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Legal Change: Integrating Selective Litigation, Judicial Preferences, and Precedent

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Abstract

The claim that the common law displays an economic logic is a centerpiece of the positive economic theory of law. A key question in this literature is whether this outcome is due to the conscious efforts of judges, or the result of invisible hand processes. This paper develops a model in which two effects combine to determine the direction of legal change. The main conclusions are, first, that judicial bias can prevent the law from evolving toward efficiency if the fraction of judges biased against the efficient rule is large enough; and second, that precedent affects the rate of legal change but not its direction.

Journal of Economic Literature Classification: K40, K41

Keywords: Legal change, judicial decision making, precedent

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1. Introduction

The claim that the common law displays an economic logic is originally attributable to Richard Posner, who argued that this was largely a result of the effort of judges to promote efficiency. His reasoning is that, because judges “cannot do much ... to alter the slices of the pie that various groups in society receive, they might as well concentrate on increasing its size” (Posner, 2003, p. 252).¹ Rubin (1977) and Priest (1977) found this argument unpersuasive, however, given that “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” (Priest, 1977, p. 66).² Rather than dismissing the claim that the law evolves toward efficiency, however, they proposed an alternative mechanism based on invisible hand, or market-like, processes which relegated judges to the background.

The key features of this class of models are, first, the litigation decisions of plaintiffs, who decide which cases to file, and second, the settlement process, which determines which cases make it to trial.³ The crux of this approach to legal change is that inefficient laws will be litigated more frequently than efficient laws because the former impose larger costs on victims. As a result, inefficient laws will come before the court for re-examination more often, resulting in a general trend toward efficiency, provided

¹ See Cooter, Kornhauser, and Lane (1979) for a formal model in which judges behave in this way.

² Hadfield (1992) similarly argues that, even if judges are efficiency-seeking, they lack the information to propel the law as a whole toward efficiency.

³ In addition to Rubin and Priest, see Landes (1971), Goodman (1978), Cooter and Kornhauser (1980), and Terrebonne (1981).

that judges are not systematically biased *against* efficiency. (It doesn't matter what they are *for*.) We will refer to this as the “selective litigation” model of legal change (Priest and Klein, 1984; Waldfogel, 1998).

At the same time, a separate strand of literature developed with the aim of explicitly examining the decision-making of judges. This literature has taken two routes, one enquiring into the nature of judicial preferences, and the other considering the role of precedent in constraining judicial discretion.⁴ And while these models have shed considerable light on the motivation of judges, there remains a substantial disconnect between models of legal change and judicial decision making.

A recent and noteworthy effort to bridge this gap is by Gennaioli and Schleifer (2007), who develop a model of legal change in which judicial bias potentially affects the direction of change. In their model, Gennaioli and Schleifer assume that judges are basically efficiency-seeking (or “Posnerian”), but may possess a bias for one or the other side in a legal dispute that can cause the law to diverge from the efficient path. As a result, the authors show that a necessary condition for the law to evolve toward efficiency is that the population of judges must be unbiased. In addition, judges must be willing to exert the necessary effort to distinguish new cases from existing (inefficient) precedents so that more efficient rules can replace them.⁵

While the Gennaioli and Schleifer (2007) model goes a long way toward improving our understanding of the role of judges in legal change, it does not fully integrate the above literatures because it ignores the impact of selective litigation. (The

⁴ On the utility function of judges, see Landes and Posner (1976), Higgins and Rubin (1980), Cohen (1991), Miceli and Cosgel (1994), and Posner (2003, pp. 542-545). On the role of precedent in the common law, see Shapiro (1972), Blume and Rubinfeld (1982), Heiner (1986), Kornhauser (1989), and Macey (1989). On the role of precedent in civil law systems, see Fon and Parisi (2006).

⁵ Judges in the Gennaioli and Schleifer (2007) model do not overturn precedent but “distinguish” cases from previous precedents by identifying new dimensions of the case at hand.

particular manner in which cases come before the court is not specified in their model.) The primary contribution of this short paper is to take a first step toward remedying that deficiency. The analysis begins by deriving the condition for the law to evolve toward efficiency in a simple version of Priest's pure selective litigation model. It then successively introduces the impact of judicial bias and precedent. The main conclusions are: (1) when judges decide cases randomly, the law evolves toward efficiency if inefficient laws are more likely to be litigated than efficient laws (the Priest selective litigation argument), (2) judicial bias does not impede the evolution of the law by this mechanism as long as the fraction of judges biased against the efficient law is smaller than the conditional probability that a case being litigated involves an inefficient law, and (3) precedent does not alter the *direction* of legal evolution, only its *rate*; specifically, weaker precedent speeds the rate while stronger precedent slows it.

