PRIVATE THIRD-PARTY LITIGATION

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"[D]amages . . . must be paid to the victim . . . as otherwise the victim will have no incentive to sue, and that incentive is essential to the maintenance of the tort system as an effective, credible deterrent to negligence."

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 223 (9th ed., 2014)

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INTRODUCTION

The law generally provides the victim (or the injured) and only the victim the right to sue and collect damages. The "case-or-controversy" requirement embodies this principle which equates plaintiffs with victims, namely with people whose interests were set back by others in wrongful ways. The view that *only* the victim has a right to sue is also dominant among legal theorists, including advocates of both corrective justice and law and economics.[1] Surprisingly, however, the law is much more generous in identifying potential defendants. The concept of wrongfulness or fault is a flexible policy-oriented concept and a defendant is commonly identified as being liable simply because she is the 'cheapest cost avoider' or because she can insure herself or because she has deep pockets or for other policy-related reasons.

This paper questions the axiomatic equation of victims with plaintiffs. Particularly, it argues that precisely as the identity of the defendant ought to rest upon policy concerns, such as who the cheapest cost avoider is, so the identity of the plaintiff should rest upon who is more likely to be incentivized by the prospects of compensation. Thus, we coin a term which is analogous to the 'cheapest cost avoider' to identify who the best plaintiff is: *the cheapest compensation seeker*. The cheapest compensation seeker is the individual or entity who has better access to the legal system and is inclined to sue even when the expected compensation is low. In many situations victims fail to sue either because they lack relevant information or prefer (for self-interested reasons) to avoid suing wrongdoers. In such cases, failure to extend the right to sue to third parties results in under-deterrence. Precisely as efficiency is served by expanding the scope of defendants, so it can be served by expanding the scope of plaintiffs.

The proposal to extend the right to sue to third parties cuts across legal fields and opens up numerous opportunities for enforcement of legal rights. Victims of child abuse, for example, are often children whose formal guardians are underperforming, failing to stand up for the rights of the abused. In other settings, victims lack the necessary information for mounting

[1] The former emphasize the "nexus between plaintiff and defendant" resulting from the unjust loss of the victim. Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law,* 2 LAW & PHIL. 37, 38 (1983). The latter typically emphasize the better opportunity the victim has to provide relevant information. *See e.g.,* Steven Shavell, *The Optimal Structure of Law Enforcement,* 36 JOURNAL OF LAW AND ECONOMICS 255, 273 (1993) (explaining that "victims of tortious harm will usually know the identity of injurers.").

claims. Medical malpractice situations provide a salient example. In still other cases, victims are well-informed but they are reluctant to sue in order to conceal their own negligence, or because suing may cause them more harm than good. Consider employees who refrain from taking their employers to courts due to fears of retaliation by the latter or because going to court would harm the employee's reputation in the job market. Alternatively consider cases of wrongful birth in which in order to be awarded compensation, the mother has to testify that she would have aborted had she known the genetic impairments of her child.

Third parties can mitigate chronic under-enforcement problems. Doctors, therapists, psychologists and teachers can be motivated, through financial incentives, to stand up for the rights of abused children. Nurses and other medical staff will often find it easier than the victim to bring a medical malpractice case. Third parties who regularly collect data, from owners of smartphones and fixed street cameras to internet service providers, possess the required information to handle many wrongs. Fellow employees and competing firms can challenge the behavior of employers.

Accordingly, instead of automatically privileging the victim, we propose a regime under which third parties could mount legal claims. Under the cheapest compensation seeker rule, the plaintiff need not be the victim; she can be a bystander or another person who has better knowledge or stronger incentives to sue. In essence, we add the tool of third-party enforcement to the usual distinction between private enforcement—only through victims—and public enforcement, most notably, through criminal proceedings. We suggest how these third-party actions would actually look like, discuss their limitations and address possible concerns. In a nutshell, our proposal relies on financial incentives for well-positioned third parties who file a lawsuit, while simultaneously integrating the actual victim in the process. We also show that alternative avenues for augmenting the threat of litigation and deter wrongdoing—such as a market for legal claims, punitive damages, class actions, and cash for information regimes—do not address the problems that the cheapest compensation seeker rule solves.

It may seem that this proposal is revolutionary as it deviates from current deeply-entrenched doctrines—which are not only an integral part of tort law but are also required by constitutional principles. Arguably, it is unclear why the requirements of standing need to be revised given the long-established legal tradition, which insist on "injury in fact" as a necessary component required for standing.

We believe that this view is overdrawn and misleading for two reasons: First, existing law already contains important exceptions to the rule privileging the victim. These exceptions have been designed to address

specific problems of under-enforcement. Our proposal can be regarded as extending these exceptions and developing a more general framework for addressing problems of under-enforcement. Second, our proposal is timely given recent doctrinal and technological changes. Recent doctrinal changes impose much greater hurdles on plaintiffs than existed before. Technological changes increasingly make it difficult and costly for victims to acquire information to substantiate their claims, and simultaneously provide greater opportunities than ever for third parties to acquire such information.

Consider first the perception that only those who suffer harm can sue. As we show below, existing law already contains exceptions to the rule privileging victims. Among these exceptions are rules, such as parens patriae and qui tam litigation, that allow individuals as well as the government to sue (and collect compensation) for harms suffered by others.

Second, the proposal is timely given recent doctrinal changes which imposed new restrictions on plaintiffs. A decade ago the Supreme Court reversed a fifty-year precedent, requiring plaintiffs to meet a higher standard of pleading to survive a dismissal and proceed to discovery.[2] The new precedents were motivated by the desire to screen out unmeritorious cases.[3] However, the heightened pleading standards made access to courts more difficult for plaintiffs. This doctrinal move has roused vigorous responses. In particular, it was argued, the heightened pleading requirements harm victims where the information necessary to bring a lawsuit resides with the defendant[4]—as is common, for instance, in medical malpractice and employment contexts.[5] The pleading-standards decisions are but one example of a general trend that raises obstacles to plaintiffs, especially uninformed ones. In 2015 the Federal Rules of Civil Procedure were amended in order to curb the right to conduct discovery.[6] Dozens of scholars lamented the "anti-plaintiff" approach that these amendments reflect.[7] Beyond these procedural

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[2] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[3] *Twombly*, 550 U.S. at 559.

[4] The literature attacking the new standards is too voluminous to be mentioned here. *See e.g.*, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 105 (2010) (arguing that "inequality of information access… poses a significant—if not the most significant—problem for many people seeking affirmative relief").

[5] For medical malpractice claims, see, *e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 550 (1997). For employment discrimination claims see, *e.g.*, William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 714 (2016).

[6] *See* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).

[7] *Id.*, at 1112. During the rulemaking process, 171 law professors, led by Janet

changes, plaintiffs have been suffering from other barriers, such as difficulties in proving causes of action, rising legal costs, and the inherent economies of scale that defendants, typically repeat players, possess.[8] No wonder, then, that other commentators concluded that "individual plaintiffs are becoming an endangered species in many litigation contexts."[9] Empirical studies corroborate this observation, showing that plaintiffs are increasingly unable or unwilling to sue. In response, theorists have suggested various mechanisms designed to revitalize civil suits.[10] Yet, despite their ingenuity, all these proposals rest on the premise that only victims have standing. The exclusive attention given to the victims obscures other venues for reform. Where a plaintiff ceases to be an effective "plaintiff," a change of paradigm is warranted.

Technological changes also call for rethinking the narrow scope of standing for two reasons. Due to the increasing complexity of modern life it is often difficult, if not impossible, for victims to acquire the knowledge necessary to file a suit.[11] Further, victims in a variety of contexts are unaware of wrongs committed against them. Hence, limiting standing to victims inevitably results in under-deterrence. At the same time, technology provides opportunities for third parties to detect harms and to store relevant evidence. Expanding the scope of compensation seekers is a natural legal response to the Information Age, where an infinite amount of data is collected by third

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Alexander, Judith Resnik and Stephen C. Yeazell, "urge[d] th[e] Committee [on Rules of Practice and Procedure] to reject the proposed amendments to the Federal Rules of Civil Procedure that would limit the scope of discovery." LETTER OF 171 LAW PROFESSORS URGING REJECTION OF CHANGING FEDERAL RULES TO LIMIT DISCOVERY AND ELIMINATE FORMS (2014), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_171_law_professors_urging_rejection_of_changing_federal_rules_2.18.14.pdf.

[8] *See generally* Stein & Parchomovsky, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. *8-16 (forthcoming 2017).

[9] *Id.*, at 42.

[10] Some criticize the heightened pleading standards and advocate the previous, permissive standards. *See* Miller, *supra* note 4. Others call for wider and earlier discovery. *E.g.*, JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 6 (n.d.), *available at* http://www.uscourts.gov/file/reporttothechiefjusticepdf. Still others promote more general proposals that aim at "empowering" plaintiffs in various ways—from a more liberal substantive law to simpler procedures and augmented damages. *E.g.*, Stein & Parchomovsky, *supra* note 8, at *30-42.

[11] *E.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1043 n.52 (1990) ("traditional doctrine (regarding the burden of proof in particular) demands too much of the victims of many modern technological risks.").

parties. Standing to third parties is thus more likely than ever to remedy the defects resulting from the ignorance of victims. For both doctrinal and technological reasons, the traditional rules limiting standing to victims no longer serve contemporary needs and should be revised.

The paper proceeds as follows. To establish the case for the cheapest compensation seeker principle, Part I identifies exceptions to the current rule limiting standing only to victims. Part II elaborates on two types of cases justifying providing third parties with the right to bring a lawsuit—where victims are unable and where victims are unwilling to sue. Part III compares the cheapest-compensation-seeker proposal to alternative mechanisms that tackle under-enforcement, such as punitive damages and class actions. Part IV addresses possible limitations to our proposal. Part V concludes by explaining the asymmetry between the ways in which we think about plaintiffs and defendants in tort cases. We further show that our proposal does not only promote the goals of tort law but is consistent with the ways in which it has evolved.

I. THE RIGHT TO SUE: A DESCRIPTIVE ACCOUNT OF EXISTING MECHANISMS FOR THIRD PARTY LITIGATION

The legal regime governing the right to file lawsuits generally forbids third-party litigation—litigants cannot vindicate other peoples' rights. This regime is rooted in constitutional principles, i.e., the requirement that litigants must have standing to sue. It is also firmly entrenched in tort law doctrine. As this Part shows, however, the ban on third party litigation has several exceptions. Courts as well as legislatures have relaxed standing requirements in response to under-enforcement concerns, namely, in circumstances in which victims are unlikely to sue wrongdoers. Section A describes litigants' power to claim redress on behalf of other individuals. Section B describes third-party litigation that benefits governmental entities.

A. Third Party Litigation in Individuals' Disputes

Article III of the Constitution extends the power of courts to "cases" and "controversies."[12] Although Article III does not define these terms, the Court over the years has "established … the irreducible constitutional minimum of standing."[13] To vindicate its rights, a plaintiff "must have suffered an 'injury in fact.'"[14] This injury has to be both "concrete and particularized" and

[12] U.S. CONST. art. III, § 2.
[13] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
[14] *Id.*

"actual or imminent" rather than "conjectural or 'hypothetical."[15]

Several rationales have been offered for the rule that plaintiffs ought to be victims who seek redress for infringements of their own rights. First, standing better maintains separation of powers. If an injury is "undifferentiated and common to all members of the public, the plaintiff has a 'generalized grievance' that must be pursued by political, rather than judicial, means."[16] Abolishing the requirement of standing would increase the influence of interest groups (and courts) at the expense of other branches.[17] Second, standing limits the class of cases that can enter courts and is therefore a tool to "ration scarce judicial resources."[18] Relatedly, denying standing from third parties prevents undesirable or unnecessary enforcement of rights, as "it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of" the litigation.[19] Third, it was argued that victims are usually best positioned to provide evidence regarding disputed claims.[20] Finally, third-party litigation is inefficient as it induces duplicative enforcement efforts,[21] and hampers the transfer of rights.[22]

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[15] *Id.* In addition to injury in fact, two related requirements are causation and redressability. *Id.*, at 560-61. *See also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465-66 (2008).

