

11-20-2015

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Recommended Citation

Wendel, W. Bradley, "Litigation Trolls" (2015). *Cornell Law Faculty Working Papers*. Paper 121.
http://scholarship.law.cornell.edu/clsops_papers/121

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Litigation Trolls
W. Bradley Wendel¹

Today “trolldom”—the seeking of financial advantage by buying or otherwise obtaining a legal claim (as distinct from filing a legal claim in order to seek redress for injury)—thrives.

Carhart v. Carhart-Halaska Int’l, LLC, 788 F.3d 687, 691 (7th Cir. 2015) (Posner, J.).

I. Introduction.

The financing of the expenses of litigation by third parties – excluding the parties’ counsel, via a contingency-fee agreement; and defense provided by liability insurers – has been described with a variety of unflattering metaphors. Litigation financiers have been likened to gamblers in the courtroom casino,² loan sharks,³ vultures,⁴ Wild West outlaws,⁵ and busybodies mucking about in the private affairs of others.⁶ The practice of litigation financing is the new thing – after advertising, contingent fees, and multidisciplinary practices – that threatens to “degrade legal professionalism.”⁷ Now

¹ Professor of Law, Cornell Law School. The author serves as an outside legal advisor on legal ethics and professional responsibility issues to Bentham/IMF and Longford Capital.

² Gard [a Norwegian maritime risk insurer], *Insight: High Rollers in the Courtroom Casino – Champerty and the Rise of Litigation Finance* (May 28, 2014), available at <http://www.gard.no/ikbViewer/web/updates/content/20740525/high-rollers-in-the-courtroom-casino-champerty-and-the-rise-of-litigation-finance>; U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES* 4 (2009).

³ Douglas R. Richmond, *Litigation Funding: Investing, Lending, or Loan Sharking?*, 2005 PROF. LAW. 17 (2005); Daniel Brook, *Litigation by Loan Shark*, LEGAL AFFAIRS (Sept.-Oct. 2004), at 42. Predictably, someone stretched the metaphor by announcing that a “sharknado” had descended upon the state capital. See Travis Akin, *Beware of “Lawsuit Loan Sharks”*, BELLEVILLE NEWS-DEMOCRAT (March 8, 2015), available at <http://www.bnd.com/incoming/article17739563.html>. Is it too soon to declare that this comparison has jumped the shark?

⁴ Mark Kantor, *Third-Party Funding in International Arbitration: An Essay About New Developments*, 24 ICSID REV. 65, 66, (2009).

⁵ See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004).

⁶ Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE (Jun. 13, 2011), at 68 (“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.”).

⁷ Robert Weber, *IBM GC Says: Beware Of Lenders Offering To Finance Your Lawsuit*, FORBES (Feb. 12, 2013) (“I fear the end result of allowing third-party financing to flourish is a slow but steady shift away from the traditional understanding of law as a profession toward a conception of law as just another money-making venture”). The worry that the pursuit of profit will degrade the legal profession into a “mere” business is a perennial one. See, e.g., *Petition of Felmeister & Isaacs*, 518 A.2d 188, 193 (N.J. 1986) (“attorney advertising raises the understandable and realistic concern that the legal profession will degenerate into just another trade”). Justice O’Connor defended restrictions on lawyer advertising as a means of bolstering lawyer professionalism. See, e.g., *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 488 (1988) (O’Connor, J., dissenting) (“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 either through legal fiat or through the discipline of the market.”). See also MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT HAPPENED TO THE LEGAL PROFESSION?* (1997); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and*

comes Judge Richard Posner to lend his prominence and rhetorical razzle-dazzle to a new image, litigation trolls. The impact of the comparison is undeniable. Everybody hates patent trolls.⁸ They leech off a cooperative scheme designed to enhance social welfare, appropriating unjustified private rents. This rent-seeking behavior siphons off resources that could be put to productive use and produces no offsetting benefit, and thus constitutes a social deadweight loss.⁹ Moreover, patent trolls do not innovate, and fostering innovation is the *raison d'être* of the patent system.¹⁰ They therefore defile what should be a pure system of encouraging invention, sully it with their purely profit-motivated behavior.

When Judge Posner refers to purchasing all or part of a legal claim as trolling, one would therefore expect some kind of analysis showing what is wrong with a particular transaction. Legal claims are, after all, for the most part freely alienable. With the exception of the prohibition in most states on the assignment of highly “personal” claims such as those for bodily injury, defamation, fraud, and legal malpractice, choses in action are freely assignable.¹¹ (For example, defendants frequently assign insurance bad-faith claims to the plaintiff’s lawyer as part of the settlement of a personal-injury lawsuit.) Not only are most claims assignable, but the *proceeds* of most non-assignable claims, such as those for personal injury, are assignable.¹² They may be pledged as security for a loan, for example, under Article 9 of the U.C.C.¹³ A stream of payments under a structured settlement, even of a non-assignable personal-injury claim, can be assigned and even securitized.¹⁴ Following the principle of the assignability of the proceeds of a cause of action, a New York State court recently held that a law firm cannot avoid an obligation to make repayments under a revolving credit facility where the lender has a security interest in the firm’s accounts receivable, notwithstanding the prohibition on a lawyer sharing legal fees with a non-lawyer.¹⁵ Not only are legal claims assignable, but as long as the total amount of a fee is reasonable,¹⁶ lawyers are permitted to profit from litigation. Contingency fees give lawyers a personal interest, shared with their clients, in the subject matter of the litigation.¹⁷ Indeed, the albeit imperfect

Reputation of the Bar, 70 N.Y.U. L. REV. 1229 (1996) (“in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest”); Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988); Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 251 (1975) (“the primacy of service over profit is the criterion which distinguishes a profession from a business”).

