v. Country Mut. Ins. Co.*, 459 N.E.2d 639, 640 (Ill. App. Ct. 1984); *Joos v. Drillock*, 338 N.W.2d 736, 738 (Mich. Ct. App. 1983); *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993); *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 217 (Mo. Ct. App. 1967); *Can Do, Inc. v. Manier*, 922 S.W.2d 865, 867 (Tenn. 1996).

63. *Comegys v. Vasse*, 26 U.S. 193, 213 (1828) (noting in dictum: "In general . . . mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of assignment.").

64. See, e.g., *McKee v. Judd*, 12 N.Y. 622 (1855) (Hand, J., dissenting) (stating that if the cause of action arises from an act that "diminishes or impairs" a person's property, it passes to the assignees, and that the transfer in these cases complies with a statute and is generally *in invitum*).

65. See *Weinberg*, *supra* note 58, at 73 (citing a difference in the treatment of voluntary inter vivos assignments of personal tort claims and involuntary assignments to executors and administrators).

66. 3 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1275 (3d ed. 1905); *Weinberg*, *supra* note 58, at 69.

feelings, or reputation) did not survive. As one court put it, looking back on this doctrine:

Underlying the distinction between actions that die with the person and those that survive is the basic thought that the reason for redressing purely personal wrongs ceases to exist either when the person injured cannot be benefited by a recovery or the person inflicting the injury cannot be punished, whereas, since the property or estate of the injured person passes to his personal representatives, a cause of action for injury done to these can achieve its purpose as well after the death of the owner as before.⁶⁷

Even if the boundary between injury to property and personal injury could be maintained with any consistency in the context of common law survivorship,⁶⁸ it was not clear why that boundary should govern the rules of assignment. The obvious difference between the two is that the original claimholder in a survivorship action is, by definition, dead; but in assignment the original claimholder usually outlives the lawsuit's transfer and resolution. In the case of assignment, a person who suffered a wrong certainly could have been "benefitted" by his assignee's recovery. The sale of the claim benefited the assignor in the most direct and obvious way, and further, if he participated in the litigation, he might have benefited by watching the wrongdoer pay for the wrong, thus increasing his satisfaction (especially if it turns out that the assignee is better able to pursue the claim than the assignor). Yet, Weinberg noted, U.S. courts assumed that "assignability flow[ed] naturally from survivability just as night inevitably follows day."⁶⁹

Another problem was that even if the "essential" quality conferred by injury to property could be rationally translated from one set of concerns (survivorship) to another (assignment), why wasn't the existence of the survivorship statutes sufficient evidence for the claim that the state had conferred to causes of action the "essential" quality possessed by causes in which the injury was to property? At this point, courts retreated to the mysterious claim that certain torts had "an assignable nature" that was independent of the effect of any statute passed by the state. When confronted with the question of whether a trustee in bankruptcy could bring a claim against one who caused the

67. *Barnes Coal Corp. v. Retail Coal Merchs. Assoc.*, 128 F.2d 645, 649 (4th Cir. 1942).

68. For example: Should fraud claims be permitted to survive in the common law? Pomeroy assumed yes, but some states held otherwise, distinguishing between fraud that affected property and fraud that affected the person. *See, e.g., Nichols v. U.S. Fid. & Guar. Co.*, 155 N.W.2d 104, 108 (Wis. 1967) ("The crucial question is whether a cause of action to recover damages for fraud is one for 'damage done to the property rights or interest of another.'") (citation omitted).

69. Weinberg, *supra* note 58, at 69.

bankrupt to lose his business reputation, the Hawaii Supreme Court said that

assignees can take only such choses in action as are of *an assignable nature*. An action for assault or for seduction could not pass to executors or assigns, and we may say generally that no action of which the gist consists of injury to the feelings or in which injury or insult is an aggravation, can be assigned, voluntarily or by operation of law.⁷⁰

This response is open to two criticisms. First, it assumes a jurisprudential worldview—some version of Langdellian formalism—in which the law is comprised of essential, a priori concepts with an existence independent of the positive law of the specific legal system.⁷¹ Second, it leaves a puzzle: If there is some essential, a priori feature of the common law called an “assignable nature” and some torts have it and some do not, *how is it that the law of assignment could change at all?* For most nineteenth and early twentieth century U.S. courts, the problem solved by the equivalency principle was “which torts could be assigned?” and it was taken for granted that contract and property claims could be assigned freely. But there was a time when the courts enforced the “doctrine of the non-assignability of choses in action”—that is, they prohibited the assignment of *any* suit for damages in property, contract, or tort.⁷²

A “chose in action” includes “all personal rights . . . which can only be claimed or enforced by action, and not by taking physical possession.”⁷³ Holdsworth noted that the category of chose in action included “rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal.”⁷⁴ This extreme position

70. *Austin v. Michiels*, 6 Haw. 595, 595 (1885) (emphasis added).

71. Cook attacked Ames (or at least his formalist disciples) for making exactly this kind of jurisprudential error:

[If Ames] meant by the statement that the rule of that a chose in action is not assignable “is a principle of *universal law*” . . . that the rule is a *necessary* one, one that must exist in all systems of law, it seems to be erroneous. . . . [S]ome at least some of Dean Ames’s students seem to assume that he meant . . . that there is some *universally necessary and absolute principle of universal law*—one that from the nature of things exists in *all systems of law*.

Cook, *supra* note 20, at 818 (emphasis added). For a discussion of Langdell’s common law formalism, see ANTHONY J. SEBOK, *LEGAL POSITIVISM AND AMERICAN JURISPRUDENCE* 78–92 (1998).

72. BODKIN, *supra* note 37, at 6 (citing FREDERICK POLLOCK, *POLLOCK ON CONTRACTS* 232 (9th ed., 1921)); see Weinberg, *supra* note 58, at 78.

73. *Torkington v. Magee*, [1902] 2 K.B. 427 at 430 (Eng.).

74. W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 997–98 (1920).

was practically impossible to sustain, and, as Holdsworth demonstrated, slowly but surely, rights contained within the legal concept of the chose in action were peeled off like the layers of an onion. Through the creative use of legal fictions, such as the use of equity to circumvent the prohibition of the assignment of contracts,⁷⁵ the common law “was induced to connive at the introduction and extension of evasion[s] of its principle that a *chose* in action is not assignable.”⁷⁶ In what appears to be a frank admission that the exceptions had swallowed the rule, the British Parliament lifted almost all limitations on the assignment of choses in action for property and contract.⁷⁷

The experience in the United States after independence was similar to that of England, except that the pragmatic tendency that eroded the limitations on assignments of choses in action in England was even more pronounced in the United States.⁷⁸ In *Comegys* the United States Supreme Court adopted a new theory of assignments in bankruptcy that did not rely on the legal fictions developed by the English courts and that reflected a skeptical attitude towards the historical prohibition of the assignment of choses in action.⁷⁹ As Weinberg and other commentators have noted, U.S. courts did not wait for legislators to ratify the liberal treatment of the assignment of contract and property tort actions in law, as in England—they just ignored the restrictions inherited from Blackstone and Coke.⁸⁰ In *Rice v. Stone*, the Massachusetts Supreme Judicial Court in 1861 noted:

[At one time a] thing in action, cause of suit or title for condition broken, could not be granted or assigned over at common law. . . . But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various

75. *Id.* at 1021; see also *Master v. Miller*, (1791) 100 Eng. Rep. 1042 (K.B.) 1052; 4 T.R. 320, 339 (Buller, J.) (“Courts of Equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradiction to it.”); Lee Aitken, *Before the High Court: ‘Litigation Lending’ after Fostif: An Advance in Consumer Protection, or a License to ‘Bottom-feeders’?*, 28 SYDNEY L. REV. 171 (2006) (reviewing the same history).

76. Holdsworth, *supra* note 74, at 1021–22.

77. Judicature Act of 1873, 36 & 37 Vict. (Eng.) (contract); Real Property Act, 1845, 8 & 9 Vict., c. 106, § 6 (Eng.) (land). Note that special legislation was passed as early as 1330 allowing executors and administrators to sue for trespass committed to the personal property during the decedent’s lifetime. See Weinberg, *supra* note 58, at 52.

78. Cook took issue with Ames’ description of reception of English law of assignment of choses in action, and argued that early American cases reveal that Colonial courts made little or no effort to preserve the legal fictions developed so painstakingly by the English courts. Cook, *supra* note 20, at 826.

79. Weinberg, *supra* note 58, at 61.

80. *Id.*; see also Cook, *supra* note 20, at 826; Radin *supra* note 20, at 68.

choses in action And at the present day claims for property and for torts done to property are generally to be regarded as assignable. . . .⁸¹

The court, in passing, noted that Massachusetts's survivorship statute was irrelevant to the question it was trying to answer, that is, whether an otherwise-insolvent debtor could assign his only asset, a tort suit, to one person and thus leave all other debtors without recourse.⁸² The court looked back on the reasons that had been deployed against assignments in the past, noting that they fell into two general types:

There were two principal reasons why the assignments . . . were held to be invalid at common law. . . . In early times [an assignment] was regarded as an evil principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole of its force. . . . The other reason is, a principle of law, applicable to all assignments, that they are void, unless the assignor has either actually or potentially the thing which he attempts to assign. A man cannot grant or charge that which he has not.⁸³

The first reason is familiar to us—it belongs to the same category of reasons as the three consequentialist reasons cited by the Virginia Supreme Court in *MNC Credit Corp.*, discussed in Part I.⁸⁴

The second historical reason against assignment is a bit more obscure, and it is important to my argument not for its precise content, but for its structure. The court referred to a “principle of law, applicable to all assignments”—not just choses in action for personal injury—which prevented *inchoate* assignments:

A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale . . . until it is thus established, it has no elements of property sufficient to make it the subject of a grant or assignment.⁸⁵

The court thus could distinguish the assignment of choses in action for personal injury from choses in action for property and contract on a different ground than the equivalency principle and, in a sense, provide an argument for the claim made by some courts (see, for example, *Austin*⁸⁶) that personal injury claims lacked an “assignable nature.” The operating distinction was between wrongs to *vested interests*, which included chattel, real property, and contractual

81. *Rice v. Stone*, 83 Mass. 566, 568 (1861) (citations omitted).

82. *Id.* at 571 (“[B]y our recent legislation actions for damage to the person survive; but we do not consider this as materially affecting the question whether such rights of action may be assigned to a stranger.”).

83. *Id.* at 569.

84. *MNC Credit Corp. v. Sickles*, 497 S.E.2d 331, 333–34 (Va. 1998).

85. *Id.* at 569–70.

86. *Austin v. Michiels*, 6 Haw. 595, 595 (1885).

expectations, in contrast to violations of *personal rights*, which included “injuries to the individual, such as assault and battery, false imprisonment, malicious prosecution, defamation.”⁸⁷ According to the court, the former had an existence independent of the person who brought the claim (and, presumably, whether the claim was brought at all), while the latter did not exist until the party whose right had originally been injured exercised his right to redress by choosing to seek a remedy for the right that had been violated (and, presumably, the court accepted the claim).⁸⁸ This position is reflected in the Uniform Commercial Code, which at first held that tort claims could not be treated as collateral under Article 9.⁸⁹ Even after it was revised to reflect commercial realities, the revised Article 9 recognizes security interests in commercial torts but not torts “arising out of personal injury to or the death of an individual.”⁹⁰

In summary, the history of the prohibition on the assignment of tort claims for personal injury is a chapter (albeit the most important one) in the history of the so-called principle of the non-assignability of choses in action. And the history of the non-assignability of choses in action is fraught with arbitrary decisions—non-assignability has been whittled down over time through a series of jurisprudential claims that look, to the modern eye, like post hoc rationalizations. First, courts permitted the assignment of property and contract claims through legal fictions such as the rooting of the transactions in equity. Second, courts attempted to justify the remaining ban on the assignment of some tort claims by relying on the equivalency principle and reference to something called “an assignable

87. *Rice*, 83 Mass. at 570.

88. *Id.* (“The considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed, whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal, that an assignee cannot urge them with any force.”). Arguably, one might view this as a primitive corrective justice argument for prohibiting the assignment of certain tort claims. That is, one might argue that the court in *Austin* was merely noting that, while there is a free-standing duty to repair a violation of a contract or an invasion of property, a tort merely gave to the victim a right to demand repair; it did not create a duty to repair on the part of the defendant. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 720 (2003) (“Under our system, a defendant’s tortious injury to another does not give rise to a duty of repair The defendant does not ordinarily have a freestanding legal obligation to pay independent of any action against her.”). Even if corrective justice theory provides an argument against the commodification of lawsuits—a view I criticize in Section IV.B.—I still cannot see the reason for claiming, as the court does here, that the duty to repair in contract and property preexists the claim by the right-holder yet it does not in the case of tort.

89. U.C.C. § 9-104(k) (1972).

90. U.C.C. § 9-102(a)(13)(B)(ii) (2000).

interest.” Finally, many U.S. courts abandoned this terminology and tried to justify the distinction—maintained to this day in most states—between the assignment of a vested interest and a personal right. The idea that some legal claims are “personal” in a way that makes their existence dependent on whether their adjudication mirrors the relationship that gave rise to the wrong is, as I shall argue below in Part III, based on the principle of the inauthentic claim.

B. Proceeds of Personal Injury Claims

As any personal injury lawyer knows, while the prohibition on the assignment of personal injury suits remains strong, the assignment of the *proceeds* of a personal injury suit can be assigned very easily at any time after the injury has occurred. On one level, it is not hard to see why the law might treat the two kinds of assignment differently. When parties assign a cause of action, they lose all control over the disposition of that cause of action, including whether to settle, for how much to settle, and every aspect of litigation strategy, including the selection and compensation of attorneys. On the other hand, when they assign just the proceeds arising from the resolution of a suit, they retain virtually all the incidents of control associated with “ownership” of the suit; they lose only the “fruits” of the suit. As the Nevada Supreme Court put it, “[w]hen the proceeds of a settlement are assigned, the injured party retains control of their lawsuit and the assignee cannot pursue the action independently. . . . [because the assignors] retained control of their lawsuit.”⁹¹

Several courts have drawn a distinction between an assignment of the cause of action itself and an assignment of the proceeds of whatever recovery may be had in such an action, taking the view that the latter is an equitable assignment, capable of enforcement once the proceeds come into existence.⁹² New York, which has a statute that permits the assignment of any “claim or demand” *except* “where it is to recover damages for personal injury,” nonetheless permits the assignment of the proceeds of personal injury

91. *Achrem v. Expressway Plaza Ltd. P'ship*, 917 P.2d 447, 448-49 (Nev. 1996) (emphasis omitted) (citation omitted).

92. *See, e.g., Costanzo v. Costanzo*, 590 A.2d 268, 271 (N.J. Super. Ct. Law Div. 1991) (“Any ‘specific thing,’ debt or chose in action may be the subject of an assignment. Obviously, that which is not in existence or cannot be identified cannot be assigned.”) (citation omitted); *Stathos v. Murphy*, 276 N.Y.S.2d 727, 731 (App. Div. 1966) (noting that since personal injury torts are non-assignable, “some courts, in order to save the assignment [of proceeds] . . . hold that the assignment does not take effect until the judgment is recovered or the money is at hand”).

suits.⁹³ Other courts have expressly rejected this view, however, and have held that there is no difference between the assignment of the action itself and the proceeds which may be recovered in such an action, and thus that such an assignment violates the rule prohibiting an assignment of a cause of action for personal injuries.⁹⁴

Among those courts that prohibit the assignment of proceeds arising from claims for personal injuries, practically all enforce provisions in insurance contracts that allow an insurer to recover amounts paid under the policy for medical expenses incurred as a result of personal injuries sustained by its insured, a practice commonly referred to as legal subrogation.⁹⁵ One common explanation for this exception is that an insurance contract's provision that gives the right of subrogation to the insurer does not assign the underlying claim for personal injury, but merely impresses a lien upon the proceeds of any recovery obtained by the insured from the tortfeasor.⁹⁶ Subrogation is an equitable remedy with roots extending "to the English common law and to the Roman civil law."⁹⁷ Other states have taken the view that subrogation is an assignment at law, but justify this special exception to the general prohibition on the assignment of personal injury claims on public policy grounds, basically for the same sorts of reasons that the contingency fee was tolerated.⁹⁸ Some of these

93. N.Y. GEN. OBLIG. LAW § 13-101 (Consol. 2001); see *Grossman v. Schlosser*, 244 N.Y.S.2d 749, 750 (App. Div. 1963) ("[A] person cannot transfer his cause of action but may transfer its potential proceeds, thereby allowing him to do by indirection what the common law and the statute expressly forbid.").

94. See, e.g., *Karp v. Speizer*, 647 P.2d 1197, 1198 (Ariz. Ct. App. 1982) ("[A]bsent a statute to the contrary a cause of action for personal injuries is not assignable."); *Town & Country Bank of Springfield v. Country Mut. Ins. Co.*, 459 N.E.2d 639, 640 (Ill. App. Ct. 1984) ("Illinois law has established that a cause of action for personal injuries may survive by virtue of the Survival Act, but it is nevertheless not assignable, on public policy grounds.").

95. See, e.g., *Ala. Farm Bureau Mut. Cas. Ins. Co. v. Anderson*, 263 So. 2d 149, 154 (Ala. Civ. App. 1972) ("[A] subrogation clause limited only to a portion of the proceeds of a personal injury claim sufficient to reimburse the insurance carrier for the indemnity paid its insured under a medical coverage provision, does not constitute an assignment of the cause of action of the insured against the tort-feasor. We further hold that the subrogation clause in the policy sued upon does not provide for a splitting of the cause of action.").

96. See, e.g., *Berlinski v. Ovellette*, 325 A.2d 239, 243 (Conn. 1973) ("Some have concluded that the policy provisions before them merely created an equitable lien against any damages the injured insured might recover.").

97. M.L. Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I*, 10 VAL. U. L. REV. 45, 45 (1975).

98. Oklahoma, for example simply creates the exception by statute. See OKLA. STAT. tit. 12, § 2017(D) (2008) ("The assignment of claims not arising out of contract is prohibited. However, nothing in this section shall be construed to affect the law in this state as relates to the transfer of claims through subrogation."); see also *Quality Chiropractic, PC v. Farmers Ins. Co.*, 51 P.3d 1172, 1179 (N.M. Ct. App. 2002) ("[W]e think there are substantive differences between

courts permit the insurer to take a full assignment of the subrogor's personal injury claim, meaning that the insurer not only has an assignment in the proceedings of any settlement or judgment arising from the claim, but also takes an assignment of the claim itself, which means it could bring suit against the tortfeasor even if the insured does not want to.⁹⁹ Only a minority of courts do not permit any form of subrogation by an insurer at all.¹⁰⁰

Furthermore, any state which has adopted the Revised Article 9 of the Uniform Commercial Code now permits a secured interest in the proceeds of personal injury claims, while still barring secured interests in the personal injury claims themselves.¹⁰¹ That is because, under the Revised Article 9, *all* proceeds from tort claims—even suits in slander—are treated as “a payment intangibles” under U.C.C. 9-108(e)(1) (2000), while personal torts (like slander) are still excluded from the scope of Article 9.¹⁰²

The history of the assignment of proceeds in personal injury claims simply mirrors the pattern we saw above in the general history of the principle of non-assignability. At first, in the nineteenth century, courts used legal fictions rooted in equity to explain why the assignment of proceeds from personal torts were treated like the assignment of proceeds from other choses in action, even as those same courts barred the assignment of personal torts and permitted

subrogation agreements and contingency fee contracts, on the one hand, and assignments, on the other.”).

99. See *D'Angelo v. Cornell Paperboard Prods. Co.*, 120 N.W.2d 70 (Wis. 1963). It should be noted that the Wisconsin Supreme Court, while permitting the assignment of the personal injury claim, limited the insurer's recovery if they brought that suit to the amount that they had paid to the insured.

