Legal Change:
Selective Litigation, Judicial Bias, and Precedent

by

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ABSTRACT
A key question in the literature on legal change is whether the law evolves via the conscious efforts of judges, or is the result of invisible hand processes. This paper confirms Priest’s claim that when judges are unbiased, selective litigation alone can cause the law to evolve toward efficiency. However, when judges are biased, the direction of legal change depends on whether the extent of judicial bias is large enough to overcome the selective litigation effect. The paper also shows that the desirability of binding precedent lies in its ability to restrain biased judges from driving the law away from efficiency.

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“…the law is what judges do as well as predictions of what they will do.” (Posner 1990, p. 225, describing Holmes’s “prediction theory” of law)

1. INTRODUCTION

The hypothesis 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 that relegates 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 the selection of cases that 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 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).

The selective litigation model, however, assumes random (unbiased) judges. Thus, it cannot address the question of how the motivation of judges affects the direction of legal change. A recent and noteworthy effort to bridge this gap is by Gennaioli and Schleifer (2007a,b), who develop a model of legal change in which judicial bias potentially affects the direction of change. The authors assume that judges are basically efficiency-seeking (or “Posnerian”), but that they 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. In this context, the direction of legal change depends on whether judges are bound by precedent, or if they are free to overrule it. If they are bound, legal change can only occur if judges distinguish a new decision from the existing precedent, either by adding a new dimension to the law or by limiting its scope.

In this setting, Gennaioli and Schleifer (2007a) show that judicial bias has offsetting effects on efficiency: on one hand, it distorts the law away from efficiency, but on the other, it provides the impetus for legal change, which in the long run can improve the precision of law. In contrast, if judges are not bound by precedent, they can change the law directly by overruling previous decisions. This is the more typical approach taken in the law and economics literature on legal change, and since the purpose of this paper is to meld that literature with the literature on judicial bias, it is the approach that will be taken here. The question remains, however, whether selective litigation can counteract the detrimental effect of judicial bias in a model of overruling.
The primary contribution of this short paper is to attempt to answer that question. 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 introduces the impact of judicial bias by allowing judges to favor one side or the other in a legal dispute. The main conclusion emerging from this hybrid model is that judicial bias does not impede the evolution of the law toward efficiency as long as the fraction of judges biased against efficiency is smaller than the conditional probability that a case being litigated involves an inefficient law. The paper concludes by asking whether or how precedent alters this conclusion. Although the model allows judges to overrule precedent, we assume that it is costly to do so. In this setting, we show that the strength of precedent affects the rate of legal change but not its direction, which is determined solely by the interaction of selective litigation and judicial bias. As a consequence, strong precedent is only socially beneficial when judges are biased because it can prevent them from driving the law away from efficiency.

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 is based on two claims: first, that inefficient laws generate higher costs for plaintiffs, and second, that lawsuits involving higher costs are more likely to go to trial than settle. And since only those disputes that go to trial can affect legal change, it is that subset of cases that matter for the efficiency hypothesis.
To illustrate the first part of Priest’s argument in the context of 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; Rubin, 1977). Suppose in particular that if the plaintiff (victim) spends $X_p$ dollars on care, her damages are $D_p$, whereas if the defendant (injurer) spends $X_d$ dollars on care, the plaintiff’s damages are $D_d$. Finally, suppose that if neither takes care, the plaintiff’s damages are $D$, where

$$D > X_p + D_p > X_d + D_d.$$  

(1)

Thus, the least-cost option is for the defendant to invest in care. For simplicity, we consider two legal rules in this context, pro-plaintiff (PP), or strict liability, and pro-defendant (PD), or no liability. Clearly, the defendant will take care under PP, while the plaintiff will take care under PD. Thus, PP is the efficient rule. It follows that if PD is in place, the victim faces higher overall costs (care plus damages) than if PP is in place.

We now turn to the second part of Priest’s argument, namely, that the inefficient rule (PD), is more likely to result in a trial than the efficient rule (PP). The argument is based on 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.

