

Gordon Tullock's Critique of the Common Law

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Abstract

This article is part of a symposium on the work of Gordon Tullock held in connection with the presentation to Tullock of the Lifetime Achievement Award of the Fund for the Study of Spontaneous Orders at the Atlas Research Foundation for his contributions to the study of spontaneous orders and methodological individualism. This contribution to the symposium studies Tullock's critique of the common law. Tullock critiques two specific aspects of the common law system: the adversary system of dispute resolution and the common law process of rulemaking, contrasting them with the inquisitorial system and the civil law systems respectively. Tullock's general critique is straightforward: litigation under the common law system is plagued by the same rent-seeking and rent dissipation dynamics that Tullock famously ascribed to the process of legislative rent-seeking. This article reviews Tullock's theoretical critique and empirical studies on both issues. The article concludes that Tullock's critique of the adversary system appears to be stronger on both theoretical and empirical grounds than his critique of the common law system of rulemaking. (JEL Codes: B31, D72, K10, K12, K13, K41)

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By Todd J. Zywicki¹

I. Introduction

Much of the research agenda of the modern law and economics movement has been predicated on the belief in the economic “efficiency” of the common law and positive explanations for it. As is so often the case, Gordon Tullock has been an iconoclast in the law and economics intellectual movement in dissenting from this consensus. But, as is so often the case as well, although contrarian in his conclusions, Tullock’s objections are not merely contrariness. Rather, Tullock raises simple, yet piercing, questions that challenge the conventional wisdom. Tullock’s primary conceptual contributions to law and economics literature are twofold. First, he raises fundamental challenges to previously-unexamined assumptions of the mainstream law and economics movement. Second, he raises coherent challenges to the conclusions of the mainstream law and economics movement, thereby denying that many of these conclusions can be settled as an *a priori* matter, and instead forcing them to be confronted as empirical questions. As this paper will show, empirical examination both confirms and rejects Tullock’s particular hypotheses; nonetheless, law and economics scholarship has been enriched by Tullock’s posing of the questions and the empirical examinations they have spawned.

This article focuses primarily on Tullock’s critique of the common law broadly identified, rather than his extensive and important contributions in other areas of law and

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economics. This focus is not intended to slight Tullock's important contributions to many doctrinal areas of law, such as criminal law and civil procedure.² Instead, the focus is intended to get at the underlying root of Tullock's critique of the common law, what amounts to a critique to the notion that the common law and the adversary process that is associated with the common law can be understood as a beneficent example of spontaneous order. Although there are important differences in the thinking of many enthusiasts of the common law,³ they all share a fundamental underlying assumption that in the most important respects the common law evolves according to an "invisible hand" process and that individual, self-interested action generally tends toward the creation of an efficient legal regime. Stated otherwise, like other invisible hand or spontaneous order explanations of social institutions, the standard law and economics model argues that although the common law and its related processes (such as the adversary process of litigation) are shaped by decentralized, non-centrally planned individual actions, the outcome of these decentralized actions is superior to what would be the result were the legal process more centrally planned. Even for those such as Posner who would vest more authority and discretion in judges to make the law than thinkers such as Hayek, it still remains the case that they believe that the common law fundamentally is a socially-beneficent spontaneous order process.

Tullock, by contrast, doubts that the uncoordinated actions of individual judges, juries, and litigants will be conducive to the generation of an efficient legal system.

² Tullock also provided a far-reaching and influential critique of the use of citizen juries to resolve disputes. This is an important issue, but one that is somewhat *sui generis* to the issues here in that the pros and cons of the use of the jury is largely separable from the question of the efficiency of the common law. Thus, the jury will not be addressed in this paper, except to the extent that it reflects specifically on the institutional structure of the common law.

³ See Todd J. Zywicki and Anthony B. Sanders, *Hayek, Posner, and The Economic Analysis of Law* __ IOWA L. REV. __ (Forthcoming 2008).

Rather, he predicts that the decentralized process of the common law system is prone to socially suboptimal outcomes, at least as the common law system operates today. Tullock believes that the common law and adversary processes create incentives for individuals to act in zero-sum and negative-sum manners that will tend to the generation of suboptimal social outcomes, relative to other legal systems.

In contrast to the common law and adversary systems, Tullock expresses enthusiasm for the civil law and inquisitorial systems of law-making. It appears that Tullock's enthusiasm is based on the conclusion that the civil law and inquisitorial systems were *relatively* superior the common law and adversary systems, rather than a conclusion that they were in some sense "optimal." His praise for Continental versus Anglo-American legal institutions fundamentally rests on the argument that at least as the systems operate today, the more centralized and essentially "centrally-planned" civil law and inquisitorial systems are superior to the more decentralized, spontaneously-ordered common law systems. The common law system tends to the production of a malign, not beneficent spontaneous order, and while the civil law system has its own problems, Tullock insists that it is far superior to the common law.

There are thus two vectors of analysis for thinking about the common law as a spontaneously-ordered system and in comparing it to alternatives. The first level of inquiry relates to the particular case at hand—which system produces greater accuracy in resolving the case at hand for the lowest cost, the adversary system or the inquisitorial system? In the adversary system, the outcome of the case is driven largely by the competing, uncoordinated, decentralized efforts and private investments of the, whereas in the inquisitorial system the outcome is motivated by the efforts of the judge, a sort of

central planner who determines both the level of investment to be made in truth-finding in a given case as well as the margins on which to deploy those resources. The second level of inquiry relates to the comparative value of different systems as rule-making devices for society at large, across cases and through time, in terms of the evolution of law as a system of social rules to enable greater coordination and economic efficiency by individual actors in other cases. Which system provides the most effective rule-generating system for maximizing social coordination and economic efficiency, the common law system or the civil law system? The rules of the classical common law system emerge from the decentralized and largely uncoordinated efforts of many individual judges interpreting and applying the law to disparate fact situations, from which a coherent pattern of principles and precedents spontaneously arise, similar to the way in which prices emerge in a market from the disparate actions of many individuals. By contrast, the civil law system creates legal rules through a more centralized process of legislation that is then subject to interpretation and implementation by the legislature.

The remainder of this paper proceeds as follows. Part II sets out a conceptual framework for thinking about legal process and legal evolution as spontaneously ordered systems. Part III examines Tullock's critique of the adversary system of litigation as a process for resolving individual disputes and the comparison to the inquisitorial system. Part IV examines Tullock's critique of the common law as a social rule-making system and his comparison to the civil law system. Part V concludes.

II. Spontaneous Order and the Common Law

A spontaneous order is a coordinated order among persons that emerges from the self-motivated activities of individuals in which individual actions are combined into a larger concatenation of coordinated activity. Although produced from the purposive activities of individuals, the overall order itself is not the product of any particular person or persons' contrivance.⁴ It is thus often said, following the Scottish Enlightenment's Adam Ferguson, that a spontaneous order is one that is "the product of human action but not human design." Moreover, although the individuals that comprise the order follow individual purposive plans, the overall order itself has no specific direction or "purpose," but rather is a purpose-independent forum through which individuals pursue and coordinate their diverse plans. A spontaneous order can thus be distinguished from a "designed" or "constructed" order, which reflects an effort by an individual or group of individuals to design an institution for a particular purpose.

Examples of spontaneous orders abound: language, money, traditions, "the market." A famous and often-cited example of spontaneous order is the common law.⁵ Statutory law, such as the Napoleonic Code, is designed by its authors (the members of the legislature) according to a conscious plan to accomplish particular goals. Statutory law is abstract and prospective in nature, aspiring to design generally applicable rules that can be applied deductively to particular cases that arise. The classical common law, by contrast, results from many judges resolving particular disputes involving particular individuals in concrete fact situations, from which emerges abstract and generalizable concepts.

⁴ See Norman Barry, *The Tradition of Spontaneous Order*, LITERATURE OF LIBERTY, Vol 5, No. 2 (Summer 1982), pp. 7-58, available in <http://www.econlib.org/library/Essays/LtrLbrty/bryTSO.html>.

⁵ F.A. Hayek developed this concept most extensively. See F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY, Vol. 1, "Rules and Order." See also Michael Polanyi, *Two Kinds of Order*, reprinted in THE LIBERTARIAN READER 225-232 David Boaz ed. (Free Press 1997).

Quite often it will be the case that the social order that emerges as a spontaneous order will be socially optimal. Spontaneous orders such as the division of labor enable parties to specialize and thereby to increase the overall social product compared to each working alone. Markets and exchange will allow an efficient “pooling” of dispersed individual knowledge to increase productivity, especially tacit knowledge possessed by various individuals that is difficult to articulate and thereby transmit to others. Spontaneous orders may be more flexible and robust than designed orders, especially if the order and the rules that govern it are the product of a decentralized evolutionary process that allows for decentralized testing and improvement at the margins over time.⁶

The mere observation of the existence of a spontaneous order, however, does not necessarily imply anything about the social optimality of the spontaneous order, merely that an order exists that results in the coordination of individual activities without central design. In particular, a spontaneous order may represent an order that is optimal from a local perspective but not a global perspective. Thus, for instance, the system of Roman numerals presumably emerged as spontaneous order; nonetheless, it is possible that it was less efficient than Arabic numbers in terms of performing complicated mathematical or financial calculations. An arms’ race is a spontaneous order, in that the order arises from the uncoordinated activities of the participants into a stable order, yet given the social waste of duplicative arms’ expenditures it would be welfare-enhancing if the spontaneous order could be replaced by a designed order that eliminated the arms’ race, *ceteris paribus*. Prisoner’s dilemma games similarly result in a form of spontaneous order, in the sense that the parties activities are coordinated and predictable but yet suboptimal, and

⁶ See A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 NORTH CAROLINA LAW REVIEW 409 (1999).

outcomes could theoretically be improved by replacing the uncoordinated actions of the participants with an overarching designed order.

This suggests that two types of spontaneous orders are thus conceptually possible—benevolent or malign spontaneous orders. A benevolent spontaneous order is one that tends to produce a globally-optimal social result when compared to alternative realistic ways of organizing that element of society.⁷ A malign spontaneous order is one in which a stable order emerges, but is suboptimal when compared to an alternative system that can be realistically achieved. The test of the value of a spontaneous order, therefore, is whether it conduces to the production of results that are more socially-beneficial than alternative arrangements.

To illustrate the point, consider the distinction drawn by James Buchanan in comparing the process of “profit-seeking” in the market versus “rent-seeking” in politics.⁸ Regardless of the forum, whether private market activity or political activity, individuals will be engaged in the relentless pursuit of economic “rents,” i.e., “that part of the payment to an owner of resources over and above that which those resources could command in any alternative use” or “receipt in excess of opportunity cost.” As Buchanan observes, “So long as owners of resources prefer more to less, they are likely to be engaged in rent seeking, which is simply another word for profit seeking.” In the private market, the individual pursuit of economic rents (profits) by self-interested individuals produces “results beneficial to all members of the community.” Notably, Buchanan invokes the conceptual structure of spontaneous order in explaining how this result comes

⁷ It is important to stress that the alternative orders must be *realistic*, in the sense that they are achievable in practice, not just a comparison to an ideal alternative.

