

ADJUDICATION AS A PRIVATE GOOD: A COMMENT

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EACH of the authors of "Adjudication as a Private Good"¹ has elsewhere enjoyed some success in the economic analysis of aspects of judicial institutions.² Regrettably, this paper is not a success; at times, the economics presented here obstructs understanding, and there are no insights offered which compensate for the hindrance.

I. THE ADJUDICATION MARKET: A DEFECTIVE MODEL

The paper is in fact two papers which can be discussed separately. The first part urges us to think of judicial services as a market in which public and private institutions compete for the business of litigants. It is of course true that judicial services meet private needs, and that the needed service can take many forms involving more or less use of the coercive power of the state. The frailty of this vision is that it conceals the heavy interdependence of the supposed competitors. There is much more cooperation than competition among them.

Every adjudicative process depends in some measure on the expectation that disputants will work out some or most of their differences. It may be a universal precept of legal systems that the public power to coerce individuals and impose decisions on them be used as sparingly as possible. Indeed, it is doubtful that a government could long survive which had no such impulse to conserve its power. Governmental policy will thus tend to favor systems or procedures which yield order without resort to the lash of public power. And public adjudication will tend to rely as much as possible on the parties to assume responsibility for outcomes.³

While these tendencies may even be universal, they have sometimes been

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¹ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235 (1979).

² See William M. Landes, *An Economic Analysis of the Courts*, 14 *J. Law & Econ.* 61 (1971); Richard A. Posner, *Economic Analysis of Law*, chs. 22 & 23 (1st ed. 1972).

³ See Piero Calamandrei, *Procedure and Democracy* 72-88 (John Clarke Adams & Helen Adams trans. 1956).

observed to be very marked. An extreme statement of a public preference for private order is that of a Chinese emperor quoted by Jerry Cohen:

Lawsuits would tend to increase to a frightful amount if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such manner that they shall be disgusted with law, and tremble to appear before a magistrate.⁴

Good subjects, the emperor believed, should settle their disputes "like brothers . . . As for those who are troublesome, obstinate, or quarrelsome, let them be ruined in the law courts—that is the justice that is due them."

Contemporary judicial systems are not so harsh in their intent, but it is widely regarded as a misfortune to be caught in the toils of their proceedings. The late Learned Hand was heard to say that he would fear nothing save death or sickness as much as he would fear litigation.⁵ Public adjudication is more properly regarded by citizens as a waste than a good. The costs in time, treasure, and stress that are associated with public intervention into a dispute can be justified, and are justified, only by reference to public needs, interests, objectives, or "goods."

Even today, few citizens, and fewer judges, would disagree with the Chinese emperor's general preference for forbearance and mediation as methods of resolving disputes. One can find an occasional voice which seems almost to say that contentiousness is a virtue to be rewarded,⁶ but such voices are very rare, and for good reason. There have been times and places where private arbitration has been viewed with suspicion by judges,⁷ but this suspicion seems to have been associated with a rare social condition: underemployment of the processes of public adjudication. More usual is an institutional preference for private processes. Settlement, mediation, and arbitration are encouraged in almost all circumstances. Where public adjudication is necessary, modern practice generally depends substantially on party management through the means of adversary procedures which give maximum effect to waivers, stipulations, and other means of private confinement of the public process. And some of the public procedures, most notably discovery and pretrial, are designed and used in manners intended to promote private settlement out of court.

⁴ Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 *Calif. L. Rev.* 1201, 1215 (1966).

⁵ *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 *Ass'n of the Bar of the City of New York, Lectures on Legal Topics* 87, 105 (1926).

⁶ For example, Monroe H. Freedman, *Lawyers' Ethics in an Adversary System*, ch. 10 (1975).

⁷ See Soia Mentschikoff, *Commercial Arbitration*, 61 *Colum. L. Rev.* 846 (1961).

Thus, an economic model which supposes private and public adjudication as competing in a marketplace is a seriously flawed model. Public institutions are reluctant suppliers to that "market," not willing sellers. Indeed, these suppliers, monopolists though they seem to be, behave as if they prefer for the consumers to go to their "competitors." The "buyer" can induce the monopolist to part with the "good" only if he can establish that there is a "public good" to be had in return, a fortuity which the buyer cannot control but can only suggest.

