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ALTERNATIVE LITIGATION FINANCE AND ANTI-COMMODIFICATION NORMS

*W. Bradley Wendel**

INTRODUCTION

Lawyers in the United States do not quite know what to think about alternative litigation financing—ALF for short.¹ Some have embraced it, while others regard it as troubling, even abhorrent. The debate has a familiar quality because many of the arguments against ALF have been raised against contingent fees, class actions, and the tort system generally. One strand of anti-ALF sentiment seems inextricably bound up with anti-litigation sentiment, so the belief that “a lawsuit is an evil in itself” simply carries over to a conviction that the law should discourage transactions that have the effect of underwriting litigation.² A different anti-ALF argument relies on the effect of third-party financing on the attorney–client relationship. We have also been down this road already in the context of the long debate among insurance law and professional responsibility scholars over the triangular relationship among insurer, insured, and defense counsel.³

* Professor of Law, Cornell University. I served as co-Reporter, with Tony Sebok, of the Working Group on Alternative Litigation Finance, part of the American Bar Association’s Commission on Ethics 20/20. The views expressed in this Article are solely mine and do not represent the position of the Working Group or any of its members. From time to time I provide legal advice to commercial-sector litigation funding companies. I have not received any direct or indirect compensation for work on this Article. While my understanding of these issues have developed over the course of my working on legal ethics in litigation funding, both as a scholar and as a paid legal advisor, none of the positions expressed here were influenced by my outside legal advising work.

1. This label cries out for standardization. The ABA Working Group used the term alternative litigation financing, abbreviated ALF, following a RAND Corporation publication by Steven Garber. STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN AND UNKNOWN (2010), available at http://www.rand.org/pubs/occasional_papers/OP306/. Scholars and commentators have also used the terms third-party litigation finance (TPLF), litigation funding, litigation investment (LI), lawsuit lending, and probably dozens of other names. I have no brief for the term ALF, but I will use it after having become accustomed to doing so on the ABA Working Group, and also because, as a child of the 1980s, I find it mildly amusing to recall the wisecracking furry space alien character named ALF on the television show of the same name.

2. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 134 (2011).

3. I am writing separately on the stabilizing effect of insurance law on what would otherwise be the insoluble conflicts of interest faced by insurance defense lawyers. For highlights of the literature on the problem, see, for example, Tom Baker, *Liability Insurance Conflicts and De-*

One might argue that if the law has managed the problem successfully in the area of insurance defense representation, there is no cause for alarm when a non-insurer third party provides the financing for legal representation. On the other hand, one might point to uncertainties that persist in the “eternal triangle” and be reluctant to open a similar can of worms in an area with relatively little existing law to stabilize the relationships among the parties. Significantly, both of these versions of the anti-ALF argument concede that ALF is similar enough to existing economic relationships to be deemed *prima facie* acceptable; the only question is how best to regulate it to prevent abuse. There is a very different objection to ALF, however, which denies its claim to play a legitimate role in the legal system. That objection is the subject of this Article.

One frequently encounters a sentiment that there is something fishy, even distasteful, about ALF. For example, a widely noted article in *Fortune* magazine cast a suspicious eye at the emerging litigation funding industry, concluding: “Dress it up as you like, there’s something about all this secret meddling in other people’s bitterest disputes and profiting from them that doesn’t sit well. You begin to sense why those benighted Puritans of yore banned these practices.”⁴ Articles in the popular media understandably seek to sensationalize a topic, but the role of legal scholarship is to unpack these sentiments in order to understand what it is about ALF that “doesn’t sit well.” One possibility is that critics are making consequentialist arguments, hypothesizing the impact of ALF on overall litigation rates, nonmeritorious or frivolous litigation, settlements, or the attorney–client relationship. In this Article, however, I would like to bracket those concerns, important as they are, and focus on an axiological (that is, value-theoretic) or deon-

fense Lawyers: From Triangles to Tetrahedrons, 4 CONN. INS. L.J. 101 (1997); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585 (1997); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991); Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27 (1997); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29 (2001); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995).

4. Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE, June 13, 2011, at 68, 75.

tological argument. In other words, the purpose of this Article is to theorize the “ick factor” that is often cited in discussions of ALF.

That argument is that there is something *conceptually* wrong with ALF, quite apart from its impact on the civil litigation system. The wrongful nature of ALF, on this view, is related to its transformation of a nonmarket good, namely civil justice, into something that can be bought and sold like anything else on the market. Consider, for example, these two objections to ALF raised by tort reform organizations in submissions to the American Bar Association Ethics 20/20 Working Group on ALF⁵: (1) “ALF—particularly third-party litigation investment—seeks to commoditize justice by creating a market for investing in litigation”;⁶ and (2) “ALF transforms courtrooms into a stock exchange and litigation into a commodity.”⁷

These arguments trade on the threat of *commodifying* the civil justice system, thereby introducing the norms and values of the marketplace into a domain that should be characterized by its separation from the market. ALF would, therefore, be objectionable in the same way that prostitution, selling babies, surrogate pregnancy, or establishing a market mechanism for the allocation of blood or organs for transplantation are potentially believed to be—some things just should not be for sale.⁸

The appeal to anti-commodification norms is, in my judgment, the strongest nonconsequentialist argument against ALF. Nevertheless, I will argue that these norms do not provide a sufficiently strong ground for resisting the further development of ALF, subject (like any economic activity) to reasonable regulation. Commodification arguments are like rhetorical “Saturday Night Special” handguns—they are cheap and widely available, but not particularly accurate.⁹ It is one

5. See *infra* notes 24–28 for a discussion of the ABA Working Group.

6. See Letter from John H. Beisner, U.S. Chamber Inst. for Legal Reform, to Comm’n Members, ABA Comm’n on Ethics 20/20 (Feb. 15, 2011) [hereinafter Chamber Letter], in WORKING GRP. ON ALT. LITIG. FIN., ABA COMM’N ON ETHICS 20/20, COMMENTS: ALTERNATIVE LITIGATION FINANCING WORKING GROUP ISSUES PAPER 136 (2011) [hereinafter WORKING GRP., COMMENTS], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf.

7. See Letter from Sherman Joyce, President, Am. Tort Reform Ass’n, to Philip H. Schaeffer & Jeffrey B. Golden, Co-Chairs, Working Grp. on Alt. Litig. Fin., ABA Comm’n on Ethics 20/20 (Mar. 7, 2011) [hereinafter ATRA Letter], in WORKING GRP., COMMENTS, *supra* note 6, at 13.

8. See MARGARET JANE RADIN, CONTESTED COMMODITIES 131–53 (1996) [hereinafter RADIN, CONTESTED COMMODITIES]; Margaret Jane Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE: NOMOS XXXI 165 (John W. Chapman & J. Roland Pennock eds., 1989); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*].

9. Michael Abramowicz stated in 2005 that no commentator had by that time considered whether restrictions on the alienability of legal claims cohere with other anti-commodification

thing to talk ominously about “justice for sale” or turning the civil justice system into a Turkish bazaar; it is quite another matter to explain what is wrong with ALF given the existing pattern of pervasive intrusion of economic norms into the procedures by which we adjudicate civil claims. A practice may not sit well at first, but upon reflection, there may turn out to be nothing wrong with it.¹⁰

A typical ALF transaction involves a third-party investment in some portion of a pending lawsuit, which gives the investor the right to a return out of the proceeds of any judgment or settlement recovered by the funded party. American law already tolerates numerous practices that are economically indistinguishable from the creation of a right to a portion of the proceeds of a lawsuit.¹¹ For example, plaintiffs’ attorneys may advance the value of their labor and pay the expenses of litigation in exchange for a right to a percentage share of their clients’ recovery. The proceeds of a lawsuit may be freely assigned or pledged as security. Commercial lenders often take a security interest in the accounts receivable of law firms. Contractual waivers of tort liability accomplish an *ex ante* sale of a legal right to a prospective injurer.¹² First-party (health) insurers obtain liens on the proceeds of personal injury claims and are subrogated to the rights of their insureds to seek damages from tortfeasors. Third-party (liability) insurers pay the expenses of defendants in litigation. Finally, in the context of tort litigation there is the pervasive substitution of

norms in the law. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 703 (2005). That may have been so at the time, but the “justice for sale” trope seems to have become commonplace among critics of ALF.

10. Some recent work in moral psychology has shown that some moral judgments are made quickly, automatically, intuitively, and are driven by affective factors. The most prominent proponent of this view is Jonathan Haidt. See, e.g., Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517 (2002); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001); Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 J. PERSONALITY & SOC. PSYCHOL. 613 (1993); cf. Erik G. Helzer & David A. Pizarro, *Dirty Liberals! Reminders of Physical Cleanliness Influence Moral and Political Attitudes*, 22 PSYCHOL. SCI. 517 (2011) (demonstrating that political attitudes vary in response to reminders of cleanliness or dirtiness). There may be an affectively charged negative association between money and litigation, such that people tend to have a “yuck!” reaction when presented with the idea of third-party investments in lawsuits. Nevertheless, the task of ethical theory is to provide a rational account of these intuitive reactions. For example, Haidt finds that people tend to have strongly negative reactions to the idea of eating dogs, but then have a hard time explaining why they find it wrong. While this intuitive response is interesting, an ethical argument for or against the permissibility of eating dogs would be concerned only with the subsequent efforts by Haidt’s subjects to explain why they believed it was or was not acceptable to eat dogs.

11. See Sebok, *supra* note 2, at 82–85, 99–100.

12. Keith Hylton’s presentation at the 19th Annual Clifford Symposium on Tort Law and Social Policy brought this equivalency to my attention for the first time; I am somewhat chagrined that I had never thought of it before.

money for injuries by means of doctrines that permit juries to award monetary damages for pain and suffering, anxiety, grief, humiliation, and other types of emotional distress—even the loss of a loved one. How is ALF different from these existing practices and their commodifying tendencies?

One's wider theoretical commitments will (or should) have a significant impact on how one views the commodification objection. Someone who believes that free markets are a good thing because they permit autonomous individuals to enter into value-enhancing exchanges should naturally be supportive of a mechanism by which causes of action and their proceeds are freely alienable to anyone willing to pay the price set by the market. On the other hand, someone who objects to ALF as having a commodifying tendency in the domain of civil litigation would be expected to object to the hegemonic tendencies of market rationality in general, and to favor restrictions on the alienation of many forms of property. If assigning the proceeds of legal claims corrupts the justice system, then what about transferring the obligation to pay money damages from a tortfeasor to a liability insurer?

To sharpen this point, one might suggest that an objection to the commodification of civil justice by ALF is likely to be purely strategic unless it is part of a broader theoretical agenda that seeks to displace economic modes of valuation from areas of life in which they do not belong. One may be a pluralist at the level of a theory of value, but will then have the burden of establishing what sorts of practices and norms are appropriate to different types of goods. For example, a concern about the commodifying effect of allowing investments in lawsuits might support not an outright ban on ALF but, rather, a regulatory regime that channels investments in litigation into relational contracts, in which the parties are conceived of as being enmeshed in a long-term web of mutual rights and obligations.¹³ Alternatively, one who objected to the commodification of civil justice but otherwise took an economic perspective on legal analysis might be suspected of theoretical ad hocery in the service of some other agenda.

