



THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF
CHICAGO
THE LAW SCHOOL

The Common Law Process and the Selection of Efficient Rules

Author(s): George L. Priest

Source: *The Journal of Legal Studies*, Vol. 6, No. 1 (Jan., 1977), pp. 65-82

Published by: The University of Chicago Press for The University of Chicago Law School

Stable URL: <http://www.jstor.org/stable/724190>

Accessed: 26-06-2016 23:57 UTC

REFERENCES

Linked references are available on JSTOR for this article:

http://www.jstor.org/stable/724190?seq=1&cid=pdf-reference#references_tab_contents

You may need to log in to JSTOR to access the linked references.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at

<http://about.jstor.org/terms>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



The University of Chicago Press, The University of Chicago Law School are collaborating with JSTOR to digitize, preserve and extend access to *The Journal of Legal Studies*

THE COMMON LAW PROCESS AND THE SELECTION OF EFFICIENT RULES

GEORGE L. PRIEST*

THIS comment simplifies and extends the important insight of the preceding paper by Paul H. Rubin.¹ I shall argue that the tendency of the set of all legal rules to become dominated by rules achieving efficient as opposed to inefficient allocative effects is substantially more pervasive than might be thought. It will be shown that efficient rules will be more likely to endure as controlling precedents regardless of the attitudes of individual judges toward efficiency, the ability of judges to distinguish efficient from inefficient outcomes, or the interest or uninterest of litigants in the allocative effects of the rules. Furthermore, it will be shown that this tendency toward efficiency is a characteristic of the common law process so that the content not only of the common law itself, but also of the legal interpretation of statutes or of the Constitution, is subject to forces pressing toward efficiency. The only assumption necessary for the hypothesis is that transaction costs in the real world are positive. It follows from this assumption that inefficient legal rules will impose greater costs than efficient rules on the parties subject to them. Since litigation is more likely than settlement where, *ceteris paribus*, the stakes of a case are greater, disputes arising under inefficient rules will be more likely to be relitigated than disputes arising under efficient rules.² It will be shown that, as a consequence, judges will be unable to influence the content of the law to fully reflect their attitudes toward efficiency. The set of legal rules will always contain a greater proportion of efficient rules than judges themselves would prefer.

* Fellow in Law and Economics, University of Chicago Law School; Associate Professor of Law (on leave), University of Puget Sound.

I am grateful to Gary S. Becker, Edmund W. Kitch, Anthony T. Kronman, William M. Landes, B. Peter Pashigian, Wallace M. Rudolph, Robert Sherwin, Kenneth I. Wolpin and to the participants of the Law and Economics Workshop of the University of Chicago Law School for helpful comments on an earlier draft.

¹ Paul H. Rubin, Why is the Common Law Efficient?, 6 *J. Leg. Studies* 51 (1977) [hereinafter cited as Rubin].

² For this conclusion it is necessary in addition to abstract from wealth effects on the "consumption" of litigation. See note 20 *infra*.

The hypothesis builds on a model of litigation and an assumption about transaction costs that are simple and realistic. It is unnecessary to assume, as might have been implied by Professor Rubin's discussion, for example, that the parties agree on the probability of a given verdict, that transaction costs are greater than the savings from voluntary shifts in liability, or, as was crucial to Professor Rubin's results, that both parties to the dispute have a continuing interest in the legal outcome.³

My analysis provides a foundation for the more general theory that common law decision making facilitates over time the efficient allocation of resources. This theory has been developed in recent years in a growing literature on the apparently efficient consequences of the common law system.⁴ This literature has been less successful, however, in explaining *why* the common law has developed in this manner. The most persuasive explanation has been that common law rules of evidence and procedure tend to emphasize those characteristics of legal disputes important to a determination of efficiency,⁵ but to conclude that the rules that are promulgated will, in fact, achieve efficiency has required two additional (often implicit) assumptions: that judges prefer efficient outcomes, and that judges can devise with at least some success legal rules to achieve such outcomes.⁶ These assumptions have been criticized as fragile reeds on which to build a theory, because the intent and motivations of judges are difficult to infer and are frequently ambiguous and because the consistent and accurate determination of efficient results is a very difficult task.⁷ The analysis in this paper, however, shows that even if judges prefer *inefficiency* or prefer efficiency but are unable to achieve it, the common law process will restrain and channel judicial discretion so that the legal rules in force will consist of a larger proportion of efficient rules than the bias or the incapacity of judges might otherwise permit.

I.

Various recent articles have developed a model in which the major determinants of the decision of two parties either to settle their dispute

³ Rubin §§ I-II. Professor Rubin necessarily assumes that legal rules possess some precedential influence on future judicial decisions, for otherwise, legal rules would have no allocative effects whatever.

⁴ Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960); Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. Law & Econ. 201 (1971); *id.*, *A Theory of Negligence*, 1 J. Leg. Studies 29 (1972), and *id.*, *Economic Analysis of Law* (1973) [hereinafter cited as Posner, *Economic Analysis*].

⁵ Posner, *Economic Analysis* 321-27.

⁶ For specific discussion of Posner's various explanations of judicial behavior see text surrounding notes 43-49, *infra*.

