# EFFICIENCY IN THE COMMON LAW

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# Efficiency In The Common Law

In the growing field of Law and Economics, a debate is raging asking the question,"Is the common law efficient, and if so, how does it go about achieving this efficiency?" Many different theories and models have been proposed by a number of respected authorities on the subject. Included in the list are Richard Posner, George Priest, Paul Rubin, John Goodman, and R. Peter Terrebonne. These men have argued that the common law does indeed evolve toward efficiency. Richard Posner has also attempted to show empirically that the common law is, indeed, economically efficient.

To address the first question of whether or not the common law is actually efficient, it is necessary to study the findings by Richard Posner, in his book, An Economic Analysis of the Law.[1] Posner believes that economists cannot tell society which rule to apply, but can show which rules are and are not efficient. He attempts to do this by analyzing the three elements of the common law: property, contract, and torts.

In terms of property law there are three criteria which must be met in order for efficiency to exist. The first is Universality, that all resources should be owned or be ownable by someone. The exceptions are those resources that are so plentiful that everyone can consume as much as they want. The second is Exclusivity, that a person given a property right can exclude others from that resource. This

criterion has qualifications, though. For example, the government, in time of war, cannot be excluded from a farmer's crops. The third criterion is Transferability. If a property right cannot be transferred, then there is no way of shifting resources from a less productive to a more productive use through voluntary exchange.

In our society, the three criterion are not completely met. Property rights are not totally universal, exclusive, or freely transferable. In fact, when transfer costs are high, an attempt to achieve exclusivity may result in the reduced efficiency of the property rights system.

Posner gives numerous examples of property right situations where efficiency is not met. One of these is in broadcasting. The law has purported not to recognize property rights in broadcasting at all. Inefficiency has resulted where willingness to pay for the right has been taken into consideration in deciding who gets the right. This is less efficient than a private sale or auction. Even if one were to pay the most money for lobbying and lawyers, it will not ensure them of receiving the right. Also, the costs of this method are much higher than the cost of the market's allocation.

Another example of property right is pollution. Efficiency is now defined as minimizing the costs of the pollution and of avoiding the pollution. Transaction cost are important in this setting. If they are unreasonably high, as is the case most often, exclusive rights, whether

to pollute or to be free from pollution, are likely to promote inefficiency. The standard of reasonable use was then applied. It stated that pollution was lawful if the benefit from continuing to pollute was greater than the cost to the victims of either tolerating it or eliminating it.

The main function of contract law is to minimize the breakdowns in the process of exchange. Efficiency is measured by the costs of the transaction with and without the law. If the cost of the transaction with the law is less than its cost without the law, then the law promotes efficiency. It may not be the most efficient, but it is at least less inefficient than without the law. The economic test of contract law is whether the imposition of a liability will create incentives for value maximizing conduct in the future.

In the market, contracts are a part of every transaction. The market can then be thought of as a series of contracts. A failure in the market can be interpreted as a contract failure. For example, monopoly power in the market is related to duress in contract law. If the market can be thought of as efficient, through the tatonnement process, then contract law must, in some way, promote efficiency.

Specific doctrines of contract law promote efficiency in different ways. Consideration, for example, lets the liability be denied where either no exchange has taken place, or where the actions of one or more party is vague or

unspecified. In the case of fraud, the nonenforcement of a contract is dictated where one party induced a promise from the other party using an outright lie. Enforcement of the contract, in this case, would not facilitate voluntary exchange, and enforcement of the contract may discourage future fraud.

In tort law there exist two classifications, intentional and unintentional. Intentional tort cases may dissolve into a dispute over an efficient solution to a conflict between legitimate activities. Unintentional tort cases use negligence as the standard to be applied.

Judge Learned Hand developed a theory of negligence for unintentional tort cases that puts it into a formula. The Hand formula says that negligence exists if the loss due to the accident, multiplied by the probability of it occurring, is greater than the cost of avoiding the accident. Efficiency exists if the smaller of the two costs is incurred in order to avoid the larger cost.

The Hand formula does not always promote efficiency. Contributory negligence under the Hand formula states that if the plaintiff could have prevented the accident at a cost lower than the discounted accident cost, then he cannot recover damages. Recently, the idea of comparative negligence has replaced contributory negligence as the standard. This way, the plaintiff's damages received are reduced by the percentage of the accident that resulted due to his own negligence.