As difficult as it is to attribute sellers' motivations to the suppliers in this "market," it is equally difficult to regard the motives of litigants as those of "buyers." The market model obscures the fact that litigants have divergent motives. The authors recognize some of this difficulty in referring to adjudication as an intermediate good. They also note the obstructive effects of the motives of some litigants which cause them to drag their feet in working out mutually acceptable private alternatives to public adjudication. But they do not acknowledge the divergence of purposes between different kinds of litigants.

In the great bulk of the private litigation to which most of the paper applies, the plaintiff is after money. Sometimes, the plaintiff wants the court, as an arm of the state, to exercise closer supervision over the allegedly harmful future behavior of the defendant through the vehicle of an injunction. Very rarely, so rarely that it is insignificant from an institutional point of view, the plaintiff is animated by the hope that he may cause the judicial system to announce a new rule of law which will result in an economic benefit to the plaintiff.

A few defendants counterattack and thus may bear some of the motives of plaintiffs. But, in general, defendants have quite different aspirations. They seek to avoid the lash of power—to avoid paying money; to resist the issuance of judicial injunctions; and, occasionally, to avoid presenting to the judicial system any opportunity to announce a new rule of law which might alter the arrangement of rights and liabilities in which the defendant's challenged course of conduct was set.

Given these incongruities in the tastes of the two classes of "buyers," it is hard to see how it can help our understanding to think of anyone as being in the business of meeting both demands simultaneously. For example, from the viewpoint of most defendants, the best and most efficient system of adjudication is the system which is the most dilatory. For most plaintiffs, dispatch is of the essence. A model which conceals this difference in orientation obstructs an understanding of the real issues of judicial procedure. While plaintiffs and defendants are surely competing for favor, they can compete in an economic sense only if the system is corrupt.

There is a second respect in which the "buyers" dimension of the market analysis is flawed. Public-adjudication procedure is designed to deal with

situations in which mutual trust and regard between the parties have broken down. As the authors note, private adjudication is possible only if there is some mutual interest which makes contract possible. In general, parties who are able to find common advantage in private adjudication are not in the class of people whom the public process is designed to serve.

Finally, the proposed model of a market is flawed by its assumption that dispute resolution and rule formulation are distinct judicial services. Perhaps the authors can be pardoned for an error that seems to have some currency among contemporary judges. It is true that the jurisdictions of some courts of last resort, most notably the Supreme Court of the United States, are cast in such a way as to emphasize the rule-formulation aspect of their work. But it remains true today, as it has always been, that judicial rule making is strictly derivative. Such undemocratic institutions as courts can be suffered to make rules only insofar as the activity is necessary to their main business of resolving disputes. It is well and widely understood that a court which formulates a rule that is not necessary to decision is engaged in the utterance of *obiter dicta*, expressions which are entitled to little force in subsequent proceedings.⁸ Indeed, as judges have in recent years become more self-conscious about their rule formulating, there is reason to suppose that they may become less effective at it. This is so because the effectiveness of the rules depends upon the adherence of other judges in subsequent proceedings to the rules formulated; as more judges approach their work with a creative bent, there is less adherence to judge-made rules. At some point in this evolution, a judge's formulation of a rule to be followed by his brethren could become an empty conceit.

From the viewpoint of public institutions, judicially formulated rules are strictly "public goods." Courts are not in the business of responding to a private demand for rules. Indeed, it is widely held that an effort by private parties to trick a court into making a rule not needed to resolve a dispute is reprehensible.⁹

Even from the viewpoint of private parties, it is, as previously noted, very rare that a rule formulation is a primary objective of a litigant. In part, this is because most litigants have no reason to suppose that they will be involved in subsequent litigation applying the same rule.¹⁰ And in part it is because of the unlikelihood that any particular issue will be presented in the desired

⁸ For an elementary explanation of the doctrine of precedent, see K. N. Llewellyn, *The Bramble Bush*, ch. 4 (2d ed. 1951).