The remainder of this Article will flesh out the strongest case for the anti-commodification objection to ALF, and will show that even this version of the objection does not tell against the practice of permitting third-party funding of personal injury or commercial litigation. Part II begins by providing a brief overview of ALF and the anti-commodification objection. Part III next considers the relationship be-

13. This possibility is suggested by Radin, *Market-Inalienability*, *supra* note 8, at 1872 n.83.

tween the theory of the value of goods—whether it can be represented in terms of a single unit of value or whether there are differentiated modes of valuation—and broader moral and political considerations. One impulse behind what I will call the market–liberal theory of value, which holds that the value of goods can be represented by their exchange value, is the desire for a decision-making technology that avoids contested questions, such as the nature of the highest good for humankind. By seeking to avoid metaphysical perplexities, this conception of value rigorously attempts to be neutral among competing visions of the good for humans. The result, however, is a substantively non-neutral conception of value with its own commitments to a vision of human good, one which turns out, upon reflection, to be extraordinarily unattractive.¹⁴

Even one who accepts this critical perspective on the market–liberal theory of value—as I largely do—may nevertheless believe that there are some domains or spheres of activity in which market rationality is less damaging, and may even be a positive good. Certain institutional practices may require abstraction away from thicker conceptions of value. Consider insurance, for example, which necessarily treats numerous potential individual losses as instances of a general type of risk.¹⁵ My house is unique and special to me, and no doubt is something that “permits self-constitution in a stable environment,”¹⁶ but it is of merely actuarial significance to an insurance company. Treating my house impartially, as nothing more than an instance of fire risk, enables the economic benefit of risk-pooling. Practices (such as insurance) that depend upon the free alienability of various goods may be appropriate in some public and institutional domains. Thus, even having established the relationship between property and personhood, it is necessary to consider whether some practice expresses this relationship in the right way. There are two stages to anti-commodification arguments, beginning with a conception of value and proceeding to a consideration of the practices and norms that are appropriate ways to express respect for values. As a matter of metaethics, the approach—

14. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 9–10, 112–13 (2012); ROBERT SKIDELSKY & EDWARD SKIDELSKY, *HOW MUCH IS ENOUGH? MONEY AND THE GOOD LIFE* 12 (2012).

15. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.5, at 116 (5th ed. 1998) (“By pooling an insured’s fire risk with many other fire risks with which the insured’s is uncorrelated, the insurance company transforms a risk into a (nearly) certain cost.”).

16. Radin, *Market-Inalienability*, *supra* note 8, at 1908 (discussing non-commodification as the appropriate way of valuing houses, which are normatively significant items of property in relation to personhood).

which may be called the expressive theory of value, and which is associated with philosophers from David Hume and Adam Smith to Allan Gibbard and Elizabeth Anderson—is central to the analysis of anti-commodification claims.¹⁷

Part IV concludes by asking whether, on the assumption that market rationality in the civil justice system tends to commodify certain goods, this is necessarily a bad thing. If it is, then vast areas of existing practice must be reconsidered in light of this conclusion. We live in a market society whose legal system has evolved alongside other capitalist institutions. The division of land into estates, banking, limited-liability corporations, trusts, insurance, secured lending, exchange-traded securities, and intellectual property are examples of practices that developed in both the law and the marketplace during the process of industrialization. Not surprisingly, these institutions have a legal form that reflects their economic substance. To argue that commodification is a per se violation of the legal system's norms for expressing value judgments overlooks the interdependence of law and the market in a capitalist economy, and also overlooks the importance of impartiality to legal modes of valuation.

II. AN INTRODUCTION TO ALF AND THE COMMODIFICATION OBJECTION

Litigation financing is “alternative” to the extent it is supplied by a person or entity other than the client or the lawyer.¹⁸ The scope of the term also excludes ordinary commercial bank loans and lines of credit made to law firms to fund ongoing operations. ALF transactions take many forms but typically involve the purchase, by an investor, of a contingent share of the proceeds of a pending lawsuit. Although it is a bit of a simplification, it is helpful to think of the ALF market as divided between two general sectors: consumer and commercial. Like the two hemispheres of the legal services industry,¹⁹ the ALF market is strongly differentiated by the identity of the participants, the structure of funding transactions, and the potential risks involved.

The consumer sector is familiar to late-night television viewers, who see advertisements for firms offering to pay “cash for lawsuits.” Put-

17. See generally Simon Blackburn, *Antirealist Expressivism and Quasi-Realism*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 146 (David Copp ed., 2006).

18. Pursuant to a contingent fee agreement, a lawyer advances the value of her labor and the out-of-pocket costs of litigation.

19. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 127–28 (rev. ed. 1994).

ting aside the superficial tawdriness of the market, these transactions provide an opportunity for plaintiffs, typically in personal injury actions, to monetize their contingent claims. The investments are nonrecourse, secured only by the proceeds of the potential recovery; the funder receives nothing if the plaintiff loses on a motion or at trial. While there is no requirement that the proceeds of these transactions be used for any particular purpose, the money received by plaintiffs may be used to pay living or medical expenses in advance of obtaining a judgment or settlement. Funding companies often emphasize these purposes in advertising to consumers.²⁰ Providers of funding in the consumer sector generally utilize a diversification strategy, funding a large number of claims and expecting to recover only on a subset of investments. Rates of return tend to be quite high in order to enable a cross-subsidization strategy between winning and losing lawsuits.²¹ Policy concerns in this area are similar to those that are raised in connection with other consumer financial products used by poor and middle-income consumers, such as payday loans, refund-anticipation loans offered by tax preparers, and subprime mortgages. A population of sometimes socioeconomically marginal and often financially unsophisticated consumers—who are frequently vulnerable in other ways (such as by having recently been injured)—is plainly vulnerable to exploitation.

Commercial sector ALF, on the other hand, is tied more directly to financing legal representation. A typical transaction in that sector might involve a small company facing cash-flow constraints in pending or contemplated litigation against a better funded adversary. For example, a start-up company may be facing a patent infringement action brought by a large competitor with the wherewithal to conduct protracted, expensive litigation. The company may lack the liquidity necessary to finance litigation on an hourly fee basis, and the lawyers who

20. Here is a fairly typical statement from an online advertisement for a consumer litigation funding company:

Personal-injury victims and lawsuit plaintiffs sometimes have trouble paying their medical bills, mortgage, rent, or other living expenses while waiting for the legal process to take its course. After they win their lawsuits, plaintiffs may not receive payment for months or years. Attorneys sometimes face cash-flow management issues during and after litigation. Insurance companies and defendants often prolong the legal process, forcing low settlements on those who cannot afford to wait. LawCash litigation financing can help level the playing field for you!

LAWCASH, <http://www.lawcash.net> (last visited Oct. 4, 2013).

21. The size of repayment obligations incurred by successful plaintiffs has been a ground for criticism of this sector of the litigation funding industry, both in judicial decisions and in the popular media. See, e.g., *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005); Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2001, at A1.

are equipped to fund litigation on a contingent fee basis may be unaccustomed to handling the types of claims involved. Funders of commercial litigation generally conduct fairly extensive due diligence before investing, relying on information obtained from filed pleadings and other nonprivileged sources. Due diligence is important because most commercial funders, at least in the United States, do not fund a sufficient number of cases to take full advantage of a diversification strategy. While consumer sector transactions are standardized to a significant extent, transactions in the commercial sector are more “bespoke,” and are often extensively negotiated between the provider of funding and the law firm representing the recipient of funding.

The subject of ALF and its relationship with legal ethics and professional responsibility came to wider attention when it was taken up by the ABA’s Commission on Ethics 20/20 (Commission), established in August 2009. The mandate of the Commission was to consider modifications to the Model Rules of Professional Conduct in light of changes to the legal practice caused by globalization and information technology.²² Somehow the topic of ALF got shoehorned into the Commission’s agenda, probably because other common law systems had permitted it (and, thus, there was a “globalization” angle).²³ As part of its process, the Commission created several sub-entities, including a Working Group on Alternative Litigation Financing (Working Group). The Working Group was comprised of members of the Commission, liaisons from other ABA entities (including the Standing Committee on Ethics and Professional Responsibility), and nonmembers with expertise in the area. After publishing a memorandum summarizing the issues and requesting comments,²⁴ the Working Group received numerous submissions from interested parties.²⁵ The Working Group considered proposed amendments to the ABA Model Rules of Professional Conduct and commentary, but in the end de-

22. See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

23. Australia in particular has apparently embraced ALF with enthusiasm, permitting not only investments by third parties in contingent claims, but also allowing third-party funders to exercise significant control over the decision making of counsel on behalf of the claimant. See, e.g., *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/41.html>.

24. WORKING GRP. ON ALT. LITIG. FIN., ABA COMM’N ON ETHICS 20/20, ISSUES PAPER CONCERNING LAWYER’S INVOLVEMENT IN ALTERNATIVE LITIGATION FINANCING (2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/alt_lit_financing_issuespaper.authcheckdam.pdf.

25. See WORKING GRP., COMMENTS, *supra* note 6 (featuring the collection of comments received by the Working Group).

cided on the publication of a White Paper discussing the ethical issues of which lawyers should be aware when their clients have received or are considering seeking ALF funding.²⁶ The White Paper discussed risks such as waiver of attorney–client privilege, conflicts of interest, and interference with the attorney’s professional judgment, but did not regard any of these risks as sufficiently different in kind from other potential ethical pitfalls that are routinely encountered by lawyers.

While many lawyers and organizations that submitted comments were supportive of ALF,²⁷ some commentators expressed concern about the practice. Included in the comments received by the Working Group was a lengthy letter from the U.S. Chamber of Commerce’s Institute for Legal Reform, a tort reform organization.²⁸ Although that comment was relatively restrained, the Chamber subsequently published a hyperbolic attack on ALF in a document entitled *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation*,²⁹ and had previously released a publication entitled *Selling Lawsuits, Buying Trouble*.³⁰ The Chamber, along with other tort reform groups, raised a number of objections to ALF, including (1) the possibility that it will result in an increase in the rate of litigation or in the proportion of some type of litigation, such as non-

26. ABA COMM’N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

27. Many of the letters from individual lawyers had an “Astroturf” feel, with quite a bit of nearly identical language recurring in numerous letters. Compare, e.g., Letter from Lucille M. Barbatto, Spiegel & Barbatto, LLP, to ABA Comm’n on Ethics 20/20 (Feb. 10, 2011), in WORKING GRP., COMMENTS, *supra* note 6, at 24 (“No ALF provider has ever sought to influence me or my cases The contracts I have approved have always been transparent, easily understandable, and in the best interests of my clients.”), with Letter from Brian L. Fantich, Law Offices of Kelman & Fantich, to ABA Comm’n on Ethics 20/20 (Feb. 15, 2011), in WORKING GRP., COMMENTS, *supra* note 6, at 51 (“No ALF provider has ever sought to influence me or my cases. The contracts I have approved have always been transparent, easily understandable and in the best interests [sic] of my clients.”). More substantive comments emphasized benefits such as leveling the playing field between wealthy and less well-off litigants. See, e.g., Letter from Amy M. Au, President, Alliance for Responsible Consumer Legal Funding, to ABA Comm’n on Ethics 20/20 (May 5, 2011), in WORKING GRP., COMMENTS, *supra* note 6, at 7.

28. See Chamber Letter, *supra* note 6.

29. JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (2012). My characterization of the document as hyperbolic is based not only on its rhetoric (for example, calling ALF “a clear and present danger to the impartial and efficient administration of civil justice in the United States”), but also on the astonishing call for federal legislation and the creation of a new bureaucracy by the U.S. Chamber of Commerce, an organization known for its vehement opposition to government regulation and administrative agencies.

30. JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009).

meritorious claims;³¹ (2) the effect on settlement;³² (3) the concern about the abuse of vulnerable litigants;³³ and (4) an argument about the effect of ALF on the attorney–client relationship.³⁴ While all of these arguments deserve to be taken seriously,³⁵ they are conceptually different from the argument that ALF “transforms courtrooms into a stock exchange and litigation into a commodity.”³⁶

The anti-commodification argument, as advanced by the Chamber, seeks to place litigation and the civil justice system firmly in the nonmarket domain of value. This means drawing a sharp distinction between the instrumental and intrinsic value of civil litigation. Some things, money being the paradigm, are useful only insofar as they enable people to trade for other things. These things are instrumentally

31. See, e.g., Chamber Letter, *supra* note 6, at 139; BEISNER & RUBIN, *supra* note 29, at 4; BEISNER ET AL., *supra* note 30, at 4–7; ATRA Letter, *supra* note 7, at 14–15. The obvious rejoinder to this argument is that no sensible funder would invest in a claim that is a likely loser. In response, the Chamber argues:

TPLF [third-party litigation financing, the Chamber’s preferred term for ALF] can be expected to prompt an increase in the filing of questionable claims. TPLF companies are mere investors—and they base their funding decisions on the present value of their expected return, of which the likelihood of success at trial is only one component. In addition, TPLF providers can mitigate their downside risk by spreading the risk of any particular case over their entire portfolio of cases and by spreading the risk among their investors. For these reasons, TPLF providers can be expected to have higher risk appetites than most contingency-fee attorneys and to be more willing to back claims of questionable merit.