100. Interestingly, Arizona does, by statute, permit the complete assignment of personal injury claims to employers and workman's compensation insurers in the event of an injury to an employee. See ARIZ. REV. STAT. ANN. § 23-1023 (2008); see also, e.g., *Allstate Ins. Co. v. Druke*, 576 P.2d 489, 492 (Ariz. 1978) (noting that the distinction between assignment of proceeds and assignment of personal injury claim is “meaningless”); 8A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4903 (2005).

101. See *Fifteenth RMA Partners, L.P. v. Pacific/West Commc'ns Grp., Inc.*, 301 F.3d 1150, 1152 (9th Cir. 2002) (“Section 9306 defined ‘Proceeds’ . . . to include ‘whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds.’ But [section] 9104 provided that ‘[a] transfer in whole or in part of any claim arising out of tort’ could not be granted as collateral to a secured party.”).

102. *Id.* at 1150; see also Adam Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 941 (2002) (“Revised Section 9-109 governs sales of ‘payment intangibles,’ a residual category of general intangibles in which the principal obligation is the payment of money. . . . Comment Fifteen [of 9-109] specifically rejects the supposed identity between tort claims and their derivative payment rights: ‘Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim in tort.’”).

the assignment of all others lawsuits.¹⁰³ For those courts that refused to adopt this fiction, their resistance to the assignment of proceeds met an irresistible force in the field of insurance—the insurance industry simply had to have the power to subrogate proceeds from personal torts, and except for a very small number of states, courts found a workable exception, usually based explicitly on policy. Finally, as the twentieth century progressed, and the distinction between an assignment of the proceeds of a personal tort and the proceeds of all other kinds of choses in action became more difficult to draw, the courts that maintained the boundary moved in one of two familiar directions—either adopting the justification that the assignment of the proceeds of personal torts would increase maintenance and champerty,¹⁰⁴ or insisting on increasingly implausible conceptual arguments about the inchoate nature of the proceeds of personal torts in comparison with the proceeds of contract or property claims.¹⁰⁵

C. Prohibition of Assignments of Malpractice and Fraud Claims

1. Malpractice

As illustrated in *MNC Credit Corp.*, an additional area of tort liability that may not be assigned is legal malpractice, where a majority of states that have examined the issue have prohibited assignment.¹⁰⁶ The courts have explored professional malpractice in

103. At law, there could be no assignment of the damages, because they were for a personal tort, and the assignment could not take effect upon the award, because that had no existence at the time. But it is otherwise in equity. Story, in his *Equity Jurisprudence*, in section 1040, says: "Courts of equity will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility."

Williams v. Ingersoll, 89 N.Y. 508, 518 (1882).

104. Karp v. Speizer, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982).

105. Sprague v. Cal. Pac. Bankers & Ins., Ltd., 74 P.3d 12, 21–27 (Haw. 2003).

106. The states that prohibit assignment include: ARIZONA, Franko v. Mitchell, 762 P.2d 1345, 1353–54 n.1 (Ariz. Ct. App. 1988), *abrogated on other grounds* by Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593 (Ariz. 2001); Schroeder v. Hudgins, 690 P.2d 114, 118 (Ariz. Ct. App. 1984); CALIFORNIA, Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83 (Ct. App. 1976); COLORADO, Roberts v. Holland & Hart, 857 P.2d 492 (Colo. App. 1993); CONNECTICUT, Cont'l Cas. Co. v. Pullman, 709 F. Supp. 44 (D. Conn. 1989); FLORIDA, KPMG Peat Marwick v. Nat'l Union Fire Ins. Co., 765 So. 2d 36 (Fla. 2000); Forgione v. Dennis Pirtle Agency, Inc., 701 So. 2d 557 (Fla. 1997); ILLINOIS, Brocato v. Prairie State Farmers Ins. Ass'n, 520 N.E.2d 1200 (Ill. App. Ct. 1998); INDIANA, Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991); KANSAS, Bank IV Wichita, Nat'l Ass'n v. Arn, 827 P.2d 758 (Kan. 1992); KENTUCKY, Coffey v. Jefferson Cnty. Bd. of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988); MICHIGAN, Joos v. Drillock, 338 N.W.2d 736 (Mich. Ct. App. 1983); MINNESOTA, Wagener v. McDonald, 509

other areas less frequently. Medical malpractice claims may be assigned only through the mechanism of subrogation, limiting the class of assignees to insurers, and the value of the assignment to the value of the insurance benefits actually paid or promised to the insured, and not the actual value of the claims.¹⁰⁷ This follows logically from the principle that, if subrogation is permitted as an exception to the equivalency principle, insurance companies should be able to sue physicians who injure their insureds the same as they can sue their insured's primary injurers. On the other hand, most states do not in any way restrict the assignment of bad faith claims by insureds against their insurance companies,¹⁰⁸ although states are divided as to whether punitive damages arising from bad faith claims may be assigned.¹⁰⁹

An area of professional malpractice where assignment may be allowed is malpractice claims against accountants.¹¹⁰ Indiana and Florida have permitted the assignment of malpractice suits against

N.W.2d 188 (Minn. Ct. App. 1993); MISSOURI, *Scarlett v. Barnes*, 121 B.R. 578 (W.D. Mo. 1990); NEBRASKA, *Earth Sci. Labs., Inc. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994); NEVADA, *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); NEW JERSEY, *Alcman Servs. Corp. v. Bullock, P.C.*, 925 F. Supp. 252 (D.N.J. 1996) *aff'd*, 124 F.3d 185 (3d Cir. 1997); TENNESSEE, *Can Do, Inc. v. Manier*, 922 S.W.2d 865 (Tenn.), *cert. denied*, 519 U.S. 929 (1996); TEXAS, *Britton v. Seale*, 81 F.3d 602 (5th Cir. 1996); and VIRGINIA, *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331 (Va. 1998).

A minority of jurisdictions allow assignment of legal malpractice claims: DISTRICT OF COLUMBIA, *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); MAINE, *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989); MASSACHUSETTS, *N.H. Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999); NEW YORK, *Vitale v. City of New York*, 583 N.Y.S.2d 445 (App. Div. 1992); OREGON, *Gregory v. Lovlien*, 26 P.3d 180 (Or. Ct. App. 2001); PENNSYLVANIA, *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988); and RHODE ISLAND, *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999). For a critique of the majority position, see Michael Reese, *The Use of Legal Malpractice Claims as Security Under the UCC Revised Article 9*, 20 REV. LITIG. 529 (2001).

107. See Kenneth S. Reinker & David Rosenberg, *Unlimited Subrogation: Improving Medical Malpractice Liability by Allowing Insurers to Take Charge*, 36 J. LEGAL STUD. S261, S262-63 (2007) (proposing to change the current system to one that "allow[s] insurers to subrogate the full potential medical malpractice claims of their insureds").

108. See, e.g., *Glenn v. Fleming*, 799 P.2d 79, 91 (Kan. 1990) ("We hold that an insured's breach of contract claim for bad faith or negligent refusal to settle may be assigned."). It is not clear why the assignment of bad faith claims against insurers are treated so differently from malpractice claims, other than some jurisdictions may view them as contract claims, not tort claims.

109. See *Cuson v. Md. Cas. Co.*, 735 F. Supp. 966, 970-71 (D. Haw. 1990) (reviewing cases and holding that, since bad faith breach is a contractual claim in Hawaii, punitive damages are not "personal" and may be assigned).

110. See 6 AM. JUR. 2D *Assignments* § 57 (2010) ("Accountant malpractice claims may be assigned.").

accountants.¹¹¹ Hawaii has taken a further step towards expanding the assignability of professional malpractice. Like the rest of the states, while it has prohibited on a case-by-case basis the assignment of legal malpractice suits, its Supreme Court refuses to rely on a *per se* rule based on the “special relationship” between client and lawyer so often cited by the other courts.¹¹² Hawaii holds that when an assignment refers to damages that arise out of an injury to the person, the assignment is prohibited, and when it arises out of damages that are non-personal, assignment is permitted.¹¹³ Thus it allowed the assignment of a suit for “professional malpractice” and breach of fiduciary duty against a law firm, since the injury caused by the firm (loss of a building) was not “personal” to the client.¹¹⁴ Florida, too, has used the rubric of “professional malpractice” as a way to carve out an exception to its prohibition against the assignment of legal malpractice claims when it allowed a suit against a law firm to be assigned because the work performed by the law firm was similar to the work that an auditor would perform.¹¹⁵

111. See *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 765 So. 2d 36 (Fla. 2000) (allowing assignment of a claim of an accountant's professional malpractice in the preparation of an audit); *First Cmty. Bank & Trust v. Kelley, Hardesty, Smith & Co.*, 663 N.E.2d 218, 220 (Ind. Ct. App. 1996), distinguished by *INS Investigations Bureau, Inc. v. Lee*, 709 N.E.2d 736, 742 (Ind. Ct. App. 1999) (same); see also *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) (allowing assignment of claim by insured against insurer for negligent failure to provide auto insurance coverage to victim).

112. See generally Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203 (1996) (discussing some of the arguments against assignment considered by courts); Pennell, *supra* note 27, at 493–94 (same).

113. *Sprague v. Cal. Pac. Bankers & Ins. Ltd.*, 74 P.3d 12, 22–23 (Haw. 2003).

114. *TMJ Haw., Inc. v. Nippon Trust Bank*, 153 P.3d 444, 455 (Haw. 2007). The claim from which the proceeds were assigned in *Sprague* was “for injury to the commercial credit and general reputation of a business that was allegedly forced into bankruptcy,” and this was deemed a “personal tort.” *Sprague*, 74 P.3d at 23–34. The claim that was assigned in *TMJ Hawaii, Inc.*, which was deemed not to be a personal tort was for “direct and quantifiable economic injuries to the estate or property” of a building. *TMJ Haw., Inc.*, 153 P.3d at 455. It is hard to see why the torts in the two cases were treated differently, since in both cases the injuries were purely economic without any physical loss.

115. *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005). *But see* Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp., 969 So. 2d 962, 968–69 (Fla. 2007) (distinguishing *Kaplan* as an exceptional case because it involved disclosures relied upon by third parties).

2. Fraud

The law concerning the assignment of fraud claims is not uniform in the United States.¹¹⁶ Since fraud is a tort that often concerns pure economic loss, usually in the formation of contracts, one might think that it should be freely assignable in the modern era. After all, as we saw above, the earliest choses in action whose assignability was recognized by the common law involved contracts and “non-personal” torts that did not involve personal injury. Numerous states have followed this line of reasoning, stating that all fraud claims are assignable.¹¹⁷ Others have taken the opposite position, stating that fraud claims are never assignable.¹¹⁸ A third group of states have taken the position that the assignability of a fraud claim depends on whether it arose out of a personal injury or an injury to property or contract.¹¹⁹ The reasons courts have offered for ending up on one side or another of the assignability question are interesting because they reveal how difficult it was for them to make sense of the law they inherited from England.¹²⁰ As with the “personal torts,” some states relied on their survival statutes to determine whether to permit the assignment of fraud claims.¹²¹ Some courts took the opposite approach: Wisconsin held that, since its survival statute explicitly provided only for the survival of suits based on damages to “real or personal estate,” the law prohibited the assignment of fraud

116. See Teal E. Luthy, *Assigning Common Law Claims for Fraud*, 65 U. CHI. L. REV. 1001, 1026–28 (1998) (listing cases and statutes that concern the assignment of fraud claims).

117. See, e.g., *Jandera v. Lakefield Farmers' Union*, 185 N.W. 656, 658 (Minn. 1921) (“A cause of action arising out of fraud or deceit is not a cause of action for injury to the person, but a cause of action for injury to a property right, and is assignable.”); see also Luthy, *supra* note 116, at 1026.

118. See *Morehead v. Ayers*, 71 S.E. 798, 798 (Ga. 1911) (“A right of action for injuries arising from fraud cannot be assigned.”); see also Luthy, *supra* note 116, at 1026.

119. See *Beall v. Farmers' Exch. Bank of Gallatin*, 76 S.W.2d 1098, 1099 (Mo. 1934) (“The mere fact that the right to enforce a claim which is itself assignable depends upon showing fraud incidentally does not make such right of action nonassignable.”) (citation omitted); see also Luthy, *supra* note 116, at 1026–27.

120. Some states could simply rely on the explicit instructions from the legislature. Georgia explicitly prohibits the assignment of fraud claims by statute. GA. CODE ANN. § 44–12–24 (2010) (“A right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned.”); see also *James v. Emmco Ins. Co.*, 30 S.E.2d 361, 363–64 (Ga. Ct. App. 1944) (citing the Georgia code).

121. Minnesota, for example, looked to the fact that its survival statute mentioned only personal injuries when it created the cause of action of wrongful death, meaning that all other choses in action, including fraud, could be assigned. See *Guggisberg v. Boettger*, 166 N.W. 177, 177 (Minn. 1918) (“[A]ll other causes of action . . . survive the death of either party. Under this statute it is plain that a cause of action for fraud survives.”).

claims and other torts in which the victim suffered a diminution of economic standing but not physical damage to property.¹²² Typically, however, the courts that prohibited the assignment of a fraud claim justified the outcome on “public policy.”¹²³

By public policy, the courts meant that they were taking a stand against assignments that were “naked” or “bare.”¹²⁴ The courts meant that the assignee had no real interest in the property that was the object of the assigned suit; all he or she wanted was to profit from the vindication of the assignor’s right. An example of what these courts feared can be seen in *Gruber v. Baker*.¹²⁵ Caroline Gruber sued to take possession of some mines whose title was held by Baker. Gruber argued that Baker obtained the title in a transaction with a man named Pollard, and that Baker deceived Pollard. Pollard assigned a “contingent right” to the mines to Gruber under which she would bring an action to have the title taken from Baker and given to her. Baker moved to have the suit by Gruber dismissed on the ground that Gruber had admitted during discovery that she had promised to give to Pollard the title to the mines were her suit successful.¹²⁶ Although it is not stated in the opinion, it is a reasonable assumption that Pollard paid Gruber to bring the suit he assigned to her (otherwise why would she do it?). In any event, the court struck down the assignment:

122. *John V. Farwell Co. v. Wolf*, 70 N.W. 289, 291 (Wis. 1897). In 1907 Wisconsin amended its survival statute to include “damage done to the . . . interests of another.” This was interpreted to mean any interest which, “if lost or impaired would pecuniarily [sic] diminish the estate of plaintiff,” entailing that claims for fraud, malicious prosecution or even the alienation of affection could be assigned. *Nichols v. U. S. Fid. & Guar. Co.*, 155 N.W.2d 104, 108 (Wis. 1967) (emphasis added) (quoting *Howard v. Lunaburg*, 213 N.W. 301, 303 (Wis. 1927)).

123. See, e.g., *Nat’l Shawmut Bank of Boston v. Johnson*, 58 N.E.2d 849, 851 (Mass. 1945) (“It is doubtless the law of this Commonwealth that a right to litigate a fraud perpetrated upon a person is not assignable at law or in equity, and that the prosecution by the alleged assignee of an action or suit on account of the fraud would be contrary to public policy.”).

124. See, e.g., *Powe v. Payne*, 94 So. 587, 588 (Ala. 1922) (“[I]t appears that complainants are not entitled to immediate possession or enjoyment of any estate in the land and hence that they are not in a position to file a bill for partition.”); *Simmons v. Klemme*, 291 S.W.2d 801, 802 (Ark. 1956) (“A mere naked right to set aside a contract on the ground of fraud is not assignable.”); *McCord v. Martin*, 166 P. 1014, 1015 (Cal. Dist. Ct. App. 1917) (holding that the cause of action was assignable because it was “much more than a mere naked right of action for fraud and deceit”); *Marshall v. Means*, 12 Ga. 61, 67 (1852) (“Before such an interest can be assigned . . . the party assigning such right, must have some substantial possession . . . and not a mere naked right to maintain a suit.”); *Mulready v. Pheeny*, 148 N.E. 132, 133 (Mass. 1925) (“A mere naked right to set aside a contract on the ground of fraud is not assignable.”); *Cornell v. Upper Mich. Land Co.*, 155 N.W. 99, 102 (Minn. 1915) (affirming that “an assignment of a bare right to [bring suit] for a fraud . . . is void as against public policy,” but holding the assignment at issue valid).

125. 23 P. 858 (Nev. 1890).

126. *Id.* at 860.

The deed passed from Pollard to Gruber with the understanding that it was not to convey any interest in or title to the property whatever, but merely for the purpose of allowing Mrs. Gruber to maintain this action in her own name, for the benefit of Pollard, to set aside a deed made by Pollard . . . and which Pollard claimed had been obtained by fraud. . . . [This] places the parties within the rule of law that the assignment of a *bare right* to file a bill in equity for a fraud committed upon the assignor will be held void as being against public policy¹²⁷

Gruber can be compared to *McCord v. Martin*, which also involved accusations of fraud in the mining industry.¹²⁸ The *McCord* plaintiffs were assigned the fraud claims of twenty-five fellow shareholders in a mine. The twenty-five assignors had sold their shares for five dollars on the advice of the defendant, one of the directors of the mine, who secretly schemed with an outsider to gain control of the mine in exchange for paying the defendant three dollars per share bounty in addition to the five paid to the shareholders. The court refused to prohibit the assignment of the fraud claims:

It is true, as the respondents contend, that *naked* actions for fraud and deceit are not the subject of assignment under long and well settled rules of equity. But . . . [i]t is not disputed that the form of assignment to plaintiffs was sufficient to cover the entire equitable and property rights and claims of the plaintiffs' assignors in the premises, and was thus a transfer of much more than a *mere naked right of action for fraud* and deceit, since it included also the right to recover the respective sums of money which the defendants had received¹²⁹

In each case the assignee or the assignor either promised to give up or gave up one hundred percent of the value of the fraud claim. In *Gruber*, the assignee promised to give the value of the fraud claim back to the assignor after its adjudication (presumably in exchange for a side-payment), while in *McCord*, the assignees gave the value of the fraud claim to the assignors prior to its adjudication (presumably in the form of a payment). Of course, the real difference between the two cases is that Gruber had suffered no "personal" wrong at the hands of the person she sued, while the assignees in *McCord* had.

The problem is that the phrase a "bare" or "naked" assignment of a fraud claim, despite its evocative terminology, arose out of a different context than the one raised by *Gruber*.¹³⁰ The term was first used in cases brought by purchasers of titles to disputed land, and referred to the unique demand, in equity, that a party's standing to sue follows title, not rights in contract or tort. For example, in *Whitney*

127. *Id.* at 862 (emphasis added).

128. 166 P. 1014 (Cal. Dist. Ct. App. 1917).

129. *Id.* at 1015 (emphasis added).

130. The expressions may have first appeared in *Prosser v. Edmonds*, (1835) 160 Eng. Rep. 196 (K.B.); 1 Y. & C. Ex. 481.

v. Kelley the plaintiff in the case, the assignee of the loser in a property dispute, brought suit to have the prior judgment in that dispute set aside on the ground that a fraud had been perpetrated on the court by the winner of the suit (the defendant now being sued by the assignee).¹³¹ The court held the plaintiff-assignee had no standing, despite the fact that he paid good consideration for the land claim, because in order for him to bring a suit in equity to set aside a judgment he had to have equitable title to the property, which he clearly did not have since the assignor could not have assigned what he did not have (the assignor had nothing more than the “right to file a bill” after he lost the original suit).¹³² It was in this context that the California Supreme Court, like many other courts, quoted Story:

So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void as contrary to public policy, and as savoring of the character of maintenance. . . . Indeed, it has been laid down as a general rule that where an equitable interest is assigned in order to give the assignee [standing] in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not a mere naked right to upset a legal instrument or to maintain a suit.¹³³

Given that the assignee in *Whitney* most likely paid the assignor the expected value of the land once title was legally restored (subject to some discount for risk of failure), and given that the court did not at any time question the genuineness of the assignee’s allegation of fraud by the defendant, this result must have come as a bit of a shock and disappointment to the assignee. Like judicial treatment of assignment doctrine above, it would be a mistake to dwell too long on the peculiar legal fictions that produced this result; after all, the California Supreme Court had no trouble reconciling this case with a decision to permit the assignment of a suit for fraud in the sale of property.¹³⁴ The distinction between assigning the right to restore title lost by fraud on the court and the right to recover a loss produced by a fraudulent contract is hard to see; even the California

131. 29 P. 624 (Cal. 1892).