⁸ See James M. Buchanan, *Rent Seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3-15 (James M. Buchanan, Robert D. Tollison, and Gordon Tullock eds. (Texas A&M Press, College Station, TX,1980).

about, “In an idealized model of market order, profit seeking as an activity produces consequences neither predicted nor understood by any single participant, but ‘good’ when evaluated as a characteristic of the order itself.”⁹ The relentless search by *individual* entrepreneurs to earn economic profits results in economic growth and development at the *social* level but only as an unintended by-product of individual self-interested actions. The attainment of short-term “monopoly” rents (more accurately “quasi-rents”) generates entry by competitors that dissipates those profits. Thus, in the institutional structure of the market, the uncoordinated, self-interested actions of individual actors aggregate into a benevolent spontaneous order that benefits all involved. Buchanan refers to the socially beneficent spontaneous order of the market as “profit seeking.”

Under different sets of institutional rules, however, the “unintended results of individual efforts at maximizing opportunities may be ‘bad’ rather than ‘good.’”¹⁰ Under these institutional settings, individual efforts to maximize value generate social waste rather than social surplus. For instance, rather than securing economic rents through making a new or better product, one can instead secure a protective tariff or anti-competitive economic regulation. In a competitive political market to secure laws and regulations that benefit oneself and hamper competitors, “entrepreneurs” will expend real resources simply to gain a political advantage, with no beneficial unintended consequences to consumers or society.¹¹ The uncoordinated rent-seeking activity of political “entrepreneurs” results in negative unintended consequences to society, as in equilibrium rent-seekers will dissipate all of the economic rents potentially available

⁹ Buchanan, *Rent Seeking and Profit Seeking* at 4 (cited in note 8).

¹⁰ *Id.*

¹¹ Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *Western Econ J* 224 (June 1967).

from investments in redistributive activity. A spontaneous order of full competition for government favors and dissipation of economic rents results, but the end result of this competition is the net generation of social waste rather than increasing social welfare. Human nature and individual self-interested behavior is identical in both cases; the differing outcomes result from the institutional rules that provide incentives for the individuals and shape the interactions between them.

This brings us at last to Gordon Tullock's critique of the common law. The common law, as noted, typically is extolled as an example of spontaneous order. There are two distinguishing features of the Anglo-American common law system. First, disputes are resolved through the adversary system, where each party hires his own lawyer to present "his" view of the case, with respect to both the law and the facts. This approach can be distinguished from the inquisitorial system that prevails throughout continental Europe, where most fact-finding activity is conducted by the judge as a purportedly unbiased expert. Second, the substantive rules of the common law emerge piecemeal out of these individual cases (which are decided by the adversary system), rather than being part of a legislative process that produces a comprehensive set of rules.

Tullock's critique of the common law is straightforward—in contrast to Hayek, Tullock finds the common law system (at least as it exists today) to be a malign form of spontaneous order. He models the competing litigants in the adversary system as essentially rent-seeking parties pleading for favors from the judicial decision-maker. There is little reason to believe, he argues, that this clash will be likely to result in socially beneficial results, as opposed to mere rent-dissipation with random results. Similarly, the development of the common law itself is unlikely to lead to efficient

results, but instead should reflect the same sorts of rent-seeking pressures as legislative decision-making. As a result, the common law should be no more efficient as a macroeconomic system than the civil law.

III. Tullock's Critique of the Adversary System¹²

Consider first the economic question of the most effective means for the resolution of discrete disputes between private parties. From an economic perspective, the optimal procedural regime for resolving disputes arises from the interaction of two offsetting cost functions, with the optimal regime being that which minimizes these joint costs. The first cost relates to the accuracy of the outcome of the case in imposing liability—more accurate results are to be preferred to less accurate results *ceteris paribus*. Second, less-expensive systems of dispute resolution are to be preferred to more expensive systems *ceteris paribus*. The costs of inaccuracy can be referred to as *error costs* and the costs of dispute resolution can be referred to as the *administrative costs* of the system. The optimal system of dispute resolution, therefore, is that which minimizes the *joint* error and administrative costs of the system.¹³ Consider each of these elements.

A. Error Costs and Administrative Costs

1. Error Costs and Accuracy

¹² The discussion in this section is based on Gordon Tullock, *Optimal Procedure*, in TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE, reprinted in The Selected Works of Gordon Tullock, Vol. 9, pp. 274-290 (Liberty Fund, Indianapolis, In., 2005).

¹³ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 JOURNAL OF LEGAL STUDIES 399-458 (1973); Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 Nw U L Rev __ (Forthcoming 2007).

First, an efficient dispute-resolution scheme should seek to minimize error costs, *ceteris paribus*. From a social perspective, legal rules provide incentives or “prices” informing citizens on how to behave, and more accurate case decisions send clearer signals to individuals. From an individual perspective, the promise of more accurate case resolutions *ex post* will tend to reduce the costs to parties of contract *ex ante* by permitting them to rely on third party adjudicators to resolve disputes that arise (such as under a contract), thereby relieving them the costs of alternative mechanisms for accomplishing their goals, such as informal means of reputation, repeat-dealings, self-enforcement (such as bonding, collateral, or the use of hostages), and vertical integration.¹⁴ By reducing the costs of contracting, the promise of more accurate *ex post* resolution of disputes reduces the transaction costs of contracting and thereby increases the gains to trade between the parties.

There are two types of errors that can affect the accuracy of a given dispute-resolution system, false positives and false negatives. A false positive occurs when liability is erroneously imposed by the Court; a false negative occurs when the Court erroneously fails to impose liability, such as where the defendant had a legal duty to undertake some action which had a social benefit, and the court erroneously fails to compel him to do so. It will be assumed for purposes of the analysis here that the costs of false positives and false negatives are symmetrical.¹⁵ Total error cost is the sum of all false positives and false negatives produced by the system.

¹⁴ See Todd J. Zywicki, *Toward a Theory of Contract Governance* (working paper, George Mason University School of Law, August 2006).

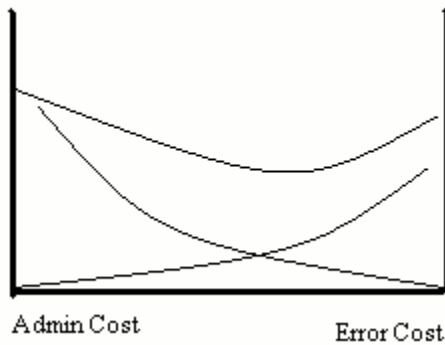
¹⁵ This is likely an accurate assumption for civil litigation. For criminal law enforcement, American society seems to have reached a working (but perhaps unreflected) consensus that the costs of a false positive that results in wrongful imprisonment is greater in magnitude than a false negative (erroneous acquittal), as reflected in the ancient aphorism that “it is better that n guilty men go free than one innocent man be wrongly convicted.” The exact “exchange rate” between false positives and negatives has been expressed

2. Administrative Costs

The costs of investigating and trying cases can be defined as *administrative costs*. In theory, accuracy can be increased at the margin by increasing resource investment in truth-finding. In investigating a murder, for instance, if the police allocated 25 detectives to the case rather than 1, presumably it would increase the likelihood of accurately resolving the case. The constraint, of course, is the opportunity cost of allocating 25 detectives to trying to solve a single crime when from a social perspective it may be more socially-optimal to allocate at least some of their efforts to investigating other cases. Similarly, it would be possible to require an extensive investigation and trial for every speeding ticket, yet these citations are resolved a summary, and often non-judicial, manner. As a result, the incidence of errors, both false negatives and false positives, is likely to be higher for speeding tickets than for other more serious crimes. Nonetheless, the limited severity of the punishment imposed implies that additional administrative resources dedicated to truth-finding are not justified for speeding tickets.

Given this apparent tradeoff between error and administrative costs, it thus becomes possible to describe a joint cost-minimization model of the litigation system, with the objective being to minimize the joint sum of error and administrative costs.

differently over time by different theorists. See Alexander Volokh, *n Guilty Men*, 146 U. PENN. L. REV. 173 (1997). If this is the case, and it seems to be a normative question of how heavily to weigh the costs of wrongful convictions versus wrongful acquittals, then it simply illustrates that in the criminal system the costs of false positives and false negatives is not symmetrical. On the other hand, it could be plausibly argued that in some situations the exchange rate runs in the opposite direction. If, for instance, criminal punishment deters multiple crimes against innocent victims, then punishment of some innocent defendants could theoretically reduce the total social cost of criminal activity, so long as the system was still *perceived* as being accurate.



In this model, the efficient level of resource investment (administrative costs) is determined by the diminishing marginal returns in terms of error costs. It is thus efficient to invest additional resources up to the point at which that investment substantially reduces error costs.

B. Tullock's Critique of the Adversary System

This analytical framework enables us to better understand Tullock's double-barreled attack on the adversary system as a device for dispute resolution. Tullock argues that when compared to the inquisitorial model of dispute-resolution, the adversary system is both *less accurate* and *more expensive* than the inquisitorial model. In other words, the adversary system is inferior under both measures of dispute resolution and thus inferior overall. Consider each of his arguments in turn.

Tullock argues that error costs will be higher under the adversary system than under an inquisitorial system. Indeed, Tullock's critique is even more fundamental. He argues that in the adversary system there is no fundamental tradeoff between error costs and administrative costs. This is because in the adversary system only the deserving party in the case is investing resources for the "truth" to come out. The adversary system "places little or no value on searching for the truth. It is a combat system in which

winning is the sole objective.”¹⁶ The investments of the undeserving party are made simply to obscure the truth from the finder of fact. He thus concludes, as an *a priori* matter that the inquisitorial system is inherently more accurate than the adversary system. His critique goes to fundamental heart of the adversary system, yet is so exceedingly straightforward and simple that it can be stated in one basic paragraph:

In the adversary proceedings, a great deal of the resources are put by someone who is attempting to mislead. Assume, for example, that in the average American court case, 45 percent of the total resources are invested by each side and 10 percent by the government in providing the actual decision-making apparatus. This would mean that 55 percent of the resources used in the court are aimed at achieving the correct result, and 45 percent at reaching an incorrect result. Under the inquisitorial system, assume that 90 percent of the resources are put up by the government which hires a competent board of judges (who then carry on an essentially independent investigation) and only 5 percent by each of the parties. Under these circumstances, 95 percent of the resources are contributed by people who are tempting to reach the correct conclusion, and only 5 percent by the saboteur. Normally we would anticipate a higher degree of accuracy with the second type than with the first.¹⁷

Elsewhere he similarly posits, “I should explain that I believe that European courts are less prone to error than American courts, but this is more a matter of feeling that their procedure is more likely to reach the truth than a decision based on actual statistical knowledge.”¹⁸ He adds, “I think [European courts] are more likely to be correct than American courts, but this is not an estimate based on real data.”

