**Week 7: Law and Jurisprudence**

* This week takes us down somewhat of a new road in this course, though far from a new road in economic inquiry. That is: the study of law and jurisprudence from an economic and—in keeping with the theme of the class—specifically, a *public choice* perspective.
* In pursuing this topic, we briefly step away from matters of elections, political debates, parties, interest groups, lobbyists, etc.—as it is often refreshing to do—and turn to the very people and institutions in our government whom we most often try to insulate from those forces, roles and responsibilities that we have decided—as many cultures have—are too important to be subject to that sort of politicking. We don’t always succeed in that, admittedly, but we often try, and it is important to consider why.
* Judges and the courts over which they preside, while they probably bear least upon the average person’s life of the three branches of government in our republic—some of you here will probably never step into a courtroom as either a plaintiff or defendant—often have the greatest impact when they do touch an individual’s life. They can decide matters of immense wealth, freedom or imprisonment, life and death. As a result, since antiquity, judges have been treated with reverence and held to high moral and professional standards.
* On Wednesday, we will turn our attention in greater depth to the matter of judges and how they exercise their decision making. Today, however, we have to begin with a more fundamental subject: the law itself.
* Different cultures and polities have, throughout history, landed at different answers as to what constitutes law; how law should be established, provided, and enforced; and on what authority men could do so.
* The two major sources of law in the history of Western civilization—particularly from the medieval and early modern period to the present—are two:
* Common law
* Civil law
* **Common law**, to define it simply, could be called simply “judge-made law.” It is law based upon the precedents set by previous judicial rulings and the legal principles that have been upheld over time as longstanding legal traditions.
* Common law, as it exists in Western tradition, derives mostly from Anglo-Saxon culture. From medieval times onward, England and what is now the United Kingdom had states in the form of monarchs, but the states were too limited and changing and the needs of their society too great for the monarch to monopolize the provision of law, so in addition to state-run courts were private courts. In fact, even where courts were state-run, they subsisted on court fees paid by litigants, so there was a strong element of competition between a wide variety of courts: crown, merchant, maritime, ecclesiastical, local, etc.
* **Civil law**, by contrast, is law that has been made through a process of legislation or by “fiat” (“fiat” meaning decree). Rather than being derived from long legal traditions, it has been created by legislators who passed a bill into law or by a dictator who simply decrees the law into existence.
* The distinction between these two forms of law, as you might anticipate, is not trivial, and it is the subject of a great deal of debate between not only lawyers but also economists which system is more desirable.
* Advocates of the common law cite a number of features which, they argue, make it distinctly preferable to civil law. The most notable of these is the claim that the common law constitutes what economists call a “**spontaneous order**”: an institution which is, as a contemporary of Adam Smith’s, Adam Ferguson put it, the “result of human action, but not the execution of any human design.”
* Ex: Markets, language, use of money, science
* Can be malign spontaneous orders, e.g. Roman numerals, arms races,
* Why does this matter? Because spontaneous orders are argued by some economists to be demonstrably more efficient institutions which emerge as the result of individual decision making: countless people all choosing what is best for them, given the constraints that they face. The alternative, a central decision made for everyone, is argued to be less efficient both because a central planner would lack the specific knowledge of time and place which is held only by market participants and because of the one-size-fits-all nature of central planning and legislation.
* Common law, having emerged from countless decisions made by judges dealing with conflicts between litigants and making their decisions in the presence of competition between courts, is argued to be just this sort of spontaneous order. It was a market for efficient rules, and where a judge made bad rules, it is argued, he stood to lose business.
* Economists are overwhelmingly advocates of common law for this reason.
* The exception, as he so often was, is Gordon Tullock. Tullock, one of the co-founders of the field of public choice and a very pro-market economist, stands out as nonetheless an advocate for civil law on two grounds:
* An insinuation (scantly argued) that common law was partly a malign spontaneous order
* The contention that the dispute resolution system under common law was riddled with wasteful rent seeking and less likely to result in good rulings
* On the first point, Tullock makes surprisingly little argument. He contends, in his writings, that yes, common law is a spontaneous order, but he points to—as we mentioned—the existence of malign spontaneous orders and says that spontaneous orders can nonetheless result in inefficient rules.
* This is probably Tullock’s weaker point, as he doesn’t point to specific instances of how common law rules are inefficient. He simply says that their being a spontaneous order is not proof that, in general, they are or must be efficient.
* His second point is more powerful and intriguing. In our legal system, we are accustomed to the following model: a plaintiff and defendant come before the court represented by lawyers, the lawyers fiercely argue their cases, and the judge or a jury decides the ruling. We think of this as standard, but in fact it is more unique to common law systems. Ours, the American system, has elements of both common and civil law, and this is one of the distinctive traits that we gained from common law traditions.
* Tullock says that this is wasteful. He points to the fact—which is true—that our **adversarial** court system derives from medieval traditions in which parties to disputes would hire champions to settle their disputes in violent trials by battle. He says that in the same way, our current system consists of two lawyers battling out a case in court and making exorbitant profits for themselves, but in such a system, at all times, half of the parties and potentially more than half of the resources are not devoted to discovering the truth but to distorting it. If you are truly guilty of a crime and you go to court to contend that you are not, you are expending resources to obscure the truth and promote a lie. The same is true if you owe your neighbor damages for a tree falling on his house. In fighting for your side of the case, not everyone is working for truth and justice but rather for their own interests. Tullock also disparages the efficacy of disinterested jury members who face no consequence of making bad decisions and so, he argues, make poor ones.
* What is the alternative? In civil law countries, such as most of Europe, the process of litigation that we have does not occur. Lawyers for each side compile the strongest evidence and legal reasoning for their side of the argument and present them to a judge who, in private, considers all of the evidence and passes down a decision. Unlike the adversarial system, Tullock argues, there is less profit to be made by lawyers whose incentive is to prolong and exacerbate the case. Unlike ignorant and indifferent jurors, he argues, knowledgeable and truth-seeking judges will be interested in following the evidence to wherever it leads.
* Two main counters against Tullock
* The presumption of a known truth of which parties are aware beforehand and which one party seeks to “obscure” is not necessarily well founded. Can there not be honest disagreements? Is the adversarial system’s argument that truth is best discovered through the process of this struggle a valid one?
* Who is to say that a judge in the civil law system is given the proper incentive to pursue truth to wherever it leads? He is unlikely to be strongly biased, but will he pursue the evidence as far as a self-interested party would? Will his process of inquiry generate as much evidence as adversarial parties would who have something at stake, or will he stop short? Does he necessarily know the questions to ask to produce further evidence past a certain point?