⁷ For a discussion of criticisms of the efficiency theory of the common law see text surrounding note 49 *infra*. For an illustration of the ambiguity of inferences of judicial intent see Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 61 (1977).

out of court or to litigate are the difference between the parties' attitudes toward risk, the combined expenses of litigation versus settlement, and the stakes of the case, that is, the gain or loss to the parties from a particular judgment. An implication of this model is that, if all other factors are held constant, those cases in which the stakes are higher are more likely than those in which the stakes are lower to be litigated rather than settled.⁸

For the set of all legal disputes, the stakes will be greater for disputes arising under inefficient rules than under efficient rules. Inefficient assignments of liability by definition impose greater costs on the parties subject to them than efficient assignments. For example, where the marginal cost of reducing the likelihood of an accident by a given amount is greater for one party than for the other, to place liability on the party whose cost is greater will lead in general to more accidents or more severe accidents than if the assignment were reversed. Where the cost of avoidance is made greater, the amount invested in avoidance generally will be lower. Even where it is possible for the party legally liable to pay the other party to assume the burden of prevention, it will be necessary to invest resources to achieve this reallocation. Thus the costs imposed by inefficient rules will always be higher than the costs imposed by efficient rules.⁹

It follows, therefore, that other factors held equal, litigation will be more likely for disputes arising under inefficient rules than for those arising under efficient rules. Once promulgated, inefficient rules are more likely than efficient rules to be reexamined by courts because they will come up in litigation more often. This conclusion follows directly from the fact that inefficient rules impose higher costs than efficient rules on the parties subject to them, and thus that the value to the parties from overturning the judgments that result—which is what I call the stakes of the litigation—is higher.¹⁰

Other characteristics besides the stakes that influence the litigation-settlement ratio—such as differences between the parties' expectations of success, aversion to risk, litigation costs, settlement costs, and even characteristics ignored by the economic model of litigation such as differences in the

⁸ William M. Landes, *An Economic Analysis of the Courts*, 14 *J. Law & Econ.* 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. Leg. Studies* 399 (1973). Greater litigation follows because for a given distribution of the parties' subjective probabilities of winning, greater stakes lead to greater differences between plaintiffs' minimum settlement offers and defendants' maximum settlement offers.

⁹ If this were not true, then the rules would not be inefficient. Where there are no transaction costs, there are no inefficiencies.

¹⁰ This conclusion does not follow where the parties subjected to the costs of a given rule, including the higher costs of the rule's inefficiency, are denied legal standing or where the parties have no continuing interest in the class of disputes and the optimal response to the liability rule is to reduce the scope of the activity so that the level of disputes weighted by intensity declines.

“litigiousness” of the particular individuals or differences in the “litigation skill” of the respective attorneys—can be ignored because they are unlikely to differ systematically between disputes arising under inefficient and those arising under efficient rules. The parties’ expectations of success may be affected by the clarity of given legal rules, but there is no reason to believe that inefficient rules are any more or less clear in general than efficient rules. If these empirical judgments are correct, then regardless of the distribution within society of the various characteristics—ability to predict, aversion to risk, even litigiousness—inefficient rules as a class will be more likely than efficient rules to generate litigation and thus to be subjected to judicial reexamination.

It follows, therefore, that if the disputes that proceed to judgment consist of a disproportionately large share which contest the appropriateness of inefficient rules, then the set of rules not contested, those remaining in force, will consist of a disproportionately large share of efficient rules. It is this consequence that limits the power of the judiciary to influence the character of the law. The set of all legal rules in force at a given time will consist of the sum of the rules not contested and the rules newly promulgated by the judiciary. The newly promulgated rules, of course, will reflect judicial preference for or hostility to efficiency. But since the effects of the rules not contested will be predominantly efficient, the allocative effects of the total set of rules will be systematically more efficient than the allocative effects of the subset of newly promulgated rules. Even where the judiciary exercises a strong hostility to efficient outcomes, it will be unable to fully impose its bias on the total set of legal rules in force.¹¹ In fact, as we shall see, it is possible for the total set of rules to be predominantly efficient, despite a preference of the judges promulgating the rules for inefficient outcomes.

An arithmetical example will illustrate the point. Imagine that judges decide cases on some basis unrelated to efficiency of outcome, so that, with respect to allocative effects, judicial decisionmaking may be described as random. Assume for simplicity that all rules can be characterized as (equally) efficient or inefficient.¹² The likelihood in any given case of the rule being efficient or inefficient then will be .5. Imagine that 100 disputes go to judgment. By definition, the rules announced for 50 of these cases will be inefficient and for 50 will be efficient. Now assume that further litigation ensues concerning some of these rules. It is unnecessary to place any restrictions on the distribution of the other characteristics that determine the litigation-settlement ratio, but imagine that they are distributed so that 30 of the initial 50 inefficient rules are relitigated. By our previous finding (and

¹¹ For a consideration of those most implausible conditions when no newly promulgated rules are efficient see text following note 14 *infra*.

¹² This assumption is not essential and is relaxed in text following note 13 *infra*.

this is essential to the theory), it follows that a smaller proportion of efficient rules will be relitigated, say 20 of the initial 50.¹³ By assumption, the judges will decide the 50 relitigated cases again randomly with respect to allocative effects. Thus 25 of the new rules will be inefficient and other 25 efficient. But when the new rules are added to the uncontested rules, it is clear that the stock of legal rules has become in sum more efficient. The number of inefficient rules has declined from 50 to 45, and the number of efficient rules has increased from 50 to 55. (See Table 1.)

TABLE 1
TENDENCY TOWARD EFFICIENCY WITH RANDOM DECISIONS
(.5 inefficient)

	inefficient		efficient		
	in litigation	in force	in litigation	in force	
period 1		50		50	
	30 (.6)	20	20 (.4)	30	50 in lit.
50 in lit.	25	<u>25</u>	25	<u>25</u>	
period 2		45 total		55 total	

N.B.: Equilibrium = 60 rules.