It follows from Tullock’s argument that increasing marginal expenditures on administrative costs in the context of the adversary system is not likely to increase the

¹⁶ Gordon Tullock, *THE CASE AGAINST THE COMMON LAW*, reprinted in *SELECTED WORKS*, Vol. 9 at 422 (cited in note 12)

¹⁷ Gordon Tullock, *The Economics of Legal Proceedings, Technology: The Anglo-Saxons versus the Rest of the World*, reprinted in *SELECTED WORKS*, Vol. 9 at 300 (cited in note 12). A similar discussion of the matter appears elsewhere in his work. See also *Law and Economics, On the Efficient Organization of Trials*, reprinted in *SELECTED WORKS*, Vol. 1 at 475 (cited in note 12).

¹⁸ Gordon Tullock, *Rent-Seeking and the Law*, reprinted in *SELECTED WORKS*, Vol. 5 at 187 (cited in note 12).

accuracy of the system. Litigation under the adversary system is an arms-race between those seeking to discover the truth and those seeking to obscure the truth. Thus, any further investments are just as likely to lead to less accurate rather than more accurate decisionmaking. “Indeed, the smaller the role played by trial lawyers,” he asserts, “the more likely it is that the outcome will be in accordance with the facts.”¹⁹

Tullock specifically analogizes litigation under the adversary system to interest groups engaging in rent-seeking activity to secure favorable legislation. As a result, he predicts that just as competition among interest groups will be likely to dissipate all of the rents generated by rent-seeking lobbying activity, all of the value at stake in litigation likely will be dissipated by the parties to the litigation. In other words, he predicts that the parties to the litigation will be likely to expend as much in competing litigation expenses as is at stake in the litigation. According to Tullock, estimates of the total cost of litigation in the American system suggest that the total costs of the litigation approximate the total amount at stake. These costs include not only the direct costs to the parties, but all other costs of litigation, from the maintenance of the court systems (including courthouse buildings and judicial and other public salaries), the misallocated human capital investments of litigation lawyers who rather than engaging in efforts to redistribute wealth through litigation could otherwise be engaging in socially productive activities (such as selling vacuums), and finally the opportunity costs of all of the largely involuntary participants in the system, such as witnesses, jurors, and the parties themselves.

Tullock charges that litigation under the adversary system is fundamentally a random process with little claim to producing reliably accurate results. The results in any

¹⁹ Tullock, *Case Against the Common Law* (cited in note 16).

given case will be the result of the investments of the parties in lawyers, expert witnesses, and other litigation expenses, rather than the intrinsic truth of the matter. Moreover, knowing this, the parties will invest in litigation as if it were an arms-race, with each party being willing to invest to try to gain a relative advantage over their rival. Each dollar invested in litigation expenses simultaneously increases that party's chance of winning and reduces the chance of the other.²⁰ Thus, as with an arms-race, the cost incurred by each party is incurred primarily to impose costs on the other party, and these investments simply cancel each other out. He says, "[T]he benefit to my case and the injury to the other case are identical. In other words, there is an externality falling on my opponent of exactly the same size as the benefit I receive."²¹ He notes that the problem is exacerbated under the so-called "American Rule" for legal fees and expenses where each party pays his own attorney, as compared the English "loser pays" rule. In the American system, the ability of each party to externalize costs on the other party raises the total expenses of litigation. In addition to direct costs, litigants can impose indirect costs on each other as well. For instance, a plaintiff can depose as witnesses senior officials of a defendant corporation, detaining them for hours under questioning (not counting preparation for the deposition itself), yet need not pay for the opportunity cost of the deponents' time. Nor are the parties likely to care about the burden that they impose on those who are not their clients, such as third-party witnesses, or the total social cost of their case, such as the cost to taxpayers from use of the court system and undercompensated quasi-conscripted jurors. Those costs are all externalized by both parties to the litigation.

²⁰ Tullock, *Rent-Seeking and the Law* at 189 (cited in note 18).

²¹ Gordon Tullock, *The Economics of Legal Proceedings: Defending the Napoleonic Code, reprinted in* SELECTED PAPERS vol. 9 at 354 (cited in note 12).

The process is thus essentially a rent-seeking process with an unpredictable outcome—parties invest in litigation, but doing so does not increase the accuracy of the system, because the investments should offset each other on a one to one basis. Thus, there is no benefit to the parties themselves from the investments, but nonetheless, these resources are squandered from a social perspective. “As in rent-seeking,” Tullock writes, “the party which wins makes a net profit from the activity, but from the social standpoint this is more than offset by a cost inflicted on other people. This is the similarity between the legal process and lobbying.”²² To the extent that there is some prospect of genuine social product, such as compensation to an injured party, Tullock charges that this “social product itself tends to be lost in a sea of social waste.”²³

Tullock explicitly rejects the notion that the common law is a beneficent spontaneous order, and argues instead that it is a malign spontaneous order because decentralized self-interested behavior by litigants depresses overall social welfare. The spontaneous order produced by the adversary system, therefore, is a spontaneous order in the same way that the “tragedy of the commons” is a spontaneous order—individual self-interest results in an order of sorts, but it is an order that is suboptimal from a social perspective. Or the way in which legislative rent-seeking is a spontaneous order, but similarly an order that is suboptimal from a social perspective given the undefined property rights that generates the rent-seeking scramble. Tullock’s conclusion is worth considering in full:

In his zeal to liken the common law system to a private market, Posner oversteps the mark. The common law system is not a private marketplace. It is a socialistic bureaucracy in which attorneys essentially lobby government officials—judges and juries—much in the same way that

²² Tullock, *Rent Seeking and the Law* at 187 (cited in note 18).

²³ Tullock, *Case Against the Common Law* at 423 (cited in note 16).

special interest groups lobby the legislature. The greater the rents at stake in an action, the more lavish will be the outlay of resources on attorney-lobbyists and on expert witness-lobbyists whose prime goal is to tilt the judgment of the judge-jury regulators in favor of their client. In some cases, attorneys will engage in judge-shopping to secure a compliant judge and in jury manipulation to secure a compliant jury. The distinction between the common law courthouse and the legislature is far less than Posner is willing to admit.²⁴

He adds:

[T]he invisible hand of the market does not have its counterpart in the disinterest of the judge. Rather, its counterpart is the visible boot of the politically active judge and the bony knees and elbows of the semi-blindfolded, intellectually lame jury. Competition between the parties does not convey information efficiently to the courtroom, because laws of evidence are designed deliberately to obfuscate the process. In consequence, the American legal system at best is extremely capricious, and at worst is a random lottery. It would be much more cost effective, in such circumstance, to decide outcomes by flipping a coin or by rolling a die rather than by indulging in the high-cost farce of the typical jury trial.²⁵

Tullock thus expressly rejects the notion that the adversary system aggregates decentralized individual actions into a benevolent spontaneous order. Rather, it is more analogous to a rent-seeking or arms'-race scenario, where many of the expenses made by one side have the effect of simply imposing costs on the other side of the dispute. As such, Tullock posits that the end result should be the dissipation of the entire social product of the litigation in attorneys' fees and other direct and indirect costs. Moreover, because these heightened costs simply cancel out each other, they do nothing to improve the accuracy of the outcome, which remains essentially a coin flip or random process.

C. The Inquisitorial System Compared

²⁴ Tullock, *The Case Against the Common Law* at 450 (cited in note 16).

²⁵ *Id.* at 451; see also Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22(2) *International Review of Law and Econ* 193 (Aug. 2002) (criticizing analogy between market competition and common law).

Tullock argues that the inquisitorial system will be both a more accurate and less expensive means of dispute resolution than the adversary system. In the inquisitorial system, the overwhelming majority of work is performed by the judge, rather than the parties. Tullock argues that this will have a salutary effect on both accuracy and administrative costs.

First, the overwhelming number of resources in the inquisitorial system are directed toward pursuing the truth of the matter, rather than its concealment. Unlike the litigants in the adversary system, the judge has no reason to pursue facts or theories that are misleading or conceal the truth, or to try to divert the fact-finder's attention toward irrelevant or misleading facts. As a result, Tullock argues that as an *a priori* matter the judge in an inquisitorial system will almost certainly converge on the truth more easily, predictably, and at lower cost than the fact-finder under the adversary system.

Second, Tullock argues that accuracy is likely to be higher in inquisitorial systems because of the absence of rules of evidence that exclude potentially relevant and probative facts from the fact-finder in Anglo-Saxon countries.²⁶ The justification for excluding evidence thought to be irrelevant, misleading, or unfairly prejudicial is justified as necessary to prevent jurors from being confused or distracted. Tullock notes, for instance, that hearsay evidence is generally excluded in the Anglo-Saxon countries, but is admissible (although discounted in importance) in the inquisitorial system. Although these rules are designed primarily to constrain juries from misusing the evidence, Tullock observes that for some reason they are also applied when the judge sits as a finder of fact. Thus, to the extent that these restrictions unduly interfere with fact-finding under the adversary system they seem counterproductive.

²⁶ Tullock, *Defending the Napoleonic Code* at 360 (cited in note 21).

Tullock also argues that the judge-centered inquisitorial system has an incentive to prevent the excessive spending and rent-dissipation associated with the adversary system. Under the adversary system, the parties have the incentive and opportunity to externalize many of their costs on each other, as well as on the public at large. In the inquisitorial system, by contrast, the judge internalizes those costs. Tullock argues that the judge bears a good part of the costs of litigation because he has to sit through the trial, ask the questions, and listen to the parade of witnesses. As a result, judges in an inquisitorial system have the incentive to make socially-optimal levels of investment in resolving suits. The judge has the incentive to incur administrative costs only so long as the value of increased expenditures increase the accuracy of the final result. The judge has an incentive to call only those witnesses who are relevant to the case and to keep them and question them only so long as necessary to improve the accuracy of the judge's decision. Overall, Tullock concludes that the social costs under an inquisitorial system are likely to be both much lower and more likely to be set at a socially-efficient level than under the adversary system.