[16] Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) (Scalia, J., dissenting). A slightly different manifestation of the separation-of-power idea is demonstrated by *Lujan*. While in *Lujan* Congress enacted a provision that allows "any person" to sue, the Supreme Court declined to turn courts, through this provision, into "continuing monitors of the wisdom and soundness of Executive action." *See Lujan*, 504 U.S. at 577 (internal quotation marks omitted).

[17] POSNER, ECONOMIC ANALYSIS OF LAW 730 (9th ed., 2014). Taxpayers standing illustrates this point. By denying standing from taxpayers, courts avoid endless challenges to government expenditures. For a short discussion see, *e.g.*, Elliott, *supra* note 15, at 478-81.

[18] Kenneth E. Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645, 684 (1973). For this "floodgates" argument see also Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 308 (1988) ("some contend that a requirement of personal stake guards against a vast and undesirable increase in litigation challenging government action.").

[19] Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

[20] Standing "sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr, 369 U.S. 186 (1962). As Richard Posner put it, "[a]bolishing the requirement [of standing] would greatly . . . reduce the quality of adjudication." POSNER, *supra* note 17, at 730.

[21] We discuss this point in *infra* note 143 and accompanying text.

[22] "The costs of transferring rights are minimized when only one, clearly identifiable party has standing in a given dispute." Michael C. Jensen et al., *Analysis of Alternate Standing Doctrines*, 6 INT'L REV. L. & ECON. 205, 210 (1986). *See also* Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1667 (2007) ("[I]n the absence of standing restrictions . . . [e]very individual rights-holder would have veto power over a government

Nevertheless, the rule against third-party litigation has been relaxed. Courts have granted standing to third parties when circumstances suggest that "there exists some hindrance" for the right-holder to file herself, and the filing-plaintiff demonstrated "a close relation" to the actual right-holder.[23] For example, white criminal defendants were allowed to claim the constitutional rights of excluded black jurors.[24] Particularly, the Court found that, without allowing standing to white criminals, under-enforcement would occur as the right-holders, black jurors, "possess . . . little incentive to set in motion the arduous process needed to vindicate their own rights."[25] Similarly, the Court allowed physicians to challenge the constitutionality of certain restrictions on abortions, acknowledging the unlikelihood that the direct victims of such restrictions would seek their day in court.[26] In a similar vein, courts have allowed plaintiffs whose speech was proscribed by a certain statute to challenge the constitutionality of that statute based on the impact it has on *other* persons, and although "the statute constitutionally might be applied to [the filing plaintiff]."[27] As the Court reasoned, the denial of standing for such a plaintiff may "chill . . . the exercise of free speech rights by persons not before the court."[28]

While these examples suggest that courts have been willing to loosen standard standing requirements, those exceptions are limited in scope. Courts have refused to extend them and allow other potential third parties to file claims on behalf of non-filing victims.[29] Particularly, courts have insisted that litigants seeking redress for the harm of non-filing right-holders would be

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action that affects the rights of many . . . mak[ing] strategic holdout likely."),

[23] Kowalski v. Tesmer, 543 U.S. 125, 136 (2004).

[24] Powers v. Ohio, 499 U.S. 400 (1991).

[25] *Id.*, at 415. In addition to the elements of "hindrance" and "close relation," third-party standing still requires the plaintiff to show that he suffered an injury. The plaintiff in *Powers* met this requirement, as it was found that discrimination against black jurors "causes a criminal defendant cognizable injury . . . because [it] . . . places the fairness of a criminal proceeding in doubt." *Id.*, at 411.

[26] Plausibly, a woman "may be chilled . . . by a desire to protect the very privacy of her decision from the publicity of a court." In addition, a women's claim can be moot, as her right "will have been irrevocably lost" after "a few months, at the most, after the maturing of the decision to undergo an abortion." *Singleton*, 428 U.S. at 117.

[27] This doctrine is known as the overbreadth doctrine. *E.g.*, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[28] Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1098 (2015).

[29] For example, in the most recent discussion of the Supreme Court on third-party standing, the Court declined to allow attorneys to vindicate the rights of future, indigent criminal defendants, "appl[ying] the close relationship and hindrance prongs with rigor" and representing "a new commitment" to "strengthening the [doctrinal] test." Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 NOTRE DAME L. REV. 1369, 1398, 1403 (2009) (discussing Kowalski v. Tesmer, 543 U.S. 125 (2004)).

themselves victims, namely, that they would suffer some individual loss as result of defendants' conduct.[30] While this loss could be limited and unrelated to the harm sustained by the non-filing victims, plaintiffs must show a distinctive harm to be eligible to file.

Other exceptions to the rule against third party litigation involving individuals' disputes are class actions and the buying and selling of legal claims. We discuss these exceptions in greater detail below.[31]

B. Third Party Litigation in Governmental-Related Disputes

The most notable exceptions to the rule against third party litigation can be found in the context of governmental-related disputes. Under the doctrine of *parens patriae*, state General Attorneys can mount claims on behalf of non-filing citizens who suffered harm. The doctrine of *qui tam* empowers individuals to file on behalf of the government when the latter failed to protect its own rights.

1. Parens Patriae

Rooted in the common law, the doctrine of parens patriae allows states to seek monetary compensation on behalf of individual victims where such litigation protects the state's "interest in the health and well-being—both physical and economic—of its residents in general."[32] Courts have interpreted these terms broadly, thereby allowing state General Attorneys to file for a range of wrongful behaviors (such as antitrust violation, harmful products, and fraud claims), and against a broad spectrum of defendants (from tobacco and gun manufacturers, to retail chains, health providers, insurance companies as well as local businesses).[33] Alongside the common law doctrine, state GA's authority to mount parens patriae claims is now often grounded in explicit state legislation.[34]

The actual breadth of the doctrine has been subject to debate among courts and scholars, most notably with regard to states' ability to invoke the doctrine when individual victims could in principle sue and collect compensation on their own. This debate resulted in part from the Court's decision in *Snapp v. Puerto Rico*, where the Court noted that parens patriae

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[30] *Supra* note 25.

[31] *Infra* Parts III.B-C.

[32] Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607 (1982).

[33] *E.g.*, Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914-15 (2008).

[34] *E.g.*, Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495-98 (2012).

claims require states to "articulate an interest apart from the interests of particular private parties, i.e., the [s]tate must be more than a nominal party."[35] Following this ruling, courts and commentators have concluded that "*Snapp* supports the majority view that the state's interest may be parasitic on the interest of individual citizens,"[36] and that the major condition for the application of the doctrine is that the state acts on behalf of "its residents in general" rather than "particular individuals."[37] While the Court did not indicate what number of residents is sufficient to satisfy this condition, *Snapp* itself suggests it needs not be "all or even most of the state's residents."[38] State AG's litigation has garnered considerable attention in recent years. While opponents believe it is "class action in disguise," [39] where state AG's "shift . . . the allocation of powers among the coordinate branches of government,"[40] proponents view parens patriae as an important procedural tool capable of closing a significant "enforcement gap."[41]

2. Qui Tam

Somewhat analogically to parens patriae yet operating in the reverse direction, qui tam empowers individuals—referred to as "relators"—to seek redress for wrongs committed against the federal government. The statutory authorization for qui-tam litigation is the False Claims Act (FCA), which enables third parties to sue on behalf of the federal government for fraud in connection with federal programs and expenditures.[42] The qui tam provisions were designed to boost lackadaisical governmental enforcement resulting from lack of information or governmental unwillingness to sue due to "captured" regulators and conflicting interests.[43]

In the last decades qui-tam cases have become an important and powerful

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[35] *Snapp*, 458 U.S. at 607.

[36] Lemos, *supra* note 34, at 494.

[37] *Id.*, at 494-95 (quoting *Snapp*, 458 U.S. at 607 & n.14). For a brief discussion on the conditions under which individual victims will be precluded in a subsequent suit see, *e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 cmt. B(1)(B) (2010).

[38] Lemos, *supra* note 34, at 495.

[39] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility V Concepcion*, 79 U. CHI. L. REV. 623, 666 (2012).

[40] Gifford, *supra* note 33, at 939.

[41] Gilles & Friedman, *supra* note 39, at 663.

[42] 31 U.S.C.A. § 3729-30. There are several statutory constraints on the ability of persons to be relators, *i.e.*, to enjoy third-party standing. Most importantly, the relator should possess significant information concerning the fraud. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1709 (2013).

[43] *E.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1949 (2014).

enforcement tool,[44] generating greater recoveries than traditional enforcement mechanisms.[45] This success stems, among other things, from the intricate procedure that accompanies qui-tam litigation and integrates financial incentives to the third party together with safeguards that maintain the interest of the victim, namely, the U.S. government. Specifically, the relator is incentivized by the potential monetary award she cashes at the conclusion of the case. These sums range from 15% to 30% of the recovery that the qui tam suit realizes.[46] At the same time, the relator does not hold the sole control over the case, as the government can join the action.[47] Importantly, if the government decides not to join the case, the third-party relator can pursue the case independently.[48] This feature guards against problems of capture and conflicting interests.[49] By allowing the plaintiff this independence to proceed without the government's consent, qui-tam litigation diverges from other regimes—such as monetary incentives for whistleblowers—that encourage cooperation from private third parties but give no formal standing to the informants.[50]

Note that if the government decides to intervene, the case proceeds with a dual-plaintiff model, in which both the government and the third party have procedural rights.[51] Thus while ill-motivated regulators can theoretically join

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[44] In 2010, for example, the number of qui-tam lawsuits approached 600, generating around $3.5 billion recoveries for the U.S. government. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1271-71 (2012).

[45] *E.g.*, Engstrom, *supra* note 42, at 1693 (the number of qui tam lawsuits in the last years and the recoveries they generated "rival, and even eclipse, those achieved by private enforcement efforts in other, much-analyzed areas of law such as securities and antitrust.").

[46] 31 U.S.C. §3730(b)-(d). *See also* Engstrom, *supra* note 44, at 1270 & n.88.

[47] More precisely, the complaint is filed under seal and is served on the government, but not on the defendant. The complaint remains sealed for 60 days, in which the government "may elect to intervene and proceed with the action." 31 U.S.C. § 3730(b)(2).

[48] 31 U.S.C.A. § 3730(c)(3) (2010). In fact, the proceeds to the relator, should the lawsuit succeed, are higher if the government decides not to join compared to a case in which it intervenes—25 to 30 percent of the total recovery in the former case, and 15-25 percent in the latter. 31 U.S.C.A. § 3730(d)(1)-(2). From a practical standpoint, though, the government's decision to join seems to be highly important to the success of the relator's claim; "nearly all cases" in which the government declines to intervene turn to be unsuccessful. *See* Engstrom, *supra* note 44, at 1274–75. For a favorable discussion of this "screening" function that the government fulfills see Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U.L. REV. 1169 (2014).

[49] Engstrom, *supra* note 44, at 1272–73.

[50] *E.g.*, David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605, 608, 611 (2014).

[51] *See generally* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 68-74 (2002). Formally, if the government elects to intervene, "it shall have the primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1).

the case and then ask the court to drop it, they would have to do so publicly, explain their motives to the court and face the relator's opposition.[52] Indeed, cases in which the government joins the case and then drops it against the relator's will are highly uncommon.[53]

The general scholarly view regards qui tam as a highly effective tool to deter wrongdoing and compensate the government for its losses.[54] Qui-tam procedures balance between two opposing positions—unrestricted private enforcement, where the dangers of costly and frivolous class actions come to mind; and unchecked public enforcement, vulnerable to informational problems and conflicting interests. Drawing on the positive experience with existing examples of third-party litigation, the next Part introduces the idea of providing the cheapest compensation seeker—and not necessarily the victim—the right to bring an action.