⁹ See also *Cory Corp. v. Sauber*, 363 U.S. 709 (1960); *United States v. Johnson*, 319 U.S. 302 (1943); *Lord v. Veazie*, 49 U.S. (8 How.) 250 (1850).

¹⁰ This is not so, of course, with regard to public agencies. For a description of the process by which federal agencies decide whether to pursue or avoid judicial rule making, see Paul D. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 *Hous. L. Rev.* 1101 (1974).

context to a court of last resort which has the power effectively to formulate a rule governing future cases. While there are exceptional litigants and exceptional cases in which this is not true, it is generally the case that an expenditure on litigation for the purpose of securing a particular formulation of a rule would be an absurdly risky expenditure. Parties who want a new rule to govern a continuing relationship of the sort which offers the opportunity for private adjudication would in virtually all cases be better advised to bargain directly for a new rule established by contract rather than to invest in litigation intended to result in the formulation of a new rule. And for others, interested in law reform, administrative agencies and legislatures will often afford more inviting forums. Thus, it is not surprising that the authors can present no specific examples of litigants entering a marketplace in which public and private sellers of rules compete.

In short, the market analysis tendered in the first part of the paper is too clumsy to be useful. This is made clear as the authors proceed to try to use the model as a tool to understand several phenomena.

II. INSIGHTS BASED ON THE MODEL: FAULTY INFERENCES FROM A FALSE PREMISE

In using their model, the authors first turn to anthropology to illustrate their point. A curious choice, it serves only to demonstrate a lack of sympathy with the anthropological material with which the authors work.

The adjudicatory practices of the Yurok Indians do not reveal the use of private alternatives to public adjudication, much less that there is a recognized general market for judicial services among such people.¹¹ One of the first lessons to be learned from the study of primitive adjudication is the great importance attached by tribal societies to the resolution of disputes.¹² One reason for this is doubtless that everyone in the society has a continuing relationship with every other member of the society which it is in the interest of all to preserve. Hence, great effort is often expended to resolve disputes which in a modern society might be regarded as trivial. Another reason why this may be so is that in many tribal societies the value of the man hours expended in elaborate proceedings is relatively low. In any case, it is no surprise to learn that considerable moral suasion is brought to bear on Yurok Indians to assist in the settlement of disputes among their fellow tribesmen.

What is positively misleading about the authors' approach is the insistence on characterizing the Yurok procedure as "private and not public." It is very

¹¹ This is exactly the kind of ethnocentric treatment of primitive law decried by Paul Bohannon, *Justice and Judgment among the Tiv*, *passim* (1957).

¹² See also Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* 357-67 (2d ed. 1967); Arthur S. Diamond, *The Evolution of Law and Order* 44-56 (1951); Lloyd A. Fallers, *Law without Precedent* (1969).

unlikely that it would be so perceived by a Yurok, to whom such a distinction would not make sense. In such a tribal society, all proceedings would be regarded as public and private at once. It would be more accurate to say that all Yuroks share in the public work of adjudication. There is in any case no suggestion that alternative Yurok procedures are in competition with one another to serve any discernible market.

Next, the authors present commercial arbitration as illustrative. Here, there does seem to be a marketplace of sorts. For reasons previously stated, it is not helpful to think of the public courts as a competitor in this market, but among private suppliers of decisions there is at least potential competition. Often that competition is dominated by monopolists such as trade associations or the American Arbitration Association, so that one should be slower than the authors seem to be in drawing conclusions about the efficiency of this market.

The authors do acknowledge that "it is difficult to use arbitration as the benchmark for judging the court system," but they do then fearlessly make such judgments. They use conventional arbitration practices as "some evidence" of what an efficient judicial procedure must be. Unfortunately, each of the six inferences drawn from this data is either altogether lacking in novelty or demonstrably unsound.

First, the authors infer that a jury is inefficient because juries are not used in arbitration. There is a large body of literature in the law calling attention to the unquestioned fact that trial by jury is expensive. It is a burden to the jurors, the courts, and the parties. The only reason it exists is to provide a decision maker who will command more trust on the part of individual litigants than will a single professional judge with all of his human failings, many of which may be well known to the parties. Whether the cost of the jury is so great that it offsets this advantage is a subject of long debate. It is no contribution to that debate to point to the fact that parties who are in a position to make contracts regarding their disputes will not choose to incur the added expense. It would be astonishing to even the most partisan advocate of the jury if parties making such a contract were to provide for jury trial. By reason of their capacity to make such contracts, they are out of the class of persons for whom jury trial is provided.