To sum up, the common law can be seen in some respects to be efficient and in other respect not to be. Assuming that, in the least, the common law has the ability to be efficient, the discussion will now be directed to how it might achieve this.

Richard Posner is probably the leading authority in the field of Economics and the Law. He believes that the common law system has not only generated efficient rules in the past, but continues to do so today. His definition of an efficient rule is one that creates more economic substance than the alternative. Posner believes that if a tatonnement process exists, that it is fueled by judges who make their decisions in accordance with the criterion of efficiency. But why does a judge's self interest lead to the promotion of efficiency? Posner argues that a judge's incentive system would not interfere with the criterion of efficiency. The laws regulating conflicts of interest and other possible personal motivations of judges effectively insulate them from having a personal stake in any case. The only stake they may have would be indirect at best. Once Posner began to promote the idea of economic efficiency of the common law, others started to build on his work. One of the first of these was Rubin.

Paul H. Rubin, in his article, "Why is the Common Law Efficient?," argues that the efficiency of the common law can be explained by an evolutionary model where parties will be more likely to litigate inefficient rules as opposed to

efficient ones.[2] He goes on to argue that the evolutionary pressure comes from the litigants, rather than the judges as proposed by Posner. He concludes that if decisions are made randomly, this evolutionary model will move toward efficiency. The efficiency that Rubin is concerned with is production efficiency.

Rubin introduces a model in which the total costs involved are made up of prevention and accident costs in the context of a liability case. The victim and the defendant both have total costs equal to their prevention costs plus their accident costs. The accident costs are equal to the number of accidents times the accident costs. He assumes the accident costs are set for both parties. If the total costs of the victim are greater than those of the defendant, then the defendant should be made liable in order for the rule to be efficient. If the total costs of the defendant are greater than those of the victim, then the victim should be made liable in order for efficiency to exist. If the total costs of the victim exceed those of the defendant, then the production inefficiency of the inefficient rule is equal to the total costs of the victim minus the total costs of the defendant.

Rubin goes on to say that if the probability that an efficient rule will prevail, multiplied by the production inefficiency of the inefficient rule, is greater than the combined litigation costs of both parties, then litigation will continue until a judge reverses the inefficient rule.[3]

The judge may reverse it because he was interested in efficiency or simply persuaded to do so by the litigants. This model does not assume judicial bias toward efficiency as does Posner's theory.

Rubin specifies four classifications of litigants according to their interest in the case as a precedent. First, the case where neither party is interested in the potential precedent provides no incentive to litigate, and, therefore, no pressure for the law to change. Second, the case where only one party is interested in precedent, that party will litigate until a favorable decision is obtained. The law will, therefore, lean toward the interests of the party who pursued the case. Third, the case where both parties are interested in the precedent value of the case, pressure toward efficiency will result. Fourth, the case where different types of parties have an interest in the same type of case, will lead to inconsistencies in the law due to differentiation of cases and the precedents that result. Neither litigant would have an incentive to capitalize on the inconsistency, so it would continue to exist.

Rubin goes on to argue that the evolution of those rules where an evolution would take place toward efficiency will be faster as current rules are more efficient, as net court costs are lower, and as inefficient rules are less entrenched in society. Another authority on the subject, George Priest, built on the model proposed by Rubin.

George L. Priest, in his article, "The Common Law Process and the Selection of Efficient Rules," argues that even though the common law is not or may never be completely efficient, there exists a strong tendency toward efficient outcomes.[4] He believes that inefficient rules impose greater costs on the parties subject to them than do efficient rules. He argues that this is what motivates a greater proportion of inefficient rules to be litigated and relitigated than are efficient rules. Thus, over time, leaving the common law more efficient than before. In this argument, Priest assumes transaction costs to be positive in the real world because without transaction costs inefficient rules would not exist.

Priest begins by concluding that due to the positive transaction costs found to exist, inefficient rules impose greater costs on the parties involved than do efficient rules. Because litigation will be more likely than settlement where, ceterus paribus, the "stakes" are greater, disputes under inefficient rules are more likely to be litigated than are disputes arising under efficient rules. Inefficient rules will be more likely to be reexamined because they will appear in litigation in higher proportions than efficient rules. Priest argues that other characteristics like differences in parties' expectations of success, aversion to risks, litigation costs, settlement costs, and differences in litigiousness can be ignored due to the unlikeliness of them differing systematically between

efficient and inefficient rules.