The tendency of the proportion of efficient rules to increase does not depend on the assumption of decision making that is random with respect to allocative effects. The proportion of efficient rules may increase over time even where each judge has a strong bias against efficient outcomes. Amend the previous example by assuming that judges promulgate inefficient rules in 90 percent of all cases, so that at period 1, 90 of the rules are inefficient, 10 efficient. Assume even greater relitigation: 80 of the 90 inefficient rules are relitigated and 7 (again a smaller proportion) of the 10 efficient rules, so that 10 inefficient and 3 efficient rules remain in force unchallenged. Of the 80 relitigated inefficient rules, 72 of the new rules will remain inefficient while 8 will be changed to become efficient. Of the 7 relitigated efficient rules, 6.3 will become inefficient and .7 remain efficient. Again the totals following relitigation favor efficiency: at the subsequent period, 88.3 as opposed to 90 rules are inefficient but 11.7 as opposed to the previous 10 are now efficient.

In this simple model the proportion of efficient rules in force at any period is a function of the stock of efficient and inefficient rules in force at the previous period, the respective rates of relitigation of efficient and inefficient rules, and the proportion of efficient rules announced by judges (the judicial bias toward efficiency). If the rates of relitigation and the judicial bias re-

¹³ The difference in the rate of litigation between disputes arising under efficient rules and those arising under inefficient rules will be a function of the extent of the inefficiency.

main constant over time, the share of efficient rules will reach an equilibrium level. The proportion of efficient rules at equilibrium will be greater than the proportion of efficient rules promulgated by judges in any given period, regardless of the relitigation rates or the level of the judicial bias.

Let X_t and Y_t represent respectively the proportion of efficient and inefficient rules in force at period t . Let a be the proportion of efficient rules announced by the judiciary, b the rate of relitigation of efficient rules, and c the rate of relitigation of inefficient rules, each of which is assumed to remain constant through all periods. By definition $X_t + Y_t = 1$, and $c > b$. The proportion of efficient rules in force at any period is represented as follows:

$$X_t = X_{t-1}(1 - b) + a(bX_{t-1} + cY_{t-1}) \quad (1)$$

Substituting $(1 - X_{t-1})$ for Y_{t-1} ,

$$X_t = X_{t-1}(1 - b + ab - ac) + ac \quad (2)$$

It can be shown that in the limit (as t approaches infinity) X will converge to an equilibrium value. To show this, rewrite X_t as

$$X_t = X_0(1 - b + ab - ac)^t + ac[(1 - b + ab - ac)^{t-1} + (1 - b + ab - ac)^{t-2} + \dots + (1 - b + ab - ac) + 1] \quad (3)$$

where X_0 equals the proportion of efficient rules in the base period 0. Letting $Z = (1 - b + ab - ac)$, we know that $Z < 1$, since $0 > b$ and $(1 - b) < 1 + a(c - b)$. We can write X_t as

$$X_t = X_0Z^t + ac(Z^{t-1} + Z^{t-2} + \dots + Z + 1). \quad (4)$$

As t goes to infinity, we have

$$X_t = ac/b - ab + ac. \quad (5)$$

As expected the proportion of efficient rules in equilibrium will increase with increases in the judicial bias toward efficiency and with increases in the relitigation rate of inefficient rules. It will decline with increases in the relitigation rate of efficient rules:

$$\frac{\partial X_t}{\partial a} \geq 0 \quad \frac{\partial X_t}{\partial c} \geq 0 \quad \frac{\partial X_t}{\partial b} \leq 0 \quad (6)$$

It is important to appreciate the implications of this model on the exercise of judicial authority. It is true, of course, that greater judicial hostility to efficiency will lead to a lower equilibrium level of efficient rules. But the difference in the rates of relitigation between efficient and inefficient rules places an important restriction on the extent to which judges who prefer inefficiency can implement their preferences. Table 2 shows equilibrium levels of efficient rules, holding the rate of relitigation of efficient rules

TABLE 2
EQUILIBRIUM PROPORTION OF EFFICIENT RULES (%)
RELITIGATION RATE OF EFFICIENT RULES HELD CONSTANT (.02%)

		RELITIGATION RATE, INEFFICIENT RULES			
		.04	.06	.08	.09
	.7	82.4%	87.5%	90.3%	91.3%
JUDICIAL	.6	75.0	81.8	85.7	87.1
BIAS	.5	66.7	75.0	80.0	81.8
(% EFFICIENT)	.4	57.1	66.7	72.7	75.0
	.3	46.2	56.3	63.2	65.9

constant, for plausible values of judicial attitudes toward efficiency (within a range of 40 percent of the mean) and for selected relitigation rates of inefficient rules. Note that “judicial bias” represents the proportion efficient of all rules promulgated by all of the judges within a given jurisdiction over a long period of time. Thus a .3 judicial bias measure could not be achieved if only a small set of judges were hostile to efficiency or if judges were to exercise their hostility in only a selected set of cases. Rather such a measure would require deep and systematic hostility.