132. *Id.* at 625–26.

133. *Id.* at 625 (quoting 3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1400 (W.H. Lyon, Jr. ed., Little, Brown & Co., 14th ed. 1884))

134. See *Wikstrom v. Yolo Fliers Club*, 274 P. 959, 960 (Cal. 1929) (“[T]he following demands, claims, and rights of action have been held to be assignable: . . . claims arising from the carrying away or conversion, of personal property, from the fraudulent misapplication of funds by the officer of a bank, from negligent or intentional injury done to personal property or upon real estate . . . [and] where property is obtained by deceit or fraudulent device of any sort, the cause of action is assignable, for here the injury is done in respect of the particular property which is wrongfully acquired.”) (quoting 3 THOMAS ADKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 86–87 (1906)).

Supreme Court seemed unsure as to whether it could be maintained.¹³⁵

If we take a step back from the historical roots of the condemnation of the “bare” assignment of fraud and ask what possible principled objection could have motivated the courts, we return to the familiar theme of the inauthentic claim. Although very few cases involved the assignment of a fraud claim to a disinterested party (like *Gruber*), it is worth reflecting on why courts opposed this sort of deal. If, as the Connecticut Supreme Court noted, the assignment in *Gruber* was made “in the absence of . . . fraud or mistake, [and the underlying claim was] valid,” where was the harm?¹³⁶ Courts who took an absolutist position against this sort of assignment had a ready answer: a bare or naked assignment was the very essence of “savoring of the character of maintenance.”¹³⁷

As the Supreme Judicial Court in Massachusetts admitted in *Rice*, the risk to Americans of harassment and oppression through maintenance was practically non-existent.¹³⁸ All that remained was maintenance born out of selfless reasons (for example, charity or a public interest) or financial reasons (for example, to earn a profit). If maintenance were to be prohibited because these reasons violated public policy, the rationale had to stand on a different conceptual ground than the one first mentioned by the courts, that is, fear of abuse of the courts by social and political elites. Indeed, the courts soon adopted a conceptual vocabulary to distinguish between forms of maintenance that did not rely on fear of abuse of the courts. As the Nevada Supreme Court said in *Gruber*:

The modern decisions of the courts of the United States and England make a distinction which before prevailed in the rules of the common law, between maintenance which is *innocent* and that which is *unlawful*. To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the assignor by ties of consanguinity or affinity.¹³⁹

For the Nevada Supreme Court, only a pre-existing interest in the outcome of the suit, either financial or by family or friendship, qualified as an “innocent” reason for a third party’s decision to take over a suit. The Nevada rule was taken from the 1835 English decision *Prosser v. Edmonds*, where Lord Abinger stated that “[a]ll our

135. *Id.* at 962.

136. *Metro. Life Ins. Co. v. Fuller*, 23 A. 193, 196 (Conn. 1891).

137. *Gruber v. Baker*, 23 P. 858, 862 (Nev. 1890) (quoting STORY, *supra* note 133).

138. *Rice v. Stone*, 83 Mass. (1 Allen) 566, 569 (1861).

139. *Gruber*, 23 P. at 862 (emphasis added).

cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation, by the introduction of parties *to enforce those rights, which others are not disposed to enforce.*"¹⁴⁰ As the *Gruber* court explained:

The reason of the rule . . . is to prevent litigation and the prosecution of doubtful claims by strangers If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer his right to another party for the purpose of prosecution, thereby encouraging strife and litigation.¹⁴¹

At the heart of the idea that certain forms of third-party involvement in litigation were not "innocent" was that a claim should be brought for the "right" reason. A claim which would not have been pursued by the party who was wronged should not be entertained by the courts, even if it was valid, unless it was assigned to someone who had a reason to press the claim that mirrored the authenticity of the assignor's.¹⁴²

The focus of any study of the law of assignment must shift, therefore, from *who* brought a claim (which was always the ground for challenging an assignment) to *why* a claim was brought. The former question provided the form of the doctrine of non-assignability, while the latter question provided its rationale—which in turn was based on the more basic concern with maintenance. Assignment and maintenance have always been linked on a technical level, since champerty (which comprises the bulk of maintenance) necessarily involves an assignment of the *proceeds* of a chose in action (this will be explained in the next Part). My argument in this Article is that these two doctrines are linked by more than a mere technicality, and that they are linked by something much deeper, the principle of the inauthentic claim. It is no accident that so many courts cited the prevention of maintenance as rationale for the principle of non-assignability. While both practices were historically linked to certain abuses of the legal system, nineteenth-century U.S. courts were sophisticated enough to recognize that the risk of abuse by wealthy

140. *Prosser v. Edmonds*, (1835) 160 Eng. Rep. 196 (K.B.) 204; 1 Y. & C. Ex. 481, 497 (emphasis added); see also *Poe v. Davis*, 29 Ala. 676, 681 (1857) (citing *Prosser*, 160 Eng. Rep. at 198); *Metro. Life Ins. Co.*, 23 A. at 196 (same); *Gruber*, 23 P. at 863 (same).

141. *Gruber*, 23 P. at 862.

142. Thus, a party sued in fraud could defeat the claim if the assignor of the fraud suit subsequently refused to cooperate in the assignee's suit even if the assignor did not repudiate the evidence that supported the assignee's claim. See, e.g., *Mulready v. Pheeny*, 148 N.E. 132, 133 (Mass. 1925) ("It would be contrary to the fundamental principles of equity to allow Meagher, the intervener, whose only interest in the personal wrong done to Mrs. Mulready arises from his agreement with her, to prosecute a suit which she does not believe has merit")

litigants and over-zealous attorneys was not in itself a reason to single out these doctrines among all others in the newly emerging civil litigation system. The reason that these two doctrines were linked, and were treated as a unique threat to the common law, was precisely because both permitted someone who had not suffered a wrong to exercise some degree of control over a claim for redress for a private wrong suffered by a stranger.

III. THE CURRENT LAW ON MAINTENANCE

A. The Relationship Between Assignment and Maintenance

The reason that so much time was spent in the previous Part on the justificatory role that maintenance played in the development of the law of assignment is that what was true for the law of assignment is still true today for the law of maintenance: underneath all the precedent and confused (and incoherent) discussions of the equivalency principle or the distinction between personal and real property, the rationales for limiting assignment are parasitic on the rationales for limiting maintenance and champerty.¹⁴³

The intertwining of assignment and maintenance can be seen in two representative cases from the nineteenth century: *Poe v. Davis* (1857)¹⁴⁴ and *Metropolitan Life Insurance Co.* (1891).¹⁴⁵ In *Poe*, the assignors, who were locked in a protracted probate battle with other putative heirs, assigned their right to the estate for \$100 to the assignees, who had no connection with the estate. The Alabama Supreme Court voided the assignment on a motion from the assignors after the probate litigation was won by the assignees. Although the court cited Lord Abinger's views in *Prosser* to the effect that the estate claimed by the assignees was a "mere naked right," the court recognized that this conclusion was inconsistent with the fact that in Alabama "distributees may assign their interest or shares in the estate to be distributed."¹⁴⁶ To buttress the claim that *this* assignment was different, and could not be recognized by the common law, the court noted that it could easily have been purely the product of a desire on the part of the assignees to *speculate in* (or profit from)

143. See *Prosky v. Clark*, 109 P. 793, 794 (Nev. 1910) (suggesting that the doctrine of maintenance is the basis for the limitation of all forms of assignment).

144. 29 Ala. 676 (1857).

145. 23 A. 193 (Conn. 1891).

146. *Poe*, 29 Ala. at 681-82.

litigation—even if, as the court conceded, the assignees “may have acted very discreetly and fairly in the management of the litigation.”¹⁴⁷ To show that an impermissible speculative motive lay behind the assignment proved that the assignees purchased a “mere naked right,” the court cited the fact the assignees had offered to indemnify the assignors any potential costs that could be imposed upon them by the court at the conclusion of the suit. Quoting Story in this context, the court said an assignment that “savor[ed] of maintenance” was one in which the assignor undertook to pay for “any costs, or make any advances” beyond the cost of pursuing the suit after the assignment.¹⁴⁸ In *Poe* an assignment “savored of” maintenance because the claim was clearly sold for a profit, although the court did not say whose profit caused the problem—the assignors’ (otherwise why would they have sold the claim?) or the assignees’ (otherwise why would they have bought it?).¹⁴⁹

In *Metropolitan Life Insurance Co.*, the Connecticut Supreme Court upheld the assignment of an unspecified number of identical fraud claims to Fuller, the assignee. Both the assignors and the assignee had purchased life insurance policies from Metropolitan Life, which they then surrendered to the insurer for a fraction of what they claimed were the policies’ true surrender value. Fuller successfully sued the insurer in an earlier, separate case in New York and then approached the assignors with the following offer: if they would assign their claims in fraud to him for a dollar (which was in fact never paid), he would pursue the insurer in fraud and divide the recovery with the assignors. The insurer asked to have the assignments declared void because they were champertous and against public policy.¹⁵⁰ The court refused, noting that, although in the past, “public policy was opposed

147. *Id.* at 681.

148. *Id.* at 682 (quoting STORY, *supra* note 133).

149. The court alluded to its concerns that the assignees somehow would have an unfair advantage over the defendants in the probate suit that the assignors lacked, but it did not spell out exactly what those concerns were:

But when, as is recited in the assignment before us . . . a protracted litigation has been carried on . . . and one of the contestants becoming uneasy, and willing and desirous of selling out for a small sum (\$100) . . . the seller allowing it to proceed, being indemnified against all expense, cost and trouble; and the purchasers, (strangers) who thus interfere bringing into the cause to bear upon the result whatever of power, influence or adroitness they may command.

Id. at 683–84 (emphasis added).

150. *Metro. Life Ins. Co.*, 23 A. at 196. Despite similarities with a modern class action, Fuller was neither a class action attorney nor even the functional equivalent of a class action attorney. Put simply, Fuller did not litigate the cases that were assigned to him *on behalf* of the “class” of assignors—for example, he owed them no fiduciary duties.

to champerty and maintenance, and therefore all contracts which savored of these vices were void," the "modern [law] is the reverse."¹⁵¹ Absolute prohibition of all maintenance or champerty would "perhaps not generally [] promote justice," and "the true inquiry may therefore be limited exclusively" to the merits of each transaction.¹⁵² The court conceded that Fuller had taken "naked" or "bare" assignments, at least in the sense that U.S. courts adopted these terms following Lord Abinger's opinion in *Prosser*.¹⁵³ However, the court held that earlier judicial hostility to the assignment of "a mere right of action" in a fraud had to be balanced against the positive social consequences of allowing men like Fuller to bundle together the assignors' claims (in what was, in effect, a class action).¹⁵⁴ Unlike the *Poe* court, the *Metropolitan Life Insurance Co.* court was not concerned with the fact that Fuller, who was taking a fifty percent "contingency fee" to do something which, in theory, the assignors could have done themselves, was motivated by a simple profit motive and that the assignors were seeking to enjoy a reward from claims that they were not willing to pursue on their own.¹⁵⁵

Poe and *Metropolitan Life Insurance Co.* demonstrate that the struggle over the limits of assignment in the United States was indistinguishable from the struggle over the permissibility of maintenance motivated by the "wrong reasons." As *Poe* demonstrates, this concern, when it was made explicit, often took the form of a censorious view of speculation in litigation, which meant, of course, champerty. But the *Poe* court's hostility to the assignment of the estate at issue in the case reveals more than just a concern for the specter of third parties profiting from litigation. It also reveals a concern with the impermissible motives that might lie behind the original claimholder's reasons for permitting his or her claim to go forward in the hands of another person. By the time Lord Abinger set out his rule in *Prosser*, the idea that a chose in action could be transferred to a stranger in property and contract was familiar, and it

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* ("It would manifestly be both useful and convenient to policy-holders of the plaintiff, residing in this state, who . . . having . . . just demands, the individual enforcement of which, to any person in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility, that a more fortunate person, of experience, ability and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of it.")

155. *Id.* at 196-97 ("[W]hatever was the motive of the defendants, whether selfish or philanthropic . . . we can discover no rule of public policy that would be thereby violated.")

certainly must have been the case that these assignments, when they occurred, reflected a speculative appetite. The *Poe* court's hostility to the transaction it struck down was explicitly based on its disgust at the assignor's desire to be indemnified for, and protected from, its prior decision to claim a right rather than the assignee's desire to profit from the case.

The real speculator in *Poe* was the assignor, and the court's hostility to the manner in which the assignor made the sale must be read in the context of the court's larger argument, which is that the real risk to society of permitting this kind of sale is that it would encourage more persons to try to sell "bare" rights. As noted above, many U.S. courts accepted Lord Abinger's statement that the evil permitted by maintenance was that it "encourage[d]" the enforcement of rights that the original rightholder was "not disposed to enforce."¹⁵⁶

At this point the clumsy dichotomy between property rights and personal rights that has been running through every effort by the courts to make sense of permissible and impermissible forms of assignment helps to illustrate the principle behind the rejection of maintenance and champerty. Under basic common law theory, legal rights followed property as it moved from titleholder to titleholder. A wrong arising from the violation of a property right was, strictly speaking, a wrong that ran with the property itself; the right to sue the wrongdoer followed transfer of title. One can imagine that, as the pressure built for permitting the assignment of contract rights, a story could be told about how contract rights, except in personal services, are like property rights. But, as the court said in *Poe*, if a claim in court is *only* for the vindication of a legal right, then there is *nothing* at stake which possesses an objective "capability of personal enjoyment."¹⁵⁷ A bare legal right is nothing more than the power to "overset a legal instrument, or to maintain a suit" against another.¹⁵⁸ Unlike objects in the world, which can properly be the object of speculation, the "right to vindicate a legal right" cannot be the object of speculation—it must be held by the person in whom it originated. This is the principle of the inauthentic claim.

156. See *Poe v. Davis*, 29 Ala. 676, 681 (1857) (quoting *Prosser v. Edmonds*, (1835) 160 Eng. Rep. 196 (K.B.) 204; 1 Y. & C. Ex. 481, 497).

157. *Id.* at 682 (quoting STORY, *supra* note 133).

158. *Id.*

B. The Ways States Permit and Limit Maintenance

As illustrated at the end of the previous Section with the discussion of *Poe*, maintenance involves intermeddling (through money or other support) by a third party who is not “innocent”—that is to say, the intermeddler had no prior legal interest in the outcome of the suit. Champerty occurs when the intermeddler provides something of value to a party in a lawsuit in return for a portion of the recovery. Champerty is considered a type of maintenance. Barratry has been defined as the offense of frequently exciting or stirring up suits and quarrels between others, and is also a species of maintenance.¹⁵⁹

Limitations on maintenance can come from two sources: common law and statutes. Common law restrictions on maintenance, in those states where they were recognized, typically related back to English common law doctrines that the states received and maintained after the American Revolution.¹⁶⁰ Even where the common law was once recognized as limiting maintenance in some way, state courts may have revisited those decisions, deciding that the common law of that state no longer sustained the English rule (usually for reasons having to do with the evolution of social and economic conditions in the state) or the common law doctrine may have been reversed by statute.¹⁶¹

When it comes to maintenance, the devil is in the details. Like the law of assignment, there are liberal and restrictive rules concerning maintenance, and they are distinguishable in multiple ways. The major distinction, and the one that interests most modern readers, concerns champerty, or maintenance in exchange for a return contingent on the outcome of the suit. Twenty-eight of fifty-one United States jurisdictions (including the District of Columbia) explicitly

159. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13, at 489–90 (1986) (“The most common kinds of impermissible maintenance involve financial assistance. Champerty is simply a specialized form of maintenance in which the person assisting another’s litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery. Barratry is adjudicative cheerleading—urging others, frequently, to quarrels and suits. All were thought to lead to a corruption of justice because of their tendency to encourage unwanted and unmeritorious litigation, inflated damages, suppressed evidence, and suborned perjury. Those, of course, are the same arguments that have traditionally been made against other aids to impecunious litigants, such as free legal services and the contingent fee.”) (footnotes omitted).

160. See Radin, *supra* note 20, at 68 (pointing out the relationship between English and American law with regard to champerty and maintenance).

161. *Id.*

permit champerty, albeit with varying limitations.¹⁶² This Section, however, will analyze limitations on maintenance along a number of dimensions, from the most restrictive to the most liberal.

1. Lawyer Maintenance (Contingency Fees for Attorneys)

Technically, of course, all fifty-one jurisdictions permit at least one form of maintenance: the contingency fee.¹⁶³ At the turn of the twentieth century lawyers began to offer to take cases without payment unless they obtained a settlement or a judgment for their clients, a practice that was flatly illegal under the doctrines of

162. These jurisdictions are: ARIZONA, *Landi v. Arkules*, 835 P.2d 458, 464 n.1 (Ariz. Ct. App. 1992); CALIFORNIA, *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 142 n.26 (Cal. 1987); COLORADO, *Fastenau v. Engel*, 240 P.2d 1173, 1174 (Colo. 1952); CONNECTICUT, *Robertson v. Town of Stonington*, 750 A.2d 460, 463 (Conn. 2000); FLORIDA, *Kraft v. Mason*, 668 So. 2d 679, 682–83 (Fla. 1996); HAWAII, *TMJ Haw., Inc. v. Nippon Trust Bank*, 153 P.3d 444, 449–50 (Haw. 2007); IOWA, *Wright v. Meek*, 3 Greene 472, 472 (Iowa 1852); KANSAS, *Boettcher v. Criscione*, 299 P.2d 806, 809–12 (Kan. 1956); MAINE, ME. REV. STAT. ANN. tit. 9–A, §§ 12–101 to –107 (2009) (partially amending ME. REV. STAT. ANN. tit. 17–A, § 516(1) (2009)); MARYLAND, *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112, 119–20 (Md. 1998); MASSACHUSETTS, *Saladini v. Righellis*, 687 N.E.2d 1224, 1224 (Mass. 1997); MICHIGAN, *Smith v. Childs*, 497 N.W.2d 538, 540 (Mich. Ct. App. 1993); MISSOURI, *Schnabel v. Taft Broad. Co.*, 525 S.W.2d 819, 823 (Mo. Ct. App. 1975); MONTANA, *Green v. Gremaux*, 945 P.2d 903, 907–08 (Mont. 1997); NEW HAMPSHIRE, *Adkin Plumbing & Heating Supply Co. v. Harwell*, 606 A.2d 802, 803–04 (N.H. 1992); NEW JERSEY, *Polo v. Gotchel*, 542 A.2d 947, 949 (N.J. Super. Ct. Law Div. 1987); NEW YORK, *Leon v. Martinez*, 638 N.E.2d 511, 512–14 (N.Y. 1994); NORTH CAROLINA, *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 773–76 (N.C. Ct. App. 2008); NORTH DAKOTA, *Interstate Collection Agency v. Kuntz*, 181 N.W.2d 234, 242 (N.D. 1970); OHIO, OHIO REV. CODE ANN. § 1349.55 (West 2009) (superseding *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220 (Ohio 2003)); OKLAHOMA, *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441, 444–45 (Okla. 1981); OREGON, *Brown v. Bigne*, 28 P. 11, 13 (Or. 1891); SOUTH CAROLINA, *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277 (S.C. 2000); TENNESSEE, *Record v. Ins. Co. of N. Am.*, 438 S.W.2d 743, 747 (Tenn. 1969); TEXAS, *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 103–04 (Tex. App. 2006); WASHINGTON, *Giambattista v. Nat'l Bank of Commerce of Seattle*, 586 P.2d 1180, 1186 (Wash. Ct. App. 1978); and WEST VIRGINIA, *Currence v. Ralphsnnyder*, 151 S.E. 700, 700 (W. Va. 1929). This is based upon the author's survey of the current state of the law. It is consistent with a survey by Paul Bond. Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 app. at 1333–41 (2002).