A similar error is reflected in the authors' second observation that the chief benefit of the appeal lies in the rule formulation which results. The chief purpose of appellate proceedings is to assure that the primary decision makers have made decisions that are at least overtly consistent with the controlling law as understood and expressed by the highest court. Such proceedings unquestionably add substantial cost. Unless the decision maker is expected to adhere to the law, and unless the parties so mistrust the arbitrator that they want to invest good money in holding him to account for the legality of his award, there is simply no point in incurring that substantial cost. Again,

it would be surprising if parties who are in a position to make contracts with one another regarding their disputes would want to bear the cost of this kind of quality control, which is most sensible in situations in which the level of trust between the parties is least.

In regard to this issue, the understanding of the authors may have been hindered by their failure to consider labor arbitration. In that field, the parties sometimes manifest greater concern for the stability of the controlling rules. Arbitrators are much more often expected to write opinions explaining their decisions by reference to the custom of the employment.¹³ And it is not unknown for a master agreement to specify an arbitrator who will be responsible for resolving all disputes arising during the life of the contract.¹⁴ In such situations, it is quite feasible for the arbitrator to provide through his opinions for a system of rules which can fairly be described as "the law of the shop." Such a development does not require the participation of an appellate court, so long as the parties are prepared to entrust the power to a single arbitrator.

A third inference drawn by the authors pertains to the process of discovery. They find the limited use of discovery in arbitration to be some evidence that discovery is overused by the public courts. Again, the costliness of discovery proceedings is everywhere acknowledged.¹⁵ Discovery is justified only by a serious public commitment to decisions based on accurate perceptions of fact, even in situations in which the adversaries are trying to conceal truth from one another. Disputants who are in a situation which implies some modicum of mutual trust and a shared concern for costs would be expected to bargain for less discovery. Their willingness to do so will not support any inference about the wisdom of providing more or less extensive discovery in public proceedings to resolve disputes among more contentious parties.

The authors note that discovery procedure is presently the object of criticism because of its excessive costliness. But it deserves note that the prescriptions which have thus far been advanced as reforms have not proposed to reduce the amount of information exchanged. To the contrary, the present proposals would attempt to get the same information at less cost by increasing the amount of judicial participation and coercion in the process, and diminishing the reliance upon the parties privately to conform their behavior to the prescribed standards of procedure. There is nothing in the present

¹³ Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 168 (3d ed. 1973).

¹⁴ *Id.* at 58.

¹⁵ See American Bar Association, Section of Litigation, *Report of the Special Committee for the Study of Discovery Abuse* (1977); Judicial Conference of the U.S., *Comm. on Rules of Practice & Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* (1978).

proposals to support the kind of inference drawn by the authors that discovery should be partly abandoned in commercially arbitrable cases.

The authors' fourth inference pertains to the rules of evidence. Because arbitrators use them, it is inferred that they are efficient. But the fact that arbitrators, like judges in nonjury trials, tend generally to adhere to the rules of evidence is in part the result of the conventionality of those rules. The "transaction cost" of developing different rules is too great to make the enterprise worthwhile, especially so where it is unlikely that any party contracting to arbitrate would be able to anticipate clearly which, if any, rule of evidence might operate to his disadvantage. Moreover, the traditional rules of evidence do embody many years of practical experience, which have some bearing on any proceeding that has the discernment of facts in dispute as its object. It remains true that the most rigorous applications of the traditional rules of evidence are most often explained by a mistrust of lay jurors' deductive capacities.