Priest also goes on to argue that judges are unable to influence the relative efficiency of the common law because legal rulings will contain a greater proportion of efficient rules than they may prefer or would like to permit. This is because if the majority of relitigated rules are inefficient, then the majority of standing rules will be efficient. This limits the judiciary's power to influence the law.

Priest gives an example of how this works. Assume that judges' decision making is completely random, that is, the likelihood of a rule being either efficient or inefficient is 50 %. If 100 cases are litigated, 50 efficient and 50 inefficient will result. Following the argument that a greater proportion of inefficient rules will be relitigated, assume that 60% inefficient and 40% efficient rules will be relitigated. This means 30 inefficient and 20 efficient rules will be relitigated, totaling 50. This will result in 25 inefficient and 25 efficient new rules. Adding these to the previously settled cases, 55 efficient and 45 inefficient rules now exist. thus the tendency toward efficiency exists. Over time, if the judicial bias toward efficiency (in this case 0.5) and the proportions of efficient and inefficient relitigations remains constant, the share of efficient rules will reach an equilibrium level. This equilibrium level will increase as judicial bias towards efficiency and the rate of litigation of

inefficient rules increases. Priest believes that the relitigation rate of inefficient rules is an indirect measure of the inefficiency of the individual rules promulgated. As the inefficiency increases, the costs increase causing the relitigation rate to increase.

Where Rubin argues that the common law tends toward efficiency only where both parties have a continuing interest in the rule as precedent so they will take directly into account more of the costs of the inefficiency of the rule, Priest believes this to be incorrect. He argues that greater costs impose greater litigation if the party involved bears all the cost or not. Priest also believes it unnecessary to examine judicial preferences or ideologies to predict the course of the law. He explains that although ideology may influence the equilibrium level of efficient rules, it cannot affect the process that leads to the survival of the efficient or inefficient rules.

The implications that this paper has are two-fold. First, the rate at which efficient outcomes will be achieved is a function of judicial bias toward efficiency, the frequency of relitigation, the rate of social change of conditions underlying the disputes, and the adaptability of the surviving precedents. Second, the predictive ability of attempts to explain common law decision making is likely to be enhanced by attention to the forces that systematically affect the amount of litigation. Priest's and Rubin's models have been scrutinized and tested by at least one

theorist, John Goodman.

John C. Goodman, in his article, "An Economic Theory of the Evolution of Common Law," disagrees to an extent with the theories proposed by Posner, Rubin, and Priest.[5] He believes that a limitation exists in Posner's argument that judges prefer efficiency or need have no other motivation which would produce a bias toward inefficiency. Goodman believes that even if it were true, it is largely conjecture about facts that can be difficult to verify. He believes a problem also exists with Priest and Rubin's argument that the more inefficient a rule is, the greater costs it brings and the higher probability that it will be challenged. Goodman believes that this ignores the way precedents were formed in the evolution of the common law. His view is that binding precedents only arise from a series of similar decisions in separate cases. If judges use random decision making techniques, then no clear precedent will appear. Continued litigation will produce efficient results only when efficient decisions have a greater probability of being made.

Goodman, in this paper, proposes a third explanation of the development of common law. He doesn't assume any type of litigation rate or any particular motivation for judges. He does assume, though, that judges are susceptible to persuasion by the litigants in a case before him.

His model is that of an adversarial system. The probability of winning a favorable decision depends on the

efforts put out by the litigants to influence the court and by the weight of any judicial bias present. The efforts mentioned above incur certain legal costs. As incentive to litigate increases, so do the efforts made by the litigants causing the cost incurred by them to increase as well. The fundamental assumption in this model is that any increase in legal costs incurred leads to some, however small, increase in that litigant's probability of winning. Assuming only diminishing returns in legal expenses, an equilibrium will always exist in this adversarial model. If the court is unbiased, the party with the greater stake in the case will always, assuming in equilibrium, have the greater probability of winning. This also assumes that both parties have the resources available to spend in litigating the case. Since the litigants are motivated by private and not social gains, if the ratio of private benefits from a favorable decision reflects accurately the social benefits or at least doesn't distort the social benefit ratio, over a series of cases,then an efficient precedent will be established.

