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Abstract

The superior efficiency of the common law has long been a staple of the law and economics literature. Generalizing from this claim, the legal origins literature uses cross-country empirical research to attempt to demonstrate this superiority by examining economic growth rates and the presence of common law legal systems. We argue that this literature fails to adequately characterize the relevant legal variables and that its reliance on broad-brush labels like "common law" and "civil law" is inappropriate.

In this Article, we first examine the efficiency literature's claims about the common law and find that it fails to accurately account for important distinctions across common law legal systems and under-specifies key terms. We next turn to the lengthy debate over replacing the common law with a civil code that raged across the nineteenth century United States, drawing from the arguments of the participants the key factors that promote efficient outcomes. We conclude that a focus on legal systems' ability to cheaply identify efficient rules, restrain rent-seeking in the formulation and application of rules, adapt rules to changed conditions, reveal the law to those affected by it, and enable contracting around inefficient rules would be more appropriate than the current emphasis on labels. Further, more attention to transition costs would make efforts at reform more credible.

The Fable of the Codes: The Efficiency of the Common Law, Legal Origins and Codification Movements[•]

Nuno Garoupa[*] & Andrew P. Morriss[**]

Building on Richard Posner's 1972 claim in the first edition of *Economic Analysis of Law*,[1] law and economics scholars created an extensive literature arguing that the "common law" creates economically efficient rules[2] while statutes are the source of economically inefficient rules.[3] If these claims are correct, those living in common law jurisdictions have a major advantage over those living in civil law ones, and the growing "legal origins" literature purports to find evidence of precisely that, through statistical analysis of rates of economic growth across countries while controlling for the presence or absence of a common law legal system.[4]

Unfortunately, neither "common law" nor "statutes" are well-specified terms within either the theoretical or the empirical literatures. They are used with different and diffuse

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[1] RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 98 (1st ed. 1972) ("Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character.").

[2] For a survey of the literature, *see* Nuno Garoupa and Carlos Gómez-Ligüre, *The Syndrome of the Efficiency of the Common Law*, 29 B. U. INT'L L.J. 287 (2011). The most historically grounded attempt to understand common law evolution is Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007), It provides little support for the devotees of the efficiency of the common law. The author concludes that most discussions of common law evolution have little if any historical basis; they are pure theory or bad history.

[3] *See, e.g.*, Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEG. STUD. 205 (1982).

[4] Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); Rafael La Porta, Florencio Lopez de Silanes and Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008); Gani Aldashev, *Legal Institutions, Political Economy, and Development*, 25 OXFORD REV. ECON. POL'Y 257 (2009). The most critical claim is against French law since other civil law systems (German and Scandinavian) perform at least as well as the common law in most of the empirical studies. A recent critique is provided by Daniel Klerman, Paul Mahoney, Holger Spamann and Mark Weinstein, *Legal Origin or Colonial History?*, 3 J. LEGAL ANALYSIS (forthcoming 2011).

meanings. As both types of law come in a wide variety of forms, this lack of definitional clarity contributes to a lack of precision in specifying models and testing hypotheses. For example, the legal origins literature purports to distinguish "common law" systems in former British colonies from civilian-influenced legal systems in the former colonies of other European colonial powers by using a dummy variable that treats as equivalent the legal systems of India, Canada and Nigeria on the one hand and Lebanon, Brazil and Côte d'Ivoire on the other.[5] Yet there are vast differences within these families of legal systems. Moreover, the literature includes multiple, competing explanations for the hypothesized greater efficiency of the common law, some focusing on supply side mechanisms and others on demand side mechanisms, leaving the theoretical justification for a dichotomous coding under-specified. There are also significant definitional issues concerning the contextual meaning of common law, civil law or statute law (resulting in complex hybrid or mixed legal systems).

Although the current literature's analysis is largely ahistorical, it is not the first debate over the relative merits of common law and statute law. France's adoption of the Code Napoléon in France in 1804 sparked an extensive and wide-ranging series of exchanges among lawyers,

[5] For a general survey of the legal origins literature, *see* La Porta et. al., *supra* note 4. The theoretical foundations are provided by Edward L. Glaeser and Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON.C LITERATURE 401 (2001) and Edward L. Glaeser and Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193 (2002). The empirical papers include Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, and Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez de Silanes, and Andrei Shleifer, *Corporate Ownership around the World*, 54 J. FIN. 471 (1999); Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, and Robert W. Vishny, *Agency Problems and Dividend Policies around the World*, 55 J. FIN. 1 (2000); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *Courts*, 118 Q. J. ECON. 453 (2003); Rafael La Porta, Florencio Lopes-de-Silanes, Christian Pop-Eleches, Andrei Shleifer, *Judicial Checks and Balances*, 111 J. POL. ECON.445 (2004); Juan Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez de Silanes, and Andrei Shleifer, *The Regulation of Labor*, 119 Q. J. ECON. 1339 (2004); Edward L. Glaeser, Rafael La Porta, Florencio Lopez de Silanes, and Andrei Shleifer, *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271 (2004); Rafael La Porta, Florencio Lopez de Silanes, and Andrei Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (2006); Simeon Djankov, Oliver Hart, Caralee McLiesh, and Andrei Shleifer, *Debt Around the World*, 116 J. POL. ECON. 1105 (2008); Aron Balas, Rafael La Porta, Florencio Lopez de Silanes, and Andrei Shleifer, *The Divergence of Legal Procedures*, 1 AM. ECON. J.: ECON. POL'Y 138 (2009). Notice that economic growth was conspicuously absent from their long list of dependent variables in the earlier work.

legislators, and the general public across the world over the merits of systematic codification relative to the common law.[6] Napoleon carried his Code across Europe by both force and persuasion, leading to adoption at various times of Civil Codes related closely to the French code by Belgium; Luxembourg; the Netherlands; a number of Germanic states including the Palatine, Rhenan Prussia, Hesse-Darmstadt, the Hanseatic territories, Frankfurt, Westphalia, and Hanover; most of the Italian states, including Genoa, Parma, Lombardy, Modena, Venice, Tuscany, Naples, and the Papal States; Portugal; and Spain.[7] Even before the French, Denmark (1683, then including Norway and Iceland), Sweden (1734), Austria (1786), and Prussia (1794) enjoyed some form of codification.[8] The French-, Portuguese- and Spanish-influenced jurisdictions and colonies in the Americas and Africa also created code-based systems, including the colonies that became Latin American nations, the territory that became the American state of Louisiana, and Quebec.[9] In the Middle East, Egypt, Lebanon, and Syria adopted French-influenced codes.[10] Turkey was influenced by the Swiss code.[11] In Asia, Japan, Korea and China adopted code-based legal systems influenced by European codes.[12]

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[6] By 1868, the Napoléonic Code or codes related to it, governed "two-thirds of the civilized world." Jean Limpens, *Territorial Expansion of the Code, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD 102 (quoting 1 THÉOPHILE HUC, LE CODE CIVIL ITALIEN ET LE CODE NAPOLEON, (,1868) at 2.). The example of the Code Napoléon continued to be discussed in the American debate throughout the century. *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON THE AMENDMENT OF THE LAW UPON THE PROPOSED CIVIL CODE 6-22 (Mar. 15, 1881), ("The soil of France was peculiarly adapted to the growth of codified legislation.").

[7] Limpens, *supra* note 6, at 93-5.

[8] Angelo Pieor Sereni, *The Code and the Case Law, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD 55, *supra* note 6. The legal origins literature has found the Scandinavian-derived codes to be correlated with higher GDP per capita. *See* La Porta et. al., [YOU HAVE MULTIPLE BY THIS AUTHOR IN NOTE 5, NEED THE TITLE FOR REFERENCE] *supra* note 5. For a discussion of the differences between pre-Napoleonic codes and post-Napoleonic codes, see Sereni, *supra*, at 57-9.

[9] Limpens, *supra* note 6, at 98-100.

[10] *Id.* at 102.

[11] *See* Arzu Oguz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 PACE INT'L L. REV. 373, 380 (2005) (Turkey adopted "a direct translation of the French version of the Swiss Civil Code" in 1926).

[12] Limpens, *supra* note 6, at 101. A Japanese delegation visited California during that state's codification process "and on their return took with them copies of the codes, portions of which were afterwards incorporated into the

Even within the common law world, codification was vigorously debated, and sometimes adopted, either in part or as a system. Jeremy Bentham wrote to President James Madison offering to codify the United States' laws in 1811[13] and repeated his offer in letters to state governors several years later.[14] Thomas Jefferson pondered – and rejected – codification as a law reform measure[15] and Americans debated what to do with the English common law after Independence.[16] The Louisiana Purchase spurred a discussion over what form of law would govern in the newly acquired territory.[17] Joseph Story coauthored a report for Massachusetts in 1837, which spoke favorably of the merits of codification while concluding that the time was not yet ripe to undertake it.[18] Californians considered retaining the region's Mexican civil law system when drafting their initial state laws in 1849 and, although they initially opted not to do

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laws of Japan." Oscar T. Shuck, *The California Code of Laws, in* HISTORY OF THE BENCH AND BAR OF CALIFORNIA 191, 194 (Oscar T. Shuck ed. 1901),

[13] JEREMY BENTHAM, *Letter to James Madison* (Oct. 30, 1811), *in* 8 THE CORRESPONDENCE OF JEREMY BENTHAM 182 (Timothy L.S. Sprigge ed., 1988). Madison rejected the offer in 1816. *Letter from James Madison* (May 8, 1816), *in id.* at 521-22.

[14] CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 98-101 (1981).

[15] James R. Stoner, *Sound Whigs or Honeyed Tories? Jefferson and the Common Law Tradition, in* REASON AND REPUBLICANISM: THOMAS JEFFERSON'S LEGACY OF LIBERTY 103, 109-10 (Gary L. McDowell & Sharon L. Noble eds., 1997). *See also* Arthur T. Vanderbilt, *The Reconciliation of the Civil Law and the Common Law, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 389, 393 ("Jeffersonians favored the reception in France of the civil law.").

[16] *See, e.g.*, THOMAS JEFFERSON, THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 163 (John P. Foley ed., Funk 1900). ("Whether we should undertake to reduce the common law, our own, and so much of the English statues as we have adopted, to a text, is a question of transcendent difficulty. It was discussed at the first meeting of the committee of the Revised Code [of Virginia] in 1776, and decided in the negative by the opinions of Wythe, Mason and myself, against Pendleton and Thomas Lee.").

[17] Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo-American Sources*, 12.1 ELECTRONIC J. COMP. L. (May 2008), *available at* http://www.ejcl.org/121/abs121-12.html. Tucker argues that efforts to introduce the common law in Louisiana were led by American lawyers unfamiliar with the existing legal system. John H. Tucker, Jr., *The Code and the Common Law in Louisiana, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 346, 351.

[18] JOSEPH STORY, *Codification of the Common Law, in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 1837 (William Story ed., Charles C. Little & James Brown 1852). Story was a proponent of "what has been called 'moderate' codification … to make the law more manageable, as well as unified." M. H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer,* 29 AM. J. LEG. HIS. 36, 75 (1985). Story made use of civil law scholarship and code provisions throughout his career, including in his *Commentaries* and judicial decisions. *See id.* at 63-71.

so, continued to debate it.[19] Among other prominent advocates for codification in California, Gov. Leland Stanford insisted on "the absolute necessity" of codification in his 1863 address to the legislature[20] and a Civil Code was ultimately adopted in 1872. [21] Georgia (1861),[22] Dakota Territory (1866),[23] and Montana (1895)[24] adopted civil codes as well, the latter two heavily influenced by the Code Napoléon.[25] New York began official efforts at codification in 1846 with the adoption of a constitutional provision establishing a code commission,[26] which yielded draft codes in the 1860s that were debated in New York between 1879 and the late 1880s.[27] The proposed N.Y. civil code even passed both houses of the state legislature in 1879 and 1882, only to be vetoed both times by the governor.[28] The New York struggle produced a particularly

[19] Ralph N. Kleps, *The Revision and Codification of California Statutes, 1849-1953,* 42 CAL. L. REV. 766, 766 (1954).

[20] Shuck, *supra* note 12, at 191. Codification was regularly debated in California in the 1850-60s. Kleps, *supra* note 19, at 767-72.

[21] Rosamund Parma, *The History of the Adoption of the Codes of California,* 22 LAW LIBR. J. 8 (1929); Kleps, *supra* note 19.

[22] Marion Smith, *The First Codification of the Substantive Common Law,* 4 TUL L. REV. 178 (1930); Roscoe Pound, *Codification in Anglo-American Law, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 267, 272-73.