II. THE CHEAPEST COMPENSATION SEEKER

This Part advocates extending the power to sue to third parties in cases in which victims are unable or unwilling to sue. We argue that often third parties—the cheapest compensation seekers—are better suited to sue and are more likely to do so than the victims. The cheapest compensation seeker is a person or an entity that is in the best position to seek compensation for a wrong, because she has the best information, the best access to the legal system, stronger incentives to sue or is less averse to risk. The failure to extend the power to sue to the cheapest compensation seeker results in serious under-enforcement and consequently under-deterrence.

We first establish that there is a serious problem of under-deterrence. Second, we discuss typical settings in which there are indeed third parties for whom it is cheaper or easier to sue.

A. The Problem of Under Enforcement

Many tort theorists believe that tort law suffers from a significant problem of under-enforcement; many tort victims simply fail to claim their rights.[55]

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[52] 31 U.S.C. § 3730(c)(2)(A). *See also* Engstrom, *supra* note 44 at 1272 & n.93 (describing this provision and noting that some appellate courts have substantially narrowed the capacity of the government to dismiss a case where the relator objects). More generally, the government "may settle the action with the defendant notwithstanding the objections" of the relator if it convinces the court after a similar public hearing; and it can ask the court to impose other restrictions on the relator's procedural participation. 31 U.S.C. § 3730(c)(2)(B)-(C).

[53] For empirical findings along these lines see Engstrom, *supra* note 42.

[54] *See* Engstrom, *supra* note 44, at 1246-47 (surveying accounts of qui-tam litigation).

[55] *See, e.g.*, Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J.

Victims fail to do so for various reasons: some are unaware that they were wronged or lack sufficient evidence to substantiate their claims; others face high litigation costs, or are exposed to intimidation not to litigate. One empirical study concludes that:

> Research typically shows [that] Americans rarely take their disputes to court. Of every one hundred Americans injured in an accident, only ten make a liability claim, and only two file a lawsuit. Of every one hundred Americans who believe they have lost more than $1,000 because of someone else's illegal conduct, only five file a suit. … Far from a nation of litigators, the United States seems to be filled with "lumpers," people inclined to lump their grievances rather than press them.[56]

The failure to sue on the part of many victims is not irrational. Theorists identify "rational apathy" on the part of victims resulting from the combination of sizeable litigation costs and the difficulties in proving negligence.[57] Rational apathy may apply to the victim but need not apply to others who may be more informed than the victim or have greater resources. Further, rational apathy is more likely to affect the poor, women and minorities. These groups are less likely to receive high economic damages,[58] and given that the compensation they get is lower than their litigation costs it is often rational on their part not to sue.[59] Moreover, given the uncertainty that characterizes litigation, victims in general and the poor in particular may be less willing to sue because they are likely to be risk-averse.

These difficulties led many to skepticism concerning the usefulness of tort law,[60] while less skeptical voices proposed mechanisms to reform tort

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443, 448-52 (1987) (surveying the literature). *See* also David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1088-92 (2006).

[56] THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 3 (2002).

[57] Keith Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991); Roger Van den Bergh & Louis Visscher, *Optimal Enforcement of Safety Law* 3-23 (Rotterdam Inst. Of L. & Econ., Working Paper No. 2008/4).

[58] This unwillingness of the poor to sue is exacerbated by the unwillingness of attorneys to sue. *See* Catherine Sharkey, *Unintended Consequences of Medical Malpractice Damages Cap*, 80 NYU L. REV. 391, 489-90 (2005).

[59] See Phillip Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employer's Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 430-31 (2001-02).

[60] *E.g.*, *supra* note 55; Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 814-16 (1990).

law, e.g., to expand the use of class actions,[61] and punitive damages.[62] We suggest that third parties can overcome some of the hurdles. What is needed is to identify third parties that are better capable or more willing than the victims to sue. We focus therefore on the cases in which the victim is not the cheapest compensation seeker and identify third parties that are more likely to litigate.

How would these third-party suits look like? Who are the third-parties who should be induced to vindicate the victims' rights? Before presenting typical cases, we outline a description of the procedure for such third-party lawsuits. Such a procedure ought to serve the goal of overcoming under-enforcement and, at the same time, should take account of the legitimate interests of the victim. Under this proposal, a third party can file a third-party lawsuit. If the court finds that the lawsuit presents enough facts and that the third party is an appropriate or a suitable third party, the case is served on the victim who may decide to a) join it; b) oppose the complaint and ask the court to dismiss it; or c) stay uninvolved. Under the first alternative, the court considers the case on the merits where both the plaintiff and the third-party lead the case. Under the latter two alternatives—where the victim opposes the complaint or stay uninvolved—the court decides whether or not to let the third-party proceed. In any case, if the complaint ends successfully, the third-party who initiated the lawsuit is entitled to a portion of the monetary fruits and the remaining proceeds goes to the victim. The suggested procedure provides monetary incentives and procedural rights to third parties without compromising the legitimate interests of the victim.

B. Illustrations

To establish the desirability of the cheapest compensation rule one needs to establish two claims: 1) Sometimes, victims are unlikely to sue. 2) At least in some of these cases, third parties are better able or willing to sue.

We identify two broad settings in which the cheapest compensation seeker is a third party rather than the victim—where victims are unable and where victims are unwilling to sue.

1. Victims unable to sue

There are situations in which the victim is unable to sue; victims in these

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[61] *E.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); Gilles & Friedman, *supra* note 32.

[62] *E.g.*, Stein & Parchomovsky, *supra* note 8, at *39-40.

cases cannot "name" and/or "blame."[63] They cannot "name" because they do not know that a wrongful act was committed against them—for instance, they might think that their injuries resulted from an act of nature rather than a wrongdoing. They cannot "blame" because they cannot identify the perpetrator or provide sufficient evidence to substantiate their suspicions. In these cases, private third-party lawsuits can be useful when there is an informed third party—the "cheapest" source of information. The following illustrates typical settings.

a. Deceased and non-performing victims

Inability to sue can manifest itself in various ways. At its purest form, deceased victims are unable to bring a lawsuit:

> Hypothetical I—Deceased Victims. Tim, a successful businessman, undergoes an emergent medical procedure. Tim dies due to the doctors' negligence. Tim has no heirs and he did not leave a will.

At least according to some views, only Tim has the legal power to sue—hence, the doctors' negligence is left unaddressed.[64] While criminal sanctions are sometimes available, the odds that such sanctions be imposed are slim. Criminal cases need to be proven "beyond reasonable doubt" and the burden of proof may be too high. Further, in the absence of any incentives to provide information, third parties who are aware of the negligence will not be inclined to report it.

In contrast, under the proposed cheapest compensation seeker rule, the

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[63] *Cf.*, William L. F. Felstiner, Richard Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming Claiming. . .*, 15 LAW & SOC'Y REV. 531 (1980-1981).

[64] *See, e.g.*, Mendez v. State of Oregon, 669 P.2d 364, 367 (Or. 1983) (rejecting the view that "if a decedent leaves no surviving spouse, children, parents or other individuals who would be entitled to inherit the decedent's personal property, the personal representative could . . . maintain a cause of action . . . on behalf of the state, to which any damages recovered would escheat."); Andrew Jay McClurg, *It's A Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 64 n.29 (1990) (stating that "the broader rule [is] that, unless a decedent leaves behind dependent survivors, there can be no recovery for wrongful death" and referring to case law); STUART M. SPEISER & JAMES E. ROOKS, RECOVERY FOR WRONGFUL DEATH §3:1, 3:22 (4th ed., Westlaw 2015) (same). *Cf.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 75 (2011) (unlike other legal interests, "tort claims survive the death of the plaintiff . . . [only] by a set of persons named in the statute, usually members of the plaintiff's family."); JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 382, 399 (3d ed., 2012) (describing the common law rule where "a cause of action dies with the person," and stating that states "vary as to which tort claims may be asserted in survival and wrongful death actions.").

looming financial reward can induce the information-holders to claim Tim's rights. Importantly, there is a reason to believe that under these circumstances there are relevant informed third-parties, such as nurses and medical staff that will be willing to provide information if they are likely to be rewarded.[65] The case of deceased victims, then, is a straightforward setting in which the only way to vindicate the victim's right is to empower third parties.[66] However, such a case may be too rare to justify a legal reform.

A more frequent case of non-performing victims concerns child abuse resulting from negligence or abuse by the legal guardians. Similar to deceased victims, children abused by their guardians are unlikely to stand for their rights, and the imposition of liability depends on the cooperation of third parties such as doctors, therapists, psychologists and teachers who are willing to inform the authorities about suspected incidents of child abuse. Indeed, most states have established mandatory reporting duties requiring such third parties to report any case in which they believe a child has been abused.[67] Yet the authorities often fail to properly enforce the reporting requirements and/or respond to these reports, such that even law-abiding third parties have weak incentives to comply. One study found that when asked whether "they had ever failed to notify government authorities of instances of suspected abuse or neglect," 44% of clinical psychologists, 51% of social workers, and 58% of child psychiatrists acknowledged that they had.[68] Mental health professionals similarly indicated being "skeptical of the quality of state child protection staff services" and their preference to address such matters privately.[69]

Empowering doctors, therapists and teachers to initiate legal proceedings against abusers could partially address the problem of children's vulnerability and inability to sue. Moreover, third-parties' litigation may encourage the authorities to better respond to reports filed by these third parties in the first place. Knowing that failures to respond to such reports could lead to private litigation that would expose their inaction, authorities will be incentivized to seriously investigate complaints regarding child abuse.

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[65] Of course, these information holders, employees of the hospital, may be inhibited from filing a lawsuit against their workplace. It is plausible to think that only a few third-parties will do so, *e.g.*, those who are about to leave their job. Yet our proposal significantly increases the odds of a lawsuit.

[66] We note here that even if Tim's estate is entitled to bring the lawsuit, such lawsuit may be unlikely due to informational problems. *Infra* Part II.B.1.b.

[67] Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1004 (2015).

[68] Janet A. Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance*, 20 LAW & POL'Y 135, 147 (1998).

[69] *Id.*, at 194. For a discussion see Swan, *supra* note 67, at 1004.

b. Uninformed victims

In other situations, there is a right-holder who is willing to litigate but cannot acquire the relevant information. Consider the following hypothetical:

> Hypothetical II—Uninformed Victims. Warren and his ex-girlfriend, Joanna, have been embroiled in several arguments. After one of their confrontations, Joanna shatters the windows in Warren's car. Ron, a neighbor whose security cameras videotape the adjacent premises, notices and documents the incident.

How can Ron proceed? Ron can report Joanna to the authorities, but he gains no financial reward for so doing. Of course, Ron may be motivated by non-financial incentives—the desire to be a good citizen (or a good neighbor). But, reporting Joanna may be costly to Ron either because of the negative reputation that might be associated with informers, or due to the potential resulting conflict with Joanna, or because of the risks and inconvenience of implicating himself and being subject to interrogation.[70]

Arguably, Ron can sell his incriminating information to Warren. But such transactions are rare, if not virtually non-existing. Such transactions suffer from inherent asymmetric information problems—Ron knows something that Warren does not. Once Warren is provided with the information, he may pursue the proceedings on his own.[71] Yet, Warren may be reluctant to pay for the information in the absence of any indications as to its reliability. This asymmetry in information will therefore lead to possible breakdowns in hypothetical negotiation.[72] Moreover, by their nature, information holders such as Ron are "a strong natural monopoly."[73] Hence, any market negotiation between Ron and Warren "allow[s] for holdout and rent

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[70] Theoretically, Ron can ask Joanna to buy his silence, forcing her to pay (to Ron) for her wrongdoing. Yet knowing that Ron has nothing to gain from turning Joana to the authorities, she may reject his offer.