Goodman points out one main implication from his conclusions. That is, the common law will tend to be Pareto Optimal if the court is unbiased, the private benefit ratio between parties is representative of the social benefits which would result if it were law, and over a series of cases, the most frequent outcome becomes general law. Even more work has been done on this body of theory. Following

in Priest's and Rubin's footsteps is R. Peter Terrebonne.

R. Peter Terrebonne, in his paper titled,"A Strictly Evolutionary Model of the Common Law," presents a model which follows in the footsteps of work done by Rubin and Priest.[6] It tests the proposition that inefficient rules are litigated more often than efficient ones.

This model makes eight separate assumptions in the context of an accident liability rule. The most important of them are as follows. First, he assumes that rules litigated more frequently have a lower probability of survival. Second, he assumes that the defendant could prevent the accident by investing in accident avoidance. Third, he assumes the plaintiff can bring suit against the defendant, and if he wins, he will receive compensation equal to the damages arising from the accident. Fourth, he assumes a strategy is defined as an Evolutionary Stable Strategy(ESS) if it has a higher realized average return than the alternative strategy. If an accident occurs, a strategy that includes bringing suit by the victim is an ESS if the probability of the plaintiff winning(P) is greater than the legal cost paid by the plaintiff(L) divided by the damages recovered(D), ie. $P > L/D$. If a strategy does not include bringing suit, it is an ESS when the inequality is reversed, ie. $P < L/D$.

Terrebonne presents two cases in his model which define economic efficiency as the minimization of social costs. In the first case where the cost accident avoidance is less

than the damages arising from the accident, efficiency is approached if investing in accident avoidance was an ESS for the defendant. In the second case where the cost of accident avoidance is greater than the damages, efficiency is approached if not investing in accident avoidance was an ESS for the defendant, and not bringing suit was an ESS for the plaintiff.

In order to test if the common law favors efficiency, a three step process is suggested in the model. First, it is necessary to determine which strategies are ESS's for which rules. Next, assuming that most litigants adopt their ESS, it is necessary to determine whether the rules approach economic efficiency. Finally, it is necessary to test if evolution favors continuance of efficient rules and elimination of inefficient rules. To do this it must be shown, according to the assumption, that the rate of litigation is less for rules that promote efficiency. Efficiency may not be approached if litigation costs are high since they may prevent the elimination of inefficient rules.

The conclusion Terrebonne makes is that his model supports the claim that the evolution of the common law favors rules that promote efficiency. In all cases, except where litigation costs are high, both parties adopt strategies with high rates of litigation for inefficient rules and low rates for efficient rules. Terrebonne admits that the model assumes quite a bit. He believes that it

remains to be seen whether more detailed and empirical models will come to the same conclusion.

Not all theorists agree that the common law tends toward efficiency. There is at least one who suggests that the common law does the exact opposite. He suggests that the evolutionary process leads away from efficiency.

The Yale Law Journal staff in the note titled, "The Inefficient Common Law," dispute the conclusion that common law rules evolve toward efficiency.[7] They propose a new economic model of the development of common law that casts doubt on the ability of the common law process to achieve efficiency and disputes the view that the common law is a source of economically efficient legal rules. This analysis is, in terms of accident or liability rules, concentrating on how unforeseen losses are produced and allocated.

It begins by defining an efficient rule as one that maximizes social wealth by providing incentives to invest in accident prevention that minimizes the sum of accident avoidance and accident damage costs. A rule may then be inefficient if it either leads to too great or to little accident prevention by the parties involved, or if it misallocates the burden of production of accident avoidance between parties.

This note classifies rules into three categories. Non-reckless rules are ones where too much accident prevention and sub-optimal damage occur; efficient rules are those that are defined above; and reckless rules are those where

insufficient accident prevention and excessive accident damages occur. This note claims that some scholars' beliefs that efficient rules dominate judicial is caused by a failure to make the distinction between non-reckless and reckless rules.

This model predicts that reckless rules will eventually dominate the common law at the expense of non-reckless and efficient rules. The process is as follows: First, reckless rules are more likely to be litigated. Second, rules litigated more often are more likely to develop a precedent pool favorable to their replication.[8] Finally, rules with large favorable precedent stock will eventually dominate less favored rules. There are two ways recklessness affects the rate of litigation. The occurrence effect says that as a rule increases in recklessness, it results in an increased number of accidents. Increased litigation of reckless rules follows due to the larger number of accidents to litigate. The severity effect says that as a rule increases in recklessness, the severity of accidents increase causing accidents to be more expensive. Increased litigation follows due to the greater stakes involved.

