Boston College Law Review

Volume 59 | Issue 4 Article 5

4-26-2018

Crowdfunding Civil Justice

Ronen Perry
University of Haifa, rperry@law.haifa.ac.il

CROWDFUNDING CIVIL JUSTICE

RONEN PERRY

INTRODUCTION 1358
I. THE EVOLUTION OF LITIGATION CROWDFUNDING 1361
A. The Underlying Need *1361*
B. Market Developments *1365*
1. Third-Party Litigation Funding 1365
2. Crowdfunding 1367
3. Litigation Crowdfunding 1368
C. Legal Obstacles *1371*
II. INVESTMENT-BASED MODELS 1373
A. The Plaintiff *1373*
1. Potential Benefits 1373
2. Possible Drawbacks 1376
B. The Defendant *1382*
1. Process Costs 1382
2. Outcome Costs 1383
III. NON-INVESTMENT-BASED MODELS 1384
A. Overview *1384*
B. The Plaintiff *1385*
C. The Defendant *1388*
CONCLUSION 1394

CROWDFUNDING CIVIL JUSTICE

RONEN PERRY*

Abstract: The Article provides a systematic law and economics analysis of civil litigation crowdfunding. It first distinguishes between investment-based and non-investment-based crowdfunding models. Investment-based litigation crowdfunding is generally a welcome phenomenon, because it enables parties to pursue meritorious claims and defenses without generating a significant risk of frivolous litigation. Thus, it should be minimally regulated by securing disclosure of relevant information to potential investors. Non-investment-based crowdfunding of process costs should be subject to professional vetting, which will inhibit frivolous claims and defenses that waste scarce administrative resources and do not further the underlying goals of civil law. Non-investment-based crowdfunding of outcome costs should be prohibited when it undermines the primary objectives of substantive law.

INTRODUCTION

In June 2017, Maajid Nawaz, the chairperson of a London-based think tank, launched an independent campaign for crowdfunding a defamation action against an American nonprofit legal advocacy organization that had published his name on a list of "anti-Muslim extremists."[1] In the same month, Andy Wightman, a Member of the Scottish Parliament, raised over £60,000 through a British crowdfunding website to fight a defamation action brought by a wildlife protection organization over his blog posts about the plaintiff's practices.[2] Wightman has pledged to reimburse contributors pro rata if the defense succeeds and he recovers his legal expenses. At approximately the same time, Igal Sarna, a journalist held liable for defamation in a Facebook post scorning Is-

* Professor of Law and Director, Aptowitzer Center for the Study of Risk, Liability, and Insurance, University of Haifa. I am grateful to participants in faculty workshops at the IDC Law School and at the UPF Faculty of Law for valuable comments on earlier drafts, and indebted to Daphna Perry, who painstakingly read the first draft and assumed more than her fair share of the burden at home in order to enable timely submission of this paper.

1 *Donate to Help Maajid Take on the SPLC*, QUILLIAM, https://www.quilliaminternational.com/shop/donate/donate-to-help-maajid-take-on-the-splc/ [https://perma.cc/S9JQ-9TRK]; Thomas Chatterton Williams, *Maajid Nawaz's Radical Ambition,* N.Y. TIMES MAG. (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/magazine/can-a-former-islamist-make-it-cool-to-be-moderate.html.

2 Andy Wightman, *Legal Costs of Defending Defamation Action*, CROWDFUNDER, http://www.crowdfunder.co.uk/awdefamation [https://perma.cc/7CCM-BJP5]; *see also Defamation Case Against MSP Andy Wightman Begins*, BBC (Apr. 26, 2017), http://www.bbc.co.uk/news/uk-scotland-scotland-politics-39721538 [https://perma.cc/RNG5-MV6Q].

raeli Prime Minister Benjamin Netanyahu and his wife,[3] raised over $45,000 through an Israeli crowdfunding website to cover his liability.[4] Sarna obliged to donate any excess funding and any sums reimbursed on appeal to the Association for Civil Rights.[5] These three cases—each arising in a different jurisdiction and concerning a different cost—reflect an evolving global trend that may revolutionize the civil process.

Commercial third-party litigation funding (hereinafter "TPF") has been around for decades.[6] Crowdfunding, which is based on the aggregation of nu-

---

[3] File No. 56211-03-16 Magistrate Court (Tel Aviv), Netanyahu v. Sarna (June 11, 2017) 40–50 (Isr.) [Nevo] (Ronen Perry trans.).

[4] Igal Sarna, *Fighting the SLAPP Together*, GIVEBACK, https://www.giveback.co.il/project.aspx?id=767 [https://perma.cc/QQY5-A5JU] (Ronen Perry trans.); *see* Nati Tucker, *Found Guilty of Libel for Facebook Post About Netanyahu, Crowdfunding Campaign Helps Cover Journalist's Costs*, HAARETZ (June 20, 2017), http://www.haaretz.com/israel-news/1.796804 [https://perma.cc/7MPP-UP4P].

[5] Tucker, *supra* note 4.

[6] This topic is highly researched. *See, e.g.*, David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075 (2013) (discussing the effects of TPF); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233 (2014) (same); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008) (same); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007) (discussing TPF in general); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010) (same); Tara E. Nauful, *Third-Party Litigation Financing: Do We Need It? Is It Worth the Risks?*, AM. BANKR. INST. J., May 2016, at 16 (same); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005) (same); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159 (2011) (same); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673 (2011) (same); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 139 (2011) (same); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347 (2004) (proposing a statute to regulate litigation funding for individual consumers); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861 (2015) (examining responses to the TPF industry); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011) (detailing TPF generally); George Steven Swan, *The Economics of Usury and the Litigation Funding Industry*: Rancman v. Interim Settlement Funding Corp., 28 OKLA. CITY U. L. REV. 753 (2003) (same); Willem H. van Boom, *Litigation Costs and Third-Party Funding*, *in* LITIGATION, COSTS, FUNDING AND BEHAVIOUR 5 (Willem H. van Boom ed., 2017) (discussing TPF in general); Cento Veljanovski, *Third Party Litigation Funding in Europe*, 8 J.L. ECON. & POL'Y 405 (2012) (exploring TPF from an international perspective); Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007) (detailing TPF generally); Nicholas Beydler, Comment, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159 (2012) (same); Nicholas Dietsch, Note, *Litigation Financing in the US, the UK, and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687 (2011) (exploring TPF from an international perspective); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010) (discussing TPF in general); Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503 (2006) (same).

merous but modest individual contributions through specialized online platforms,[7] is a relatively new finance method. Yet the dramatic growth of the crowdfunding industry in recent years, reaching $34.5 billion in the United States alone in 2016,[8] was unlikely to leave the civil litigation market unaffected. In the last few years, crowdfunding has begun its incursion into this arena.

This Article is the first to provide a systematic law and economics analysis of civil litigation crowdfunding.[9] It argues, first, that the distinction between investment-based and non-investment-based crowdfunding models is crucial.[10] In non-investment-based models, contributors expect only a non-monetary benefit (reward-based crowdfunding) or none at all (donation-based crowdfunding).[11] In investment-based models, contributors expect financial return—a share in the fundraiser's future gain (equity-crowdfunding)[12] or repayment of the contribution with interest (debt-crowdfunding).[13] The Article contends that investment-based litigation crowdfunding is generally a welcome phenomenon, because it enables parties to pursue meritorious claims and defenses without generating a significant risk of frivolous litigation. Thus, it should be minimally regulated by securing disclosure of relevant information to potential investors.[14]

Non-investment-based litigation crowdfunding should be more constrained. The analysis requires a second fundamental distinction between pro-

---

[7] Manuel A. Gómez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 310, 313, 322 (2015) (defining crowdfunding); Ethan Mollick, *The Dynamics of Crowdfunding: An Exploratory Study*, 29 J. BUS. VENTURING 1, 2 (2014) (same); Michael Elliott, Comment, *Trial by Social-Media: The Rise of Litigation Crowdfunding*, 84 U. CIN. L. REV. 529, 529 (2016) (same).

[8] TANIA ZIEGLER ET AL., THE AMERICAS ALTERNATIVE FINANCE INDUSTRY REPORT: HITTING STRIDE 26–27 (2017), https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2017-06-americas-alternative-finance-industry-report.pdf [https://perma.cc/BW2C-KY76].

[9] Only one law review article and one student comment have been published on this topic so far. Gómez, *supra* note 7; Elliott, *supra* note 7. Neither identifies the normative significance of the distinctions between investment and non-investment-based crowdfunding, between process and outcome costs, and between financing claims and defenses. *See generally* Gómez, *supra* note 7; Elliott, *supra* note 7.

[10] *See* ZIEGLER ET AL, *supra* note 8, at 22 (offering this conceptual distinction).

[11] *See* Gómez, *supra* note 7, at 309–10, 322 (discussing non-investment-based crowdfunding models); Nauful, *supra* note 6, at 17 (same); Ross S. Weinstein, *Crowdfunding in the U.S. and Abroad: What to Expect When You're Expecting*, 46 CORNELL INT'L L.J. 427 *passim* (2013) (same); Elliott, *supra* note 7, at 529, 531–32 (same).

[12] *See* Peter C. Sumners, *Crowdfunding America's Small Businesses After the Jobs Act of 2012*, 32 REV. BANKING & FIN. L. 38, 42 (2012) (discussing equity crowdfunding); *see also* Gómez, *supra* note 7, at 313 (same); Elliott, *supra* note 7, at 522–23, 529 (same).

[13] *See* Gómez, *supra* note 6, at 313, 324–25 (defining debt crowdfunding); Elliott, *supra* note 7, at 529, 532–33 (same).

[14] *See infra* notes 117–187 and accompanying text.

cess costs and outcome costs. Process costs are any outlays incurred by either party in relation to the dispute resolution process and prior to its conclusion. These may include court charges, attorneys' fees, witnesses' and experts' expenditures and remuneration, etc.[15] In cases of incapacitating injury, process costs may include the claimant's living expenses throughout the process. Outcome costs are the amounts payable under the settlement or the judgment. This Article contends that non-investment-based crowdfunding of process costs should be subject to professional vetting. This vetting will inhibit frivolous claims and defenses that waste scarce administrative resources and do not further the underlying goals of civil law. Non-investment-based crowdfunding of outcome costs should be prohibited when it undermines the primary objectives of substantive law.

The Article unfolds in three parts. Part I discusses the evolution of litigation crowdfunding. It first explains the need that litigation funding models were developed to meet. Next, it shows how this need was met through traditional financing methods, collectively known as third-party litigation funding; how technology enabled alternative finance methods to emerge and gather pace; and how these two global trends have combined to form a new subindustry: civil litigation crowdfunding. Part I also presents possible legal obstacles to this development. Part II analyzes investment-based crowdfunding of claims and defenses, showing that they offer considerable benefits and only raise easily manageable problems. Part III turns to non-investment-based models, asserting that crowdfunding process costs must be subject to professional vetting, and that crowdfunding outcome costs should be prohibited, at least under some circumstances.

I. The Evolution of Litigation Crowdfunding

A. The Underlying Need

Civil litigation is costly. Litigants incur court charges, attorneys' fees, witnesses' and experts' expenditures and remuneration, opportunity costs, and intangible harms.[16] These costs impact the tendency to sue, and might inhibit access to justice when: (1) they exceed the claimant's expected benefit from litigation; (2) the victim does not have sufficient resources; or (3) the victim is unwilling to bear the costs due to risk-aversion and the uncertainties of the process.

[15] *See* Christopher Hodges et al., *The Oxford Study on Costs and Funding of Civil Litigation*, *in* THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE 1, 12 (Christopher Hodges et al. eds., 2010) (itemizing litigation costs).