2. A Pure Selective Litigation Model of Legal Change

Consider first a simple model of legal change that is driven purely by selective litigation along the lines of Priest (1977). Priest's argument begins with a model of litigation and settlement originally developed by Landes (1971), wherein a plaintiff and defendant decide whether to settle their dispute out of court or go to trial.⁶ Since only those disputes that go to trial can affect legal change, it is that subset of cases that interest us. It is a simple matter to show that, in the context of the Landes model, cases that

⁶ For a survey of the literature on litigation and settlement, see Cooter and Rubinfeld (1989).

involve higher stakes are more likely to go to trial, all else equal.⁷ Further, to quote Priest (1977, p. 67):

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. ... 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.

This argument forms the basis for the selective litigation approach to legal change. The following simple model verifies that, absent judicial bias, this mechanism is sufficient for the law to evolve toward efficiency.

Suppose that at a given point in time there are two existing legal rules, one of which is efficient and one of which is not. Then, during a fixed period of time, some litigation takes place which may result in one or both of these rules coming before a judge. Suppose in particular that the litigation occurs randomly such that

a = the probability that the efficient rule is litigated

b = the probability that the inefficient rule is litigated.

When a case comes to court, the judge either “upholds” the law or “overturns” it. To keep things simple, assume that if an efficient law is overturned, it is replaced with an

⁷ To see why, let P_p and P_d be the plaintiff's and defendant's assessments of the plaintiff's probability of victory at trial; let C_p and C_d be their costs of trial; and let J be the monetary judgment the defendant would have to pay the plaintiff should the plaintiff win (also referred to as the “stakes” of the case). The plaintiff's expected value of trial is thus $P_p J - C_p$, while the defendant's expected cost of trial is $P_d J + C_d$. Prior to trial, the plaintiff will only accept settlement offers that satisfy $S \geq P_p J - C_p$, while the defendant will only propose offers that satisfy $S \leq P_d J + C_d$. A trial therefore ensues if a mutually acceptable settlement does not exist; that is, if $P_d J + C_d < P_p J - C_p$, or if $(P_p - P_d)J > C_p + C_d$. Assuming that $(P_p - P_d) > 0$ (i.e., both parties are optimistic about their chances at trial), then a trial is more likely the larger is J . A similar prediction emerges from the asymmetric information approach to litigation and settlement. See Shavell (1996).

inefficient one, and vice versa. This is not as restrictive as it sounds, since overturning an efficient rule and replacing it with another efficient one is equivalent to upholding the efficient rule. Likewise, replacing an inefficient rule with another inefficient one is equivalent to upholding the original inefficient rule.

As a concrete example, consider an alternative care (or “least cost avoider”) accident model in which it is optimal for either the plaintiff or the defendant to take care, but not both (Landes and Posner, 1987, pp.60-61). If it is optimal for the defendant to take care, then strict liability is the efficient rule—we will call this the pro-plaintiff rule (or PP); whereas if it is optimal for the plaintiff to take care, then no liability is efficient—we will call this the pro-defendant rule (or PD). At a given point in time, suppose that one of each of these rules is in place (in different jurisdictions, say). At this point, it doesn’t matter which rule is efficient.

In the pure selective litigation model, we assume that judges act in a random and unbiased manner, and are not constrained at all by precedent (assumptions we will relax later). Thus, assume that judges uphold (overturn) either type of rule with probability $\frac{1}{2}$.⁸ Let N denote the number of efficient rules after one round of litigation. (The number of inefficient rules must therefore be $2-N$.) Given the above assumptions, we can write the expression for N as

$$N = (1-a) + \frac{a}{2} + \frac{b}{2}. \tag{1}$$

The three terms in this expression represent the three possible sources of efficient rules. The first is the probability that the efficient law is not litigated and so remains in place; the second is the probability that the efficient law is litigated and upheld by the judge;

⁸ The use of $\frac{1}{2}$ is arbitrary; any fixed fraction would do. (See note 9 below.)

and the third is the probability that the inefficient law is litigated and overturned. The total number of laws remains fixed at two, but the expected number of efficient laws has increased if $N > 1$. Applying this to (1), we find that the condition reduces to

$$b > a, \tag{2}$$

which is simply the requirement that inefficient laws are more likely to be litigated than efficient laws.⁹ Intuitively, the more often a law is litigated, the more opportunities there are for a judge to review and overturn it.