[23] J.O. Muus, *The Origin of the North Dakota Civil Code,* 4 NOTRE DAME L. Rev. 103 (132).

[24] Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws" – Lessons from One Hundred Years of Codification in Montana,* 56 MONT. L. REV. 359 (1995).

[25] Both were based on drafts prepared for New York as modified by California. Morriss, *Plenty of Laws, supra* note 24, at 382-83. The New York drafts were heavily influenced by the Code Napoleon. *See, e.g.*, ARGUMENTS AGAINST THE BILL "TO ESTABLISH A CIVIL CODE," AT THE JOINT MEETING OF THE JUDICIARY COMMITTEES OF THE SENATE AND ASSEMBLY, FEB. 25, 1886 6-7 ("Mr. Rives said that he had compared the code now before the legislature with the Code Napoléon. In their general arrangement and in the order of certain subjects and sections the two codes closely resembled each other. He would not say that the proposed code was a translation of the French code, but some portions seemed to be literally translated.").

[26] N.Y. CONST. art. I, § 17 (1846). *See also* David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 18-9 (1889).

[27] The draft code "slept undisturbed in the limbo of legislative experiments from 1865 until the winter of 1879, when the Bar of the State was startled by news of its adoption by both branches of the Legislature." ALBERT MATHEWS, THOUGHTS ON CODIFICATION OF THE COMMON LAW 6 (3rd ed. 1882).

[28] Andrew P. Morriss, *Codification and Right Answers*, 74 Chi.-Kent L. Rev. 355, 364-65 (1999); *Veto, Senate Bill, Not Printed, Civil Code, in* PUBLIC PAPERS OF LUCIUS ROBINSON, GOVERNOR 72 (1879); Alonzo B. Cornell, *Memorandum Filed with Assembly Bill No. 215, Entitled 'An Act to Establish a Civil Code,' Not Approved, reprinted in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' REAPPOINTED NOVEMBER 1, 1881 8-9 (1882). The Civil Code also passed the Senate in 1888, but failed in the Assembly. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

voluminous literature of pamphlets, speeches, and articles on the topic, and led New York lawyer James Coolidge Carter to write important anti-codification works,[29] some of which were later cited by economist Friedrich von Hayek in his own arguments in favor of the common law.[30] It also inspired a two-day debate in 1886 at a meeting of the American Bar Association, at which those present voted 58 to 41 in favor of reducing the common law to statutory form.[31]

Within the British Empire, Bentham forcefully advocated codification for years.[32] John Austin similarly supported codification[33] and in the 1860s a Royal Digest Commission was given the task of digesting all of the laws.[34] Also during the nineteenth century, Britain undertook extensive law reform efforts at home that transformed large areas of the common law into comprehensive statutes. India began a codification effort under Thomas Macaulay in 1833-34 that ultimately produced the Indian Penal Code (1860), Indian Contract Act (1872), and Indian Evidence Act (1872), among others.[35]

EIGHTH ANNUAL REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED DECEMBER 11, 188 7 (1889).

[29] JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (G.P. Putnam's Sons 1907); JAMES COOLIDGE CARTER, THE PROVINCES OF THE WRITTEN AND UNWRITTEN LAW (New York, Banks Brothers 1889); JAMES COOLIDGE CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (New York, Evening Post Job Printing Office 1884); James Coolidge Carter, *A Communication to the Special Committee 'To Urge the Rejection of the Proposed Civil Code,' showing the Effect of such Code upon the Law of General Average, in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THIRD ANNUAL REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED OCTOBER 10, 1882 (New York, C.G. Burgoyne 1883); JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE BEFORE THE SENATE JUDICIARY COMMITTEE, ALBANY, MARCH 23, 1887 (Albany, The Committee 1887).

[30] 1 Friedrich A. Hayek, LAW, LEGISLATION AND LIBERTY 74, 169, 174, 176 (1978) (citing and quoting from Carter).

[31] William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 NOTRE DAME L. REV. 17, 24 (1968).

[32] *See* Jeremy Bentham, "LEGISLATOR OF THE WORLD": WRITINGS ON CODIFICATION, LAW, AND EDUCATION (Philip Schoefield & Jonathan Harris eds., 1998) (collecting Bentham's writings on the subject).

[33] *See* 2 John Austin, LECTURES ON JURISPRUDENCE 321-47 (1885).

[34] Its first report is printed at 2 AM. L. REV. 361 (1867). Prominent British legal thinker Sheldon Amos wrote extensively on codifying English law. Sheldon Amos, CODIFICATION OF PRIVATE LAW IN ENGLAND AND THE STATE OF NEW YORK (1867); Sheldon Amos, AN ENGLISH CODE (1873).

[35] *See* 3 Roscoe Pound, JURISPRUDENCE 707-08 (1959); Bijay K. Acharyya, CODIFICATION IN BRITISH INDIA (1914) 180-263 (describing process).

Even these were not the first debates within the common law world. Codification has been part of the legal policy discussion in Britain since early days. While judicial precedents developed the common law, the role of statutes and the need to simplify and systematize law was a matter of concern since, at least, the sixteenth century.[36] Significant British legal scholars such

[36] At different stages, there were significant efforts to codify the common law, although they largely failed. Desmond Brown, *Abortive Attempts to Codify English Criminal Law*, 11(1) PARLIAMENTARY HIST. 1, (1992), at 1. Edward VI was particularly supportive of codification in the sense of consolidation of the common law. In 1547, a bill for the "Reformation of the Common Laws of the Realm" was introduced but no legislation was approved. *Id.* at 3. The king was displeased with the lack of action by the Parliament but died in 1553 before his concerns were addressed the Parliament, and his successors had less interest in consolidation and codification, although Sir Francis Bacon made an attempt in 1614. *Id.*; Pound, *Anglo-American*, *supra* note 22, at 267-68. The British government in the 1830s took the issue seriously and produced important criminal legislation through a procedure which, according to one legal scholar, "allowing for the differences between the French and the British systems, was not unlike Napoléon's methodical procedure prior to the enactment of the Code Civil." Brown, *supra*, at 17. By the late 1830s, the discussion in Britain had shifted to consideration of codification of particular areas of the law, mainly criminal law and procedure, through a method similar to the French codification. A Criminal Law Commission was appointed (largely composed of practitioners) to merge statute law and common law principles of criminal law, and later reform it. *Id.* at 18; John E. Stannard, *A Tale of Four Codes: John Austin and the Criminal Law*, 41 N. IRELAND LEGAL Q. 293 (1990), at 300 (the Commission was formerly appointed by William IV to produce a "Digest of the Criminal Law" which consisted of consolidation of statute law, codification of the common law, and preparation of a code of criminal law). A first code of criminal law was submitted to the Parliament in 1843 (this new code was largely a consolidation) and a code of criminal procedure in 1845 (this one was an important reform of criminal procedure significantly influenced by French law). Brown, *supra*, at 19. A division between those who favored mere consolidation and those who sought broader legal reforms killed both proposals. A new commission was appointed in early 1845 to "amend the law where necessary" and submitted a new criminal code to the Parliament by 1853. Stannard, *supra*, at 303-44. The judges were vehemently opposed and the codification of criminal law was abandoned (although there were consolidation attempts such as the Consolidation Acts of 1861). *Id.* at 305.A new criminal code was drafted by James Fitzjames Stephen in 1878, although it too was never approved by the Parliament. *Id.* at 305, 309. A new criminal code was drafted in 1985. *Id.* These efforts at codification in criminal law yielded several statutes including the Perjury Act (1911), the Forgery Act (1913) and the Larceny Act (1916), but failed to achieve the significant reform its supporters sought. V. V. Veeder and Brian Dye, *Lord Bramwell's Arbitration Code*, 8 ARB. INT'L 329 (1992), at 337.

Although criminal law was the main focus of codification in Britain, there were efforts in other areas as well. There were also significant attempts at commercial law. A commission was appointed in 1853 to consider consolidation and assimilate the commercial laws of England, Scotland and Ireland; some influential lawyers even suggested a Code Victoria but that came to nothing. Alan Rodger, *The Codification of Commercial Law in Victorian Britain*, 109 The Law Quarterly Review 570 (1992), at 574. After the developments in Germany, in the particular the 1862 Common Commercial Code of the German confederation, the advocates of commercial law codification argued a similar statute was needed for Britain and the Empire. *Id.* at 577. While influential lawyers and business interests demanded a commercial law code, and were supported by the advocates of British imperialism, the Parliament moved slowly. *Id.* at 585. It approved some statutes to consolidate commercial law (for example, the Factors Act (1889), the Partnership Act (1890), Sale of Goods Act (1893), the Marine Insurance Act (1906)) but there was never a new commercial code. A possible explanation is that there were not significant problems with the common law principles and they varied little within the United Kingdom. *Id.* at 587.

Another serious attempt of codification was made in arbitration law. A code was proposed for commercial arbitration in 1889. Veeder and Dye, *supra*, at 329. The reason seems to have been the views shared by lawyers and judges that the rules of procedure followed by English courts were inappropriate for commercial litigation and were

as John Austin, Jeremy Bentham, Frederick Lawson, Frederick Pollock and Glanville Williams participated in the debates. The explosion of statue law (there were around 2,000 statutes by 1547 and 17,000 by 1877[37]) and important contradictions in existing laws (for example, different sanctions were mandated by law for the same offense[38]) led to a pro-codification movement, initially focused on consolidation in a consistent and simplified way. However, as one British legal scholar has recognized, "the history of attempts at codification in the nineteenth century Britain is the history of movement which largely failed."[39] The arguments for codification defended by its supporters were a "clear statement of the law within a manageable compass"[40] and modernization of law. However, eventually, these arguments were not as persuasive as the tradition of the common law and the perception that a code "might prove difficult to adapt to changing circumstances".[41] Many influential legal thinkers concluded that the values of English law were inconsistent with codification except where "substantial reforms are both necessary and urgent".[42] The American debate was influenced by these events and debates, with both proponents and opponents using the ideas of Bentham, Austin, Sheldon Amos, and other British sources in their arguments.

Thus at exactly the time when Britain and the United States were experiencing unprecedented economic growth, substantial numbers of thoughtful, well-informed lawyers and

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difficult to understand by non-specialists. *Id.* at 330, 334. Some favored the French model of a state-sponsored arbitration courts (the *tribunaux de commerce*) staffed by business people. *Id.* at 331. Such solution would eliminate commercial litigation from the English High Court. *Id.* at 344. Others proposed far reaching procedural reforms but within the common law courts. The 1889 statute was largely modest and the effects were much less structural than defended by the supporters of codification. *Id.* at 332.

[37] Brown, *supra* note 36, at 2.

[38] *Id.* at 15.

[39] Rodger, *supra* note 36, at 570.

[40] *Id.* at 575.

[41] *Id.* at 575.

[42] Veeder and Dye, *supra* note 36, at 334ff.

others concerned about law were promoting replacing the common law with civil codes. Nations with civil codes, like France and Germany, also experienced substantial economic growth during this period. While it is possible that they simply missed the connection between the growth around them and the common law, we think it is more likely that the legal origins literature has missed some important points about how the law relates to economic efficiency. In this Article, we use insights from the nineteenth century American portion of these debates to reframe the issues involved in comparing "common law" to "statute law". Rather than focusing on poorly specified labels, we suggest that the key to a legal system's ability to promote economic growth lies in its ability to minimize transaction costs, restrict rent-seeking, and cheaply adapt to changing circumstances. Different legal systems represent different mixes of strategies to accomplish these sometimes-conflicting goals and different circumstances make different emphases among the goals the efficient choice.[43] Refocusing the debate over the role of legal systems in economic growth on their ability to accomplish these goals is necessary if the law and economics literature is to contribute meaningfully to the economic development debate.

There is an important parallel in the earlier literature over path dependence in standards. In their classic article, *The Fable of the Keys*, economists Steve Leibowitz and Stan Margolis compared efficiency claims for the rival QWERTY and Dvorak typewriter keyboards.[44] Contrary to popular belief that the QWERTY keyboard was less efficient than the Dvorak because the Dvorak keyboard minimized the distance fingers had to travel while typing in English, they found that keyboards had multiple dimensions of efficiency and that each keyboard had

[43] *See, e.g.*, Paul Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L. J. 1, 10-11 (1994) (arguing that creating systematic law codes was costly in Eastern European transition economies because doing so diverted scarce resources away from wealth-increasing transactions during transition from socialist to capitalist economies).