[16] *See id.*

Assume p denotes the plaintiff's probability of success, d the extent of damages in case of success, c_p the plaintiff's litigation costs, and c_d the defendant's litigation costs. In jurisdictions where each party must bear his or her own legal costs, most notably the United States,[17] the potential plaintiff will not bring an action if $p \times d < c_p$.[18] In jurisdictions where the loser reimburses the winner for reasonable costs, most notably the United Kingdom,[19] the potential plaintiff will not bring an action if $p \times d < (c_p + c_d)(1 - p)$. In jurisdictions that allow reimbursement but compute the costs by reference to tariffs or a percentage of the claim (such as Germany[20]) or allow only modest reimbursement (such as France[21]) the incentive would be somewhat different. Law and economics literature shows that a shift from the American rule to the English rule (or vice versa) may have conflicting effects on the likelihood of bringing an action, so it is impossible to predict the overall impact of such a change on the probability of litigation.[22]

In all systems, both the probability of success, presumably correlated with merit, and the claim-value, which is uncorrelated with merit, affect the likelihood of a legal action.[23] On the one hand, litigation costs deter frivolous and meritless claims. If a plaintiff's litigation costs were zero, there would be no incentive to avoid undeserving claims.[24] The higher the costs, the greater their screening effect; a person whose potential claim is sufficiently weak will be unwilling to bear the costs of pursuing it. On the other hand, some victims, particularly individuals (as opposed to corporations), may be unable or unwilling to bear the costs of litigating meritorious claims. Even if $p \times d$ is greater than c_p, the victim might not have sufficient resources to bear c_p, at least during

---

[17] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

[18] The victim may bring an action even if $p \times d < c_p$ where the defendant's litigation costs exceed his or her cost of settling. Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 *passim* (1996).

[19] *See* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting,* 47 LAW & CONTEMP. PROBS. 37, 44–47 (1984) (discussing the English rule to computing legal costs); Thomas D. Rowe, Jr., *Shift Happens*: *Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 128 (2003) (same).

[20] *See* Burkhard Hess & Rudolf Hübner, *Germany*, *in* THE COSTS AND FUNDING OF CIVIL LITIGATION, *supra* note 15, at 349, 351, 365 (discussing the German law approach to legal costs).

[21] *See* van Boom, *supra* note 6, at 8 (discussing the French law approach to legal costs).

[22] *See* Louis T. Visscher & Tom Schepens, *A Law and Economics Approach to Cost Shifting, Fee Arrangements and Legal Expense Insurance*, *in* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE 7, 12–13 (Mark Tuil & Louis Visscher eds., 2005) (reviewing the literature).

[23] *Id.* at 14 ("[T]here is a critical probability of success and a critical value of the claim below which the plaintiff will not sue.").

[24] In a "loser pays" system, litigation costs include the opponent's expected costs. *See* Pfennigstorf, *supra* note 19, at 44–47.

the process, or may hesitate to bear these costs due to risk-aversion. Thus, litigation costs might inhibit access to justice. Naturally, the English cost-shifting rule fares better than the American rule in incentivizing meritorious claims (where $(c_p+c_d)(1-p)<c_p$) and discouraging non-meritorious claims (where $(c_p+c_d)(1-p)>c_p$).[25] But the risk of failure and, more importantly, the need to bear significant costs during the process, might discourage meritorious claims under all regimes.[26]

Different methods for alleviating the economic burdens of civil litigation have been devised and contemplated. Following World War II, European governments developed mechanisms for enhancing access to civil justice, dovetailing markets for legal services with public funding.[27] The climbing costs of legal aid systems have led to severe cuts in public funding, making private financing of civil litigation a more attractive option to policy and lawmakers.[28]

One market-based method is assignment (or sale) of the victim's cause of action, transferring to a third-party all handling costs along with any expected benefit for a contractual consideration.[29] In many Western jurisdictions, such as Germany, this is permitted and quite common. In others, such as England, assignment is prohibited, at least with respect to some types of tort claims.[30] In the United States, personal injury claims are generally unassignable,[31] and many states also prohibit assignment of rights of action for legal malpractice[32] and fraud.[33] A second market-based method is an ordinary loan for the duration of the legal process. In this arrangement, the lender does not directly cover the costs of litigation, and does not acquire or share in any benefit arising therefrom. Rather it bears the risk of the borrower's default, a risk that may increase if he or she fails in court. Such loans are very risky and therefore rare.[34] A third

---

[25] *See id.*

[26] *Id.* at 77 (arguing that litigation costs may deter claimants even under the English rule); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 *passim* (1990) (providing empirical evidence).

[27] van Boom, *supra* note 6, at 5.

[28] *Id.*

[29] *See* Sebok, *supra* note 6, at 72 (discussing assignment of claims); Shannon, *supra* note 6, at 871 (same).

[30] Simpson v. Norfolk & Norwich Univ. Hosp. NHS Trust [2011] EWCA (Civ) 1149, [15] (UK). Acquiring a limited interest in a claim is legitimate and valid. *Id.*

[31] *See* Sebok, *supra* note 6, at 62, 74–75 (2011) ("The most important current limitation, universally enforced except in Texas, and to a lesser extent Mississippi, prohibits the assignment of causes of action for personal injuries.") (footnotes omitted).

[32] *See, e.g.*, MNC Credit Corp. v. Sickles, 497 S.E.2d 331, 333 (Va. 1998) ("The common law of this Commonwealth did not permit the assignment of legal malpractice claims."); Sebok, *supra* note 6, at 85 (discussing legal malpractice).

[33] *See* Sebok, *supra* note 6, at 88 (discussing rights of action for fraud).

[34] *See* Richmond, *supra* note 6, at 650 ("[M]ost traditional lenders are unwilling to lend money with only a potential litigation recovery as collateral because such loans are deemed to be too risky.").

market-based method is legal expenses insurance. Insurance reduces the likelihood that the insured will surrender his or her rights or accept an unsatisfactory settlement.[35] This arrangement is an undeniably promising solution for access to justice problems, but it is not always available and affordable, particularly once the event triggering the legal dispute has occurred.[36]

One of the primary tools for overcoming the economic obstacle to justice is attorneys' contingency fee arrangements, whereby lawyers' remuneration is contingent on success and calculated as a percentage of plaintiffs' recovery.[37] Contingency fees mitigate plaintiffs' litigation costs and increase the likelihood of pursuing meritorious claims.[38] Nevertheless, this solution is insufficient for at least six reasons.

First, in some jurisdictions, contingency fees are deemed unethical or even illegal because the lawyer's stake in the outcome might blur his or her professional judgment.[39] Other jurisdictions prohibit contingency fees but permit a "success fee" supplementing an hourly rate.[40] This reduces, but does not eliminate, the access problem. Second, even where contingency fees are permitted, the lawyer may charge a flat rate per case or per task performed, an hourly rate, or some combination of the two. This may occur in specific cases or in certain categories of cases, such as those with high-risk or low-value claims. Refusing contingency fee arrangements may constitute reasonable screening of non-meritorious (high-risk) claims, but also thwart meritorious low-value claims.

Third, litigation costs have other components, such as court charges, witnesses' and experts' expenditures and remuneration, and intangible harm. These costs may deter victims from suing even if attorneys' fees are contingent on success.[41] Fourth, contingency fee lawyers will charge a premium for the financing and "insurance" they provide, so their expected hourly rate will be greater than that of hourly fee lawyers.[42] In other words, substituting a contingency fee for an hourly rate may enable an impecunious victim to bring a suit,

---

[35] *See* Shannon, *supra* note 6, at 871 (discussing legal expenses insurance).

[36] After-the-event legal expenses insurance is less common and is usually offered only to claimants with high probability of success in jurisdictions where the loser reimburses the winner for his or her litigation costs.

[37] *See* Sebok, *supra* note 6, at 99–100 (explaining the notion of a contingency fee).

[38] Visscher & Schepens, *supra* note 22, at 17.

[39] van Boom, *supra* note 6, at 7; Visscher & Schepens, *supra* note 22, at 16–17.

[40] This is the case in France and in Germany. Michael G. Faure et al., *No Cure, No Pay and Contingency Fees*, *in* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE, *supra* note 22, at 33, 43–45.

[41] *See* Visscher & Schepens, *supra* note 22, at 17 ("In his decision of whether or not to bring suit, the plaintiff compares his expected benefits with the other costs involved in litigation.").

[42] Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 270 (1996) (quoting Pennsylvania v. Del. Valley Citizens' Council, 483 U.S. 711, 735–36 (1987) (Blackmun, J., dissenting)).

but it is more likely that the expected costs of litigation (the lawyer's fee plus other costs) will exceed the expected benefit, discouraging a claim.

Fifth, under a contingency fee arrangement, the client's and the lawyer's interests are not aligned. The lawyer may have an incentive to settle at a certain point and for a certain amount that are not optimal for the client.[43] Finally, contingency fee arrangements can be offered only to those who stand to gain from litigation. Defendants have no prospect of gain and do not have a contingency fee option. They may be unable to obtain reasonable representation and feel compelled to accept unfair settlements. These deficiencies have motivated the development of private litigation-funding models.

B. Market Developments

1. Third-Party Litigation Funding

The most recent commercial method for overcoming the litigation-costs barrier to justice, namely third-party litigation funding ("TPF"), emerged in the late 1980s and early 1990s.[44] It originally involved corporate lawsuits, but subsequently expanded to individual claims including personal injuries, copyright and patent violations, and employment discrimination.[45] TPF is an advance collateralized by the possibility of recovery later in the lawsuit. The advance can be used to cover personal expenses during the process, litigation costs, or both.[46] The claimant's obligation to pay the funder is contingent, in the sense that repayment is only due if the claim succeeds.[47] It is nonrecourse in the sense that the funder obtains a security interest only in the proceeds of the claim,[48] and repayment cannot exceed the proceeds.[49] Consequently, this method may facilitate access to justice only when the victim does not have sufficient resources or when he or she is unwilling to bear litigation costs due to risk-aversion and the uncertainties of the process. In contrast, when litigation costs exceed the claimant's expected benefit from litigation, commercial funders, whose expected return is limited by the claimant's expected benefit, have no reason to provide funding.

---

[43] Visscher & Schepens, *supra* note 22, at 21.

[44] *See* Beydler, *supra* note 6, at 1162–63 (providing historical background of TPF); Dietsch, *supra* note 6, at 693 (same).

[45] Dietsch, *supra* note 6, at 693.

[46] *See* Nauful, *supra* note 6, at 16 (explaining that TPF may be used to underwrite the costs of litigation or to offset living expenses during the pendency of the suit); Elliott, *supra* note 7, at 533 (same); Lyon, *supra* note 6, at 577–78 (same).

[47] Elliott, *supra* note 7, at 533–34.

[48] Beydler, *supra* note 6, at 1165.

[49] Elliott, *supra* note 7, at 533.

There are two major forms of TPF. The first is a contingency-based non-recourse loan with a relatively high interest rate, usually between two and five percent a month, reflecting the risk of the lawsuit's failure.[50] This method is common for small claims, where the amount of diligence required to assess the specific risk exceeds the benefit of using a more complex structure.[51] A 2010 RAND study indicated that the majority of claims funded this way in the United States arose from automobile accidents, and that the average loan made by litigation financing companies ranged between $1,750 and $4,500.[52] A company may consider several factors when deciding whether to make a loan. These factors include the amount of damages claimed, the claim's strength (probability of success), the defendant's ability to pay, the attorney's fee arrangement (contingency fee preferred), other expenses payable from the proceeds (liens and bills), existing legal proceedings that might affect liability, and state of residence (apparently due to the laws governing TPF).[53]

The second form of TPF is investment in civil actions, whereby the financing company covers the plaintiff's costs in whole or in part, on the condition that the investor would receive a share of the proceeds if the claim succeeds. The success fee usually ranges between twenty percent and forty percent of the damages, depending on various factors, although it can be even higher.[54] In Germany, this model, known as *Prozessfinanzierungsvertrag* (process funding contract), is a very common investment among underwriters and capital investors.[55] The second model usually entails a thorough investigation of the claim's validity and the defendant's solvency.[56] It is primarily available for commercial claimants with high-value claims and a high probability of success.[57]

---

[50] *See* Avraham & Wickelgren, *supra* note 6, at 237–38 (discussing this form of TPF); Beydler, *supra* note 6, at 1159–60, 1163 (same); Lyon, *supra* note 6, at 574 (same); Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES (Jan. 16, 2011), http://www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=all.