3. Introducing Judicial Preference

The selective litigation model highlights the role of litigant behavior in propelling legal change. As noted, the neglect of judges in these early models was largely due to the lack of a good economic model of how judges make their decisions and how this would affect the direction of change.¹⁰ Random judicial behavior therefore seemed to be the most innocuous assumption since it imposed no bias, either for or against efficiency. In this section, we combine the selective litigation model from the previous section with a simple model of judicial bias along the lines of Gennaioli and Schleifer (2007) in order to examine the combined effect on legal change.

Recall our example of an accident setting in which two rules are possible, pro-plaintiff (PP) and pro-defendant (PD), one of which is efficient at any point in time.

Suppose that in the population of judges there are three types based on their personal (or political) preferences: those who favor plaintiffs, comprising a fraction π of the total,

⁹ To show that this condition is independent of the probability that judges uphold or overturn precedent, let θ be the probability that a judge upholds a given rule, and $1-\theta$ the probability that he or she overturns it. (In the current model, this probability is the same whether or not the rule is efficient.) Equation (1) then becomes $N=(1-a)+\theta a+(1-\theta)b$, and the condition for $N > 1$ again reduces to (2).

¹⁰ It also reflects the fondness of economists for invisible-hand type arguments. See Rubin (1977, p. 51) and Hadfield (1992, p. 583).

those who favor defendants, comprising a fraction δ of the total, and those who favor the efficient rule, comprising the remainder, $1-\pi-\delta$. Assuming that precedent continues to be non-binding, judges will again decide cases that come before them based solely on these preferences.

Suppose, for sake of argument, that PP is the efficient rule. Then, after a round of litigation, N , the expected number of efficient rules is

$$N = 1-a + a(1-\delta) + b(1-\delta). \quad (3)$$

The three terms correspond to the same three sources of efficient rules as above, but the second and third terms now reflect the impact of judicial preferences. As before, the first term reflects the probability that the efficient rule (PP) is not litigated and so remains in place. Obviously, this source of efficient rules is unaffected by the motivation of judges. The second term reflects the situation where the efficient rule is litigated and comes before either a pro-plaintiff or pro-efficiency judge (comprising a fraction $1-\delta$ of all judges), both of whom uphold it. Finally, the third term reflects the situation where the inefficient law (PD) is litigated and comes before a pro-plaintiff or pro-efficiency judge, who overturns it.

The condition for $N > 1$ in this case is

$$\delta < \frac{b}{a+b}. \quad (4)$$

This condition says that, in order for the number of efficient rules to increase, the fraction of judges biased *against* the efficient rule—in this case, the fraction biased against the PP rule, δ —must be less than a threshold that is equal to the conditional probability that a case that comes before the court involves an inefficient rule. Note that, according to (4), $b > a$ is no longer either necessary or sufficient for the law to evolve toward efficiency.

However, the larger is b and the smaller are a and δ , the more likely it is that this will occur.

4. The Impact of Precedent

Finally, we introduce the impact of precedent. To do this, we consider a situation in which prior rules are accorded some deference by judges but are not absolutely binding. Thus, a judge will depart from precedent if the benefit exceeds the cost (Miceli and Cosgel, 1994). In the current model, the benefit of “activism” consists of the utility gain to the judge from replacing the existing precedent with a rule more in line with his or her personal preferences. Let D be the resulting utility gain, which we assume varies across judges according to their intensity of attachment to their preferred rule and/or their respect for precedent. Specifically, let $F(D)$ be the distribution of D across judges. The cost of overturning a precedent consists of the extra effort involved in rationalizing the new rule, plus the expected reputational cost of possibly having that decision overturned in the future. Let k be the cost of overturning a precedent, which we assume is the same for all judges.

It follows from this model that a judge who confronts a precedent in line with his or her personal preferences will necessarily uphold it since there is no cost of doing so. However, a judge confronting a precedent contrary to his or her preferences faces a choice; he or she will uphold the precedent if $D < k$, but overturn it if $D > k$. The resulting probability that a randomly chosen judge will uphold a precedent that is contrary to his or her preferences is $F(k)$, while the probability that he or she will overturn it is $1 - F(k)$.