Given the obvious superiority (to him) of the inquisitorial system, Tullock professes puzzlement that the adversary system has persevered in the Anglo-American world: "The line of reasoning is so simple that I always find it difficult to understand why the Anglo-Saxon court system has persisted."²⁷ He offers two explanations for the persistence of the adversary system. First, is the "inertia of established custom" and path dependency. The adversary system, Tullock argues, is a blind residuum of the ancient trial by battle, with the parties' lawyers filling the roles previously performed by

²⁷ *Economics of Legal Proceedings* at 300 (cited in note 21).

champions in battle.²⁸ Second, is the “immensely powerful interest group favoring the preservation of the present situation in Anglo-Saxon courts,” namely lawyers. Tullock observes that the number of lawyers per capita in Anglo-Saxon countries is much higher than in countries that rely on the inquisitorial systems. Tullock posits that a change from the adversary to the inquisitorial system would dramatically reduce the demand for lawyers, thereby reducing lawyers’ incomes dramatically. Moreover, given the substantial investments in industry-specific capital by lawyers, this reduction in the demand for lawyers and this dramatic reduction in their roles would eliminate much of the value of their accumulated human capital. Tullock predicts that lawyers would be likely to strongly oppose any reform that would result in such dire financial consequences. By contrast, any public benefit from legal reform would be dispersed widely among consumers. Thus, in standard Olsonian fashion, it is doubtful that any reform is likely to come about. Tullock concludes that the combination of these two factors, path-dependency and interest group pressures, explains the puzzling perpetuation of the inefficient adversary system.

D. Adversary v. Inquisitorial Systems Compared: A Second Look

Is it true that the Tullock has demonstrated that it can be established as a matter of *a priori* reasoning that the adversary system is both inferior and more expensive than the inquisitorial system? And that the persistence of the adversary system reflects nothing more than custom and interest group pressures by lawyers?

It certainly seems evident that litigation expenditures are higher in adversary systems. It is also evident that there are more lawyers in economies with adversary-based

²⁸ The trial by battle, of course, is a classic rent-seeking interaction, as there is no social surplus generated by resolving disputes in that manner, and each parties’ efforts are designed simply to gain a comparative advantage by injuring the other party and thereby to redistribute resources to himself.

legal systems, and probably a greater number of lawsuits as well, suggesting that higher levels of social costs are allocated to dispute resolution in those countries. Thus, there seems to be little doubt that the overall administrative costs of dispute resolution are higher in those countries with the adversary system. On this count, at least, Tullock's reasoning seems sound.

If the administrative costs of the adversary system are higher than the inquisitorial system, it thus follows that the only economic defense for the persistence of the adversary system is whether its use results in lower error costs (i.e., greater accuracy) relative to the inquisitorial system. Tullock argues that cannot be the case, and even if the adversary system produces greater accuracy for some reason, the difference is unlikely to be so large as to justify the much-higher administrative costs. But is this so?

The fundamental assumption of Tullock's conclusion is his assumption that litigation can be best understood as a zero sum rent-seeking enterprise with one side seeking to reveal "the truth" and the other to obscure it. Thus, centralizing investigation in the hands of a judge will minimize the social waste and dissipation associated with competition between the lawyers for both sides. At best, therefore, there is no improvement in accuracy as a result of these competing investments. Indeed, he goes so far as to argue that beyond some point greater investments in lawyers will be likely to lead to *less* accuracy. The argument for the superiority of the adversary system, however, rests on the idea that "the truth" is not merely out there to be recognized, but must be discovered.

First, defenders of the adversary process argue that it will control bias by decision-makers better than will the inquisitorial system. If a judge is biased, in the

inquisitorial system it may be difficult to offset this bias and therefore for difficult for the victimized party to get a fair hearing. By contrast, the adversary system acknowledges the biases of the parties and implicitly suggests that rather than ignoring them, it is better to acknowledge them and instead try to preserve the neutrality of the judge and/or jury to distinguish between these competing biased stories. In fact, the adversary system may be better than the inquisitorial system in mitigating bias in decisionmakers.²⁹ Moreover, although Tullock ridicules juries for being amateurs at fact-finding in litigation, their inexperience may also allow them to bring a “fresh” and relatively unbiased perspective to a case.³⁰ A judge, by contrast, may tend to form conscious or unconscious biases based on observed patterns of outcomes in prior cases—for instance, if most charged criminal defendants are found guilty at trial, a judge may be bring this subconscious bias to bear in assessing the guilt or innocence of a defendant in any new case.³¹ Thus, although the inexperience and unsophisticated nature of the jury may lead to the exclusion of certain evidence or mistakes in considering evidence, these concerns may be offset at least to some extent by the jury’s potential for mitigating bias in evaluating the evidence with fresh eyes.

Second, it is argued that private parties in an adversary system will have a greater incentive to investigate and produce information in a case than would a judge in an

²⁹ See John Thibaut, Laurens Walker, and E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386-402 (1972); see also See Michael K. Block, Jeffrey S. Parker, O. Vyborna, & L. Dusek, *An Experimental comparison of adversarial versus inquisitorial procedural regimes*, 2(1) AM. L. & ECON. REV. 170-194 (2000) (noting that adversary system may be preferable in cases with “correlated” information structure).

³⁰ Of course, jurors may also bring different distorting biases to the case. For instance, there is widespread concern that jurors may exhibit a hostility to “deep pocket” corporations or to out-of-state parties relative to local parties.

³¹ This suggests that the judge’s bias may be more pronounced in criminal cases as well as more costly to the defendant. Parisi notes that it is thus curious that where elements of the adversary system have been introduced into continental legal systems, this has generally been in civil cases, rather than criminal cases. Parisi at 203, n. 33 (cited in note 25).

inquisitorial system.³² Judges in an inquisitorial system essentially have a monopoly on fact-finding which may make it difficult to monitor whether their efforts are sufficiently diligent in uncovering evidence. Appellate judges similarly may be at a disadvantage in reviewing the judge's opinion under the inquisitorial system for thoroughness of evidence gathering or for whether the judge erred in weighing the evidence. Judges in an inquisitorial system internalize the administrative costs of searching for greater accuracy, but can externalize error costs on parties and society unless the judge suffers some independent private cost from inaccuracy, such as reversal and some sanction derived therefrom.³³ This divergence between private and social costs may lead judges in an inquisitorial system to exert suboptimal effort.

The adversary method of litigation is essentially a competitive model of evidence production. In the adversary system, a disappointed party has a full opportunity to introduce evidence into the case and make a proffer of evidence even for evidence that is excluded. A record of the evidence is thus created for review by an appellate court as to both the evidence presented to the fact-finder as well as that evidence that was excluded by the judge. By contrast, an inquisitorial judge might simply overlook or fail to mention certain evidence that does not support his case or that he deems irrelevant. Moreover, the inquisitorial judge's budget for evidence gathering is set exogenously and somewhat arbitrarily by the taxpayers, in terms of money, time, and support staff available for investigation. In the adversary system, by contrast, the budget for evidence gathering is endogenous to the case and is established by the parties. Thus, if both parties are

³² The standard law and economics model comparing the two systems is described in Richard A. Posner, *The Economic Analysis of Law* (6th ed. 2003), §22.2, at 613-15.

³³ The personal cost of reversal, however, appear to be small and do not seem to interfere with a particular judge's likelihood of promotion. See Richard S. Higgins and Paul S. Rubin, *Judicial Discretion*, 9(1) *JOURNAL OF LEGAL STUDIES* (Jan 1980), pp. 129-138.

wealthy, ample resources will be available for evidence gathering and production of arguments on each side of the case. But if one or both sides lack resources, then it seems probable that the adversary system will produce results inferior to the inquisitorial system. In the adversary system, lawyers for the parties have strong incentives to pursue and uncover all evidence relevant to their respective cases. Over the long run, trial lawyers' compensation is based largely on the basis of their success at trial, thus they have strong incentives to develop evidence favorable to their client and to find flaws in their opponent's case. The lawyers thus internalize the costs of their errors (and triumphs) through the impact on their market reputations.

Contrary to Tullock's assumption, therefore, the relative accuracy of the two systems cannot be resolved as an *a priori* matter. Instead, their relative accuracy depends critically on the type of information in question, e.g., how difficult it is to uncover, the degree of asymmetry between the parties in the amount of relevant information that they hold, and the degree to which one party has some sense of the information possessed by the other party.³⁴ Experimental research suggests some conclusions, most of which are consistent with the predictions of economic theory. Lawyers in an adversarial system may work harder and will produce more information than judges in an inquisitorial system. Inquisitorial judges will tend to stop searching for evidence once they believe that they have all of the information that they need to decide. The adversarial system is especially effective at uncovering difficult to discover and private information, relative to

³⁴ See Michael K. Block, Jeffrey S. Parker, O. Vyborna, & L. Dusek, *An Experimental comparison of adversarial versus inquisitorial procedural regimes*, 2(1) AM. L. & ECON. REV. 170-194 (2000); Michael K. Block & Jeffrey S. Parker, *Decision Making in the Absence of Successful Fact Finding: Theory and Experimental Evidence on Adversarial versus Inquisitorial Systems of Adjudication*, 24 INT'L REV. L. & ECON. 89 (2004).

the inquisitorial system.³⁵ Except in the situation of difficult to discover facts, however, there seems to be no systematic tendency for the adversary system to produce “more” information than the inquisitorial system.³⁶ As a corollary, given a weak or lopsided case, lawyers in an adversary system are likely to work harder than judges in an inquisitorial system.³⁷

Note, however, that these findings are not necessarily incompatible with Tullock’s hypothesis. Uncovering “more facts” may be irrelevant if those facts would not change the results in the case—i.e., the key facts are discovered under either scheme, and the new facts would simply be inframarginal, or if those facts simply confirm earlier-discovered evidence.³⁸ If the additional facts do not change the outcome, then the marginal cost of increased administrative costs expended on the investigation are greater than the marginal benefit returned. In most cases the most important evidence or most important legal arguments will probably emerge early on in the investigation, regardless of whether a judge or lawyer is conducting the investigation; thus it is likely that subsequent investments will tend to result in diminishing marginal returns to search. Moreover, in any given case it cannot be known for certain *ex ante* whether further investigation will return a net benefit. Thus, any analysis of social welfare should be at the level of creating a rule for determining when further investigation is permissible. As a result, it is not obvious that the collection of “more” information will necessarily result in the collection of the “optimal” amount of information. Similarly, if lawyers with a

³⁵ See E. Allan Lind, John Thibaut, & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Luke Froeb and Bruce H. Kobayashi, *Evidence Production in Adversarial v. Inquisitorial Regimes*, ECONOMICS LETTERS Vol. 70 (Feb. 2001), pp. 267-272 (noting that if errors are unbiased under either regime, the relative accuracy of the underlying processes should be equivalent).

“weak” case expended greater resources or work harder, then this too may be social waste if the case was weak because of its lack of merits and if the evidence simply makes the case less weak but still nonetheless a clear loser.