[44] Steven Leibowitz & Stanley Margolis, *The Fable of the Keys*, 33 J.L. & Econ. 1 (1990).

advantages over the other in at least one dimension. Much like the pre-Leibowitz-Margolis QWERTY / Dvorak debate did with respect to keyboards, the common law / civil law debate has focused for too long on only a subset of the relevant efficiency dimensions.

In Part I, we analyze the efficiency claims of the common law and legal origins literatures. We show how the lack of clarity in defining key terms and specifying key mechanisms has led to misidentification of features related to efficiency and a nebulous conception of the "common law" rather than with how legal systems cope with some crucial problems. In Part II, we turn to the nineteenth century American debates' contributions as a means of further specifying the features of legal systems that can produce efficient rules. In Part III, we use these insights to suggest a more fruitful framework for assessing legal systems than the dichotomy between common and civil law.

I. The Economics of the Common Law

The common law efficiency literature identifies the role of the legal system in promoting economic growth as an important area of inquiry for law and economics. However, the precise mechanism by which this occurs is a matter of considerable debate, as we describe below. In addition to identifying the mechanisms by which a legal system moves towards efficiency in theoretical terms, it is also necessary to map the theories on to the features of real legal systems. Here the common law efficiency literature is particularly problematic, since the degree of diversity of legal systems that fall within the labels "common law" and "civil law" is large. In this section, we identify problems with the efficiency of the common law literature and show how these problems are related to misspecification of key terms.

A. Definitional issues

Posner argued that the common law provided a coherent and consistent system of incentives that generally induced efficient behavior, not merely in explicit markets but in all social contexts (implicit markets). For example, Posner contended that common law rules reduced the transaction costs of market transactions such that the rules favored market transactions when it was efficiency enhancing to do so.[45] He did not argue that all common law doctrines were economically justifiable, that they were simple to understand from an economic perspective, or that judges had made explicit economic arguments to support their adoption of particular rules. Posner's formulation of the initial efficiency claim for the common law thus rested on the idea of an implicit economic logic to common law doctrines.[46] While Posner's formulation of the efficiency claim did not attempt to provide a complete theory of the common law, he offered an innovative explanation for some of the major features of the American legal system and one that was appealing to law and economics scholars both because of its focus on the efficiency of legal rules and because it allowed testing legal rules' efficiency through modeling.

To explain the implicit logic's source, Posner put forward a theory of the common law related to Oliver Wendell Holmes' 1880s' theory of the common law.[47] Both Posner and Holmes define the "common law" in the Blackstonian sense. According to Blackstone, the common law

[45] Posner, *supra* note 1, at 99 ("The presumption in such areas [where transactions costs are low] is that existing customs and practices are efficient and that rules intended to alter them are inefficient as well as futile.").

[46] Id. at 98-9. In the most recent edition, Posner puts it this way: "economics is the deep structure of the common law, and the doctrines of that law are the surface structure. The doctrines, understood in economic terms, form a coherent system for inducing people to behave efficiently, not only in explicit markets but across the whole range of social interactions." Posner, *supra* note 1, at 315-16 (8th ed. 2010).

[47] Oliver Wendell Holmes Jr., *The Common Law* (Dover Publications 1991) (1881).

consists of general customs by which the judges and the courts are guided and directed.[48] Thus, the common law includes all legal doctrines that do not require a written form to be valid, but rather rely on the usage by courts.[49] Holmes' primary argument was that the development of the common law was driven by judicial responses to public policy issues presented by cases rather than by a consistent internal logic. In Holmes' theory, the ability of the common law to adjust appropriately to external needs derived from the judiciary's role as a representative of the community.[50] Notably Holmes vehemently opposed the nineteenth century codification movement, asserting that the judiciary was better equipped than the legislature to articulate appropriate rules.[51] Posner's understanding of the evolution of the common law is close to Holmes' formulation, particularly if we treat efficiency as a conceptualization for the evolutionary survival of what Holmes perceived as the superiority of the common law rules and doctrines. In short, Posner provided a structure for the Holmesian evolution of the common law, one that pushed the common law toward efficient rules through judges' mostly unconscious internalization of efficiency as a value, and, through public choice theory, to explain why statute law was inferior.

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[48] Sir William Blackstone, *The Commentaries on the Laws and Constitution of England* (University of Chicago Press 1979) (1796). This idea was widespread in the nineteenth century United States. *See, e.g.*, Story, *supra* note 18, at 702 (common law "is a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country.").

[49] Blackstone, *supra* note 48, at 68 ("general customs" are "that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed"); 69 (judicial decisions are "the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form part of the common law.").

[50] Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) (it was "the merit of the common law that it decides the case first and determines the principle afterwards" which provides over time "a true induction to state the principle which has until then been obscurely felt." As a result, "[a] well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.") This view was shared by prominent anti-codifiers like James C. Carter. *See* CARTER, PROPOSED CODIFICATION, *supra* note 29, at 25.

[51] SHELDON M. NOVICK, INTRODUCTION TO THE DOVER EDITION, THE COMMON LAW BY OLIVER WENDELL HOLMES (1991).

This reliance on a Blackstonian definition leaves many important issues unaddressed, however. The first problem is that the Blackstonian understanding of the common law is not universally accepted even within American or British legal thought.[52] For example, Jefferson thought Blackstone's "honeyed Mansfieldism" led to a "slide into toryism" by the bar, in contrast to the role of Coke, which led to the "Whigism" Jefferson thought necessary to the preservation of liberty.[53] And Jefferson stressed that the common law was "written law the text of which is preserved from the beginning of the thirteenth century downwards" whose "substance" was "retained in the memory of the people and committed to writing from time to time in the decision of the judges and treatises of the jurists."[54] For Jefferson, common law was "legislation, the particular origins of which are lost in the midst of time, but origins that are in principle discoverable," making his difference with Blackstone a distinction between Parliament and the people as the source of the legislative activity, the belief in which was "precisely what describes [a person] as a Tory or a Whig."[55] In the Jeffersonian tradition, there was little room for a Holmesian (or Posnerian) judge, since judges' task was not to respond in a representative capacity or to choose an efficient rule but instead to discover a pre-existing social consensus. The Holmesian and Jeffersonian approaches suggest differences with respect to precedent, innovation, and other key attributes of the legal system. Moreover, French civil law itself served as persuasive precedent for Chancellor Kent, one of the greatest American judges, who wrote that he could "generally put my Brethren to rout & carry my point by mysterious use of French and civil law. The Judges were republicans & very kindly disposed to everything that was French

[52] *See, e.g.*, Emily Kadens, *Justice Blackstone's Common Law Orthodoxy,* 103 Nw. U. L. Rev. 1553 (2009) (describing Blackstone as "an outlier on his own court" due to his views on the common law).

[53] Stoner, *supra* note 15, at 103 (quoting Jefferson's Feb. 17, 1826 letter to James Madison).

[54] *Id.*, at 113 (quoting Jefferson's November 1785 letter to Phillip Mazzei).

[55] *Id.*, at 113-14.

& this enabled me without citing any alarm or jealousy, to make free use of such authority & thusly enrich our commercial law."[56]

Consider next the role of statutes. At least for much of the nineteenth century in Britain and the United States, statutes played only secondary and subordinate roles in the law, as declaratory (to restate the common law) or remedial (to correct the flaws of the common law). But even a critic of the common law as severe as Bentham thought British common law judges had "scrupulous fidelity in following the declared will of the legislator,"[57] suggesting that there might be a larger role for statutes within the common law than the Posnerian model suggests. Most importantly, a binary conceptualization of common law and statute law is inadequate to accurately describe the evolution of exactly those legal rules on which much of the common law efficiency argument rests. For example, one can argue that statutes provide certainty within a common law system in some instances by offering particularization of rules in some instances.[58] And prominent American legal thinkers articulated quite different visions of the role of statutory law. For example, Justice Cardozo saw clear advantages in the codification process and recognized some advantages to the French legal method in shaping judgments.[59] More generally, the nineteenth century American codification debate demonstrates that multiple understandings of the roles of both the common law and statutes existed throughout the common law's period of dominance.[60]

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[56] Vanderbilt, *supra* note 15, at 393 (quoting James Kent, *An American Law Student of a Hundred Years Ago, in* SELECT ESSAYS IN ANGLO-AMERICAN LAW 843 (1907).).

[57] JEREMY BENTHAM, THEORY OF LEGISLATION 156 (1911).

[58] Sereni, *supra* note 8, at 73.

[59] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (BiblioBazaar 2009) (1921).

[60] For example, Carter, one of the common law's great spokesmen, limited his definition of the common law to "that body of rules for the regulation of the conduct of men *in their ordinary transactions with each other* which are enforced by the State." CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 8.

In contrast to many of these earlier ideas about the role of statutes in the common law, Posner contends that statutes that go beyond the Blackstonian role are likely to be inefficient. In particular, Posner draws on public choice theory's insights about the role of special interests in legislation to argue for the absence of a basis for efficiency in legislation.[61] Unfortunately for the theory, the evolution of many legal doctrines in the United States occurred through courts in some jurisdictions and through legislatures in others, producing equivalent rules through different processes.[62] Reliance on a Blackstonian definition is thus an important limitation contained within Posner's (and related) claims, although it is rarely explicitly discussed.

A third important issue concerns the role of customary law within the common law. The *lex mercatoria* provided many commercial law doctrines and practices that promoted commerce; but statutory intervention was necessary to address rigidities and technicalities that were introduced through the common law into the law governing bills of exchange.[63] Getting the role of custom right can have important consequences.[64] Moreover, the processes by which custom and case law are developed differ dramatically, including the identity and method of selection of decision makers. If those efficiency properties derive from the characteristics of decision makers,

[61] Posner, *supra* note 1, at 716-20 (8th ed. 2010).

[62] For example, some states abolished privity and contributory negligence by statute and some by court decision. Similarly some adopted comparative negligence by statute and some by court decision. *See* Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 Emory L.J. 523, 575-76 (1996) (discussing flaws in studies of these doctrinal changes that do not properly distinguish legislative from judicial change). There are also similarities across legal systems. For example, "the case law developed for the protection of neighbors a set of limitations that, under the name of *abus de droit*, produces the same results as the Anglo-American notion of 'nuisance.'" Claude Lévy, *The Code and Property*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra* note 6, at 162, 167.

[63] Janice Dickin McGinnis, *Statute Law and the Owl of Minerva: The Bills of Exchange Act, 1882,* 24 Alberta L. Rev. 275, 292 (1985-1986) (codification of area of law in part due to law "becoming more technical and rigid.").

[64] For example, John Hasnas has convincingly argued that Hayek's analysis of the common law erred because of a fundamental confusion between case-based common law and customary law. John Hasnas, *Hayek, the Common Law, and the Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79 (2005). Samuel Morrison and Hasnas debated Hayek's interpretation of the common law and custom. *See* Samuel T. Morrison, *Custom, Reason and the Common Law: A Reply to Hasnas*, 2 N.Y.U. J.L. & LIBERTY 231 (2007); John Hasnas, *Confusion about Hayek's Confusion: A Response to Morrison*, 2 N.Y.U. J.L. & LIBERTY 244 (2007); Samuel T. Morrison, *Rejoinder to Hasnas*, 2 N.Y.U. J.L. & LIBERTY 258 (2007).

they should differ as well.[65] If customary law is the source of efficiency properties,[66] some have argued that much of particular codified systems are based on customary law as well.[67] Moreover, if the efficient rules come from custom and a code embodies custom, putting it in statutory form might preserve those rules better than leaving them subject to explicit, ad hoc change through court decisions. Finally, specifying a mechanism that distinguishes efficiency-enhancing customs from efficiency-reducing ones is essential.

As these examples suggest, the argument for the common law's efficiency rests on underspecified terms that go to the heart of the issue. Without clearly specifying what is meant by "common law", including an understanding of the roles of statutes and custom, grouping a wide range of legal systems under the term is meaningless. This is particularly problematic for the legal origins literature, since its use of the term "common law" is virtually synonymous with "former British colony." Since Britain's legacy to its former possessions goes well beyond a legal system involving judicial opinions and powdered whigs, identifying the source of the purported efficiency within the legal system (rather than in widespread use of English, Westminster-style parliaments, or financial ties to London) requires examining the theoretical basis for the claim.

B. Judicial preference models

Posner's theory derives efficient rules through judges' values finding their way into judges' decisions, where those values are related (perhaps indirectly) to efficiency. This requires

[65] If the key is the common law judge's selection of custom as enforceable, rather than the custom itself, this problem is partially ameliorated, although we now require a theory of why judges are more likely to select efficiency-enhancing customs than non-efficiency-enhancing ones.