Table 2 shows that where judges are relatively indifferent to the allocative effects of their decisions or where the number of decisions hostile to efficiency is roughly equal to the number of decisions sympathetic to efficiency (bias = .5), the equilibrium level of efficient rules will be predominantly efficient. Where judges on the whole prefer efficient outcomes (bias = .6 or .7), the preference is strengthened and the number of efficient rules that survive becomes very large. But efficient rules will comprise a substantial and in most cases a predominating component of legal rules in force even where judicial hostility to efficiency is high (bias = .4 or .3). For example, where judges promulgate efficient rules only 30 percent of the time and the relitigation rate of inefficient rules is .06, efficient rules will dominate at equilibrium, comprising 56 percent of total rules in force.

Table 2 confirms a second limitation on judicial discretion. Regardless of judicial bias, an increase in the relitigation rate of *inefficient* rules will lead to an increase in the equilibrium share of *efficient* rules. The relitigation rate is an indirect measure of the extent of the inefficiency of individual rules. As rules become more inefficient and impose greater costs on the parties subject to them, the stakes of the disputes will increase and the litigation rate will rise. Although it may initially seem paradoxical, as judges promulgate rules imposing greater inefficiencies on society, judicial influence on the proportion of efficient rules in force will decline because each of the rules individually will be less likely to avoid challenge. The proportion of inefficient rules will be maximized where the rules themselves are only negligibly inefficient.

The tendency of legal rules to become efficient over time is independent of judicial bias or the method of judicial decisionmaking. It follows rather from the limitations on the opportunity set of cases available for judicial decision, limitations imposed by independent economic variables that determine the cases that are litigated.¹⁴ Efficient rules “survive” in an evolutionary sense because they are less likely to be relitigated and thus less likely to be changed, regardless of the method of decision. Inefficient rules “perish” because they are more likely to be reviewed and review implies the chance of change whatever the method of judicial decision. In a state of dichotomous rules (assumed for the previous examples), this tendency toward efficiency could be thwarted only if judges could choose an inefficient rule in every case, without exception or error. If judges were to occasionally err then the tendency toward efficiency could not be reversed.¹⁵ If judges were able only to choose rules achieving partial inefficiency, even if they could do so infallibly, the set of legal rules still would tend over time to contain more efficient rules than judges desired, because rules that imposed greater inefficiency would be more likely to be relitigated.¹⁶ It is evident, furthermore, that the tendency of the common law over time to favor efficient rules does not depend on the ability of judges to distinguish efficient from inefficient outcomes. Even where judges are ignorant of the allocative effects of their judgments, they will be led by the litigation decisions of individual parties to promulgate rules that increase the relative proportion of efficient rules.

The tendency toward efficiency is a function of the common law process according to which legal rules are generated from the investment in litigation by individual parties and the parties’ investment is systematically determined by the allocative effects of prior legal rules. This suggests, therefore, that efficient outcomes will tend to dominate for all disputes resolved by this process including not only rules derived from the common law itself but also

¹⁴ This analysis is derived from Gary S. Becker, *Irrational Behavior and Economic Theory in the Economic Approach to Human Behavior* 153 (1976).

¹⁵ The tendency will exist no matter how low the rate of error. But note that these examples assume (unrealistically) that the proportion of inefficient rules promulgated will remain constant over a long period of time, and that the probability of a particular allocative outcome in a dispute regarding any given legal rule will be unrelated to the allocative outcome in any previous dispute regarding that rule (this qualification does not deny precedential influence). If judges, however, are able to selectively reverse rules that are efficient, the proportion of inefficient rules promulgated may rise. Furthermore, where the judicial bias has shifted, there may be a greater tendency in the short run to litigate specific rules that appear inconsistent with the judiciary’s new attitude so that the effective judicial bias might appear quite extreme.

Although efficient rules may remain unchallenged where judges clearly have manifested hostility to efficient rules, the settlement of disputes arising under such rules may approximate inefficient outcomes. As with Holmes, the model in this paper construes the law to mean “The prophecies of what the courts will do in fact . . .”

¹⁶ This suggests that where legal rules have been designed to achieve a redistribution of wealth the rules will evolve so that the redistribution will occur efficiently.

rules interpreting legislation and construing provisions of the Constitution. To the extent that a statute or an interpretation of a statute imposes inefficiencies, it will be more likely to be overturned because of the greater likelihood of relitigation. Similarly, within the class of possible constructions of a given constitutional provision, those constructions with relatively more efficient allocative effects will tend over time to survive. It is immaterial to this result that one of the parties to a dispute regarding a statute or a constitutional provision may itself be the government (such as the Justice Department or an administrative agency) whose investment in litigation may be determined by the maximization of something other than dollar returns. Where government suits are brought under legal rules that are inefficient, the stakes will be higher and defendants will be more likely to resist the suits and force litigation.

It is important to appreciate the generality of the hypothesis. Professor Rubin explains that the tendency toward efficiency will be realized only where both parties have a continuing interest in the particular class of disputes so that they will take directly into account more of the costs of the inefficiency of a given rule. This view, however, is not correct. The greater costs imposed by inefficient rules will generate greater litigation whether the particular parties to a dispute bear all of the costs of the rules or not.¹⁷ Professor Rubin argues that where both litigants are indifferent to the future allocative effects of a rule, the judgment with respect to these litigants will have distributive effects only. He infers that each party's decision to litigate, as a result, will be based on the size of the potential judgment alone.¹⁸ But to understand the effects on litigation of the inefficiency or efficiency of rules, it is important to ignore the individual case and to consider the effects on the set of all disputes.¹⁹ It should be apparent that of that set of disputes where neither party possesses a continuing interest in the legal rule, there is likely to be more litigation among those arising under inefficient rules (because the stakes are higher or the number of disputes greater) than among those arising under efficient rules.