[71] Once Warren knows that Ron possesses valuable information, he can compel Ron through subpoena. Ezra Friedman & Eugene Kontorovich, *An Economic Analysis of Fact Witness Payment*, 3 J. LEGAL ANALYSIS 139, 139 (2011) (referring to FED. R. CIV. PRO. 45). On the other hand, without indications that the third-party has information, compelling the witness is "extremely difficult." *Id.*, at 152. For a parallel discussion in the criminal context see Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690, 715, 705 (2012).

[72] This general phenomenon is well-documented, and a major reason for which mutually beneficial transactions are not entered into. *See, e.g.*, the classic papers that link asymmetric information with failures to settle. Lucian A. Bebchuk, *Litigation and Settlement under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Jennifer Reinganum & Louis Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557 (1986).

[73] Friedman & Kontorovich, *supra* note 71, at 140.

extraction by the" former,[74] leading again to "strategic behavior" and "bargaining breakdown."[75] Indeed, while third parties often possess essential information, commentators have noted that in reality "we do not see . . . payments (or requests for payment) for things like privately owned surveillance devices."[76]

There seem to be numerous situations in which wrongs are committed and third parties, privy to the information, could sue successfully. As Hypothetical II demonstrates, technological advancements may provide opportunities for third parties to share valuable information concerning wrongs that is not available to the victims of these wrongs. Think of the vast amount of information collected by internet providers, Facebook, etc.[77]

Note last that providing such opportunities to sue to third parties would provide the cheapest compensation seeker an incentive to search for such information. This may of course be desirable (if done properly and within limits) or undesirable (if done improperly). We later examine this concern of "over nosiness" of third parties.

Hypothetical II involves factual information. Would we extend our argument to other types of information? In particular, one can imagine cases in which the victim lacks legal information concerning her rights, and a third-party who is a legal expert could advise the victim of her legal rights. Nonetheless, there seems to be a fundamental difference between factual and legal information. The factual information is held typically by a single person—in essence a monopoly—and deals between the information holder and the victim are unlikely. In contrast, the legal information is held by many people and there are competitive forces which incentivize those who hold such information to share it with uniformed right-holders for a fair price.[78] Indeed, as opposed to the non-existing sale of factual information, one commonly observes transactions in which legal information is sold, namely, lawyer-client agreements.

c. Medical malpractice

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[74] *Id.*

[75] Friedman & Kontorovich, *supra* note 71, at 143.

[76] Levmore & Porat, *supra* note 71, at 693. A possible exception is a situation in which the potential victim can, ex-ante, "identify potential witnesses and commit to make payments to them," *e.g.*, "associate assigned to witness an employee termination." Friedman & Kontorovich, *supra* note 71, at 152 n.10.

[77] *Cf.*, Levmore & Porat, *supra* note 71, at 715 ("fixed cameras, smartphones, and motivated human witnesses have the potential to bring about dramatic reductions in police forces.").

[78] For a similar analysis *see* Friedman & Kontorovich, *supra* note 71, at 142-3. *See also* Levmore & Porat *supra* note 71, at 703-04.

Professional malpractice often raises problems of informational asymmetries. The victim, typically lacks expertise and first-hand knowledge of the facts, is disadvantaged with regard to the prospects of litigation. Moreover, in professional malpractice situations there are many possible causes for the victim's loss that the victim cannot discern; physical and mental injuries are often latent and may be perceived by the victim to be unrelated to the wrong. When victims are uninformed, there are usually informed third parties, e.g., the defendant's employees. These third parties have no independent incentives to share their incriminating, valuable information, but they may well do so under our proposed regime.

Medical malpractice seems particularly appropriate for third-party litigation. The statistics establish a serious problem of under-claiming. According to one study, only 1.5 percent (!) of negligence-induced injuries ended with a demand for compensation.[79] Another influential research concludes that 97 percent of patients who suffered an injury as a result of a negligent treatment failed to vindicate their rights, among which the elderly and the poor are over-represented.[80] Other studies found that only one in eight negligent medical injuries ends with a legal claim.[81] A major part of the problem is the inability of victims to "name" and "blame" the wrongs committed against them.[82] In the absence of alternative effective enforcement routes, such as criminal sanctions, this under-enforcement problem plausibly translates into sub-optimal levels of care.

Note, however, one complication of medical malpractice cases. While a third party such as a nurse could be more informed with respect to the negligence (or liability) on the part of a doctor or other professionals, the victim may be more informed with respect to the type and size of harms caused by negligent treatment. In such cases, both parties need to be incentivized; incentivizing the nurse alone or the patient alone is insufficient

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[79] Troyen A. Brennan et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 NEW ENG. J. MED. 245 (1991). *See also* Joanna Shepherd, *Uncovering The Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151 (2014).

[80] David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000).

[81] Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y, L. & ETHICS 357 (2013); Don Dewees & Michael Trebilcock, *The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L. J. 57, 79-86 (1992).

[82] Evidence suggests that, when a medical malpractice claim is being made, the American legal system does a "reasonably good" job, *i.e.*, good claims are generally compensated and non-meritorious claims are generally dismissed. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006). Alternatively put, the problem is with medical malpractice instances that are not being claimed, essentially for the reasons identified in this paper.

to provide deterrence. Hence, only a "dual-plaintiff" model, in which both advance the claim and are entitled to its proceeds, achieves this goal.

Next, we discuss more controversial situations, in which the victim can—but is unwilling—to sue.

2. Victims unwilling to sue

Sometimes the victim can sue but is unwilling to do so for various reasons. While the victim has reasons not to bring the case, from a social perspective such a suit may well be desirable. The victim's reluctance to sue undermines the deterrent effect of tort law and induces future wrongdoing. In the rest of this section we distinguish between two types of cases: where the victim's reasons to avoid filing the claim are wrongful (and therefore should be ignored); and where the victim has legitimate reasons not to sue (and therefore such reasons ought to be seriously considered by the court).

a. Wrongful Victims

Sometimes the victim is unwilling to sue because litigation may expose his own wrongdoing. Consider the following example:

> Hypothetical III—Concealing One's Negligence. Abe drove his car intoxicated when his car was hit by Beth due to Beth's negligence. Abe is reluctant to file a lawsuit, as a lawsuit would expose him to criminal sanctions and/or to higher car insurance fees. Carl, a bystander, witnesses the accident and brings a lawsuit against Beth (on behalf of Abe).

Hypothetical III is not unique. It is not rare that a lawsuit by the victim may bring to light the victim's own faulty behavior, resulting in future undesired financial, reputational, or criminal sanctions.[83] To demonstrate, American colleges have growing institutional responsibilities for wrongs that are committed on their premises—however, they "continue their patterns of ignoring or downplaying the harms."[84] It is not implausible to believe that a college would be reluctant to sue students who harmed it in order to hush the incident and prevent future reputational harm.[85]

While the victim in these examples is unwilling to litigate, from a societal perspective litigation is desirable not only because it deters the wrongdoers

[83] *Cf.*, Swan, *supra* note 67, at 1026-7 (demonstrating that students "victims of assault are sometimes held liable for their own minor violations of campus alcohol or other policies [generating] a chilling effect." *Id.*, at 1026).

[84] Swan, *supra* note 67, at 1021. *See also id.*, at 1021-23 (discussing the problem).

[85] *Cf.*, Caroline Kitchener, *When Helping Rape Victims Hurts a College's Reputation*, THE ATLANTIC, Dec 17, 2014 (describing colleges' interests to limit assistance to rape

but also because it exposes the wrongdoing of the victim herself. Giving a third party the right to sue achieves both ends, extracting damages in torts against the injurer and exposing the victim to sanctions for her wrongdoing.[86]

b. Innocent Victims and Retaliation Threats

In some cases, the victim's reluctance to sue is legitimate and consequently the legal system ought to be more cautious in empowering third parties to sue. Take the following example:

> Hypothetical IV—Reputational Concerns. Nora works in a major law firm. Her employer violates labor regulations. Nora refuses to bring a lawsuit; she believes that such a move will tarnish her reputation and prevent her from securing prestigious positions in the future.

While Nora will not bring a lawsuit, in our model one of her colleagues can do so on her behalf. The same reputational concerns that hinder Nora from filing a lawsuit would probably drive her not to join (or even cooperate) with the third-party suit. In fact, Nora may request that the case would be dismissed. How should the court react?

Unlike hypothetical III, Nora may have good reasons to veto the lawsuit. She is seeking to minimize harms to her reputation in the job market. Under the proposed third-party litigation model, courts may well honor Nora's request to drop the lawsuit. In that case, the third-party complaint will be dismissed without even being sent to Nora's employer.

These difficulties notwithstanding, our proposal may be particularly relevant for cases of anticipatory retaliation threats. The current regime places the sole responsibility for a lawsuit in the hands of the victim. Given that it is *only* the victims who can bring a civil lawsuit, it is easier for empowered wrongdoers to threaten vulnerable victims not to litigate. In the antitrust context, it is "recognize[d] that direct purchasers sometimes may refrain from bringing a . . . suit for fear of disrupting relations with their suppliers."[87] In the context of regulator-regulatees relations, the latter are sometimes "afraid to file a lawsuit because of the potential regulatory consequences."[88] Municipalities are in a position to retaliate against local

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victims to avoid reporting and media coverage that could harm their reputation).

[86] In light of the victim's behavior in these cases, it may also be justified to award all the proceeds to the third party and leave no compensation to the actual victim.

[87] Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). Nonetheless, the Court limited standing solely to direct purchasers, as opposed to indirect purchaser such as end-consumers. *Id.*

[88] Gregory Bresiger, *SEC Defends Fund Registration*, TRADERS MAGAZINE (Feb. 1, 2005) (quoting Phillip Goldstein, the president of a hedge fund who successfully challenged

businesses.[89] Members of closed communities are likewise reluctant to confront the legal status quo in their community due to fears of retaliation.[90]

These and other areas notwithstanding,[91] the most prominent manifestation of anticipatory retaliation exists in employment relations. Consider the following two hypotheticals, which are based on actual events:[92]

> Hypothetical V—Five hundred Mexican farmworkers arrive in North Carolina with visas to work legally for a harvest season. Each has a "know-your-rights" booklet distributed by a legal services organization that describes U.S. employment laws and offers assistance if the workers have a problem. The workers are greeted by a representative of their employer, who instructs them to throw their booklets away and distributes another booklet, which warns that "history . . . shows that the workers who have talked with [legal services] have harmed themselves." Workers report feeling that if they "keep [the] booklets or if they are ever seen with one of [the] booklets, they will be fired or have serious problems" with their employer.

> Hypothetical VI—In Alabama, Diane, a U.S. citizen poultry worker, develops severe pain in her hands due to the repetitive motions required by her job. When she asks to see the company nurse, Diane's supervisor tells her that she "shouldn't say [the pain is] work-related. If I say my pain comes from something I did at work, then I will be laid off without pay and three days later get fired. So, when I go to the nurse I tell her that I hurt my hands at home."

As these examples suggest, retaliation against employees and the resulting silencing of employees is not a mere theoretical or fantastic conjecture. Its prevalence has been recognized by Title VII which forbids any employer:

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relevant SEC regulations, Goldstein v. S.E.C., 451 F.3d 873 (D.C. Cir. 2006)). *See also* Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd., 627 F.3d 547 (5th Cir. 2010) (describing retaliation by the Texas State Board of Medical Examiners against physicians who complained about the board).

[89] Golodner v. Berliner, 770 F.3d 196 (2d Cir. 2014) (a contractor alleging that a municipality retaliated against him due to a previous lawsuit he filed). *See also* Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 458 & n.283 (1981).