Now return to the situation where there are two rules in place, PP and PD, and continue to assume that PP is the efficient rule. After one round of litigation, the expected number of efficient rules is

$$N = 1-a + a(1-\delta) + a\delta F(k) + b(1-\delta)[1-F(k)]. \quad (5)$$

The first two terms are identical to (3): they correspond to the case where the PP rule is not litigated, and where it is litigated and upheld by a pro-plaintiff or pro-efficiency judge. The third and fourth terms, however, now reflect the interaction between judicial preferences and precedent. The third term reflects the case where the PP rule is litigated by a pro-defendant judge who upholds it because he or she perceives the cost of abandoning precedent as being too high. The final term reflects the case where the PD rule is heard by a pro-plaintiff or pro-efficient judge who feels strongly enough about his or her preferences to overturn the precedent and replace it with the PP rule.

As above, the law evolves toward efficiency if $N > 1$, which in this case implies

$$1 - [1-F(k)][\delta(a+b)-b] > 1. \quad (6)$$

This simple condition summarizes the combined effects of selective litigation, judicial bias, and precedent on legal change. Note that, since $[1-F(k)] \geq 0$, this condition can only hold if the second bracketed term, $[\delta(a+b)-b]$, is negative. A necessary condition for this to be true is that condition (4) holds.¹¹ Thus, the *direction* that the law evolves depends only on the relative rates of litigation of the two types of rules, and the bias of judges, as reflected by (4). The impact of precedent, as captured by the $1-F(k)$ term, therefore only affects the *rate* at which the evolution occurs. Specifically, the law will converge on the efficient rule (or diverge from it) more quickly as k , the cost of abandoning precedent,

¹¹ It is also a sufficient condition if $1-F(k) > 0$.

becomes smaller (i.e., as the fraction of activist judges becomes larger, or as the strength of precedent becomes weaker), and more slowly as k becomes larger.

Finally, suppose that a change in the environment occurs to make PD the efficient rule, but everything else remains the same. (In particular, the distribution of judicial preferences remains unchanged.) Note that a is now the probability that PD will be litigated while b is the probability that PP will be litigated. In this new setting, pro-defendant and pro-efficiency judges will uphold PD and consider overturning PP, while pro-plaintiff judges will uphold PP and consider overturning PD.

Proceeding as above, we calculate that after one round of litigation, the expected number of efficient (PD) rules will be

$$N = 1 - a + a(1 - \pi) + a\pi F(k) + b(1 - \pi)[1 - F(k)], \quad (7)$$

where, recall, π is the proportion of pro-plaintiff judges. The condition for $N > 1$ is thus

$$1 - [1 - F(k)][\pi(a + b) - b] > 1. \quad (8)$$

Assuming $1 - F(k) > 0$, a necessary and sufficient condition for the law to evolve toward efficiency is

$$\pi < \frac{b}{a + b}, \quad (9)$$

which has the same interpretation as (4), except that now, since PD is the efficient rule, the proportion of pro-plaintiff judges (those biased against the efficient rule) must be below a threshold that is again equal to the conditional probability that a case before the court involves the inefficient (PP) rule.

In order to conclude that the law will evolve toward efficiency regardless of which particular rule is efficient, we would like (4) and (9) to hold simultaneously. This requires that the fraction of judges who have a bias in favor of either of the rules must be

less than $b/(a+b)$. Note that this is possible in the current model (though not assured) because we have assumed that some fraction of judges (whom we have labeled Posnerian judges) always favor the efficient rule. However, if no such judges exist—that is, if all judges are either pro-plaintiff or pro-defendant—then (4) and (9) cannot hold simultaneously.¹² In that case, the law can only evolve toward efficiency if the distribution of judicial preferences happens to be biased toward the efficient rule, a situation that is unlikely to hold systematically across all areas of the common law.

5. Conclusion

One of the centerpieces of the economic theory of law is the claim that the common law displays an economic logic. How this state of affairs arose has been the center of much debate. Is it the result of the conscious decisions of judges to steer the law toward efficiency, or is it the by-product of a system that evolves according to market-like forces? Although few would accept the argument that it is solely or primarily the work of judges, one cannot deny that judges play an important part in shaping the direction of legal change. Despite this fairly obvious fact, law and economics scholars have had a hard time explicitly incorporating judges into models of legal change, primarily due to the lack of good models of judicial decision making.

This paper has attempted to remedy this deficiency by introducing a simple of model of judicial bias and precedent into a selective litigation model of legal change. The main findings are, first, that judicial bias can prevent the law from evolving toward efficiency if the fraction of judges biased against the efficient rule is sufficiently large; and second, that precedent only affects the rate of legal change, not its direction.

¹² This would be the case because $\pi=1-\delta$. Thus, both cannot simultaneously be less than $b/(a+b)$.

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