⁸ See Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735 (2015) (“Everybody hates intellectual property trolls. They are parasites, who abuse intellectual property by forcing innovators to pay an unjust toll.”).

⁹ See Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2124-25 (2013) (reporting, but not necessarily endorsing this critique).

¹⁰ Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583, 1587-89 (2009).

¹¹ See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 74-82 (2011).

¹² *Id.* at 82-85.

¹³ UNIFORM COMMERCIAL CODE, Art. 9 § 9-102(a)(13)(B)(ii) (2000).

¹⁴ See Adam F. Scales, *Against Settlement Factoring*, 2002 WIS. L. REV. 859, 944-45.

¹⁵ *Hamilton Capital VII, LLC v. Khorrami, LLP*, 48 Misc.3d 1223(A), 2015 WL 4920281 (N.Y. Sup. Ct., Aug. 17, 2015). The fee-splitting rule is NEW YORK RULES OF PROF’L CONDUCT, Rule 5.4(a).

¹⁶ Reasonableness is a defined term in the law of lawyering. See ABA MODEL RULES OF PROF’L CONDUCT, Rule 1.5(a), and numerous cases applying the rule.

¹⁷ See, e.g., Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 509 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

alignment of interests created by contingency fees is a significant part of their justification.

Judge Posner was not really concerned with giving an explanation of the concept of litigation trolls. The case in question had bizarre facts, and went off on the principle that a purchaser of a claim was not a judgment creditor in good faith where the purchaser was, in effect, on both sides of a transaction and in a position to manipulate the price of the asset.¹⁸ One therefore wonders about the point of the gratuitous swipe at the buying and selling of legal claims. If Judge Posner disapproves of third-party litigation financing, is it too much to ask why? What makes buying a legal claim trolling and not simply acquiring a property interest that has long been recognized by law?¹⁹

Broadly speaking, a critique of a practice like patent trolling or third-party litigation financing can be instrumental or conceptual. An instrumental argument against patent trolls might be that, by aggregating a large number of patents and overwhelming an alleged infringer with lawsuits, trolls are able to force technology companies to pay royalties rather than challenging potentially invalid patents or denying infringement.²⁰ Sometimes one also encounters a different type of instrumental critique that patent trolls are doing something sneaky or underhanded, or exploiting or abusing the patent system.²¹ For example, the Supreme Court once said that Nineteenth Century patent trolling “embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.”²² That is a different type of instrumental critique – one that focuses on the violations of duties owed as a matter of the governing law of patents and the likelihood that the parties will be tempted to violate them by the prospect of economic rewards.

Conceptual critiques are more elusive.²³ This type of analysis does not have a particularly good reputation in the contemporary legal academy. The devastating attack on the reliance by judges on “transcendental nonsense” and a noumenal “heaven of legal concepts” still inspires caution in anyone tempted to put forth a claim that property, a contract, or a corporation is “*really* such-and-such,” in its essential form.²⁴ Nevertheless, the argument that third party financiers are litigation trolls is, at its root, an appeal to the essential features of the concept of a civil lawsuit. It may seem a bit quixotic to attribute a metaphysical thesis to the U.S. Chamber of Commerce’s Institute for Legal Reform, when the Chamber is primarily fighting a public relations battle, but as a scholar I cannot help but be puzzled by the claim that it is a necessary truth that

¹⁸ See *Carhart v. Carhart-Halaska Int’l, LLC*, 788 F.3d 687, 692 (7th Cir. 2015).

¹⁹ See, e.g. *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. 2012) (litigation funder acquires “ownership interest in proceeds for a claim” under New York law).

²⁰ See Lemley & Melamed, *supra* note ___, at 2153. As they do throughout their paper, Lemley and Melamed push back on this frequently voiced criticism of patent trolls. It is offered here only as an example of an instrumental argument that might be made.

²¹ See, e.g., Merges, *supra* note ___, at 1591.

²² *Atl. Works v. Brady*, 107 U.S. 192, 200 (1883) (quoted in Merges, *supra* note ___, at 1595).

²³ See, e.g., Brian H. Bix, *Raz, Authority, and Conceptual Analysis*, 50 AM. J. JURIS. 311 (2005).

²⁴ For the classic takedown of formalist legal reasoning, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

third parties cannot invest in lawsuits. The Chamber and other critics of third-party litigation financing want to argue that, in addition to the allegedly harmful impacts on the rate of non-meritorious litigation and the cost of defending lawsuits, allowing strangers to purchase legal claims is somehow a violation of the natural order of things.²⁵ If it were merely happenstance – a convention of Anglo-American procedure – that third-party investment in legal claims was unusual, and historically suspect, then it would be open to observe that many practices we now take for granted were once not only innovative but a bit radical. Life insurance, attorney contingent fees, and derivative contracts on exchange-traded commodities were all formerly regarded with extreme suspicion. Futures contracts, for example, were seen as no different from gambling, and life insurance was regarded as even worse – gambling on the possibility of death.²⁶ Contingent fees, similarly, were “thought to stir up unwanted litigation and involve unscrupulous lawyers in the nefarious business of brokering lawsuits.”²⁷ To forestall the argument that third-party litigation financing is simply another innovative form of investing, hedging risk, or accomplishing some other financial end, critics have to rely on the strong thesis that categories such as “gambling,” “insurance,” and “investment” are not conventional but somehow the meaning of these concept terms is fixed by the natural world. Otherwise litigation investment is likely to take its place alongside derivatives and contingent fees as another once-controversial but subsequently generally accepted financial product.