The authors also infer "some evidence" of the disutility of the conventional rule that courts will not specifically enforce personal service contracts. Specific enforcement requires the use of the contempt power by the court. Long experience has taught that this power should be sparingly used. Like a nuclear weapon, it is more effective as a threat than as an activity. The risk of contumacious behavior is especially grave in regard to personal service contracts: an employer forced to retain in an important position an employee who is no longer held in regard is likely to subvert the intent of the decree in many ways and, even more so, the employee who is required to perform service for his adversary. A court that tries to force employment on unwilling parties is embarking on a course that is too likely to result in continued bickering about the adequacy of the coerced performance and continued rattling of the saber of contempt. For these reasons, parties enforcing such contracts are generally left with compensatory remedies, i.e., an "adequate remedy at law."¹⁶ The authors direct our attention to two cases,¹⁷ which hold that such contracts can be specifically enforced at the direction of an arbitrator who is not bound by the judicial rule. Perhaps, indeed, the matter is put in a different light where there is an arbitrator involved to perform the onerous supervision of performance, and whose reputation for effectiveness is the one to be impaired when there is contumacious behavior. Moreover, the risk of contumacy may be less in those cases in which there is still enough mutual regard between the parties to make arbitration possible. But there is here no evidence whatever that the general rule employed by the courts is

¹⁶ For example, *London Bucket Co. v. Stewart*, 314 Ky. 832 (1951).

¹⁷ *Staklinski v. Pyramid Electric Co.*, 6 N.Y.2d 159, 188 N.Y.S.2d 541, 160 N.E.2d 78 (1959); *Grayson-Robinson Stores, Inc. v. Iris Construction Corp.*, 8 N.Y.2d 133, 202 N.Y.S.2d 303, 168 N.E.2d 377 (1960).

“inefficient” in situations in which warring parties seek to compel one another to engage in personal relationships of trust.

The authors’ final inference from the popularity of commercial arbitration is that the American rule against taxing attorneys’ fees is efficient. It seems clear that the presumption against taxing attorneys’ fees in arbitration unless the contract otherwise so provides is a normal consequence of the conventionality of the American rule. Contracts are normally construed to conform to custom, and there is no other custom in America by which the parties’ unexpressed intent could be gauged. It is circular to reason that the use of custom for this purpose tends to show that parties to arbitration agreements find it efficient. Accordingly, this inference, too, proves to be without value.

Having made the foregoing inferences from the use of arbitration in commercial cases, the authors proceed to make some additional comments about the nature of competition in the judicial-services market which they have described. Only one point is to be made here in regard to these comments: the authors are perverse in their refusal to understand the basis for the limited public control of the private alternatives to adjudication which they describe.

The perversity is unveiled in their statement that the rule against the enforcement of penalty clauses in contracts is “mysterious to economists.” Surely there must be at least some economists who can perceive the motive of the rule, even if perhaps there may be few who agree with it. The assumption on which the rule rests is that penalty-clause enforcement may facilitate overreaching by strong bargainers.¹⁸ Some contracting parties, perhaps many, would be quite improvident in their willingness to make super-guarantees of performance, assuming liabilities far in excess of the normal liabilities for breach, with the perhaps unrealistic expectation that no breach would occur. It is not immediately clear, to this lawyer at least, why some protection against this kind of improvidence is either unjust or uneconomic.

A similar public policy underlies some of the public control of the commercial arbitration process. The authors emphasize the importance of *Paramount Famous Lasky Corp. v. United States*¹⁹ as an illustration of judicial hostility to competition in the judicial-services market. The case is a somewhat puzzling one, particularly in its use of the antitrust law to invalidate a boycott used to compel arbitration in conformity with the trade practice. But it is possible perhaps to explain the result as an application of a broader policy which disfavors the use of arbitration to resolve disputes arising under laws of social and economic regulations that cut against the grain of private economic autonomy. This principle was applied to a dispute arising under the Securities Act of 1933 between a securities broker and its

¹⁸ Corbin on Contracts § 1057 (1964).

¹⁹ 282 U.S. 30 (1930).

customer; it was held that the dispute was not arbitrable.²⁰ The same principle has been applied to claims arising under the antitrust laws.²¹ It is possible that the Court in *Paramount Famous Lasky Corp.* was giving effect to a similar concern that the policy of the antitrust law might be subverted through ineffective enforcement of legal rights by the private arbitrators.