[90] *E.g.*, Lauren Evans, *Parents Of Yeshiva Students File Class Action Lawsuit Against State Department Of Education*, GOTHAMIST (Nov. 23, 2015), *available at* http://gothamist.com/2015/11/23/yeshiva_lawsuit.php (describing plaintiffs who declined to be identified for fear of retaliation from the Orthodox-Jewish community in New York); *infra* note 118 (providing another example).

[91] Miskovsky v. Jones, 437 F. App'x 707 (10th Cir. 2011) (a prisoner alleging claims of retaliation by prison officials)

[92] These hypotheticals are taken from Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 779-80 (2013).

> [T]o discriminate against any of his employees or applicants . . . because he has opposed any [unlawful employment] practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[93]

Further, employers often fail to disclose, misrepresent or even deliberately lie about the terms and conditions of work. Workers who are confronted with misrepresentations of this nature may be unlikely to question, rebut, or resist them for fear of losing their jobs.[94] Legislatures try to address this problem by imposing duties to post notices concerning employees' rights and to prohibit lying.[95] Yet despite these efforts, misrepresentations as well as anticipatory retaliation are common practices.[96] Assume now that one of the Mexican workers in hypothetical V shares the information concerning the unfair labor practices with a friend or neighbor. Currently, without willingness to sue on the part of at least one of the employees, no effective legal sanctions (other than criminal sanctions) can be employed. In contrast, if third parties, such as business competitors driven by prospective monetary awards, can sue, the incentives of the employer to use threats of this type diminish. Further, litigation initiated by the third party need not be detrimental to the employees' interests as the employer understands that the litigation was not initiated by any of the workers. Intimidation cannot therefore be effective as litigation does not hinge on the workers' consent.

Interestingly, courts and enforcers have shown some willingness to recognize the right of third parties to file lawsuits against employers in the context of harassment claims. The doctrinal tool used by courts is a broader conception of harm, which enables a larger circle of "victims" to sue. Specifically, by arguing that the harassment (of others) amounts to a "hostile work environment," fellow employees can file a claim, even if they are not the direct target of the harassment.[97] A salient example is sexual favoritism

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[93] 42 U.S.C. § 2000e-3.

[94] Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 100 MINN. L. REV. *14 (forthcoming 2016).

[95] *Id.*, at *4.

[96] *See, e.g.*, Peter D. DeChiara, *The Right to Know: An Argument For Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. LEGIS. 431, 451-452 (1995).

[97] *E.g.*, Dianne Avery & Catherine Fisk, *Overview of the Law of Workplace Harassment*, *in* LITIGATING THE WORKPLACE HARASSMENT CASE 1, 18-19 (MARLENE HEYSER ED., 2010). *See also* Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807 (11th Cir. 2010) (en banc) ("Disparate treatment can take the form . . . of a "hostile work environment" that changes "the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned."). The Equal Employment and Opportunity

cases—"consensual sexual relations, in exchange for tangible employment benefits," generate hostile working environment even if "the recipient of such sexual advances . . . does not find them unwelcome."[98]

Beyond the scope of sexual favoritism, courts and policymakers seem to have divergent views regarding third-party harassment claims.[99] While some courts insisted that only the targeted employee (that is, the direct victim of the harassment) has standing, other courts allowed co-workers who belong to the same protected class of the targeted employee to file, even where the "targeted" employee chose not to sue, and although the harassing statements were not directed to the plaintiffs.[100] Thus, for example, a female worker who overhears her employer's sexist comments to her fellow female worker could sue her employer and demand compensation.[101] But a white male police officer has no standing to sue his supervisor for alleged racist and sexist harassment of black and female fellow officers.[102] The Equal Employment and Opportunity Commission (EEOC) endorses the most expansive view of hostile work environment, as it recognizes the right of *all* employees to sue their employer upon discovering they engaged in harassing conduct:

> [I]n situation in which supervisors in an office regularly make racial, ethnic or sexual jokes . . . [e]ven if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct . . . creates a hostile work environment for them.[103]

Commission (EEOC) guidelines are likewise illustrative, as they allow for the "injury" to be common to non-targeted employees. 29 C.F.R. § 1604.11.

[98] Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988). In that case, it was held that "the occurrence of [these] incidents . . . poisoned any possibility of plaintiff's having the proper professional respect for her superiors and . . . affected her motivation and her performance of her job responsibilities." *Id.*, at 1273. *See also* Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 521-24 (1999).

[99] Avery & Fisk, *supra* note 97, at 18.

[100] *Cf.*, Yuknis v. First Student, Inc., 481 F.3d 552, 554 (7th Cir. 2007) ("The fact that one's coworkers do or say things that offend one, however deeply, does not amount to harassment if one is not within the target area of the offending conduct. . . ."); *Reeves*, 594 F.3d at 811 (holding that an employee overhearing harassing comments, not directed to her, could sue employer if "totality of the evidence" indicates a hostile work environment).

[101] *E.g.*, *id.*.

[102] *E.g.*, Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998). *See also* Drake v. Minnesota Mining & Mfg., 134 F.3d 878, 884-85 (7th Cir. 1998) (holding that white employees did not show evidence of a hostile work environment where black co-workers suffered race discrimination); Swan, *supra* note 67 at 1015-16 (summarizing the current doctrine along these lines); O'Connor, *supra* note 98, at 524-26, 530-32 (discussing cases). Ironically, employees who belong to the same group as the "target" of the harassment are part of the same disempowered group, and they may likewise be reluctant to sue.

[103] EEOC POLICY STATEMENT NO. N-915.048, 2 EEOC COMPLIANCE MANUAL § 615

The move to expand the circle of potential plaintiffs is consistent with the logic of this paper. However, this move falls short of creating a regime under which third parties are entitled to sue wrongdoers for several reasons. First, the foregoing expansion applies only in the context of hostile-environment claims, and not in other types of Title VII lawsuits. Second, even under the broadest conceptions of "injury," the right to sue is still limited as only fellow employees working at the same organization or facility can sue, rather than any third party.[104] Potential powerful and effective enforcers, such as competitors and non-governmental organizations, are excluded. Further, the foregoing expansion of the class of "injured" shifts attention from the actual victim to her co-workers. By contrast, our model forces the court to take into account the real victim, as she is invited to join, and can convince the court that the action should be dismissed. Perhaps these difficulties explain why Title VII "has not been the effective remedy many had originally hoped for . . . and sexual harassment remains disturbingly common and unaddressed."[105]

Beyond the cases of reputational costs and anticipatory retaliation there are cases of expressive and emotional reluctance on the part of victims to sue. Sometimes, litigation requires victims to provide evidence that, while being in their possession, imposes on them painful emotional costs. The tragic cases involving wrongful birth and wrongful life can provide an example. When genetic impairments are discovered after the birth, parents sometimes sue under the tort of wrongful birth or wrongful life actions (actions that are initiated in the child's own name).[106] Yet in order to show causation in wrongful birth cases, courts require the mother to testify that she would have had an abortion or would have prevented conception if properly informed of her child's defect.[107] This is a painful admission on the part of the mother and consequently some parents refuse to testify. Third parties may have relevant information that indicates causation, e.g., prior willingness on the part of the mother to have an abortion. In such cases while the mother may be reluctant

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(Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html. The EEOC guidelines, of course, are not controlling in federal courts, even though they can be an influential source. O'Connor, *supra* note 98, at 508.

[104] Moreover, the doctrinal focus on "injury" to the co-workers ushers in an implicit requirement of physical proximity between the "actual" victim and the co-worker. *E.g.*, Leibovitz v. New York City Transit Auth., 252 F.3d 179, 185 (2d Cir. 2001) (denying hostile environment allegations as the employees who were actually "harassed were working in another part of the employer's premises" and under a different supervisor).

[105] Swan, *supra* note 67, at 1016 (quoting Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1047 (2015)).

[106] *See* Wendey F. Hensel, *The Disabling Impact of Wrongful Life and Wrongful Death Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 143-44 (2005).

[107] *Id*., at 166.

to sue, she would welcome a suit by a third party.

The foregoing examples illustrate that third-party litigation can be valuable when the victim is unwilling as well as unable to sue.[108] Although some of the examples provided above seem too rare to justify an urge for reform, we have identified areas of law in which the current legal doctrine restricts unjustifiably potential enforcers: medical malpractice and employment law. Yet, while the cheapest compensation seeker principle can be useful to handle these situations, we caution that the victim's reasons for not suing should be examined and, at times, justify dismissing the case. It is sometimes unfair that innocent victims bear the costs resulting from rules designed to achieve optimal deterrence.

Next, we examine alternative mechanisms for resolving the problem of under-deterrence and establish that they are unsatisfactory.

III. ALTERNATIVE AVENUES TO AUGMENT ENFORCEMENT

The cheapest compensation seeker rule addresses the problem of under-enforcement. However, there are more conventional tools to incentivize victims to sue. This Part compares our proposal to other mechanisms designed to enhance enforcement of legal rights.

A. Empowering the Victim

Sometimes the law addresses under-enforcement by empowering the actual victim and incentivizing her to sue. To illustrate, in asymmetric information situations the law sometimes eases the evidentiary requirements plaintiffs should meet, for example through the Res Ipsa Loquitur doctrine.[109] A lower burden of proof means that victims have higher expected benefits and consequently stronger incentives to sue. Another example is several statutes that mandate one-way fee-shifting, i.e., shifting of legal expenses in case the plaintiff wins (but if the defendant wins, each side carries its costs).[110] Other procedural tools have been proposed in the literature to incentivize victims to sue.[111]

These tools are valuable, but they are less relevant to the cases discussed

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[108] The same considerations that justify providing third-parties the right to sue on behalf of unwilling victims can similarly justify the involvement of third-parties in litigated cases—in order to address cases in which unwilling plaintiffs file a lawsuit but sabotage their own case.

[109] RESTATEMENT (SECOND) OF TORTS, § 328D

[110] *E.g.*, Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039 (1993).

[111] *E.g.*, Stein & Parchomovsky, *supra* note 8, at *7 ("[W]e recommend setting up special procedures for fast-track litigation [and] a new remedial mechanism: advanced payment orders issued by courts [to the victim].").

earlier. The cheapest compensation seeker rule applies primarily to situations in which the victim is unable or unwilling to bring a lawsuit, and in many of these cases the proposals that empower the victim are ineffective. Where victims are unable to acquire the information necessary to even identify their wrongdoers, for example, lower legal expenses, weaker evidentiary requirements, and fee-shifting provisions cannot induce these victims to vindicate their rights.[112]

The law also addresses under-enforcement by awarding enhanced and punitive damages.[113] Punitive damages increase deterrence in cases in which many victims fail to reach courts. Victims who sue and win are awarded a multiplier on their individual damages, which (ideally) reflects the unclaimed damages of other victims.[114] Yet punitive damages cannot solve the problems of under-enforcement for several reasons.

First, punitive damages presuppose that at least some victims can bring a lawsuit. When there are no informed victims who can bring a lawsuit, punitive damages are futile. Second, in cases in which there is small probability that a victim will end up suing, punitive damages fail to provide optimal incentives. To achieve optimal deterrence in these cases, the award of punitive damages to the victims should be very high, in order to reflect the small probability of a lawsuit by the remaining, uninformed victims. But under current law, punitive damages are capped;[115] and even if they have not been so, there is a limit above which the defendant is insolvent and therefore a monetary sanction fails to deter.[116] Third, if very few cases of some type reach litigation, it is hard for courts to assess the right amount of punitive damages in those cases as courts have no information with respect to the

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[112] We acknowledge that in some situations these tools can encourage victims to look for information and bring a lawsuit. The res ipsa loquitur rule, for example, can help plaintiffs who identify their wrongdoer but cannot provide the required evidence. We suspect, though, that the capacity of the res ipsa doctrine to induce uninformed victims to litigate is limited, as evidenced by the aforementioned data, *supra* notes 79–82 and accompanying text.