[51] *See* Molot, *supra* note 6, at 95.

[52] STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS 10–12 (2010).

[53] *See* Avraham & Wickelgren, *supra* note 6, at 239–40 (discussing the relevant factors); Shannon, *supra* note 6, at 872, 890 (same); Veljanovski, *supra* note 6, at 420 (same).

[54] *See, e.g.*, Avraham & Wickelgren, *supra* note 6, at 239; Veljanovski, *supra* note 6, at 424 (explaining that in European countries the fee usually ranges between 20% and 40% of the award or settlement, but can get as high as 50%, and that in Australia the range is 30–60%).

[55] van Boom, *supra* note 6, at 15–16.

[56] *Id.*

[57] *See* Avraham & Wickelgren, *supra* note 6, at 239 ("Commercial claims are funded in this riskier way because commercial claims are often larger than personal injury claims and therefore are worth the diligence required to reduce the funder's risk."). In Germany, this form of TPF is also available for smaller claims. Michael Coester & Dagobert Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, 24 CIV. JUST. Q. 83, 88, 101 (2005).

2. Crowdfunding

Crowdfunding is a rapidly growing method for raising capital to fund various ventures by aggregating small contributions from many individuals through specialized online platforms.[58] Though fundraising is a time-honored practice,[59] technology has simplified it, and dramatically increased its frequency and reach, with respect to both potential contributors and funded ventures. Web-based fundraisers for specific projects date back to the late 1990s,[60] but the earliest designated crowdfunding platform, *ArtistShare*, was launched in 2003 to help musicians raise funds for producing and marketing music albums.[61] The first project funded through *ArtistShare* was Maria Schneider's album *Concert in the Garden*, an album that ultimately received a Grammy Award.[62] Some platforms still fund projects only in a specific industry or niche, such as music and arts (*ArtistShare*, *Sellaband*) or scientific research (*Experiment*). Nonetheless, the most successful and prominent crowdfunding platforms, such as *Indiegogo* and *Kickstarter*, have no thematic restrictions.

Initially, crowdfunding followed either a donation-based or a reward-based model.[63] In the former, contributors do not expect any return. In the latter, fundraisers offer nominal rewards that roughly correlate with the pledged amounts, such as formal recognition or gratitude, free access to the funded project, or an opportunity to take part in special events with the fundraiser. More recently, two additional models have developed. In debt-crowdfunding, fundraisers obtain loans from the public, and contributors expect repayment with interest.[64] In equity-crowdfunding, business ventures obtain equity capital from the public, and contributors expect a share of the profits.[65]

The Federal Jumpstart Our Business Startups ("JOBS") Act of 2012 facilitated equity-crowdfunding by exempting small companies, offering up to fifty-million dollars of securities, from the general obligation of securities issuers

---

[58] *See supra* notes 7–8 and accompanying text.

[59] *See, e.g.*, W.R. Vance, *The Early History of Insurance Law*, 8 COLUM. L. REV. 1, 3–5 (1908) (discussing ancient forms of fundraising for the benefit of colleagues in need).

[60] In 1997, the rock band Marillion raised over £35,000 from fans through the internet to finance its first American tour. *See* Weinstein, *supra* note 11, at 437.

[61] Gómez, *supra* note 7, at 309–10.

[62] *Id.* at 310.

[63] *See* Gómez, *supra* note 7, at 309–10, 322 (discussing donation-based and reward-based platforms); Nauful, *supra* note 6, at 17 (same); Weinstein, *supra* note 11, *passim* (same); Elliott, *supra* note 7, at 529, 531–32 (same).

[64] *See* Gómez, *supra* note 7, at 313–14 (discussing debt crowdfunding); Elliott, *supra* note 7, at 529, 532–33 (same).

[65] *See* Gómez, *supra* note 7, at 313 (discussing equity crowdfunding); Sumners, *supra* note 12, at 42–43 (same); Elliott, *supra* note 7, at 529, 532 (same).

to register with the SEC.[66] Similar exemptions were endorsed in several states.[67] Some websites, such as *CircleUp*, *Crowdfunder*, and *SeedInvest*, are dedicated exclusively to equity-crowdfunding, whereas others, such as *Indiegogo*, allow equity-crowdfunding among other forms of crowdsourcing.[68] Although crowdfunding may appear to have a global audience, ninety-four percent of the industry is concentrated in North America (fifty-nine percent) and Europe (thirty-five percent), which is also where most crowdfunding platforms are headquartered.[69]

Usually, the fundraiser receives the pledged funds only if a preset capital goal is reached, thus reducing the contributors' risk that undercapitalized projects will be undertaken.[70] Some platforms enable fundraisers to obtain pledged funds even without meeting fundraising goals.[71] Realizing the risks associated with online transactions and the need to build a trustworthy environment for their users, crowdfunding platforms started to develop selection processes for the projects that they agreed to sponsor and made efforts to ensure transparency throughout the funding campaigns.[72] To cover their operating costs and make a profit, these platforms take a certain percentage of the funds raised.[73]

3. Litigation Crowdfunding

Litigation crowdfunding is a combination of TPF and crowdfunding: the parties in civil disputes seek to finance some of their costs by aggregating many small contributions through online platforms. Because the two bases are relatively new phenomena, their progeny is nascent. Litigation crowdfunding can be carried out through three types of platforms: general crowdfunding plat-

---

[66] *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.); *see also* Elliott, *supra* note 7, at 532 (discussing the JOBS Act).

[67] *See* Gómez, *supra* note 7, at 314–15 (discussing state legislation of equity crowdfunding); Alan McGlade, *Michigan Governor Signs Intrastate Crowdfunding Exemption*, FORBES (Dec. 31, 2013), https://www.forbes.com/sites/alanmcglade/2013/12/31/michigan-governor-signs-intrastate-crowdfunding-exemption/ [https://web.archive.org/web/20171006114300/https://www.forbes.com/sites/alanmcglade/2013/12/31/michigan-governor-signs-intrastate-crowdfunding-exemption/] (same).

[68] This model is still relatively rare. Elliott, *supra* note 7, at 533.

[69] Gómez, *supra* note 7, at 314.

[70] *Id.* at 312. For example, Kickstarter contributors are "only charged if the project reaches its fundraising goal." *Terms of Use*, KICKSTARTER, https://www.kickstarter.com/terms-of-use [https://perma.cc/5VKV-7ZMB].

[71] Gómez, *supra* note 7, at 312. For example, if a campaign does not meet its fundraising goal, Indiegogo enables contributors to make the contribution anyway. *Evaluating Indiegogo vs. Kickstarter?*, INDIEGOGO FOR ENTREPRENEURS, https://entrepreneur.indiegogo.com/how-it-works/indiegogo-vs-kickstarter/ [https://perma.cc/7H7B-DSUK].

[72] Gómez, *supra* note 7, at 311–12.

[73] *Id.*

forms, specialized litigation crowdfunding platforms, and traditional business or personal websites. The first litigation crowdfunding campaigns were launched through general crowdfunding platforms, such as *Indiegogo*.[74] Two of the three cases outlined in the Introduction provide examples for such use of general platforms: the Scottish politician Andy Wightman raised money to finance his defense against a defamation action through the British website *Crowdfunder*;[75] and the Israeli journalist Igal Sarna raised funds to cover his liability in defamation through the donation-based spin-off of the Israeli crowdfunding website *Headstart*.[76]

In 2014, building on the growing popularity of crowdfunding platforms and TPF, the first specialized litigation crowdfunding platform, *LexShares*, was established in the United States.[77] *LexShares* enables crowdfunding of commercial lawsuits, including business torts, professional negligence, and intellectual property violations, but it does not currently allow crowdfunding of personal injury claims.[78] Contributors expect a substantive return in the case of success—a share of the proceeds, as in commercial TPF.[79] As an investment-based mechanism, it is subject to SEC regulation.[80] *LexShares* keeps a certain percentage of the funds raised and takes part of the investors' profit if the claim succeeds. *Funded Justice*, established a few weeks following *LexShares*, is different in three interrelated respects:[81] (1) it is a non-investment-based platform,[82] (2) it aims at helping those who cannot afford legal services,[83] and (3) contributors do not need to be SEC accredited investors.[84] Another non-

[74] *See id.* at 324 (listing litigation crowdfunding campaigns).

[75] *See supra* note 2 and accompanying text.

[76] *See supra* note 4 and accompanying text.

[77] Daniel Fisher, *Feeling Lucky? Maybe It's Time to Invest in Somebody Else's Lawsuit*, FORBES (Nov. 19, 2014), http://www.forbes.com/sites/danielfisher/2014/11/19/ lexshares-invests-in-litigation/ [https://perma.cc/S8QL-RTFY]; Debra Cassens Weiss, *New Website Uses Crowdfunding to Finance Lawsuits*, ABA J. (Nov. 20, 2014), http://www.abajournal.com/news/article/new_website_uses_crowdfunding_to_finance_lawsuits/ [https://perma.cc/A388-Z8TT].

[78] *Frequently Asked Questions*, LEXSHARES, https://www.lexshares.com/pages/faqs [https://perma.cc/2TMY-AG4D].

[79] Gómez, *supra* note 7, at 328–29.

[80] Elliott, *supra* note 7, at 535. For a person to be an accredited investor, he or she must have an income exceeding $200,000, or $300,000 for a married couple, in the prior two years or have a net worth of more than $1 million, excluding the value of their primary residence. *Id.*

[81] Meg Graham, *Funded Justice Aims to Help People Raise Funds for Legal Fees*, CHI. TRIB. (Jan. 8, 2015), http://www.chicagotribune.com/bluesky/originals/chi-funded-justice-michael-helfand-bsi-20150105-story.html [https://perma.cc/B46X-4ABX].

[82] *Id.*

[83] *Id.*; *see also* Elliott, *supra* note 7, at 530, 536.

[84] Elliott, *supra* note 7, at 536.

investment-based platform is the British website *Crowd Justice*.[85] Both *Funded Justice* and *Crowd Justice* keep a certain percentage of the funds raised (seven percent and five percent, respectively).[86] Neither has funded tort litigants yet. One of the first litigation crowdfunding websites, *Invest4Justice*, which enabled investment-based and donation-based crowdfunding,[87] is no longer active for unknown reasons.

In addition to general and specialized crowdfunding platforms, crowdfunding campaigns can be launched on more traditional websites—such as business or personal web pages. For example, Maajid Nawaz, the founder and chairman of the London-based think tank Quilliam, who was accused by the Southern Poverty Law Center of being an anti-Muslim extremist, sought crowdfunding for a defamation action through Quilliam's website.[88]

Given the various models of crowdfunding, its potential impact on litigation funding is much broader than the more developed commercial TPF. To begin with, crowdfunding may be available to claimants who seek non-monetary remedies, such as an injunction or a declaratory judgment, or whose expected damages do not appeal to profit-based funders. Second, TPF is generally offered to claimants, who can pledge a share in the expected recovery as collateral. It is not normally available for defendants who cannot similarly collateralize a loan.[89] Potential defendants can obtain legal expenses insurance ex ante, but normally cannot obtain special funding ex post, after the occurrence of harm for which they are sued.[90] In contrast, crowdfunding—particularly donation-based and reward-based—can also be utilized by defendants, as the Wightman and Sarna cases clearly demonstrate. Third, although traditional TPF typically covers process costs, crowdfunding can extend to outcome costs, most notably civil liability, as in the Sarna case.

---

[85] Joshua Rozenberg, *Is Crowdfunded Litigation the Future of Justice?*, THE GUARDIAN (May 25, 2015), https://www.theguardian.com/commentisfree/2015/may/25/crowdfunded-litigation-future-justice-crowdjustice [https://perma.cc/6H5A-2BD6].

[86] *Frequently Asked Questions*, FUNDED JUSTICE, https://fundedjustice.com/help [https://perma.cc/7PDK-JU6A]; *How It Works*, CROWDJUSTICE, https://www.crowdjustice.com/how-it-works/ [https://perma.cc/Z7D8-CUEF].