163. The last state to finally permit the contingency fee was Maine. 1965 Me. Laws 333 (codified as amended at ME. REV. STAT. ANN. tit. 17–A, § 516(2) (2009)). On the other hand, the freedom of lawyers to help maintain their client's lawsuits is not limitless. In virtually all jurisdictions lawyers are prohibited from advancing funds to their clients, especially for living expenses. See Michael R. Koval, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1126–27 (1994) (stating that courts interpret Model Code section 5–103(B) to prohibit living expenses).

maintenance and champerty.¹⁶⁴ Courts and legislatures quickly found an exception to the restrictions on champerty such that by 1930, even in those states that strictly prohibited maintenance, a lawyer was permitted to “invest” in his client’s civil litigation.¹⁶⁵

But given the unique nature of this form of maintenance (it is regulated by another body of law, namely each state’s rules regarding the regulation of lawyers), the more relevant question is how do states determine whether, and the degree to which, *non-lawyer* third parties may support meritorious litigation to which they are not a party. The answer to this question is complex. As one commentator has put it, “in short, confusion reigns over what the doctrine of champerty [maintenance] is and to whom it applies.”¹⁶⁶ It turns out that the various state rules on maintenance can be sorted along a spectrum. One end of the spectrum represents maintenance arising from motives that arguably enjoy universal approval (for example, support of a stranger’s lawsuit based on purely charitable motives), while on the other end of the spectrum are acts of maintenance that often receive universal condemnation (for example, support of a stranger’s lawsuit motivated by pure spite towards the stranger’s opponent). The various kinds of maintenance can be set out according to the following distinctions.¹⁶⁷

2. Selfless Maintenance

At one end of the spectrum are the states that ban all maintenance, regardless of the reason or method by which the support

164. Radin, *supra* note 20, at 73 (“Contingent fees of lawyers, supported by a lien on the proceeds of a suit, can scarcely be differentiated from the assignment of a cause of action, or rather part of one.”).

165. According to Radin, objections to the champertous nature of the contingent fee were “ineffective” in the face of an increasing demand for legal representation as industrialization brought more and more claims for compensation against railroads and other powerful defendants. *Id.* at 70–71; see also Painter, *supra* note 48, at 639–42 (tracing the development of contingency fee exceptions in champerty law).

166. Bond, *supra* note 162, at 1304.

167. Not all states have taken a position on the permissibility of any form of maintenance. Nine states have judicial decisions that are ambiguous as to the current status of the common law prohibition of maintenance: ALASKA, *Wichman v. Benner*, 948 P.2d 484, 487 (Alaska, 1997); ARKANSAS, *Bennett v. NAACP*, 370 S.W.2d 79, 83 (Ark. 1963); IDAHO, *Wolford v. Tankersley*, 695 P.2d 1201, 1222 (Idaho 1984) (Bistline, J., dissenting); INDIANA, *Reichhart v. City of New Haven*, 674 N.E.2d 27, 32 (Ind. Ct. App. 1996); NEBRASKA, *Hadley v. Platte Valley Cattle Co.*, 10 N.W.2d 249, 253 (Neb. 1943); NEW MEXICO, *Rienhardt v. Kelly*, 917 P.2d 963, 967 (N.M. Ct. App. 1996); UTAH, *Croco v. Oregon Short-Line R. Co.*, 54 P. 985, 987 (Utah 1898); VERMONT, *D’Amato v. Donatoni*, 168 A. 564, 568 (Vt. 1933); and WYOMING, *Johnson v. Sellers*, 84 P.2d 744, 751 (Wyo. 1938).

is delivered.¹⁶⁸ This would include, in theory, even non-monetary support, such as moral encouragement (“Come on, you should sue the guy who hit your car!”) or aid (“I saw who hit your car; here is that person’s license plate.”) It would also include support given to family members and friends, or to members of one’s church or school, without any quid pro quo expected nor any independent gain by the maintainer (other than the good feeling of having helped another in need). This end of the spectrum, which I shall call “selfless maintenance,” is of little or no practical importance today, although there was a time when certain states attempted to criminalize certain forms of selfless maintenance when it took the form of advice and support offered by civil rights groups during the 1950s and 1960s.¹⁶⁹ In *NAACP v. Button* the Supreme Court held that Virginia could not restrict lawyers or non-lawyers from providing support (such as legal advice, non-legal advice, and encouragement) by invoking the state’s power to exercise its police powers to limit maintenance and champerty.¹⁷⁰ It can be taken as a given that, whatever a state might *want* to do with its maintenance law, it cannot, under the First Amendment, limit the power of laypersons to engage in selfless maintenance designed to protect constitutionally protected rights through litigation.

NAACP v. Button, however, reminds us that, outside of one narrow exception, the police powers can justify the practical elimination of selfless maintenance. Of the fourteen jurisdictions that

168. It could be argued that a more natural dividing line would be between the states that criminalize champerty and those that do not. This is not correct for three reasons. First, it is hard to determine whether champerty is still punishable as a crime in some states, given that it may be a common law crime, albeit unenforced. *E.g.*, R.I. GEN. LAWS § 11-1-1 (1956). Second, among those states that have statutory criminal prohibitions against certain forms of maintenance (Illinois, Maryland, Maine, Mississippi, and New York), some of those statutes prohibit a very narrow range of conduct, for example, N.Y. JUD. LAW § 489 (2004), while others categorically prohibit maintenance for any reason, for example, MISS. CODE ANN. § 97-9-11 (2009). Finally, it is likely that the threat of a contract being voided under a common law of prohibition of maintenance deters maintenance as much as the threat of a criminal sanction. *See* Bond, *supra* note 162, at 1304 (pointing out that champerty’s most visible impact is as a contract defense rather than in criminal statutes).

169. *See* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2248-52 (1999) (tracing the decisions of the Supreme Court that overturned state statutes and allowed the NAACP and unions to assist in representing members).

170. *NAACP v. Button*, 371 U.S. 415, 439 (1963) (“However valid may be Virginia’s interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record.”).

explicitly prohibit maintenance, two (Illinois and Mississippi) seem to prohibit selfless maintenance.¹⁷¹ Here is Mississippi's law:

It shall be unlawful for any person . . . either before or after proceedings commenced: (a) to promise, give, or offer, or to conspire or agree to promise, give, or offer, (b) to receive or accept, or to agree or conspire to receive or accept, (c) to solicit, request, or donate, any money . . . or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency.¹⁷²

This language would, in theory, prohibit one neighbor to gratuitously provide something of value (information, law books, etc.) to another. Of course, this law has probably never been applied to stop gratuitous acts of friendly "intermeddling," although one can imagine that, from the point of view of the person whom the neighbor wants to sue, the friendly maintainer is a bothersome busy-body, sticking his nose into business that does not concern him.

3. Malice Maintenance

While the dangers of prohibiting selfless maintenance are, on a practical level, quite minimal, it does represent one end of the

171. The fourteen jurisdictions are: ALABAMA, *Wilson v. Harris* 688 So. 2d 265, 270 (Ala. Civ. App. 1996); DELAWARE, *Street Search Partners, L.P. v. Ricon Int'l, L.L.C.*, No. 04C-09-191-PLA, 2006 Del. Super. LEXIS 200, at *12-15 (Del. Super. Ct. May 12, 2006); DISTRICT OF COLUMBIA, *Design for Bus. Interiors, Inc. v. Herson's, Inc.*, 659 F. Supp 1103, 1107-08 (D.C. 1986); GEORGIA, GA. CODE ANN. § 13-8-2 (2009); ILLINOIS, 720 ILL. COMP. STAT. 5/32-12 (2009); KENTUCKY, KY. REV. STAT. ANN. § 372.060 (West 2009); MINNESOTA, *Johnson v. Wright*, 682 N.W.2d 671, 675-79 (Minn. Ct. App. 2004); MISSISSIPPI, MISS. CODE ANN. § 97-9-11 (2009); NEVADA, *Schwartz v. Eliades*, 939 P.2d 1034, 1036-37 (Nev. 1997); PENNSYLVANIA, *Fleetwood Area Sch. Dist. v. Berks Cnty. Bd. of Assessment*, 821 A.2d 1268, 1273 (Pa. Commw. Ct. 2003); RHODE ISLAND, *Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 906 (R.I. 2002); SOUTH DAKOTA, *McKellips v. Mackintosh*, 475 N.W.2d 926, 928-29 (S.D. 1991); VIRGINIA, *Allstate Ins. Co. v. Commonwealth*, 100 S.E.2d 31 (Va. 1957); and WISCONSIN, *In re Estate of Katze-Miller*, 463 N.W.2d 853, 858 (Wis. Ct. App. 1990). All of these states have explicitly held that their common law or statutes prohibit champerty. Certainly most would permit selfless maintenance, if the question were ever presented to a court, although this is a matter of speculation, which, as I will note below, introduces a degree of uncertainty which may inhibit those inclined towards performing acts of maintenance.

172. MISS. CODE ANN. § 97-9-11 (2009). Illinois' law sweeps slightly less broadly:

If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry. It is not maintenance for a person to maintain the action of his or her relative or servant, or a poor person out of charity.

720 ILL. COMP. STAT 5/32-12 (2009). Illinois allows selfless maintenance when the recipient of the support is either one's family or a person who is poor.

spectrum of how broadly a state could regulate third-party support of litigation (taking into account the First Amendment rights established in *Button*). On the other end of the spectrum, as a logical and practical matter, lie a narrow set of motives for third-party support that are not directly based on financial self-interest (as in champerty), but are based on non-pecuniary motives that are the opposite of those that motivate selfless maintenance. One can imagine a third party gratuitously supporting a stranger's litigation with either money or non-monetary aid, just out of pure spite or malevolence towards the target of the person aided by the maintainer. This could be described as *malice maintenance*. In *Oliver v. Bynum*, for example, the court held that common law maintenance prohibited the gratuitous act of helping a party secure funding to mount a lawsuit because the maintainer desired to ruin the career of the person who would be named in the lawsuit.¹⁷³

One could view malice maintenance in such a way as to trivialize it as an analytic distinction while recognizing its attractiveness as a common law doctrine. As the Idaho Supreme Court observed, maintenance intended to injure another party (regardless of whether it profited the maintainer) is not *just* maintenance, or even *primarily* maintenance: it is indistinguishable from malicious prosecution (which is also known as "the wrongful use of civil proceedings") and abuse of process.¹⁷⁴ It might conceivably be tortious

173. *Oliver v. Bynum*, 592 S.E.2d 707, 711 (N.C. Ct. App. 2004). Arguably, this case, like *Toste Farm*, 798 A.2d at 901, are cases of "regular" champerty, since it could be argued that in both cases the maintainer, who were lawyers, were using their professional knowledge or status to provide 'in-kind' services (not money) to support the litigation of a stranger (who really was once, or still was, their client) in order to secure a long-term financial advantage. I do not disagree, and this only supports my ultimate conclusion that the common law distinctions currently employed to help lawyers and judges navigate the law of maintenance, champerty, and assignment are formalistic and ought to be redrawn on the basis of policies untainted by conceptual concerns raised by the principle of the inauthentic claim.

174. *Wolford v. Tankersley*, 695 P.2d 1201, 1222 (Idaho 1984) (Bistline, J., dissenting). See RESTATEMENT (SECOND) OF TORTS, § 674 (1977) ("One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if: he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."). Although section 674 is entitled "Wrongful Use of Civil Proceedings" and restricts the tort of "malicious prosecution" to improper initiation of criminal proceedings, many courts refer to both wrongful use of either the criminal or the civil process as malicious prosecution, a convention adopted by this Article. See also RESTATEMENT (SECOND) OF TORTS § 682 (1977) ("One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."); 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL

interference with economic advantage or prima facie tort.¹⁷⁵ The Idaho Supreme Court is probably correct, and the implication of this conclusion is twofold. First, to the extent that the prohibition of maintenance is based on fear of “malice maintainers,” who would use other people’s litigation as a way to achieve their spiteful and socially unproductive ends, we already have multiple doctrines that provide exactly that protection; it is not clear why we need yet one more doctrine.¹⁷⁶ Second, as a descriptive matter, since every U.S. jurisdiction recognizes one or more of the torts of abuse of process, malicious prosecution, tortious interference with economic advantage, or prima facie tort, it must be the case that even a state that has no law explicitly prohibiting maintenance does, in effect, prohibit malice maintenance.¹⁷⁷

However, before leaving the subject of malice maintenance, it is worth pausing to consider one tempting but bad argument for specifically prohibiting malice maintenance: that malice maintenance, if left unchecked, would lead to an increase in frivolous litigation.¹⁷⁸ This confusion is illustrated in the one recent work of scholarship which attempted to clearly and explicitly discuss malice maintenance, Paul Bond’s 2002 article (in which the practice is referred to as “malice champerty”).¹⁷⁹ Bond defined malice champerty as “the funding of *frivolous* litigation by an otherwise disinterested party,

MALPRACTICE § 6:10 (4th ed. 1996) (stating that malicious prosecution derived from the torts of champerty and maintenance).

175. The five elements for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Youst v. Longo, 729 P.2d 728, 733 n.6 (Cal. 1987). See generally Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447 (1990) (tracing the history of prima facie torts).

176. South Dakota, following this line of argument, equates malice maintenance with malicious prosecution, although oddly, it calls this “barratry”: “Barratry is the assertion of a frivolous or malicious claim or defense or the filing of any document with malice or in bad faith by a party in a civil action.” S.D. CODIFIED LAWS § 20–9–6.1 (2009).

177. See *Moffett v. Commerce Trust Co.*, 283 S.W.2d 591, 596–600 (Mo. 1955) (showing that elements of abuse of process claim and malice maintenance—defined as “‘officious intermeddling in a suit’” in order to injure another—are indistinguishable).

178. See *SELLING LAWSUITS*, *supra* note 3, at 5 (“[T]hird-party financing encourages frivolous and abusive litigation.”).

179. See Bond, *supra* note 162 (defining and distinguishing “malice champerty” as a form of champerty in general).

with the purpose of harming or discomforting the defendant.”¹⁸⁰ If, by “frivolous,” Bond meant a claim which is objectively unjustified, then the definition is, strictly speaking, inaccurate.¹⁸¹ While malice maintenance could result in an increase in frivolous lawsuits, the relationship between a malicious motive and the objectively false basis of the suit is contingent.¹⁸² Furthermore, in addition to non-frivolous claims employed for an improper end, the courts sometimes see claims which impose huge costs on defendants and the courts which are based on a plaintiff’s idiosyncratic yet deeply held principles—and which are not, on their face, frivolous.¹⁸³

For these reasons, malice maintenance should be defined as the support of *meritorious* litigation employed for an improper end. By “meritorious” I mean non-frivolous, that is, where the claim is based on (a) factual allegations that the plaintiff has a reasonable basis for believing could be proven true, and (b) law which the plaintiff has reason to believe a court could interpret in such a way so as to support a result in the plaintiff’s favor.¹⁸⁴ Obviously, not all meritorious legal claims would succeed if taken to trial, and not all meritorious legal claims which have a lower expected return value than their opponent in litigation are frivolous.¹⁸⁵

180. *Id.* at 1301 (emphasis added).

181. “A frivolous action exists when ‘the proponent can present no rational argument based on the evidence or law in support of the claim’. . . . To fall to the level of frivolousness there must be such a deficiency in fact or law that no reasonable person could expect a favorable judicial ruling.” *Ridley v. Lawrence Cnty. Comm’n*, 619 N.W.2d 254, 259 (S.D. 2000) (citations omitted). While it is possible for a person to subjectively believe in the validity of a claim that is objectively false, it is highly unlikely. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 530–34 (1997) (examining the ability of a plaintiff to subjectively believe in the validity of a claim).

182. P may sue D under the tort of abuse of process even though D’s suit against P was non-frivolous—that is, based on true allegations and established precedent—if P can show that D’s suit was brought to achieve improper ends. This is in contrast, for example, with the tort of malicious prosecution, which requires that the proceeding be brought without probable cause. See RESTATEMENT (SECOND) OF TORTS § 682 (1977); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 687 (1997) (stating that malicious prosecution requires that the suit be brought without probable cause in addition to the existence of an improper purpose).

183. See, for example, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 154 (Wis. 1997), where the plaintiff, a landowner, sued the defendant, a builder, for cutting across his property in winter and won \$1 in nominal damages and \$100,000 in punitive damages.

184. This is the converse of Bone’s definition of a frivolous lawsuit. Bone, *supra* note 181, at 533.

185. “[N]ot all unsuccessful legal arguments are frivolous.” *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990); see also George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (examining the likelihood that litigation will ensue in terms of the expected return values of the parties). If only successful claims (from the ex post

Frivolous litigation is not a necessary byproduct of maintenance, whether malicious or selfless.¹⁸⁶ Therefore, if a state's concern is with frivolous litigation (some of which happens to be supported by a third party), it should just use the statutes and doctrines designed to punish litigants and lawyers for making frivolous claims and defenses, and for abusing civil litigation.¹⁸⁷ No extra work is done by a rule specific to maintenance that targets frivolous litigation since frivolous litigation is disfavored regardless of who pays for it. The question malice maintenance raises is: How should the courts view meritorious litigation whose adjudication is likely, for various reasons, to interfere with the larger goals of the civil justice system?¹⁸⁸ The answer may lie in existing doctrines of abuse of

perspective) were meritorious *ex ante*, then half of all claims resolved at trial are, by definition, non-meritorious, which is not consistent with the convention of using "meritorious" in litigation as a synonym for "non-frivolous." See *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991) (describing "frivolous" as "shorthand that this court has used to denote a filing that is both baseless and without a reasonable and competent inquiry").

186. To be sure, the historical justifications for prohibiting any form of maintenance was that third-party funding of litigation encouraged fraudulent lawsuits. The wealthy and powerful would "buy up claims, and, by means of their exalted and influential positions, *overawe the courts, secure unjust and unmerited judgments*, and oppress those against whom their anger might be directed." *Casserleigh v. Wood (Casserleigh I)*, 59 P. 1024, 1026 (Colo. App. 1900) (emphasis added). Whether this historical story was true or not, American courts held judicial corruption had disappeared with the advent of modern reforms. See, e.g., *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 645 (N.Y. 1824) ("In modern times, and since England has enjoyed a pure and firm administration of justice, these evils are little felt, and champerty and maintenance are now seldom mentioned . . . as producing mischief in that country.").

187. As the Massachusetts Supreme Judicial Court said in response to the argument that restrictions on champerty were necessary to control for frivolous lawsuits:

There are now other devices that more effectively accomplish these ends [Such] devices include Mass. R. Civ. P. 11, 365 Mass. 753 (1974), providing sanctions for misconduct, and G. L. c. 231, § 6F, regulating the bringing of frivolous lawsuits To the extent that we continue to have the concerns that the doctrine of champerty was thought to address, we conclude that it is better to do so directly, rather than attempting to mold an ancient doctrine to modern circumstances.

Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997); see also *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277 (S.C. 2000) ("We are convinced that other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty."); Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 811–12 (2004) (citing Bond, *supra* note 162, at 1330, stating that the goals of champerty and maintenance are more easily accomplished through other legal mechanisms).