[113] Treble damages, for example, can be awarded to successful plaintiffs in patent and antitrust suits. For a discussion of treble damages see Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 94 MINN. L. REV. 9, 15-16 (2010).

[114] *Cf.*, Steven Shavell, *On the Proper Magnitude of Punitive Damages:* Mathias v. Accor Economy Lodging, Inc., 120 HARV. L. REV. 1223 (2007) (analyzing an actual case along these lines).

[115] *E.g.*, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (holding that "the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as grossly excessive," *id.*, at 353, and vacating a jury award of $79.5 million in punitive damages where compensatory damages amounted to $821,000) (internal quotation marks omitted).

[116] *E.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 945 (1998) (concluding that, due to these problems, there should be "a lower level of punitive damages" than the socially optimum.).

number and scope of cases that do not reach litigation.[117] Finally, under a punitive damages scheme, many actual victims are not compensated, as the compensation to which they are theoretically entitled to, goes, in fact, to the atypical victim who filed a suit. Our proposed cheapest compensation seeker rule can at least partially benefit the actual victims, even if they did not initiate an independent lawsuit.

B. Class Actions and Other Representative Litigation

Class actions are a useful vehicle to deter defendants from inflicting small harms on many potential plaintiffs. In particular, class actions address situations in which victims are reluctant to sue because the expected judgment is too small. At times, class actions would enable litigation where individual victims are uninformed. If there are many victims for whom it is prohibitively costly to acquire the information to initiate a lawsuit, class actions can prompt some victims to acquire the information.

However, the overlap between class litigation and third-party litigation is not complete. First, the proposed mechanism can complement class litigation where no class members initiate proceedings. Those include cases in which victims are unaware of their injuries or cases involving reputational costs that deter victims from "going public" and represent the class. Under our proposal, in these cases an informed and willing third party would be able to initiate a class action—and let members of the class join throughout the proceedings. Hence, it seems that third parties could initiate some important class actions that are currently not filed.[118]

Second, class actions cannot handle cases in which a single uninformed victim suffered a large harm caused by a single defendant. Hypotheticals I-III demonstrate situations where the wrongdoer's behavior inflicted injuries on a single victim, and thus class litigation is irrelevant. Medical malpractice, and professional malpractice more generally, typically represent similar

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[117] *E.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004). *Cf.*, Shavell, *supra* note 114 (criticizing an actual punitive damages award on similar grounds).

[118] A somehow similar procedure exists in Israel, where interested organizations can bring a class action where no victim pursues legal proceedings. Circumstances in which this option was triggered are illustrative. In one case, a third party sued on behalf of orthodox-Jewish women, on grounds of gender discrimination in the largest orthodox-Jewish radio station. The third party established that probably no class member—orthodox-Jewish listeners of the station—was willing to bring a class (or individual) action, due to the community pressure. CA 6897/14 Kol Barama Radio v. Kolech [2015]. In another, securities case, institutional shareholders were claimed to be in conflict with the defendant, hence, absent the third party, no litigation was expected. CC (TA) 2484-09-12 Hatzlacha v. Cohen [2013].

individual settings, which are not appropriate for class treatment. More broadly, currently the law tends to prefer individual litigation over class actions, even where an apparently similar behavior injured many victims.[119]

Third, class actions do not tackle situations in which victims do not want to sue. The victims—class members—receive notice and opportunity to opt-out of the class.[120] If they opt-out, these victims are free to forego their individual rights, perhaps due to the reputational and financial concerns that we described in Part II.B.2. Opt-outs can harm, then, the deterrent power of class actions.[121] In contrast, under the proposed regime third parties can under certain circumstances sue on behalf of victims who chose not to pursue their claims.

By the same logic, under the proposed liberal approach to standing, associations can sue on behalf of their members and remedy some under-enforcement problems.[122] Indeed, currently associations fulfill an important enforcement function, where the members of these associations are reluctant or unable to sue. Similar to class actions, however, associations do not fully address under-enforcement problems. First, organizations typically have to find individual members who suffered injuries—"[b]ut the need to show an injury . . . complicate[s]"[123] enforcement efforts. Second, in many cases there are no potential associations that can stand for victims' rights. Moreover, a rule that allows third parties to bring an independent lawsuit can facilitate the flow of information from third parties to relevant associations.

C. A Market for Legal Claims and Information

Arguably, transactions between third parties and the victims could overcome the problem of under-enforcement. Under a regime which allows such transactions, the victim can "buy" the information that a third party has.

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[119] A notable example is Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011), in which the Court refused to authorize class litigation on behalf of the female employees of Wal-Mart, holding that these women do not have enough in common to join together in a single suit.

[120] Some types of class actions are mandatory. FED. R. CIV. P. 23(b)(1)-(2). However, these class actions are rare.

[121] Indeed, the literature recognized, in related contexts, the problems associated with opt-outs and suggested possible solutions. *E.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 915-17, 925-30 (1987) (identifying the problems and suggesting to tax the right to opt-out); Rosenberg, *supra* note 61, at 862-66 (proposing to ban the right to opt-out).

[122] Associations can have standing on behalf of their members if they point to their members' standing, and some courts have interpreted this exception broadly. Elliott, *supra* note 15, at 503-05 (criticizing appellate court cases).

[123] Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 221 (1992).

Alternatively, the victim can sell her entire legal right to a third party who has better tools to realize its value. While these alternatives currently face serious legal and ethical constraints,[124] they can potentially bring to light unclaimed wrongs.

Yet market-based solutions are vulnerable to the problems raised earlier. In many cases of uninformed victims, third parties could not profitably sell the information they have to victims. The lack of information on the part of the victim, his inability to evaluate the value of his rights, and the "monopoly" that the third party has over that information are main obstacles to the successful completion of such transactions.[125]

Transactions also cannot take place when the victim is reluctant to sue because she may be subject to criminal sanctions or other undesirable repercussions resulting from the legal proceedings. In such cases, there may be a conflict between the private interests of the victim and the societal interests in optimal deterrence, and the victim has no reason to buy information or sell her claim.

D. Regulated Payments for Information

Another proposal involves payments for information. The recent use of whistleblower provisions,[126] for instance, indicates that such monetary rewards can mitigate under-enforcement problems. Scholars have argued that whistleblowers provisions are superior to the use of police officers and investigations on efficiency grounds,[127] and have shown empirically that where levels of moral outrage are expected to be low, financial rewards will likely be a decisive factor in inducing individuals to report misconduct.[128]

In our context, regulated payments for information involve payments to fact-witnesses. In a recent article Friedman and Kontorovich criticize the current regime, which provides no monetary rewards for fact-witnesses.[129] Instead, they suggest a regulated payment system for fact witnesses, to be set

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[124] *E.g.*, Friedman & Kontorovich, *supra* note 71, at 141-2 ("no jurisdiction allows compensation for the service of having witnessed."); Sebok, *supra* note 64, at 74-75 (stating that the law generally "prohibits the assignment of causes of action for personal injuries.").

[125] *Supra* notes 71-76 and accompanying text.

[126] Engstrom, *supra* note 50, at 606. *See also infra* notes 156-157 and accompanying text.

[127] *See* Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43 (2016).

[128] Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010). *Cf.*, *infra* Part IV.B. (discussing objections to our proposal that are based on the crowding out phenomenon).

[129] Friedman & Kontorovich, *supra* note 71.

by courts according to "the posterior belief the court placed on the witness being a true witness."[130] The new rule, they conclude, would incentivize third parties to share and collect socially beneficial information.[131]

To what extent and under what circumstances the use of regulated payments is superior or inferior to our proposal to extend the scope of potential plaintiffs? Without challenging the recent recommendations to use whistleblowers and fact witnesses through monetary rewards, we maintain that our proposal solves problems that cannot be addressed by regulated-payment systems.

First, the regulated-payment proposals cannot solve the problem of plaintiffs who are unwilling to sue, e.g., the cases of anticipatory retaliation such as the farmworkers or the poultry-workers (Hypotheticals V and VI). In a system that allows only the victim to initiate a lawsuit, an unwilling victim eliminates the incentives of third-parties to reveal and/or search for information.

Second, even with respect to victims who want to sue but lack information, it is unclear that monetary rewards to third-party witnesses can induce victims to sue. Relatedly, these schemes raise a host of practical difficulties. Consider an example along the lines of Hypothetical II, where the victim Warren cannot identify the wrongdoer Joanna without being tipped by Ron, the third party. Under our proposal, Ron simply files a lawsuit and serves the complaint on both Warren and Joanna. By contrast, it is unclear how Ron is supposed to proceed under the regulated payment approach. Ron could contact Warren in order to convince him to use its power to litigate. However, Warren, who bears the costs of filing a lawsuit, does not want to proceed without being sure that Ron has good evidence to produce. Suppose that Ron somehow credibly convinces Warren that his information is reliable. But once Ron shows Warren the incriminating evidence, the latter can presumably investigate the case on his own to save the payment to Ron.[132] Perhaps the court could compel Warren to pay. But, to do this the court would have to investigate the contribution of Ron to the case, which often would be a costly endeavor. To stress, it is not impossible for third parties to extract payments under such a system. Rather, such a rule imposes hefty transaction costs, particularly where the information is pivotal to the case and cannot be credibly conveyed to the victim.

Third, our proposal does a better job at screening frivolous and misleading information. Suppose that Ron, the third-party witness, convinces Warren that the latter has a good case against Joanna and Warren files the

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[130] *Id.*, at 160.

[131] *Id.*, at 157.

[132] We presume here that the regulated payment is subtracted from the victim's proceeds, as is common in whistleblower provisions. *E.g.*, 26 U.S.C. § 7623 (b)(1) (2006).

lawsuit. However, it is Warren who bears the costs of that lawsuit. Ron may gain from the lawsuit but he bears no costs, and therefore has an incentive to provide partial, inaccurate, or even misleading information. Indeed, this is a familiar drawback of the recent cash-for-information regimes, as "there is little to deter individuals from making unjustified accusations of wrongdoing."[133] By contrast, under our proposal the third party initiates the proceedings and bears the costs of the legal process. Therefore, the third party's incentives to provide unsubstantiated or speculative information are lower relative to a regulated payment regime.

Finally, under the regulated payment regime it would often be difficult and costly for courts to make judgements as to whether the testimony of a third party was necessary or useful to the victim.[134] Such problems do not arise in cases in which the third party serves as a plaintiff and receives a pre-determined portion of the proceeds.

E. Legal Obligations of Third Parties

Last, rather than paying third parties, the legal system can impose liability on them. A regime which renders third parties liable for victims' harm, or requires them to actively help identifying those who engage in harmful activities, incentivizes third parties to monitor and report wrongdoers. Although common law doctrines traditionally refrained from imposing positive duties on third parties, under the current legal system "third-party policing [has become] an increasingly important form of regulation and law enforcement that is now often deployed to address social problems."[135]

Third parties policing takes several forms. Under one version, third parties (or as they are often called "gatekeepers") are themselves potential defendants who can be sued if they fail to provide information that enables victims to sue wrongdoers. Under the more moderate versions of third-party policing, third parties are obligated to adopt procedures that would help identifying wrongdoers. For example, federal as well as state laws now require universities and colleges to apply "bystanders' intervention programs" which are designed to encourage witnesses (such as students and teachers) to provide information regarding cases of bullying and sexual

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[133] Jenny Lee, Note, *Corporate Corruption & the New Gold Mine How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 BROOK. L. REV. 303, 319 (2011) (quotation marks omitted).

[134] *Cf.*, Friedman & Kontorovich, *supra* note 71, at 140 ("We acknowledge that in many cases the administrative costs and practical difficulties of witness payment might often outweigh the benefits."). Such inquiries would be particularly costly where the information the third-party provided led the victim to a new piece of information, which eventually triggered the lawsuit.