BEISNER & RUBIN, *supra* note 29, at 4. This argument does not address other controls on the filing of frivolous lawsuits, including FED. R. CIV. P. 11 (and state analogues); statutes such as the federal Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006); and MODEL RULES OF PROF’L CONDUCT R. 3.1 (2013) (as adopted by state courts). These legal norms exist on the assumption that attorneys already have incentives to file nonmeritorious lawsuits and should be deterred from doing so. It is unclear why the risk-spreading effect of ALF, as relied upon in the Chamber’s argument here, would so greatly increase the incentive to file frivolous lawsuits that it would override existing constraints.

32. See Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677 (2010) (discussing *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003), which invalidated a litigation funding contract largely due to its effect on the parties’ incentives to settle). *But see* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012) (favoring third-party financing in nonclass aggregate litigation as a way to separate the lawyer’s dual role as agent and investor and thereby promote better monitoring of the performance of counsel); *see also* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 72 (2010) (contending that ALF helps reduce the likelihood that “[a] risk-averse, one-time plaintiff may dispose of a claim for too little because he is forced to sell to a repeat-player, risk-neutral defendant that is in a much stronger bargaining position”).

33. ATRA Letter, *supra* note 7, at 17–18.

34. BEISNER & RUBIN, *supra* note 29, at 6; *see also* BEISNER ET AL., *supra* note 30, at 7–8.

35. For a careful overview of consequentialist arguments against ALF, see Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 590–608 (2010).

36. See ATRA Letter, *supra* note 7, at 13.

valuable. Goods other than money can have instrumental value if they are a way of expressing concern for some other person or thing. For example, an inartful drawing may be extremely valuable to me because it was made by one of my children. At some point, however, there is a good that it makes sense to care immediately about, instead of as a means of caring about some other person or thing.³⁷ An intrinsic good is something that is valuable not as a means for obtaining something else or valuing someone or something else.³⁸ The concern about “commoditizing” something is essentially an appeal to the idea of intrinsic goods. Commodification means wrongly treating an intrinsic good as something that can be freely exchanged in the marketplace.³⁹ There are right and wrong ways to value things and commodification is a kind of corruption—by market modes of valuation—of intrinsic, nonmarket modes of valuation. The commodification objection to ALF is that litigation does, and should, have intrinsic value, but risks being corrupted by practices that treat it as instrumentally valuable.

A claim that something is being commodified is an ascription, not an empirical observation. One can look at the world and observe, for example, that investors in many states are permitted to purchase a share of the proceeds of a pending lawsuit. These investment contracts have certain features, such as rates of return that vary according to the length of time that passes between the investment, and some specified event such as recovery by judgment or settlement. These contracts may bear a family resemblance to other types of economic activities that affect civil litigation, such as liability insurance, contingent fee financing, the assignment and transfer of litigation proceeds, and the factoring of structured settlements. None of these observed facts carries the label “commodified” along with it; rather, the label must be earned through normative argument, which takes into account other considerations such as the purposes of the civil justice system.⁴⁰ The dependency of value on considerations external to the

37. See ANDERSON, *supra* note 14, at 19.

38. See NICHOLAS RESCHER, INTRODUCTION TO VALUE THEORY 53–54 (1982).

39. See, e.g., SANDEL, *supra* note 14, at 34 (arguing that, with respect to some goods, transforming access or possession “into a product for sale demeans and degrades it”).

40. As an example of how normative ascriptions can sometimes be made to seem like facts of nature, consider the “law as price” view of legal obligation. See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998). Williams quotes a passage from law-and-economics theorists Frank Easterbrook and Daniel Fischel:

[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition

thing itself does not undercut the objectivity of evaluative judgments. A real estate appraiser places a “value” on a parcel of land that is a feature of the land itself and its environment (its location, condition, and so on), as well as its suitability for particular types of uses. Nevertheless, this value may be principled in the sense that it is based on objective features of the thing being valued.⁴¹ Thus, even though value is ascribed to a thing, evaluative judgments are subject to rational analysis. Value is not simply a matter of taste, of finding that something is disagreeable or “doesn’t sit right.” It is the conclusion of an argument that, as we will see, has a complex structure beginning with premises about the ultimate good for human beings and proceeding through means by which this value is manifested in action.

A critic of ALF who wishes to stigmatize it as a corruption of an appropriate mode of valuation must establish first that there are higher and lower modes of valuation; second, that lawsuits, or the civil justice system, belong to a higher mode; and third, that allowing investment by third parties in lawsuits will have the effect of devaluing this form of property. Even if the critic establishes these three things, there is the further problem that the legal system routinely values personal relationships, harms, and remedies in monetary terms.⁴² Tort plaintiffs, for example, can recover monetary damages for the wrongful death of a loved one, for the pain and suffering that accompanies bodily harm, or for pure emotional distress caused by some inten-

that managers not only may but also should violate the rules when it is profitable to do so.

Id. at 1266–67 (alteration in original) (quoting Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982)). Compare the psychological phenomenon of the crowding-out effect, where the presence of a fine for noncompliance may come to be perceived as merely the price for a service. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000) (showing that when a day care center introduced a fine for late pickups of children, the rate of tardiness actually increased, contrary to the prediction of a nonbehavioral economic approach). This perspective, as Robert Cooter has argued, “is blind to the distinctively normative aspect of law.” Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984), cited in Williams, *supra*, at 1268. So which is it? Does the law establish a price that may be paid in exchange for the permission to violate the law, or is the law a reason in itself to perform the action required? I have argued for the latter position, against what may be called the Holmesian bad man stance. See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 60–61, 201–02 (2010). The point here is not to get into the jurisprudential arguments for and against the Holmesian bad man or law as price perspective, but to note that *both* the Holmesian bad man stance and a robust normative perspective on the law are consistent with the facts on the ground—i.e., the law requires an actor to do something, and provides a penalty for noncompliance. The label of “price” or “sanction” is not a part of the empirical description of the facts—rather, it must be earned by normative argument.

41. RESCHER, *supra* note 38, at 55–56.

42. RADIN, *CONTESTED COMMODITIES*, *supra* note 8, at 184–205 (discussing incomplete commodification in the tort system).

tional or negligent acts. Will the critic bite the bullet and object to these features of the legal system as well, or seek instead to draw a distinction between acceptable and unacceptable commodification? On one view, the legal system does commodify some goods, but does so in order to vindicate other morally significant interests. If it is permissible to award noneconomic damages in tort cases to create the optimal level of deterrence of negligent behavior, then this may be an instance of acceptable commodification. Value theory alone cannot answer the final question about whether commodification to a limited extent is tolerable as a way to further other important ends. Further moral analysis is required even if one concludes that a practice has a commodifying tendency, because systems of moral norms regulate the practices by which we express values.⁴³ Something may be commodified, but this may be tolerable, or even a good thing, depending on the circumstances surrounding the representation of some good in market terms.

At a more general level, the legal system pervasively transforms one kind of thing into another. Awarding money damages for personal injuries is just one instance of using a particular institutional mechanism to accomplish ends that could be accomplished in other ways. It sounds crazy, but one could always propose going back to *lex talionis* (an eye for an eye) or using retaliation practices patterned on medieval Icelandic blood feuds as a means of deterring wrongdoing and compensating victims.⁴⁴ These practices at least have the virtue of not commodifying the underlying interests. Our supposedly more modern notions of justice are built on exchange and commensuration of goods in terms of monetary units of measurement. As William Ian Miller points out, the iconic image of Justice as a goddess holding a scale or balance incorporates an element of economic rationality. “The scales are the signature emblem of the trader Scales are tools of the marketplace, the stuff of everyday settling accounts.”⁴⁵ It is built into our ideal of justice that the measure of harm one is responsible for, as a way of righting wrongs, getting even, or restoring balance, is to a significant extent symbolic. We use one thing—money—to represent another—justice.

43. See generally ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 86–89, 153–60 (1990) (explaining how systems of norms regulate expressions of judgments of rationality).

44. See WILLIAM IAN MILLER, EYE FOR AN EYE (2006) [hereinafter MILLER, EYE FOR AN EYE]; see also WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990).

45. MILLER, EYE FOR AN EYE, *supra* note 44, at 5.

It is conceivable that in a relatively simple, premodern society, goods are never traded off or represented in the form of something else, but this would require a radical restructuring of a large, complex society characterized by institutions such as the market. Miller notes that “[t]alionic cultures were invariably honor cultures, and that led to a more complex interplay between injury and conventional money substances than is the case now.”⁴⁶ Honor cultures are noteworthy for their emphasis on the centrality of one’s reputation for fearsomeness as well as probity, and one’s public presentation, which is always under threat by those of lesser status; honor cultures are intensely conflict-ridden, hierarchical, and unstable.⁴⁷ The whole point of tort law, according to Miller and the civil recourse theorists, is to civilize or tame the impulse to get even in literal terms.⁴⁸ The civil justice system does this by transforming moral claims into rights and remedies that have monetary equivalents—that is, commoditizing them. At least some degree of commodification may be a feature, not a bug, in the legal system of a modern, capitalist society.⁴⁹

In addition to worrying about the commodifying effect of ALF on litigation, one might also be concerned about the effect of third-party investment in, and potentially control over, litigation on the legal profession. One of the most persistent themes in professional responsibility scholarship is that some innovation threatens to transform lawyers from members of a profession, practicing a noble calling, to “mere” businesspeople.⁵⁰ In the mid-nineteenth century, which lawyers today

46. *Id.* at 22.

47. See W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have To Do with Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567 (2003) (citing numerous works of history and anthropology pertaining to honor cultures).

48. For the civil recourse theory of tort law, see, for example, John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 *MD. L. REV.* 364 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733 (1998); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695 (2003); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1 (1998).

49. See Molot, *supra* note 32, at 73 (“If we want the settlement process to value lawsuits accurately, perhaps we should do the exact opposite of what scholars (including myself) have done in the past. We should consider making settlements look less like adjudications and more like market transactions.”).

50. See, e.g., RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM* (1989); MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT’S HAPPENED TO THE LEGAL PROFESSION* (1997); Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 93 *DICK. L. REV.* 643 (1989); Carl T. Bogus, *The Death of an Honorable Profession*, 71 *IND. L.J.* 911 (1996); Norman Bowie, *The Law: From a Profession to a Business*, 41 *VAND. L. REV.* 741 (1988); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 *VAL. U. L. REV.* 563 (1994); Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949 (1995).

tend to idealize as a golden age of professionalism, one of the first great legal ethics scholars, George Sharswood, bemoaned the forces transforming the legal profession “from an honorable office to a money-making trade.”⁵¹ More recently, Justice Sandra Day O’Connor argued that membership in a profession “entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced . . . through the discipline of the market.”⁵² Significantly, she wrote those words in a dissenting opinion, in a case where the Court majority held unconstitutional a state disciplinary rule prohibiting targeted direct-mail advertisement. Advertising, the end of mandatory fee schedules,⁵³ contingent fees, nonlawyer ownership of or investments in law firms,⁵⁴ multidisciplinary practices (MDPs),⁵⁵ unbundling legal services, and legal-process outsourcing have all been resisted by lawyers on the ground that they further the transformation of the practice of law from a profession to a business. This objection is another iteration of the anti-commodification argument—made indirectly—appealing to the effect of the commodification of one practice (financing civil liti-

51. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 86 (Phil., T. & J. W. Johnson & Co. 2d ed. 1860), available at <https://archive.org/details/nessayonprofes00philgoog>. Russ Pearce locates Sharswood’s treatise within an “extraordinary outpouring of rhetoric” lamenting the loss of the central professional ideal of indifference to financial success and its replacement by an attitude that practicing law is merely another way to earn a living. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1241, 1245 n.77 (1995).