On the other hand, this tendency toward excessive expenditures might explain some otherwise unusual aspects of rules governing the adversary system. Consider, for instance, Tullock’s criticism of the rules of evidence as being inconsistent with an all-out search for the truth, such as the inadmissibility of evidence with low probative value (such as hearsay or irrelevant evidence) or evidence that might produce undue bias or prejudice in the fact-finder. Even if we assume that admitting this evidence would produce valuable information and reduce error costs as an *ex post* matter, it may be that these restrictions are defensible as a means of restricting undue investment by litigants in seeking out this information *ex ante*, and thereby to reduce administrative costs.³⁹ For example, private litigants in the adversary system may be prone to overinvestment in collecting personally embarrassing information on their adversary solely to improperly prejudice the fact-finder rather than to increase accuracy in the case. And even if this information might make a small contribution to increased accuracy at the margin, the administrative costs of acquiring this information will likely exceed the tiny reduction in error costs brought about by its acquisition. Thus, the purpose of the evidentiary rules, such as excluding irrelevant or unduly prejudicial evidence, may be to regulate the problem of excessive *ex ante* rent-seeking expenditures inherent the adversary system, even if Tullock is right that this marginally reduces the accuracy of the system. Similarly, evidentiary privileges (such as the attorney-client privilege or spousal

³⁹ See POSNER, §22.6-22.7, pp. 624-26; Jeffrey S. Parker and Bruce H. Kobayashi, *Evidence*, in THE ENCYCLOPEDIA OF LAW AND ECONOMICS, Vol. V (Boudewijn Bouckaert & Gerrit DeGeest eds. (Edward Elgar (2000), pp. 290-306, available in <http://allserv.rug.ac.be/~gdegeest/7900book.pdf>.

privilege), may prevent the generation of useful evidence, but may do so in order to advance other social goals or to improve the overall operation of the litigation system.

A full comparison of the two systems, therefore, would have to consider all second and third order effects, rendering the question an unlikely candidate to be established through a simple *a priori* analysis. Contrary to Tullock's assumption, the increased administrative costs of the adversary system are not necessarily purely rent-seeking expenditures. At least some of those expenses *may* lead to increased accuracy by discovering evidence that would not be produced in an inquisitorial system and which may be relevant at the margin to the accurate resolution of the case. On the other hand, Tullock is surely correct that many of the increased costs of the adversary system are little more than rent-seeking costs imposed by one party on the other to try to obstruct discovery of evidence or to distract or mislead the fact-finder. Because of this ability to externalize costs, Tullock is correct that it cannot be assumed that the private parties' private investments in litigation will produce a socially optimal level of investment. Moreover, the adversary system will produce wasted expenditures for the collection of additional marginal information even where it is irrelevant to the outcome of the case.

Thus, it is possible that the adversary system will produce greater accuracy (and lower error costs) than the inquisitorial system in some cases. There may be other cases where most of the lawyers' fees are allocated to obscuring the truth or confusing the fact-finder and thus accuracy is reduced (consider O.J. Simpson's murder trial, for instance). Which situation is more common in the real world? It is not clear whether this question can even be answered empirically. But it seems obvious that administrative costs will be higher under the adversary system, both for the beneficent purpose of producing new

information but also for the wasteful purpose of rent-seeking and imposing costs on the other party. But Tullock does suggest the correct question—given that administrative costs probably are higher under the adversary system, the burden of proof should rest on proponents of the adversary system to prove that those increased administrative costs are justified by reduced error costs. It is not obvious that proponents of the adversary system have carried this burden.

IV. Common Law versus Civil Law

Tullock also critiques the common law as a system of rule-making when compared to the civil law. At its most simplistic, the common law is a system of judge-made law where legal principles are articulated as a by-product of deciding concrete factual disputes between litigants. Abstract legal principles thus emerge inductively out of the process of judges deciding many cases that pose similar repeated legal questions (e.g., “Was the driver negligent?”) under different fact situations. Common law is thus also fundamentally retrospective in nature, as the legal principle is articulated and applied to the interaction that has already occurred and which the judge must now resolve. Civil law, by contrast, is law enacted by a legislature. It is generally prospective and abstract in nature, in that it attempts to anticipate and resolve general categories of cases before they arise. Although systems of procedure and rule-making pose distinct questions and could be disentangled, in practice and historical development, the adversary system is generally associated with common law rule-making whereas the inquisitorial system is generally linked to civil law rule-making.

Tullock prefers civil law to common law—at least as the common law system exists today—for similar reasons to his preference for the inquisitorial system over the adversary system. Again his analysis is comparative rather than absolute—his preference for the civil law arises not from his enthusiasm for legislative rule-making but rather because of his distinct lack of enthusiasm for the common law. Given Tullock’s seminal contribution of the concept of legislative rent-seeking, it may at first seem anomalous that he would prefer legislative rule-making over the common law. On closer inspection, however, Tullock’s preference for the civil law rests on the same logic that underpins his preference for the inquisitorial versus adversary system. Tullock’s critique of the common law is not as thoroughly developed in his research as his critique of the adversary system; nonetheless, the logic of his critique is manifest.

A. Tullock’s Critique of the Common Law

Tullock’s critique of the common law as a rule-making system is most systematically laid out in his monograph *The Case Against the Common Law*.⁴⁰ Tullock argues that although the common law was once a superior form of law making, that advantage has been eroded over time due to special interest pressures on the common law legal system. Tullock begins his discussion of the common law by introducing the “ideal of the common law,” as it came to flourishing during the eighteenth century. He identifies several valuable characteristics of the common law of this period. First, the eighteenth-century common law was characterized by the rule of law in the sense that law constrained government action according to known and predictable legal rules. Second, law was based on precedent. The third key characteristic of the common law, according

⁴⁰ Gordon Tullock, *The Case Against the Common Law* at 399 (cited in note 1612).

to Tullock, was the writ system. Tullock sees these three characteristics of the common law as forming the foundation of the classical period of the common law, which has been eroded “not least because the erosion of the U.S. constitutional republic by the forces of democratic majoritarianism has exposed law and justice to the pressures of the political marketplace.”⁴¹

As a corollary to Tullock’s characterization of the adversary process as rent-seeking, Tullock views the production of the common law as a rent-seeking process as well.⁴² “The U.S. common law system is appropriately analyzed,” he writes, “as part of the more general political marketplace, from the perspective of the interest group approach to politics.” In the interest group approach, politicians are modeled as “providing a brokering function in the political market for wealth transfers” of matching demand for wealth transfers with supply. Following Mancur Olson, Tullock contends that relatively small, homogeneous special interest groups will be more effective at demanding wealth transfers and larger, more heterogeneous groups will be the suppliers of the wealth to be transferred.⁴³ Tullock contends that wealth transfer through litigation is fundamentally similar to the more familiar model of wealth transfer through legislative activity:

[B]ecause the legal system is intimately bound up in the legitimate use of coercive force in society, it must be viewed as an integral part of the political process. Special interest groups have strong incentives to try to influence the behavior of the legal system. All areas of law are subject to interest group manipulation through the legislative process. Moreover, once laws are passed, the administration of justice is also influenced by interest groups. Attempts are made to influence the courts, the police, the juries,

⁴¹ Id. at 410.

⁴² Id. at 411-412.

⁴³ See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press: Cambridge, MA, 1971).

the prosecutors, the witnesses, and the rest of the legal system to assure that laws favorable to special interest groups are enforced.⁴⁴

Tullock argues that these political pressures to use the courts for rent-seeking ends eroded the classical common law during the second half of the twentieth century, transforming the law from a vehicle for creation of economically efficient rules into a mechanism for wealth transfers.⁴⁵ Tullock begins by averring agreement with Posner's view that the classical period of the common law contained many efficiency-enhancing factors. Tullock adopts Posner's analysis of the efficiency of the common law as deriving from three basic factors. First, the dominant ideological worldview of judges in the nineteenth century was utilitarian, which naturally led judges to pursue wealth maximization as a primary goal of the law. Second, unlike legislatures, judges lack effective tools for engaging in widespread wealth redistribution, and so as a result will come to recognize the futility of pursuing redistribution as a goal of the law. Whereas legislatures can impose and enforce mandatory rules (for example, a minimum wage law that prohibit paying below a certain hourly wage, enforceable by sanctions imposed by the executive branch), judge-made law generally consisted of default rules that parties can contract-around in order to pursue their goals. Thus, judges will be unable to impose their preferred end-state societal patterns of wealth distribution and in the process will simply have imposed unnecessary transaction costs on parties seeking to reach the efficient outcomes. Efforts to impose the judge's preferred ordering will be doomed to frustration, leaving judges with little alternative but to pursue wealth maximizing rules. Third, following the seminal models of Priest and Rubin, Posner adopts the basic

⁴⁴ Id. at 412.

⁴⁵ Id. at 431-48.

invisible hand model of litigation that predicts the survival of efficient rules and the disproportionate overruling of inefficient legal rules.

Tullock argues that these three factors have systematically been altered during the latter half of the twentieth century, causing an evolution away from the production of efficient rules toward inefficient, rent-seeking rules.⁴⁶ During the classical period of the common law, all three of these forces tended to push in the direction of the production of economically efficient law—the judges utilitarian ideological orientation, the judges’ lack of tools to engage in systematic wealth redistribution, and a litigation process characterized by largely equal stakes by the two parties to the case. Beginning in the latter half of the twentieth century, however, this underlying dynamic began to change, driving the evolution of the law away from the production of efficiency enhancing rules and towards inefficient, wealth redistribution. On each of these conclusions Tullock’s conclusions are supported by other scholars reaching similar, independent conclusions.

1. The Decline of Utilitarian Judicial Philosophy

First, he argues that “the benign nineteenth-century influence of utilitarian philosophy has been swept away dramatically during the twentieth century under the influence of socialist ideology combined with pervasive legal rent-seeking.”⁴⁷ Tullock argues that the evolution of contract and tort law illustrate the ideological transformation of the judiciary toward a redistributivist ideology. He argues that the utilitarian judges of the nineteenth century adopted a Smithian conception of contract law, which emphasized

⁴⁶ Tullock, of course, is not alone in observing this transformation of the common law from efficient to redistributive ends. See Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NORTHWESTERN L. REV. 1551, 1581-1621 (2003 at 1551, and n.2 (listing sources reaching similar conclusion).

⁴⁷ Tullock, *Case Against the Common Law* at 431 (cited in note 16).

the benefits to both individuals and society of the private ordering made possible by the opportunity to voluntarily enter into contracts, and viewed contract as “simultaneously promoting autonomy (or individual freedom) and social welfare.”⁴⁸ Modern judges, by contrast, are suspicious of both the voluntariness of contractual obligations and their beneficent social consequences. Tullock states, “Now, courts read in consideration when it is not there, in order to uphold promises that individuals relied upon when they should not have done so. They strike down bargains that should be upheld, simply because some judge does not like the terms the parties agreed to.”⁴⁹ Tullock argues that this judicial suspicion rests on many faulty premises of modern thinking that assume that a contractual bargain is flawed if it fails to reflect the Platonic form of a perfect contractual bargain, such as the presence of incomplete information (“ignoring the fact that the future is always uncertain”), cognitive difficulties of one of the parties (“ignoring the fact that talent is unevenly distributed across human beings”), “unconscionable” or “contrary to public policy” (“as viewed by some judge, not by the parties to the bargain”), or because of the presence of externalities (“ignoring the fact that that externalities are universal and that the very large majority of them are not Pareto relevant”).