[87] *See* Gómez, *supra* note 7, at 328–29 (discussing Invest4Justice).

[88] *See supra* note 1 and accompanying text.

[89] *E.g.*, *Litigation Finance 101*, LEXSHARES, https://www.lexshares.com/litigation_finance_101 [https://perma.cc/8TTK-R23C] (explaining that the three principal participants in litigation funding are plaintiffs, investors, and attorneys).

[90] Ordinary loans with fixed interest rates and an unconditional obligation to repay may be available in the financial markets.

C. Legal Obstacles

The main legal obstacles to litigation funding in common law jurisdictions seem to be the doctrines of champerty, maintenance, and usury. Champerty is an agreement whereby a person with no previous interest in a lawsuit supports or maintains it in exchange for a share of the proceeds if the suit succeeds.[91] Although recent discussion of champerty in case law and legal literature has focused on TPF, the doctrine may also be relevant to investment-based crowdfunding of claims. In 2003 the Supreme Court of Ohio famously held in *Rancman v. Interim Settlement Funding Corp.*[92] that: "a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance,"[93] because it "gives a nonparty an impermissible interest in a suit, impedes the settlement of the underlying case, and promotes speculation in lawsuits."[94] *Rancman* was overturned by the Ohio legislature,[95] but considerable variance remains among the states. Some have abolished the prohibition on champerty altogether,[96] a trend applauded by many scholars.[97] Among those that have retained the doctrine,[98] a few have explicitly applied it to TPF,[99] some have specifically refused or excluded such application, and many have not yet addressed the question.[100] Arguably, if the contributors' return upon the claim's success is kept separate from the amount of the victim's recovery, champerty restrictions may be avoided.[101] So in some jurisdictions, debt-based crowdfunding may be more feasible than "equity-based" crowdfunding.

Maintenance is the "assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case [or] meddling in someone else's litigation."[102] The chief differences between mainte-

---

[91] *In re* Primus, 436 U.S. 412, 424–25 n.15 (1978) (defining champerty); Schnabel v. Taft Broad. Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975) (same); Avraham & Wickelgren, *supra* note 6, at 242 (same); Sebok, *supra* note 6, at 73 (same); Shannon, *supra* note 6, at 874 (same); Lyon, *supra* note 6, at 579 (same).

[92] 789 N.E.2d 217, 219 (Ohio 2003).

[93] *Id.* at 221.

[94] *Id.*

[95] OHIO REV. CODE ANN. § 1349.55 (West 2017).

[96] *See, e.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997) (abolishing champerty); Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 278 (S.C. 2000) (same).

[97] *E.g.*, Lyon, *supra* note 6, at 576, 579–80, 589–90.

[98] *See id.* at 583–84 (showing that "thirty-two states and the District of Columbia still retain either statutes or intact precedents prohibiting champerty").

[99] *E.g.*, Johnson v. Wright, 682 N.W.2d 671, 678 (Minn. Ct. App. 2004) ("[B]ecause recovery is tied to the outcome of the litigation, the . . . agreement is champertous.").

[100] Avraham & Wickelgren, *supra* note 6, at 243–44; Beydler, *supra* note 6, at 1177.

[101] Beydler, *supra* note 6, at 1159, 1164.

[102] Sebok, *supra* note 6, at 72 (alteration in original) (quoting *Maintenance*, BLACK'S LAW DICTIONARY 1039 (9th ed. 2009)); *see also* Shannon, *supra* note 6, at 874; Elliott, *supra* note 7, at 540.

nance and champerty are that "the maintainer is not rewarded for his support of the litigant"[103] and that maintenance applies to the assistance of either party, not only the plaintiff. Although champerty is a special case of maintenance,[104] judicial and scholarly analyses of TPF have generally focused only on the former because TPF is a profit-motivated funding of claimants.[105] Yet the general prohibition on maintenance may be highly pertinent to civil litigation crowdfunding, particularly reward-based and donation-based, where contributors expect only nominal benefits or none at all. Furthermore, the doctrine of maintenance may apply to crowdfunding of defendants' costs.

In the well-known 1963 case of *NAACP v. Button*, the Supreme Court held that Virginia could not restrict a third party from providing legal or nonlegal support and encouragement to a litigant by invoking the traditional prohibitions on barratry, maintenance, and champerty.[106] This ruling, however, was limited to a very special context: a legislative attempt to curb the activities of the NAACP, which employed "constitutionally privileged means of expression to secure constitutionally guaranteed civil rights."[107] The doctrine of maintenance is still in force in many states. For example, according to Illinois law, a person who "officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action" commits an offense.[108] Similarly, it is unlawful in Mississippi to promise, give, offer, receive, accept, solicit, request, or donate any money, services, or property in order to induce or assist another "to commence or to prosecute further . . . any proceeding in any court."[109] Such state-specific restrictions ought to be considered in assessing the legal feasibility of litigation crowdfunding.

Usury is lending money at an unreasonably high interest rate.[110] Nowadays, a maximum rate is usually set through legislation.[111] The traditional prohibition on usury cannot normally hinder litigation crowdfunding. Firstly, the doctrine does not apply to donation-based and reward-based models, where contributors do not expect a profit at all. Moreover, even in the case of invest-

---

[103] Sebok, *supra* note 6, at 73.

[104] Shannon, *supra* note 6, at 874; Elliott, *supra* note 7, at 540–41.

[105] *See supra* notes 44–57 and accompanying text.

[106] 371 U.S. 415, 439 (1963).

[107] *Id.* at 442.

[108] 720 ILL. COMP. STAT. 5/32-12 (2017).

[109] MISS. CODE ANN. § 97-9-11 (2017).

[110] *See* Shannon, *supra* note 6, at 895 (defining usury); Sheri P. Adler, Note, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329, 331, 333 (2012) (same); Beydler, *supra* note 6, at 1172 (same); Elliott, *supra* note 7, at 537 (same).

[111] For example, the maximum interest rate in New York is sixteen percent per annum. N.Y. BANKING LAW § 14-a (McKinney 2018); Adler, *supra* note 110, at 333–34.

ment-based crowdfunding, which generates a financial return, the doctrine of usury might be formally inapplicable. Usury laws generally apply only in the case of an absolute obligation to repay, not if repayment is subject to a contingency.[112] Because investment-based litigation crowdfunding, much like TPF arrangements, does not require repayment if the claim fails, usury laws might be irrelevant.[113] In some jurisdictions, when recovery is almost certain, the funding may be deemed a loan, subject to usury restrictions.[114] But, even there, a usurious return would not necessarily lead to invalidation of the funding arrangement. The court may simply opt for an adjusted interest rate.[115] From a substantive perspective, high returns in litigation funding arrangements may be justified in terms of the greater risks involved, so courts and legislatures will be less likely to intervene.[116]

II. Investment-Based Models

A. The Plaintiff

1. Potential Benefits

The first fundamental distinction in assessing litigation crowdfunding arrangements is between investment-based and non-investment-based funding. Investment-based crowdfunding is akin to commercial TPF,[117] so the scholarly debate on the latter may be pertinent to the former. The analysis will, therefore, build on existing literature on TPF, and adjust for the differences between the two paradigms.

The benefits of crowdfunding seem evident. First and foremost, as explained above, litigation costs may impede access to justice.[118] The need to bear significant costs during a process with an uncertain outcome might discourage meritorious claims—either because the victim cannot afford to pursue a claim or because, being risk-averse, the uncertain benefit is not worth the

---

[112] 44B Am. Jur. 2d *Interest and Usury* § 2, Westlaw (database updated Nov. 2017); Elliott, *supra* note 7, at 537.

[113] Dopp v. Yari, 927 F. Supp. 814, 823 (D.N.J. 1996) (holding that if the obligation to repay is conditional, usury laws do not apply); Kraft v. Mason, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996) (same); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 101 (Tex. App. 2006) (same); Avraham & Wickelgren, *supra* note 6, at 244 (explaining that if the obligation to repay is conditional, usury laws do not apply); Shannon, *supra* note 6, at 892, 895, 896 (same); Beydler, *supra* note 6, at 1159, 1163 (same); Elliott, *supra* note 7, at 537–40 (same).

[114] *See, e.g.*, Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704 (N.Y. Sup. Ct. Mar. 2, 2005) (discussing a workers' compensation claim that is almost a certain win); Elliott, *supra* note 7, at 540 (discussing the possibility of almost certain recovery).

[115] *Echeverria*, 2005 WL 1083704, at *12 (awarding an annual interest of sixteen percent).

[116] *See* Shannon, *supra* note 6, at 893.

[117] The two forms of TPF are comparable to the two forms of investment-based crowdfunding.

[118] *See supra* notes 16–43 and accompanying text.

certain costs. "Only those who feel particularly aggrieved or determined, or have deep pockets and a sufficient stake," will tend to embark on a costly and uncertain process.[119] Investment-based crowdfunding, like TPF, can help overcome these obstacles and facilitate access to justice.[120] Neither TPF nor investment-based crowdfunding will be available when litigation costs exceed the claimant's expected benefit from litigation, because the claimant's benefit is typically the upper limit of the funders' return.

Although increased access to justice is an undeniable consequence of crowdfunding, one needs to determine why, and to what extent, it is required. The assumptions that substantive law is justifiable, and that it is under-enforced, underlie this line of argument. Put differently, litigation costs hinder litigation, and the volume of litigation is too low to achieve the defensible goals of substantive law—efficient deterrence of potential wrongdoers, victim compensation, corrective justice, etc.[121] All other things being equal, reducing or removing litigation costs increases the likelihood of litigation and the level of enforcement.[122] Crowdfunding may thus be warranted if it facilitates meritorious claims that would not otherwise be pursued, thereby helping achieve the law's underlying goals.

Second, profit-motivated funding may accelerate settlement, saving valuable dispute resolution resources. To begin with, it increases defendants' tendency to settle meritorious claims. To the extent that the screening of claims is related to merit, funding signals the claim's quality. Such a signal induces defendants to settle to avoid a costly process with a relatively certain outcome. This decreases the litigation rate and conserves both legal and other related costs.[123] Seemingly, the funded plaintiff does not have an incentive to settle quickly. But, in many funding arrangements, the funder's return hinges on the duration of the process, and in others the funder has some control over the process and its conclusion.[124] In both cases, the plaintiff will also be under some pressure to settle. At any rate, the defendant, who has a sufficiently strong incentive to settle, can induce the plaintiff to settle by making a satisfactory offer as soon as possible.

---

[119] Veljanovski, *supra* note 6, at 407.

[120] *See* Avraham & Wickelgren, *supra* note 6, at 234 (2014) (discussing the increased access to justice); Gómez, *supra* note 7, at 319 (same); Nauful, *supra* note 6, at 64 (same); Shannon, *supra* note 6, at 869 (same); Veljanovski, *supra* note 6, at 407 (same); Beydler, *supra* note 6, at 1160, 1168 (same); Elliott, *supra* note 7, at 534 (same); Lyon, *supra* note 6, at 576 (same).

[121] *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1799 (2015); Veljanovski, *supra* note 6, at 437–38 (focusing on deterrence).

[122] Veljanovski, *supra* note 6, at 438.

[123] *Id.* at 439.

[124] *Id.* at 440.