52. *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 488–89 (1988) (O’Connor, J., dissenting).

53. See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (holding that lawyers engage in “trade or commerce” and thus the legal profession is not exempt from antitrust laws; accordingly, minimum fee schedules are impermissible restraints on trade).

54. Larry Fox has consistently opposed investment by nonlawyers in law firms, warning of the potential interference with professional independence. See, e.g., Lawrence J. Fox, *Old Wine In Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971 (1999).

55. An ABA committee had recommended that lawyers and nonlawyers be permitted to practice together in a multidisciplinary professional association and share fees with nonlawyers. See COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR. ASS’N, REPORT TO THE HOUSE OF DELEGATES (2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html. The full ABA House of Delegates rejected the proposal after “rancorous” debate. Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2193 (2010). It is widely believed that the financial accounting scandals at Enron and other companies drove the final nail in the coffin of MDPs, since one of the perceived causes of the debacle was the accounting profession’s compromised independence due to the imperative of selling consulting services. For a typically colorful expression of this position, see Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547 (2002), and for a prescient warning of the risk of compromised independence in the accounting profession, see Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000).

gation) on another practice (representing clients in civil litigation). To the extent the practice of law has already become a business, this critique either loses force (because the practice has changed and the sky has not fallen) or gains force (because changes have taken place that appear to be steps down the road toward an irretrievable loss of professional ideals).⁵⁶

III. ARE MODES OF VALUATION HIGHER OR LOWER, OR UNITARY?

What does it mean for something to have value? On one highly influential view, value is equivalent to price. That is, the value of a good is equivalent to the amount of money one would pay to acquire that good or, alternatively, the amount of money that one would demand before parting with the good.⁵⁷ This is the market-liberal theory of value. In other words, the value of a good is defined by its *exchange value*, measured by the price that would be attached to the good in a real or hypothetical market exchange. In an economically developed society, of course, money is the medium used to keep track of the exchange value of goods; in this sense, the value of something can be said to be reduced to money, although it is more accurate to say it is measured in monetary units.⁵⁸ It is important to see that money here is not being valued for its own sake, but as a means of keeping score, because the market-liberal theory of value is deeply and essentially connected with other aspects of some forms of political

56. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

57. See, e.g., Radin, *Market-Inalienability*, *supra* note 8, at 1859 n.44 (describing, but not endorsing, this theory of value). Behavioral economists would cite the endowment effect in predicting that a person would generally demand more to relinquish possession of a good than to acquire it in the first place. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSPECTIVES, Winter 1991, at 193, 194.

58. Radin argues that money is foundational in the market-liberal theory of value: "The market paradigm is a form of foundationalism because in this paradigm market concepts *ground* thought about human activity and experience; explanations and prescriptions are to be *derived* from them." Margaret Jane Radin, *On the Domain of Market Rhetoric*, 15 HARV. J.L. & PUB. POL'Y 711, 712 (1992). This seems slightly off, because I think it may be possible to see money as nonfoundational within the market-liberal theory of value. On this approach one might say that people may value all sorts of different things in different ways, not all of which are reducible to money, but that in the public domain it is necessary to set aside what John Rawls would call comprehensive views, including privately held conceptions of value, and to use money as a medium of exchange. Radin's target here is not a straw person, however, because some economic theorists have claimed that money is foundational. Elsewhere Radin criticizes Richard Posner, for example, for arguing that wealth maximization is the criterion for judging whether acts and institutions are good. See Radin, *Market-Inalienability*, *supra* note 8, at 1857 n.38.

liberalism.⁵⁹ One aspect may be called naturalism, scientism, or empiricism.⁶⁰ That is the view that the explanation of some observation, such as the way we treat objects or practices, has to be within the domain of the natural or social sciences. Thus, there must be a natural or social scientific explanation for preventing oil and gas exploration on some public land, prohibiting prostitution or selling donor organs, or restricting advertising in elementary schools. As we will see, Aristotelian or perfectionist theories of value explain these observations by appealing to higher and lower modes of valuation.⁶¹ The market-liberal paradigm, by contrast, has to make do with explanations that avoid appeals to normative notions such as a hierarchy of values.

Building on the empiricist ethics of David Hume, utilitarianism articulated a naturalistic approach to human nature and value. For Hume, pleasure was central to moral philosophy, particularly in the sentiment of approval we feel when observing benevolent actions by others, which we feel because benevolence is socially useful.⁶² It is not much of an extension for utilitarianism, in its classic Benthamite form, to rely on empirically measurable quantities of happiness as the standard of the rightness of action. As Bentham famously put it, “[p]rejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either.”⁶³ Identifying the

59. There are different varieties of liberalism, and one differentiating characteristic is the extent to which a liberal theory is committed to neutrality among competing conceptions of the good. Dworkin is a prominent philosopher who takes as a hallmark of liberalism the principle that government action must not promote or hinder any ideals of the good life. See RONALD DWORKIN, *Liberalism, in A MATTER OF PRINCIPLE* 181 (1985). As Joseph Raz puts it, arguing against this position, the liberal principle of neutrality holds that “[g]overnments are . . . to be even-handed between all rival moralities.” JOSEPH RAZ, *THE MORALITY OF FREEDOM* 135 (1986). Raz argues instead for a conception of individual well-being grounded in autonomy, that is, the free choice of goals and relations. *Id.* at 369. Other liberals begin with a list of basic goods, again holding that government should not be neutral and should not refrain from promoting these goods. See, e.g., MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 5–6 (1999).

60. This is not a thesis about what is, but about methodology.

61. See Thomas Hurka, *Value Theory, in THE OXFORD HANDBOOK OF ETHICAL THEORY*, *supra* note 17, at 364–67.

62. See DAVID HUME, *ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* (L.A. Selby-Bigge ed., 3d ed. 1975).

63. JEREMY BENTHAM, *THE RATIONALE OF REWARD* 206 (London, Robert Heward 1830), available at http://books.google.co.uk/books?id=L5Q7AAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false. The great systematic utilitarian philosopher Henry Sidgwick similarly defined happiness as a “surplus of pleasure over pain; the two terms being used, with equally comprehensive meanings, to include respectively all kinds of agreeable and disagreeable feelings.” HENRY SIDGWICK, *THE METHODS OF ETHICS* 120–21 (Dover Pub’ns, Inc, 1966) (1907). Mill, of course, was more of a perfectionist and insisted on a distinction between higher and lower pleasures. See JOHN STUART MILL, *UTILITARIANISM* 11–15 (Oskar Piest ed., Prentice Hall 1957) (1861).

value of something with the pleasure it provides, rather than its contribution to a higher good, avoids metaphysical obscurities as well as controversies over which activity (push-pin or poetry, for example) was “really” more valuable.⁶⁴

One target of Bentham’s argument was a perfectionist theory of value, taking an approach familiar in moral philosophy at least since Aristotle’s *Nicomachean Ethics*, that relies on a characteristic final end or highest good toward which all things aim.⁶⁵ Humans, like anything else, have a characteristic final end or highest good, and a good person is one who aims at that final end or highest good.⁶⁶ Other ends have to be rejected as irrational or inappropriate to pursue. By the nineteenth century, however, the prestige of the natural and social sciences made this type of argument appear disreputable. For one thing, human beings, like other things, may do many different things, aim at a variety of ends, and have a range of functions that characterize them.⁶⁷ Moreover, the final end specified by Aristotle was not susceptible of empirical measurement, unlike the quantities of pleasure and pain. Some philosophers were thus drawn to a methodology that promised the benefit of rigor.⁶⁸ Rather than ruling out certain ends as irrational because they are contrary to human nature, ethics could locate the goodness of action in the net balance of aggregate pleasure over pain. The critical methodological move was to use utility as the common unit of value, and thereby to allow comparison and aggregation of pleasures and pains from a variety of activities and across persons. Unsurprisingly, utility came to be seen not as a means of keeping score but as value in itself. The fact that something gives pleasure, or satisfies a preference, came to be regarded as the source

64. See Christine M. Korsgaard, *Skepticism About Practical Reason*, 83 J. PHIL. 5 (1986).

65. See ARISTOTLE, *THE NICOMACHEAN ETHICS*, bk. I.7, at 1097a15–35 (William David Ross trans., J.O. Urmson ed., Oxford Univ. Press rev. ed. 1984) (c. 384 B.C.E.) [hereinafter ARISTOTLE, NE] (references given by book and chapter, as well as using the standard line numbers).

66. *Id.* For a very helpful clarification of Aristotle’s Function Argument at this point in the text, see MICHAEL PAKALUK, *ARISTOTLE’S NICOMACHEAN ETHICS: AN INTRODUCTION* 80–81 (2005).

67. See Thomas Nagel, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE’S ETHICS* 7, 7–8 (Amélie Oksenberg Rorty ed., 1980).

68. Others, notably G.E. Moore, accepted the separation of empirical and evaluative domains. Moore’s open question argument showed that for any empirical observation (say, “A is conducive to X’s pleasure”), it is an open question why anyone should act to bring about that state of affairs. Moore relied upon a basic, non-natural (that is, not subject to empirical verification) property of goodness that can be grasped using the faculty of intuition. See generally J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 50–63 (1977). Mackie and many others objected to the bizarre metaphysics underlying moral intuitionism, relying as it did on the existence of supposed non-natural entities or properties of the world which are objective, action-guiding, and intrinsically motivating. See *id.* at 38–42; see also GIBBARD, *supra* note 43, at 154.

of value. The question of *why* something gives pleasure, or someone had a preference for it, was no longer asked.

The development in ethics of a formal theory of value was paralleled in economics. In the first half of the twentieth century, economists reached a methodological consensus (with only a few dissenters⁶⁹) that what matters is the satisfaction of wants or desires, which are taken as given.⁷⁰ It is a disciplinary faux pas in economics to ask why someone wants something, or what that something is for. “Utility is a purely descriptive concept; it expresses what I want, not what I ought to want. If I prefer to spend my money on crack rather than wine—well, then, crack has more utility for me.”⁷¹ The reason for preferring a unitary theory of value was metatheoretical. A discipline such as economics, which aspired to the prestige of the natural sciences, was motivated to adopt the same methodological commitments. These included reliance on externally observable, quantifiable data; the preference for parsimonious explanations in terms of a limited number of fundamental explanatory concepts; emphasis on producing hypotheses that are falsifiable by empirical testing—for example, observation, experimentation, or analysis of large data sets; the preference for universality of explanation and unification across seemingly disparate observations by appeal to causal explanations; and the assumption that a valid explanation must have a deductive-nomological structure, i.e., accounting for individual observations as deductive inferences from general laws.⁷²

The emphasis on utility as an explanatory concept is responsive to the metatheoretical end of eliminating unobservable ideas such as “value” from an explanation of human behavior, relying instead on revealed preferences as indications of the amount of utility the actor believed he would derive from a choice between, say, wine and crack. An explanation that wine is somehow “better” than crack would not yield testable implications; the only hypothesis one could test would be that fully informed, rational individuals would choose wine over crack. Testable predictions are the hallmark of a scientific discipline; talking in terms of values sounds woolly-headed by comparison. Thus, any explanatory concepts that cannot be subjected to empirical testing must be purged from economic accounts of human behavior.

69. Robert Frank is a noteworthy example. See, e.g., ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* (1999).

70. See, e.g., SKIDELSKY & SKIDELSKY, *supra* note 14, at 89.

71. *Id.* at 91.

72. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 20–32 (1994).