With respect to the probability of litigation, a legal rule is like any commodity. A change in relative prices (here, as between efficient and inefficient rules) will change the distribution of consumption choices toward relatively

¹⁷ See Rubin § II B-C and my note 10 *supra*, for a qualifying comment. Professor Rubin must accept this point since he acknowledges that a given rule may impose costs on parties other than the parties to the dispute that generated the rule. See Rubin § II-C.

¹⁸ Rubin's analysis confused the allocative effects of given rules with other determinants of litigation or settlement. Rubin's assumption, for expositional convenience, that the parties possessed identical expectations of the outcome of the case, suggested that all disputes for which neither party had a continuing interest in the dispute would be settled rather than litigated. See Rubin § II-C.

¹⁹ Emphasized in Gary S. Becker, *supra* note 14, at 167-68.

cheaper and away from more expensive commodities.²⁰ It is unnecessary to assume that consumers possess continuing consumption interests in a particular commodity in order to predict their responses to relative shifts in prices, although such interests may influence to speed of consumer adjustment to such shifts. Similarly, it is unnecessary to assume that individual litigants possess continuing interest in a particular class of disputes in order to predict the response in the litigation rate to an increase in the proportion of inefficient legal rules.

A relative shift from efficient to inefficient legal rules will influence both the number and intensity of disputes regardless of the characteristics of the parties to the disputes. Inefficient rules impose excessive costs, and excessive costs can be predicted to lead to nonoptimal consumption, whether of accident avoidance, contract compliance, or solicitude for another's property. Where the total costs of accidents and accident avoidance under a particular legal rule are higher, there will be nonoptimal investment in avoidance. The accidents that occur may be more severe or may be greater in number or the investment in avoidance may be greater than if the rule were changed. As a result, the litigation rate for inefficient rules will be higher.

Similarly, for the set of disputes in which only one party has a continuing interest in the allocative effects of a given rule, disputes arising under inefficient rules are more likely to be litigated than those arising under efficient rules. Professor Rubin concludes as to such cases that the tendency with respect to efficiency is indeterminate.²¹ But again he fails to distinguish the decision to litigate the individual dispute from decisions for the set of all disputes. Professor Rubin notes correctly that where one party alone possesses continuing interest, the stakes of the case to that party relative to his opponent will be greater²² and the party may be willing to invest more in the

²⁰ This analysis is well known. See Gary S. Becker, *Economic Theory* 19-24 (1971). For commodities it is assumed that the price changes are compensated; in the context of litigation, that the wealth effects on the consumption of litigation from a shift between inefficient and efficient rules is negligible, a reasonable assumption. The wealth effects of a particular decision on the rate of litigation within the society are likely to be small since the costs of litigation typically constitute a tiny fraction of an individual's purchases. Where wealth effects, to the contrary, are large, this conclusion does not follow.

²¹ Rubin § II-C. Rubin supports his hypothesis by the description of 19th century nuisance law in Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 *J. Leg. Studies* 403 (1974). According to Brenner, the common law applied different (stricter) standards of proof in suits against factories by inhabitants of industrial towns than in suits by inhabitants of the country. This distinction may be quite consistent with economic efficiency. Brenner did not study whether the wage structure compensated workers coming to industrial cities for the disagreeable conditions. Regardless of inefficiency, both legal standards appear to have been derived from disputes between landowners (and especially wealthy landowners) and factories, both of which, one would imagine, had continuing interests in the dispute. *Id.* at 415-20.

²² We must assume that there are other parties absent from the dispute whose interests are similar to the party without continuing interest; otherwise it would be efficient for the party with the continuing interest to spend more and dominate more.

litigation. The common law has attempted to deal with this problem of malrepresentation by various means such as equitable bills of peace, exceptions to collateral estoppel, the statutory class action, and more generally by adopting a style of decisionmaking that appears to take the interests of the absent parties into account.²³ The larger investment of one party to a dispute may in fact influence the allocative effect of a rule in a given case, but even if the rule favors the party with the continuing interest, if it is inefficient, it will generate more future disputes (because it generates more accidents or accident avoidance) and consequently it will be more likely to be overturned.

II.

The analysis in this paper can be distinguished from other attempts to explain and predict judicial behavior by its disregard of individual holdings and its focus on systematic changes in the aggregate set of legal rules in force. The set of legal rules can be analogized to the set of consumer decisions in a market. Like consumers, judges are restrained by a budget, derived from the aggregate budget of litigants, which determines the cases that proceed to judgment. As mentioned above, where the opportunity set of commodity choices changes, legal rules in the aggregate, like consumer decisions in the aggregate, can be expected to be shifted toward the relatively cheaper commodities (efficient rules).

Previous efforts of lawyers and political scientists to predict the content of the law have concentrated, to the contrary, on the conscious or unconscious motivations of judges that lead to particular holdings in individual cases. Such efforts, however, are as heroic as predicting the market response to a change in price by analyzing the specific motivations of individual consumers. Just as it is unnecessary for the prediction of market responses to explain the psychological processes that have led individual consumers to choose or to reject particular products,²⁴ it is unnecessary for the prediction of the course of the law to explain the mental processes that have led individual judges to particular holdings.