[66] Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis*, 97 Nw. U. L. Rev. 1551 (2003).

[67] *See* C.J. Friedrich, *The Ideological and Philosophical Background*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra* note 6, at 1, 3 (summarizing and criticizing this argument with respect to the French code).

a mechanism for selecting judges that select individuals with the relevant values (or alternatively, are not subject to the same lobbying pressure than legislators, an empirically problematic hypothesis). Yet there is no mechanism to explain how, even during the common law's period of dominance in the nineteenth century United States, judges in different jurisdictions would have shared the critical set of values. Just during that time period, state judges (the most important with respect to the common law) were selected by election, legislative appointment, gubernatorial appointment with legislative confirmation, gubernatorial appointment with confirmation by a governor's council, and with wide degrees of effort at restricting selection to "merit".[68] Adding the heavily politicized territorial judiciary to the mix further complicates the picture.[69] A consistent judicial preference for efficiency among judges selected by such a variety of methods requires the preference to be extraordinarily widely shared. Moreover, although Posner has offered a convincing analysis of why the federal judiciary is designed to minimize the opportunities for special interests to influence judges,[70] his theory does not address state judiciaries where the differences in selection method may create different incentives for judges.[71]

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[68] Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment-at-Will*, 59 MO. L. REV. 679, 713-15 (1994) (discussing differences across state courts); Evan Haynes, THE SELECTION AND TENURE OF JUDGES 101-35 (Littleton, Colorado, Fred B. Rothman & Co. 1981) (1944) (describing methods of selection in each jurisdiction 1776-1943).

[69] *See* Andrew P. Morriss, *Legal Argument in the Opinions of Montana Territorial Chief Justice Decius S. Wade*, 1 NEV. L. REV. 38, 42-3 (2001) (discussing politicized nature of territorial judiciary).

[70] Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing as Everybody Else)*, 3 SUP. CT. ECON. REV. 1 (1993), Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005), Richard A. Posner, HOW JUDGES THINK **(**2008). At times the scholarly literature [?] focuses on the federal judiciary without properly distinguishing it from state judges subject to completely different incentive schemes. *See, e.g.,* Cross, *supra* note 62, at 570 (an article on common law, stating, "A considerable body of political science research finds that judges tend to make decisions in furtherance of their ideological leanings" but citing only research on the U.S. Supreme Court, which has almost no role in the development of the common law).

[71] Consider former Arkansas Supreme Court Associate Justice Robert A. Leflar's 1961 account of why elected judges have an incentive to write well:

> If the parties and their counsel are reasonably well satisfied with the quality of the opinion handed down in their case, the opinion may well be off to a better start on its long-run law-making function than if they pick holes in it from its inception, though initial dissatisfaction of this sort will not always or necessarily be a long-run handicap to an opinion. Strong dissatisfaction with an

More broadly, consider Lord Mansfield, responsible for the development of efficient common law commercial law rules in Britain.[72] Mansfield "was a reformer who often strayed outside the restraints of precedents" to adopt what he viewed as improvements to the law.[73] Mansfield's role in developing the common law was significant, yet his preferences appear to be quite different from those of his contemporary fellow judges, since it was Mansfield, and not the others, who is credited with introducing major efficiency-promoting innovations.

More generally, the messy reality of a common law made up of limitations imposed by multiple and conflicting precedents and subject to significant shifts as the result of judicial efforts fits poorly into an efficiency-promoting approach as suggested by Posner.[74] As Frank Cross suggested in criticizing the Posnerian model of judging, the wide array of preferences a judge may be satisfying in a particular case "could well produce a rather random body of

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> opinion may, however, be a political handicap to the judge who wrote it, if he be an elected officeholder. The political implications of a decision may, for the elected judge, be the most important aspect of his opinion.

Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 811-12 (1961). Moreover, elected judges have strong incentives to favor rulings that redistribute wealth from non-voters to voters. *See also* Richard Neely, THE PRODUCT LIABILITY MESS 6-7 (1987) ("For example, I am a backwoods judge who decided ordinary cases that are of absolutely no concern to anyone but the litigants. Most of my day is consumed by working as the inside man at the judicial skunkworks where I slog through tedious criminal, workers' compensation, and product liability cases. If I say to myself, 'the hell with those Frenchmen at Michelin!' and give some injured West Virginian a few hundred thousand dollars, it doesn't shatter the foundations of West Virginia's commercial world. Since I'm paid to choose between deciding for Michelin and sleeping well, I choose sleeping well. Why hurt my friends when there is no percentage in it?"). As a result, judicial preferences – for the very reasons that make public choice theory a compelling analysis of legislators' motives – are likely to vary.

[72] *See* S. Todd Lowry, *Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century*, 7 J. ECON. ISSUES 605, 609-11 (1973) (describing Mansfield's role).

[73] Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W.VA. L. REV. 43, 70-1 (2001). Ironically, Mansfield's success was, in part, due to his ability to transcend the fact patterns of cases and instead generalize principles from cases in a fashion similar to that used by code writers. He also drew heavily on Roman law methods and principles. Lowry, *supra* note 72, at 610 (he was "strongly influenced by the Roman legal tradition" and "[w]hile he recognized the factual orientation of the jus gentium, he in no way minimized the importance of the role of the legal scholar in generalizing and rationalizing the popular usages of the merchants in terms of expediency or efficiency and morality.").

[74] Fisch notes that Blackstone's contemporaries might have found his "praise and rationalization of the status quo … sufficiently at variance with the actual performance of the system to jolt the sensibilities of many…." William B. Fisch, *The Dakota Civil Code: Notes for an Uncelebrated Centennial*, 43 NOTRE DAME L. REV. 485, 489 (1967).

decisions, at least at the margin of doctrine."[75] Not only is it sometimes difficult even for law and economics scholars to identify which rule is the most efficient,[76] but Posner's efficiency hypothesis begs for a more detailed explanation for how efficient rules would appear despite the apparent judicial disinterest in efficiency, at least as expressed in common law court opinions.[77] In particular, Posner's articulation of the hypothesis lacks an explicit mechanism for why judges would prefer efficient rules over rules that satisfy their other preferences.[78] Moreover, Posner's theory does not offer a reason to believe a civil code-based legal system would be less likely to promote efficiency than a common law one. If a code was written by a group with shared preferences for efficiency, the rules they devised would also be efficient. While individual statutes drafted by legislators can readily be attributed to rent-seeking, codes such as the Code Napoléon were created through a process which considerably restricted opportunities for rent-seeking.[79] Both processes have advantages and disadvantages. For example, in developing contract law, von Mehren argued that

[75] Cross, *supra* note 62, at 571.

[76] For example, see generally the economic literature about contributory and comparative negligence. The efficiency superiority of negligence rules over strict liability is still a matter of intense discussion and depends on the specifications of the economic model. *See* Robert D. Cooter and Thomas S. Ulen, LAW AND ECONOMICS, (5th ed. 2011).

[77] Posner's initial explanation was particularly unsatisfying. Posner, *supra* note 1, at 99 ("the character of common law litigation forces a confrontation with economic issues. The typical common law case involves a dispute between two parties over which one should bear a loss. In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question. And at least an approximation to the answer is in most cases reasonably accessible to intuition and common sense.") Judges see a wide variety of possible audiences for their opinions. A 1960 survey of twenty-five state supreme court and U.S. Court of Appeals judges found they considered as their audiences: posterity, the bar, future judges, the legislature ("to show that new legislation is needed to clean up the common law mess in the general area"), law students, the readers of the *New York Times*, the author of the opinion, the losing lawyer, and "my brother judges, so that I can get a majority of the court to go along with me". Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810, 813-14 (1961).

[78] Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

[79] *See, e.g.*, Arthur von Mehren, *The Code and Contract — A Comparative Analysis of Formation and Form, in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra* note 6, at 110, 121-27 (describing the process of creating French Civil Code's contract provisions through abstract reasoning).

> The more satisfactory treatment accorded problems of formation and form in the Civil Code, as compared with the common law, seems to be due in large measure to the role that speculative and systematic thought played in the evolution and ultimate codification of French law. At least until recent times, the common law has not benefited from any comparable efforts to think legal problems through systematically and to develop a rationalized body of legal solutions, rules, principles, and doctrines. Nor has the common law had the benefit of a thorough legislative reshaping in the course of which many inherited complexities and encumbrances could be discarded. In some areas of the law of contracts the common law may be better today just because this has not taken place; but it would seem that the common law pays a price in other areas—areas that can benefit from rationalized, speculatively developed doctrines and in which the greater freedom of action at any given point in time possessed by a legislature, as compared with a court, can be of considerable importance in determining the shape the law will take.[80]

Responding to the need for a basis beyond the preferences of judges through which the common law would develop efficient rules, a second wave of law and economics analyses hypothesized an evolutionary process through which the common law achieves efficiency. [81] These analyses discussed the conditions under which respect for precedent would generate evolution to efficiency. Some theories focused on precedent (more efficient rules more likely to survive through a mechanism of precedent);[82] others relied on the incentives to bring cases and the role of court litigation (since inefficient rules are not welfare maximizing).[83] We turn to these in the next section.

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[80] Mehren, *supra* note 79, at 127.

[81] "Evolutionary theory models" is the term used by Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. 19 (2005).

[82] *See, e.g.*, Paul H. Rubin, *Why is the Common Law Efficient*, 6 J. LEGAL STUD. 51 (1977). *But see* Victor E. Schwartz, et al., *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. 317, 326-27 (2006) (arguing that tort law has evolved toward greater recognition of remedies for plaintiffs because plaintiffs' lawyers "are more likely than defense lawyers to ask for a departure from *stare decisis*" because the lawyers "have great leeway in determining trial strategy" compared to defense counsel and are forced to "think creatively and aggressively in developing a theory of the case and drafting a complaint" rather than being "risk averse" and cost-sensitive like defense counsel.). Civil law systems accord persuasive effect to prior decisions, with greater respect given to "a consistent line of identical decisions." Sereni, *supra* note 8, at 68. The significant differences in the form of decisions suggest different processes are at work.

[83] *See, e.g.*, George L Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

C. Evolutionary Mechanisms

The search for an efficiency-promoting mechanism more robust than unarticulated judicial preferences initially focused on how litigation pressures might improve the law, or at least a particular specific legal doctrine, taking into consideration that only a self-selected subset of cases are actually litigated to the point at which an opinion is produced.[84] In particular, the second wave scholarship tied the efficiency of the common law to the observations that litigation follows private interests and under some circumstances those interests have an interest in searching for efficient rules.[85] As a result, one branch of the literature posited that inefficient rules would be challenged more often than efficient ones, leading court interventions revising rules to improve the overall efficiency of the law.[86] Another proposed that lawyers would litigate to obtain rules that advanced their own financial interests, with ambiguous efficiency consequences.[87]

The assumptions necessary for these models introduced new issues related to the definitional issues discussed earlier. If the common law evolves from the application of

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[84] *See* John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); Robert D. Cooter and Lewis A. Kornhauser, *Can Litigation Improve the Law without the Help of Judges*, 9 J. LEGAL STUD. 139 (1980); Peter R. Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981); PAUL H. RUBIN, BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES (1983); Georg von Wagenheim, *The Evolution of Judge Made Law*, 13 INT'L REV. L. & ECON. 381 (1993); Vincy Fon and Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); Ben Depoorter, Vincy Fon and Francesco Parisi, *Litigation, Judicial Path-dependence, and Legal Change*, 20 EUR. J. L. & ECON. 43 (2005); Vincy Fon and Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006); FRANCESCO PARISI AND VINCY FON, THE ECONOMICS OF LAWMAKING (2009); and MAXWELL L. STEARNS AND TODD J. ZYWICKI, PUBLIC CHOICE: CONCEPTS AND APPLICATIONS IN LAW (2009), at 464. A critical view of this literature is provided by FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009), at chapter 6.

[85] The pressure would not be universal because some interests participate only infrequently and because of the public good aspects of efficient rules. *See* William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (also making the point that judicial opinions are a public good that arbitration fails to provide).

[86] *See, e.g.*, Priest, *supra* note 83.