The market-liberal theory of value, which is the direct descendant of utilitarianism and rational choice theory, has proven to have its own hegemonic tendencies. Much of Michael Sandel's recent book, *What Money Can't Buy*, is comprised of a laundry list of intuitions about value that are at odds with the market-liberal theory, which finds these practices unobjectionable. Among other things, Sandel finds the following practices troubling: fast-track lines through airport security,⁷³ concierge medicine,⁷⁴ scalping camping permits for Yosemite National Park,⁷⁵ paying schoolchildren for good grades,⁷⁶ carbon offsets,⁷⁷ guided big-game hunts for rhinos and walrus (with the walrus hunters taking advantage of hunting rights granted to indigenous Inuit people),⁷⁸ gift cards,⁷⁹ viatical settlements,⁸⁰ and the sale of naming rights for sports stadiums and even banter used by play-by-play announcers.⁸¹ Sandel reviews several different types of objections to these practices. One objection, which is essentially a fairness argument, focuses on the ways these practices add to the advantages of affluence.⁸² One way the rich become even better off is by acquiring the ability to buy their way out of many of the routine annoyances of daily life, such as having to wait to see a doctor or stand in line at the airport.⁸³

The mirror image of this argument is the concern that great disparities in wealth may result in coerced exchanges from donors who lack genuine alternatives (due to poverty or other circumstances) to those more fortunate. Markets for donor organs and sexual services are often believed to be so distorted by economic inequality that transactions on them cannot be deemed to result from the autonomous deci-

73. SANDEL, *supra* note 14, at 17–18.

74. *Id.* at 25–27.

75. *Id.* at 35–37.

76. *Id.* at 51–55.

77. *Id.* at 76–77.

78. *Id.* at 79–84.

79. SANDEL, *supra* note 14, at 104–07.

80. *Id.* at 136–41. Viatical settlements involve the purchase of life insurance policies from terminally ill patients. For an overview, see Andy Rich, Article, *Viatical Settlements: The Visceral Reaction, the Existing Market, and a Framework for Regulation*, 29 QUEEN'S L.J. 283 (2003).

81. SANDEL, *supra* note 14, at 169–72 (giving the example of the Arizona Diamondbacks' deal with Bank One that obligated announcers to call every home run a "Bank One blast").

82. *See, e.g., id.* at 21–22, 36–37.

83. As applied to ALF, this argument cuts against the conclusion that ALF involves an impermissible valuing of goods. A prohibition on ALF would add to the advantages of affluence by favoring litigants with substantial resources on hand or relatively low-cost access to traditional financial markets.

sions of individual participants.⁸⁴ Sandel also raises a cluster of consequentialist objections that posit a crowding out of noneconomic modes of valuation by market rationality. He cites the well-known Israeli day care study, in which the creation of fines for late pickups of children actually increased the rate of tardiness. The explanation is that the fine had the effect of changing the characterization of being late, transforming it from a regrettable hassle to be avoided into a service for which parents had the option to pay.⁸⁵ Similarly, with respect to carbon offsets, Sandel is worried about the effect on “habits, attitudes, and ways of life that may be required to address the climate problem.”⁸⁶ Notice that, in this form of the objection, these attitudes and ways of life are not intrinsically valuable but potentially a more effective means to another end, which is addressing climate change.

Sandel considers nonconsequentialist arguments as well as the preceding consequentialist objections to commodification, appealing to the intrinsic value of a good or proper ways of valuing it. The sale of naming rights for sports stadiums, for example, “intrude[s] upon the game and spoil[s] the inventive, authentic narrative that a play-by-play account of a game can be.”⁸⁷ Online death pools, in which participants can bet on the date of a celebrity’s demise, are objectionable because of “the attitude toward death it expresses and promotes.”⁸⁸ A hypothetical wealthy hiker who willingly pays a fine for littering in order to be freed of the hassle of packing his trash up from the bottom of the Grand Canyon “has failed to appreciate . . . in an appropriate way” the value of unspoiled nature.⁸⁹ Each of these arguments presupposes a diversity of modes of valuation, with certain goods calling for specific, appropriate ways of valuing. This type of objection raises two conceptual questions. First, what does it mean to value something in a particular way? As the Reverend Rowan Williams, the former Archbishop of Canterbury, writes, “[a] world in which every object is instantly capable of being rendered in terms of what it can be exchanged for is one in which there is nothing worth looking at for itself, a world systematically ‘de-realised.’”⁹⁰ Pursuing this objection re-

84. SANDEL, *supra* note 14, at 110–12; *see also* Radin, *Market-Inalienability*, *supra* note 8, at 1909–10 (justifying market-inalienability of personal property for prophylactic reasons, because with respect to property significant to one’s personhood, “sometimes the circumstances under which the holder places it on the market might arouse suspicion that her act is coerced”).

85. SANDEL, *supra* note 14, at 64–65 (citing Gneezy & Rustichini, *supra* note 40).

86. *Id.* at 77.

87. *Id.* at 188.

88. *Id.* at 142.

89. *Id.* at 65.

90. Rowan Williams, *From Faust to Frankenstein*, PROSPECT (Apr. 23, 2012), <http://www.prospectmagazine.co.uk/economics/rowan-williams-archbishop-canterbury-markets-sandel-skidel->

quires an account of what a “reali[z]ed” conception of value would hold to be the significance of life, the natural world, sports, and so on. Second, if one rejects the market–liberal theory’s use of money to represent the value of different types of goods, are these various noneconomic modes of valuation hierarchically ordered, with some being higher than others (and, if so, what does that mean), or simply different in kind, with no priority among them? Sandel unfortunately has little to say in response to these questions, other than to call for a conversation about the type of society in which we want to live.⁹¹

On a robust noneconomic account of value, what it means to value something, or for something to have value, is related to the reasons one has for acting or taking up other practical stances with respect to that thing, and in particular to the *justification* that one might give for acting in a particular way.⁹² Unlike the economic approach, which relies on externally observable behavior, noneconomic approaches to value incorporate the internal point of view—the perspective of someone who wants to know whether something is a reason for her. “[V]alues not only show how certain actions are intelligible but also how they are justified.”⁹³ One acts in ways that express attitudes toward other people or things; the connection between action and attitude is given by the reasons for one’s actions.⁹⁴ Using one of Sandel’s examples, imagine asking the rich hiker why he threw his trash on the

sky-marx-morality-aristotle-good-life/#.UIRv9BbfA_4 (reviewing SKIDELSKY & SKIDELSKY, *supra* note 14; SANDEL, *supra* note 14).

91. SANDEL, *supra* note 14, at 202.

92. JOSEPH RAZ, *Agency, Reason, and the Good*, in *ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION* 22, 30–31 (1999).

93. *Id.* at 31.

94. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1510 (2000). Borrowing an example from Christine Korsgaard, Anderson and Pildes illustrate the way expressive norms regulate the connection between action and justification:

[C]onsider the following rationales for actions:

(a) I will avoid visiting my mother in the hospital, in order to avoid transmitting my contagious illness to her.

(b) I will avoid visiting my mother in the hospital, in order to spare myself unpleasantness.

(c) I will avoid watching television, in order to spare myself unpleasantness.

Rationales (a) and (b) involve the same type of act, but action based on the first reason is permissible, or even required, while following the second is arguably wrong. This demonstrates that what makes (b) wrong is not that it involves a categorically forbidden type of action. Furthermore, it is not that there is something generally impermissible about the goal of (b) either, because (c) has the same goal, but is clearly permissible. What is wrong with (b) is taking the goal of avoiding unpleasantness as a justification for avoiding visiting one’s mother in the hospital. In expressivist terms, avoiding her for this reason is wrong because taking this as one’s reason for acting is callous and it is wrong to express such an uncaring attitude toward one’s mother.

side of the trail rather than packing it out. That is a demand for justification. The hiker acted for a reason and, if that reason is going to do any work in explaining his action to others, it has to appeal to considerations that can be shared by others and, potentially, make sense of his action. “Because I can,” is a reason, but it does not appeal to a value, unless the hiker is a sociopath and believes his own urges are reasons that others should respect.⁹⁵ Treating the hiker with contempt is a way of expressing the sense that the hiker’s action manifested the wrong practical attitude toward the Grand Canyon. Had he been rightly disposed toward this place of great natural beauty, he would have made the effort to bring out his trash. Observers who shamed the hiker into picking up his trash, or even simply thought “what a jerk!” are engaging with the hiker’s justifying reasons, or lack thereof.

The example of the litterbug hiker is trivial, but it shows the role of the notion of value in not just explaining and making intelligible, but also in justifying actions and other practical stances, such as emotions and attitudes.⁹⁶ It helps explain other practices related to value, such as the prohibition (in many countries) on selling sexual services, despite the pervasive use of sexuality in advertising and entertainment; the legal prohibition serves to highlight an ideal of “interpersonal sexual sharing in spite of the widespread association of sex and money.”⁹⁷ While there are market aspects to sexuality, there are nonmarket aspects as well; the law can promote these ways of valuing sexuality as a way of promoting a conception of human flourishing, of which sexual intimacy is a component. Similar arguments may be used to understand prohibitions on the sale of donor organs or babies for adoption. The relevant social practice—a prohibition on market transactions in organs or babies—expresses and promotes a way of relating to ourselves or other people that emphasizes the uniqueness of each individual.

Evaluation may appear mysterious, because although an evaluative judgment makes reference to empirical observations (for example, the litter left by the hiker), evaluative judgments cannot be reduced to facts about the world. Evaluative properties may supervene on facts

Thus, expressive norms regulate actions by regulating the acceptable justifications for doing them.

Id. at 1511 (emphasis omitted) (footnote omitted) (citing CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 75 n.58 (1996)).

95. See RAZ, *supra* note 92, at 24 (“That an action is hurtful does not make it good, but it makes it intelligible by making its appeal to some agents intelligible.”).

96. “Practical” here is to be contrasted with theoretical reasons, that is, what reasons one has for *belief*.

97. Radin, *Market-Inalienability*, *supra* note 8, at 1922.

about the natural world, or they may be projected onto the world by the evaluators.⁹⁸ Still, something more must be said to add rigor to Sandel's laundry list of intuitions concerning how one evaluates the practices he describes. The most promising approach is the expressive theory of value, which avoids metaphysical complications while grounding different modes of evaluation in something external to the valuing subject.⁹⁹ Expressive theories focus on the attitudes expressed toward persons or objects. Attitudes are non-propositional, meaning they do not reflect beliefs and do not have a truth-value; rather, they include stances such as love, hate, approval, hostility, admiration, indifference, reverence, respect, and contempt, which can be taken up toward people or things.¹⁰⁰ Actions, norms, and practices express value through characteristic and recognizable manifestations of attitudes, intentions, or other mental states: "First, expressions of mental states *embody* and *realize* those states. Second, expressions of mental states *manifest* those states: they cast them in a form that makes them *recognizable* as what they are. Third, expressive vehicles can do a better or worse job of expressing mental states."¹⁰¹

To make this more concrete, consider Sandel's discussion of gift-giving.¹⁰² Many economists are baffled (or at least profess to be baffled) by gift-giving, which frequently involves a mismatch between the gift and the preferences of the recipient.¹⁰³ *Ex ante*, a giver choosing between a book that costs \$25 and \$25 in cash should always favor the cash gift, because if the recipient would like the book, she can use the \$25 to buy it, but if she prefers something else, she has the option of acquiring it with the cash, but would be stuck with the less preferred book. "[U]nfettered consumer choice leads the consumer to higher utility than constrained choice."¹⁰⁴ It is therefore a puzzle for economists who accept the market-liberal theory that the practice of non-cash gift-giving persists. An expressivist would not find this puzzling at all, however. Giving noncash gifts affirms the unique value of the

98. This is not the place to get deeply into some of the thorniest issues in contemporary metaethics. See, e.g., SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* 119–21 (1998); Geoffrey Sayre-McCord, *Moral Realism*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY*, *supra* note 17, at 39; John McDowell, *Values and Secondary Qualities*, in *ESSAYS ON MORAL REALISM* 166 (Geoffrey Sayre-McCord ed., 1988).