This section reviews some of the more prominent theories of judicial behavior to suggest how their predictive power can be enhanced by analysis of the variables that determine the survival of legal rules. The study of the law since Langdell has focused on the published opinions of judges. These

²³ For a discussion of equitable bills of peace see *Yuba Consolidated v. Kilkeary*, 206 F. 2d 884 (9th Cir. 1953); 1 John Norton Pomeroy, *Equity Jurisprudence* §269 (5th ed. Spencer W. Symons 1941). For a discussion of rules of estoppel see Richard A. Posner, *Economic Analysis of Law* § 21.9 (2d ed. forthcoming 1977). For an example of tacit consideration of the interests of individuals not parties to the litigation, see Benjamin N. Cardozo, *The Nature of the Judicial Process* 21 (1921); *Boomer v. Atlantic Cement Co.*, 26 N.Y. 2d 870 (1970).

²⁴ Gary S. Becker, *supra* note 14.

opinions constitute, of course, the most recent and authoritative statements of the principles that will control particular disputes, and the tendency to emphasize them is encouraged by the demand for predictions of decisions that will be immediately forthcoming rather than of more substantial long-term changes in the character of legal rules. Excessively narrow attention to current decisions, however, neglects two aspects of the common law that are essential for understanding it. First, such attention ignores the broader corpus of rules and principles which remain effective as controlling precedents but which are infrequently litigated. Second, concentration on judicial opinions creates the hazard of losing sight of the processes that cause certain disputes and not others to be litigated. Every student of the law appreciates, of course, that a judge can decide only cases that come before him, but it has been a universal although implicit assumption of studies of judicial output that the cases that proceed to judgment represent an unbiased sample of the society's disputes.

An early and now notorious explanation of judicial behavior is that of Jerome Frank who, building on his understanding of modern psychology,²⁵ argued that the factors determining legal rules were the innumerable unconscious personal biases of judges.²⁶ He concluded that except to the extent that published opinions and announced rules of law were autobiographical, they provided no predictive ability for future decisions. "The law var[ies] . . .", Frank explained, "with the personality of the judge."²⁷

Although his view retains currency,²⁸ Frank was criticized in his own time on grounds that presage in some respects the analysis in this comment. Dean Pound reproached Frank for insisting on the unique, single case which Pound thought may or may not actually be significant, rather than attempting to understand "the uniform course of judicial behavior." According to Pound, Frank and other realists ignored aspects of the common law process

²⁵ Frank was criticized for giving insufficient attention to the scope of contemporaneous psychological studies. Mortimer J. Adler, *Legal Certainty in Law and the Modern Mind: A Symposium*, 31 *Colum. L. Rev.* 91, 92 (1931).

²⁶ Jerome Frank, *Law and the Modern Mind* 106, 362 (1931). Frank argued that "the judge's sympathies and antipathies are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge's initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness's testimony." *Id.* at 106.

²⁷ *Id.* at 111-16, 150.

²⁸ See Sheldon Goldman, *Behavioral Approaches to Judicial Decision-Making: Toward a Theory of Judicial Voting Behavior*, 11 *Jurimetrics J.* 142 (1971). For another modern evaluation of Frank see Bruce A. Ackerman, *Law and the Modern Mind* by Jerome Frank, *Daedalus*, Winter 1974, at 119.

that render nonrational judicial action unimportant. “[T]he logical and rational element and the traditional technique of application, or art of the common-law lawyer’s craft . . . tends to stability and uniformity of judicial action in spite of the disturbing factors.”²⁹ In a similar vein, Mortimer Adler criticized Frank for neglecting the restraints of the common law process on judicial discretion. Although a judge’s “psychological prejudices and his hunches . . . are undoubtedly large factors in determining his disposition of the case, . . . [a judge] must nevertheless operate within the range of possible alternatives defined by an exhaustive analysis of the plurality of legal doctrines.”³⁰

Pound’s first criticism is that Frank wrongly emphasized idiosyncratic judicial behavior, and it is true that the evidence that Frank summoned to support his theory consisted of anecdotes and confessions by various judges unable to explain some of their more difficult decisions.³¹ Erratic decisions, as Pound indicates, would appear less significant if one were to consider—as a theorist must—a large sample of decisions. The second aspect of Pound’s and Adler’s criticism, however, is that there are characteristics inherent to the common law process that suppress irrational variations by encouraging their correction. This paper has argued that individual judges may be irrational, just as individual consumers may be irrational, yet the rules in force, like reactions in the market, may in sum exhibit strong rational characteristics. Economic variables, not psychological attributes of judges, will lead to regularities in the cases that come before judges. As a result, Frank’s finding that the decision in any individual case was unpredictable was not sufficient to support his conclusion that the law itself was unpredictable.

A sophisticated variant of Frank’s approach is that of modern political scientists who attempt to predict the character of the law chiefly from the ideological attitudes of judges.³² This work has attempted to increase predictive ability by aggregating data of the backgrounds and perceptions of judges, and by selecting and narrowing the range of judicial response by

²⁹ Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *Harv. L. Rev.* 697, 706-07 (1931). Note that Pound’s was not a consistent criticism. Elsewhere Pound criticizes the realists for “faith in masses of figures.” *Id.* at 701. Pound suggested as a substitute theory that the course of the law could be explained by what he called the “ideal element,” that judges do what they ought to do. See, for example, *id.* at 700.

³⁰ Mortimer J. Adler, *supra* note 25, at 105. Adler’s view is similar to Edward H. Levi’s. See text following note 37 *infra*. The constraints of the common law process that Adler perceived were doctrinal limitations as opposed to economic limitations leading to greater survival of efficient rules.

³¹ Jerome Frank, *supra* note 26, at 102-17, 137, 143-45.