The argument in this paper will proceed by comparing, in Section II, the conceptual critique of litigation financing with two other areas in which it is claimed that some form of financing “just doesn’t sit right” in light of the nature and function of the legal system. The first is patent trolling. The second is private financing of campaigns for public office. Both comparison cases involve the same basic issue, i.e. whether commercial practice of investing is somehow anathema to the practice considered in terms of its end or function. Not to give away too many surprises, but most readers already know that the American legal system has permitted a significant amount of investment in patent claims and an almost untrammelled freedom for interested parties to donate to campaigns for political office.²⁸ The one limit on political campaign financing, recently recognized by the U.S. Supreme Court,²⁹ is the exception that proves the rule in an interesting way. In states that elect judges in contested, partisan elections, candidates for judicial office cannot personally solicit donations,

²⁵ See, e.g., Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL’Y 673 (2012).

²⁶ See MICHAEL SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 144-48 (2012) (describing slow path to acceptance for life insurance, as against the view that it manifested a ghoulish speculation in death); Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701 (1999) (recounting history of hostility toward contracts that were intended to be settled by means other than the delivery of goods); Robert Merkin, *Gambling By Insurance – A Study of the Life Insurance Act of 1774*, 9 ANGLO-AM. L. REV. 331 (1980).

²⁷ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4.1, at 52 (1986) (citing *Coon v. Landry*, 408 So. 2d 262 (La. 1981)). See also Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998).

²⁸ See *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010). On the subject of conceptual analysis, the first conceptual wrong turn in the regulation of campaign financing was arguably the Court’s equation of free speech with donating to an election campaign in *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁹ *Williams-Yulee v. Florida Bar*, 575 U.S. ____, 135 S.Ct. 1656 (2015).

although donors are permitted to give money to the judge's political campaign committee. Somehow privately funded political campaigns are "trolls" when the elected officials are judges, but instances of the exercise of First Amendment freedoms when all other elected officials are concerned. As Chief Justice Roberts explained, in an astonishingly question-begging passage, "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."³⁰ The question is, therefore, what the analogies to patent trolls and campaign contributions (judicial and non-judicial) tell us about the third-party financing of lawsuits. Section III takes up this question and concludes that there is no conceptual reason to regard third-party financing as somehow incompatible with the existing institutions and practices of the civil justice system.

II. Arenas of Trolling: Campaign Financing and Assignments of Patents.

A. When are Candidates in Contested Elections not "Politicians"?

The battle of analogies will begin with contributions to the campaigns of candidate for judicial office. The analogy goes like this: The foundational normative ideal of the role of judge is impartiality. A judge must decide cases based on "proper controlling factors" and not "some personal bias or improper consideration."³¹ This ideal is familiar from the ritual of Senate confirmation hearings, at which appointees declare that they will be like umpires calling balls and strikes, and Senators from the opposing party work themselves into a lather over evidence that the appointee will not be impartial.³² Into this pure practice of impartial adjudication intrudes the grubby reality that most state judges are selected in public elections.³³ Some judicial elections are partisan, meaning that candidates can identify themselves as part of the Republican, Democratic, or a third party ticket.³⁴ The Supreme Court has held that the First

³⁰ *Williams-Yulee*, 135 S. Ct. at 1662.

³¹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

³² As an illustration of the latter, consider the statement of Alabama Senator Jeff Sessions, the ranking Republican member of the Judiciary Committee, in response to President Obama's nomination of Sonia Sotomayor to the U.S. Supreme Court and his expressed hope that that she would bring her life experience and empathy to the Supreme Court:

"I will not vote for, and no senator should vote for, anyone who will not render justice impartially," Sessions said. "Call it empathy, call it prejudice or call it sympathy, but whatever it is, it's not law," he said. "In truth, it's more akin to politics, and politics has no place in the courtroom."

Robert Barnes, Amy Goldstein & Paul Kane, *In Senate Confirmation Hearings, Sotomayor Pledges "Fidelity to Law,"* WASH. POST (July 14, 2009).

³³ See *Williams-Yulee*, 135 S. Ct. at 1662 (noting that, in 39 states, trial or appellate judges are elected, and that in Florida, appellate judges are first appointed and then stand for retention elections every six years, while trial judges are popularly elected).

³⁴ See Lawrence M. Friedman, *Benchmarks: Judges On Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451 (2009). Even in states in which judicial elections are nominally nonpartisan, a great deal of partisan politics enters into the campaign. See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397 (2003).

Amendment permits candidates to state their opinion on contested political issues.³⁵ A candidate for judicial office may, for example, announce that she will be “tough on crime” or express her dismay with excessive litigation and its costs to businesses in the state. The result should surprise no one. Judicial elections have become expensive, dominated by organized interest groups, and often fought around highly salient political issues like the death penalty or same-sex marriage. In 2010 in Iowa, for example, nearly a million dollars in out-of-state money was spent on a campaign against retention of three justices on the Iowa Supreme Court who had voted along with a unanimous court to strike down the state Defense of Marriage Act.³⁶ The American Bar Association’s Code of Judicial Conduct tries to explain how it is that judges can be elected and yet respect the value of impartiality in adjudication: “Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case.”³⁷ If that were the case, however, what would be the point of raising money to target judges who vote the “wrong” way? Focus group studies show that many voters do not acknowledge a difference between the role of judges and non-judicial elected officials.³⁸ In a democracy, these voters may have a point, as the long debate over the countermajoritarian difficulty in constitutional law shows.³⁹ Judges make policy, and policy-makers should be accountable to the voters.⁴⁰

Yet the value of democratic accountability must contend with the government’s interest in “preserving public confidence in the integrity of the judiciary.”⁴¹ Not only is there a vital state interest in the fairness and integrity of the judicial system, but there is an equally compelling interest in safeguarding the public’s *confidence* in the system.⁴²

³⁵ *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (invalidating a provision of the Minnesota Code of Judicial Conduct that prohibited a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues”).