To be specific, suppose that an accident has occurred. The expected value of trial for the plaintiff is $P_pJ - C_p$, where $P_p$ is the plaintiff’s subjective assessment of her probability of winning at trial, $J$ is the monetary judgment she will receive from the defendant in the event of victory, and $C_p$ is the plaintiff’s cost of trial. Similarly, $P_dJ + C_d$ is the defendant’s expected cost of trial, where $P_d$ is the defendant’s subjective...
assessment of the plaintiff’s probability of winning, and $C_d$ is the defendant’s cost of trial. A sufficient condition for the case to go to trial rather than settle is that the defendant’s maximum settlement offer is less than the plaintiff’s minimum acceptable offer, or


Rewriting this, we obtain the trial condition

$$(P_p - P_d) J > C_p + C_d.$$  \hspace{1cm} (2)$$

Clearly, a necessary condition for trial is $P_p - P_d > 0$; that is, both parties must be optimistic about their chances of winning at trial.\(^7\)

When this is true, (2) implies that a trial is more likely the larger are the stakes, given by $J$. In terms of the above accident model, the stakes are determined by the expected costs incurred by the plaintiff. For a forward-looking plaintiff, $J$ will include total accident costs (precaution plus damages), since the outcome of this case will affect future decisions. In that case, (1) implies that no liability (PD, the inefficient rule) will be more likely to result in a trial. Alternatively, if the plaintiff is a one-time player, the stakes are only the damages from the current case, since that is all the plaintiff can seek at trial. In that case, PD may or may not be more likely to result in a trial since (1) does not necessarily imply that $D_p > D_d$ (though one suspects that this will generally be the case).\(^8\)

Since the purpose of this paper is to incorporate judicial bias into the Priest model (rather than to evaluate it per se), we assume that his mechanism works on average.

The preceding argument forms the basis for the selective litigation approach to legal change. We now verify that, absent judicial bias, this mechanism is sufficient for the law to evolve toward efficiency.
Suppose that at a given point in time, either PP or PD is in place, representing the precedent inherited from the previous period. Further, suppose that either rule is equally likely, reflecting the absence of past judicial bias for or against efficiency. Then, during a fixed period of time, some litigation takes place which may or may not result in the rule coming before a judge. Suppose in particular that the litigation occurs randomly such that

\[ a = \text{the probability that the efficient rule is litigated}, \]

\[ b = \text{the probability that the inefficient rule is litigated}. \]

When a case comes to court, the judge either “upholds” the law or “overrules” it. To keep things simple, we assume that if the efficient law (PP) is overturned, it is replaced with the inefficient one (PD), and vice versa. This is not as restrictive as it sounds, since overruling an efficient rule and replacing it with another efficient one (if more than one efficient rule exists) is equivalent to upholding the efficient rule. Likewise, replacing an inefficient rule with another inefficient one is equivalent to upholding the original inefficient rule.

In the pure selective litigation model, judges act in a random and unbiased manner, and are not constrained at all by precedent (assumptions we will relax later). Thus, we assume that judges uphold (overrule) either type of rule with probability \( \frac{1}{2} \). Let \( R \) denote the probability that the efficient rule (PP) is in place after one round of litigation. Given the above assumptions, we can write the expression for \( R \) as

\[
R = \frac{1}{2} (1-a) + \frac{a}{4} + \frac{b}{4}.
\]

(3)

The three terms in this expression represent the three possible sources of efficient rules. The first is the probability that the prevailing rule is the efficient one, times the
probability that it is not litigated (and so remains in place); the second is the product of
the probability that the prevailing rule is efficient (½), the probability that it is litigated
(a), and the probability that it is upheld (½); and the third is the product of the probability
that the prevailing rule is inefficient (½), the probability that it is litigated (b), and the
probability that it is overruled (½). The law has evolved toward efficiency as a result of
this litigation if \( R > \frac{1}{2} \). Applying this to (3), we find that the condition reduces to
\[
b > a,\tag{4}
\]
which is simply the requirement that inefficient laws are more likely to be litigated than
efficient laws. Intuitively, the more often a rule is litigated, the more opportunities there
are for a judge to review and overturn it.\(^{10}\) This result confirms Priest’s claim regarding
the evolution of the law with random (unbiased) judges.