A dimension of the problem of arbitrability is the proper scope of review in the law courts of arbitration awards when judicial enforcement of the awards is sought. It is generally held that an arbitration award may not be refused enforcement by a court merely because it is contrary to law.²² The arbitrator is not required to be a lawyer, is not required to explain his decision, and cannot be effectively required by a law court to account for the legality of his decision. In these respects, an arbitrator is quite different from a trial judge in a law court, who is held accountable by means of appellate review. Thus, to the extent that there is a public interest to be secured by effective enforcement of the public's rules, arbitration may jeopardize the public welfare. One way to try to deal with this problem is to provide some legal review of the arbitrator's award to prevent him from subverting the law by a lawless award. Thus, for example, in a case in which it was held that a dispute over the scope of a bankruptcy discharge was arbitrable, the court emphasized that it would review the award and reverse it if it appeared that the arbitrator was guilty of "manifest disregard of the law."²³ How this disregard might be manifested was, however, not explained by the court. It seems fair to say that the court was prepared to tolerate a greater risk of nonenforcement of the bankruptcy law than the risk it was earlier prepared to tolerate of nonenforcement with the antitrust law.

I am not prepared to suggest a correct view on the proper scope of judicial review of awards and the arbitrability of commercial disputes of the sort described. But I do suggest that an analysis which seeks to explain the problem in terms of public judicial competition with private arbitrators disguises legitimate concerns about private subversion of public policy.

III. PRIVATE DETERMINATION OF JUDICIAL OUTCOMES: AN ERRONEOUS SOLUTION TO A NONPROBLEM

The second half of the paper addresses the question of whether the apparent efficiency of common law rules can be explained as an outcome of the

²⁰ *Wilko v. Swan*, 346 U.S. 427 (1953).

²¹ For example, *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

²² *Marcy Lee Manufacturing Co. v. Cortley Fabrics Co.*, 354 F.2d 42 (2d Cir. 1965); cf. *IS Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974).

²³ *Fallick v. Kehr*, 369 F.2d 899 (2d Cir. 1966).

private choices of litigants. The authors undertake to analyze and extend a series of articles written by economists²⁴ which deal with this issue.

For the purpose of this discussion, at least, the economics writers assume that the common law has a tendency to develop "efficient" rules of law.²⁵ A contrary assumption is apparently to be made about rules fashioned by legislatures. The question troubling to economists is: why?

Only an economist is likely to regard this as a troubling question. Author Posner, the lawyer, was one of those to remark on the apparent tendency of judge-made law toward efficiency and was earlier satisfied with the explanation that the law is efficient because the judges make it that way. But the economists apparently suffer from a trained incapacity to accept this simple explanation. As one of them, Paul Rubin, explained,²⁶ he is accustomed to invisible-hand explanations of efficiency; thus, to him, appearances are unacceptable explanations. In this instance, unfortunately, their rejection of the obvious leads the economists on a snark hunt. Why Posner, who must know better, joins in this hunt is the true mystery.

To be sure, very few judges have a clear understanding of efficiency as economists use that term; and fewer still would state that efficiency is a goal of the law. But the judicial process affords a discipline which is intended to make judge-made rules conform to "public policy," namely, the generally shared perceptions of the public interest. What judges regard as sound public policy conforms in a very general way with what philosophers would describe as justice, or what laymen might describe as common sense. Unless economists worship at a strange shrine, there must be a high correlation between their perception of efficiency and the judges' collective perception of the public good.

The discipline imposed on judges is not in the least mysterious. First, it should be emphasized that no single judge has the power to make a rule. The authority to make general principles abides only in appellate courts where all decisions are made by groups of judges. In order to utter a rule on behalf of a court, a judge must persuade somebody else. The shared professionalism of the judges dictates that the reference points for their deliberation include past or higher authority and a shared sense of the public interest. In this discourse, arguments for efficiency, whether so labeled or not, will often prevail.

Not only must the judges convince one another in order to reach a decision, but they must convince others as well, if their decision is in fact to be

²⁴ Paul H. Rubin, *Why Is the Common Law Efficient?* 6 J. Legal Stud. 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977).

²⁵ For example, Posner, *supra* note 2, *passim*.