³⁶ See Roy A. Schotland, *Iowa’s 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 COURT REV. 118 (2010). A well known precedent for the Iowa election was the defeat of California Supreme Court Chief Justice Rose Bird and two other Justices in retention elections, motivated by their opposition to capital punishment. See Friedman, *supra* note ___, at 456. It is ironic, given the opposition to third-party litigation financing by the U.S. Chamber of Commerce and its Institution for Legal Reform, that the Chamber and allied tort-reform groups contributed heavily to a campaign in Illinois designed to seat a justice on the state supreme court who would be friendly to the Chamber’s anti-regulation and anti-litigation agenda. See Burt Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1229-31 (2008). The Chamber’s concern for keeping the justice system unsullied by money is apparently a case of sauce for the goose, but not for the gander.

³⁷ ABA CODE OF JUDICIAL CONDUCT, Rule 4.1, cmt. [1] (2010).

³⁸ Schotland, *supra* note ___, at 123. Courts sometimes agree. The Eleventh Circuit, for example, considering disciplinary charges brought against a judicial candidate, said that “the distinction between judicial elections and other types of elections has been greatly exaggerated.” *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002).

³⁹ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

⁴⁰ Friedman, *supra* note ___, at 452. Following out the principle of democratic accountability to its logical implication, interest groups in several states have distributed questionnaires to judicial candidates asking about their views on issues such as abortion, assisted suicide, human cloning, and same-sex marriage; theories of judging such as “strict constructionism” vs. “the living document approach”; and even “which former president best represents your political philosophy – Kennedy, Carter, Reagan, or Bush.” *Id.* at 464-65.

⁴¹ *Williams-Yulee*, 135 S. Ct. at 1666.

⁴² *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009).

This interest underlies the regulatory approach of the ABA Code of Judicial Conduct, which instructs judges not only to avoid impropriety but also the *appearance* of impropriety. The Florida judicial conduct rule at issue in *Williams-Yulee* prohibits judges from personally soliciting campaign funds.⁴³ Chief Justice Roberts, writing for the Court majority, cited his most illustrious predecessor as Chief Justice for the proposition that a judge must “observe the utmost fairness” and strive to be “perfectly and completely independent, with nothing to influence or control him but God and his conscience.”⁴⁴ He admitted that the majority of elected judges strive to be, and in fact mostly succeed in being fair and impartial. Empirical evidence is unclear on the effect of campaign donations on judicial decisions; even if judges decide in ways that favor their donors’ interests, this may not establish a causal connection, because donors may support judges with whom they feel ideologically compatible, and the judge’s ideology may determine the decision.⁴⁵ Nevertheless, Florida has a compelling state interest in avoiding the “regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity.”⁴⁶ This is the case even though judges may in fact obtain money from private donors, serve as treasurer of their political campaign committees, learn the identity of donors, and even write thank-you notes to donors.⁴⁷ Perhaps this does not rise to the level of underinclusiveness that undermine the state’s assertion of a compelling interest,⁴⁸ but it does seem like a strange approach to regulation. Florida is not seeking to ban campaign contributions in light of concerns about actual biased adjudication, but it will prohibit judges from asking for contributions, because the public might think judges are biased. Particularly in light of the noise and intensity of modern issue-driven judicial election campaigns, Florida’s approach seems a bit like trying to prevent forest fires by prohibiting television coverage of forest fires.

Justice Ginsburg’s concurring opinion better highlights the deep conceptual tension in the field of judicial elections and campaign finance. If they are different from other elected officials, it is because judges are not expected to be directly attentive to the concerns of their constituents.⁴⁹ Whatever one thinks of campaign finance decisions like *Citizens United* and *Buckley*, they do reflect a strong conception of democratic accountability. Voters and donors support candidates who are expected to be responsive to their beliefs and interests.⁵⁰ As Justice Ginsburg puts it, however, “when the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims.”⁵¹ If that distinction is blurred, the effect may be to reopen the normative issue that Chief Justice Roberts tried so hard to dodge – i.e. whether judges *ought* to behave more like politicians, in the sense of being responsive to the will of voters. Justice Scalia’s dissenting opinion makes exactly this point. “A Court that sees

⁴³ Florida Code of Judicial Conduct, Canon 7C(1) (cited in *Williams-Yulee*, 135 S. Ct. at 1663).

⁴⁴ *Williams-Yulee*, 135 S. Ct. at 1667 (citing Address of John Marshall, in PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, p. 616 (1830)).

⁴⁵ Friedman, *supra* note ___, at 469-71.

⁴⁶ *Williams-Yulee*, 135 S. Ct. at 1667.

⁴⁷ *Id.* at 1663.

⁴⁸ *Id.* at 1669-70.

⁴⁹ *Id.* at 1674 (Ginsburg, J., concurring).

⁵⁰ See *McCutcheon v. Federal Election Comm’n*, 572 U.S. ____ (2014).