99. See, e.g., ANDERSON, *supra* note 14; Anderson & Pildes, *supra* note 94.

100. ANDERSON, *supra* note 14, at 29; see also Anderson & Pildes, *supra* note 94, at 1506–07.

101. Anderson & Pildes, *supra* note 94, at 1506–07.

102. SANDEL, *supra* note 14, at 101–07.

103. A famous article arguing this position, discussed by Sandel, is Joel Waldfoegel, *The Dead-weight Loss of Christmas*, 83 *AM. ECON. REV.* 1328 (1993).

104. *Id.* at 1328.

relationship between two people.¹⁰⁵ Because cash can be exchanged for anything, it can be given without any thought to the recipient's personality and interests. By contrast, a well-chosen gift reveals that the giver knows the recipient, took the time to think about what would make her happy, and regards the recipient's interests as worthy of recognition. Parents teach their children that "it's the thought that counts." That is an expressive approach to the value of gifts, and from that perspective, the thought expressed by a gift card might be, "I don't know you well enough, or care enough, to find the right gift." The giver might have intended a very different message, and some recipients may be open to receiving cash gifts or gift cards,¹⁰⁶ but there is at least the potential for the gift of cash or cash equivalents to express an attitude of indifference toward the recipient. On an expressive analysis, that is the reason for the otherwise puzzling persistence of the practice of giving noncash gifts.

Social meanings are potentially contestable. Consider Sandel's example of online death pools, which allow betting on the date of a famous person's passing. He finds this practice objectionable on expressive grounds, reasoning that "the moral tawdriness of the game lies mainly . . . in the attitude toward death it expresses and promotes."¹⁰⁷ What is the attitude that Sandel finds objectionable? He says it is a "cavalier indifference" toward death,¹⁰⁸ but perhaps it is something healthier, such as an awareness of the inevitability of death and a determination to laugh in the face of it. A great many human undertakings may be understood as an attempt to transcend death by becoming part of something of lasting significance.¹⁰⁹ Death pools are not connected with sources of meaning such as art and science, but who is to say that mocking death is necessarily unhealthy? Moreover, emotions are not always reliable guides to appropriate attitudes. Funeral directors give many people the "willies," but this does not mean, from an evaluative point of view, that there is anything objectionable about being a funeral director, or hanging around with them. An aversion to anything that is a signifier of death may be an attitude that

105. ANDERSON, *supra* note 14, at 151–52.

106. Social meanings are not fixed, and a practice that at one time had a particular expressive significance may acquire a different meaning over time. As a purely anecdotal example, my pre-teenage children vastly prefer Amazon or iTunes gift cards, at least from people outside their immediate family, because they seem to appreciate that it is hard to know exactly what to get a thirteen-year-old, and that no indifference or disrespect is intended by sending the gift card.

107. SANDEL, *supra* note 14, at 142.

108. *Id.* at 146.

109. See generally ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

we should aspire to overcome, just as medical students learn to deal with their initial feelings of queasiness at the sight of blood.

An example more on point with this Article is the shifting boundary between investment and speculation. Sandel relates the fascinating history of the slow path to social acceptance of life insurance, which traditionally was regarded as a kind of ghoulish speculation in the possibility of another's death, not unlike death pools.¹¹⁰ Over time, however, the social meaning of life insurance changed so that it was assimilated to the category of financial investments, not to that of gambling. In today's economy it is regarded as merely another vehicle for retirement, tax, and estate planning.¹¹¹ Contested meanings of life insurance now arise with respect to practices such as corporate-owned life insurance policies, where the premiums are paid by, and the beneficiary is designated as, the employer of the person whose life is insured.¹¹² Do these policies, like viatical settlements, "give investors a rooting interest in the prompt passing of the people whose policies they buy"?¹¹³ If the "rooting interest" is too strong, there may be a consequentialist objection to the alienability of life insurance proceeds; that is, the beneficiary may be tempted to somehow actively conspire in the death of the insured. Apart from that, though, the expressive version of the commodification critique depends on which social meaning predominates, (1) an unhealthy interest in the death of another person, or (2) a tax-planning vehicle for corporations that happens to take the form of life insurance. In order to avoid falling into a merely impressionistic or sentimental mode of analysis, an anti-commodification account must begin with a conception of human flourishing and explain how some practice tends to "defile" or "corrupt" an authentically well-lived life or interfere with the right social practices of expressing value.

110. SANDEL, *supra* note 14, at 144–48.

111. Compare the evolution of exchange-traded commodities futures (here, referring to literal commodities such as wheat and porkbellies). See Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701 (1999). Stout describes how "difference contracts," to be settled by any means other than delivery of the goods, were prohibited as a violation of public policy because they were indistinguishable from gambling. *Id.* at 714 & n.40. Parties who sought to profit from the fluctuation in commodities prices had to incur the transaction costs of trading on the spot market, including the cost of actually taking delivery of the goods, and transporting and storing them. Courts began to recognize exceptions to the unenforceability of difference contracts, for instance in situations in which the contract served a legitimate hedging function, and the Commodities Exchange Act eventually permitted difference contracts as long as they were traded on an organized exchange.

112. SANDEL, *supra* note 14, at 133–36.

113. *Id.* at 139.

One advantage of the market–liberal conception of value is that it avoids taking sides in these sorts of contested issues of social meaning. It may be a misnomer to call it value *neutrality*. It is, instead, value *proceduralism*. If there is a range of reasonable stances one can take toward death pools or viatical settlements, the role of the state is to get out of the way and allow people to make choices about whether or not to participate in these practices.¹¹⁴ If they find the practices objectionable, people are under no obligation to bet in death pools or invest in the life insurance proceeds of terminally ill patients. “Liberals traditionally address plural and conflicting ideals by giving their adherents private spaces to pursue them, protected from state-sponsored interference by adherents of rival ideals.”¹¹⁵ As critics of the market–liberal theory have pointed out, the state, by scrupulously avoiding taking sides, in effect promotes a conception of value—one that leads to a society with unattractive features. To illustrate, Sandel discusses the proliferation of advertising in public parks, on police cars, in jails and schools, and pretty much anywhere,¹¹⁶ and gives an example of the Indianapolis Fire Department struggling with budget cuts, which dealt with its revenue shortfall by entering into a contract with KFC to place its “fiery wings” logo on fire hydrants.¹¹⁷

The reader is meant to think this is a terrible idea, and it certainly seems tacky. But to prohibit the Indianapolis Fire Department from earning advertising revenue from public property would be to prioritize an aesthetic preference over a source of funds for a vital public service. Apparently, public officials and voters in Indianapolis had already been persuaded that permitting KFC to advertise its “fiery wings” on public property was the least-worst option, as compared with raising taxes or requiring the department to do without an additional fire truck or new personnel. To put it another way, one would have to say that voters and elected officials put the relevant values in the wrong rank order, inappropriately preferring advertising to an ad-free public space. In terms of the distinction between value neutrality and value proceduralism, what is being preferred here is not just money over an ad-free public space, but a contested conception of value over a decision reached using the procedures of democratic politics. The priority here is given to process values over an approach

114. See, e.g., JULES COLEMAN, *RISKS AND WRONGS* 197 (1992) (“Markets . . . contribute to social stability by allowing a broad range of interaction to take place among individuals with significantly different conceptions of the good.”).

115. ANDERSON, *supra* note 14, at 154–55.

116. SANDEL, *supra* note 14, at 192–97.

117. *Id.* at 195.

to political decision making that removes certain questions from debate. Given the strong preference in a modern liberal democratic society for allowing contested questions about values and the good to be settled by campaigns, elections, lobbying, rulemaking, litigation, and other means of citizen participation, there is a substantial burden of persuasion on one who seeks to take an issue off the table by citing a conception of value that is opposed to the market-liberal theory.

As critics of the market-liberal theory would point out, this is exactly the way societies have always done things, up until fairly recently. In classical ethics, the starting point is the specification of a *telos*—a final end or highest good toward which a thing, person, or practice moves. “Good” for Aristotle is not a thing that all things aim at, nor is it something that exists independently of things, which things participate in (as in Plato’s Form of Goodness). Rather, “good” means essentially “aimed at.”¹¹⁸ The end of anything, its function or *ergon*, is its aim—that which makes it what it is. Some things are aimed at for the sake of something else. One may become a lawyer or a banker in order to make money and support a family. Pursuing an occupation in that case would be instrumental to the realization of another end, namely having a stable, comfortable life. The “for the sake of” relationship implies a hierarchy. Some ends are higher than others, because we pursue some intermediate end for the sake of a further aim. That which something does that no other thing can do—that which makes it uniquely that thing and not another, and with respect to which everything else the thing does is directed—is its final end.¹¹⁹ Aristotle argued that human beings have a highest good or final end, the most desirable form of life;¹²⁰ it is *eudaimonia*, sometimes translated as “happiness,” but more accurately rendered as “flourishing.”¹²¹ *Eudaimonia* is not a subjective mental state, bodily pleasure, or the satisfaction of desires, but an objective condition of having the best possible life. That life is one in which one can aim at something that has no aim beyond itself—to pursue the highest good means to do something for its own sake and not for the sake of something else.¹²²

What is that end? Aristotle concluded that a life of contemplation (*theoria*) would be most conducive to a life characterized by

118. ARISTOTLE, NE, *supra* note 65, bk. I.7, at 1097a15; *id.* bk. VI.2, at 1139a17 (“The excellence of a thing is relative to its proper function.”); *see also* PAKALUK, *supra* note 66, at 48–49.

119. *See* PAKALUK, *supra* note 118, at 54.

120. ARISTOTLE, NE, *supra* note 65, bk. I.7, at 1097b25–1098a10; *id.* bk. X.7, at 1177a10–15.

121. *See, e.g.*, J.L. Ackrill, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE’S ETHICS*, *supra* note 68, at 15.

122. ARISTOTLE, NE, *supra* note 65, bk. X.7, at 1177b14–1178a5.

eudaimonia, which is the highest, final, or self-sufficient end for humankind.¹²³ Modern people, of course, ask why that function and not something else should be regarded as the ultimate end for humans. Perhaps there are things that are good for humans—in the sense of leading to a life of *eudaimonia*—other than sitting around contemplating truth. Perhaps something other than *eudaimonia*, such as the good of all humanity, or serving God, is the final end of human life. The story of moral philosophy from the classical through the medieval to the modern period has been the inability to reach agreement on such foundational matters as the highest good for humankind.¹²⁴ Ethical reasoning is now characterized by

the absence of any agreement upon where the justification of belief ought to begin, the *de facto* ineliminable conflicts as to how various relevant types of considerations ought to be ranked in weight and importance as reasons for holding particular sets of beliefs, and the limited resources provided for reasoning about the justification of beliefs by even the most subtle and rigorous analysis of entailment relations.

. . . [T]here exists no generally agreed way of resolving the issues which divide the protagonists of these alternative and incompatible standpoints.¹²⁵

123. *Id.*, bk. X.7, at 1177a10–1177b20; *id.* bk. X.8, at 1178b5–30, 1179a20. The whole story of the good for humans, and the relationship between individual and political goods is of course enormously more complicated than there is space (or occasion) to discuss here. One observes people in political communities, so inferences about the end or function of humans cannot be separated from the political role of citizen. More strongly, a person apart from a political community (*polis*) lacks some of the essential qualities of a human being. See ARISTOTLE, *THE POLITICS*, bk. I.2, 1252b27–1253a35 (T.A. Sinclair trans., T.J. Saunders rev. trans., Penguin Books 1981) (c. 350 B.C.E.) [hereinafter ARISTOTLE, *POLITICS*] (including the frequently quoted line, “man is by nature a political animal”). Guiding a community requires excellence in practical judgment (*phronesis*). ARISTOTLE, *NE*, *supra* note 65, bk. VI.5, at 1140b5–15. Practical wisdom in turn requires virtue. *Id.* bk. VI.12, at 1144a5–10. Virtue, finally, can be developed only in a *polis* characterized by justice and the law because the whole is prior to the part, and so the state is prior to the individual. ARISTOTLE, *POLITICS*, *supra*, bk. I.2, at 1253a18–b35. Moreover, “men have the same ends whether they are acting as individuals or as a community.” *Id.* bk. VII.15, at 1334a11. Thus, while the highest good, the ultimate end, of human life is *theoria*, Aristotle does not believe that one ought to spend one’s life exclusively in philosophical contemplation. *Theoria* is a target at which a good life aims, but a good life is also characterized by activity and political involvement. See PAKALUK, *supra* note 118, at 323–28.