[135] Swan, *supra* note 67, at 996 (internal quotation marks omitted).

harassment.[136]

Our proposal shares some similarities with the recent trend to magnify third parties' liabilities. Both approaches recognize that victims would often not enforce effectively their rights and need to be assisted by third parties. Our proposal however provides third parties with "carrots"—rather than "sticks."

While the use of "sticks" can sometimes resolve cases of under-enforcement, it suffers from several drawbacks. First, where it is hard to know or prove that a third party has knowledge concerning victims' loss (think of hypothetical II), the threat of liability and a duty to provide information might be of little consequences. In many instances, it is hard to identify and "single out" in advance a third party who is well-positioned to acquire information.[137] Moreover, while under our proposal third parties have an incentive to reveal the fact that they have information, under rules involving "sticks" they have incentives not to reveal it and, furthermore, not to acquire any information even when they can. Indeed, at least in typical contexts, liability on third parties seems futile.[138] Second, when victims' own interests are to avoid litigation, securing further information from third parties would have no effect on victims' decision not to sue and therefore no influence on the incentives of wrongdoers. Last, third-party policing is not costless—for instance, effective third-party obligations have to be monitored and enforced. Furthermore, by sanctioning third parties, "sticks" blur the line between wrongdoers and observers. This is an undesirable by-product as it can dull the normative weight that society assigns to wrongdoing.[139]

IV. OBJECTIONS

We examine below a number of objections to our proposal. While some of these objections are sound, they can be addressed by a careful implementation of procedural safeguards and by a wise use of the discretionary powers by courts.

A. Over Nosiness and Frivolous Suits

Arguably, our proposal could trigger too large incentives on the part of

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[136] *Id.*, at 994-96.

[137] Moreover, where the law singles out one third party, "others observers are less likely to intervene." *Id.*, at 1013 (internal quotation marks omitted).

[138] Swan, *supra* note 67, *passim* (discussing third party liability in the contexts of school bullying, sexual misconduct in college campuses, and workplace harassment).

[139] *Cf.*, *id.*, at 1040 (criticizing current bystander intervention programs for failing to "focus on the ultimate responsibility of perpetrators").

third parties to investigate and perhaps violate the privacy of victims. Further, it may also result in overinvestment and duplicative efforts in detecting wrongs in order to benefit from the resulting compensation. One can even conjecture that extending standing would lead to fraudulent and frivolous legal proceedings. Alternatively, it can lead to a race to the court where third parties file suits before the victim can bring his own suit and thereby deprive him of part of his just compensation.

These considerations have to be weighted against the advantages of our proposal. Our proposal tackles under-enforcement as it offers monetary rewards to information providers. Plausibly, with financial incentives, third-parties will be more likely to share information, and even more so, to collect and produce it.[140] The current regime offers no monetary incentives for third-parties, suggesting "socially suboptimum levels" of information sharing and producing.[141]

It is difficult to evaluate the significance of the conflicting considerations in abstract, without solid empirical bases. Yet it is not difficult to mitigate the concerns regarding overinvesting and disrupting the rights of victims for financial gains. The most obvious way is to deny compensation, block, or even sanction cases in which such abuses took place. Courts often evaluate the motives and background of third parties in class actions and qui tam litigation, and similar mechanisms can be used in our context.

To be concrete, we sketch here three procedures that mitigate these problems: early dismissals and informational requirements; continuous involvement of the victim; and aggressive sanctions.

First, under our proposal, third parties' suits may be dismissed at an early stage—the court ought to grant the power to sue only to those third parties who demonstrate that they are likely to be effective plaintiffs. A possible criterion to identify such plaintiffs is their informational advantage. It seems relatively easy for courts to identify third parties who bring a lawsuit based on original or solid informational basis, as the experience with qui tam litigation demonstrates.[142]

Early dismissals and a requirement for solid informational basis mitigate several potential problems with third-party litigation. Presumably, the threat of early dismissals would drive third parties to prepare high-quality complaints, which are based on genuine and convincing information.[143]

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[140] *See* Friedman & Kontorovich, *supra* note 71, at 144 (showing how monetary incentives could incentivize potential witnesses to actively place themselves in positions in which they would more likely be able to gather information)

[141] *Id.*, at 157.

[142] In qui tam litigation a lawsuit can be brought only by "original sources" of information. 31 U.S.C. §3730(e)(4).

[143] We observe a similar phenomenon in qui tam suits. The government's decision to join the case predicts its success. *See supra* note 48. This threat provides a "strong incentive

Moreover, the class of possible plaintiffs would be highly limited in most cases—only those who possess private information that victims do not have and/or the sufficient wherewithal to survive early dismissal. Our proposal should induce third parties with unique information, such as medical staff, therapists, etc., where the victim is uninformed; and "big-guys," such as competitors and NGO's, where the victim is informed but unwilling to sue. As a result, concerns regarding "race to the courthouse" and duplicative efforts to litigate seem minimal.[144] Importantly, these procedures also guarantee that third-party's information that was gathered by using intrusive or illegal means would not give rise to standing. Finally, allowing the court broad discretion at early stages can better respect the victim's rights—as a court can decide to stay the third-party's complaint in order to give the actual victim more time to initiate a lawsuit on her own.[145]

The second procedural feature that mitigates these concerns is the continuous involvement of the actual victim in the process. Recall that, under the proposed model the complaint is first served on the victim, who can elect whether to join the action or not.[146] Hence, even if a third party receives the court's preliminary approval, a notice will be sent to the defendant *after* the actual victim had the opportunity to express her views. The involvement of the real victim, alongside the third party, would presumably provide the court with more information, making frivolous suits less likely.

Third, an extensive use of monetary sanctions against frivolous suits would discipline third parties. Third-party lawsuits that crossed the preliminary stages but then turned out to be frivolous or based on fraudulent information or on information which was acquired by using intrusive means should be penalized—e.g., through Rule 11 motions.[147]

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for relators' counsel to do top-quality work from the earliest stages." Bucy, *supra* note 51, at 69.

[144] Landes & Posner are known for arguing that duplicative enforcement concerns justify the current monopoly of victims on filing lawsuits. William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975). These concerns dissipate, however, when enforcement is only available to a limited circle of third parties.

[145] In that case, if the victim does not sue, the court can revive the third party's complaint toward the end of the limitations period.

[146] *Supra* Part II.A.

[147] The concerns that monetary incentives would lead to fabrication or perjury by third parties is "greatly exaggerated." Lisa Bernstein & Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 GEO. L.J. 2215, 2255 (1995). First, at least with regard to physical evidence fabrication seems difficult and risky. Levmore & Porat, *supra* note 71, at 714. Second, the current system already accepts similar risks, as the parties and their experts are highly incentivized to commit perjury. *E.g.*, Bernstein & Klerman, *supra*, at 2253-5 (discussing the incentives of defendants in multi-party cases); Friedman & Kontorovich, *supra* note 71, at 148 (discussing experts). Third, under our proposal more information would flow from potential third parties to the court—

The positive experience with qui tam lawsuits suggests that with a careful design, expanding the right to bring lawsuits to informed third parties is likely to be unproblematic.[148] Allowing third parties to become plaintiffs may create some procedural complications, but it also serves a socially valuable goal.

B. Crowding Out

Psychologists and behavioral economists have established that providing monetary compensation may 'crowd out' other incentives, and in particular altruistic incentives. In various contexts, from blood donation to volunteering, monetary incentives exclude or annul altruistic incentives.[149] Similarly, it could be conjectured that providing monetary incentives may weaken or annul the altruistic incentives and need not necessarily result in greater cooperation of third parties.

There are reasons to believe crowding out is not a serious problem. To bring about altruistic reaction the wrong committed must incite sufficient "moral disapprobation."[150] Some of the previous examples do not seem to raise such moralistic motivations.[151] Further, while currently individuals may voluntarily cooperate where a wrong is committed in front of them, it is less likely that monetary rewards cannot induce third parties to share information concerning wrongs that were not committed in front of them or induce third parties to actively invest resources in detecting wrongs that they can easily detect.[152]

If anything, the current climate supports our conjectures. First, the existing level of cooperation or involvement of third parties in detecting

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increasing the odds that the court would detect one's false testimony or evidence. *Id.*

[148] *See supra* Part I.B.2 (experience with qui-tam litigation). *See also* O'Connor, *supra* note 98, at 544 (in the context of sexual harassment, "the existence of . . . third-party claims based on sexual favoritism and obscene pictures has not resulted in a flurry of litigation in those areas.").

[149] *See* RICHARD TITMUS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (comparing blood donation levels in Britain and the U.S., and arguing that the latter relative low donation levels are due to the provision of monetary incentives to donors). For a survey of empirical research on Titmus's work, see Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589 (2001).

[150] Engstrom, *supra* note 50, at 623. *See also supra* note 128 and accompanying text.

[151] In particular, the examples that discuss the rights of employees seem to lack the "physical" element that plausibly correlates with moral disapprobation. *Cf.*, Engstrom, *supra* note 50, at 623-4 (discussing moral disapprobation and the direct, physical dimension of the activity).

[152] *See* Friedman & Kontorovich, *supra* note 71, at 150 ("[I]t does not seem to us that fact witnessing is the kind of voluntary activity that is subject to crowding-out effects. For one, . . . [p]eople may feel obliged to testify if they have important factual information, but few feel any civic duty to acquire factual information . . . Secondly, even now testimony is not a voluntary activity, but rather one that can be mandated by subpoena.").

wrongs committed by others is apparently small. The prevalent norms do not encourage third parties to intervene or report—rather, they reflect a "stay out of other people's business" view.[153] Second, under-deterrence concerns have triggered in recent years programs that utilize monetary incentives to induce people to share their information. Qui tam litigation—whose very goal is to encourage non-injured, informed third parties to file lawsuits—has been flourishing in the last few decades.[154] In addition to qui tam litigation, whistleblower programs are clearly on the rise.[155] The Internal Revenue Service reinvigorated in 2006 its cash-for-information program, and it appears that these changes indeed improve enforcement.[156] Most notably, as part of the Dodd-Frank overhaul of financial and securities regulation, Congress enacted and fortified monetary-driven, whistleblower programs in these areas.[157] Against the backdrop of these seemingly successful programs, scholars suggest that "conditions . . . seem ripe for further expansion" of the use of monetary incentives,[158] as our paper proposes.

C. Under Compensation (of Victims) and Windfalls (for Third Parties)

One may still be skeptical about the desirability of a regime under which non-victims collect compensation from wrongdoers at the expense of actual victims. As every dollar paid to the cheapest compensation seeker is deducted from the damages awarded to the actual victim, our proposal may appear objectionable on fairness grounds. Yet this proposal applies to victims who under the current legal regime typically remain uncompensated. Thus although third-party litigation does not provide complete compensation to victims, it makes them better off relative to the current regime.

More generally, the proposed mechanism is in line with the emerging rules regarding injurers' liability under conditions of factual uncertainty. Conventionally, victims must show that injurers' behavior is the but-for-cause of their harm. The but-for-cause test is biased against victims who face iterated risks that are below 50%. A classic example is patients whose chances of recovery is equal or lower than 50%. When such patients suffer harm due to doctors' malpractice, they cannot establish that but-for the negligence of their doctors they would have recovered.

The concern that doctors systematically inflict uncompensated harms on

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[153] Swan, *supra* note 67, at 1003. *See generally id.*, at 997-1006, 1029 (surveying the legal norms). Even statutes that mandate a duty-to-report, as opposed to duty to intervene, are rare in the U.S. *Id.*, at 1000.

[154] *Supra* notes 44-45 and accompanying text.

[155] Givati, *supra* note 127 (describing the recent trend).

[156] Engstrom, *supra* note 50, at 606 & n.2.

[157] *Id.*, at 606.