Third, external litigation funding may generate more accurate settlements, thereby furthering the underlying goals of civil law. For example, if the law's primary goal is efficient deterrence, and the extent of damages necessary to achieve this goal is X, actual damages should be as close as possible to X. Funding may diminish the power imbalance between the parties.[125] Plaintiffs who can obtain external coverage of litigation costs will not settle for an unsatisfactory amount,[126] and defendants cannot rely on plaintiffs' inability to withstand a costly and wearisome process to extract an unfair settlement. Continuing the example, a more accurate settlement will result in better internalization of the costs of misconduct by potential injurers.[127]

Fourth, profit-motivated funding enables a transfer of litigation costs and risks to better cost and risk bearers.[128] Commercial litigation funders typically have more access to financial resources than the average plaintiff, superior cost-spreading capacity, and better hedging tools. They are less risk-averse than individual plaintiffs, and better risk bearers than corporate plaintiffs. Thus, a transfer of litigation costs and risks to commercial funders generates economic value.[129] A transfer may generate an even clearer benefit in the case of crowdfunding: given the diminishing marginal value of individual wealth,[130] spreading litigation costs among numerous investors is better, in terms of overall welfare, than placing the financial burden on a single litigant's shoulders.[131]

Fifth, some authors have argued that disclosing information about TPF to the court can improve the court's ability to evaluate the case and reach the correct decisions on liability and damages.[132] The funder's independent evaluation of the claim, the decision to fund it, and the expected return, provide relevant evidence about the claim's relative strength.[133] Taking these factors into ac-

---

[125] *See* Avraham & Wickelgren, *supra* note 6, at 234 (explaining that TPF equalizes the bargaining power between the parties); Gómez, *supra* note 7, at 319 (same); Lyon, *supra* note 6, at 599 (same).

[126] *See* Swan, *supra* note 6, at 758 ("Most plaintiffs settle because they are unable to wait the nearly two years elapsing before the average case comes to trial."); Beydler, *supra* note 6, at 1160, 1161, 1168 ("[Third party] funding . . . improves plaintiffs' bargaining position vis-a-vis defendants with greater resources, allowing plaintiffs to resist lowball settlement offers or go to trial to vindicate their rights . . . [prohibition on third party funding] would likely result in earlier, less accurate settlements.") (footnotes omitted).

[127] Molot, *supra* note 6, at 101–02.

[128] Veljanovski, *supra* note 6, at 439.

[129] Avraham & Wickelgren, *supra* note 6, at 251.

[130] *See* Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 758–59 (2004) (explaining the diminishing marginal utility of wealth).

[131] *Id.* at 759–60 ("[T]ransferring a certain economic burden from a risk-averse person to numerous persons ('spreading the loss') increases aggregate wealth . . . .").

[132] Avraham & Wickelgren, *supra* note 6, at 248.

[133] *Id.*

count may help courts fine-tune their decisions. More accurate determinations of fact serve the underlying goals of substantive law. A by-product of such disclosure may be lower interest rates because the funder knows a lower rate sends a stronger signal to the court and increases the likelihood of recovery.[134]

2. Possible Drawbacks

An outmoded criticism of any form of external funding of litigation is that it enables victims to pursue claims that would not otherwise be pursued and is, therefore, expected to result in more litigation.[135] Empirical data seem to support this prediction: a study in Australia showed that there was an increase in filings in jurisdictions that allowed TPF, and a decrease in jurisdictions that prohibited it.[136] This criticism of funding derives from the historical perception that litigation was an evil to be avoided.[137] The common law adopted various mechanisms to show its disapproval of those who motivated litigation, including strict bans on barratry, maintenance, and champerty.[138] The perception that litigation is an evil has gradually waned. Litigation and the threat thereof are considered important tools in righting wrongs and regulating human behavior.[139]

The fear of additional litigation has transformed into the institutional concern that external funding would overburden the legal system.[140] Still, there is reason to believe that any increase in litigation rate will be limited. Claimants often seek funding for lawsuits they would bring anyway; funders' due diligence filters out many of the claims that would not be brought without external funding, and defendants have an incentive to settle quickly and avoid litigation.[141] Consequently, although a certain upsurge in litigation is foreseeable, it should not and, in fact, does not clog the system.[142]

This leads us to the first real concern: external funding might encourage frivolous or non-meritorious claims.[143] Such claims are undesirable because they waste scarce administrative resources without furthering the underlying goals of substantive law.[144] For example, if liability aims to deter wrongful

[134] *Id.* at 252.
[135] Rubin, *supra* note 6, at 675; Veljanovski, *supra* note 6, at 439.
[136] Abrams & Chen, *supra* note 6, at 1094–97.
[137] Sebok, *supra* note 6, at 123; Shannon, *supra* note 6, at 874.
[138] *See supra* notes 91–116 and accompanying text.
[139] Rubin, *supra* note 6, at 675.
[140] *See, e.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1225–27 (Mass. 1997); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App. 2006).
[141] Veljanovski, *supra* note 6, at 439, 446.
[142] *Id.* at 439–41.
[143] *See* Gómez, *supra* note 7, at 319–20 (discussing the fear of encouraging meritless claims); Shannon, *supra* note 6, at 874 (same); Elliott, *supra* note 7, at 535 (same).
[144] Gómez, *supra* note 7, at 330.

conduct, an unfounded claim will consume administrative resources without any expected benefit and, if successful, lead to over-deterrence. The general response to this concern is that substantive and procedural rules, as well as lawyers' ethical commitments, are designed to prevent frivolous claims.[145] More specific retorts focus on two features of the funding model: the funder's stakes in the particular case and its credibility as a repeat player.

Regarding the funder's stakes, profit-motivated funders will only fund cases likely to yield a return on their investment. It is unlikely that meritless claims, with low probability of success and therefore low expected damages,[146] will be funded on a nonrecourse contingency basis.[147] Funders may agree to fund riskier claims for a higher return, but funding frivolous suits is implausible if the funders' profit derives solely from the claimant's proceeds.[148] Indeed, interviews with European third-party litigation funders have revealed that they devote considerable time to screening cases considered for funding, reject most, and fund only those with high odds of success and monetary value.[149] Non-meritorious cases have low probability of success and negative expected returns if they go to court. Given the profit-maximizing screening process, the probability of funding unworthy claims is low.[150]

In addition, commercial third-party funders are often repeat players. Thus, the signal sent to the other party and to the court by their involvement in a particular case is correlated with their overall credibility as funders.[151] If the funder's screening is credible, its selection of the specific case will provide a stronger incentive for the defendant to settle, and settle at a more accurate amount. This will increase the funder's expected profit and reduce its costs. Similarly, if the funder is credible and the court is aware of the external funding, expected liability—and the funder's share thereof—will rise. To establish credibility, the funder will conduct a thorough due diligence, and this too will reduce the likelihood of meritless claims.

Litigation crowdfunding is different from traditional litigation funding: it usually involves multiple investors with minor stakes. Because the stakes are small, individual investors are less concerned about the possibility of the claim's failure and are therefore less selective.[152] Put differently, whereas tradi-

---

[145] Lyon, *supra* note 6, at 595; *see, e.g.*, GA. CODE ANN. § 9-11-68(e) (2017) (enabling courts to award damages against parties presenting frivolous claims or defenses).

[146] Expected damages are the product of the probability of success and the extent of provable harm.

[147] Lyon, *supra* note 6, at 591.

[148] Shannon, *supra* note 6, at 875; Lyon, *supra* note 6, at 593–94.

[149] Veljanovski, *supra* note 6, at 445.

[150] *Id.*

[151] Lyon, *supra* note 6, at 595.

[152] Elliott, *supra* note 7, at 547.

tional litigation-funding firms with high stakes conduct due diligence and select cases with the highest expected return, litigation crowdfunding contributors "may invest in a larger volume of cases that have a smaller likelihood of success."[153] Moreover, as the stakes are small, uninformed individuals may be encouraged to make hasty and risky investments. Because the cohort of participants is large, diverse, and case-specific, severe collective action problems prevent the development and application of selection criteria by funders. Finally, many contributors are not repeat players in the particular segment of the crowdfunding industry or in crowdfunding generally. They have neither the interest nor the ability to establish credibility that will strengthen the signal that their involvement sends to the other party and to the court.

These properties may lower the bar for those who seek funding but will not eliminate the rational profit-driven screening of claims. Although the participants in litigation crowdfunding bear much smaller risks than commercial funding firms, they are still profit-seeking players who prefer investment opportunities with the highest possible expected value. The legal system can and should facilitate rational and informed investment by requiring claimants to disclose relevant information, as in other cases of "public offering."[154] This will prevent uninformed or underinformed investments, upgrade the selection process, and maintain correlation between the willingness to invest and the claim's merit. In addition, although the crowdfunding participants' motivation and ability to vet claims are inferior to those of commercial litigation funding firms, the crowdfunding platform may assume the screening functions that are carried out by the funder in ordinary TPF. The platforms may have an incentive to list only sufficiently strong claims, because failing to do so will result in unsuccessful investments, deter investors, and reduce revenue. They may also have the capacity, as aggregators of considerable capital, to conduct due diligence. Indeed, realizing the risks associated with electronic commerce and the need to offer users a reliable venue, crowdfunding platforms have started to develop and employ project-selection processes and endeavor to ensure transparency throughout the funding campaigns.[155] Presumably, these developments will also be reflected in the context of litigation funding.

Critics may argue that willingness to invest does not always indicate the claim's strength, because investors make mistakes, and their investment in a specific project may be so small (and their portfolio so diverse) that the partic-

---

[153] *Id.*

[154] Consider, for example, the disclosure requirements under the SEC "Regulation Crowdfunding," adopted in accordance with the JOBS Act. 17 C.F.R. § 227.201 (2017); Samuel G. Wieczorek, *Regulation Crowdfunding: A Viable Option for the Franchising Industry?*, 36 FRANCHISE L.J. 275, 279–82 (2016).

[155] Gómez, *supra* note 7, at 311–12.

ular investment does not generate any reliable signal. Although specific investors may make mistakes in specific cases, there is sufficiently strong correlation between the willingness to invest in a specific claim and its relative merit, assuming relevant information is available.[156] The fact that a successful crowdfunding campaign requires numerous individual decisions to invest reduces the likelihood of systematic mistakes (again, assuming relevant information is available). Admittedly, the average size of the investment impairs the signal's quality, but the large number of investors reinforces it, and investors' expectation for profit may also be translated into additional platform-based screening. If these predictions are nonetheless proven wrong, and empirical studies reveal market failures, investment-based crowdfunding can be subject to the same vetting process proposed below for non-investment-based crowdfunding.

The second concern with external funding is that it might unnecessarily prolong litigation by disincentivizing the plaintiff to settle.[157] The plaintiff might reject what would otherwise be a fair settlement offer and hold out for a larger sum of money, increasing administrative costs. This argument is unconvincing. It is not at all clear that the victim's position regarding settlement is skewed by funding. The victim might rush into an unsatisfactory settlement without external funding. So, funding may ameliorate rather than create an incentive problem. In fact, the funder's or the platform's risk-analysis can help the victim make more informed decisions about settlement.[158] Moreover, as explained above, external funding might provide proper incentives to settle: sometimes the funder's fee increases gradually over time (so the victim is harmed by unnecessary prolongation);[159] at times the funder has some control over the process, and will exert pressure to accept a cost-effective settlement; and funding incentivizes the injurer to make fairer offers that the victim can more easily accept.

A third concern is that profit-seeking funders would require and exercise control over the process in order to secure their interests.[160] They may wish to select the attorney, direct his or her strategy, and decide whether, when, and under what conditions to settle.[161] This is arguably problematic because attorneys should act independently for their clients' benefit, and the funder's interests are not necessarily aligned with the claimant's. But, it is unclear whether

[156] This understanding is shared by most scholars discussing third-party litigation funding. *See supra* notes 144–148 and accompanying text.

[157] Avraham & Wickelgren, *supra* note 6, at 235; Lyon, *supra* note 6, at 576.

[158] Lyon, *supra* note 6, at 597–98.

[159] *Id.* at 597.

[160] *See* Avraham & Wickelgren, *supra* note 6, at 235 (discussing the problem of external control); Gómez, *supra* note 7, at 319–20 (same); Shannon, *supra* note 6, at 873 (same); Elliott, *supra* note 7, at 534–35 (same); Lyon, *supra* note 6, at 601–02 (same).