⁵¹ *Williams-Yulee*, 135 S. Ct. at 1674 (Ginsburg, J., concurring).

impropriety in a candidate's request for *any* contribution to his election campaign does not much like judicial section by the people.”⁵² Justices Ginsburg and Scalia both recognize that there are certain features that make judges a particular type of public official, distinct from others. If interested individuals and groups can donate to judicial election campaigns in the hopes of electing judges who agree with their positions on contested policy issues, then judges are no different from legislators. The only difference is that Justice Ginsburg would prefer not to see this distinction eroded, while Justice Scalia rather gleefully imagines a judiciary shaken out of its self-image of “oracular sanctity,”⁵³ and brought down from its perch of “great remove from the (ugh!) People.”⁵⁴

The important thing about *Williams-Yulee* for the issue of third-party litigation financing is the pattern of analysis used by all the Justices. Although on its face a First Amendment case, *Williams-Yulee* is also about the nature of the judicial role and its essential features that distinguish it from other roles. Motivating the Florida rules of conduct for judicial candidates is a concern that, as Justice Ginsburg puts it, allowing too much of the apparatus of political campaign financing to intrude into the field of judicial elections might have the effect of turning judges into politicians in a bad sense. (Justice Scalia seems to want them to be politicians in a good sense.) The danger here is not instrumental or pragmatic, but conceptual. It is that there will no longer be a distinction between judges and politicians, just as one might say tablet computers have blurred the distinction between laptops and smartphones. The question to be taken up in Section II.C is whether this conceptual boundary-blurring is a bad thing and, if so, what can be done about it.

B. When are Non-Practicing Entities Trolls?

The “troll” label originated to describe individuals or entities other than inventors who assert patent claims. The threat of an infringement action can be used leverage in the negotiation over patent licensing, between the patent owner and the firm manufacturing a product incorporating the patented technology. Patents are, of course, a form of property, and one of the hallmarks of property is that it is freely alienable. A market therefore exists in patent rights, which can be sold, acquired, and licensed. Some patent owners engage in manufacturing products based on an invention (i.e. “practicing” a patent); others only in licensing. Universities, for example, may develop technology that they do not intend to commercialize directly, although they would be willing to license it to others who will manufacture and sell products based on the technology.⁵⁵ Other firms formerly practiced the patents they owned, but due to technological changes have been transformed into non-practicing entities, licensing the technology to other manufacturers. Eastman Kodak and Texas Instruments are perhaps the best known firms that have found themselves in this situation. Some non-practicing entities – patent aggregators – go around acquiring portfolios of patents, seeking to license them to other firms who will manufacture products using the patented

⁵² *Id.*, 135 S. Ct. at 1681 (Scalia, J., dissenting).

⁵³ *Id.* at 1681.

⁵⁴ *Id.* at 1682.

⁵⁵ See Mark A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611 (2008).

invention. As in many markets, there may be middlemen or brokers, who in this case match manufacturing firms with patent owners so that the technology can be licensed. Middlemen, of which patent aggregators are arguably an example, reduce information costs and contribute to the efficiency of the market for patent rights. Given this admittedly simplified description of the market, what justifies the conclusion that a non-practicing patent owner is engaged in troll-like behavior?

Robert Merges argues that trolling is the assertion of a patent right where the resulting exchange creates no social welfare gain.⁵⁶ The resolution of an infringement action, or a bargain in the shadow of the law of patent infringement, may seem like a Pareto-optimal exchange. Acquiring patents is costly, and so the patent owner requires a royalty greater than the acquisition cost; on the other side of the transaction, the licensee presumably would not have agreed to pay royalties if it did not believe it possible to make money by selling products incorporating the patented technology. In this transaction, the patent owner gets paid, the licensee practices the technology, and everyone is better off – right? Wrong, says Merges. Patent trolls are like blackmailers, who offer to keep information secret in exchange for payment. The target of the blackmail attempt can be said to be better off making the payment – presumably secrecy is worth more to the target than the amount paid – yet blackmail is a crime. Blackmail is a significant puzzle in the theory of criminal law,⁵⁷ but Merges largely brushes the puzzling aspects of blackmail aside by asserting that some transactions are wrong because they are socially wasteful. The obvious rejoinder is that if a transaction is Pareto-efficient, it is by definition not wasteful. To which Merges responds by quoting Ronald Coase’s analysis of blackmail:

The blackmailer's actions generate fear and anxiety – blackmailing involves more than the employment of resources which leave the value of production unchanged – it causes real harm which reduces the value of production . . . The victim, once he succumbs to the blackmailer, remains in his grip for an indefinite period. It is moral murder . . . [I]t is only certain threats in certain situations which cause harm on balance and in which the harm is sufficiently great as to make it desirable that those making them should be prosecuted and punished.⁵⁸

The “moral murder” label shows that there is a lot more going on with blackmail than merely a social deadweight loss. Blackmail is the wrong *kind* of transaction.⁵⁹ It departs from the paradigm of a purely voluntary exchange by interfering with the target’s deliberation for impermissible reasons.⁶⁰

⁵⁶ Merges, *supra* note ___, at 1601.

⁵⁷ See, e.g., James R. Shaw, *The Morality of Blackmail*, 40 PHIL. & PUB. AFF. 165 (2012); Mitchell Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); Leo Katz, *Blackmail and Other Forms of Arm-twisting*, 141 U. PA. L. REV. 1567 (1993); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43 (1992).

⁵⁸ Merges, *supra* note ___, at 1600-01 (*quoting* Ronald H. Coase, The 1987 McCorkle Lecture: Blackmail, 74 VA. L. REV. 655, 675-676 (1988)).