³² Glendon A. Schubert, *The Judicial Mind Revisited* (1974); *id.*, *Judicial Policy-Making* (rev. ed. 1974); Sheldon Goldman & Thomas P. Jahnige, *The Federal Courts as a Political System* (2d ed. 1976). For an earlier review of this work see Glendon Schubert, *Judicial Process and Behavior, 1963-1971* in 3 *Political Science Annual*, 73, 94-103 (James A. Robinson ed. 1972).

abstracting certain characteristic legal issues with respect to which it is most plausible that ideology will influence judicial decisions.³³ These studies, however, have weaknesses similar to those of Frank. First, they ignore except in an extremely narrow sense forces that lead certain cases to be brought to judgment.³⁴ Second, they tend to measure the “law” of a given period or the influence of the judiciary by the content of current decisions.³⁵ By neglecting those decisions that fail to generate continuing litigation, which are likely to comprise the predominating component of legal rules in force, these studies attribute excessive influence to measurements of the background of the current judiciary.

Various legal scholars have responded to Frank’s characterization of judicial decisionmaking by emphasizing the limitations on judicial discretion imposed by the common law process. Their analysis is similar in many respects to the model in this paper.³⁶ A prominent example is Edward H. Levi’s *An Introduction to Legal Reasoning*.³⁷ Levi explains that the common law process develops legal rules from reasoning by example. For a given decision a judge surveys the set of rules of law announced in earlier similar cases and applies one of the rules to decide the case at hand. The law changes as the similarities perceived between current cases and certain former cases increase. A new legal category or similarity can be proposed by one of the litigants and if the idea is accepted it will displace an earlier legal concept.³⁸

³³ See Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 *Am. Pol. Sci. Rev.* 491 (1975). Goldman for example classifies cases in categories such as “Criminal Procedures”, “Private Economic”, “Injured Persons” and identifies judicial outcomes such as “For the injured in federal torts cases” and “For the injured or the fatally injured’s estate in automobile accidents.”

³⁴ Goldman and Jahnige mention that subsequent litigation provides “feedback” that influences judicial decision, but their only examples of “feedback” are test cases, too narrow a set. Sheldon Goldman & Thomas P. Jahnige, *supra* note 32, at 238-42. See, as further examples of studies of the judicial process that neglect the determinants of litigation, those debating the influence of the Supreme Court: Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. Pub. Law* 279 (1957); and Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 *Am. Pol. Sci. Rev.* 50 (1976). But see another contribution to this debate, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J. Law & Econ.* 875, 895 & n.41, 896-901 (1975).

³⁵ Sheldon Goldman, *supra* note 33; Robert A. Dahl, *supra* note 34.

³⁶ *E.g.*, Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (mimeo. class materials Harv. U., 2 vols. 1958); Edward H. Levi, *An Introduction to Legal Reasoning* (1948); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959). For further references see the sources cited in Bruce A. Ackerman, *supra* note 28, at 123, 128 n. 26. Ackerman has designated these scholars the “Legal Process” school.

³⁷ Edward H. Levi, *supra* note 36.

³⁸ *Id.* at 1-8. For an earlier formulation of a similar model of the common law see Benjamin Cardozo, *supra* note 23, at 41-44, 47-49.

The similarity to the model in this paper lies in Levi's view that judicial discretion is constrained by the set of available socially acceptable legal categories. According to Levi, even though an idea may at one time have been rejected by a court, once it achieves standing in the society it will be suggested again in a subsequent case. The court thus will be offered the opportunity to reinterpret the prior decision and adopt the rejected idea. When adopted, the idea will be extended in later cases and further defined, as it is applied more generally and related to other accepted ideas.³⁹ The scope of judicial influence, therefore, is restricted by the tendency of decisions that conflict with controlling social concepts to be relitigated and, thus, redefined and reinterpreted.

The chief limitation of Levi's theory is its ability to predict the content of the legal rules that will develop from the common law process. The theory predicts that legal decisions will be controlled by ideas that have won acceptance in the society,⁴⁰ but it offers no means of determining which ideas are likely to prevail. Levi, for example, describes in some detail the gradual adoption and extension of different standards of liability for injuries caused by "inherently dangerous" products, but his theory explains this development only as "a reflection of a period in which increasing governmental control and responsibility for the individual were thought to be proper. No one economic or social theory was responsible . . . [A]s changes came about in the manner of living, the social theory moved ahead to explain and persuade."⁴¹

Levi's model of the judicial process, however, generates empirical propositions similar to those offered in this paper. A social idea or legal category is more likely to be replaced by a different idea, according to Levi, the more often alternative concepts are proposed. Similarly, a new legal category is more likely to be accepted by a court, the more often it is suggested to the court as the appropriate ground for judicial decision. Levi relates the frequency of such proposals, that is of relitigation, to the set of controlling ideas in the society. But, presumably, regardless of the content of the social consciousness, predictable differences in the rate of relitigation of certain legal rules will generate the same result. This is not to suggest that prevailing social concepts have no influence on legal doctrines. But until theories are devised relating social welfare policies or other ideas to litigation rates, one can increase predictive power by concentrating on more narrow characteristics of legal rules that can be shown with greater confidence to affect litigation.

A more recent explanation of judicial behavior is that of Richard A.

³⁹ Edward H. Levi, *supra* note 36, at 5-8, 33, 61, 73.

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 102. See also pp. 8-27.

Posner in *Economic Analysis of Law*. Earlier in the paper I criticized Posner's explanation of the stimuli that might lead judges to choose efficient outcomes.⁴² Posner's hypotheses, however, have generated substantial dispute among legal scholars. It is worthwhile reviewing some of the differences between Posner and his critics because the theory proposed in this paper, I believe, renders many of them moot.