Tullock observes a similar ideological trend at work in the evolution of tort law. Tullock notes that until the 1950s, tort law, like contract law, focused on concepts of individual autonomy and economic efficiency. The scope of tort law in society was tightly circumscribed, remedies were focused on compensating provable injuries and economic loss, and the purpose of tort law was focused on deterrence, compensation, and individual fault. In the latter half of the twentieth century, by contrast, these intellectual

⁴⁸ Id. at 446

⁴⁹ Id. at 446-47.

foundations have been replaced by a broader, redistributive function of tort law, focused on “notions of societal insurance and risk-spreading” and corollary weakening of individual fault as the foundation for liability, such as the imposition of joint and several liability on defendants (regardless of provable fault) and the weakening of contributory negligence and its underlying principle of moral hazard. Moreover, damage awards have expanded dramatically to permit recovery of speculative harms such as pain and suffering and loss of companionship, with serious unintended consequences to consumers and society.

“The consequence,” of these developments, “is a late-twentieth-century common law that is scarcely recognizable as a descendant of its classical predecessor.”⁵⁰ Tullock’s conclusions about the intellectual revolution in the common law and the supplanting of utilitarian judicial philosophy with a redistributive ideology has been similarly observed by George Priest, who similarly points to an intellectual revolution in the judicial conception of the social function of tort law as a driving force in the expansion of liability in recent decades and the evolution away from the efficiency-enhancing doctrines of the classical common law.⁵¹

At the same time, there has been a rise in the agency costs available to common law judges, as they have increased opportunities to read their ideologies into the law. In the formative years of the common law in England, there were numerous legal systems and courts with overlapping jurisdictions, which enabled parties to choose among courts

⁵⁰ Id at 431.

⁵¹ See George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5(3) J. ECON. PERSPECTIVES 31 (1991); see also George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (arguing that modern tort law is the result of judges reading their philosophical ideas into the law); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987) (same); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

on the basis of the quality of law and legal service provided by those courts.⁵² In turn, the judges themselves were paid partially or wholly from the fees generated by litigants, giving judges an incentive to compete for business. Importantly, this competition took place against a well-established background of shared expectations as to which courts might govern a given dispute and in many courts the substantive law itself arose from custom and reciprocal interactions between many parties over time (such as in the law merchant courts) which tends to promote the evolution of efficient legal rules. This *ex ante* competition among courts thus had the salutary effect of forcing courts to respond to the needs of the parties that came before them.

More importantly for current purposes, however, this competition imposed a constraint on judges—the ideological predilections of judges were largely irrelevant, because the law arose from the needs of the parties, not the ideological proclivities of the judges. Judges who tried to commandeer the litigants’ causes to advance their own agendas would soon find themselves with fewer fee-paying customers. Thus, litigants could avoid these self-indulgent judges, thereby making it impossible for those judges to impose their ideological preferences on the parties themselves. Thus, it is only after the end of this system of competing courts with overlapping jurisdictions that it became possible for judges to even impose their ideological preferences on the law. And while eighteenth-century judges in this monopolistic legal system continued to pursue utilitarian ends, which largely dovetailed with private parties’ preferences for efficiency, subsequent generations of judges may have moved toward more egalitarian and social-engineering goals. The development of a monopoly court system was a necessary

⁵² See Zywicki, *Rise and Fall* at 1581-1621 (cited in note 46).

condition that created greater agency costs and subsequently the intellectual revolution that Tullock describes.

2. Increased Opportunities for Wealth Transfer

Second, Tullock argues, “Judges indeed have found it possible to change legal rules to benefit favored special interest groups, most notably the Association of Trial Lawyers of America, and they have done so with a vengeance.”⁵³ He adds, “Where the judges have not moved, federal and state legislators, dominated by lawyers, have enacted statutes to ensure that legal rent-seeking is profitable for an ever-growing cohort of American attorneys.”

Subsequent research tends to confirm Tullock’s intuitions on this point. A primary, if underappreciated consequence of the growth of tort law and its consequent supplanting of contract law across much of contract’s traditional domain is the corollary substitution of mandatory rules for default rules. Most of the rules that govern the substance of contractual relations are default rules that parties can alter by mutual agreement. Rules designed to redistribute wealth, therefore, will tend to be self-defeating, as parties can contract-around those rules and substitute an efficient rule.⁵⁴

Lord Mansfield’s views are illustrative of the principle, “If the parties do not choose to contract according to the established rule, they are at liberty, as between themselves, to vary it.”⁵⁵

⁵³ Tullock, *Case Against the Common Law* at 433 (cited in note 15).

⁵⁴ See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1002 (1996); Louis De Alessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 CONST. POL. ECON. 107, 116 (1991).

⁵⁵ Quoted in C.H.S. FIFOOT, LORD MANSFIELD (1936), at p. 99.

The ability of parties to contract around contract default rules also made the legal system more resistant to rent-seeking litigation pressures by reducing the incentive for parties to use the court system to try to obtain rules that redistribute wealth rather than promote efficiency.⁵⁶ Although the winner in a given case might gain a windfall from the promulgation of an inefficient rule, this windfall will likely be a one-time-only boon. Parties could “exit” the inefficient legal rule by contracting around it, reallocating the risk to the party who is in the best position to bear the risk.⁵⁷ Where the parties can contract around an inefficient rule there will be little incentive to seek inefficient rules or for judges to create such rules. Forcing the parties to contract around the inefficient rule, however, requires the use of real economic resources that could otherwise be deployed to a higher social use. The inefficient rule creates deadweight social loss that could be avoided by the promulgation of a more efficient legal rule. At the same time, the ability of affected parties to contract around the inefficient rule reduces its usefulness as a mechanism for redistributing social wealth on an ongoing basis. Thus, even if judges or interest groups sought to use the common law process to redistribute wealth, the ability to contract around inefficient rules generally made the common law a very cumbersome and inefficient mechanism for accomplishing the desired end. It is this dynamic that led Posner to assert that even redistributive judges will recognize the futility of their efforts and simply confine themselves to advancing economic efficiency, leaving efforts at redistribution to the legislature, which can more readily enact and enforce mandatory rules that limit the ability of parties to contract-around.

⁵⁶ Of course, when combined with a competitive court system, these two features gave parties a great ability to escape inefficient legal rules in favor of preferred rules.

⁵⁷ See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

Modern law has substantially reduced the ability of parties to contract around inefficient rules, particularly as legislative and mandatory common law rules have increasingly come to squeeze out contract default rules in many areas of society and the economy. Traditionally, the common law was conceived as a set of off-the-rack default rules that could be freely modified by the mutual consent of contracting parties. The whole point of strict products liability, for instance, was to supplant this regime of default rules with a network of immutable rules that parties were specifically forbidden to contract around. For example, courts came to reconceive contractual warranty cases as strict products liability cases. Thus, in *Henningsen v. Bloomfield Motors, Inc.*,⁵⁸ the New Jersey Supreme Court ruled that cases involving personal injury from product use would no longer be governed by warranty law, even though warranty law had controlled such actions for 100 years. The New Jersey Supreme Court believed the limitations of warranty law created an opportunity to exploit consumers and denied such warranties any future effect.⁵⁹ Similarly, in *Greenman v. Yuba Power Products, Inc.*⁶⁰ California Chief Justice Roger Traynor articulated the standard of strict tort liability for personal injuries caused by products. Traynor concluded that consumers possessed neither the sophistication nor power to freely bargain about warranty terms for mass-produced consumer goods.⁶¹ Moreover, strict liability for manufacturers would provide insurance to injured victims who might not otherwise be covered by insurance (as well as duplicate insurance for those who were already insured). By contrast, Traynor argued that

⁵⁸ 161 A.2d 69 (N.J. 1960).

⁵⁹ As such, their logic followed the intellectual framework pioneered by Friedrich Kessler, that such warranty contracts constituted “contracts of adhesion” and were the result of coercion by corporations rather than bargained-for consent. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943).

⁶⁰ 377 P.2d 897 (Cal. 1962).

⁶¹ *Id.* at 900–01.

manufacturers were uniformly in a better position to control the risk of product defects and could obtain insurance at lower cost, the cost of which could be spread among numerous other consumers. Finally, the revolution was complete in 1964 when the American Law Institute adopted the strict liability standard in the Restatement (Second) of Torts, § 402A.⁶²

By making it impossible to contract out of this regime of mandatory rules, one-size-fits-all legal rules have weakened the dynamic evolution of the common law by eliminating the ability to contract around inefficient rules and requiring all further changes to go through judicial gate-keepers. As Richard Epstein observed, through this process of legally-imposed uniformity, “The system of product liability was stripped of its powers of self-correction. In essence, *Henningsen*, *Greenman*, and the Restatement (Second) of Torts reserved to the courts a legal monopoly to fashion the relevant terms and conditions on which all products should be sold in all relevant markets.”⁶³ Epstein concluded that the once-flowing river of the common law that “works itself pure” has arguably been replaced by a “Procrustean bed” of judicially imposed uniformity.⁶⁴

The increased use of mandatory rules has also made the common law more susceptible to rent-seeking pressures. Through mandatory rules, private parties have the ability to impose rules that serve their private ends, rather than general efficiency. Because unwilling parties cannot escape the reach of these inefficient rules, they are compelled to provide wealth transfers to rent-seeking interests. In turn, the increased

⁶² RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶³ Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202 (1989).

⁶⁴ *Id.*

ability to provide such wealth transfers increases the incentives to private parties to invest in lobbying and litigation to secure wealth transferring rules.

3. The Decline of Evolutionary Model of Efficiency

Finally, Tullock notes the weakening of the invisible-hand theory of the selective relitigation of legal rules that tended to produce efficient legal rules.⁶⁵ As Tullock observes, this model rests on the assumption that both parties to the dispute will have equal stakes in the outcome. If, however, the party on one side of the dispute is a repeat player or otherwise has a much higher stake in the outcome than the other, the law can be predicted to evolve in a direction preferential to that party. As a result, the “model is not generalizable.”⁶⁶ Tullock concludes that the departure from efficiency has not been the result of a slow, unguided process of evolution, “it is the product of rent-seeking trial lawyers, activist judges, and gullible juries who together have conspired to shackle capitalism into the confines of the plantation,”⁶⁷ pointing particularly at the influence of the Association of Trial Lawyers of America (ATLA) the major association of plaintiff’s tort lawyers in America as the driving force toward inefficiency.