188. To quote Justice Thomas in a slightly different, but related context:

The common law consistently has sought to place limits on [negligent infliction of emotional distress] by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover. This concern underlying the common-law tests has nothing to do with the potential for fraudulent claims; on the contrary, *it is based upon the recognized possibility of genuine claims*

process, malicious prosecution, tortious interference with economic advantage, or prima facie tort. However, it is too easy, and it makes the question of malice maintenance uninteresting, to assume that such cases which attract third-party support are frivolous, at least when compared to cases brought by plaintiffs—motivated by malice as well—without any third-party support.¹⁸⁹

4. Profit Maintenance (Champerty)

Of the twenty-eight states that permit maintenance in some form, sixteen explicitly permit maintenance for profit.¹⁹⁰ The remaining states probably permit champerty—it is just that they do not explicitly cite the investment by contract into a stranger's suit as a permissible form of maintenance. This Article will assume that, once attorney maintenance, selfless maintenance, or malice maintenance is taken out of consideration, the remaining range of choices facing a state that wishes to regulate maintenance concerns profit maintenance, that is, champerty.¹⁹¹ In the sections that follow, I will

Conrail v. Gottshall, 512 U.S. 532, 552 (1994) (emphasis added). One may not agree with Justice Thomas' conclusion, but one has to respect his honesty: The real reason that tort reformers want to change the basic rules of civil litigation is not because they fear a flood of frivolous litigation, but because they fear a flood of genuine, well-founded lawsuits.

189. In these suits, of course, there *is* someone investing in the lawsuit other than the plaintiff: the plaintiff's attorney.

190. The sixteen jurisdictions are: COLORADO, Fastenau v. Engel, 240 P.2d 1173, 1174 (Colo. 1952); CONNECTICUT, Robertson v. Town of Stonington, 750 A.2d 460, 463 (Conn. 2000); FLORIDA, Kraft v. Mason, 668 So. 2d 679, 682–83 (Fla. 1996); IOWA, Wright v. Meek, 3 Greene 472, 472 (Iowa 1852); KANSAS, Boettcher v. Criscione, 299 P.2d 806, 812 (Kan. 1956); MAINE, ME. REV. STAT. ANN. tit. 9A, §§ 12–101 to –107 (2009) (partially amending ME. REV. STAT. ANN. tit. 17A, § 516(1) (2009)); MARYLAND, Son v. Margolius, Mallios, Davis, Rider & Tomar, 709 A.2d 112, 119–20 (Md. 1998); MASSACHUSETTS, Saladini v. Righellis, 687 N.E.2d 1224, 1224 (Mass. 1997); MISSOURI, Schnabel v. Taft Broad. Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975); NEW HAMPSHIRE, Adkin Plumbing & Heating Supply Co. v. Harwell, 606 A.2d 802, 803–04 (N.H. 1992); NORTH CAROLINA, Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008); OHIO, OHIO REV. CODE ANN. § 1349.55 (West 2009) (superseding Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003)); OKLAHOMA, Mitchell v. Amerada Hess Corp., 638 P.2d 441, 444–45 (Okla. 1981); OREGON, Brown v. Bigne, 28 P. 11, 13 (Or. 1891); WASHINGTON, Giambattista v. Nat'l Bank of Commerce of Seattle, 586 P.2d 1180, 1186 (Wash. Ct. App. 1978); and WEST VIRGINIA, Currence v. Ralphsnyder, 151 S.E. 700, 700 (W. Va. 1929).

191. There is a well-developed body of scholarship that analyzes and describes the evolution of champerty in the United States by examining the litigation lending and funding industries. GARBER, *supra* note 26; GEOFFREY MCGOVERN ET AL., UCLA-RAND CTR. FOR LAW & PUB. POLY, THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER: TRENDS AND IMPLICATIONS FOR THE CIVIL JUSTICE SYSTEM, (2010), available at http://www.rand.org/pubs/conf_proceedings/2010/RAND_CF272.pdf; Bond, *supra* note 162; Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529 (1996); Hananel & Staubit, *supra* note 187;

identify the different ways that various states limit and/or permit profit maintenance based on the following criteria: *what* kind of lawsuit may be the subject of investment; *how* can the investment be made; and whether the investment motive is the primary *cause* of the lawsuit.

a. Restrictions on What Lawsuits May be Maintained for Profit

We can imagine mapping a state's champerty law along multiple dimensions. For example, a state might restrict *what* may be supported by a stranger interested in maintaining for profit. Tennessee, for instance, permits profit maintenance in anything but transactions concerning land.¹⁹² Texas, which has one of the most liberal bodies of law concerning both assignment and maintenance, does not permit profit maintenance in certain areas of litigation, such as legal malpractice.¹⁹³ Limiting profit maintenance on the basis of *what* kind of suit the maintenance supports would seem to be an obvious means of regulation for a state that wanted to support champerty as a matter of general principle while recognizing that, as a matter of public policy, there might be some types of litigation which are ill-suited to third-party investment. It is odd, therefore, that states rarely limit profit maintenance on the basis of what kind of litigation is supported.

Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85 (2002); Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57 (2000); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Marial Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, 155 U. PA. L. REV. 503 (2006). Some of this work is explicitly comparative. VICKI WAYE, *TRADING IN LEGAL CLAIMS: LAW, POLICY AND FUTURE DIRECTIONS IN AUSTRALIA, UK & US* (2008); Peter Cashman & Rachael Mulheron, *Third Party Funding: A Changing Landscape*, 27 CIV. JUST. Q. 312 (2008); Vicki Waye & Vince Morabito, *The Dawning of the Age of the Litigation Entrepreneur*, 28 CIV. JUST. Q. 389 (2009).

192. *Record v. Ins. Co. of N. Am.*, 438 S.W.2d 743, 747 (Tenn. 1969).

193. Texas courts have invalidated six types of claims based on public policy: legal malpractice claims, certain assignment of interests in an estate, collusive assignments of insurance claims, Mary Carter agreements, settlement agreements enabling one joint tortfeasor to sue another on the injured plaintiff's claim, and assignments of claims under the [Texas] Deceptive Trade Practices Act (DTPA).

Christy B. Bushnell, Note, *Champerty Is Still No Excuse in Texas: Why Texas Courts (And the Legislature) Should Uphold Litigation Funding Agreements*, 7 HOUS. BUS. & TAX L.J. 358, 376-77 (2007).

*b. Restrictions on How Lawsuits May be Maintained for Profit
(Intermeddling Profit Maintenance)*

More common are limitations based on *how* the maintenance is performed. Of course, restrictions on *how* litigation is supported are not exclusive of limitations on *what* litigation is supported; the two might operate in complementary ways. The most common way states control the *how* question in champerty is by limiting how much *control* the investor has over the conduct of the litigation into which she has put her money. We can say, therefore, that states sometimes limit *intermeddling profit maintenance*: where a contract allows the third party to take too much control over the conduct of what otherwise would be a meritorious suit by another, the maintenance will be prohibited. In Florida, for example, intermeddling means “offering unnecessary and unwanted advice or services; meddlesome, esp[ecially] in a highhanded or overbearing way.”¹⁹⁴

Intermeddling profit maintenance can take many forms, and there is no common test to determine whether the maintainer has crossed the line into intermeddling. At a minimum, intermeddling must mean something more than that the maintainer has made suggestions which the party litigating the case has followed; in the context of champerty, it must mean that the investor has bought the right to make certain decisions about the litigation from the party bringing the suit along with a share of the contingent outcome.¹⁹⁵ The degree of control the investor obtained by contract can, in theory, extend over a spectrum ranging from relatively minor control (for example, control over what documents the investor can see) to almost complete control (for example, control over selection of counsel or veto power over settlement). At some point the control the funder assumes by contract verges on full control over the lawsuit, and full control of the lawsuit collapses the distinction between maintenance and assignment.¹⁹⁶ Once the maintainer assumes full control of the

194. *Kraft v. Mason*, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (citation omitted).

195. I recognize that it is possible that an intermeddler could influence litigation without enjoying a contractual right to control, but in cases where a funder's suggestions are offered gratuitously and are accepted entirely, it seems to me that, although the funder is a cause-in-fact of the change in the litigation's direction, she is not a proximate cause. The proximate cause is the funded party, who bears the responsibility for choosing to subject their will to that of the funder.

196. See, for example, State Bar of Michigan Comm. on Prof'l and Judicial Ethics, Op. RI-321 (2000), which described a litigation funding agreement offered in Michigan by a Nevada-based funder, containing the following conditions: (1) The funder had the right to order the litigant to replace the lawyer currently handling the case; (2) the funder had the right to order

lawsuit, she really is an assignee and the contract that brought her control of the lawsuit is properly a contract of assignment, not maintenance.¹⁹⁷

In *American Optical*, a federal district court, applying New York's relatively permissive law of maintenance and assignment, declared unlawful an agreement between a patent holder and a stranger which transferred the patent holder's claim to the patent to the stranger in exchange for the stranger's binding promise that it would bring a suit to enforce the patent.¹⁹⁸ The court held that the agreement was a form of champerty and that it was impermissible because the party who was "maintaining" the litigation exchanged her aid (in part) for control over whether the party aided could abandon the suit.¹⁹⁹

Other states have held that a champerty contract that gives the power to settle to the funder crosses the line into intermeddling. The Minnesota Supreme Court voided a maintenance contract because it required the plaintiff to pay the funder a set amount if the plaintiff settled the case without the funder's permission.²⁰⁰ Some states have pointed to the absence of control over settlement as *prima facie*

the litigant to refuse any settlement; (3) the litigant had promised to continue the case "under all circumstances"; and (4) the funder had the right to inspect any document in the litigant's (or his attorney's) possession, regardless of the effect that the inspection might have on the potential waiver of attorney-client privilege. The committee offered the opinion that no lawyer could recommend this agreement to a client because it made the funder "in real terms" a "client" in the case "with a co-equal, if not superior, decision making role" to the litigant receiving the funding. *Id.*

197. *See* *Am. Optical Co. v. Curtiss*, 56 F.R.D. 26, 29-32 (S.D.N.Y. 1971) (holding that an agreement which limited the litigant's control over whether to sue at all violated Federal Rule of Civil Procedure 17(a), which requires the moving party to be the "real party in interest").

198. *Id.*

199. *Id.* at 29-30. It must be noted that, technically, the transaction in question was not champertous but was an assignment, since the patent holder assigned its patent to the party who presented itself before the court as the real party in interest. The court viewed the assignment as a "contrivance" chosen only after the original patent claimant rejected the original proposal by the assignee, which was that the assignee would fund the original patent holder's enforcement action. *Id.* at 30.

200. But there is a still more objectionable provision in this contract, one upon which we mainly rest our decision. It is the one which binds the defendant not to settle the claim without the written consent of the plaintiff, and provides that, if he does settle without plaintiff's consent, he shall pay the plaintiff a fixed and arbitrary sum, without any regard to the amount or value of the services which the latter may have performed.

Huber v. Johnson, 70 N.W. 806, 808 (Minn. 1897); *see also* *Brown v. Dyrnes*, 109 So. 2d 788, 789 (Fla. Dist. Ct. App. 1959) (noting that the funder had demanded a fixed sum if litigant settled without his consent).

evidence that a champerty contract did not permit the funder to intermeddle.²⁰¹

The question of where the line between champerty and intermeddling profit maintenance *ought* to lie is one that has not received any sort of comprehensive review, and this Article will not undertake that task. It is likely that there is a short list of incidents of control which no funder can demand from a litigant in exchange for support, and this list would include, for example, the power to select one's own attorney, to accept or refuse a settlement, to abandon the lawsuit, and to determine the theory of the case. It is possible that outside of this short list, there is another list of "lesser" incidents of control, none of which are necessary or inalienable, but where the loss of enough of these incidents would "add up" to a loss of control large enough to take the champerty contract across the line intermeddling profit maintenance.²⁰²

On the other hand, some courts have incorrectly held that the mere fact of the champerty contract itself allows for too much control on the part of the funder, holding, therefore, that all forms of profit maintenance are really intermeddling profit maintenance.²⁰³ The Ohio Supreme Court declared a champerty contract unlawful because the promise to repay the funder would necessarily become an additional factor that the litigant would weigh in making the decision whether to settle her case.²⁰⁴ In the *Rancman* case, the court noted that the \$6,000 advance provided by the funder gave it the right to the first

201. See *Kraft v. Mason*, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996) ("[The funder did not] concern herself with the antitrust litigation or impose her views upon the attorneys or the litigants once she provided the loan."); *Clifford v. Wilcox*, 27 P.2d 722, 725 (Wash. 1933) (noting that the funder did not control settlement).

202. While control over settlement cannot be given over to the funder, the funder might legitimately demand that if the litigant wants to accept a settlement the funder believes is too low, given the funder's own estimate of the expected value of the case, the litigant must permit the funder to exercise an option (written into the champerty contract, of course) to take an assignment in the case. Similarly, while the funder cannot control the "theory of the case," which must be kept in the hands of the party in interest, the funder might insist that none of the funds provided to the litigant (assuming that the funds were dedicated to pay for litigation expenses) be used for a particular legal expense with which the funder disagrees (e.g., an expert the funder believes is ill-suited to the litigant's own theory of the case). Even if these "lesser" rights are permitted individually, it may be that if a funder demanded both of them (plus others I have not set out), a court would correctly hold that the funder had overreached and was now intermeddling.

203. See *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003) (finding that a champerty contract implicitly impedes the settlement of lawsuits); see also *Johnson v. Wright*, 682 N.W.2d 671, 679–80 (Minn. Ct. App. 2004) (endorsing *Rancman*).

204. *Rancman*, 789 N.E.2d at 221.

\$16,800 of the settlement if the case settled within twelve months.²⁰⁵ Therefore, it hypothesized:

[I]f there had not been any superior liens on [the litigant]'s settlement and her attorney had charged a 30 percent contingency fee, [she] would not have received any funds from a settlement of \$ 24,000 or less. This . . . gives [her] *an absolute disincentive to settle for \$ 24,000 or less* because she would keep the \$6,000 advance regardless of whether she settles . . . and would not receive any additional money from a \$ 24,000 settlement.²⁰⁶

The court concluded that the agreement between the funder and the litigant intermeddled with the lawsuit because it could “prolong litigation and reduce settlement incentives.”²⁰⁷

The Ohio Supreme Court is correct descriptively—the fact that the litigant has a contingent debt after agreeing to the contract offered by the funder does in fact increase the total settlement that the litigant will have to recover in order to be better off than had she not signed the contract and settled the case. But this is trivially true about any contractual relationship assumed by the litigant which is payable out of the contingent settlement (or award) the litigant receives, including the contingency fee agreement the litigant signed with her attorney. The counterparty to these contracts is not in “control” of the litigation merely because he has, in exchange for a valuable service (that is, something the litigant freely chose to pay for), increased the amount that the plaintiff must receive from the defendant in order to obtain a positive outcome from the litigation. The fact that the litigant’s incentive structure with regard to future settlement is affected by champertous contracts does not mean that the funder is intermeddling with the litigant’s case.²⁰⁸ This is not to deny that there may be policy-based reasons for setting outer boundaries to the ratio between the expected amount to be repaid in the event of a favorable outcome and expected value of the lawsuit; it is just to say that the argument for limiting profit maintenance based on the claim that any *ex ante* increase in the settlement value of a case always converts the investment into a form of intermeddling profit maintenance is wrong.

205. *Id.* at 220.

206. *Id.* (emphasis added).

207. *Id.* at 221.

208. While the existence of [the funders'] lien on the proceeds of Plaintiff's recovery may have influenced some of Plaintiff's decisions regarding her personal injury claim, Plaintiff simply has not demonstrated that [the funders] attempted to control the resolution of her claim for the purpose of stirring up strife and continuing litigation.

Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008).

*c. Restrictions on the Cause of the Maintenance for Profit
("But-For" Profit Maintenance)*

Some states are less concerned with issues of control than with the fear that a champertous contract is the efficient cause of a lawsuit that otherwise would not have existed. For example, Colorado rejected the category of intermeddling maintenance, or at least, its courts have never held that a champertous contract was unlawful because it allowed the funder to take too much control over the litigation. In *Bashor v. Northland Insurance Co.*, the Colorado Supreme Court held that control over attorney selection was not an essential element to remaining a party-in-interest, and suggested that if a funder maintained control over this as well as other major aspects of the litigation, then the contract was not unlawful.²⁰⁹ Colorado took the position that, if the suit brought is meritorious—meaning that the plaintiff wanted to bring it, but was wanting of resources—then the degree of control exercised by the funder is irrelevant.²¹⁰ On the other hand, Colorado has developed a definition of intermeddling that potentially sweeps many more champertous contracts across the line into illegality. The Eighth Circuit summarized a series of Colorado opinions to stand for the proposition that “intermeddling” meant

209. *Bashor v. Northland Ins. Co.*, 480 P.2d 864, 867 (Colo. App. 1970). The case arose in the context of assignment: The assignor, whose only asset was the expected return from a bad faith claim against his insurer, assigned that claim to the party who had been the original plaintiff in the underlying suit that gave rise to the bad faith claim. The defendant insurance company moved to have the assignee dismissed from the case on the ground that it was not the real party in interest, in part because the assignor maintained significant control over the conduct of the case by the assignee. Compare *Bashor*, 480 P.2d at 867, with *Am. Optical Co. v. Curtiss*, 56 F.R.D. 26 (S.D.N.Y. 1971) (involving a case where one party assigned its rights to certain patents to a third party in exchange for the third party bringing suit to enforce the patent). In fact, the court pointed to the irony of an insurer making this argument against the assignment, since virtually every insurance contract contains a clause reserving to the insurer the right to control the selection of counsel in any suit brought by the insured involving the redress of an injury to the insured for which the insurer is responsible. *Bashor*, 480 P.2d at 867.

210. [The rule against champerty] was never intended, although possibly such cases might have come within the strict letter and reading of the old rule, to prevent poor persons from charging the subject-matter of the suit in order to secure the means to assert and enforce their rights by legitimate methods and in a legitimate manner. *Casserleigh I*, 59 P. 1024, 1027 (Colo. App. 1900) (citations omitted). Colorado courts will not permit malice maintenance, even if the plaintiff would have brought a meritorious suit “but for” the want of resources:

[S]uch contracts . . . will not be enforced from reasons based upon considerations of public policy and good morals, if it appears that they were entered into, not with the bona fide object of assisting a claim believed to be meritorious and just, but for the purpose of injuring and oppressing others.

Id.

encouraging (or causing) another to bring a suit "which otherwise he would not have brought."²¹¹

The evil of intermeddling, according to the view adopted by Colorado, does not stem from the participation of a stranger in an otherwise legitimate lawsuit, but stems from the fear that "but-for" the stranger's conscious decision that the lawsuit ought to be brought, the lawsuit would never have occurred.²¹² *Casserleigh v. Wood* is a good illustration of but-for maintenance. A "stranger" (Casserleigh) approached the Wood family with a piece of evidence that was crucial to proving that they had a valid claim for land that had once been owned by their deceased father. Apparently, the Woods had wanted to bring the suit but did not because they lacked "crucial" evidence without which "the Woods could not successfully maintain any action," and this evidence was in Casserleigh's possession.²¹³ Casserleigh offered the evidence to the Woods on the condition that, if they used it and they recovered the land (or a sum in compensation for the loss of the land), they would give a portion of that recovery to Casserleigh.²¹⁴ The Woods agreed, recovered, and refused to pay Casserleigh, claiming that, under the common law, the contract was void for public policy because it was champertous.²¹⁵

The court noted that unlike the common law definition once adopted in England and adopted by other states, the statutory definition of maintenance in Colorado did not prohibit any "taking in hand or upholding of quarrels or sides" in a lawsuit by any means and it certainly did not prohibit profit maintenance.²¹⁶ Colorado only prohibited malice maintenance (maintenance with "the purpose of injuring and oppressing others") and "but-for" maintenance (maintenance "for the purpose of stirring up strife inducing suits to be

211. *Casserleigh v. Wood* (*Casserleigh II*), 119 F. 308, 312 (8th Cir. 1902) ("[Champerty] is committed when a man, with a view of fomenting litigation, encourages another to bring a suit or to make a defense which otherwise he would not have brought or made.") (emphasis added). It is interesting that the federal court thought that the doctrine of maintenance (and the limits it imposed) applied to third party support of plaintiffs or defendants. In 1902 Colorado was in the Eighth Circuit.