Posner's explanation of judicial behavior attempts to predict various means by which a judge can increase his individual welfare by altering the content of his decisions. Posner initially comments that the common law system appears designed to both suppress and make insignificant the personal pecuniary gains to a judge from a particular decision. Rules of judicial ethics prohibit judges from deciding cases in which they have personal interests. Rules of evidence and procedure tend to conceal the distributive consequences of particular decisions.⁴³ Posner adds that the wealth effects to a judge from any single decision are likely to be small.⁴⁴ This contention has been forcefully contested by Arthur Leff and Morton Horwitz, who argue that the wealth effects of a judicial decision on certain social classes of which the judge may be a member can be quite large—in some cases, according to Horwitz, "enormous."⁴⁵ Since it is virtually impossible to measure empirically the wealth effects of a given decision, this dispute is irresolvable. Yet the theory in this paper suggests that even where judges are able in individual cases to directly enhance their own pecuniary welfare, they will remain unable to systematically alter the character of the law. The wealth effects of a particular decision on the rate of litigation are likely to be small,⁴⁶ and thus the principal determinants of the allocative effects of legal rules remain beyond judicial control.

Posner's theory of judicial motivation argues that since judges will be typically unable to achieve direct pecuniary gain, they will turn to other decision rules that will enhance their welfare, albeit less directly. Posner initially believed that many judges aspire to higher judicial or political office, so that if efficiency were valued by society, a judge might attempt to improve his chances of advancement by announcing efficient legal rules. In the second edition of *Economic Analysis of Law* Posner suggests that ambition to advance is less important than judges' more general desires to "impose

⁴² See text surrounding notes 5-7.

⁴³ Posner, *Economic Analysis* 322. Note that the efficient character of these rules supports the hypothesis of this paper. The litigation rate is likely to be higher for procedural disputes than for other disputes since the costs are lower of litigating issues developed by argument rather than by trial. As the litigation rate increases, the tendency toward efficient rules increases.

⁴⁴ Posner, *Economic Analysis* 325-27.

⁴⁵ Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 *Va. L. Rev.* 451, 471 (1974); Morton J. Horwitz, *supra* note 7, at 100.

⁴⁶ See note 20 *supra*.

their preferences, tastes, values, etc. on society."⁴⁷ Much of Posner's work has shown that many common law doctrines crystallized in the 19th century, a period, he argues, in which efficiency may have been more highly valued by the society and by common law judges.⁴⁸ This description of common law decisionmaking, however, has been assailed by Arthur Leff and by James E. Krier. Leff criticized Posner for failing to explain why the judicial process is systematically less sensitive to distributive consideration than the legislative process, and Krier argued that judges themselves may prefer distributive to allocative consequences.⁴⁹

A reformulation that bases the content of the common law on the preferences and values of judges only pushes the inquiry one step farther back. Since there are no theories for the prediction of judicial tastes, there is no increase in our understanding of the law. This paper has attempted to set forth an alternative theory that does not rely on determination of the preferences or ideology of individual judges. According to this theory, the dispute over judicial preferences becomes less important because although the ideology of individual judges may influence the rate of adoption of common law rules as well as the equilibrium level of efficient values, it cannot affect the process that leads to the survival of efficient or inefficient rules.

III.

It is important to appreciate that this paper has not shown that the rules of the common law are or ever will be completely efficient. It has suggested only that the common law process incorporates a strong tendency toward efficient outcomes. It is an implication of this theory that the rate at which efficient outcomes will be achieved will be a function of the nature of the judicial bias for or against efficiency,⁵⁰ the frequency of relitigation of inefficient rules (itself determined by the costs of litigation versus settlement, the precedential effect of the rules, and the extent of their inefficiency), the rate of change of the social conditions that underlie various disputes, and the adaptability of earlier surviving precedents to the efficient resolution of new disputes. It is a further implication that areas of the law within which characteristic disputes have remained relatively consistent over time, such as admiralty, sales, or procedure, are more likely today to be dominated by

⁴⁷ Posner, *Economic Analysis* 325. Richard A. Posner, *Economic Analysis of Law* § 19.7 (2d ed. forthcoming).

⁴⁸ Posner, *Economic Analysis* 327. Richard A. Posner, *A Theory of Negligence*, *supra* note 4.

⁴⁹ Arthur Allen Leff, *supra* note 45, at 471-73. James E. Krier, *Book Review*, 122 U. Pa. L. Rev. 1664, 1696 (1974).

⁵⁰ The effect of judicial bias on the rate of change toward efficiency and the ultimate equilibrium level suggests that the attention of Richard Posner and his critics to preferences of judges is not irrelevant. It is my own view that efforts to develop theories of judicial preferences will be no more successful than efforts to develop theories of consumer preferences.

efficient rules; and there is evidence supporting this hypothesis.⁵¹ Perhaps a more important suggestion of the paper, however, is that the predictive ability of attempts to explain the character of common law decision making is likely to be enhanced by more careful attention to the forces that systematically affect the amount of litigation.

⁵¹ For a discussion of the evolution of common law rules of admiralty see William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism* (forthcoming); of rules of sales see K. N. Llewellyn, *On Warranty of Quality and Society*: II 37 *Colum. L. Rev.* 341, 392-93 (1937); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* §§ 3.7-3.8 (2d ed. 1975); of procedure see Posner, *Economic Analysis* 322.