Rubin and Bailey have also noted these developments and attributed them to ATLA’s influence.⁶⁸ Rubin argues that during the nineteenth century (and presumably before), rule making (both common law and statutory) was dominated by individual actors acting independently, rather than by organized special interests acting

⁶⁵ Tullock, *Case Against the Common Law* at 431-433 (cited in note 16).

⁶⁶ *Id.* at 432.

⁶⁷ *Id.* at 448.

⁶⁸ Paul H. Rubin and Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23(2) *J Legal Studies* 807 (1994).

collectively.⁶⁹ This was the case for several reasons. First, most disputes that arose were between two individuals or between an individual and a very small business. Thus, there was little benefit to be captured by a party from strategic litigation because neither party was a frequent, repeat litigant. Moreover, each individual usually stood in a reciprocal relationship with all other individuals; thus an individual or small business who is a plaintiff today was equally likely to be a defendant tomorrow, reducing the incentive to litigate for one-sided rules and favoring advocacy in favor of stable and efficient rules. Finally, Rubin argues, the structure of litigation and high costs of communication made it very difficult for groups to solve collective action problems in order to aggregate their interests into a coherent and effective litigation strategy. Thus, for much of the common law's evolution, most litigation was between two individual parties, both with substantially equal stakes in the outcome. The result was that the common law tended toward efficiency.⁷⁰

In the twentieth century, however, this dynamic changed dramatically, primarily as a result of the rising influence of ATLA. Among its activities, ATLA organizes plaintiff's lawyers into a coherent interest group that organizes lobbying and litigation activities toward more expansive liability rules. In turn, more expansive liability rules increase litigation opportunities for trial lawyers, thereby increasing their wealth. Thus, trial lawyers have both high stakes and strong organization that enables them to effectively overcome collective action problems. Moreover, as Tullock notes, trial lawyers have become a potent political force as well, lobbying legislatures not only to

⁶⁹ Paul Rubin, *Common Law and Statute Law*, 11 J Legal Studies 205, 211–14 (1982).

⁷⁰ As Rubin notes, this same dynamic meant that statute law also tended toward efficiency during this era. Id.

adopt liability-expanding rules, but perhaps even more importantly lobbying to prevent legislative tort reforms designed to counterbalance these trends in the courts.⁷¹

Further contributing to the opportunities for rent-seeking through litigation is again the decline of competing courts, as described above. For wealth redistribution through rent-seeking to occur, rent-seekers must have the ability to tap into the resources of their “victims” and involuntarily redirect those resources to themselves. Absent “captive” providers of wealth transfers, there is no ability or incentive to engage in rent-seeking. Therefore, in addition to protecting private citizens from the imposition of particular ideological agendas, as described above, competing courts also provided private parties with protection against rent-seeking litigation by enabling them to escape rent-seeking efforts to forcibly extract wealth from them. A court system that catered to particular interest groups would soon find litigants unwilling to acquiesce to their jurisdiction. While it is generally recognized that the competition among courts tended to promote the development of efficiency-enhancing legal rules,⁷² it is not as often recognized that this ability to escape the imposition of rent-seeking legal rules insulated the legal system from countervailing pressures to push the law toward the production of rent-seeking rules.⁷³

⁷¹ In fact, many newly-wealthy trial lawyers have been elected to office themselves. See Todd J. Zywicki, *Public Choice and Tort Reform* (working paper, George Mason University School of Law, October 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244658. Fon and Parisi argue that there would be a trend toward liability expanding rules, even without strategic rent-seeking. See Vincy Fon and Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116(3-4) *Public Choice* 419-433 (Sept. 2003).

⁷² In addition to Zywicki, *Rise and Fall* (cited in note 46), see ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* bk. V, ch. 1, pt. 22, at 241 (Edward Cannan ed., 1976); ADAM SMITH, *Report of 1762-63*, in *LECTURES ON JURISPRUDENCE* at 280 (R.L. Meeks et al. eds., 1982); ADAM SMITH, *Report dated 1766*, in *LECTURES ON JURISPRUDENCE* at 423.

⁷³ Zywicki, *Rise and Fall*, at 1620-21 (cited in note 46).

B. Why Tullock Prefers Napoleon

Faced with these dismaying trends, Tullock contends, “So diseased has the U.S. common law system become that even root-and-branch internal reform no longer is feasible. If individual autonomy and the rule of law are to be re-established, Wellington must now cede victory to Napoleon, and the common law must give way to the civil code.”⁷⁴ A close reading Tullock’s reasoning, however, reveals that although he has forcefully indicted the common law he has not demonstrated that the civil law is superior in addressing his concerns nor does the relative superiority of the civil law necessarily follow from his critique of the common law. In fact, it appears that he has conflated two distinctive concepts, the question of the superiority of the adversary system versus inquisitorial system on one hand versus the distinct question of the relative superiority of the civil law versus common law on the other. Tullock’s discussion of this question in *The Case Against the Common Law* reveals that his actual concern is with the adversary system versus the inquisitorial system, rather than demonstrating the relative superiority of the civil law over the common law.

Nor, if pressed, is it clear that Tullock could express a preference for the civil law over the common law, or to restate the comparison, legislative rule-making over common law rule-making. Tullock’s criticisms of the evolution of the common law in recent decades seem sound and are consistent with the analysis of many other commentators. Yet, his foundational concept of rent-seeking was originated in his analysis of the legislative process, and his criticisms of the legislative process remain much more forceful than his critique of the common law.⁷⁵ Although judge-made law has become

⁷⁴ Tullock, *Case Against the Common Law* at 448 (cited in note 16).

⁷⁵ Tullock, *Welfare Costs of Tariffs, Monopoly, and Theft* (cited in note 11).

increasingly prone to rent-seeking pressures, it seems evident that judges still remain amateurs compared to legislators when it comes to redistributing resources to well-organized special interests and imposing inefficient rules on society. The reach of laws such as minimum wage, rent control, protective tariffs, earmarks, occupational licensing, and the like, dwarf in the aggregate the wealth redistribution brought about by courts, and the flexibility and power of legislatures to redistribute wealth is much more vast than for courts.

A more plausible model, therefore, is not that either courts or legislatures are completely immune to rent-seeking pressures, but rather that they are susceptible to *different* rent-seeking pressures.⁷⁶ Legislatures will tend to be more responsive to well-organized economic interests that can convert their demand for legislation into campaign contributions and other products that assist in reelection. Courts, by contrast, will tend to be more responsive to intellectually-motivated interest groups that share the judges' upper-class, educated, elitist world view, such as interest groups organized around social issues.⁷⁷ Beyond a certain point of resource investment, increased monetary investments in litigation (especially appellate litigation) generate rapidly decreasing marginal returns—there are only so many briefs to be written or depositions to be taken. By

⁷⁶ Pritchard and Zywicki, *Finding the Constitution* (cited in note 6).

⁷⁷ *Id.* This was not always the case. As Robert Bork notes, for instance, the bar and the Supreme Court during the *Lochner* era were drawn from the commercial class and were much more responsive to economic concerns, personal biases that may help to account for their receptivity to the arguments of commercial interests during that period. Lawyers and judges today, by contrast, are often drawn from the academy or the government, reflecting those biases. Moreover, in the past, lawyers entered the bar primarily through an apprenticeship with a practicing lawyer solving real-life legal dilemmas. Today, however, law schools are fully a part of the academy, and law professors and lawyers are best understood as members of the intellectual class, rather than the commercial class. These factors have tended to make today's lawyers more responsive to elite, intellectual-class concerns than during the classical common law period. See Robert A. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990).

contrast, legislators have an essentially unlimited appetite for money, suggesting that the marginal value of investment in lobbying legislatures will fall much more slowly.

Thus, as much as Tullock bemoans the evolution of the common law in recent decades, he has not demonstrated that a general replacement of common law rule-making with increased legislative rule-making in the civil law fashion would improve matters. Instead, it seems that Tullock's actual agenda is reform of the common law process, by replacing the adversary system with the inquisitorial system, for the reasons described earlier in this paper. If it is indeed lawyers who are driving the expansion of liability in an inefficient manner, Tullock suggests that the obvious response is to reduce the influence of lawyers in the legal system and to reduce the gains that they can capture from the legal system. The inquisitorial system, Tullock argues, does exactly that, by reducing the role of lawyers in the litigation process and enlarging that of judges. And although judges may have incentives to shirk, at least they do not have the distorting incentives of lawyers to expand liability as a means of increasing their own wealth, which is more detrimental to overall social welfare. Indeed, if anything, judges will have an incentive *not* to expand liability in order to prevent an expansion of their caseload, which would require them to work harder.

There is an inconsistency in Tullock's argument, however. Adopting the inquisitorial system would reduce the influence of lawyers and might thereby reduce their incentives and ability to lobby for liability-expanding rules. But at the same time, by increasing the power of judges, this seemingly would increase their discretion to impose their ideological worldviews on society and the economy. If it is true that the problems of the common law system have arisen because of the *combination* of rent-seeking

lawyers and “socialist”-minded judges, merely transferring some power from former to the latter would be unlikely to fundamentally alter the underlying trends. Moreover, increasing the power of judges would also tend to simply push back the political battles one step, placing greater importance on the political and ideological battles involving judicial appointments.⁷⁸ This would not necessarily reduce the influence of lawyers, but simply change the location where they exert this influence.

C. Precedent

Finally, Tullock observes a change in the nature of judicial precedent over time, but on this point it is difficult to understand what he is saying. Tullock endorses the views of Italian Roman law scholar Bruno Leoni, who noted that under the Roman law, a judgment did not become a “true precedent” until it had been reached independently in separate cases by several judges, in large part because the absence of a “supreme court” meant that decisions had to be independently ratified by several courts based on their reason and persuasive authority, rather than being imposed by authority.⁷⁹ Tullock observes that during the formative period of the English common law (until 1800), a similar view of precedent prevailed, as the “English common law itself had evolved out of a competing court system and was composed of judgments that had survived repeated scrutiny. Appeals to the House of Lords, though theoretically possible, were rare events. This implied that the common law evolved only very slowly and that changes had to

⁷⁸ Zywicki, *Public Choice and Tort Reform* (cited in note 71).

⁷⁹ *Case Against the Common Law* at 444 (cited in note 16); see Bruno Leoni, *Freedom and the Law* (Liberty Fund, 3rd Revised ed., 1991). Leoni was an important early contributor to the analysis of the implications of public choice theory for law. See his lectures on “Law and Politics” appended to the Third Revised edition of *Freedom and the Law*.

survive a sequence of independent judgments before becoming established as precedent and subject to *stare decisis*.”⁸⁰

In contrast to this more flexible view of precedent as based on ratification of the reasoning of opinions, elsewhere Tullock seems to urge a stricter form of *stare decisis* similar to the more modern view. Tullock, like traditional law and economics scholars, justifies *stare decisis* as being economically efficient because it increases the stability of legal rules, thus making it easier for private parties to plan their transactions.⁸¹ Greater predictability will also tend to reduce the amount of litigation by reducing the zone of uncertainty of legal obligations that will need to be resolved by a judge. Moreover, precedent will tend to reduce the administrative costs of courts in deciding cases as judges needn’t reconsider legal rules once settled. This implies a stricter form of precedent than the classical view.