212. The "but for" test for causation is a familiar one in law; it is also known as the *sine qua non* or *counterfactual* test. It holds simply that an act is a legal cause if it was necessary (but not necessarily sufficient) to produce the effect in question. See RESTATEMENT (SECOND) OF TORTS § 431 (1965) (stating what constitutes legal cause); GOLDBERG ET AL., *supra* note 55, at 218 (addressing legal cause).

213. *Wood v. Casserleigh*, 30 Colo. 287, 290 (1902).

214. *Casserleigh I*, 59 P. at 1025.

215. *Id.*

216. *Id.* at 1027.

begun which would otherwise not be commenced”).²¹⁷ The fact that the funder in this case was in fact selling evidence in exchange for a portion of the lawsuit in which the evidence was to be introduced did not bother the court.²¹⁸ All that mattered was that the funder acted “with the *bona fide* object of assisting a claim believed to be meritorious” and that the party who was funded was already inclined to bring the lawsuit:

[The maintenance contract] recites . . . the desire of the [litigants] to prosecute their rights, and a reasonable presumption from the language used would be that it was their intention for this purpose to institute suit, or to cause suit to be instituted in their behalf. *There is nothing upon the face of the contract to indicate that the [funder] induced the bringing of a suit which would otherwise have not been commenced*, or that the acts to be performed by him were for the promotion of litigation, in the sense in which those words are used in all the authorities; but, on the contrary, a conclusive presumption from the language used, and from the results obtained by the suit, is that they were to aid a legitimate suit, to be instituted in good faith, not for the purpose of stirring up and encouraging strife, but for the legitimate purpose of enforcing legitimate rights.²¹⁹

The idea behind drawing the line between lawful and unlawful champerty at “but-for maintenance” is that “unnecessary” litigation ought to be discouraged. This idea has a historical pedigree.²²⁰ According to Stephen Presser, “it was originally a mainstay of the Anglo-American legal culture that one should try one’s best to resolve disputes out of court, [and] that litigation was something of an evil, and that it ought to be resorted to *only if all other means [of accommodation] failed*.”²²¹ Even in 1936, Max Radin conceded that “the psychological background [of the common law] is the medieval and Christian one in which litigation is at best a necessary evil, and litigiousness a vice.”²²²

But what, exactly, evidenced that litigation, having been brought, was brought only because it was “necessary”? As Radin noted, the common law’s critics of third-party involvement took the

217. *Id.*

218. *Id.* at 1028–29 (“[A]n agreement to pay one for the disclosure of instruments for proof of claims asserted in courts of justice is valid, unless the production of the same could be a dereliction of duty on the part of the person producing the evidence.”) (citation omitted). The court noted that the agreement was not directed to the *suppression* of truthful evidence, but towards the *production* of truthful evidence, something that is in the public interest. *Id.* at 1029.

219. *Id.* at 1027–28 (emphasis added).

220. This is not to say that as a matter of history, the rule of ‘but-for maintenance’ was universally accepted in England or the United States. The real story is much more nuanced, as will be seen in the next Part.

221. Stephen B. Presser, *How Did We Get Here? What Litigation Was, What It Is Now, What It Might Be* 7, COMMON GOOD (June 27, 2005), <http://commongood.org/assets/attachments/142.pdf> (emphasis added).

222. Radin, *supra* note 20, at 68.

view that if the person who suffered the original harm did not initially pursue a valid claim, it ought not to be brought.²²³ Kent, for example, believed that it was a “principle common to the laws of all well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights *which others are not disposed to enforce*.”²²⁴ Coke, in explaining why he opposed contingency fees, said that they would bring into the courts claims that “they [the parties in interest] would not venture to go in upon their own bottoms.”²²⁵

The test offered by Kent and Coke is a “but for” test—if, but for the introduction of the funder’s resources, the litigant would not have been able to bring a suit, the lawsuit was unlawful. The test Kent and Coke recommended simply categorically prohibits maintenance in which the support is provided *before* the lawsuit has been filed.²²⁶ The suit brought by the Woods in *Casserleigh* would fail this test. The Woods could not have “venture[d] to go in upon their own bottoms” and would not have filed suit without the crucial piece of evidence provided by *Casserleigh*.

And yet the Colorado court did not view the suit brought by the Woods as unlawful and did not hold that the introduction of necessary resources by an outsider made the litigation unlawful. How could this be? From a logical point of view, it would seem that the “but-for” test would have compelled the opposite result in *Casserleigh*. Obviously, the Colorado court must have meant “but for” in a way that went beyond the simple mechanics of litigation. It was not enough that but-for the funder’s act, the litigant would have been *materially* incapable of filing suit. The court must have meant that, for the funder’s act to be intermeddling, it would have to be the case that but-for the funder’s actions, the litigant would not have developed the desire or interest in pursuing the suit. Kent and Coke embraced the first meaning of “but-for” maintenance, which might be called “material but-for maintenance” while the *Casserleigh* court embraced the second meaning of “but-for” maintenance, which might be called “desire but-for maintenance.”

223. *Id.* at 48.

224. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 528 n.(c) (John Gould ed., Little, Brown & Co. 1896) (1826) (emphasis added).

225. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 255 (n.p. 1716).

226. Blackstone conceded that maintenance motivated by “charity and compassion”—*e.g.*, selfless maintenance—could be allowed by the common law. BLACKSTONE, *supra* note 55, at *134.

The *Casserleigh* court said it would be supremely unjust if the Woods could not pursue the lawsuit just because, although they knew that their rights were being violated, and they wanted to secure their rights, they lacked the resources necessary to sue.²²⁷ A test of “material but-for maintenance” would make it impossible for litigants to sue even if the purpose and plan behind the suit were wholly their own and the appearance of the funder was a mere happy accident upon which the litigants seized. On the other hand, the test of “desire but-for maintenance” would, in theory, prevent only those suits by litigants who either did not know they had suffered an injury (or had a claim) until approached by the funder, or did not care about the injury or claim until the funder planted within them a sense of injury sufficient to motivate them to bring a suit.²²⁸

On a practical level, it could be very hard to discern whether litigants like the Woods “contemplated and desired . . . to assert their rights” before they were approached by an investor (and if they did, how much they contemplated their “lost” rights and how intensely they contemplated them). The question of proof and the risk of fraud in answering this question threaten to swamp the otherwise praiseworthy goals which the law of champerty would secure if it excluded only “desire but-for maintenance.”²²⁹ Even if one disagreed with Kent and Coke as a matter of principle, one could see why some courts might think that the best and most direct evidence of whether a litigant wanted to bring a suit was whether the litigant did bring a suit. If a court took this position simply from a pragmatic point of view of choosing a rule that was easy to apply, it would, in effect, adopt a rule that barred champerty in cases where the investor promised support to the litigant before the litigant filed her suit.

The discussion about the problems of proof connected with excluding “desire but-for maintenance” may explain why New York’s

227. A poor man may have the right upon his side, but be without means to enforce such rights in the courts, and possibly against some powerful adversary. Surely, it cannot be said that in such case it is the intent of the law to prohibit a friend from assisting him with the necessary money to enforce his rights, dependent for his reimbursement solely upon the contingency of securing a portion of the property which may be obtained by the litigation; this being the only security or chance for repayment which the party could give or have.

Casserleigh I, 59 P. at 1026 (emphasis added).

228. The contract between the investor and the litigants in *Casserleigh* did not cross the line into “desire but-for maintenance” because “[i]n the case at bar, it appears that the [litigants] contemplated and desired the bringing of a suit to assert their rights” before they were approached by the investor. *Id.* at 1027.

229. “[I]t may be said, on the other hand, that such assistance or maintenance may have a tendency to secure rights and promote the ends of justice.” *Id.* at 1026.

law of assignment and maintenance is concerned almost exclusively with contracts made *before* the lawsuit is filed.²³⁰ There is no common law prohibition of maintenance (or champerty) in New York. The only governing law is a statute, §489 of the Judiciary Law. The statute is violated if “the foundational intent to sue on [the] claim [was] at least . . . the primary purpose for, . . . if not the sole motivation behind, entering into the transaction.”²³¹ While the primary focus of §489 litigation has been over the permissibility of full assignments of claims prior to the filing of lawsuits by the assignee, §489 also applies to maintenance contracts.²³² In both cases the evil that the law was designed to prevent was the ability of “attorneys and corporations to purchase claims for the purpose of bringing actions thereon.”²³³ In the words of one judge, the point of §489 was to insure that strangers could not purchase “a hunting license” to bring actions that would not otherwise have been brought.²³⁴ The “rule” that only if a lawsuit had already been filed before the stranger added his or her extra support served as a rough proxy for the “desire but-for maintenance” rule. This is so since it can be assumed that, if someone who has a right goes through the trouble of insisting on that right in court before receiving

230. See, e.g., *Syigma Photo News, Inc. v. Globe Int'l, Inc.*, 616 F. Supp. 1153, 1157 (S.D.N.Y. 1985) (“Section 489 prohibits assignments ‘for the purpose of bringing an action’ and thus, read strictly, extends only to the ‘transfer of claims prior to the institution of any proceeding or action.’”) (quoting *Rosenkrantz v. Berlin*, 317 N.Y.S.2d 704, 705 (1971)).

231. *Bluebird Partners v. First Fid. Bank*, 94 N.Y.2d 726, 736 (2000).

232. The most recent statement to this effect came out in 2004, which permitted the partial assignment to a third party of the money owed to a property owner by its fire insurer:

Here, the loans were made *after* the action was commenced and pending, and thus were not made “with the intent and for the purpose of bringing an action.” Further, plaintiff did not assign his claim against defendants . . . but merely assigned to [the third party] an interest in the proceeds of the policy.

Fahrenholz v. Sec. Mut. Ins. Co., 13 A.D.3d 1085, 1086 (N.Y. App. Div. 2004) (emphasis added).

The question of the primacy of the intent to sue was raised recently in *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors v. Love Funding Corp.*, 918 N.E.2d 889 (N.Y. 2009). This question was certified to the New York Court of Appeals by the Second Circuit, but the New York court was able to resolve the case without reaching the question. Since this case involved an assignment of a chose of action that was filed after the assignment, it did raise an important question about the significance of the New York rule that all assignments, whether partial or full, had to occur after the lawsuit had been filed. The Court of Appeals did not reach this question, however, since the unanimous opinion by Judge Pigott held that as a matter of law, it is not champerty for a party to purchase a full (or partial) interest in a lawsuit in which it has a “pre-existing interest” in the lawsuit, and that the assignee could have had a pre-existing interest in this case. See also *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp.*, 591 F.3d 116 (2d Cir. 2010) (holding that as a matter of law the assignee had a pre-existing interest).

233. *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*, 28 N.Y.2d 325, 329 (1971).

234. *Refac Int'l v. Lotus Dev. Corp.*, 131 F.R.D. 56, 58 (S.D.N.Y. 1990).

any help or promise of anything of value from anyone, it can be safely assumed that he or she truly desired to have his or her right vindicated, and was not influenced by the encouragement of a stranger (whose encouragement may have taken the form of a bribe).

Of course, it could be asked why the limit on champerty—practical or theoretical—needs to be drawn where Colorado and New York have tried to draw it. Why does it matter, for example, whether or not the Woods' claim was something already in their minds when they were approached by Casserleigh? Casserleigh's evidence was, according to the court, honest and relevant; had the facts been that the Woods had, until Casserleigh, never heard of their father's property claim, the evidence would not magically have become less honest and relevant. And yet, according to the rule of "desire but-for maintenance," if Casserleigh's offer to provide the crucial evidence would have been the but-for cause of the Woods coming to believe that they had a claim (or, coming to believe that they should *sue*), the resulting lawsuit should not have gone forward—a position endorsed by the Colorado court.²³⁵

The rule against "desire but-for maintenance," while more liberal than the rule urged by Kent and Coke, shares a similar feature with the other rules limiting maintenance in this Section, such as the rule against intermeddling maintenance or malice maintenance. All of these rules specify a fatal flaw in claims for civil redress which the courts would otherwise accept and enforce. The rule of "desire but-for maintenance" cites the absence of a genuine desire for redress as the fatal flaw. The rule of intermeddling maintenance cites the absence of genuine control as the fatal flaw. The rule of malice maintenance cites the absence of a socially acceptable motive for seeking redress as a fatal flaw.

In each case, while a story could be told (and sometimes is told) about the utility of these rules in preventing frivolous lawsuits from being brought, it is not at all obvious that these rules are the best way to protect the courts from frivolous litigation, and this Article takes the position that their robust survival in the modern era is explicable only in terms of the conceptual and non-instrumental values these rules reflect. The connection between them is the same as the connection I drew between the non-consequentialist reasons that lay

235. *Casserleigh I*, 59 P. at 1026. This is assuming that the only way to secure Casserleigh's cooperation was to promise him a contingent part of the recovery. Of course, if Casserleigh had acted out of political or charitable motives, then the maintenance would not be champerty, but selfless maintenance, which was discussed *infra* Section III.B.2.

in common behind the common law's hostility to unlimited assignment and its hostility to unlimited maintenance at the end of Part II. I argued that the common law disfavored assignment and maintenance because it permitted someone who had not suffered a wrong to exercise an inappropriate degree of control over a claim for redress for a private wrong suffered by a stranger. I referred to this conceptual objection to assignment and maintenance as the theory of the inauthentic claim.

We can see how the objections based on the theory of the inauthentic claim in the law of assignment are repeated in the rule of the law of maintenance reviewed in this Section. The chief argument for the rules barring either variant of "but-for maintenance" is that a lawsuit brought by a litigant who does not "genuinely" feel aggrieved should not be brought at all. This is exactly the same argument made by U.S. courts that refused to permit "naked" or "bare" assignments. These courts, it will be recalled, disfavored assigned lawsuits which were corrupted by the original victim's indifference. The Nevada Supreme court said that if the original victim of a civil wrong was "not disposed to attempt the enforcement of" the suit, "he should not be allowed to transfer his right to another party for the purpose of prosecution."²³⁶ In this argument, the U.S. courts were adopting the principle developed by Lord Abinger in *Prosser* that "no encouragement should be given to litigation, by the introduction of parties to enforce those rights, which others are not disposed to enforce."²³⁷

Now that the theory of the inauthentic claim has been identified as pervasive in the common law's various rules for regulating both assignment and maintenance, it is time to take up the question of whether the theory of the inauthentic claim has any merit independent of its deep historical roots in the common law.

IV. THE WEAK CASE FOR THE THEORY OF THE INAUTHENTIC CLAIM

In the preceding Part, I demonstrated that the law concerning third-party investment in litigation has changed since the early common law, and that this change, while generally in a direction of liberalization, has been inconsistent. Islands of resistance to third-party investment exist, in different degrees, along at least two

236. *Gruber v. Baker*, 23 P. 858, 862 (Nev. 1890).

237. *Prosser v. Edmonds*, (1835) 160 Eng. Rep 196 (K.B.) 204; 1 Y. & C. Ex. 481, 497 (emphasis added).

dimensions. First, there are islands of “no-assignment” in various parts of the tort law, ranging from personal injury to fraud. Second, there are islands of “no-maintenance” that constrain third-party support in any form of civil litigation, ranging from the broadest limitations (in Georgia and Illinois, for example, which forbid almost all forms of maintenance by statute, or the District of Columbia, which forbids it by common law) to the most liberal (New Jersey, Massachusetts, Texas). The existence of these islands is no more troubling in itself than the existence of islands of “no-duty” in the law of liability for negligently caused personal injury; these kinds of inconsistencies are a feature of the common law.²³⁸

But as with tort law, when rules seem to be inconsistent across areas of human behavior which seem indistinguishable from a social or moral point of view, the common lawyer begins to feel uncomfortable. While inconsistency may be unavoidable in the common law, the burden to justify the inconsistency has always fallen on those who want to make it part of the law.²³⁹

In Parts II and III of this Article, I argued that there has been inconsistent treatment of third-party investment in litigation in the common law.²⁴⁰ The last time there was true consistency was at the earliest centuries of the common law in England, when (or so we are told) the assignment of all choses in action were prohibited, and no form of maintenance, other than “selfless maintenance,” was permitted. In Part II, I detailed the various devices that led the common law to recognize, in fits and starts, assignments in property, then contract, then torts that did not involve “personal rights,” then proceeds of torts that did involve assignments of “personal rights,” until finally the common law of the United States embraces free assignability in all choses of action except personal injury (including

238. See, e.g., Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 319–23 (2006) (discussing the place of “no duty” rules in modern American negligence law); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 659–63 (1992).

239. It is worth recalling the words of Judge Kaufman, who fought for a clear rule barring liability for negligently inflicted emotional distress independent of physical contact: “To be sure, the majority freely—one might say almost cheerfully—acknowledges that its position is arbitrary; yet nowhere does it consider the cost of such institutionalized caprice.” *Thing v. La Chusa*, 771 P.2d 814, 882 (Cal. 1989). I agree with Kaufman that courts ought not to be engines of “institutionalized caprice.”

240. The history of inconsistencies noted in this Article has been drawing comment for some time. See, e.g., *Cnty. Hotel & Wine Co. v. London and N.W. Ry. Co.*, [1918] 2 K.B. 251 (Eng.); BODKIN, *supra* note 37, at 9–10; Radin, *supra* note 20, at 78 (commenting on inconsistencies in common law treatment of third-party investment in litigation).

slander and intentional infliction of emotional distress), legal malpractice (except when it does), and fraud (except when it does). Part III detailed the history of the liberalization of the law of maintenance in the common law. Based on the prohibitions memorialized in the words of Kent and Coke, maintenance was apparently prohibited except in cases involving what I called selfless maintenance. Part III explained that the rule set out by Kent and Coke, which I called material but-for maintenance, which would have barred all forms of profit maintenance, was never embraced in the United States. Furthermore, beginning with the adoption of a special exception for what I called lawyer maintenance (the contingency fee) in the early twentieth century, pockets of profit maintenance were permitted. These increased under a variety of common law and statutory rules, until we now have a situation where almost half of the jurisdictions in the United States allow some form of profit maintenance, and a few arguably have lifted all restrictions on maintenance under their common law, to the point where even antisocial forms of maintenance (malice maintenance) are treated as a species of abuse of process, malicious prosecution, tortious interference with economic advantage, or prima facie tort.

U.S. courts have never been shy about admitting that the earliest justification for limitations on assignment and champerty has almost no relevance to contemporary life.²⁴¹ As early as 1824, a New York court observed that “the English doctrine of maintenance arose from causes peculiar to the state of the society in which it was established.”²⁴² In this Article, I have taken these courts seriously, and have proposed that a conceptual argument for resisting third-party investment in litigation is at work; I have called this the theory of the inauthentic claim. In this Part, I identify the two arguments for maintaining the theory of the inauthentic claim as an independent reason for rejecting further liberalization of the rules concerning assignment and maintenance. The first is historical and the second is jurisprudential. In my opinion both are quite weak, and cannot at this moment offer a firm foundation for those who seek to limit third-party investment in litigation.