[161] Lyon, *supra* note 6, at 601–02.

control by a profit-maximizing actor is detrimental,[162] and even if it is, funder's control can be limited or banned without giving up the benefits of external funding altogether.[163] Thus, in some jurisdictions, the funder's level of control over the process is taken into account in assessing whether a TPF agreement violates public policy.[164] In others, funders' control is specifically prohibited.[165] Additionally, funders' practices may be subject to self-imposed constraints. The American Legal Finance Association code of conduct stipulates that funders shall not take any step to "acquire ownership in the consumer's litigation" or to "interfere or participate in the consumer's litigation, and/or attempt to influence the consumer's litigation."[166] Still, funder control is allowed and common in some countries, most notably Australia.[167]

Furthermore, the risk of funder's control is much smaller in the case of litigation crowdfunding. A commercial third-party funder has a substantial stake and, hence, a sufficiently strong incentive to intervene, and because there is usually a single funder, it has the power to do so. In the case of crowdfunding, there are many investors with small stakes. Because the stakes are limited, the funders are less interested in controlling the process, and because they are many, collective action problems will hinder any attempt at devising a control strategy.[168] Of course, as litigation crowdfunding develops, crowdfunding platforms may wish to attain some control over funded claims to protect investors and increase their own competitiveness. In such a case, regulation may be appropriate.

The fourth concern with profit-motivated funding, which is one of the traditional rationales for the champerty doctrine,[169] is that claimants' plight might be exploited by funders to capture a significant share of any recovery. To the extent that fair compensation to victims is one of the primary goals of civil law, profit-seeking funders might generate a problem. American experience with TPF demonstrates that the amount payable to the funder following a suc-

---

[162] *Id.* at 602. Admittedly, it might counteract the empowering features of the civil process. *See* Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 975–83 (2008) (discussing the empowering effects of tort litigation).

[163] *See* Richmond, *supra* note 6, at 681–82 (explaining that the funder's control can be limited); Shannon, *supra* note 6, at 880 (same).

[164] *See, e.g.*, *Anglo-Dutch Petroleum*, 193 S.W.3d at 104; Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ) 655 [40] (UK).

[165] *See, e.g.*, ME. REV. STAT. tit. 9-A, § 12-104(7) (2017); NEB. REV. STAT. § 25-3303(1)(c) (2017); OHIO REV. CODE ANN. § 1349.55(B)(3) (West 2017).

[166] AM. LEGAL FIN. ASS'N, THE ALFA CODE OF CONDUCT, https://americanlegalfin.com/what-is-alfa/alfa-code-of-conduct/ [https://perma.cc/8GVB-KGHD].

[167] *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 299 CLR 386, 434 (Austl.) (holding that a funder's control may be allowed).

[168] Gómez, *supra* note 7, at 307–08, 321–22, 331–32.

[169] Shannon, *supra* note 6, at 874.

cessful conclusion of the case might leave hardly anything for the claimant.[170] For example, the plaintiff was obliged to repay 280% of the advance in *Rancman*,[171] and 240% in *Fausone*.[172]

There are two possible responses. First, the high return may be justified because the funder bears: (1) the risk of no award in the case of failure; (2) the risk of insufficient award in the case of success, due to the nonrecourse nature of the "loan"; and (3) the cost of collecting data about claims and their potential value (either directly, in the case of TPF, or indirectly, in the case of investment-based crowdfunding). Second, if high returns pose a real problem, caps can be set. Some state legislatures have indeed proposed such caps,[173] but these "one size fits all" rates were criticized for being unrelated to the level of risk incurred by funders.[174] Scholars are divided on this matter. Some argue that funders' yield should be subject to ordinary usury rates, to a maximum percentage of the claimant's recovery, or both.[175] Others contend that deregulation would attract more players into the market and increase competition.[176]

The fifth concern is that external funders will not adequately inform clients of the true cost of the advance under the agreement, resulting in inefficient and unfair arrangements.[177] This problem can be ameliorated either voluntarily by the industry or through regulation, as the experience with TPF demonstrates.[178] For instance, members of the American Legal Finance Association have reached an agreement with the New York Attorney General, guaranteeing transparency to consumers.[179] At least three states enacted specific legislation

---

[170] Nauful, *supra* note 6, at 64; Beydler, *supra* note 6, at 1167–68; Elliott, *supra* note 7, at 534.

[171] Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 218–19 (Ohio 2003) (noting that the funder "forwarded $6,000 to Rancman in exchange for the first $16,800 she would recover if the case was resolved within 12 months, $22,200 if resolved within 18 months, or $27,600 if resolved within 24 months").

[172] Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627–28 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So. 2d 899 (Fla. 2006).

[173] Beydler, *supra* note 6, at 1181; Elliott, *supra* note 7, at 535; *see also* Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 278 (S.C. 2000) (explaining that in enforcing a funding agreement the court should consider "whether the financier would retain a disproportionate share of the recovery").

[174] Beydler, *supra* note 6, at 1182.

[175] *See* McLaughlin, *supra* note 6, at 657 (advocating that funders be subject to the statutory usury rate as well as a maximum fee equal to twenty-five percent of the advance); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 354, 360 (2004) (proposing that funders receive the greater of a fixed interest rate subject to the state's usury statute calculated over the life of the loan or a twenty-five percent contingency fee).

[176] Steinitz, *supra* note 6, at 1327.

[177] Nauful, *supra* note 6, at 64; Lyon, *supra* note 6, at 603; Appelbaum, *supra* note 50.

[178] Shannon, *supra* note 6, at 908 (advocating disclosure); Beydler, *supra* note 6, at 1183.

[179] ATTORNEY GEN. OF N.Y., BUREAU OF CONSUMER FRAUDS & PROT., *In re* Plaintiff Support Servs., Inc. et al., Assurance of Discontinuance Pursuant to Executive Law § 63(15), at 4 (Feb. 17, 2005), [https://perma.cc/DG6P-DK66] ("All contracts shall . . . contain the following disclosures . . .

requiring systematic disclosure of the costs and fees, with a lawyer's acknowledgment that the relevant information was properly disclosed,[180] and others consider following suit.[181]

B. The Defendant

1. Process Costs

Special profit-motivated litigation financing is not usually available for defendants because they cannot provide comparable litigation-related collaterals. Thus, defendants can only obtain ordinary loans, with a fixed interest rate and an obligation to repay that is unconditional on case outcome, or can use legal expenses insurance where available. One can envisage a special funding model whereby the funder covers the defendant's litigation costs, and repayment is contingent on the claimant's failure to obtain a certain outcome, such as damages equal to or exceeding the claimed amount. In the case of the defendant's "success," the funder will be entitled to a share of the difference between the amount claimed (or another prearranged amount) and the amount payable to the claimant. For example, assume that P sues D for $100,000. F agrees to cover the costs of D's legal defense in the amount of $3,000 under the condition that D will pay ten percent of any "saving" relative to the amount claimed. If the claim is denied, F is entitled to $10,000, and if P is awarded $60,000, F is entitled to $4,000.

To my knowledge, such a model has not been used in practice, either by traditional third-party funders or through crowdfunding platforms. A possible explanation is that if the expected saving is significant (because the claim is weak), the defendant will not wish to share it with a third-party, and, if the expected saving is small, a third-party will be less likely to invest in a share thereof. Moreover, because the defendant cannot derive financial gain from the process, he or she might be unable to repay the funder in cases defined as "success," discouraging potential investors and lenders. But, given the theoretical possibility of profit-driven funding of the defendant's litigation costs, a critical evaluation is required.

The benefits reflect those of crowdfunding claims. First, external funding may enable impecunious defendants to fight frivolous or meritless claims. In light of the risks involved, profit-seeking funders will probably select the very

---

(B) itemization of one-time fees, broken out item by item . . . (C) percentage fee or rate of return, stated on an annualized basis, including frequency of compounding; (D) total amount to be repaid by the consumer . . . .").

[180] ME. REV. STAT. tit. 9-A, § 12-104 (2017); NEB. REV. STAT. § 25-3303 (2017); OHIO REV. CODE ANN. § 1349.55 (West 2017).

[181] Shannon, *supra* note 6, at 905.

worthy and filter out undeserving defendants. Because the crowdfunding model involves many investors with small stakes, platforms will gradually develop and implement screening criteria to attract investors. Second, funding a deserving defendant may signal the claim's weakness, and induce the claimant to settle or drop the case, saving administrative resources. Third, by diminishing any power imbalance between the parties, external funding may generate more accurate settlements,[182] where the claim is not absolutely meritless, preventing an undesirable outcome. Fourth, profit-motivated funding constitutes a transfer of litigation costs and risks to better cost and risk bearers.[183] Fifth, disclosing information about a funding arrangement to the court can improve its ability to evaluate the case and reach the correct decisions on liability and damages.

The possible criticism that external funding might encourage defendants to assert unfounded defenses is unconvincing. Profit-motivated funders will only fund cases likely to yield a return on their investment.[184] In the case of crowdfunding, the large number of investors and their relatively small stakes might affect their ability and willingness to conduct due diligence, but crowdfunding platforms have the incentives to assume these tasks in order to attract investors. The related argument that funding might unnecessarily prolong litigation by disincentivizing the defendant to settle is also unpersuasive for reasons similar to those outlined above.[185] The potential problems of funder's control over the defense, excessive returns, and nondisclosure of information can be similarly resolved through regulation.

2. Outcome Costs

Assume now that the defendant wishes to crowdfund the outcome rather than the process. If the parties settle or if the court finds the defendant liable, he or she must pay damages to the claimant. Before the conclusion of the case, when the obligation to pay damages is still an uncertain risk, investment-based crowdfunding may be possible. At least one scholar proposed a system that would allow defendants to share their risk of liability with an investment company by paying the investor the expected value of the lawsuit plus a premium.[186] This proposal may be even more feasible when the risk is widely spread through crowdfunding.[187]

---

[182] *See* Beydler, *supra* note 6, at 1160, 1161, 1168.

[183] *See* Veljanovski, *supra* note 6, at 439.

[184] *See supra* notes 117–134 and accompanying text.

[185] *See supra* notes 135–181 and accompanying text.

[186] Molot, *supra* note 6, at 82–84.

[187] The defendant will pay (or commit to pay) the expected value of the claim plus a premium to the crowdfunding platform. Contributors will pledge to cover full liability if imposed, in return for a respective share of the defendant's prepayment if the claim is denied.

Once the case has concluded, by a settlement or a judgment, and the obligation to pay becomes certain, the defendant can invoke liability insurance, but investment-based crowdfunding is no longer viable. At this point, the defendant has nothing to offer investors, not even a chance of reduced or no liability. Thus, the defendant cannot seek crowdfunding. In this respect, funders' economic motivation is critical. As Part III will shortly demonstrate, in the absence of economic motivation, individuals may take part in crowdfunding the defendant's outcome costs.

III. NON-INVESTMENT-BASED MODELS

A. Overview

The analysis changes dramatically once we move from investment-based to non-investment-based crowdfunding. Some of the general and specialty litigation crowdfunding platforms allow profit-based and donation-based or reward-based projects, whereas some do not allow fundraisers to offer contributors revenue sharing.[188] If funders do not pursue financial gain, their decision to fund will be based more on intuitions and emotions, and less on solid data and cost-benefit analysis. Consequently, they may be willing to fund ventures that profit-seeking funders will avoid, and disinclined to fund ventures that profit-seeking funders will embrace. These differences in funding strategies have considerable and normatively relevant implications.

What drives individuals to donate money to a litigant without any prospect of financial gain is a preliminary question. An individual's motivations can be personal, moral, or political, and they can relate to the funded party or to his or her opponent.[189] Thus, one may financially support a litigant when the funder is the litigant's family member or friend, or the opponent's foe; the funder wishes to encourage the litigant's conduct or views or to discourage the opponent's conduct or views; or the funder perceives the litigant as belonging to the "right camp" or the opponent as belonging to the "wrong camp" in a civil war of ideas. For example, an individual who finds the business practices of a company repugnant may contribute funds to a lawsuit against it, even if the claim does not arise from these practices.[190] Similarly, an individual who believes a particular claim is a strategic lawsuit against public participation

---

[188] *See, e.g.*, *Our Rules*, KICKSTARTER, https://www.kickstarter.com/rules [https://perma.cc/EDA8-QM65] ("Projects can't offer incentives like equity, revenue sharing, or investment opportunities.").

[189] *See* Gómez, *supra* note 7, at 308 (explaining that crowdfunding contributors are "not necessarily driven by a financial gain, but instead by an altruistic motivation or by the funder's empathy towards a particular cause or project") (footnote omitted).