⁵⁹ *Id.* at 1601 (“Blackmail is part of a broader pattern in which the legal system sorts out which voluntary transactions ought to be enforced.”).

⁶⁰ Berman, *supra* note ___, at 831-32.

Trolling, then, would be an assertion of an infringement claim for the wrong reasons. Legitimate inventors and middlemen contribute to the overall goal of the patent system, which is innovation; patent trolls, by contrast, are engaging in rent-seeking, obtaining a private benefit without any corresponding public benefit related to innovation. The dividing line between trolls and non-trolls, whether universities, patent aggregators, or other non-practicing entities, is highly contextual and requires judgment to locate: “Trolling . . . is a matter of behavior rather than status. One can act as a troll, but it will usually not be true that one simply is a troll. The ‘troll line,’ in other words, must be policed case-by-case and fact-by-fact.”⁶¹ It has proven difficult to give general theoretical criteria for the location of the “troll line.” Mark Lemley and A. Douglas Melamed have made an admirable attempt, describing in detail numerous business models that might be regarded as trolling, but in most cases noting where there may be a legitimate, innovation-related justification for the activity.⁶² For example, royalty payments to non-practicing entities are economically indistinguishable from cross-licensing arrangements entered into by competing practicing entities; the only difference is that monetizing a firm’s intellectual property portfolio may actually increase its value.⁶³ Critics of patent trolls have an intuitive sense that trolling involves rent-seeking and does not contribute to innovation, but in practice this distinction can be hard to apply. However, the general approach of contrasting private and public purposes may be a promising way to get at the “wrong sorts of reasons” critique of trolls.

C. Blurred Lines.

If one believes that a feature of an institution or role, such as allowing personal solicitation by judges of campaign contributions by judicial candidates or the assertion of patent claims by non-inventors or non-practicing entities, creates a danger of fundamentally transforming the institution or role, there are at least four possible positions one can take:

1. Accept that the danger exists – e.g., that too much of the apparatus of campaign financing can turn judges into politicians – but believe that sensible, tailored regulations can mitigate the risk. This is, in effect, the position of the Florida Code of Judicial Conduct and the approving opinion of Chief Justice Roberts in *Williams-Yulee*. In the context of patent trolling, pending House and Senate bills attempt to reduce the costs of undesirable patent lawsuits (however they are defined) using familiar litigation-reform mechanisms such as heightened pleading standards, fee-shifting, and limitations on discovery.⁶⁴
2. Deny that the danger exists, because either the role is robust enough to resist erosion by the addition of some new feature, or the new feature is marginal to the essential functions of the role. For example, at one point in his dissent in

⁶¹ Merges, *supra* note ___, at 1611.

⁶² Lemley & Melamed, *supra* note ___.

⁶³ *Id.* at 2134-37.

⁶⁴ See, e.g., Ryan Davis, *4 Differences In The House And Senate Patent Troll Bills*, LAW 360 (Apr. 30, 2015), available at <http://www.law360.com/articles/650207/4-differences-in-the-house-and-senate-patent-troll-bills>.

Williams-Yulee, Justice Scalia notes that, for most of our history, judicial elections have coexisted with personal solicitations by judges of campaign contributions.⁶⁵ This is meant to show that judges are not corrupted into politicians merely by asking for contributions. Some prominent patent scholars, including Mark Lemley, have argued that the dangers associated with patent trolling are greatly exaggerated, except in limited circumstances.

3. Deny that the predicted outcome is actually a danger. As Justice Scalia seems to be saying in *Williams-Yulee*, if judges do become politicians, it would be a cause for celebration. Similarly, some observers of the patent scene of asserted that non-practicing entities perform a valuable function as middlemen or clearinghouses that reduce the transaction costs of licensing and marketing patented technology.⁶⁶ In Lee Drucker's contribution to this symposium, he asserts that a lawsuit simply *is* a financial asset. The boundaries between the two have blurred, but the result should not be consternation but acceptance.
4. Believe the danger is so great that it cannot be avoided by reasonable regulation, and thus the practice ought to be banned altogether. This is the strongest critique of patent trolls, illustrated by Robert Merges's contention that trolling is akin to blackmail. In the context of judicial campaigns, one might argue that judicial elections ought to be abolished altogether and replaced with a pure appointment system.

In the context of litigation financing, the Chamber's argument is a version of #4. It does not concede that any danger associated with third-party financing, such as increasing rates of meritless litigation or interfering with the attorney-client relationship, can be addressed by reasonable regulation. Nor does it consider the possibility that the institutions and procedures of the civil justice system may be sufficiently robust to withstand whatever pressures are created by third-party financing. Rather, its argument is that, by introducing commercial motivations into what should be a purely justice-motivated domain, third-party financing distorts or defiles the institution in a way that cannot be counteracted by regulation. That is the sense in which it is a conceptual argument, and an appeal to the idea of trolling. As Section III will contend, however, the Chamber relies upon an ideal of litigation as a pure domain of justice that is unrecognizable as a description of actually existing practices.

III. Who Wins the Battle of Analogies?

The conceptual arguments against judicial campaign finance and assertions of patent claims by non-practicing entities may be seen as variations on familiar anti-commodification arguments.⁶⁷ Commodification is the introduction of market modes of

⁶⁵ *Id.* at 1678.

⁶⁶ See, e.g., Lemley & Melamed, *supra* note ____.