This note explains that common law evolution is based on litigation of rules supported by precedents. The pool of available precedents is distributed into those unlitigated in the previous period, those resulting from revising old precedents in the previous period, and those litigated and upheld in the previous period. This note claims the first

two divisions of the pool will not change much from period to period. The last group, they claim, will tend to shift the pool toward recklessness. This is due to reckless rules being litigated more often and accumulating favorable precedent stock. The more reckless cases rise, the more the pool will be dominated by reckless rules, a sort of snowball effect. Judicial bias against recklessness can counteract the effect, but it is unlikely that the judiciary would be aware of the standard of efficiency and, therefore, so biased toward it.

The main implication of the model is that liability rules will become more reckless over time. They support this contention with evidence showing that the common law tort system has been replaced recently by a statutory tort system. They claim that as the common law increased in recklessness, it became necessary for the legislatures to reduce this recklessness by making more efficient statutory law.

The efficiency discussed above was in terms of minimizing social costs. Efficiency can also be discussed in terms of efficiency of allocation and distribution.

In chapter 23 of An Economic Analysis of the Law, Posner compares the market with the legal system in terms of their abilities to allocate resources.[9] The processes by which these two systems allocate can be thought of as different types of tatonnement systems. If the common law system is efficient, and if the process by which it gets

there is a groping, evolutionary process, then it can be thought of as a tatonnement process. Although Posner believes that the common law does evolve toward efficiency, he does not believe that it is by a groping process. His assumption that judges have a bias toward efficiency makes the process one that is based on preference. There are similarities and differences in the two systems which Posner brings out under the assumption of a judicial bias toward efficiency.

The first similarity is that both systems use price equal to opportunity cost as a measure of its efficiency. If the price the violator has to pay is higher than the value derived from the violation, then efficiency requires that the law not be violated. The legal system, like the market, confronts the potential violator(buyer) with the potential costs of the act, but it still leaves the decision whether or not to pay the costs up to the individual.

The second similarity is that both rely on private individuals, motivated by economic self interest, to power the system. The reliance is not on altruists or officials of the system. In the legal system, victims promote enforcement of the law through their incentives to collect damages due to the violation of the law. Other parties, the state, attorneys, or public employees will have less motivation to do so because of their lack of economic self interest. They are only indirectly affected by the violation and subsequent enforcement of the law. Because of

this, the legal system has relatively few public employees involved in managing it, as is the case in the market.

The third similarity is that both systems are competitive. The law is an adversarial (plaintiff v. defendant) system, while the market is a different adversarial system (buyer v. seller). The competition does differ, though, in that the market is competive in terms of entry, while the legal system is competive in terms of rivalry. The critical stage of the legal process is the competition between the plaintiff and the defendant for a favorable ruling by the judge.

The fourth similarity is that both systems are impersonal and subordinate the distributive considerations in the system. The "invisible hand" of the market has a counterpart in the law: the aloof disinterest of the judge. The judge has no economic interest in the cases before him. The same is true of the jurors. This is reinforced by the rules of evidence that exist in the common law process. Neither the judge or the jury can take into consideration such things as the economic conditions of the parties in making their decision.

The tatonnement process in the legal realm is not entirely the same as in the market, though. The major difference is that the market is much more efficient when it comes to determining preferences than is the legal system. In the market, the buyer has to back up his value assertions with money. This willingness to pay gives greater

credibility to a claim of greater value. The law simply has a problem identifying preferences which carries with it two consequences. First is that common law courts have a tendency to avoid major allocative judgments. The "custom" defense for negligence, as an example, shows that the costs of overcoming the custom will most likely exceed the plaintiff's stake in the outcome of the case.

The second consequence is that the legal process suppresses variances in value. Standards of subjective value, while economically correct, are hard to administer because of the difficulty of proving the higher value. This is a real problem with respect to pain and suffering resulting from an accident. Trying to prove that there is a specific value to a lost body part, for example, is impossible. There is a tendency, therefore, to award an average or standard value.

Posner shows two implications from the deficiencies of the legal system in its allocative process. First, it is desirable to minimize the use of cost-benefit analysis in legal decisions as far as it is consistent with the efficient use of resources. Second, that people should be prevented from changing a market transaction into a legal transaction unless the costs of the market transaction are very high. This is the justification of punishing theft, for example, when apprehension of the violator is certain.