[87] *See, e.g.*, Paul Rubin & Martin Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994). *But see* Cross, *supra* note 62 (criticizing Rubin and Bailey).

principles to the specific factual context of the case at hand, rather than from judicial efforts to impose desired outcomes, the outcome will be affected by which facts are presented and how they are presented.[88] If the subset of cases litigated does not present factual circumstances conducive to triggering the necessary efficiency-enhancing, litigation could bias the evolution of legal rules against efficiency.[89] Further, the evolution of case law will depend on the factors which shape how a case is represented in an opinion,[90] which opinions are written and published,[91] and so on. Yet among cases, not all result in published opinions (with the

[88] *See* Nicola Gennaioli and Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007); Nicola Gennaioli and Andrei Shleifer, *Overruling and the Instability of Law*, 35 J. COMP. ECON. 35 (2007); Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 J. LEGAL STUD. 157 (2009); and Thomas J. Miceli, *Legal Change and the Social Value of Lawsuits*, 30 INT'L REV. L. & ECON. 203 (2010). Posner's original hypothesis argued that judges seek efficiency whereas the later work by Rubin and Priest proposed an invisible hand. Gennaioli and Shleifer show that even if judges are efficiency-seeking, precedent and overruling must be balanced in an appropriate way. A judicial bias might distort the law in the short run but also provides the mechanism to improve the law in the long run. Miceli introduces the possibility of selective litigation to show that convergence to efficiency is still possible as long as the biases do not overwhelm the likelihood that inefficient laws will be more often litigated. Strong precedent is socially valuable if judges are significantly biased.

[89] Gillian K. Hadfield, *Biases in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

[90] *See, e.g.*, Susan F. French, *Gruen v. Gruen: A Tale of Two Stories*, *in* PROPERTY STORIES (Gerald Korngold and Andrew P. Morriss, eds.) (2d ed. 2009) (describing how the law could characterize differently the interactions and communications of family life and so produce widely different legal results in the law of gifts depending on the characterizations).

[91] Many courts do not publish all opinions and there continues to be disputes over just which opinions ought to be published. Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions,* 6 JUST. SYS. J. 405, 413 (1981) (describing disagreement among courts over publication of "cases where the facts are intricate and unique, but no new rules of law are announced," with some courts considering these "lengthy and laborious to prepare" and so excluding them while others require their publication as "useful to a litigant with a similar fact situation."). Unpublished opinions have sometimes been unequally available to types of parties, creating advantages for those with greater access. *Id.* at 414 (noting unequal advantage for "institutional litigants, large urban law firms, and other powerful organizations"). Hoffman calculated that publication rates varied from 21.2% to 69.5% across federal circuit courts of appeal in 1977. *Id.* at 423, Table 2.To take just one example, consider the Ohio courts from the 1920s to the 1970s. These are important courts: Virtually all intermediate appellate court opinions finally disposed of the case (98% in 1979); fewer than 3% of these opinions were published. Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio,* 50 U. CIN. L. REV. 477, 478 (1981). This reflected Ohio's decision to "eliminate the proliferation of unofficial reports" by adopting formal rules in 1919 to restrict official reporting to a single reporter and to refuse any "official sanction" to any opinion not reported in that reporter. *Id.* at 485. Yet by the end of the 1970s, unpublished decisions were playing an important role in the Ohio jurisprudence of the period:

> Lower courts constantly refer to their own unpublished opinions as having precedential value and cite the unpublished opinions of other courts. Unreported cases are cited in Ohio law review articles and in Ohio law treatises. … [After describing how unreported cases are distributed, the author notes that] [n]one of these sources of information about Ohio's unpublished judicial opinions makes them available in the national arena …. Thus, although an unpublished opinion is

proportions published varying across time and across jurisdictions).[92] Nor do reported opinions always accurately reflect the actual decisions. For example, many important early English common law decisions were delivered orally, making the reporters "not only editors and digesters" but the reporters of "the words which fell from the lips of the Court,"[93] suggesting that

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> obviously enforceable between the litigants, and although it is open and available for inspection at all reasonable times by the general public as a public record, the mass of Ohio decisional law does not exist on the national scene.

Id. at 483-84 (1981). The result was

> two bodies of law: one that is published and generally available, and another that is not published and available only to special groups. It splits the bar, because only those who have the necessary resources in time, money and personnel can make arrangements to gather, store and retrieve unpublished cases; those who can tend to be public legal offices (the attorney general and the county and municipal prosecutors) and the large urban law firms.

Id. at 486. Today, of course, Ohio opinions are widely available to anyone willing to pay for access to Westlaw or Lexis. The point is that the shift in availability of the final opinions for the vast majority of Ohio cases from barred from consideration as precedent (from the 1919 statutes) to widespread use by some interest groups to widely available over the course of the twentieth century would change how an evolutionary mechanism operated. *See also* J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions,* 27 STAN. L. REV. 791, 798, n. 36 (1975) (noting a service for providing unreported opinions on search and seizure cases in California claimed "subscribers from all over the state report winning case after case in trial courts by citing unpublished opinions"). Of course, this will bias the selection of cases for litigation and the outcomes.

[92] Hoffman, *supra* note 91, at 405, 407 (noting the practice of written opinions of "relatively recent origin", federal courts follow "widely divergent plans or implemented similar plans in widely divergent ways" on publication). *See also* Max Radin, *The Requirement of Written Opinions,* 18 CAL. L. REV. 486 (1930) (contrasting states whose constitutions require publication of all supreme court opinions with those that do not). Publication decisions themselves may be influenced by a wide range of factors, including the interests of the judges. *See* Andrew P. Morriss, Michael Heise, & Gregory C. Sisk, *Signalling and Precedent in Federal District Court Opinions,* 13 SUP. CT. ECON. REV. 63 (2005) (finding the decision to publish related to opportunities for advancement for federal district judges in sentencing guidelines cases); Charles E. Kenworthy, et al., *Opinions of Courts: Should Number Published be Reduced?*, 34 A.B.A. J. 668, 669 (noting that "[s]ome judges will exercise self-restraint [in publishing opinions]. Others will not."); Jacobstein, *supra* note 91, at 798-99 (noting a major decision in California requiring local governments to provide free legal assistance to indigents in traffic violation cases was unpublished and that the lawyer for the appellant commented that its impact on local government finances was why he was "sure that's why the judges wouldn't have their opinion published."). *See, e.g.,* Allan D. Vestal, *A Survey of Federal District Court Opinions: West Publishing Company Reports,* 20 SW. L.J. 63 (1966) (finding no correlation between court workloads and opinion production for data from 1962). *See also id.* at 63, n. 3 (noting that trial courts in Connecticut, Florida, New Jersey, New York, Ohio, and Pennsylvania publish opinions while courts in many other states do not).

[93] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON LAW REPORTING TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 25 (New York, Evening Post Steam Presses 1873). The classic English case of *Keeble v. Hickeringill* illustrates this problem. The case is reported in four English reporters: 11 East 574; 103 Eng. Rep. 1127; 11 Mod. 74 (as *Keble v. Hickringill*); and 3 Salk 9 (as *Keble v. Hickeringhall*). The East and Modern reports differ with respect to the ownership of the land on which a wild animal is found. The court in *Pierson v. Post*, 2 Am. Dec. 264 (N.Y. 1805) cited the Modern report and distinguished *Keeble* from the case before it on a ground that would not have applied had it been using the East report (which was not available until 1815). *See* A. JAMES CASNER, ET AL., CASES AND TEXT ON PROPERTY 42 (5th ed. 2004). This example seems particularly apt to us because *Pierson* is a case that is both foundational to the teaching of property, (Bethany R.

reporters' biases might also be important in understanding the evolution of legal rules at a crucial time in the common law's development. Furthermore, there is considerable evidence that the emergence of efficiency in the common law depends on a number of factors in the evolutionary mechanism, including initial conditions, path dependence and random shocks,[94] all of which vary across time and place.

Perhaps most importantly, if evolutionary pressures are the mechanism that produces efficiency, we are left with no explanation for the persistence of major doctrinal differences across common law jurisdictions, unless the whole process depends on particular confluences of local determinants.[95] These differences are particularly problematic. If the efficiency hypothesis is true, rules that do not promote efficient results should be eliminated, at least in the long run, across all common law jurisdictions. However, we observe persistent substantive differences in rules across common law jurisdictions. This can be addressed in either of two possible ways. One interpretation of the efficiency hypothesis is that the evolution of the common law to

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Berger, *It's Not About the Fox: The Untold History of Pierson v. Post,* 55 DUKE L.J. 1089, 1090 (2006) ("Two hundred years after *Pierson v. Post* was decided, the case continues to horrify successive generations of law students….")), and has been analyzed extensively from a law and economics point of view. *See, e.g.*, Dhammika Dharmapala, *An Economic Analysis of 'Riding to Hounds': Pierson v. Post Revisited,* 18 J.L., ECON., & ORG. 39 (2002). The problems were even worse for early British decisions as British court records until around 1730 "were in law-Latin, which no one but a lawyer and by no means all of them could understand." Fisch, *supra* note 74, at 491. The problems were widespread. *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra*, at 10 (estimating that "two-thirds" of reports of New York cases are worthless), 12 ("Your Committee find that the reports, with few exceptions, are carelessly prepared"), 14 (noting a decision decided in 1862 for which the report did not appear until 1872, long after it had been reversed in 1863), 18 (noting printing of a dissent instead of a majority opinion), 19 (noting "years often elapse" before decisions are reported), 20 (noting that Lord Mansfield "absolutely forbade the citing of Barnardiston's Reports" because of their inaccuracy).

[94] Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV, L. REV. 641 (1996) and Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001). *See also* Henry N. Butler, *Smith v. Van Gorkom, Jurisdictional Competition, and the Role of Random Mutations in the Evolution of Corporate Law*, 45 WASHBURN L.J. 267, 267 (2006) ("American corporate law has seen numerous changes that may be characterized as random mutations."); Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines,* 75 AM. POL. SCI. REV. 975, 984 (1981) (concluding that "the pattern of adoption [across states] for [the twenty-three plaintiff-oriented tort] doctrines [studied] is largely idiosyncratic.").

[95] Nuno Garoupa and Carlos GómezLigüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. (forthcoming 2012).

efficiency is associated with multiple equilibria. Under this interpretation, there are different possible efficient versions of the "common law"[96] and the particular set of doctrines which are efficient in any particular jurisdiction at any particular time will depend on local determinants, selection biases and other conditions. Alternatively, there might be one and only one efficient equilibrium, which the common law is able to achieve only under conditions not present in all common law jurisdictions. Both results are problematic for efforts to link economic development to legal system characteristics.

In multiple efficient equilibria models, the common law converges to efficient doctrines and rules in the long run, but which doctrines and rules are efficient is not uniform because of the differences in local conditions that affect the process of convergence to an efficient and stable equilibrium. This allows the selection of disputes for litigation to differ across the common law world and across time in response to local conditions and asymmetric shocks. The circumstances under which a rule is applied in different jurisdictions and at different times varies since different sets of cases are litigated.[97] As a consequence the conditional probability that a given inefficient rule is challenged is not the same across time and space.[98] The evolution of the common law would thus follow different paths in different jurisdictions. Necessarily the pattern of path

[96] Codification advocates like David Dudley Field stressed the differences across jurisdiction. *See* David Dudley Field, *Address before the Law Academy of Philadelphia,* April 15, 1886 *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 244, 246 (A.P. Sprague ed., 1884) ("This common law is not the same everywhere; there is a common law of England, a common law of Massachusetts, and a common law of Pennsylvania, and these differ from one another in important particulars.").

[97] *See, e.g.,* Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment at Will,* 45 CASE W. RES. L. REV. 999 (1995) (describing circumstances under which the employment-at-will rule eroded in three areas across states).

[98] *See* Miceli, *supra* note 88 (both references) and Wangenheim, *supra* note 84.

dependence will be diverse, leading to distinctive (but potentially equally efficient once local conditions are considered) equilibria.[99]

There are two important implications for the efficiency hypothesis of multiple efficient equilibria due to distinctive patterns of selective litigation. First, there is no single or unique common law as usually implicitly assumed by the literature,[100] but instead a multiplicity of possible common law systems, each with a claim to be efficient under particular circumstances. If this is the case, the focus on particular doctrines or rules in the abstract is no longer useful in evaluating the efficiency of legal arrangements. As a result, the efficiency claim becomes difficult to evaluate empirically, since doing so would require identifying all of the factors that go into determining efficiency rather than simply modeling the rule. Second, the outcome of a common law process in any particular jurisdiction at any particular time is difficult to predict, as particular local determinants might generate a completely new path.