²⁶ Rubin, *supra* note 24.

effective as a rule. Thus, they can make a rule only if they can publish a persuasive opinion. If their decision strikes others as unwise, unjust, or inefficient, it is likely to be disregarded in the making of subsequent decisions. It is a notable feature of the doctrine of precedent that a former decision may be given a broad or a narrow application by a later court according to its appraisal of the soundness of the rule.²⁷ A statement of a rule of decision that is an inefficient or unwise rule can and will be treated as nonbinding dictum. Thus, an appellate judge who seeks professional applause and recognition is obliged to be the voice of what others perceive to be practical wisdom.

In addition to these internal disciplines, the judicial tendency toward efficiency is a likely result of the adversary tradition. A familiar argument for freedom of expression is that truth will prevail in the marketplace of ideas.²⁸ This is an argument which seemingly ought to have a special attraction to economists. And it has special application to the appellate process which is an effort to create just such a marketplace, in which a true view of justice, public policy, and even efficiency will prevail. The adversaries, animated by their self-interest, are expected to produce all the arguments that can be made in favor of any rule which might yield a judgment in their favor. Accordingly, even dim-witted judges who have a very limited perception of the public interest may well be informed by advocates of any adverse consequences which might flow from the adoption of alternative rules. Counsel who can demonstrate that the rule proposed by his adversary is wasteful is quite likely to prevail.

The foregoing would seem to be an abundant explanation of the phenomenon of the efficiency of judge-made rules. There may, however, be one other subtle force at work here which bears observation. The common law, like economics, tends to assume the rationality of individuals; both systems of thought suppose that people are in control of themselves and can make decisions in their own interests. This common ground may inhere in part in the nature of the two enterprises; for law, at least, it is hard to imagine a system built on wholly deterministic premises. It may also be reinforced by the historical accident that the common law principles most familiar to us were formulated at the same time that the premises of economic thought were taking shape; I have elsewhere remarked on the proximity of Smith and Blackstone.²⁹ In any case, lawyers do tend to think somewhat like economists, and judges are lawyers.

²⁷ Llewellyn, *supra* note 8, at 68 *et seq.*, is again a useful explanation.

²⁸ For example, John Stuart Mill, *On Liberty* (1853), may be read as an excellent statement of the case for the adversary tradition.

²⁹ Book Review, *Economic Analysis of Law*, 1974 U. Ill. L.F. 187.

For all of these reasons, there is very little mystery about the tendency of judge-made law to conform to the hopes of economists for efficiency. This in itself is not so bad; solving a nonmystery is harmless enough. And it is imaginable that some illumination may be gained by trying to think about the legal system as if the judges were ciphers. But there is no such illumination to be found in the authors' paper. And in trying to mount the subject as they do, they propagate misunderstanding.

The more serious miscomprehension is their portrayal of litigants. In trying to force the existence of an invisible hand, the economists attribute to litigants a preoccupation with judicial rule making which simply does not exist. Anyone trying to think about problems of court administration who assumes that litigants are there to cause favorable rules to be made is not likely to come to grips with real issues of dispute resolution.

Doubtless there are a few private litigants who do come to court in the hope of causing a new and better rule to be formulated which will govern their own future conduct and relations. But such litigants are truly extraordinary.

Contemplate the position of a private litigant disadvantaged by what he perceives to be an inefficient rule made by judges. In order effectively to get the rule changed, he must influence the highest court, because it alone can be authoritative. In most judicial systems today, he cannot even plan on attracting the notice of such a court; the statistical probability is that his appeal will be turned away without a hearing or statement of reasons. Indeed, even at the intermediate levels, he is likely to get an attentive hearing only if his argument is at least superficially attractive to some judges.³⁰ Moreover, in most situations, it will be doubtful whether any particular case can be tried in a way which will present the issue which the litigant would like to raise; even if the adversary is so cooperative that no messy issues of fact are raised, there are likely to be alternative issues presented which may divert attention from the alleged rule inefficiency. In addition, the litigant must reckon on the very substantial costs generally associated with last-resort litigation. And all of these risks and costs must be appraised against the chance that the same issue will be presented to the court by different litigants who will bear their own costs. When all this reckoning is done, few litigants will be hardy enough to pursue a claim or defense with the primary ambition of influencing a change in the law.