**Law and Growth**

* Building off of our discussion in the last class of the debate surrounding the argued superiority of common or civil law, let us turn to another line of argument: that on the effects of legal systems on growth.
* First, let us speak for a minute about the importance of economic growth rates. These are oft-cited statistics in economic discussions and discussion of economic policy, but the apparently small magnitudes of difference between them—a two percent growth in GDP in one year versus a three percent growth—betray just how immense an effect they can have on the well being of a country’s residents.
* It is important to keep in mind, when we discuss growth rates, that they are compounded rates. Over time, this gives even small differences in growth rates enormous significance.
* For instance, the last reported census data from 2015 held that the median American household income was $55,775. Starting from that, if we assume an average of two-percent growth over the ensuing twenty years, in 2035 the median household income should be $82,879. However, with three-percent average annual growth, that number would soar to $100,736!
* Given such numbers, it is easy to see why Nobel laureate Robert Lucas once said that, “The consequences for human welfare involved in questions like these are simply staggering: once one starts to think about them, it is hard to think about anything else.”
* Now, let us turn to the role of the law in these questions.
* In your readings for this week is an article by Paul Mahoney in which he presents evidence of an association between common law and greater growth rates. Looking at evidence from 1960 to 1992, he shows that common law countries experienced higher growth rates and argues that these results stem from common law systems’ greater security of property and contract rights. Specifically, controlling for all other relevant variables, he finds that common law countries grew, on average, .71% per year faster than civil law countries. These magnitudes might not sound significant to the average listener, but given what we have now discussed as to the meaning of even a percentage point over the course of a generation and the fact that these legal systems are often unchanging for centuries, the differences in wealth that result are immense.
* Similarly, research by La Porta, Lopez-de-Silanes, Shleifer, and Vishny (1998) examines protections offered to corporate shareholders and creditors and the quality of rule enforcement in 49 countries and finds that common law countries have the strongest protections, French civil law countries the weakest, and German/Scandinavian civil law systems somewhere in between.
* They also find that legal systems have significant effects on the concentration of ownership in firms: where investor protections are stronger, there is less concentration of ownership in the largest public companies; contrarily, where investor protections are weak, there is more concentrated ownership. Why does this matter? Well, it isn’t because more or less concentration is inherently good or bad. Rather, it’s because it implies that the smaller, diversified shareholders who are able to invest in common law countries might be discouraged from doing so in civil law countries where their contractual rights are less protected and less certain. Therefore, valuable capital doesn’t make it into firms where it otherwise might. Such findings begin to give us some idea of where these aggregate growth differentials come from!
* In light of all of this evidence and the debate that we discussed the other day between civil and common law advocates, we have to ask: which system best promotes the well being of most members of society? What is the socially efficient policy (without neglecting to consider the costs to individuals)? Consider your own probabilities of interacting with the justice system or that of the average person in your country. Based on the expected costs and benefits of each system on your life in a direct sense (meaning, through direct interaction with the court system), is it worth the apparent lost benefits of growth experienced under civil law systems? This, of course, doesn’t negate any strong moral preferences you might have for one or the other; should you believe that civil law results in truly more just outcomes, you may decide that it is worth the cost to you to know that you live in a more just society. All of this is simply to present you with the evidence and alternatives.