In single efficient equilibrium models, diversity among jurisdictions means that the common law develops the efficient doctrine or rule only under certain conditions. The most immediate implication is that if doctrines and rules vary across the common law jurisdictions, only one is efficient and the remaining failed to achieve efficiency. Given that the initial condition for most common law jurisdictions was similar (English law)[101] while their outcomes

[99] *See*, among others, Roe, *supra* note 94 and Hathaway, *supra* note 94. Fisch speculates that the failure of codification in New York was due to idiosyncratic factors such as "personalities, timing, and chance." Fisch, *supra* note 31, at 53.

[100] *See* examples in tort law discussed by Garoupa and Gómez, *supra* note 95.

[101] To some extent, different British colonies inherited different versions of the common law. The thirteen original U.S. states took with them the common law as of the date of independence, although the exact nature of the reception of English law was unclear. Joseph Story described it as bringing "the common law of the mother country, (England,) so far, as from its nature and objects, it then was or might be applicable to their situation, as colonists, distant from and possessing institutions and political arrangements varying from those of the parent country." He concluded that it was "obvious" that they had not brought "the whole body of English law then in force" and concluded that what applied in the United States was not the "original form" of the common law but "as it was then existing in England, modified, amended and ameliorated by statutes; and as it was claimed as the birthright and

differ in many respects, a single efficient equilibrium theory means that some judicial interventions produce efficiency but, under different conditions, other judicial interventions are detrimental.

A second inference from this model is that the common law is efficient only under certain conditions and not all common law jurisdictions satisfy those conditions at all times. A comparison across common law jurisdictions or across time demands a focus on the local judiciary and the stickiness of precedent, among other characteristics.[102] Even within a Blackstonian definition of the common law, there are crucial differences across common law jurisdictions in these areas. For example, British common law is subject to a single court of last resort while American common law is the product of multiple state courts of last resort. A rule adopted in Britain need only persuade one court; to become widespread in the United States, the rule must persuade multiple courts.[103] Yet the final court in Britain decided "relatively few cases" until the late nineteenth century, leaving the law there less "fixed" than in the United

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inheritance of all the colonists." As a result, he concluded that Massachusetts' common law (in 1837) was "that portion of the common law of England, (as modified and ameliorated by English statutes,) which was in force at the time of the emigration of our ancestors, and was applicable to the situation of the colony, and has since been recognized and acted upon, during the successive progresses of our Colonial, Provincial, and State Governments, with this additional qualification, that it has not been altered, repealed or modified by any of our own subsequent legislation now in force" together with "those local usages and principles, which have the authority of law, but which are not founded upon any local statutes." Story, *supra* note 18, at 699-701. *See generally* William B. Stoebuck, *Reception of English Common law in the American Colonies,* 10 WM. & MARY L. REV. 393, 420-26 (1968) (comparing differential treatment of English common law across several states).

[102] *Compare* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort,* 37 HARV. L. REV. 409 (1923-24) (Pennsylvania Supreme Court Justice's analysis of *stare decisis* that contends that "Rules … should be subject to but slow changes") with GRANT GILMORE, THE DEATH OF CONTRACT (1974) (legal realist critique of classical contract law as based on misstatement of cases). The respect for precedent has varied considerably over time. *See* Sereni, *supra* note 8, at 67 (noting *stare decisis* "is of comparatively recent origin" and "developed slowly in England during the seventeenth and eighteenth centuries" while in the United States it "was never rigidly followed").

[103] *See, e.g.*, Edward H. Warren, *The Welter of Decisions,* 10 U. ILL. L. REV. 472, 475 (1915) ("It is one thing to have all courts following a rule because that rule is imposed upon them by a higher court—but how much greater weight does it carry when you find that court after court in the United States has been presented with a problem and that they have felt that they could come to the same decision-the decision not being imposed upon them by some higher court but being adopted by them in respect to the decisions in other jurisdictions?"). *See also* Healy, *supra* note 73, at 55-91 (tracing the evolution of *stare decisis* and concluding that "for most of its life the common law operated without a doctrine of *stare decisis*.").

States.[104] As both the supply side efficiency theories and Erin O'Hara and Larry Ribstein have shown, jurisdictional competition is a key force in the evolution of law,[105] and so such differences in the degree of competition within national legal systems should have an impact. Similarly, common law jurisdictions differ substantially in their attitudes toward precedent across time and across jurisdictions in ways that would affect the evolution of the law. For example, Joseph Story wrote in 1837 that "[w]hen once a doctrine is fully recognized as a part of the common law, it forever remains a part of the system, until it is altered by the legislature."[106] Well into the late twentieth century, New York's highest court continued to hold to this theory while Indiana's more "modern" state supreme court felt free to alter the same long-standing common law rule based on its own assessments of the rule's merits.[107]

There are multiple possible explanations for why common law would fail to achieve efficiency in some cases but not in others. Suppose the distribution of relevant attributes of judicial preferences related to efficiency varies among courts. For example, the proportion of pro-plaintiff and pro-defendant judges might vary across jurisdictions due to differences in selection processes,[108] with the consequence that the number of pro-efficient rule (whichever

[104] Pound, *supra* note 22, at 291.

[105] *See* Erin O'Hara and Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000) and ERIN O'HARA AND LARRY E. RIBSTEIN, THE LAW MARKET (2009); Zywicki, , *supra* note 66.

[106] Story, *supra* note 18, at 719. *See also* CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 28 (describing judicial task as "the examination, arrangement and classification of human actions according to the legal characteristics which they exhibit").

[107] *Compare* Estate of Thompson v. Wade, 509 N.E.2d 309 (N.Y. 1987) (refusing to abandon rule that rights cannot be reserved in favor of a third party in a deed despite lack of policy rationale for the rule on grounds that courts cannot overturn earlier precedents) with Nelson v. Parker, 687 N.E.2d 187 (Ind. 1997) (specifically rejecting *Thompson* and asserting ability of court to alter rules). *See generally* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, COVENANTS AND EQUITABLE SERVITUDES§ 3.04, 35-36 (2d ed. 2004) (examining this issue).

[108] West Virginia Supreme Court Justice Neely's account (somewhat tongue in cheek) of the thought processes of an elected judge suggest one reason such differences might occur.NEELY, *supra* note 71, at 4 ("As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is

direction that is) judges varies as well, so that in some cases the proportion of pro-efficient rule judges is insufficient to force convergence to efficiency.[109] Alternatively, the intensity of judicial biases related to efficiency might vary across the population of judges, affecting the judiciary's ability to reach a consensus on a specific outcome,[110] or creating more polarized conditions under which judiciaries may be less likely to achieve efficient doctrines and rules.[111] A varying degree of influence of special-interest groups in judicial politics could contribute to shape behavior in different ways that preclude some particular institutional arrangements from converging to efficiency.[112] Differences in the level of concern about the future evolution of the law (for example, how forward-looking judges are) plays an important role in explaining efficiency. A judiciary more focused on the short run and less on the long run is less likely to generate an efficient legal outcome than one that pays greater attention to the long run.[113] Give the variation in judicial terms and degrees of security in office,[114] there are strong reasons to believe that the degree of future-orientation among judges is likely to vary substantially across jurisdictions.

Moreover, evolutionary models depend heavily on having both a sufficiently strong precedential impact of efficient decisions to protect those decisions once reached and a flexible enough approach to allow overruling inefficient precedents. Thus the evolutionary theories face

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my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.").

[109] See Miceli, *supra* note 88 (both references).

[110] *See* Dean Jaros & Bradley C. Canon, *Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges*, 15 MIDWEST J. POL. SCI. 322 (1971) (intensity affects frequency of dissents).

[111] *See* Gennaioli and Shleifer, *supra* note 88 (both references).

[112] *See* Giacomo A. M. Ponzetto and Patricio A. Fernandez, *Case Law versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379 (2008).

[113] *Id*.

[114] *See* Morriss, *supra* note 68, and Haynes, *supra* note 68 (describing differences in term length and retention mechanisms).

the need to both control defections from an established efficient precedent, undermining the process of converging to efficiency, and inducing changes to allow evolution away from inefficient precedents. This requires that the cost of changing precedent fall within a limited range: If the cost of changing precedent is too low, the evolutionary mechanism to obtain the long run efficient outcome becomes unavailable because the judicial gains from getting closer to an efficient outcome are insufficient to motivate the challenge when it is easy to change a precedent.[115] If the cost is too high, inefficient rules will not be successfully challenged frequently.[116] Consequently the value of precedent plays an important role in the evolutionary theories, but it must fall within a range bounded by values high enough to allow change and low enough to induce investment in obtaining efficient rules. Unfortunately for the theory, the treatment of precedent also varies widely across jurisdictions.[117] Moreover, the efficiency theories tend to focus primarily on precedents that establish firm rules. The many instances of purely persuasive precedent playing a significant role suggest that a richer conception is needed.[118] Further, as noted earlier, courts differ in their production of precedent, including in the rates at which they publish opinions and which types of courts publish opinions at all. Moreover,

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[115] *See* Miceli, *supra* 88 (both references) and Gennaioli and Shleifer, *supra* 88 (both references). *See also* ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (photo. reprint 1986) (1923) ("Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. . . . If we seek principles, we must seek principles of change no less than principles of stability.").

[116] *See* Wangenheim, *supra* note 84.

[117] *See* MARY ANN GLENDON, PAOLO G. CAROZZA AND COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS (2007) . *See* the discussion of *Estate of Thompson v. Wade*, *supra* note 107.

[118] In addition, a richer theory of the role of persuasive precedent is needed. Persuasive precedent plays an important role in a number of instances. For example, a San Francisco probate judge sold collections of his opinions, which "by virtue of his learning and great ability as a judge … [were] of exceptional value to a practitioner." Fred H. Peterson, *Court Opinions and Reports*, 86 CENT. L.J. 428, 430 (1918). *See also* Gerald T. Dunne, *The Unreported Opinion – An Appeal to the Banking Bar*, 99 BANKING L.J. 387 (1982) (describing "[a] recent letter from a prominent law firm to this *Journal* [which] requested authenticating data with respect to an opinion carried in its pages over a half-century ago but still of critical relevance to current litigation. Extensive research indicated that the opinion had not been reported, officially or otherwise, elsewhere and that the *Journal* reference was the sole indicia of its existence.").

this explanation does not suffice to distinguish the civil codes from the common law. The Code Napoleon covered torts in just five sections, making the details of tort law under it a matter of judicial decision-making.[119]

Drawing on this discussion of the two types of evolutionary models, we can derive a more complex overview of the common law's operation. First, there is not a single "common law" rule or doctrine in many areas, but a multiplicity of possible equilibria depending on the conditions that determine which disputes are litigated, which opinions are written and published, and so forth. One or more of these outcomes may be efficient. Second, for each specific set of circumstances determining which disputes are litigated, which opinions are written and published, and so forth, there is no guarantee of a convergence to efficiency, as that depends on the combined effects of judicial attributes and the treatment of precedent. The most important consequence of such a richer view is that the identification of the efficiency of the common law is more intricate and multifaceted than assumed by the standard literature. If there are multiple efficient solutions, it is unclear what the optimal common law should be. If there is a single efficient solution, an explanation for why it is reached in some jurisdictions and not others is necessary. Given that the variables that determine efficient outcomes vary, a complete economic analysis would require a clear understanding of local determinants and specific conditions, including judicial preferences, before one could support the hypothesis that the common law is efficient.[120]

[119] Vanderbilt, *supra* note 15, at 395.

[120] Garoupa and Gómez, *supra* note 95.

D. The role of legislation

Even at the common law's high watermark, there were significant statutory interventions. In some cases, statutes might be inefficient interventions where they displace or change earlier common law rules. In others, statutes could represent "corrections" to common law problems, as with Hayek's argument that statutes are needed to rescue the common law from "dead ends".[121] Statutes could also be efficiency-enhancing by reducing transactions costs, as general incorporation statutes were in the United States.[122] Moreover, judicial interpretation of statutes may fulfill a common-law-like function at times, creating innovations that would not have arisen absent the statute and which can be efficiency-enhancing.[123] A full theory of the efficiency of the common law needs to account for the role of statutes and legislatures within the law beyond

[121] Hayek, *supra* note 30, at 88-9. *See also* Story, *supra* note 18, at 733 (code would be a "fit opportunity for the legislature to supply some of the acknowledged defects, to cure some of the admitted anomalies, and to correct some of the erroneous doctrines, which, in a long succession of ages, have gradually been ingrafted [sic] upon our common law."); E. FLOYD CLARKE, THE SCIENCE OF LAW MAKING 300 (New York: Macmillan Co. 1898) ("That a case law has defects, all will admit. That, in some instances, these defects can be removed by legislation, and by legislation only, all will admit", citing the Statute of Frauds and Statute of Limitations as examples.); CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 18 ("From time to time, progress and change in social conditions require corresponding changes in the law, which can be effected only through the instrumentality of statutes"). Carter also argued that rules where the content was less important than stability (e.g. concerning Bills of Exchange) should be handled by statutes. *Id.* at 54.