3. A HYBRID MODEL OF SELECTIVE LITIGATION AND JUDICIAL BIAS

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.\(^{11}\) 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 (2007a,b) in
order to examine the combined effects on legal change.

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 \( \pi \) of
the total, those who favor defendants, comprising a fraction $\delta$ of the total, and those who favor the efficient rule (Posnerian judges), comprising the remainder, $1-\pi-\delta$. Assuming that precedent continues to be non-binding, judges will decide cases that come before them based solely on these preferences. That is, pro-plaintiff judges will uphold PP and overrule PD, pro-defendant judges will uphold PD and overrule PP, and Posnerian judges will select the efficient rule (PP).

Since PP is, by hypothesis, the efficient rule, after a round of litigation, $R$, the probability that the new rule is efficient, is

$$R = \frac{1}{2} (1-a) + \frac{a}{2} (1-\delta) + \frac{b}{2} (1-\delta). \quad (5)$$

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 prevailing law is efficient and is not litigated. Obviously, this source of efficient rules is unaffected by the motivation of judges. The second term reflects the situation where the prevailing law is efficient, is litigated, and comes before either a pro-plaintiff or a Posnerian judge (comprising a fraction $1-\delta$ of all judges), both of whom uphold it. Finally, the third term reflects the situation where the prevailing law is inefficient, is litigated, and comes before a pro-plaintiff or a Posnerian judge, both of whom overrule it.

The condition for $R>\frac{1}{2}$ in this case is

$$\delta < \frac{b}{a+b}. \quad (6)$$

This simple condition represents the key result of the paper. It 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, or $\delta$—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. In other words, the anti-efficiency effect of judicial bias must be more than offset by the pro-efficiency effect of selective litigation. Note that, according to (6), $b > a$ 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 $\delta$, the more likely it is that this will occur. The important implication is that the ability of selective litigation to drive the law toward efficiency depends on the nature of judicial bias. Thus, the motivation of judges is important, even for invisible hand models of legal change.\textsuperscript{12}

4. THE IMPACT OF PRECEDENT

Finally, we introduce the impact of precedent. Precedent can affect legal change by possibly preventing judges from overruling existing laws (whether efficient or not). To introduce precedent, 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, suppose that 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 overruling a precedent consists of the extra effort, or decision costs, involved in
rationalizing the new rule (Gennaioli and Schleifer 2007a, p. 310).\footnote{13} Let \( k \) be this cost, which we assume is the same for all judges.\footnote{14}

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 overrule 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 therefore \( F(k) \), while the probability that he or she will overrule it is \( 1–F(k) \).

The condition for the law to evolve toward efficiency in this case reduces to

\[
[1–F(k)][\delta(a+b)–b] < 0. \tag{7}
\]

Note that since \( 1–F(k)\ge0 \), condition (7) can only hold if \( \delta(a+b)–b<0 \), or if (6) holds. 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 (6). In contrast, precedent, as captured by the \( 1–F(k) \) term, 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, becomes smaller (for example, as the fraction of activist judges becomes larger, or as the strength of precedent becomes weaker), and more slowly as \( k \) becomes larger.

What this result shows is that, in the context of the current model, binding precedent plays no role in enhancing the efficiency of the law,\footnote{15} but it can play a potentially important role in limiting the ability of biased judges to drive the law in an
inefficient direction. It follows that the existence of judicial bias is important for understanding the social value of precedent.

5. CONCLUSION

One of the centerpieces of the economic theory of law is the hypothesis that the common law displays an economic logic. How this state of affairs arose (assuming that it is true) 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 theories of judicial decision making.