**Jurisprudence**

* Let us now turn to a more traditionally public choice look at evidence on the behavior of judges and justices in our own legal system and what it can tell us, if anything, about the outcomes that we observe.
* There have been multiple studies in recent years by some of the most notable names in law and economics turning their attention to the subject of judicial behavior. What they find is sometimes surprising and sometimes not so.
* One of the two or three biggest figures in the field today, coming to the subject as a legal scholar, is Richard Epstein, who has a paper called, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does).” In that paper, he begins by noting that the role of judges and justices is different than that of lawyers.
* As government workers but highly educated ones with considerable opportunity costs of entering public service, there must be sufficient benefits to the position to induce them to serve in that capacity.
* Citing what is called the “Hangman’s Theory,” he says that wherever buyers of a service cannot directly observe an enterprise’s output, it is usually efficient to adopt some form of nonprofit model and says that this describes the judicial system.
* He notes that in nonprofits, where salaries are lower, we expect to see more slack and nonpecuniary benefits and that the same should be expected in judges’ offices.
* Judges, for instance, can be assumed to not work as hard as lawyers of comparable age and ability.
* Epstein also notes other possible elements which enter into judges’ utility functions
* Popularity (Unlikely to be significant, as every case has a winner and a loser)
* Prestige (Inheres in the whole judiciary; unlikely that one judge will exert himself to raise the prestige of all)
* Public interest (Likely to affect judicial preferences but only insofar as decisions expressing those views enhance the judge’s utility)
* Avoiding reversal (Does not figure largely, despite their dislikling being reversed)
* Reputation (Potentially significant element)
* Epstein considers that judges likely derive some utility from the act of voting or expressing their views within a panel of other judges but that this will come at the expense of foregone leisure or other indulgences. “Going along” with a fellow judge’s or justice’s opinion can be an act of leisure-seeking but not one which helps to promote the judge’s own reputation. Appellate judges deciding to hear every case offered to them would enhance their reputation but only at the cost of a huge workload. In these decisions, they thus face trade-offs.
* Epstein also considers that judges may derive consumption value from the act of presiding. Having no tangible stake in the outcomes, they might find it entertaining. He says that the pious perception of judges and academic analyses of their incentives may have overlooked this simple source of enjoyment.
* Thus, he offers a simple construction of a judge’s utility function
* U = f(judging time, leisure time, income, reputation, other).
* This establishes the prediction that a person will accept a judgeship if his net expected utility from it is positive, which is to say if that utility exceeds the utility that he obtains in his present employment plus the cost of becoming a judge.
* Other studies have looked in more detail, with empirical evidence, into the subject of why judges behave as they do:
* Robert Cooter, another legal scholar, looks at the differential incentives of private versus public judges. He argues that there are differences in the incentives faced by judges in the public employ versus those who serve as arbitrators or in “mock court” scenarios and that these incentives have a bearing on the outcomes. Specifically, he contends that “income-maximizing private judges make decisions which are Pareto efficient with respect to the litigants (pair-wise efficient), and the judge divides the stakes to reflect how hard the parties bargain over choice of a private judge.” By contrast, whereas public judges maintain many of the incentives of private judges, Cooter argues that they are also free to take into account the interests of third-parties. He thus concludes, as a policy prescription, that wherever the effects of a decision will exclusively bear upon the litigants, it is efficient to let rulings be issues by private judges and that wherever the effects go beyond the litigants it is best to give public judges exclusive purview.
* A pair of economists, Richard Higgins and Paul Rubin, have a paper exmining the subject of judicial discretion. There, they argue that judges derive utility from two sources: judicial discretion (imposing their views on society) and wealth. However, they are adversely affected by reversals of their opinions issued by higher courts (perhaps because being overturned could have an adverse effect on their future promotion prospects).
* U = f(D, W; A)
* Subject to R = g(D, P) and W = h(R, S)
* Where A is age, R is the rate of reversal, S is seniority, and P is a political variable indicating whether the party of the judge is the same as the majority of the appellate court
* Higgins and Rubin argue that the marginal utility of wealth falls relative to the value of the decision as a judge becomes older, so judges should exercise greater discretion as they get older.
* Testing across all active U.S. district judges in a given year (1974), they ultimately find that judicial discretion is effectively a free good. Reversals have little bearing on a judge’s future prospects. They conclude that if judges do face constraints, it is not in the form of possibilities of reversal and may instead operate at the level of selection, with judges being chosen for office when they demonstrate a propensity to act in adherence with established common law or to produce “good” decisions even with little material incentive to do so.
* Finally, a more recent study by Lee Epstein, William Landes, and Richard Posner has examined why and when judges and justices choose to dissent from majority opinions when serving on panel courts.
* They examine what is often called “dissent aversion,” which is sometimes said to cause judges to not dissent even when they agree with the majority.
* Using data on caseloads from the federal courts of appeals and the U.S. Supreme Court, they find that in courts of appeals, the frequency of judges’ dissents is negatively related to their caseloads, positively related to ideological diversity among judges on the court, and positively related to the size of the court.
* Dissents are found to increase the length of majority opinions, creating more work for one another on the court.
* In summation, we can thus say that across a wide variety of issues, on multiple dimensions, judges behave much as economic theory would predict, demonstrating that even within the confines of appointed positions which are, by careful design, insulated from popular opinions, a certain public choice logic is still at work.