It is unclear, however, whether Tullock’s preference on this point is categorical, or contingent on the reality of the hierarchical nature of the American court system where supreme courts exist (both at the state and federal level) that can impose their views through their authority rather than reasonableness.⁸² Tullock suggests that this monopoly position enables the United States Supreme Court to change the law “instantly” and to act as an essentially legislative body “[i]nstead of common law changes slowly evolving by surviving repeated independent scrutiny.”⁸³ He concludes that this power to act like a legislative body has spurred rent-seeking through litigation, as special interests have increasingly turned to the courts to overturn longstanding legal doctrines and to bring

⁸⁰ Id at 444-45.

⁸¹ Id at 402.

⁸² Id at 445.

⁸³ Id at 445.

about changes in the law that they would be unable to achieve through the legislative process. Thus, it may be that his views on the value of *stare decisis* are limited to a “second-best” context where the existence of a supreme court is presumed. Nonetheless, his justification for *stare decisis*—the stability and predictability of precedent—suggests a more general argument.

Regardless of this tension, Tullock thus concludes that “the retreat from *stare decisis* in the U.S. common law system is a predictable consequence of the institutional characteristics of the U.S. legal system and that this retreat is now sufficiently extensive as to challenge the validity of the common law system.”⁸⁴ To which he adds, “For what is left now—the surviving kernel of a once robust system of law—is a high-cost, subjective, unresponsive, non-replicable, and essentially illegitimate legal system predicated more on the rule of men than on the rule of law.”

Tullock does not resolve this question of the optimal rigor of precedent in his work, but it may be possible to resolve the question using Tullockian principles.⁸⁵ The standard law and economics justification for *stare decisis* focuses on the efficiency-enhancing value of strong precedent (i.e., *stare decisis*) in creating stability and preserving expectations. But this analysis is incomplete, because it ignores the incentives of private parties to invest in rent-seeking litigation.

We can model the common law process of rule-generation through litigation in the same manner in which we model the legislative process of rule-generation. In both rule-making institutions, the value of the stream of rents transferred to an interest group will be a function of two variables: the value of the rent to be transferred in each period

⁸⁴ Id at 402.

⁸⁵ This discussion draws on Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law*, at 1565-81 (cited in note 46).

times the number of periods over which the wealth transfers are expected to occur (the expected duration of the law). Thus, the present value of the wealth transfer to an interest group can be increased either by increasing the sum to be transferred in each period or by increasing the expected duration of the law and thus the expected number of periods over which the wealth transfers will occur. Moreover, the same Olsonian dynamics that drive the rent-seeking process with respect to legislation are likely to apply to litigation as well, as discrete, well-organized interest groups are likely to be able to organize better to try to manipulate the path of precedent better than more dispersed heterogeneous groups.⁸⁶

Thus, although strict adherence to *stare decisis* will increase the stability of efficient precedents, it will increase the stability of *inefficient* rent-seeking precedents as well. Moreover, although stronger adherence to precedent will increase the costs of interest groups in capturing favorable precedents, but it will increase the value of the “prize” once captured, by increasing the expected lifespan of a precedent once created. To the extent that the dynamics of rule-creation through litigation approximate that of the legislative process by tending to favor well-organized discrete groups there will be stronger incentives on the judiciary to produce and maintain inefficient precedents than efficient precedents. Thus, interest groups that “lobby” for rule-making through the common law process may prefer a regime where rule acquisition is more costly *ex ante* if it increases the stability of the rule (and hence the rents to be transferred over the lifespan of the rule) *ex post*, especially if those interest groups have a comparative advantage in lobbying for this rule-creation and preservation relative to other interest groups.

For example, consider the stability of the Supreme Court’s abortion jurisprudence. The initial promulgation of the right to abortion in *Roe v. Wade* may plausibly be

⁸⁶ Olson, Logic of Collective Action (cited in note 43).

explained as a reflection of the judges' ideological and class biases, rather than well-grounded legal principles. Yet, once established, the right has now been reaffirmed on the basis of *stare decisis*, rather than the underlying reasonableness of the original opinion.⁸⁷ Similarly, the Supreme Court's assertion of power in the *Miranda* case, another questionable assertion of judicial power, was subsequently on the basis of *stare decisis* rather than its correctness.⁸⁸ As Tullock observes, the multiple criminal procedure reforms of the 1960s and 1970s in the United States seem to reflect the narrow interest group pressures of lawyers and the legal class, rather than the general public. Nonetheless, once "enacted" by the Supreme Court these reforms have subsequently become entrenched through a process of *stare decisis*. By contrast, the Supreme Court has refused to honor *stare decisis* in some situations where prior holdings cut against their personal or interest group biases. For instance, in the recent case of *Lawrence v. Texas*, the Supreme Court nullified on Equal Protection grounds a Texas law criminalizing homosexual sodomy, even though it had rejected a Due Process challenge to the constitutionality of a similar law in *Bowers v. Hardwick* just years before.⁸⁹

Thus, it is not clear that the economically efficient rule in society is strict *stare decisis* once the incentives it creates for rent-seeking are considered. Instead, the efficient rule may be a weaker form of precedent, perhaps one in which a legal rule becomes established as precedent only gradually and only after repeated agreement and approval by several independent judges considering the issue. By reducing the ability to capture the litigation process to redistribute wealth, this may reduce the incentives to try to alter the path of legal precedent *ex ante*. In fact, as Tullock notes, in the formative

⁸⁷ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁸⁸ *Dickerson v. United States*, 530 U.S. 428 (2000).

⁸⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

centuries of the common law, precedent was weaker rather than the stricter *stare decisis* model that emerged in the late-Nineteenth Century under the influence of legal positivism. Most of the economically efficient doctrines of the common law emerged during this formative period. By contrast, the frequency of rent-seeking litigation and the prevalence of inefficient legal precedent has grown in the United States during the period of strict *stare decisis* over the past century.

D. Macroeconomic Effects of Common Law and Civil Law

Tullock's preference for civil law over common law is also susceptible to empirical evaluation. If Tullock is correct that the civil law is a better and more efficient system of rule generation than the common law, then countries that have adopted the civil law system should be wealthier than those that have adopted the common law system. Based on this criterion, Tullock's expressed preference for Napoleon is difficult to justify. Empirical studies have generally concluded that countries with common law legal systems are wealthier than those predicated on civil law systems.⁹⁰ The underlying causal explanation for this observed relationship remains open. Several possible mechanisms have been postulated. First, a "political" theory that points to a general preference for private ordering in the common law versus the civil law. Second, an "adaptability" theory that points to the flexibility of the common law system to respond to societal and economic changes more rapidly and sensibly than the civil law.⁹¹ A third theory argues that the rights of financial investors tend to be stronger in common law

⁹⁰ See Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUDIES 503-525 (2001).

⁹¹ See Thorsten Beck, Asli Demirguc-Kunt, and Ross Levine, *Law and Finance: Why Does Legal Origin Matter?* World Bank Policy Research Working Paper 2904 (Oct. 2002).

countries, leading to greater levels of investment and economic growth.⁹² Others have explained the relationship by pointing to differences in norms and social trust among countries, which may hold some correlation with the development of the common law system.⁹³ Notwithstanding continuing efforts to isolate the mechanisms that explain the relative efficiency of the common law relative to the civil law, the overall consensus appears to clearly favor the macroeconomic efficiency of the common law system, in contrast to Tullock's preference for the civil law.

Tullock's response may be that the common law system of the *past* was indeed more efficient than the civil law, but the common law of the *present* is converging inevitably toward the civil law and adopting the civil law's tendencies toward rigidity, interest group pressures, and redistributive ideology, and that common law societies whose legal systems have degenerated to this point would do better to simply adopt the civil law system. This response, however, is necessarily somewhat speculative and thus somewhat less persuasive than empirical evidence that suggests a clear preference for the common law. Tullock's preference for the civil law relative to the common law is difficult to understand. Although the classical common law system was seemingly superior to the modern common law system, it seems that even the degenerate common law system of today remains superior to the civil law system. Thus, the latter proposition does not seem to follow from the former.

⁹² See Ross Levine, *The Legal Environment, Banks, and Long-Run Economic Growth*, 30(3) JOURNAL OF MONEY, CREDIT, AND BANKING (August 1998, Part 2); Rafael Laporta, Florencia Lopez-de-Salines, Andrei Shleifer, and Robert W. Vishney, *Legal Determinants of External Finance*, 52 JOURNAL OF FINANCE 1131-50 (July 1997); Rafael Laporta, Florencia Lopez-de-Salines, Andrei Shleifer, and Robert W. Vishney, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

⁹³ See, e.g., John C. Coffee, *Do Norms Matter? A Cross-Country Evaluation*, 149 U. Pa. L. Rev. 2151 (2001).

IV. Conclusion

For purposes of analysis, this article has treated the common law and civil law systems as stylized “pure” forms in order to examine Gordon Tullock’s critique of the common law. Subsequent research has confirmed some of his theories, others have questioned his conclusions, and still others remain open to further investigation. In particular, his preference for the inquisitorial over the adversary system seems to rest on stronger theoretical and empirical ground than his preference for civil law over common law as contrasting systems for producing legal rules.

There remains one larger question that this article has not attempted to address—what if the systems themselves are spontaneous orders subject to their own internal evolutionary processes, such that they will tend to improvement over time. In particular, over time it appears that the “pure” distinction between the common law and civil law systems has eroded, as each system has come to borrow attributes from the other.⁹⁴ Through its system of evidentiary rules, for instance, the common law has some element of inquisitorial-style centralized control by the judge over the evidence that is introduced into the trial, and the Judge has the power to decide cases on summary judgment and other devices that prohibit the parties from putting their cases before the finder of fact. In turn, Parisi reports that in civil law systems judges have come to permit the litigants greater control over many procedural choices. Similarly, civil law judges have always provided some deference to precedent, rather than a fully statutory scheme.

Thus it may be that each system itself is a spontaneous order at the system level with an internal dynamic process that permits evolution to adapt to changing

⁹⁴ See Parisi, *Rent-Seeking Through Litigation* (cited in note 25).

circumstances and borrowing from other systems.⁹⁵ Thus, in providing a full analysis of the common law and civil law from a spontaneous order perspective, future research may fruitfully examine this mechanism for evolution at the system level as well.

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⁹⁵ Notably, in the era of competing courts in medieval Europe, borrowing innovative procedural and substantive rules from other courts was quite common. *See Zywicki, Rise and Fall* (cited in note 46).