[158] *Id.*, at 607.

patients led courts and legislatures to adopt the "loss of chance" doctrine (LOC). This doctrine, now applied in a majority of the states,[159] allows victims to collect compensation that reflects the prospects that this harm resulted from defendants' wrongdoing. For example, a patient who with proper care had 30% chance of recovery and due to her doctors' malpractice lost this chance will be able to collect 30% of the damages. As courts explained, LOC guarantees that doctors internalize the costs of their misconduct and compensate victims for their losses.

Yet, LOC inevitably compensates non-victims at the expense of actual victims. To see this point, suppose there are ten identical patients who had each 30% chances of recovery. The doctors treating the ten potential victims fail to treat them properly (thereby none of the patients recover). In practice, but for doctors' failure to provide proper medical care, three of these patients (30%) would have recovered. These patients accordingly should ideally be entitled to full compensation by their respective doctors. The remaining seven patients (70%) should ideally remain uncompensated as, in reality, they suffered no harm. However, under LOC, all ten patients receive the same compensation: an amount equal to 30% of their harm. The damages which are awarded to the seven non-victims are essentially a windfall and awarding such a windfall deprives the real victims of full compensation for their actual losses.

Third-party litigation shares the same rationales that underlie LOC. Courts and legislature replaced the but-for-cause requirement with the LOC doctrine to address problems of under-enforcement. While the doctrine provides actual victims with only partial compensation (and windfall to the non-victims), it greatly improves the victims' well-being as they are entitled to at least some compensation. Our proposal is similar. By encouraging non-victims to initiate litigation against wrongdoers, it stimulates the filing of lawsuits against injurers that otherwise would escape responsibility. If applied properly, it also ensures that actual victims would receive at least some redress to their harm.

This Part raised some objections to our proposal. We have shown that concerns regarding frivolous suits and exaggerated incentives to investigate can be mitigated through a better procedural design. Moreover, crowding-out does not seem likely under normal circumstances. And it was shown that in other contexts tort law undercompensates victims and provides windfall to non-victims in order to enhance enforcement.

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[159] Boaz Shnoor and Naomi Bacon-Shnoor, *To Accept or Not to Accept? A Study of States' Supreme Courts Decisions to Accept or Reject the Loss of Chance Doctrine*, available at: http://law.huji.ac.il/upload/ShnoorBacon.pdf

V. THE CHEAPEST COST AVOIDER RULE: A CONSERVATIVE REVOLUTION

The final Part places our proposal in a broader context of tort law doctrine. It shows that while many concepts in tort law have been given flexible, policy-oriented interpretation, the perception of "plaintiffs" in torts has remained largely rigid, strictly associated with those who suffer harm as a result of injurers' conduct. This rigid perception is unwarranted.

Over the past half century, the common-law rules that long set the boundaries of injurers' liability have been subject to important modifications. These modifications, often expanding victims' right to recovery, encompass many of the elements that underlie tort liability. Victims may now collect damages in circumstances in which tort law has traditionally barred compensation, and for losses that have not been considered compensable.[160]

In important part, tort law's expansion has occurred through broad interpretation of fundamental liability concepts. Current tort law doctrine, for example, has considerably reconfigured the notion of *harm*.[161] While common law rules limited victims' recovery right to certain well-defined categories of losses, courts have expanded the types of harm for which victims could sue. Courts, for example, have significantly liberalized the conditions under which plaintiffs can now recover for pure economic and pure emotional losses.[162] The definition of emotional loss itself has been significantly broadened, enabling victims to collect damages for psychological harms that have traditionally been deemed non-

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[160] *See generally*, Peter H. Schuck, *The New Judicial Ideology of Tort Law*, 37 PROC. ACAD. POL. SCI. 4 (1988) ("On almost all fronts and in almost all jurisdictions, liability has dramatically expanded.").

[161] This is also the case in other fields of the law. Perhaps the most radical expansion of the concept of harm took place in administrative law where in making cost-benefit calculations agencies are required to take into account "existence value"— the psychic benefit that individuals derive from the fact that they know that some goods exist, *e.g.*, the Grand Canyon (independently of the question of whether they experience that good, *i.e.*, visit the Grand Canyon). Note, *Existence-Value Standing* 129 HARV. L. REV. 775, 776 (2016); David Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 368-372 (2004).

[162] For the early, common-law based, strict compensation rules regarding pure economic and emotional harms, see for example, Mitchell v. Rochester Railway Co., 45 N.E. 354 (1896) (holding that a party may not recover for injuries sustained as a result of "fright and alarm . . . [if] there was no immediate personal injury"); Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) (denying recovery for pure economic losses). For a description of the current flexible rules see Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. SUPP. 111 (1998) (describing the variety of circumstances in which current tort doctrine allows compensation for pure economic losses); Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 101, 107-108 (2015) (reviewing the increasing recognition of victims' right to file for pure emotional harms).

compensable.[163] Similarly, tort law's protection of interests such as privacy and autonomy has been widened, resulting in new forms of harm for which victims can claim compensation.[164]

In a similar vein, the rules regarding *causation* have been modified to allow the imposition of liability on wrongdoers in cases in which the conventional rules failed to do so. As noted, courts and legislatures have replaced the traditional but-for-cause standard with alternative rules that permit sanctioning injurers even when their factual contribution to the materialization of victims' harm cannot be established by the preponderance of the evidence.[165] Furthermore, in drug, toxic-tort, and medical-malpractice cases, courts "have accepted relatively weak claims of causation . . . where proving cause and effect is often difficult."[166]

While tort law doctrine has adjusted the conventional definitions of harm and causation (as well as of other related tort concepts[167]), it has retained its traditional perception of who may demand recovery from injurers. To be sure, courts' expansionist approach in defining harm and causation has widened the scope of the plaintiffs who could seek redress in court. Yet, the gradual expansion of harm falls short of fully addressing under-enforcement problems.[168] Importantly, the *standard* to determine plaintiffs' eligibility to file has remained unchanged. Plaintiffs must be victims who themselves suffered harm due to injurers' activity.

Tort law doctrine's strict approach in defining plaintiffs is perhaps most evident when one considers its corresponding treatment of who should be considered defendants. Tort law doctrine (with the encouragement of law and economics theorists) has been fully aware of the need to be flexible with

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[163] DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS §383 (2d ed., 2011).

[164] *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2013) (discussing the rise in tort's protection of individuals' privacy); Alan Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 NEB. L. REV. 51, 52 (1977) ("There is an ongoing expansion of liability . . . through the growth of the doctrine of informed consent").

[165] *Supra* Part IV.C.

[166] Schuck, *supra* note 160, at 4.

[167] That is so regarding several concepts of tort law. *See* Note, *Government Tort Liability*, 111 HARV. L. REV. 2011-2014 (1998) (reviewing changes in federal law making the government liable under tort law); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359-360 (1988) (discussing the transformation of marital immunity in state and federal law); Donald J. Orlowsky, Note, *Charitable Immunity—The Road to Destruction*, 32 TEMP. L.Q. 86 (1958) (surveying the abandonment of charitable immunity); James A. Henderson Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467 (1975) (arguing that the general duty of reasonable care has been extensively eroded, *inter alia*, by abandonment of the privity rule regarding products liability, the expansion of rules governing environmental protection, and the expansion of duties owed by land possessors).

[168] *Supra* notes 104-105 and accompanying text.

respect to the identity of those who could be sued for causing harm. At times a person may find herself to be a defendant not because she is the most proximate cause but simply because she has deep pockets, or is in a better position to insure or spread the loss, or because other potential defendants are less likely for various reasons to take precautions. This observation raises a puzzle. Why have theorists of law and economics as well the legal system itself been flexible with respect to identifying who the defendants are and so rigid with respect to who the plaintiffs are? We offer three possible explanations.

The most obvious explanation is that the victim of a tort raises sympathy and we wish to better protect her rights.[169] One of the main concerns of tort law is to compensate the victim and it often overshadows the concern for efficiency. However, the concerns for victims' compensation should support third-party litigation, at least where the victim is willing but incapable of vindicating its rights (think of Hypothetical II and uninformed victims). Moreover, the concern for fair compensation similarly supports limiting the scope of defendants only to those who are at fault. After all, it seems unfair that a person becomes liable only because she has a deep pocket or simply is in a better position to insure. In general, we see no a-priori reason to prefer the imposition of liability on innocent defendants to granting (partial) compensation to non-victims. If anything, the law should be more careful with the innocent's loss than the third-party's windfall.

A second explanation relates to the desire, which also underlies the constitutional requirement of standing, to ration the scope of cases that reach courts. However, these "floodgates" arguments seem weak, as these new cases have social value in deterring wrongdoing and compensating victims.[170] More importantly, there is no a-priori reason to believe that litigation against faultless defendants burdens courts less than opening the gates to third-party suits.

A third and a more persuasive explanation rests upon the legal doctrines governing tort law. Typically, plaintiffs are identified by using a seemingly "natural" characteristic, namely by the fact that they were harmed by an act of another, 'victims.' In contrast, the concept of fault that is often used to identify defendants is clearly a normative concept and it provides much more opportunity for manipulation. So while equating defendants with those who have committed wrongs does not constrain effectively the scope of defendants given the flexibility of the term 'fault,' equating plaintiffs with victims imposes a genuine constraint on the scope of plaintiffs.

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[169] For the problems resulting from the compassion towards victims, see STEPHEN D. SUGARMAN, DOING AWAY WITH TORT LAW 555, 591 (1985).

[170] *Cf.*, Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1007 (2013) (arguing for a "presumption against court-centered floodgates arguments.").

This asymmetry explains but cannot justify the reluctance of legal doctrine to relax the requirement of standing. There is no a-priori stronger reason to relax the requirement used to identify defendants than the reasons to relax the requirements used to identify plaintiffs. Given the discussion above it is evident that while our proposal may seem at first sight radical, it is in effect a natural development of the type that took place in other spheres of tort law.

CONCLUSION

The cheapest compensation seeker rule can be analogized to the concept of the "cheapest cost avoider." Precisely as the principle of the cheapest cost avoider demoralizes the concept of fault and thereby facilitates the attribution of fault to individuals who are not morally wrong (but instead need to be deterred), so the concept of the cheapest compensation seeker facilitates the provision of compensation to individuals who have not been wronged (but need to be incentivized to sue). While this proposal deviates from a well-entrenched doctrine, it is consistent with major developments in tort law and it better reflects the greater stress on policy-oriented considerations that is reminiscent of contemporary tort law.

This last observation as well as the numerous exceptions to the standing requirement discussed in Part I suggest that even those who oppose reforms of the type advocated in this Article may concur with the observation that the traditional entrenched conviction that only victims can sue does not fully reflect existing legal realities. Hence, even without any further reforms, this Article reveals that perhaps like Monsieur Jourdain's discovery that he has "been speaking prose all my life, and didn't even know it," tort law has been extending the power to sue beyond what we have been trained to believe to non-victims and simply we were not told about it.

Can this proposal be extended to other fields of the law, in particular contract law? Should we allow a third party to sue when the promisee is not the best "compensation seeker"?

There are powerful reasons to reject such a proposal. In particular, unlike tort law, third parties are very rarely better litigants than the parties to the contract. Yet, at least in one context it seems that current contract law doctrine endorses such a principle, namely the right that a third-party beneficiary has to sue for violation of a third party beneficiary contract. While traditionally common law refused to grant standing to third-party beneficiaries (the requirement of privity), existing contract law recognizes such a right.[171] One plausible explanation is that the third party is more likely to sue than the party

[171] *See* RESTATEMENT (THIRD) OF CONTRACTS § 302.

to the contract as it is the beneficiary's interests that are at stake rather than the interest of the promisee.

This last observation is only an extension of the logic elaborated in this Article: standing is a procedural tool designed to realize most effectively the ends that the law ought to pursue. The rigid equation of victims with plaintiffs in tort law and the rigid equation of the parties to a contract with plaintiffs in contract law (under the privity requirement) are relics of the past and given the complexity of contemporary society fail to serve contemporary societal needs.