[190] Elliott, *supra* note 7, at 550.

may help finance the defense. A donor who does not expect direct gain may nonetheless derive some indirect economic benefit from the lawsuit. For example, it can help finance an action against its competitor.[191]

This Part examines how the different motivations affect the normative analysis. It begins with non-investment-based crowdfunding of the plaintiff's costs. It then considers the defendant's costs, distinguishing between process and outcome costs.

B. The Plaintiff

Non-investment-based crowdfunding, like any other form of external funding, may facilitate access to justice. It enables victims to pursue meritorious claims when they cannot fund litigation with their own resources or are unwilling to bear definite costs for an uncertain future benefit due to risk-aversion. Presumably, non-investment-based crowdfunding will facilitate access even where investment-based crowdfunding is improbable because the claimant's litigation costs exceed his or her expected benefit or because a non-monetary remedy is sought. Furthermore, any type of crowdfunding helps spread the financial burden. Relatively expensive claims can be completely funded by aggregating many small monetary contributions, without any single individual risking a substantial sum of money.[192] Given the diminishing marginal value of individual wealth, spreading the cost, in itself, enhances overall welfare.[193]

Even so, non-investment-based crowdfunding raises or exacerbates fundamental problems. Most importantly, although facilitating meritorious claims, it also fuels excessive and frivolous litigation. TPF and, to a more limited extent, investment-based crowdfunding, involve reasonable screening, either by the funder (TPF) or by the many funders and the platform (crowdfunding), because financing frivolous claims has a negative expected value.[194] Not-for-profit funders do not conduct due diligence. At times, they do not really care how strong the claim is: they simply like the litigant or the cause or dislike the opponent or the defense strategy. The erratic screening may bring groundless claims to court and filter out many meritorious claims.

The business model used by crowdfunding platforms increases the risk of frivolous litigation. Typically, these platforms take a certain percentage of the funds raised.[195] In the specific context of litigation crowdfunding, this means

---

[191] *Id.*
[192] Elliott, *supra* note 7, at 546.
[193] *See supra* notes 127–130 and accompanying text.
[194] Elliott, *supra* note 7, at 546.
[195] Gómez, *supra* note 7, at 312.

that the platform will make a profit regardless of whether or not the claimant succeeds. Thus, crowdfunding platforms have a patent incentive to allow more campaigns. This incentive is somewhat mitigated by the platforms' need to maintain credibility to attract donors and, consequently, fundraisers. But the counter-incentive is meager, because people who simply want to help their favored party do not care much about platforms' past success rates, and even those who do may be satisfied with minimal screening that may be over-inclusive from a legal and economic merit perspective.

For the same reasons, non-investment-based crowdfunding does not signal the quality of the claim. Therefore it does not provide the defendant an additional incentive to settle, apart from the knowledge that the claimant can endure a long process. Neither does this model generate any incentives for the claimant to settle. In some investment-based funding models, the funder's return hinges on the duration of the process, and this incentivizes the claimant not to prolong the process unreasonably. But in non-investment-based crowdfunding, the claimant is not expected to lose anything, so he or she has no incentive to settle. Moreover, unless prohibited by law, profit-driven funders or funding platforms may exercise some control over the process and its duration. In contrast, benevolent contributors would not normally have any control.

Likewise, external funding generally helps claimants obtain more accurate settlements by eliminating power imbalances between the parties.[196] But non-investment-based crowdfunding might provide a tailwind for weak claims. Claimants might be encouraged to demand more than they deserve and protract the process to extort defendants. This can result in unwarranted or excessive settlements, undermining the goals of civil law.

The other issues associated with investment-based litigation crowdfunding do not arise here. An individual who donated a small amount and does not expect any benefit has no real interest in controlling the process. Even if he or she did, it would be almost impossible to devise a strategy due to collective action problems. Crowdfunding platforms usually allow donors to follow the progress of their project, and this will probably satisfy benevolent litigation funders. Additionally, the problems of usurious arrangements and nondisclosure of information about the litigant's "debt"[197] cannot arise if funders expect no return.

In summary, the problems with non-investment-based crowdfunding are all related to the absence of proper screening. To overcome these problems the law must require reliable vetting of claims. Imposing a professional selection

---

[196] *See supra* notes 122–124 and accompanying text (explaining the competing incentives to settle for a well-funded plaintiff).

[197] *Supra* notes 164–176 and accompanying text.

mechanism will reduce the risks of frivolous claims, prolonged litigation, and inaccurate settlements. For example, the claimant's attorney may be required to acknowledge that he or she has found the claim meritorious. As an assurance of reliability, the lawyer may be required to take the case on a contingency fee basis[198] or pay the defendant's costs if the claim is found frivolous. This vetting method can be easily implemented irrespective of the nature of the platform but might be deemed inadequately reliable.

Alternatively, the crowdfunding platform can be obligated, under specific legislation or in accordance with the general principles of tort law, to employ reasonable selection criteria, including independent legal and economic evaluation of each claim. The platform could face liability for the defendant's costs if a funded claim is found frivolous. This vetting method can be implemented easily by specialized litigation crowdfunding platforms that can incorporate the necessary legal and economic analysis into their business model. General crowdfunding platforms, whose portfolios are very diverse and dynamic, might be less inclined to undertake such a task, unless litigation crowdfunding through such platforms becomes sufficiently common. Traditional business or personal websites are probably the least likely to initiate non-investment-based litigation crowdfunding if such vetting is required.

A less biased, though admittedly costlier approach, is to require preliminary judicial scrutiny of the claim. The idea that courts should vet a claim before the power of the masses is harnessed to wage a legal battle against another is not radical as might appear. In some jurisdictions, a similar threshold requirement is applied in the context of class actions. For example, under Israeli legislation a class action can be certified only if there is a reasonable likelihood that the claim will succeed.[199] In the United States, the Supreme Court held only several years ago that an inquiry into the merits of the case may be necessary for certifying a class action.[200]

Critics may argue that there is no reason to subject non-investment-based crowdfunding to legal constraints that do not apply to other forms of not-for-profit litigation funding. For example, in a recent highly publicized case venture capitalist Peter Thiel funded Hulk Hogan's lawsuit against the online news

[198] *See supra* notes 37–43 and accompanying text.

[199] Class Actions Law, 5366–2006, SH 264, § 8(a)(1) (Isr.).

[200] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011). The Court departed from the time-honored ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (noting that a federal court does not have "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"). The Court ultimately characterized the prior ruling as dictum because the judge was examining notice requirements and not performing a true inquiry into the case's merits. *Id.* at 351 n.6.

platform Gawker for invasion of privacy.[201] Yet, in most cases, the likelihood that an individual will be willing and able to fully finance another person's lawsuit without any expected return seems much lower than the probability of a successful crowdfunding campaign. The new platforms enable plaintiffs to easily reach numerous potentially-interested individuals who are asked to contribute relatively small amounts. At any rate, the law can restrict or regulate all kinds of litigation funding when deemed necessary. This is neither new nor peculiar, as the preceding analysis of the doctrine of maintenance[202] and public policy constraints on TPF[203] demonstrates.

Arguably, a claimant seeking not-for-profit contributions may frame his or her appeal as an investment-based crowdfunding campaign merely to circumvent the proposed screening process. Individual investors, however, will not invest in meritless claims,[204] and crowdfunding platforms will still have an incentive to employ screening processes to maintain credibility of the investment model and attract investors. A related problem may be the willingness of some individuals to contribute to an investment-based crowdfunding campaign without expecting financial return for personal, moral or political reasons. Yet, it is less likely that such contributions will suffice to reach the campaign's capital goal (a typical precondition for the campaign's "success"), and as long as the campaign is presented to the public as investment-based, the platform still has an incentive to employ its own screening process.[205]

C. The Defendant

For the most part, the analysis of non-investment-based crowdfunding of claims is applicable *mutatis mutandis* to crowdfunding of defenses. However, because defense lawyers do not provide legal services on a contingency fee basis and have an economic interest in accepting all cases,[206] they cannot serve

---

[201] Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits Against Gawker*, FORBES (May 24, 2016), https://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/ [https://web.archive.org/web/20180306065555/https://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/].

[202] *See supra* notes 91–116 and accompanying text.

[203] *See* Avraham & Wickelgren, *supra* note 6, at 235 (discussing the problem of external control); Gómez, *supra* note 7, at 319–20 (same); Shannon, *supra* note 6, at 873 (same); Elliott, *supra* note 7, at 534–35 (same); Lyon, *supra* note 6, at 601–02 (same).

[204] Unless the framing also involves some form of misrepresentation that is addressed by criminal law.

[205] As stated in *supra* notes 134–180 and accompanying text, if empirical studies reveal market failures, investment-based crowdfunding can be subject to the same vetting process as non-investment-based crowdfunding.

[206] Winand Emons & Claude Fluet, *Why Plaintiffs' Attorneys Use Contingent and Defense Attorneys Fixed Fee Contracts*, 47 INT'L REV. L. & ECON. 16, 16–17 (2016).

as reliable vetting agents. Imposing liability for the claimant's costs on a defense lawyer who vetted a frivolous defense may ameliorate, but not solve, the problem. A legal defense should, therefore, be vetted by an independent party like the crowdfunding platform or the court. If platforms engaged in litigation funding are required to evaluate defenses, it is reasonable to require platform-vetting of claims and defenses alike, instead of implementing a different method for each category. If judicial scrutiny is used for claims, it can also be used for defenses.

More importantly, non-investment-based crowdfunding models enable coverage of a new litigation-related cost that cannot normally be financed by commercial third-party funders or investment-based crowdfunding participants. Once the case has concluded, by a settlement or a judgment, the defendant cannot utilize investment-based funding models because he or she cannot offer investors any prospect of financial gain, not even a chance of reduced or no liability. But, if individuals empathize with the defendant or disapprove of the claimant, the defendant may seek crowdfunding of his financial obligation through non-investment-based models. For example, Igal Sarna, the journalist who was found liable for libeling Israeli Prime Minister Benjamin Netanyahu, easily raised the full amount from Netanyahu's detractors through a crowdfunding website.[207]

Liability crowdfunding has two obvious benefits: it guarantees full compensation to successful claimants and spreads the cost, thereby enhancing overall welfare.[208] Nonetheless, under certain circumstances it might undermine at least one of the primary goals of civil liability. According to classical economic theory, efficient deterrence entails internalization by the wrongdoer of the social harm caused by his or her wrongful conduct.[209] Only if the expected liability is equivalent to (or greater than) the expected externalized cost, will the potential injurer internalize that cost and take cost-effective precautions.[210] Compensatory damages can secure optimal deterrence only if wrongdoers are always liable for harms caused by their wrongful conduct, and compensatory damages are set in accordance with the social cost of the wrongful conduct. If wrongdoers do not internalize the costs of their wrongful conduct, potential wrongdoers are not incentivized to take cost-effective precautions.[211] Liability crowdfunding enables wrongdoers to evade the burden and might

---

[207] *Supra* notes 3–4 and accompanying text (discussing the background and results of Sarna's case).

[208] *See supra* notes 3–4 and accompanying text (demonstrating one case where the general public bore some costs of highly visible litigation).

[209] Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 335 (2012).

[210] *Id.* at 346.

[211] *Id.* at 344.

undercut potential wrongdoers' incentives to avoid wrongful conduct in similar situations.

When crowdfunding might have such an adverse effect, and how the law should respond, are crucial questions. One may argue that because a potential wrongdoer can never be certain (ex ante) that his or her liability will be covered through crowdfunding (ex post), the theoretical possibility of crowdfunding will not affect the conduct. This argument fails, however, because it assumes uncertain coverage of liability cannot affect deterrence. In fact, a sufficiently high probability of such coverage may induce wrongdoing. For example, if the potential victim's expected harm is $100 and the cost of precautions that can eliminate the risk is $50, taking these precautions is desirable and should be encouraged. A fifty-one percent chance of liability crowdfunding will reduce the expected cost of failing to take the precautions to 49%×$100=$49, and induce the potential wrongdoer not to take them (because $50>$49).