241. See *supra* note 176 (explaining why South Dakota law deems maintenance prohibition unnecessary).

242. *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 645 (N.Y. 1824).

A. The Historical Argument

The historical argument against a market in lawsuit assumes that the practices embedded in our common law and legal history should be given some weight, especially in the face of calls for reform (which this Article clearly is). According to modern critics of maintenance, the idea that a lawsuit should be the object of third-party investment would have been unthinkable to our forebears.²⁴³ The reason is not that the idea would not have occurred to them, but that it would have offended certain basic assumptions of the early common law and would have violated the law itself. According to Stephen Presser, “litigation was something of an evil, and . . . [a] litigious society was a fractured society.”²⁴⁴ According to Presser, this changed when the “shame of litigation” (the traditional common law view) was replaced by the “romance of litigation.”²⁴⁵ The success of the civil rights movement in the 1950s and 1960s changed the centuries-old social prejudice against litigation; even garden-variety personal injury litigation was now seen not as “a social evil but a form of political expression and, in particular, an avenue for plaintiffs (the ‘aggrieved’) to learn of and to ‘effectuate’ ‘legal rights.’”²⁴⁶ In 1964 the American Bar Association noted that the view that “litigation, per se, is bad has been replaced by the view that litigation is a socially useful way to resolves disputes, particularly the injury claims arising from our mechanized society.”²⁴⁷

Because litigation was an evil to be avoided, the common law adopted multiple mechanisms to express its disapproval of those who would excite unnecessary litigation, including strict bans on maintenance.²⁴⁸ Evidence of this is supposed to be found in the writings of Blackstone. Blackstone defined “barretry [sic]” as “exciting and stirring up [of law] suits.”²⁴⁹ Using the vocabulary developed in Part III, we can see that Blackstone included in this category any

243. See, e.g., SELLING LAWSUITS, *supra* note 3 (explaining that third-party litigation financing was not allowed at common law); Stephen B. Presser, *A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective*, (10th Annual Legal Reform Summit, U.S. Chamber Inst. for Legal Reform Oct. 28, 2009).

244. Presser, *supra* note 221, at 4, 12.

245. Presser, *supra* note 243, at 5–9.

246. Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1990–97 (2004).

247. F. B. MACKINNON, PROFESSIONAL ECONOMICS AND RESPONSIBILITY 210 (1964).

248. Presser, *supra* note 243, at 9–12.

249. BLACKSTONE, *supra* note 55, at *133.

third-party support except selfless maintenance, and even then only when directed towards one's own family or a poor person.²⁵⁰ Prohibited, apparently, was *any act* by a stranger with the foreseeable consequence of causing another to bring a lawsuit, including, it seems, merely proposing to another that they had an actionable claim.²⁵¹ One could be guilty of "barretry" even if one encouraged only non-frivolous claims.²⁵² Blackstone defined maintenance and champerty as "bear[ing] a near relation" to "barretry"; these occurred when a stranger did more than encourage litigation, but took the positive step of assisting the suit by means of money or in-kind services (for example, acting as the attorney).²⁵³ It was an "offence against public justice" to assist a stranger's suit, and according to Blackstone, even the Romans made it a crime to "support another's lawsuit by money, witnesses or patronage."²⁵⁴

The historical story told by Presser might help support the continued adoption of the theory of the inauthentic claim as a free-standing limitation on the laws regulating assignment and maintenance. Arguments rooted in the history or "culture" of a legal system must be handled carefully, but it would be extremely formalistic and narrow-minded to say that the historical practices and attitudes towards litigation do not matter at all when discussing the continued vitality of a conceptual claim about litigation such as the theory of the inauthentic claim.²⁵⁵ It would be an argument in support of the theory of the inauthentic claim if it were true that, as a historical matter, the pursuit of legal rights was seen not as a good in itself, and in fact that the pursuit of legal rights was seen as a regrettable act to be done only as a last resort. This would support the view, suggested by the quotes from Abinger, Kent, and Coke, that courts should support only those suits which are "necessary." It would also support the view suggested by cases like *Gruber* and *Poe* that it is not a good thing, all considered, for a wrongdoer to be forced to

250. *Id.* at *134.

251. *Id.* at *135-36.

252. *Id.*; see also Radin, *supra* note 20, at 59-60 (explaining that even supporters of rightful actions were presumed to be wrongful under Roman Law).

253. BLACKSTONE, *supra* note 55, at *134.

254. *Id.*

255. Beliefs about legal concepts as well as other types of beliefs may play a role in guiding choices about the structure of legal systems. See, e.g., Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 536 (1991) (hypothesizing that the differences between claiming rates in Canada and the United States can be explained by differences in how each society conceptualizes "adversary culture").

confront his wrongdoing if the only way for that to occur is for a stranger to become the “but-for” cause of the civil suit.

My objection to the historical argument is not that it is historical, but that it is wrong as a matter of history. The Blackstonian account suggests a straight line of hostility extending from Rome until the late twentieth century, when U.S. courts developed the views that litigation was no longer a social evil, and anything short of fraud which promoted legitimate claiming was a good thing. The historical truth is more complex, and offers almost no support for the idea that Blackstone’s views were accepted in the United States. The Romans were much more comfortable with third-party involvement in litigation than medieval England, which was very influenced by the “Christian attitude that litigation was something to be discouraged,” and by the time the American colonies split from England, the laws of maintenance, which Radin called “the last flaring up of feudalism,” were already on the decline on both sides of the Atlantic.²⁵⁶

As Radin pointed out in his classic history of champerty and maintenance, the idea that “litigation was itself something to be discouraged, even if the claim was well-founded . . . ran counter” to the views of classical Roman law.²⁵⁷ The prohibition on barratry, as defined by Blackstone, was foreign to Roman law.²⁵⁸ Roman law criminalized *calumnia* (from which we get the word “calumny”), which meant the support of fraudulent, groundless, or frivolous litigation for profit.²⁵⁹ In Rome, even “[the] maintenance of vexatious lawsuits for profit” would not have been prohibited “because it was not clearly the maintenance of a wrongful action.”²⁶⁰

Radin’s theory as to why medieval English common law had such a hostile attitude towards litigation, even non-frivolous litigation, was twofold. First, litigiousness was “an indication of a quarrelsome and un-Christian spirit.”²⁶¹ Second, since litigation which was not absolutely necessary was most likely motivated by a desire for profit, it would have been disfavored because “in medieval eyes [it] was

256. Radin, *supra* note 20, at 56–65.

257. *Id.* at 56.

258. *Id.*

259. *Id.* at 59.

260. *Id.* at 59–60.

261. *Id.* at 58 (“Vexatiousness, accordingly, consisted not merely in using legal procedures unjustifiably, but in using them excessively, even when it was justified, or in using it all except under the pressure of necessity. A man . . . had no business to intermeddle with the interests or wrongs of someone else.”).

tainted with that speculation which was the essence of the abhorred sin of usury.”²⁶² These explanations offer very little support to the historical argument in defense of the theory of the inauthentic claim. Radin suspected that even in England by the time Blackstone and Coke wrote, the role played by so-called Christian attitudes towards litigation had become part of the “psychological background” with which lawyers approached new and unfamiliar legal innovations, such as the assignment of choses in action and the rise of an entrepreneurial legal class.²⁶³ Radin did not deny that the professed hostility of some members of the legal profession to litigation and, more specifically, third-party investment in litigation, was a genuine reaction to changes in the economic order of the day.²⁶⁴ Radin noted that “in most instances, the modern objections to champerty are voiced by the more successful members of the profession and on behalf of propertied defendants.”²⁶⁵

If Presser’s argument is that an anti-litigation stance should be embraced because it is rooted in a set of cultural, historical, and economic assumptions that are pre-capitalist, it is a very strange argument indeed. U.S. legal culture is not defined by an aversion to speculation. It is easy, in fact, to see how neatly the economic principles behind maintenance fit with the emerging capitalist United States. As Morton Horwitz has demonstrated, early U.S. private law was altered from its English roots precisely in order to promote the power of individuals to invest their capital as they saw fit.²⁶⁶ Even in 1936 Radin could see the connection between the United States’ commitment to private property and free markets and the phenomenon of third-party involvement in litigation:

A claim in litigation is often as such a valuable piece of property To acquire a share in such a claim is essentially a speculation and in the Middle Ages [was] tainted with the discredit which attached to every form of speculation. . . . Speculation in the United

262. *Id.* at 59–61. Radin pointed out that the term “champerty” was derived from the concept in property law of tenure by *champart*, which was a form of tenancy by which a landowner shared ownership with the tenant and received a portion of the harvest, but took the risk that there may be no return at all (the tenant, in turn, had an obligation to work the land or risk forfeiture). *Id.* at 61–62. Radin argued that tenancy in *champart* was imported into the Statute of Westminster II, which was the earliest legal prohibition of third party support of litigation, in order to apply to a new context a familiar concept. *Id.* at 62.

263. *Id.* at 68.

264. *Id.* at 65 (“[The law prohibiting] champerty . . . had its source in the resistance to the slowly growing capitalism that followed the Renaissance . . .”).

265. *Id.* at 66.

266. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1979).

States never had the continuous history of slight moral obliquity which it retained in England²⁶⁷

B. The Jurisprudential Argument

Another argument for the theory of the inauthentic claim is that it instantiates an essential feature of private law—corrective justice—and therefore serves an architectonic function of guiding the development of common law doctrines.²⁶⁸ Given the diversity of views within the collection of scholars who are associated with corrective justice, any summary will necessarily be incomplete.²⁶⁹ The core idea if corrective justice is that:

[P]ersons owe certain primary duties not to cause certain kinds of injuries to others The law responds to those breaches of primary duties that cause injuries to others by generating secondary duties to repair the losses flowing from those breaches. . . . [The] law, on this view, aims both to specify the primary duties actors owe to one another and to provide a vehicle by which the secondary duty to repair is enforced.²⁷⁰

A connection between the theory of the inauthentic claim and corrective justice could plausibly be located in the fact that the theory of the inauthentic claim emphasizes what has been called the “bipolar” feature of corrective justice.²⁷¹ All private law litigation (not just tort, which is the doctrinal subgenre with which corrective justice is primarily concerned) is *relational*: claims are asserted by those persons who have suffered a wrong for which the defendant is responsible because of a legally significant relationship between the plaintiff and defendant (the content of this relationship will vary with the subgenre at issue—but duty and cause often figure in the analysis). The theory of the inauthentic claim also relies on the relational or bipolar nature of parties to justify its hostility to third-

267. Radin, *supra* note 20, at 69–70.

268. Benjamin Zipursky makes a plausible argument that this is the proper way to understand the relationship between tort theory, for example, and tort law. See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457, 458–59 (2000).

269. Some of the major recent accounts of corrective justice include JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1998); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 *HARV. L. REV.* 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449 (1992). Although not a corrective justice theory, civil recourse theory will be discussed in this section. See Zipursky, *supra* note 88.

270. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 570 (2003).

271. See Robert L. Rabin, *Law for Law's Sake*, 105 *YALE L.J.* 2261, 2264 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (noting Weinrib's vision of the bipolar structure of corrective justice).

party involvement in litigation. In the case of assignment, the theory of the inauthentic claim holds that a right to redress must be enforced by the person who suffered the wrong for which redress is claimed. In the case of maintenance, the theory of the inauthentic claim holds that the enforcement of a right to redress must be the product of the genuine desires of the party who suffered the wrong, where "genuine" means either unaided or uninfluenced by a third party. In each case, the defendant's obligation to repair must be invoked by the right person for the right reasons. The question is whether the relational requirements of corrective justice entail or require the relational requirements of the theory of the inauthentic claim.²⁷²

In the brief comments that follow, I will argue that there is no necessary connection between most versions of corrective justice and the theory of the inauthentic claim. The argument will proceed as follows. First, I will test the proposition that there is a connection against the theory of corrective justice currently offered by Jules Coleman, the "mixed conception of corrective justice," and I will argue that no connection exists.²⁷³ I will take his account to be one of the leading standard accounts of corrective justice, although of course I recognize that his account differs significantly from other leading theories, specifically Ernest Weinrib's.²⁷⁴ Then, I will test the proposition that there is an entailment between the theory of "civil recourse" proposed by Ben Zipursky and the theory of the inauthentic claim.²⁷⁵

According to Coleman, "all viable accounts of corrective justice, whatever their substantive disagreements, are committed to the

272. This question assumes that corrective justice theory is a plausible account of the private law. If it were the case that the theory of the inauthentic claim was entailed by corrective justice theory, and that corrective justice theory was invalid or failed to describe the common law, then the entailment would be of merely academic interest. It would have no practical implications for whether the current law of assignment and maintenance should be preserved or liberalized. But given the importance of corrective justice theory to scholars in modern commonwealth jurisdictions, it seems prudent to proceed under the assumption that an entailment between corrective justice and the theory of the inauthentic claim would have practical significance.

273. COLEMAN, *supra* note 269; see also Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917, 917 (1992). The mixed conception is different from Coleman's earlier account, the "annulment thesis," which he has abandoned. See Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 365 (1992).

274. Weinrib differs with Coleman in that his theory of corrective justice posits that the duty of the defendant is to "annul wrongs" rather than "repair losses." Perry, *supra* note 273, at 921. I agree with Perry that this leaves Weinrib vulnerable to far more objections than Coleman, hence the emphasis on Coleman's approach. See Perry, *supra* note 269, at 479.

275. Zipursky, *supra* note 88, at 739.

centrality of *human agency, rectification, and correlativity*.²⁷⁶ Under his account, the duty to repair wrongful losses “is grounded not in the fact that they are the result of wrongdoing, but in the fact that the losses are . . . the result of [the injurer’s] agency.”²⁷⁷ The definition of wrongful loss is contingent on the particular legal system of the time.²⁷⁸ As Stephen Perry points out, wrongfulness in private law need not result from wrongdoing, in the sense of intentional or negligent conduct.²⁷⁹ This is especially important for establishing the relevance of corrective justice theory to the theory of the inauthentic claim, since the theory of the inauthentic claim, although often applied to lawsuits in tort, should, in theory, apply to any chose in action, including contract and property claims—claims in which wrongful loss are not necessarily linked to wrongdoing. The key point for Coleman, however, once the content of wrongfulness is established by the legal system, is that “[c]orrective justice is a norm that links agents with wrongful losses.”²⁸⁰

The question for our purposes is whether the requirement that agents are connected to the wrongful losses they have caused entails that they must rectify those losses through a direct relationship with their victims, or a relationship that is generated only by their victims’ desire for rectification. That is, would it be enough if, after a victim suffered a wrong, the wrongdoer’s response was wholly in the control of a third party, assuming of course, that the procedures by which the third party sought recovery from the victim were at least as effective as the procedures otherwise available to the victim (that is, her personal pursuit of redress from the wrongdoer by means of a lawsuit). This requires further inquiry into what Coleman once called the “modes of recovery” in corrective justice.²⁸¹ Whereas he once thought that corrective justice was indifferent to the modes of recovery, once he rejected the annulment thesis he came to believe that corrective justice imposes a minimum content on the modes of recovery. Corrective justice is defined by its insistence on “agent-relative reason for acting.”²⁸² This is what he means by saying

276. Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995).

277. COLEMAN, *supra* note 269, at 326.

278. See Jules L. Coleman, *Risks and Wrongs*, 15 HARV. J.L. & PUB. POL’Y 637, 646 (1992) (arguing that “the status of corrective justice is not necessarily independent of legal or other relevant social practices”).

279. Perry, *supra* note 273, at 925.

280. Coleman, *supra* note 278, at 646.

281. Coleman, *supra* note 273, at 352.

282. Coleman, *supra* note 278, at 645.

“corrective justice involves correlativity of some sort. . . . The claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another.”²⁸³

Nothing in this account necessarily entails the theory of the inauthentic claim. While corrective justice requires “correlativity of some sort” it does not require mimetic correlativity. So, for example, Coleman’s requirements would certainly be met by maintenance contracts that would fail the test of “material but-for maintenance” (the test endorsed by Blackstone, Kent, and Coke). It is irrelevant to Coleman’s account why the defendant rectifies a wrongful loss, as long as (a) the defendant in fact exercised her agency to cause the plaintiffs harm and (b) the harm suffered by the plaintiff is a wrongful loss that bears the right relationship to the defendant.²⁸⁴ The fact that the victim could not have pursued the correction of the wrongful loss, or, for that matter, was indifferent as to whether the wrongful loss was corrected until a third party changed his mind, is simply irrelevant.

Furthermore, it is irrelevant to Coleman’s account that the victim does not actually receive the remedy that is sought from the defendant. Under both assignment and profit maintenance, the plaintiff typically agrees to give up a portion of his recovery (the remedy or a settlement) to a third party. The defendant’s obligation to rectify the wrongful loss is not altered in any way by this agreement.²⁸⁵ But what of the fact that in assignment the victim does not receive *anything at all* from the defendant? How can the requirement of correlativity of any sort be met in cases of assignment? This objection, it seems to me, misunderstands what Coleman means when he says that “because corrective justice imposes a duty to repair on those individuals who have wronged or wrongfully injured others, it has the effect of sustaining or protecting some underlying set of norms.”²⁸⁶ The duty to repair, which is based on the wrongful loss suffered by the victim, is a normative fact; it does not depend on whether the wrongful loss is repaired. Of course, a system in which

283. Coleman, *supra* note 276, at 26.

284. See Perry, *supra* note 273, at 926 (describing the agency and wrongfulness requirements).

285. It should be noted that, even if the law of assignment and maintenance did somehow effect a reduction of the defendant’s duty to correct a wrongful loss, even this would not necessarily prove a conflict between Coleman’s theory and the practices of assignment and maintenance. Corrective justice may be a conceptual essential of the private law, but it can be modified or even suspended. See, e.g., Coleman, *supra* note 276, at 29 (“Whereas corrective justice is both pre-political and non-instrumental, legal and political practices can affect the content of the duty corrective justice gives rise to in many ways.”).

286. Coleman, *supra* note 278, at 645.

wrongful losses were never repaired—that is, the defendant fails to provide the remedy to the victim—would be a system which did not instantiate corrective justice.²⁸⁷ But that is not the situation of the common law with full rights of assignment. The victim's right to assign her right to redress does not destroy the defendant's duty to make repair *to her*, even if the remedy does not go to her, any more than the fact that a victim may no longer be alive, and may be represented by an estate in a survivorship action alters the defendant's duty in corrective justice to repair the wrongful loss he caused. Duty to repair in tort law must be, as a matter of necessity (if for no other reason that sometimes victims are killed by the wrongdoer), agent-relative in a special way: the reason why the wrongdoer is obliged to repair (and the amount he is obliged to pay in repair) was fixed when the injury was caused *to the victim*, and if the repair is secured by someone else, either because of the operation of law (as is the case in a survivorship action) or contract (as in the case of assignment), the normative fact that grounds the obligation to repair remains rooted in the victim's right to repair.

The critic of assignment and maintenance could retreat from corrective justice in the conventional form offered by Coleman, and argue that according to other, equally persuasive variants, the relational requirement of corrective justice is inconsistent with assignment and maintenance. I am thinking in particular of Zipursky's "civil recourse theory," which breaks with corrective justice at a point which is relevant to this discussion.

Zipursky has criticized corrective justice for misunderstanding the content of the defendant's duty in private law.²⁸⁸ He argues that corrective justice

wrongly presupposes that the imposition of liability reflects a judgment, embedded in the law, that defendants *ought* to bear the costs of certain injuries. This assumption misconstrues what the state actually does in private causes of action In an important sense, the state does not judge that certain defendants ought to pay certain amounts to plaintiffs. Rather, *the state accedes to, and enforces, a plaintiff's demand that the state compel defendant to pay her a certain amount.*²⁸⁹

287. *Id.* at 646 (discussing New Zealand's no fault scheme: "[W]hen such a plan is in effect there are no duties in corrective justice.>").