At most, the hope of change is a marginal consideration for the private litigant, even if he expects to be involved in many more such disputes. Perhaps more significant is the effect on the settlement process of any special

³⁰ Paul D. Carrington, Daniel J. Meador, & Maurice Rosenberg, *Justice on Appeal*, ch. 3 (1976); Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 Wash. U. L. Q. 257.

potential which a given case may have for creating precedent. Thus, a motor car company which anticipates that a case of a broken wheel may reach the highest court and there be used as the event on which to proclaim new liabilities of manufacturers may advisedly pay a premium to avoid the litigation. But this will generally make sense only if the case is one which puts the manufacturer in a particularly bad light, making the liability extension more likely than it would be if the court were confronted with an ordinary case of defective manufacture. If the highest court is prone to extend liability, that adversity cannot be avoided for long, unless the litigant has an unusual capacity to keep all like cases away from the court.

For a few litigants, such a special capacity may at times exist. Such a litigative monopoly position may occur, for example, where a particular association is financing litigation of a kind which would not be financially justified to the individual litigant. Thus it was that the NAACP exercised an unusual measure of control over the development of the law of desegregation.³¹ While this position is not unique, it is very rare among private litigants.³²

As previously noted and widely understood, private litigants do influence the development of the law through the adversary arguments. But to suppose that they also influence the law by a rational process of selecting cases to challenge inefficient rules is a serious distortion of motives. Private litigants' legal arguments are shaped by the needs of their cases; rarely are their cases shaped to present their legal arguments. While the present authors do conclude that the earlier papers had failed to explain efficiency as a product of litigant choice, they nevertheless seem to fall into the same misperception of litigant behavior and to give it currency.

Another misperception which the authors propagate pertains to the nature of legal rules. In order to construct a kind of market in which an invisible hand can be seen to function, the economists want to think of legal rules as products which can be bought and sold. This seriously confuses the role of the law-making judge. This misperception is explicit only in the first half of the paper, but it seems to underlie the second half as a premise which is subliminally advertised. It is assumed that a rule is a creative act of a judge who can be cajoled or programmed to creativity by the litigants who control his agenda.³³

Like the previous misperception, this one is not wholly wrong. But judicial law making is not *that* creative. An appellate court cannot just whip up

³¹ The early history of this development is movingly if excessively recounted in Richard Kluger, *Simple Justice* (1975).

³² The contrast between private appellants and the government of the United States is marked and measured in Carrington, *supra* note 10.

³³ See also Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 *Va. L. Rev.* 561 (1977).

a new efficient rule because some market would reward the judges for doing so. At no place in this paper is confusion more evident than in the extraordinary discussion of judicial copyrights. Copyright is a means of rewarding creativity; appellate judges are at their best when they are least creative, when their words and values seem to readers to be most conventional. Paying judges more who write highly citable opinions is a perverse idea which cuts deeply against the grain of the judicial role. If judges were so rewarded, presumably each judge, as a rational and self-interested being, would strive to make a new rule on every possible occasion; but since all of his brethren would be doing the same, none would ever succeed because the old rules of no judges would command obedience in later cases.

The failure of the economists to understand this elemental aspect of the judicial process seems to be the cause of this literature. In trying to refute the literature on its own terms, the present authors have again given currency to a flawed view of the process.

What must be said about this second half of the paper is that it is more a source of confusion than of light. To some extent, the confusions are the same as before, but, as presented in this second half, they seem more likely to cause harm. It seems unlikely that any lawyers or law reformers will be seriously misled by the false inferences drawn from the market-model analysis of the first half. But it does seem quite possible that some economists may continue to drill a dry hole because of the failure of the authors to set them right in the second half.

CONCLUSION

On the whole, this paper is much too immodest. Economics has much to offer to the study of the judicial process, but it is not a tool to universal comprehension.³⁴ The vaunted vitality of common law rules is one of the least promising subjects for economic study. And the effort to force the whole enterprise in all its complexity into a single market model is not useful. The authors are encouraged to bring their very substantial talents to bear on a narrower field where they can reasonably expect to nourish a crop.

³⁴ See also Thomas C. Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis of Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 *Wis. L. Rev.* 385.