The real question, therefore, is when the perceived probability of crowdfunding ex ante is sufficiently high to undermine efficient deterrence. Many variables can influence the perceived probability. For example, crowdfunding is more likely in salient ("high-profile") cases with political or public-interest overtones. Thus, it will be easier to obtain funding in cases of defamation of public figures, than in private tenant-landlord disputes. The fact that all three cases mentioned in the introduction were salient (though two involved process costs) is not a coincidence.[212] This fact illustrates where litigants feel confident enough to launch crowdfunding campaigns, and this ex post reality is surely correlated with, and reflected in, the ex ante perceptions of the probability of crowdfunding. Similarly, the ex ante probability of liability crowdfunding may be lower if the potential injurer has already sought crowdfunding in previous cases of alleged wrongdoing. It might be more difficult to mobilize the public to support a repeat-litigator (who may be suspected of abuse). Likewise, very well-connected individuals, such as celebrities, may have a higher ex ante probability of successful crowdfunding.

From an economic perspective, crowdfunding should be prohibited when it leads to under-deterrence. The implementation of this imperative, however, might not be simple. One possible technique is a case-by-case evaluation of the ex ante perception of the probability of crowdfunding. Defendants may need to obtain judicial permission for launching a liability crowdfunding campaign, and courts will be able to deny permission on public policy grounds if the ex ante probability is too high. This option entails relatively high administrative costs. Alternatively, the law can prohibit crowdfunding in preset categories of

---

[212] *See supra* notes 1–4 and accompanying text.

cases where the ex ante probability is sufficiently high. Unless reliance on theoretical predictions is deemed appropriate, this option requires some empirical work, and relevant data can only accumulate if liability crowdfunding is unregulated for a certain period of time. This model can be applied incrementally, prohibiting liability crowdfunding in a specific category of cases once it transpires that the probability of crowdfunding in such cases is high.

The most extreme legal technique for addressing the under-deterrence problem is a general prohibition on crowdfunding. A possible rationale may be that prohibition is economically justified when the ex ante probability of crowdfunding is high, and harmless when the ex ante probability is low. Unless potential wrongdoers misperceive high probability as low, and in the absence of dramatic changes in public preferences after the wrongdoing, low ex ante probability usually means that the wrongdoer will not be able to obtain crowdfunding anyway. Therefore, a general prohibition will have a very limited impact in cases of low ex ante probability. Lawmakers should decide whether the simplicity of a general prohibition that does not entail case-by-case adjudication outweighs its cost in terms of preventing non-objectionable crowdfunding campaigns (where the perceived ex ante probability was low).

Theoretically, the prohibition may be relaxed if the defendant is judgment-proof.[213] If the potential wrongdoer is unable to fully bear the externalized costs of the wrongful conduct ex post, he or she will not internalize them ax ante. From the potential wrongdoer's perspective, the expected expense may be lower than the expected social harm, so the incentive for taking cost-effective precautions is impaired.[214] To illustrate, assume there is a two percent chance that D's conduct will cause a \$100,000 loss to P. D can reduce the probability to one percent by taking certain precautions at a cost of \$800. The cost of care (\$800) is lower than the ensuing reduction in expected harm (\$1000), so failure to take precautions is negligent. Assume further that the value of D's assets is \$30,000 and that D is risk-neutral. Even if liability for negligent conduct was certain, it would not provide an adequate incentive. D's expected sanction in case of failing to take precautions would be 2%×\$30,000=\$600, whereas the cost of care is \$800. Liability crowdfunding may be allowed for the difference between the defendant's liability and financial ability (\$70,000 in the above example). This will secure full compensation and cost-spreading without impairing the admittedly-insufficient deterrent ef-

[213] *See supra* notes 127–128 and accompanying text.

[214] *See* Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375, 1375 (1994) (noting that the existence of judgment-proof defendants undermines the deterrence objective of tort law); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 45 (1986) (concluding that liability does not provide judgment-proof defendants with adequate incentives to minimize risk).

fect of liability. In practice, however, a judgment-proof defendant does not have an incentive to seek crowdfunding for the difference between liability and ability, because he or she will not pay this amount anyway.

One possible criticism of the proposed prohibition is that liability crowdfunding operates much like liability insurance, which is permitted and very common.[215] But the analogy is flawed. Liability insurance is based on professional ex ante analysis of and response to risks. Insurers can refuse to underwrite certain people or activities, thereby preserving liability incentives. They can also control the insureds' conduct through deductibles and coverage caps, exclude liability for certain types of conduct or for the materialization of certain risks, adjust premiums based on past experience or current compliance with standards of conduct, and so forth.[216] Liability crowdfunding is an ex post mechanism, that is not based on risk analysis, not responsive to risks, and incapable of effecting desirable changes in conduct.

Another possible criticism is that even where liability crowdfunding leads to under-deterrence, this drawback may be cancelled out by other social benefits, particularly the expressive value of a civil protest against controversial judicial decisions or underlying laws, and of subsidizing activities that some of the public deems desirable. There is, however, a difference between expressing discontent with rules or judgments defining wrongdoing and actively trying to frustrate their application. In a liberal democracy, judgements or rules that seem undesirable can be altered through constitutionally acceptable means (such as legislative amendment or an appeal); otherwise, they must be respected. Thus, if a specific conduct is legally wrongful, a coherent legal system cannot encourage it. Although liability crowdfunding does not always encourage wrongdoing, it cannot be allowed when it does.

A third criticism is that civil liability serves other goals than efficient deterrence, such as corrective justice, compensation of harm, or loss spreading. Liability crowdfunding does not frustrate any of these goals and, therefore, should not be limited. This argument has merit, but its weight depends on a much more fundamental debate about the goals of civil liability, which clearly

---

[215] In the past, negligence liability insurance contracts were held unenforceable on public policy grounds. *See, e.g.*, Breeden v. Frankford Marine, Accident & Plate Glass Ins. Co., 119 S.W. 576, 607–08 (Mo. 1909) (Lamm, J., dissenting in part) ("The validity of insurance . . . taken to indemnify a carrier or employer of men against the lapses, slips, inadvertences, misadventures, and negligences incident to their business . . . . was assailed as against public policy . . . ."); Alice Erh-Soon Tay, *The Foundation of Tort Liability in a Socialist Legal System: Fault Versus Social Insurance in Soviet Law*, 19 U. TORONTO L.J. 1, 15 (1969) (showing that liability insurance was not allowed in the Soviet Union because of its possible effect on deterrence and "moral functions of civil liability").

[216] *See, e.g.*, Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 385 (1994) (describing methods used by insurance companies to control and modify the insured's conduct).

transcends the boundaries of this Article. To the extent that civil liability aims at efficient deterrence (whether or not exclusively), as many jurists and scholars insist,[217] liability crowdfunding must be cautiously scrutinized as explained above. Note further that in the rare cases where an award of damages is intended to achieve retributive justice (most notably under the rubric of "punitive damages"),[218] liability crowdfunding must be categorically prohibited irrespective of its ex ante probability. Retributive justice requires that the wrongdoer suffer in proportion to the gravity of the wrong,[219] and relieving the wrongdoer of the burden annuls his or her suffering and thwarts proportionality.[220]

The fourth possible criticism is that prohibiting crowdfunding will not prevent unwarranted fundraising but only shift it from designated online platforms to other unregulated mechanisms. The defendant's family, friends, colleagues, and congregation members can be called upon to help by phone or e-mail, at public events, or through social networks. This, too, is a legitimate concern. However, crowdfunding platforms dramatically increase the frequency and probability of success of liability funding campaigns, making the problem more acute. Technology enables the fundraiser to easily and inexpensively reach numerous individuals, including complete strangers, geographically and socially remote from the parties and the incident. A broader audience increases the likelihood that a sufficiently large pool of donors will be accessed, and a sizeable pool of contributors reduces the extent of the average contribution and induces potential donors to actually make a donation. More importantly, if oth-

---

[217] *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) ("Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties.").

[218] *See* Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409, 442–49 (2011) (discussing the retributive justification for punitive damages); Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 225–31 (2006) (same).

[219] *See, e.g.*, TONY HONORÉ, RESPONSIBILITY AND FAULT 13, 83–84, 92, 123, 138 (1999) (explaining that retribution requires proportionality between the severity of the sanction and the gravity of the misconduct); Peter Cane, *Retribution, Proportionality, and Moral Luck in Tort Law*, *in* THE LAW OF OBLIGATIONS 141, 143, 160–61 (Peter Cane & Jane Stapleton eds., 1998) (same); Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 87 (David G. Owen ed., 1995) (same); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1690 (1992) (same); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 530–32 (1987) (same); Ronen Perry, *The Third Form of Justice*, 23 CAN. J.L. & JUR. 233, 235–36 (2010) (book review) (same); Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 851 (1985) (same).

[220] Consider, by analogy, the idea that a convicted criminal sentenced to ten years in prison will be pardoned on the basis of his followers' willingness to "share" his sentence among them (each spending several days in prison in his stead).

er liability funding methods raise similar under-deterrence concerns, they should also be regulated.

CONCLUSION

This Article is the first to systematically analyze civil litigation crowdfunding from a law and economics perspective. Part I provided the necessary background for the theoretical inquiry. It explained that the risk of failure and the need to bear significant costs during a dispute resolution process might discourage meritorious claims or defenses. Two contemporary models in the world of finance—TPF on the one hand and crowdfunding on the other—very recently combined to form an innovative and promising paradigm: civil litigation crowdfunding. The potential legal obstacles to this development seem obsolete.

The key to the theoretical analysis of litigation crowdfunding is the distinction between investment-based and non-investment-based models. Acknowledging the similarities between investment-based crowdfunding and TPF, Part II drew on existing literature on the latter to evaluate the former. Investment-based litigation crowdfunding offers considerable benefits, particularly the enhancement of access to justice, and most of the problems it might bring about are manageable. Indeed, the cohort of contributors is large, diverse, and case-specific, and each has a minor stake in the outcome. Consequently, their ability and willingness to inspect claims and defenses prior to investment are limited. However, they are still profit-seeking players, who prefer investment opportunities with the highest possible expected value. The legal system can and should facilitate rational and informed investment by requiring fundraisers to disclose relevant information. In addition, crowdfunding platforms have incentives to assume the screening functions that are carried out by the funder in ordinary TPF. They have an incentive to list only sufficiently strong claims, because failing to do so will result in unsuccessful investments, deter investors, and reduce revenue. They also have the capacity, as aggregators of considerable capital, to conduct due diligence.

Part III discussed non-investment-based litigation crowdfunding, starting with process costs. TPF, and to a more limited extent, investment-based crowdfunding, involve reasonable assessment of each funding application. In non-investment-based models, no party has a sufficiently strong incentive to establish and implement reasonable screening processes. Contributors who pledge relatively modest amounts and do not pursue financial gain are not particularly concerned about the expected value of the claim (or the defense). Furthermore, the crowdfunding platform has only a meager incentive to vet applications because it makes a profit whenever a funding goal is reached, irrespective of the case outcome. It does not need to credibly demonstrate its willingness and capacity to filter out weak claims or defenses in order to attract future investments. To overcome this problem the law must require professional vetting of claims and defenses. Turning to outcome costs, Part III concluded that crowdfunding should be prohibited, at least when its ex ante probability is sufficiently high, because unconditionally relieving the defendant of the burden of liability might undermine one of the primary goals of civil liability: efficient deterrence.

This Article has focused on direct litigation crowdfunding, whereby the platform serves as the sole intermediary between a party to a legal dispute and those offering financial support. Yet civil litigation crowdfunding is a nascent phenomenon, likely to develop in new directions. Specifically, market forces may push for indirect litigation crowdfunding. For example, litigation funding companies and law firms may seek equity- or debt-crowdfunding, and nonprofit legal advocacy organizations may seek donation-based crowdfunding. These and other—possibly unforeseeable—developments will surely require modification and extension of the basic theoretical framework. The Article thus paves the way for further research on emerging topics at the intersection of technology, law, and economics.