124. See RESCHER, *supra* note 38, at 54 (“The question ‘What sorts of things may reasonably be taken to be valued as ends?’ is the grand-prize question of traditional philosophical ethics. Here we reach the dividing point of the great ethical systems. What is to be valued as an end is *pleasure* (the Cyrenaics), *happiness* (Aristotle), *knowledge* (Plato), *virtue* (the Stoics), *a good will* (Kant), *the general welfare* (the Utilitarians), and so on.”).

125. ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* 12 (1990). MacIntyre’s arresting opening chapter of *After Virtue* imagines a culture in which all we possess are fragments of traditions that formerly existed and which gave meaning to the terms that are now used without any awareness of their significance. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 1–5 (3d ed. 2007).

Someone who argued that aiming at *theoria* does not lead to a life of *eudaimonia* would be hard pressed to provide an alternative account of the good life—and those practices that are conducive to it—that would receive general support. If there were a conception of the good that was widely accepted, it would probably be at such a high level of generality that it would be unhelpful in addressing the sorts of concerns we are interested in here, regarding the right way to value something, the appropriate attitudes to express toward a thing, and so on. In the absence of agreement on these foundational questions, it is tempting to retreat back to the market-liberal theory, which at least has the virtue of sharing features of other modern practices with which we are familiar, such as reliance on empirically observable facts (behavior, market prices, revealed preferences, and the like).

Fortunately it is not necessary, for the purposes of this discussion, to work at the level of the theoretical foundations of ethics. The reason is not that we will be retreating to the market-liberal theory of value as such, but that the relevant foundational values belong to a specialized domain. Keeping in mind the dependency of the evaluation of community and social practices on assumptions about the good for individual human beings, we can focus attention on the way in which political institutions and actors manifest respect or disrespect for individuals.

IV. EXPLAINING THE MORAL LIMITS OF MARKETS IN LITIGATION AND LEGAL SERVICES

The core idea in the anti-commodification objection to ALF is the expressive theory of value. The expressivist analysis focuses on the way attitudes are expressed in actions, and specifically what goals are furthered by the actions and whether those goals reflect the appropriate respect for persons:

E: Act in ways that express the right attitudes toward persons; that is:

E': Act in accordance with norms that express the right attitudes toward persons.

.....

R: Take (or do not take) goal *G* as a reason for doing *A*.¹²⁶

Returning to Sandel's example of life insurance, the same act *A* of purchasing a contractual right to receive payment upon the death of another person can be understood as either morally acceptable or appalling, depending upon the goal, *G*, underlying the purchase.¹²⁷

126. Anderson & Pildes, *supra* note 94, at 1512.

127. SANDEL, *supra* note 14, at 144–47.

Early English insurance markets were apparently a hodgepodge of property owners seeking to hedge against the risk of, say, a cargo being lost at sea and complete strangers placing bets on occurrences such as the loss of a ship. When wagering on the deaths of others became rampant, public criticism prompted Parliament to enact a statute restricting life insurance contracts to those who had an “insurable interest” in the person who was the subject of the contract, in order to disassociate life insurance from the moral stigma attached to gambling.¹²⁸

Critics of alternative litigation financing are best interpreted as making the same rhetorical move as the members of the public who found it abhorrent to speculate on the deaths of strangers, but were untroubled by ordinary life insurance. Understood in expressivist terms, the strongest version of the anti-commodification argument against ALF is that the goal of profiting from an investment in a lawsuit is not a reason that should be taken in favor of participating in the civil litigation process. A strong claim is that ALF expresses an inappropriate attitude (“ALF turns courtrooms into a stock exchange”) toward the substantive value of civil justice in the context of an institutional scheme for resolving disputes. These critics do not say what the substantive value is that underlies the civil justice system, perhaps because they believe it is self-evident. In fact, however, it is not at all clear what the relevant underlying values are, nor how they should appropriately be instantiated in a scheme of institutions, practices, and regulative norms. Thus, the remainder of this Article will consider what is, or should be taken as, the value of the legal system and civil litigation, and how it is related to underlying moral values.

This inquiry may begin at either a high or low level of generality. As an example of a highly general approach, consider the proposal by Avishai Margalit that societies should be evaluated in terms of whether their public institutions and practices tend to humiliate peo-

128. *Id.* at 146; see also ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 40, at 291–95 (3d ed. 2002); R. Merkin, *Gambling By Insurance—A Study of the Life Insurance Act of 1774*, 9 ANGLO-AM. L. REV. 331 (1980). In American law the existence of an insurable interest is determined at the time the contract is written, not upon death. See *Grigsby v. Russell*, 222 U.S. 149, 154–55 (1911). The secondary market in life insurance contracts made possible by this doctrine led to the practice discussed above of investors purchasing life insurance contracts owned by the terminally ill. See *supra* text accompanying notes 110–113. Another practice criticized by Sandel related to the insurable interest doctrine is that of corporations taking out Corporate Owned Life Insurance (COLI) policies on employees as a tax-avoidance strategy. See SANDEL, *supra* note 14, at 132–36. However, there is considerable variation in state versions of the insurable interest doctrine and many courts do not agree that employers have an insurable interest in the lives of their employees. See, e.g., *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004).

ple.¹²⁹ Humiliation expresses an inappropriate attitude toward the substantive value of humanity. Why do human beings have this value? Because, according to Margalit, they have the capacity of radical freedom; someone is worthy of respect and freedom from humiliation who has the capacity of “reevaluating one’s life at any given moment, as well as the ability to change one’s life from this moment on.”¹³⁰ Similarly, David Luban contends that defending human dignity is the role of both the legal system and lawyers within it, so that lawyers may be criticized in moral terms for actions that fail to express respect for human dignity.¹³¹ Dignity, in turn, has to do with being the author of one’s own story, so that treating people instrumentally is a failure to express the appropriate way of valuing humans.¹³² Importantly, for Margalit and Luban, institutions as well as individuals can express appropriate or inappropriate attitudes—respecting dignity and humiliating people, respectively. The appropriateness of the attitudes expressed can be evaluated with reference to the fundamental underlying value of respect for humanity, whether the ground for that respect is understood in terms of radical freedom, self-constitution, the capacity for reflection, or something else. Thus, although the object of evaluation is a social institution, the evaluation is ultimately grounded in the value of persons.

To begin the inquiry at a low level of generality, we may look specifically at the purposes underlying the law of civil procedure, torts, contracts, or whatever body of law creates the cause of action that is referenced in the ALF transaction. What are these underlying purposes? The Federal Rules of Civil Procedure are to be administered for the purpose of securing the “just, speedy, and inexpensive determination” of lawsuits.¹³³ Leading procedure casebooks similarly talk about a system designed to “ensure that litigation will be accurately resolved in a fair and orderly way and as expeditiously and economically as may be practicable,”¹³⁴ which also reflects values such as “a deep mistrust of government and an abiding faith in competition and individualism.”¹³⁵ As for substantive areas of law, any first-year law

129. AVISHAI MARGALIT, *THE DECENT SOCIETY* (Naomi Goldblum trans., 1996).

130. *Id.* at 70.

131. DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, in *LEGAL ETHICS AND HUMAN DIGNITY* 65 (2007).

132. *Id.* at 68–73.

133. FED. R. CIV. P. 1.

134. RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 5 (10th ed. 2010).

135. GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 48 (10th ed. 2009).

student can rattle off a standard list of interests served by the conventional doctrinal divisions of American law: tort law “reflects the basic norm that people should act reasonably under the circumstances;” property law “gives individuals ownership of a piece of property and lets them make their own decisions about its use;” and contract law “establishes a structure within which individuals can voluntarily bargain and reach their own agreements.”¹³⁶ These are relatively uncontroversial assumptions about the underlying purpose of various bodies of law—call it the *normative significance* of the law.

Margalit and Luban make explicit the connection between public institutions and the respect owed to persons. However, the relationship is often left unstated between the normative significance of some area of law and the theory of value it presupposes. Consider tort law, for example. Two competing conceptions of the normative significance of tort law are welfare economics and corrective justice.¹³⁷ On a familiar economic account of tort law, liability rules are required to force parties to internalize the costs they impose on others; while in theory the parties might be able to bargain over an allocation of costs, high transaction costs make this impossible in practice.¹³⁸ A legal rule—negligence, strict liability, no-liability, etc.—is to be preferred if it induces an efficient level of precaution-taking by all the affected parties, so that the aggregate cost of precautions and expected accidents is minimized.¹³⁹ As with utilitarianism in moral philosophy, the economic approach to tort liability treats all persons equally, as maximizers of the net balance of benefits over costs.¹⁴⁰ Social welfare, with which the law is concerned, is an aggregation of individual welfare.¹⁴¹ As John Rawls observed in connection with utilitarianism, the appeal of this approach is that it appears to be connected with rationality: “[R]ationality is maximizing something and . . . in morals it must be maximizing the good.”¹⁴² Using the heuristic of the ideal observer, classical utilitarianism equates the situation of one person trying to maximize the satisfaction of his desires with the good for society, indifferent to whether the gains in welfare of some are purchased at the

136. William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1210–11 (1994).

137. See generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

138. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 289–90 (3d ed. 2000).

139. *Id.* at 300–11.

140. KAPLOW & SHAVELL, *supra* note 137, at 18–24.

141. *Id.* at 24–28. We can leave aside the difficult issues raised by different methods of aggregating well-being across persons and time. See, e.g., JOHN BROOME, *WEIGHING LIVES* (2004); LARRY S. TEMKIN, *INEQUALITY* (1993).

142. JOHN RAWLS, *A THEORY OF JUSTICE* 25 (1971).

cost of the violation of the rights of the few. However, Rawls went on to note, with devastating effect, that “[u]tilitarianism does not take seriously the distinction between persons.”¹⁴³ Following a similar line of reasoning, Ronald Dworkin declared that rights function as “trumps” over utilitarian considerations.¹⁴⁴

One who takes the individuality of persons seriously may, therefore, be attracted to a rights-based or corrective justice theory of tort law. On a corrective justice account, “individuals who are responsible for the wrongful losses of others have a duty to repair the losses.”¹⁴⁵ The distinctive feature of at least one version of corrective justice is that it provides particular persons with reasons for acting, unlike distributive justice, which provides reasons for everyone in the community to act.¹⁴⁶ Corrective justice is *rights-based* and *relational*. It is rights-based in that the obligation to rectify an injury flows from its status as a wrong, not merely a loss.¹⁴⁷ It is relational in that the obligation to rectify wrongdoing arises from a relationship between persons that creates a scheme of rights and responsibilities among them. It therefore creates agent-relative reasons to act.¹⁴⁸ If Driver *D* carelessly runs into Pedestrian *P*, then *D* has an obligation to *P* that is not shared by others, including *P*’s family, bystanders, or the state. Although anyone may help *P* out of a sense of benevolence, only *D* has a *duty* to compensate *P*. That duty arises because *D*, as a moral agent, has acted in a way that harmed *P*. *D*’s agency grounds the obligation to *P* because only agents can be wrongdoers and only wrongdoers have an obligation to *rectify* harms, as opposed to a more general obligation of beneficence.¹⁴⁹

Without introducing the idea of agent-relative reasons, the relational characteristic of tort law becomes something of a mystery.¹⁵⁰

143. *Id.* at 27.