⁶⁷ See W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 62 DEPAUL LAW REVIEW 655 (2014).

valuation into practices that, by their nature, ought to be valued in different ways.⁶⁸ For example, one might criticize prostitution as valuing sexual relations under a description (something that can be exchanged for money) that mis-describes the way in which people ought to value sex – i.e. as a way of sharing joy and expressing intimacy – as part of a wider view about what is involved in human flourishing. The “ought” here is contestable, but should not scare us off. Normative arguments frequently presuppose an end that makes a practice intelligible, and values are simply those reasons that explain an action in terms of the ends of a practice. Some practices, like banking and finance, have purely commercial ends. Other practices, such as work for many people, have a plurality of ends; we may work because the job is intrinsically satisfying, but also in order to earn money to purchase other things. Unlike having sex in exchange for money, valuing one’s job as a means of earning a living is not necessarily a distortion of the value of work. With respect to some occupations, however, it may be a mis-description of the value of that calling to pursue it exclusively or even primarily for money. The traditional professions of medicine, law, and the clergy, and newer professions such as engineering, architecture, and business, are often thought to involve sources of intrinsic meaning that to some extent displace commercial motives for practitioners.⁶⁹ That ideal strikes many modern lawyers as anachronistic and sentimental; they are squeezed financially from both sides, by burdensome student loan payments and a fiercely competitive market for legal services, and do not have the luxury of caring about their work only for its intrinsic rewards. Still, the ideal is not mysterious, even if it is elusive. Professional occupations can offer meaning and satisfaction along with a decent paycheck, in a way that is difficult to imagine in connection with jobs like working on an assembly line or in the checkout line at Wal-Mart.

Conclusions about how one ought to value something are reached by reflection on the nature and purpose of that thing. This sounds a bit woolly, but in fact it is perfectly ordinary. For example, critics of patent trolls begin with an express or tacit premise that the patent system has as its end the encouragement of innovation. Buying up a bunch of patent claims and holding out for an exorbitant licensing fee is antithetical to this end. It is buying and selling patents for the wrong reasons. Similarly, the Florida judicial conduct rule at issue in *Williams-Yulee*, and the approving opinion of Chief Justice Roberts, is motivated by the belief that judging aims at an end that is distinctive from politics. (Justice Scalia, like many critics of judicial review, seeks to collapse or at least reduce the distance between the practices of judging and politics.) The question to which this essay has been leading up is, therefore, what is the nature and purpose of civil litigation?

Judges have had something to say about this question when confronted with practices such as the assignment of causes of action. Most civil claims, of course, are freely alienable, but a narrow category of particularly personal claims are covered by anti-assignment rules. Causes of action for professional malpractice, for example, are

⁶⁸ See, e.g., SANDEL, *supra* note ___; ROBERT SKIDELSKY & EDWARD SKIDELSKY, *HOW MUCH IS ENOUGH? MONEY AND THE GOOD LIFE* (2012); MARGARET J. RADIN, *CONTESTED COMMODITIES* (1996); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

⁶⁹ See, e.g., MIKE W. MARTIN, *MEANINGFUL WORK: RETHINKING PROFESSIONAL ETHICS* (2000).

not assignable in many states. A California court explained the reason for this prohibition:

The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights . . . The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system . . .⁷⁰

This passage reveals both instrumental and conceptual analysis of the practice of claim assignment. The instrumental argument – common in criticisms of third-party litigation financing – is that allowing assignments would encourage unjustified lawsuits and lead to complicated and burdensome litigation. It is unexplained why anyone would purchase a non-meritorious and therefore valueless lawsuit; that would make no more sense than buying a car that does not run or a parcel of Florida swamp land. The point, however, is to differentiate that argument *formally* from the other critique in the passage. Assignment of malpractice claims tends to commodify them. Why? Because the purchaser is a stranger to the claim – he or she is someone with whom the attorney has never had a professional relationship and therefore to whom the attorney has never owed a duty.

The label of trolling signifies buying and selling something for the wrong reasons. The discussion of the anti-assignment rule suggests that third parties always have the wrong reasons when they involve themselves in lawsuits to which they were strangers *ex ante*. This argument proves too much, however. Only some highly personal claims are subject to the anti-assignment rule; most claims are freely alienable. Breach of contract and patent infringement claims, for example, are readily assignable. On one view of litigation financing, the free alienability of claims allows them to be aggregated and pursued more efficiently by claimholders who have broken the expensive monopsony of client representation by lawyers pursuant to contingent fee agreements.⁷¹ There is nevertheless a core claim within anti-trolling rhetoric that has some plausibility; interestingly, this claim overlaps with some of the reasons the Court was uncomfortable with private funding of judicial campaigns in *Williams-Yulee*. The core objection to all of these practices is that they threaten to erode the public realm.⁷² A cause of action may be alienable, but it is not a purely private good. Society as a whole benefits from the resolution of disputes with reference to public values, and the articulation of reasons by

⁷⁰ *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976) (quoted in Sebok, *supra* note ___, at 68).

⁷¹ Scales, *supra* note ___, at 950-51.

⁷² See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

judges that provide public resources for understanding, critiquing, and reforming the law. The reason for the discomfort with privately financed judicial election campaigns is that, as the Court said, judges are not exactly politicians, in the sense that they do not simply and straightforwardly represent the interests of constituents. Rather, they have obligations to the law that differ from those of legislators and executive officials. Similarly, we criticize patent trolls for abusing a system that is intended at least in part to produce the public good of innovative and beneficial new technologies. An actor within the civil justice system might likewise be called a litigation troll if its private interests predominate over what should be the public end of the system.