[122] *See* discussion by Ron Harris and Naomi Lamoreaux on comparing the US versus the British approach to incorporation; RON HARRIS AND NAOMI R. LAMOREAUX, CONTRACTUAL FLEXIBILITY WITHIN THE COMMON LAW: ORGANIZING PRIVATE COMPANIES IN BRITAIN AND THE UNITED STATES (2010), http://www.econ.yale.edu/faculty1/lamoreaux/Contractual-Flexibility-10.pdf.

[123] *See* Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law, 1790-1870*, S. CT. ECON. REV. (forthcoming 2011) (discussing the development of patent claim out of practice and ratification by courts). Bentham, however, warned against this, arguing that "it will be necessary to forbid the introduction of all unwritten law. It will not be sufficient to cut off the head of the hydra, the wound must be cauterized that new heads may not be produced." 3 Bentham, *infra* note 164, at 209. Thus even code systems are likely to differ in the role assigned interpretation. *See* Clarke, *supra* note 121, at 294-95 (comparing French and Prussian codes on the role of interpretation). Many nineteenth century common law partisans appear to have believed that civil law systems left no room for interpretation. *See, e.g.*, Mathews, *supra* note 27, at 18 (discussing the "radical difference" in how law was administered in civil and common law jurisdictions). This view continues in some modern writings. However, codes differ in the degree to which they leave matters for courts to interpret. *See* Fisch, *supra* note 74, at 501 (discussing how Field draft codes had "style of draftsmanship" that was "dogmatic and precise and tends … to be dominated by rules rather than principles" and so restricted interpretation, while other codes left more room for it.).

simply attributing rent-seeking to legislators in creating statutes. Thus far, however, there is little within the common law efficiency literature that examines the role of legislation in depth.

In general, the efficiency theories focus on the argument that private interests are more likely to capture the legislature than the courts,[124] although such argument is debatable theoretically and empirically[125] requiring a comparative assessment rather than blanket assertion.[126] Most importantly, the production of statutes differs in important ways across jurisdictions and across time, which should have consequences for the degree of rent-seeking and rent-dissipation. Considering just the United States today, state legislatures range from part-time groups of poorly paid members meeting infrequently for comparatively brief periods (Texas) to well-paid bodies with professional staffs effectively in continuous session (California).[127] Code systems have suffered different degrees of intrusion by statutes outside the code framework.[128]

There are differences across time as well. For example, both the opportunities for communication of policy ideas among legislatures and the role of the federal government in affecting state policy choices have changed over time, affecting the speed with which legislative

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[124] *See* Michael A. Crew and Charlotte Twight, *On the Efficiency of Law: A Public Choice Perspective*, 66 PUB. CHOICE 15 (1990) (arguing that common law is less subject to rent-seeking than statute law), and Rubin, *supra* note 3 (arguing that both are influenced by private interests to advance their goals).

[125] The most devastating criticism is GORDON TULLOCK, THE CASE AGAINST THE COMMON LAW (1997) and Gordon Tullock, *Rent-Seeking and the Law*, *in* 5 THE SELECTED WORKS OF GORDON TULLOCK 184–95 (C.K. Rowley ed., 2005). *See also* Barbara Luppi and Francesco Parisi, *Litigation and Legal Evolution: Does Procedure Matter?*, PUB. CHOICE (2011, forthcoming).

[126] *See*, among others, William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975); Robert D. Tollison and W. Mark Crain, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979); W. Mark Crain and Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (discussing several theories of capture in rulemaking); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997); and Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW AND SOC. INQUIRY 959 (1997).

[127] *See* Troy Senik, *California's Legislative Blitzkrieg,* 21(2) City Journal (Spring 2011), *available at* http://www.city-journal.org/2011/21_2_snd-california-legislature.html.

[128] Sereni, *supra* note 8, at 59.

innovations spread.[129] Moreover, the incentives for legislators are affected by election law changes. For example, the nineteenth century series of Reform Acts in Britain dramatically changed the electorate and constituency boundaries for Parliament, while in the United States both the populations eligible to vote and voting rules changed substantially over that same period, all changes which must have had impacts on the ability of special interests to engage in rent-seeking.[130]

Moreover, legal and political cultures differ across jurisdictions, and some may be more "innovative" than others.[131] There may be interaction effects, in which early adopters influence others to follow.[132] Demographic factors may influence adoption of particular types of statutes.[133] Some jurisdictions regularly enforce rules like the "single subject rule," which impede legislative deal-making while others either lack the rule or do not enforce it.[134] Some statutes are drafted by interest groups; others are the product of entities like the Uniform Law

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[129] Susan Welch & Kay Thomson, *The Impact of Federal Incentives on State Policy Innovation*, 24 AM. J. POL. SCI. 715, 727 (1980).

[130] *See* Oonagh Gay, *Voting Systems: The Jenkins Report*, House of Commons Research Paper 98/112 9-12 (Dec. 1998), *available at* http://www.parliament.uk/commons/lib/research/rp98/rp98-112.pdf (describing history of British election reforms); Rick K. Wilson, *Partisanship and Electoral Reform: Change in Congressional Cohesion, 1877-1932*, *available at* http://rkw.rice.edu/Papers/Partisan.pdf (describing U.S. electoral reforms and impact on Congress).

[131] *See* Canon & Baum, *supra* note 94 (discussing differences in adoption rates of twenty-three tort law doctrines). Canon and Baum found that states' "innovation scores" (based on speed of adoption) changed significantly between pre-World War II and post-World War II and that judicial innovation scores were only "moderately related" (correlated at 0.276) with legislative innovation scores. *Id.* at 978-79. *See also* Jack L. Walker, *The Diffusion of Innovation Among American States*, 63 AM. POL. SCI. REV. 1186 (1969); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. PO. SCI. REV. 1174 (1973); Jack L. Walker, *Comment: Problems in Research on the Diffusion of Policy Innovations*, 67 AM. POL. SCI. REV. 1186 (1973); and Virginia Gray, *Rejoinder to "Comment" by Jack L. Walker*, 67 AM. POL. SCI. REV. 1192 (1973) (disputing whether or not there is a quality of "innovativeness" in states that can be measured).

[132] Gray, *Innovation*, *supra* note 131, at 1176.

[133] Gray, *Innovation*, *supra* note 131, at 1182 (finding that innovative states in some areas "are both wealthier and more [politically] competitive than their sister states at the time of adoption of a particular law.").

[134] *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006). Random events like "[t]he presence of a single staff aide on a legislative staff who is enthusiastic about a new program, or the chance reading of an article by a political leader can cause states to adopt new programs more rapidly" than they would otherwise. Walker, *Comment*, *supra* note 131, at 1189-90.

Commissioners, which are widely thought to have often avoided rent-seeking.[135] Partisan and other differences lead to different interests having greater or lesser influence in different jurisdictions.[136] Different degrees of political competitiveness, whether as the result of cultural differences or gerrymandering, could have an impact on rent-seeking.

More broadly, civil law systems' codes are subject to significant constraints in the codification process[137] while stand-alone statutes in both civil and common law systems are not. Statutes within a code are subject to additional constraints, as they must fit logically within the existing framework of code provisions to be included within the civil code. Roscoe Pound argued that "[p]atchwork overruling along with patchwork legislative tinkering often does at

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[135] Prof. William Henning, a participant, describes the Uniform Law Commissioners' process as follows:

> the process by which Code amendments and revisions are produced involves multiple years of careful work by a dedicated committee drawn from the ranks of NCCUSL and the ALI, none of whose members have a political stake in the outcome; at least one dedicated reporter who is a top scholar in the field; hands-on oversight by the leadership of the sponsoring organizations; an open process where the only price of admission is the travel costs involved in attending meetings and where there is a full opportunity to explain one's needs to the committee and other observers; and multiple exposures at annual meetings of both sponsoring organizations, where many members have a deep knowledge of commercial law and long experience as judges, practitioners, and academics.

William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 141 (2009). At least some commentators see the Uniform Law Commissioners as producing "real codification of the common law". Smith, *supra* note 22, at 189. *See also* Fisch, *supra* note 74, at 486. Uniform laws also create a "need for consistent uniformity in the judicial interpretation of such laws." Shelden D. Elliott, *Techniques of Interpretation, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 80, 90. This likely changes the incentive structure for decisions.

[136] *See* Robert D. Brown and John M. Bruce, *Political Parties in State and Nation: Party Advantage and Party Competition in a Federal Setting*, 8 PARTY POL. 635 (2002); Thomas M. Holbrook & Emily van Dunk, *Electoral Competition in the American States*, 87 AM. POL. SCI. REV. 955 (1993) (summarizing literature on political competitiveness).

[137] *See* Andre Tung, *The Grand Outlines of the Code, in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 23-4 (discussing constraints of completeness, generality, and logical organization imposed by codification in France). Codifiers in Dakota Territory and Montana pointed to their jurisdictions problems with keeping statutory law organized as a reason to adopt the constraints provided by codification. Decius S. Wade, *Necessity for Codification* 10-4 (1894), *reprinted in* Andrew P. Morriss, *Decius S. Wade's Necessity for Codification*, 61 MONT. L. REV. 407 (2000); Morriss, *supra* note 24, at 372-75 (describing adoption in Dakota); 386-402 (describing adoption in Montana). *See*, for example, EVA STEINER, FRENCH LEGAL METHOD (2002) on French codification.

least as much harm to the legal system as it does good."[138] Since both systems are actually mixed systems, evaluating their efficiency-producing or –destroying properties requires more nuance. If the relevant issue is the proportion of statutes, perhaps interest group or rent-seeking theories would predict the common law would be superior.

Some have claimed a pro-market bias of the common law as the result of Hayekian, bottom-up efficiencies in the English legal system and top-down inefficiencies in the French legal system.[139] However, the traditional efficiency analysis could be transposed to civil law in many ways and multiple forms. It could be argued that general law (code) is more efficient that specific statutory interventions (potentially prone to more capture) and that the efficient code crowds out some rent-seeking statutes from intruding into areas covered by the code.[140] Similarly, a commentator on Georgia's Civil Code argued that the effect of the code on the case law was to make the case law "more readily understood" since it provided a code section that could serve as a "governing principle" and then be "the natural starting point of the judge's opinion."[141] A code system might provide more bottom-up law (for example, case law accruing under general code provisions) than a common law system that includes numerous specific statutes which lead to more top-down law. Nothing in the discussion so far makes the argument

[138] Pound, *supra* note 22, at 292.

[139] *See* Mahoney, *supra* note 4. A closer example suggests that the claim of some anti-market bias in French law is debatable at best. For discussion, *see* Benito Arruñada and Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 WASH. U. J.L. & POL'Y (2008) and Benito Arruñada and Veneta Andonova, *Judges' Cognition and Market Order*, 4 REV. L. & ECON. 665 (2008).

[140] Some observers argue that the most important difference between code and common law systems is "the method by which rules are developed and of the material on which the law is based." Smith, *supra* note 22, at 179. Smith characterized civilian reasoning as "to found its jurisprudence upon an exact and authoritative text, and upon commentaries based on the text" while the common law focused on case reports. *Id.* 179-80. It is not clear that the former method is more prone to rent-seeking than the latter. Fisch phrased the issue as the two systems having different hierarchies of sources with which to resolve unprovided-for cases. Fisch, *supra* note 74, at 499-500.

[141] Smith, *supra* note 22, at 187.

unique to common law or provides a complete framework to derive implications for comparative law.

Moreover, courts and legislators have their own goals in terms of enhancing their influence, complicating the potential effect of private interests in lawmaking.[142] If we assume for sake of discussion that statute law attracts more rent-seeking and produces more rent dissipation in the process of creating rules than the common law does,[143] the growing predominance of statute law in many common law jurisdictions suggests a decline over time in the overall efficiency of the law within those jurisdictions.[144] Even during the common law's period of dominance in the nineteenth century United States, state legislatures passed large numbers of statutes: one estimate of the New York legislature's output found 23,300 "chapters" of statutes from 1830-1876, of which 6,000 were affected by 11,000 amendments, and 1,658 chapters enacted between 1883 and 1885.[145] Since the rate at which statutes are created and change, and the subject areas within which change occurs, differs across jurisdictions, there should be a varying impact on economic growth across jurisdictions and within jurisdictions across time. Before one can meaningfully distinguish a "common law" from a "civil law" jurisdiction, it is thus necessary to account for the role of statute law within each.