144. See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”).

145. Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in PHILOSOPHY AND THE LAW OF TORTS 183, 184 (Gerald J. Postema ed., 2001) (emphasis omitted).

146. COLEMAN, *supra* note 114, 312–14. Coleman here modifies his earlier position, which he calls the “annulment thesis,” that corrective justice requires the elimination of certain gains or losses, but does not impose a duty on any particular person to rectify the situation.

147. *Id.* at 316.

148. Agent-relative reasons are defined as follows: “Each person has reasons stemming from the perspective of his own life which, though they can be publicly recognized, do not in general provide reasons for others and do not correspond to reasons that the interests of others provide for him.” THOMAS NAGEL, THE VIEW FROM NOWHERE 172 (1986).

149. COLEMAN, *supra* note 114, at 325.

150. Sebok, *supra* note 2, at 127–28 (raising, but not endorsing, the argument that ALF is incompatible with corrective justice).

For example, factual causation rules in tort law embody the requirement that a claim be brought against someone who is a wrongdoer with respect to the injury, not merely someone who behaved dangerously.¹⁵¹ “[I]f a victim can show that her loss is wrongful in the appropriate sense, the burden of making good her loss falls to the individual responsible for it.”¹⁵² In other words, tort law as it stands essentially involves a plaintiff–defendant or victim–wrongdoer dyad, which distinguishes it from public law approaches to the prevention of harm, such as administrative regulations directed toward workplace safety or consumer protection, and criminal law penalties for causing bodily harm. Mass torts, involving toxic substances and defective pharmaceutical products, put enormous strain on the tort system precisely because the system is committed to a private law approach to individualized, dyadic assessments of wrongdoing and imposition of remedial obligations. Some scholars have called for relaxing these private law constraints to enhance the deterrent and compensatory effects of the tort system,¹⁵³ while others have resisted eroding the norm of individual responsibility that underlies private law remedies.¹⁵⁴ Notwithstanding this decades-long debate, tort law continues to be seen as embodying an essentially relational quality, with public law mechanisms, class actions, informal aggregation, and legislatively created compensation schemes (such as the 9/11 Victims’ Compensation Fund) being departures from the paradigm.

To my mind, the strongest version of the anti-commodification argument against ALF would emphasize the essential victim–wrongdoer dyad. “Corrective justice imposes *on wrongdoers* the duty to repair their wrongs and the wrongful losses their wrongdoing occasions.”¹⁵⁵ According to corrective justice, participants in the litigation process have agent-relative reasons to either seek or receive rectification for a wrongful loss; these reasons constitute the normative foundation of

151. See, e.g., Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995).

152. COLEMAN, *supra* note 114, at 198.

153. See, e.g., Kenneth R. Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions*, 24 HOUS. L. REV. 155 (1987); Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779 (1985); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297 (1992).

154. See, e.g., Kenneth S. Abraham, *Individual and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845 (1987); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69.

155. COLEMAN, *supra* note 114, at 324 (emphasis added).

tort law. On the other hand, efficiency or welfare theorists emphasize not an agent-relative value arising out of something like the injurer-victim relationship, but agent-neutral reasons that apply to everyone, such as the minimization of aggregate social costs. The corrective justice theorist would say that responding to these sorts of agent-neutral reasons is a characteristic of public law mechanisms—not private law, which is essentially relational. Therefore, it is impermissible for third parties—neither the victim nor the wrongdoer—to participate in the process.

The reason, cashed out in expressivist terms, would be that the participation of strangers would express an inappropriate attitude with respect to the underlying claim for corrective justice.¹⁵⁶ If that is the argument, however, it will have a difficult time accounting for two features of the tort system that are so pervasive as to be almost invisible—insurance and settlement. Both of these practices show that the law already permits either the alienation of the obligation to rectify wrongs, in the case of insurance, or a means of resolving disputes that denies the wrongfulness of the defendant's actions, in the case of settlement. Thus, to conclude this Article, I would like to ask whether critics of ALF who rely on the anti-commodification argument are willing to carry it through to condemn insurance or settlement, or whether there is some distinction at the level of value theory between insurance, settlement, and ALF.

Although the duty to repair wrongs is agent-relative—that is, it applies only to wrongdoers—it can be discharged through insurance contracts.¹⁵⁷ The wrongdoer's moral agency connects him to the wrongful loss and makes it his responsibility, but that connection merely grounds a duty; it does not specify any particular personal or institutional means of complying with the duty.¹⁵⁸ Third-party liability insurance or a New Zealand-style accident compensation scheme is consistent with corrective justice, because the moral right to recover and the moral responsibility to compensate are unaffected by the presence of a private or public institutional mechanism to provide compensation.¹⁵⁹ The distinction between the grounds of a duty and the permissible means of discharging it parallels the distinction noted

156. Again, this reasoning applies only where one endorses a corrective justice theory of tort rights and remedies. One who adopts a welfare or efficient cost allocation perspective would be concerned only with considerations of social welfare or efficiency.

157. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 370 (1992).

158. COLEMAN, *supra* note 146, at 326–27.

159. *Id.* at 401–03. Similarly, Andrew Gold, in comments on Lynn Baker's paper, suggested that *claim* alienation may be compatible with civil recourse theory, but there may nevertheless

above, between conceptions of value and norms that express appropriate attitudes toward that value. We may take the agent-relativity of the duty to rectify wrongs as given, but also maintain that discharging that duty through the means of an insurance contract is an appropriate way of responding to the duty. The reason we regard payments by liability insurers to rectify losses as an appropriate way of respecting the essentially relational quality of the wrong done in a personal injury matter is that, regardless of the compensation mechanism, the judgment in a tort action acknowledges that the injurer has done wrong and that the victim's rights have been taken seriously. As Margaret Radin insists, "some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor's fault in failing to respect those rights."¹⁶⁰ The underlying judgment expresses the appropriate attitude toward the wrong, and the insurance mechanism serves to ensure that the victim's financial needs arising from the accident are met. This is a "noncommodified conception of compensation," according to Radin.¹⁶¹

This story may reconcile liability insurance with an expressivist and corrective justice account of the tort system, but it runs up against the difficulty that most tort actions settle without any institutional expression that the defendant has committed a wrong. Civil settlements, unlike most guilty pleas in criminal cases, do not acknowledge wrongdoing. Thus, they fail to express the recognition that a serious transgression of the victim's rights has occurred. If a court judgment paid by liability insurance is a partial commodification of the underlying injury, then a settlement paid by liability insurance is almost complete commodification. "Redress" . . . means showing the victim that her rights are taken seriously," and doing so requires an expression that manifests an attitude that the victim's right not to be harmed is not fungible with money.¹⁶² The trouble is, a settlement manifests precisely the attitude that the victim's rights are fungible with money. In exchange for a promise to make a monetary payment, the victim agrees to dismiss a lawsuit voluntarily with prejudice. Of course settlements occur in the shadow of the law, and clear cases of either liability or nonliability tend to settle.¹⁶³ But that does not mean a

be problems in the application of certain remedies. See Andrew S. Gold, *On Selling Civil Recourse*, 63 DEPAUL L. REV. 485 (2014).

160. RADIN, *CONTESTED COMMODITIES*, *supra* note 8, at 188.

161. *Id.* at 187–89.

162. *Id.* at 188.

163. See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

settlement reflects an expression by the defendant of acceptance of the seriousness of the violation of the plaintiff's rights; it means only that the defendant has made an economic decision that a sum of money paid in the present time is less valuable than the possibility of paying less in the future.

Therefore, it is inconsistent to hold the following three beliefs simultaneously:

- (1) Corrective justice is the right theoretical framework to use for understanding and explaining the normative foundation of tort law;
- (2) Liability insurance and settlements are a normatively acceptable feature of the tort system;
- (3) ALF is not a normatively acceptable feature of the tort system.

One of these three propositions must be given up. The most common response seems to be to abandon proposition (1) and to rely on a welfarist or economic foundation as the best way to understand and explain the tort system. Notice that one collateral effect of denying proposition (1) would be to make a commodification objection to ALF theoretically untenable. Economic explanations of any area of law seek to demonstrate that some rule, doctrine, or area of law maximizes the welfare of society, as compared with some alternative. If *X* is injured by the carelessness of *Y*, the economic analysis of law is concerned only with preventing future accidents that are not cost justified.¹⁶⁴ If permitting the free alienability of legal claims will increase overall social welfare in the future, then there are no resources within economic analysis to condemn ALF as “not sitting right;” rather, a consistent economist would have to dismiss that reaction as a kind of superstition, like getting the “heebie-jeebies” when thinking about funeral directors.

The most attractive response for a corrective justice theorist who wishes to maintain proposition (3) would be to distinguish existing features of the tort system from ALF. For example, Michelle Boardman seeks to draw a conceptual line between liability insurance and ALF, noting several ways in which the two practices differ¹⁶⁵: liability insurers are required by the policy to defend a claim, whereas litigation investment firms have the choice to invest in the claim or not;¹⁶⁶ third-party insurance contracts provide for indemnification as well as payment of the costs of defense;¹⁶⁷ the interests of litigation investors

164. See POSNER, *supra* note 15, § 2.2, at 27–28.

165. See Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012).

166. *Id.* at 681.

167. *Id.* at 682–83.

and plaintiffs may be misaligned to a greater extent than the interests of liability insurers and defendants;¹⁶⁸ and the defendant has a duty to cooperate with a liability insurer that a plaintiff does not have with respect to a litigation investor.¹⁶⁹ These distinctions may hold up to scrutiny or they may not,¹⁷⁰ but the important thing to notice for present purposes is that none of these distinctions bears at all on the question of whether liability insurance and ALF differ *with respect to their commodifying tendencies*.¹⁷¹ In fairness to Boardman, she is not one of the critics raising the anti-commodification argument against ALF, so her paper can hardly be faulted for not attempting to ground the insurance-versus-ALF distinction in value-theoretic considerations. It may be significant, however, that all of her arguments are variations on economic themes, citing agency costs, externalities, and the like. It is probably the case that it would be quite a tightrope act to differentiate ALF and liability insurance in terms of degrees of commodification.

V. CONCLUSION

This Article sought to demonstrate what would be involved in making a rigorous anti-commodification argument against ALF. It is easy to criticize “justice for sale,” but when one considers the pervasive use of economic measures to allocate the rights and duties among citizens in a free-market capitalist society, it is difficult to see how ALF is any worse than, say, permitting the recovery of noneconomic damages for emotional distress in a tort lawsuit. Moreover, the most plausible anti-commodification argument leads down roads that many theorists tend to avoid, such as neo-Aristotelian conceptions of value which rely on positing a final end for humans, or corrective justice accounts of the end of the tort system. It is highly ironic that groups such as the Chamber of Commerce, which ordinarily favor a lightly regulated marketplace, are making common cause with theorists like Michael Sandel and the Archbishop of Canterbury, who criticize our society for its shallow materialism, obsession with accumulation of wealth for

168. *Id.* at 684–86.

169. *Id.* at 687.

170. See Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617 (2014).

171. It would not have been difficult to point out that insurance purports to offer peace of mind in addition to protection against future financial catastrophe; consider the marketing campaigns of insurance companies, who promise they will be there “like a good neighbor” or that their insureds are “in good hands.” Jay M. Feinman, *The Insurance Relationship as Relational Contract and the “Fairly Debatable” Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 559 (2009).

its own sake, and adoption of a paper-thin conception of value that purports to represent the value of everything in terms of market price. One wonders whether the Chamber will follow through on its new-found principles and demand the removal of advertisements from public property or a ban on the practice of selling naming rights to sports stadiums. In any case, if the anti-commodification objection is anything other than smoke and mirrors, we can await a critique that engages with some of these foundational issues in the theory of value and that demonstrates the opposition to ALF is rooted in something other than economic self-interest.