The trouble with this argument, as the dated cite to Owen Fiss's *Against Settlement* article suggests, is that this ship has long since sailed. Alternative dispute resolution advocates largely won the day against Fiss and others who sought to preserve litigation as an essentially public good. Courts now routinely order parties to mediate claims and, of course, enforce most arbitration clauses in contracts between businesses and consumers. As Thomas Coyle's contribution to this symposium shows, the judicial enforcement of anti-aggregation clauses in contracts erects almost insuperable barriers to vindicating legal rights where the economic value of an individual party's claim is insufficient to make a lawsuit worthwhile. Whatever public value would be lost by enforcing arbitration and anti-aggregation provisions is thought to be compensated by speedier, less expensive resolution of disputes. Other practices, such as the widespread use of unpublished decisions by appellate courts, have eroded the public's access to law. Society appears to be able to tolerate significant incursions of private processes into the litigation system without thereby concluding that its essentially public nature has been compromised. Litigation financing is, if anything, a change of much lesser magnitude than the widespread use of ADR. The number of cases funded is miniscule in proportion to the total number of civil lawsuit filings. More importantly with respect to the conceptual argument, litigation financing does not change the underlying relationships between the opposing parties and their counsel. Litigation funding agreements prohibit funders from exercising control over the conduct of litigation, including the selection of counsel, strategic decision-making and, most importantly, the settlement of claims. Funders are true strangers to the underlying litigation, and while that distance may sometimes prompt an evaluation like Posner's, it is what actually prevents funders from being litigation trolls.

The "wrong sorts of reasons" critique is much less sweeping than its proponents would have us believe. To a significant extent, litigation has been privatized, and strangers to the underlying dispute, including liability insurers and plaintiffs' contingency lawyers, are permitted to own a share of one side of the lawsuit and even profit from it. It is certainly conceivable that a much narrower, carefully tailored version of the critique may have some bite. For example, in comments at the symposium, Stephen Gillers suggested that litigation financing must make the plaintiff better off in some material respect, and that the client cannot merely be a notional presence or a necessarily but inconvenient vehicle for the lawyer and the funder to make a lot of money. This test may be vague and unenforceable as a legal standard, but it does capture something that seems disquieting to observers of third-party litigation financing. In a similar vein, I have insisted that a litigation financing relationship not

interfere unduly with the independent professional judgment of the lawyer representing the plaintiff.⁷³ Lawyers sometimes play the valuable role of introducing beneficial inefficiencies into a market – functioning as grit, rather than grease.⁷⁴ If they understand their clients’ claims only from a financial point of view, as assets with value that can be carved up and alienated in various ways, lawyers are missing an essential aspect of their ethical obligations. But the response to this risk should not be to introduce overbroad and heavy-handed regulation. There are all sorts of risks to lawyers’ independent professional judgment. Hourly and contingent fees both potentially misalign the interests of lawyers and clients,⁷⁵ and yet the regulation of attorneys’ fees is remarkably deferential to the profession.⁷⁶ Similarly, lawyers’ advice to clients concerning settlement is rife with agency problems,⁷⁷ yet there is virtually no regulation of this area of professional practice, save for a few malpractice cases arising out of grossly incompetent advice.⁷⁸ The reason is that we still have some faith in lawyers’ respect for their ethical obligations. Indeed, the U.S. Supreme Court refused to use the term “ethical dilemma” to refer to a settlement offer conditioned upon an agreement by the plaintiff’s lawyer to waive a statutory entitlement to seek attorney’s fees:

[A] lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. Accordingly, it is argued that a lawyer is required to evaluate a settlement offer on the basis of his client’s interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client’s decision whether or not to accept the offer.⁷⁹

As long as this trust is not misplaced, there is no reason to overreact to the perceived risks of investing in lawsuits for the wrong sorts of reasons.

IV. Conclusion.

All litigation is financed; the only question is how, and by whom. Innumerable lawsuits involve funding by liability insurers and plaintiffs’ counsel, who have their own interests for investing their capital in litigation. As a matter of professional ethics, lawyers are simply expected to deal with the crosscutting personal, financial, and

⁷³ See Wendel, *supra* note ____.

⁷⁴ See Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper’s Guide to the Psychology, Culture, and Ethics of Financial Risk-Taking*, 96 CORNELL L. REV. 1209 (2011).

⁷⁵ See, e.g., Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

⁷⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34, cmt. c (2000) (stating three factors for evaluating the reasonableness of attorney’s fee, and noting that as long as the client had a free and informed choice and there was no subsequent change in circumstances, the most important factor is whether the fee falls “within the range commonly charged by other lawyers in similar representations”).

⁷⁷ See, e.g., Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

⁷⁸ See, e.g., *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992); *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986).

⁷⁹ *Evans v. Jeff D.*, 475 U.S. 717 (1986).

professional incentives that affect the representation of clients. There is accordingly a high burden of persuasion on the claim that third-party financing is conceptually different from practices with which we have long since made peace. This is not to deny the risk. The analogies reviewed here, of patent trolling and the thin line between judges and politicians, are meant to show that it can be important to attend to the reasons for which an actor engages in a practice. From where I sit, as a legal ethics scholar and an occasional advisor to funders and law firms, the existing structure of regulation – of both lawyers and the funding contract itself – appears to be more than adequate to mitigate these risks.⁸⁰ If the risks can be managed, there is no more justification in calling third-party funders “trolls” than in prohibiting life insurance because it involves speculation on death. Some practices seem a bit strange when first introduced, but eventually become normalized. As litigation financing becomes more familiar, the focus of discussion should shift from whether it should exist at all to whether risks to clients or lawyers remain, and how those risks should best be addressed.

⁸⁰ See Wendel, *supra* note ___; see also Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013).