This paper has attempted to remedy this deficiency by introducing a simple model of judicial bias and precedent into a selective litigation model of legal change. The main findings are, first, that when judges can overrule precedent and do so randomly, selective litigation will cause the law to evolve toward efficiency; and second, that judicial bias can overturn this result if the fraction of biased judges is larger than the conditional probability that the rule being litigated is inefficient. These conclusions establish the result that invisible hand models of the evolution of the common law cannot explain the convergence of the law toward efficiency without accounting for the motivation of judges. At the same time, neither the direction nor the rate of legal change can be attributed solely to judicial bias. A complete picture recognizes instead that, while judges
can affect legal change in ways that may be detrimental to efficiency, they are also constrained by precedent and the selection of cases that come before them.
REFERENCES


FOOTNOTES

*Thomas J. Miceli is Professor of Economics at the University of Connecticut. I acknowledge the comments of an anonymous referee, which substantially sharpened the argument in this paper.

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.


5. Gennaioli and Shleifer (2007b) argue that it cannot, but their conclusion is based on a characterization of the selection bias that is different from that in Priest (1977). Specifically, they do not allow the stakes of legal disputes to depend on the efficiency of the underlying legal rule—a key element of the Priest model. Consequently, their analysis does not fully integrate the invisible hand and judicial bias models of legal change.


7. The assumption of mutual optimism is necessary to ensure that some cases go to trial. Priest and Klein (1984) attribute the divergent beliefs of the parties to individual-specific
knowledge about the facts of the case and possibly different predictions about how the
court will interpret those facts in light of the law. Cooter and Rubinfeld (1989) survey
the literature arising from this model. The other major explanation for the existence of
trials is the asymmetric information model, which assumes that one party holds private
information about his or her prospects at trial (Bebchuk, 1984). Since this model also
makes the prediction that a trial is more likely the larger are the stakes (Shavell, 1996),
Priest’s conclusions are not dependent on his use of the Landes model.
8. Priest (1977, p. 67) is not clear on this point, simply asserting that “[f]or the set of all
legal disputes, the stakes will be greater for disputes arising under inefficient rules than
under efficient rules.” Rubin’s (1977) model is more rigorous in this regard.
9. See Cooter and Rubinfeld (1989, pp. 1080-1081), who argue that the settlement-trial
condition in (2), which is deterministic, can be made probabilistic by introducing a
random error term.
10. There are several potentially counteracting effects. First, litigants who favor the
inefficient law (defendants in our example) may have an interest in precedent and hence
will litigate the rule more vigorously (Rubin, 1977; Goodman, 1978). Second, if the
costs of the inefficient law are dispersed over a large number of victims, none may have
an incentive to file suit to overturn the law. A third factor concerns the role of precedent,
to which we return in detail in Section 4 below.
11. It also reflects the fondness of economists for invisible-hand type arguments. See
Rubin (1977, p. 51) and Hadfield (1992, p. 583).
12. The analysis in this section has assumed that litigants’ assessments of the plaintiff’s
probability of victory at trial are independent of the nature of judicial bias. In fact,
rational litigants will likely take judicial bias into account when forming their assessments. In particular, we would expect both \( P_p \) and \( P_d \) to be increasing in \( \pi \) and decreasing in \( \delta \). It follows that the effect of a change in the distribution of judges on \( P_p - P_d \), the measure of mutual optimism, will be ambiguous. It therefore seems reasonable to treat \( a \) and \( b \) as being largely independent of \( \delta \).

13. In a more sophisticated model, forward-looking judges would also consider the possible reputation costs or benefits from overruling precedent, consisting of the possibility that he or she will either be cited by future judges or overruled by them (Miceli and Cosgel 1994).

14. Gennaioli and Schleifer (2007b) consider the case where unbiased (Posnerian) judges have a lower \( k \) and hence are more activist (i.e., are more likely to overrule precedent) compared to biased judges. Not surprisingly, this increases the likelihood that the law will evolve toward efficiency.