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An Examination of Variables Relevant to Models of Legal Evolution toward Efficiency

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Abstract

The notion that an "invisible hand" operates to enhance "the wealth of nations" suggests that, over time, judicially-produced rules progress toward efficiency as a byproduct of biases governing the selection of cases that are litigated. The decision to litigate a case involves a balancing of the costs of litigation with the potential gains of litigation. Arguably, because small stakes tend to be dominated by litigation costs, and because inefficient laws created by prior judicial rulings (precedent) tend to involve higher stakes than efficient laws, disputes governed by inefficient laws may be litigated with greater frequency than those governed by efficient laws, resulting in natural propulsion toward a state of economic efficiency. The decision to litigate a dispute, however, involves not only a balancing of pecuniary costs with pecuniary stakes. Rather, a host of psychological (and emotional) variables pervades such balancing. These variables, and their role in the common law evolution toward efficiency, are the subjects of this paper. Attorneys whose cases failed to settle and proceeded through litigation have been interviewed for the purpose of examining the prevalence of certain psychological factors involved in the decision to litigate. Findings suggest that variables extraneous to the pecuniary costs and stakes of litigation, such as acrimony, stubbornness, acting on the basis of principle, and disinclination to treat property rights as readily commensurable with cash, are indeed prominent in cases that resulted in failed settlements.

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