288. See Zipursky, *supra* note 88, at 718–21 (noting that unlike contractual and property law, tort law does not contain an "affirmative duty to pay"); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 4 (1998) (arguing that proponents of corrective justice generally neglect "substantive standing" in tort law).

289. Zipursky, *supra* note 288, at 80.

Zipursky argues that there is no “freestanding legal obligation” to repair wrongful losses in the common law: “a defendant’s tortious injury to another does not give rise to a duty of repair unless that defendant has, at a minimum, been sued.”²⁹⁰ Zipursky’s complaint with corrective justice is not great—he himself admits that he thinks Coleman and others “rearranged the genuine structure of tort law” but got the basic elements right.²⁹¹ His innovation is to recognize that the private law does not create a duty to repair on the part of the defendant but a right of action against the defendant.²⁹² This is the basis of his principle of civil recourse.

Does civil recourse theory make assignment less compatible with our common law? On the one hand, one could argue that, since the norm instantiated by civil recourse theory makes the plaintiff’s right to bring a cause of action correlative with her wrongful loss, the private law remedy must take the form of the plaintiff bringing the suit. Under this account, redress in private law must be mimetic to the extent that the original relationship that gave rise to the right (Δ violated π ’s right) structures the remedy (π has right of action against Δ).²⁹³ That some plaintiffs choose not to enforce their rights to civil redress may pose a greater challenge for assignment under civil recourse theory than under corrective justice, where the failure of plaintiffs to receive the full measure of the repair they are owed does not undermine the normative fact that the defendants in fact owe them a duty to repair.

As with corrective justice, I think it is a mistake to insist that redress in private law must *mirror* the relationship that gave rise to the wrong. Zipursky may be correct that private law—especially with its unique feature of substantive standing—changes the character of the normative relationship between victim and defendant, such that the significant normative fact is the power the victim gains over the defendant to pursue redress.²⁹⁴ However, it is not clear why this means that the right created by the wrongdoing must be satisfied by

290. Zipursky, *supra* note 88, at 720.

291. *Id.* at 735.

292. *Id.*

293. One could hold this position despite the existence of survivorship actions. The argument made earlier was an interpretive one; obviously it is open to the civil justice theorist to argue, if they insisted on the sort of mimetic relationship now under consideration, that survivorship is a second-best solution in the face of the plaintiff’s inability to bring suit, where the alternative (the defendant paying no one) is unacceptable.

294. See Zipursky, *supra* note 88, at 714–15 (describing the “substantive standing” rule and its importance in tort law).

the wrongdoer providing redress *only* to the person she wronged. The right to seek redress was a product of the wrongdoing, and it is not clear why the rightholder cannot do what she wants with that right—destroy it, ignore it, or give it to someone else. The normative fact that gave rise to the right will not be undermined, and it is not clear why the courts should not respect the sovereignty of the rightholder to exercise unlimited control over that right.

V. CONCLUSION: REFLECTIONS ON POLICY

The purpose of this Article is to isolate an argument against assignment and maintenance. This argument, which I have called the theory of the inauthentic claim, may have once had some independent normative force, but as I have demonstrated, it is not currently persuasive from either a historical or jurisprudential perspective. This Article has also demonstrated that the doctrinal development of the law has been twisted and rendered incoherent by the theory of the inauthentic claim in two specific ways. The law of assignment has been permitted to expand by means of legal fictions that hide its true structure and purpose, while the law of maintenance has not been permitted to expand as much as it could.

While the purpose of this Article has been to criticize the theory of the inauthentic claim and to map out its baleful influence in our law, the Article clearly has taken a further position on the desirability of liberal rules concerning assignment and maintenance. This Article has not evaluated the positive case for the utility of a market in lawsuits for two reasons. First, because others have already begun this work.²⁹⁵ Second, because it seems to me that, once one understands the role that has been played by the theory of the

295. See, e.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005); Bond, *supra* note 162; Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435 (1995); Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989); Dobner, *supra* note 191; Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) [hereinafter Molot, *Litigation Risk*]; Painter, *supra* note 48; Poonam Puri, *Financing of Litigation by Third-Party Investors: A Share of Justice?*, 36 OSGOOD HALL L.J. 515 (1998); Shukaitis, *supra* note 54; Jonathan T. Molot, *A Market Approach to Litigation Accuracy* (10th Annual Legal Reform Summit, U.S. Chamber Inst. for Legal Reform, Oct. 28, 2009) [hereinafter Molot, *Market Approach*]; Rubin, *supra* note 34; Max Schanzenbach & David Dana, *How Would Third Party Financing Change the Face of American Tort Litigation?: The Role of Agency Costs in the Attorney-Client Relationship* (Third Party Financing of Litigation Roundtable, Searle Ctr., Nw. Univ. Law Sch., Sept. 24–25, 2009), available at http://www.law.northwestern.edu/searlecenter/uploads/Dana_Schanzenbach_Agency%20Costs1.pdf; David Abrams & Daniel L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes* (unpublished paper, on file with author).

unauthentic claim in the history of the common law so far, it is not clear why the burden of proof is on those who want to lift limits on assignment and maintenance, rather than on those who insist that the courts should preserve common-law precedents that are based on arbitrary reasons and historical myth.

It would be foolish to pretend that considerations of policy have not always been in the background when the limits of assignment and champerty were debated and chosen. The Roman rule of *calumnia* was justified by the desire to prevent false and harassing litigation.²⁹⁶ The early common law prohibitions on assignment, which were stricter than the Roman law, were later similarly justified as being designed to prevent false and harassing litigation.²⁹⁷ Even Blackstone offered up what can be described as “policy” arguments for opposing champerty.²⁹⁸ But it is not enough to say that policy arguments should play a role in the evaluation of legal rules such as assignment and maintenance. The framing of two further questions is critical to insuring that the policy inquiry provides a useful result. The first question is, what concerns should matter when evaluating the laws of assignment and maintenance? The second question is, assuming that we care mostly about the effect of the laws of assignment and maintenance on the functioning of the civil litigation system, what effects are to be avoided?

A. What Concerns Should Matter?

To invoke the policy that “a lawsuit is an evil in itself,” as some have done, is not really to put forward a policy argument, unless that policy is, as Radin put it, that it is “always better to suffer a wrong than to redress it by litigation.”²⁹⁹ But that is not to say that there is not a diverse range of policy concerns that are motivated by political and social concerns that stand on a different footing than the historical and jurisprudential arguments reviewed in Part IV.

296. Radin, *supra* note 20, at 52–53, 56.

297. See Damian Reichel, Note, *The Law of Maintenance and Champerty and the Assignment of Choses in Action*, 10 SYDNEY L. REV. 166, 166 (1983) (noting that in medieval times “[b]arons abused the law to their own ends and . . . [b]ribery, corruption, and intimidation of judges and justices of the peace [was] widespread”).

298. BLACKSTONE, *supra* note 55, at *135 (“This is an offence against public justice . . . [that] perverts the remedial process of law into an engine of oppression.”).

299. See Radin, *supra* note 20, at 72. Radin suspected that those who still held onto the “assumption of Medieval society, that a law suit is an evil in itself” suffered from an “infantile psychosis” that insisted on an “all or nothing” approach to legal rules. *Id.*

One of these policy concerns has to do with the effect of profit maintenance on the relationship between litigants and their lawyers.³⁰⁰ The Ohio Supreme Court identified one of the potential problems in the *Rancman* case, discussed in Section III.B.³⁰¹ A contract with a third-party funder may make it very difficult for the litigant to accept a settlement offer that her attorney recommends. Another potential problem arises from the question of waiver of privilege with regard to attorney-client communications and work product.³⁰² A third-party funder may want to form an independent valuation of a case based on an examination of materials that are privileged. The litigant may not appreciate the costs associated with waiving privilege, especially when weighed against the risk of losing the desired funding if the materials are not provided. Furthermore, the litigant's lawyer may not be able to give the client a clear answer whether under these circumstances she is in fact waiving privilege at all. The uncertainty surrounding this question is quite real, as numerous opinions from bar committees around the country have demonstrated.³⁰³

This Article cannot provide a solution to these concerns, but it can help place them in context. Obviously, rather than assume that all maintenance agreements interfere with the relationship between lawyers and litigants, and that a presumption against them should be built into the law, I would recommend that bar associations and other concerned parties develop solutions that preserve the right of litigants to communicate with third-party funders without necessarily destroying privileges they would otherwise enjoy.

Another policy concern is whether the laws of assignment and maintenance should discriminate on the basis of the subject of litigation. This was discussed briefly in Section III.B.4.a. This is not the same question as asking whether malice maintenance ought to be prohibited, since, as I argued above, malice maintenance is already prohibited by common law doctrines that are not specific to

300. See SELLING LAWSUITS, *supra* note 3, at 7–8.

301. See *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220–21 (Ohio 2003). See *supra* text accompanying notes 203–08.

302. See FED. R. EVID. 502(b) (stating that an inadvertent disclosure may act as a waiver of privilege if the sending attorney did not take “reasonable steps to prevent disclosure”).

303. State Bar of Ariz., Comm. on the Rules of Prof'l Conduct, Op. 01–07 (2001); Fla. Bar Comm. on Prof'l Ethics, Op. 00–3 (2002); State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, RI–321 (2000); N.J. Advisory Comm. on Prof'l Ethics, Op. 691 (2001); Supreme Court of Tex., Prof'l Ethics Comm., Op. 558 (2005); see also Hananel & Staubitz, *supra* note 187.

maintenance.³⁰⁴ It is similar to the exceptions to the so-called rule of free assignability discussed in Part II. The difference is that I argued that many of the subject-based exceptions to the rule of free assignability make no sense, such as the continuing prohibition on the assignment of actions for personal injury (but not the proceeds of personal injury) or legal malpractice (but not interference with prospective economic advantage) or fraud (only in some jurisdictions).

It may be the case that good arguments can be made for why certain causes of action should not be assignable or should not be the subject of maintenance contracts based on either a general theory of noncommodification or more local concerns specific to the effects of allowing third-party investment on third parties. This Article cannot begin to sketch out the kinds of arguments that might prove persuasive, but I will note that scholars including Margaret Radin and others have been discussing when and under what circumstances the law should permit commodification.³⁰⁵

The following news story reflects the difficulties with picking which subjects can be the object of investment. The British press reported in 2009 that Harbour Litigation Funding, based in London, was “investing” in the divorce suit of Michelle Young against her estranged husband, Scot Young, whose fortune was once valued at more than £400 million.³⁰⁶ The media coverage reflected unease over bringing emotionally fraught disputes within the control of business entities that have no interest or empathy with the parties (as one funder said of the parties in divorce cases, “they tend to be economically irrational and commercially irresponsible”).³⁰⁷ On the other hand, the article noted that the Young divorce was “about asset recovery and has the same elements as a commercial dispute,” and it also noted that litigation funders could be serving a useful social function in the U.K., where, due to high legal costs, unhappily married

304. See *supra* Section III.B.3.

305. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); see also MARTHA ERTMAN & JOAN C. WILLIAMS, *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (2005).

306. Jane Croft & Megan Murphy, *Litigation Fund Backs £400m Divorce Case*, FIN. TIMES, Oct. 9, 2009, <http://www.ft.com/cms/s/0/97f1005e-b50f-11de-8b17-00144feab49a.html?ftcamp=rss>.

307. Elena Moya, *Hedge Funds, Investors and Divorce Lawyers - It's Match Made in Heaven*, GUARDIAN (London), Oct. 16, 2009, at 35, available at <http://www.guardian.co.uk/business/2009/oct/16/hedge-funds-divorce-litigation-funding>.

parties “thought twice before considering divorce because of potential deflation of the value of the family wealth.”³⁰⁸

It is obvious that divorce is an area of law where the rights are truly personal in a way that has no parallel in contract law, or even, for that matter, tort law. It would be unthinkable, for example, to extend the logic of the Young investment by Harbour Litigation Funding from profit maintenance to assignment. It is possible that similar reasons would counsel limiting the maintenance contract along certain dimensions. For example, even if a legal system were to permit profit maintenance contracts in divorce, it might want to adopt stricter rules concerning investor intermeddling than in lawsuits concerning contracts or even personal injury.³⁰⁹

B. What Effects Are To Be Avoided?

Most of the current policy-oriented work on the social effects of third-party involvement in litigation is about profit maintenance, and it divides into two groups. The majority of research is formal and speculative—it uses models drawn from the contemporary literature of law and economics to predict the likely effects of changing the current bias against champerty to permit more investment in litigation.³¹⁰ There is a smaller set of studies that attempt to draw conclusions about the effect of changing the law of maintenance in the United

308. *Id.* The article also notes that litigation funding came to the U.K. from continental Europe. Allianz Litigation Funding UK, which is part of the German insurance group Allianz, has already funded divorces in Germany and Switzerland. *Id.*

309. *See supra* Section III.B.4(b). One might want to strictly limit the ability of a funder to have veto power over the terms of the divorce settlement, for example, where one might permit a funder to have some control over the terms of a settlement of a contract case.

310. *See, e.g.,* Abramowicz, *supra* note 295, at 702 (expressing skepticism about the overall economic benefit of allowing alienation because adverse selection would lead to only problematic claims being alienated); Choharis, *supra* note 295, at 444 (“The economic efficiencies resulting from a tort claims market will benefit nearly every participant in the tort process.”); Dobner, *supra* note 191, at 1529 (describing the economic efficiency benefits of allowing claim alienation); Molot, *Litigation Risk*, *supra* note 295, at 438 (addressing the feasibility of developing a market in litigation risk and arguing its benefits); Painter, *supra* note 48, at 687 (arguing for the abolition of champerty doctrines so that plaintiffs can better insure against legal cost); Rubin, *supra* note 34, at 3 (arguing that allowing claim alienation would produce negative externalities, namely increasing the amount and cost of litigation and moving the law in inefficient directions); Schanzenbach & Dana, *supra* note 295, at 4 (arguing that claim alienation might reduce attorney-client agency costs, as well as reduce negotiation and settlement costs and make alternative dispute resolution more common); Shukaitis, *supra* note 54, at 330 (arguing that the benefits of allowing claim alienation would substantially outweigh its costs); Molot, *Market Approach*, *supra* note 295 (arguing that investment in litigation on both plaintiff and defendant sides could promote more accurate settlements and lower total transaction costs).

States from looking at the experiences of other nations where the law of maintenance has been liberalized.³¹¹

Most of the formal studies predict that the introduction of champerty will have mostly positive effects on the civil litigation system. They differ, however, on the nature of these beneficial effects. Peter Choharis, for example, stresses the improvement of access to justice for victims of tortious injury, especially medical malpractice.³¹² Jon Molot stresses the increase in accuracy for the value of settlements that would result from increasing the flow of capital to litigants on both the defense and the plaintiff side of litigation.³¹³ In general, no one who favors increasing the freedom of parties to invest in litigation argues that it will result in *less* litigation, although one could imagine such an argument being made if one adopted Molot's argument to the point of predicting that increases in litigation resources will lead parties to settle sooner. Only Paul Rubin's study takes a contrary view; he argues that increases in litigation funding will be bad for the civil litigation system because it introduce "excess lawsuits" into the system.³¹⁴ His argument is based in part on the assumption that funders, having exhausted non-frivolous cases, will have an incentive to encourage frivolous cases.³¹⁵

The two empirical studies that have so far been produced go only part way to supporting the negative case offered by Rubin. Both claim that after the liberalization of the laws restricting profit maintenance in Australia, litigation rates increased.³¹⁶ The study by Abrams and Chen cautions that no conclusions can be drawn from their results about the transferability or desirability of the Australian approach.³¹⁷ The study by the U.S. Chamber of Commerce is much less cautious, and it recommends that "third-party litigation financing be prohibited in the United States."³¹⁸

311. See, e.g., SELLING LAWSUITS, *supra* note 3, at 9 (examining third-party litigation funding in Australia to warn that it can lead to an increased volume of litigation); Abrams & Chen, *supra* note 295. Both of these studies rely exclusively on Australian data.

312. Choharis, *supra* note 295, at 473.

313. Molot, *Litigation Risk*, *supra* note 295, at 382; Molot, *Market Approach*, *supra* note 295.

314. Rubin, *supra* note 34, at 10-12.

315. *Id.* at 13-14.

316. SELLING LAWSUITS, *supra* note 3 at 9; Abrams & Chen, *supra* note 295, at 19 ("[T]he effect appears to be driven by the fact that lawsuits filed are declining in states without litigation funding as funding amount increases, whereas lawsuits filed are increasing in states with litigation funding as funding increases.").

317. Abrams & Chen, *supra* note 295, at 24-25.

318. SELLING LAWSUITS, *supra* note 3, at 2. It should be noted that this study discusses only the effect of changes in Australian law relating to third-party investment in class actions. The

This brief survey of the state of current policy-oriented research on the effects of changes in the law of maintenance in the United States illustrates how far we have to go before we can rely on policy arguments to evaluate the doctrinal confusion caused by the theory of the inauthentic claim. It might be the case that there are good policy-based reasons to liberalize the current law, but first we have to define which policy ends we think count as significant in making that decision. It might be the case that the civil justice system will be affected by the introduction of third-party funding in litigation, but it is not clear whether that effect will be primarily expressed in terms of an increase in access to justice, accuracy in litigation outcomes, or frivolous cases. Finally, it may be the case that we can predict policy implications from looking at the experiences of other nations who have liberalized their laws concerning third-party involvement in litigation, but we should look beyond the experience of one nation (Australia) and adopt a more nuanced examination of all the nations that have permitted some form of third-party involvement in litigation (especially in Europe).

The goal of this Article has been to establish the premise for beginning the hard work of identifying reliable rationales for third-party involvement in litigation, whether as investors or as purchasers. We already allow this to occur; what we need now is to explain to ourselves why we allow it to occur—or do not, as the case may be—in terms that do not rely on ad hoc judgments about the nature of the common law. We are long overdue accepting what Radin said in 1936: “There is no necessary and inevitable connection between improper litigation, hard bargains and solicitation on the one hand and the acquisition by a third party of an interest in a litigated case, on the other.”³¹⁹

law in Australia governing “group litigation” is different in many ways from American class action law, specifically in the area of whether class representatives or their lawyers have the power to promise a third party a contingent portion of the class action recovery. In Australia the class representatives and their lawyers apparently have this power. See *Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd.* (2006) 229 C.L.R. 386 (Austl.) (allowing a litigation funder to continue appeals as part of representative proceeding). I believe that no American class representative or her lawyer has this power.

319. Radin, *supra* note 20, at 72.

The Limited Diagnosticity of Criminal Trials

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A fundamental function of the criminal trial is to determine the facts correctly in order to distinguish between guilty and innocent defendants, and between strong and weak prosecutions. This Article seeks to answer a simple question: How good is the criminal trial at reaching accurate factual conclusions?

The Article applies a body of experimental psychology to examine the ability of factfinders to assess the evidence and draw correct inferences from it. The psychological research indicates that the mental processes involved in determining facts in criminal trials are more complex and fickle than generally believed. Part I exposes the difficulties in deciphering the human testimony that is frequently encountered in criminal trials, including eyewitness identification, witness memory for the event, confessions, alibis, and witness demeanor. The task is further hindered by two systemic problems with the integrity of the evidence: false corroboration and the paucity of the investigative record. Part II demonstrates that the inference-making process is susceptible to distortion from the context of legal decisionmaking. Intrusive factors include courtroom persuasion, exposure to impermissible information, emotional arousal, racial prejudice, and the decisionmaker's cognitive process itself.

In sum, the accuracy of the criminal trial falls short of the system's high epistemic demands and the certitude it exudes. The findings contribute to our understanding of the causes of mistaken verdicts, particularly wrongful convictions. The Article proposes ways to improve the diagnosticity of the process.