These are Posner's views on the ability of the legal system to allocate efficiently. If you remove the

assumption of a positive judicial bias toward efficiency, the two systems can be compared as tatonnement systems. Priest and Rubin have taken this approach.

Is the evolution of the common law a tatonnement process? In my opinion, it is. A tatonnement system is one where, through a groping, self-equilibrating process, the system will reach efficiency without a need for intervention. I believe the models developed by Rubin and Priest to be tatonnement. In the market, the tatonnement system is powered by the self-interest of the parties involved through the mechanism of voluntary, positive-sum transactions. In the common law, Rubin and Priest's models are also powered by the self-interest of the parties involved in the dispute, but the mechanism is not the same. In the judicial system, transactions are not voluntary. I believe the mechanism in Rubin and Priest's model which drives the tatonnement process is the relitigation of inefficient rules. As long as the rate of litigation of inefficient rules is greater than the rate of litigation of efficient rules, the process will tend toward efficiency.

Now that it can be shown that the legal system may be thought of as tatonnement, the question to ask is,"So what?" The response is simple. If it is shown that the legal system is tatonnement, then when market costs are inhibitably high, questions of allocation can be addressed by the legal system. The results will be similar to those of the market in terms of efficiency.

A second consequence is that the legal system can be used as an alternative to the Legislative/Bureaucratic system which is known not to be a tatonnement system. The interface between the judicial and legislative/bureaucratic systems will shift, increasing the role of the judiciary and decreasing the role of the legislative/bureaucratic system in terms of the conflict resolution process. This is due to the strong ideological evidence provided by the fact that the judiciary is seen as tatonnement. The role of the legislative/bureaucratic system cannot be eliminated though. The market and the judiciary will fail on occasion, and the legislative/bureaucratic system will be needed to correct the failures using statute and administrative regulation.

The above analysis of the common law includes some strong points as well as some deficiencies. In my opinion, the common law is not a totally efficient body of legal precedent. Posner has brought out some of these inefficiencies.

When it comes to the proposed processes by which the law may or may not become efficient, I believe the common law can evolve toward efficiency in the theoretical sense. The assumption made by Posner that judges prefer efficiency I believe to be incomplete. Efficiency may be the basis by which some judges decide cases, but it cannot be assumed that all judges have this bias.

The models proposed by Priest and Rubin are based on a different assumption that I believe to be better founded.

The assumption that inefficient rules are litigated more frequently makes more logical sense. The assumption that follows, that because they are litigated more frequently, the inefficient rule has a greater probability of being overturned, is more theoretically plausible than the Yale Law Journal Staff's assumption that greater litigation of inefficient rules is more likely to develop an inefficient body of precedent.

There is one implication of the acceptance of the above assumptions; Priest and Rubin may have proven too much. If you assume that a rule litigated more frequently will be overturned, then anyone willing to pay the costs of the repeated litigation will be able to achieve any result they wish in the courts. They will continue to go to court until the ruling is in their favor. This possible result would definitely favor corporate interests.

## NOTES

1) R. Posner, An Economic Analysis of the Law, Little, Brown, and Company, Boston, 1972, pp.1-95.

2) P. Rubin,"Why is the Common Law Efficient?" JLS, V.6, No.1, pp.51-64.

3) (1-R)(Ta-Tb) > 2C Where "R" is the probability that the inefficient rule will continue, "Ta" and "Tb" are the accident and prevention costs for A and B respectively, and "C" is the cost of litigation for one party. "C" is fixed and equal for both A and B.

4) G. Priest,"The Common Law Process of the Selection of Efficient Rules," Journal of Legal Studies(JLS) V.6, No.1, pp.65-82.

5) J. Goodman,"An Economic Theory of the Evolution of the Common Law," JLS, V.7, pp.393-406.

6) Terrebonne,"A Strictly Evolutionary Model of the Common Law," JLS, V.10, pp.397-407.

7) Yale Law Journal Staff,"The Inefficient Common Law," Notes, Yale Law Journal. V.92, pp.862-887.

8) This assumption is the point of deviation from the Priest and Rubin models. Where Priest and Rubin assume that greater litigation leads to a higher turnover rate, this article assumes greater litigation leads to an inefficient body of precedent.

9) R. Posner, An Economic Analysis of the Law, Little, Brown, And Company, Boston, 1972, pp.320-332.