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[142] *See* discussion by A. C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999). For an interesting comparison between lawmakers and its influence under English and French systems, *see* J. W. F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (1996).

[143] Todd J. Zywicki*, Spontaneous Order and the Common Law: Gordon Tullock's critique,* 135 PUB. CHOICE 35 (2008).

[144] See Rubin, *supra* 81, noting that the common law might have been more efficient in the past when the organization of interests was more costly, but not now. Also, these arguments face a serious challenge in areas such as antitrust law which are statute law precisely because the traditional principle of fair trade in common law did not protect market competition and courts were excessively deferential to monopolies.

[145] *Arguments Against*, *supra* note 25, at 12-3.

E. Comparative legal systems

The common law efficiency literature that followed Posner's initial hypothesis is rarely comparative, but generally focuses on the American version of judge-made law that it labels "common law". The legal origins literature attempts comparisons, but based on what we have shown to be an inadequately nuanced categorization. In short, a particular "common law" jurisdiction may have more in common with some other "civil law" jurisdiction than it does with other "common law" jurisdictions. The "common law" includes both judge-made law and statutes and the civil law includes both judge-made law interpreting the statutory law and statutes (both within and outside of a particular civil code).[146] There are, of course, differences, as judicial decisions in the two systems are constructed differently and so different incentives may apply to their production.[147] As we have described, there are also differences in these areas within the families as well.

One possible response to our argument is to argue that the common law efficiency claim is actually a claim about the superiority of judicial over legislative creation of substantive legal rules. However, if this is so, the efficiency claim should hold in any jurisdiction with respect to judge-made law (better known in civil law jurisdictions as general principles of law developed by courts). Just as inefficient common law decisions are theoretically overruled, the judiciary

[146] *See* discussion and examples by Garoupa and Gómez, *supra* note 2 (mainly in the context of French tort law).

[147] *See* Sereni, *supra* note 8, at 60-1 ("an English or American legal rule might often appear to a civil-law lawyer to be so particularized as to constitute a *solution d'espece*; that is, the application of a legal provision to the solution of a particular case rather than a legal provision of general scope and authority. On the other hand, the civil-law *regle juridique* may appear at times to an Anglo-American lawyer to be nothing more than an abstract precept or at most a general directive rather than an actual legal provision."). The role of juries in common law jurisdictions also potentially influences the substance of rules to allow judges to control which issues reach juries for decision. Morriss, *supra* note 68; Sereni, *supra*, at 70 ("Because of the existence of the jury system and of the distrust of judges toward jurors, many questions that from a logical point of view should be characterized as problems of fact are treated in common-law countries as problems of law.").

could effectively 'correct' inefficient statutes in civil law systems through interpretation.[148] Moreover, code-system judges may be more constrained by the structure of the code than common law judges who view themselves as the ultimate arbiters of the law.[149] If the general principles were themselves efficiency-promoting, such constraints would increase efficiency. In fact, from the perspective of civil law countries, the claim could be rephrased as 'court interventions improve the overall efficiency of the legal system' either because of the common biases of litigation (i.e., less efficient laws will be subject to more court interventions than more efficient laws) or because of a Posnerian instinct for efficiency on the part of the judges. But this then returns us to the problems identified earlier with respect to differences across jurisdictions and across time with respect to the means by which judge-made law might exert influence. If there were more occasions for court intervention and judgment in a common law legal system than under code law, and all (or most) interventions were efficiency-increasing, the appropriate mutation towards efficiency would be faster in common law than in civil law but it would still occur in both systems. It is not obvious that any of these assumptions are correct, however.

The processes by which these changes occur would have to be carefully analyzed to determine which are more likely to occur in practice. Further, the relative efficiency of judge-made versus statue law by itself does not provide a good framework to justify the superiority of the common law system as compared to the civil law system. As we have noted, statute law is

[148] See, for example, Fon and Parisi, *Judicial Precedents*, *supra* note 84, (discussing *jurisprudence constante*); Tung, *supra* note 137, at 26 ("In thus applying the law, the courts [in civil law systems] create a new body of law, although a secondary one."); Max Rheinstein, *The Code and the Family*, *in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 139, 158 ("the role of judicial lawmaking in the field of family law has been no less in France than in the United States [and…] equally considerable in other Continental countries…."). *See also* Elliott, *supra* note 135, at 83-4 (describing a range of civil code interpretation methods). This idea is not new. Napoleon thought his code should have allowed more room for interpretation, arguing that interpretative freedom was an important feature in a code based system: "Injustice can be found in judges because they are men; but it is against the nature of things that it should never be found in the law, and that the law should force the judge to be unjust against his own better judgment." Friedrich, *supra* note 67, at 11.

[149] *See* note 181 *infra.*

important in common law jurisdictions and many important areas of private law such as torts or even commercial law are essentially case law in civil law jurisdictions (for example, tort law in France is largely derived from judge-made law).[150] At the end of the day, the efficiency hypothesis does not set common law in a better position than civil law in the evolution towards efficient rules as it does not by itself provide a framework to argue that judicial precedent is a superior way to promote an efficient solution than a statutory rule just because the focus is on judge-made law.[151] As we discussed earlier, there will surely be differences across both common and civil law systems in the frequency with which such events would occur, making broad generalizations about systemic frequency problematic. Moreover, such a conclusion relies on the inability or the incapacity of those engaged in statute creation and modification to supplement any "delays" in the evolutionary process in both systems. Thus, the assumptions underlying the claim for the efficiency of the common law over the civil law are convoluted and debatable. Finally, the competition between common law and civil law in hybrid systems does not provide an empirical answer as to which legal system will prove superior in the long-run (since we would expect the most efficient legal system to be chosen by the relevant legal actors in a hybrid system).[152]

As we have shown, there are serious issues with the efficiency of the common law hypothesis, beginning with the definition of "common law" and extending through its efforts to

[150] See discussion and examples by Garoupa and Gómez, *supra* note 2.

[151] See a technical model by Ponzetto and Fernandez, *supra* 102 (predicting the progressive convergence of common and civil law toward a mixed system); Giuseppe Dari-Mattiacci, Bruno Deffains and Bruno Lovat, *The Dynamics of the Legal System*, J. ECON. BEHAVIOR & ORG. (forthcoming, 2011) (explaining the relationship between high litigation rates and the balance between case law and legislation); and Carmine Guerriero, *Democracy, Judicial Attitudes, and Heterogeneity: The Civil versus Common Law Tradition* (Cambridge Working Paper 917, 2009) (arguing that case law outperforms statute law when political institutions are weak).

[152] Nuno Garoupa and Carlos Gómez, *The Efficiency of the Common Law: The Puzzle of Mixed Legal Families* (Working Paper, 2011).

articulate a mechanism through which the common law would reach efficient results. As a result, the efficiency hypothesis does not provide a sufficient framework to support the claims of the legal origins literature. Moreover, even if the efficiency hypothesis proved correct and the common law was found to be more efficient and/or more conducive to economic growth, the question of how to move from one system to the other remains largely unaddressed. Legal culture, rent-seeking, and the loss of accumulated human capital impose costs for such transplantation, particularly if the alternatives are simply wholesale replacement of one system with another.[153] The available evidence suggests reasons to be skeptical that such large-scale reforms can succeed.[154]

The problems with the efficiency literature that we identified above suggest a need to identify specific features within specific legal systems that produce tendencies towards (or away from) efficiency. Identifying these features requires paying close attention to how actual implementations of legal systems operate. The nineteenth century American codification debate provides a useful means to do so, since the participants were primarily drawn from the ranks of experienced lawyers and the debate included detailed disagreements over specifics. We now turn to the insights from that debate.

II. Insights from the 19th Century American Debate

Engaging some of the best legal minds in the United States, proponents and opponents of codification debated the relative merits of common law and civil codes during the course of the nineteenth century. While not conducted by economists, these debates were conducted by people intimately familiar with the day-to-day practice of law within a common law system much less

[153] *See*, among others, Nuno Garoupa and Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339 (2006). *See also* Rubin, *supra* note 43.

[154] *See* Rubin, *supra* note 43.

affected by statutory measures than any American jurisdiction today. The participants were also often widely read in European legal literatures and familiar from first hand experience with European legal systems.[155] They included James Coolidge Carter, F.R. Coudert, David Dudley Field, Stephen Field, Oliver Wendell Holmes, Jr., Hugh Legare, Leland Stanford, John Norton Pomeroy, and Joseph Story. Although they did not use explicit economic language in their debates, what modern analysts would label efficiency concerns underlay much of their debate. As a result, by examining their arguments and areas of disagreement, we can gain insights into the features of both systems that influence the efficiency of the substantive rules produced.

The debate turned on claims by both sides about the virtues of their preferred systems and the problems presented by the other. Both sides made important claims about the gains possible from adopting or retaining their preferred legal system that we would recognize today as related to efficiency. For example, code proponents frequently claimed that a clear, well-organized code of laws would enable individuals to resolve disputes without resort to attorneys.[156] On the other hand, code opponents worried about codes' "inexhaustible capacities for mischief" by producing litigation over their language.[157] Although they did not use the terminology, both were making arguments that the code would change transactions costs.

The participants in this long running debate did more than make proto-efficiency arguments without using economic terminology, however. They also focused on the features of the two systems that they believed affected the results, analyses that can be applied today to

[155] *See* Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002); M. H. HOEFLICH, ROMAN & CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE (1997); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 315-16, 318 (1988).

[156] Andrew P. Morriss, et al., *Debating the Field Code 105 Years Later*, 61 MONT. L. REV. 371, 373 (2000).

[157] Carter, *Argument … in Opposition, supra* note 29, at 21. *See also id*. at 25 (arguing that California Civil Code "is so vague, that the meaning of it cannot be intelligently arrived at until it has passed through the crucible of the courts in the shape of a lawsuit from the highest to the lowest.").

refine the issues surrounding what produces efficient rules. Their debate went beyond the substance of the rules within each system, focusing on the mechanisms by which rules would be created and disseminated.[158] We have identified three key areas relevant to the modern debate: uncertainty over the substance of the law, adaptability of the law to changed circumstances, and accessibility of the law. In this section, we discuss the arguments and map them into the modern debate over the common law's efficiency.

A. Uncertainty

The efficiency of the common law literature generally focuses on the substance of the rules and rarely addresses the transactions costs imposed by the means of determining which legal rules govern a particular situation. For people seeking legal advice, these costs are important ones, and the codification debate included considerable discussion over whether a civil code or the common law was superior in this respect. Particularly in societies where legal resources are scarce and so costly, this factor should play a major role in determining the legal system's impact on economic growth. As Hernando de Soto documented, when formal legal systems are too costly for people to access, the lack of access to them can be a major hindrance to economic growth.[159] In fact, according to de Soto, the ability to access to a formal legal system at low cost is a key feature of successful economies.[160]

The critics of the common law pointed to the scattering of legal rules among cases in a multitude of sources, often available only in specialized library collections accessible only to

[158] There were also disputes over specific provisions. *See*, *e.g.*, Charles M. Platt, *The Proposed Civil Code of New York*, 20 AM. L. REV. 713, 715-16 (1886) (criticizing organization of the Law of Persons section). *See, e.g., Veto*, *supra* note 28, at 74 (citing as grounds for veto a change in adoption law); A.G. Sedgwick, *Damages in the Code* (1885) (critiquing damages provisions); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra* note 6, at 6-22 (criticizing a wide range of specific provisions).

[159] HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 151-52 (1989).

[160] *Id.* at 250-52.

members of the bar.[161] For example, an 1887 editorial in the pro-codification *Albany Law Journal* termed the common law "obscure, contradictory, inconveniently scattered and fluctuating."[162] Similarly, code proponents pointed to the uncertainty created by the reception of British common law in the United States, since it was unclear which British cases still applied.[163] Suggesting one solution to that problem, Jeremy Bentham had urged Americans to "shut their ports against the common law as they would against the plague."[164]

It was not just difficult to find the relevant rules, however. The "contradictory and confusing" reports of cases were "frequently made to prove more or less according to the inductive skill of the contender," to the disadvantage of clients "in the hands of a defective or careless legal logician."[165] Code proponents argued that these problems were inherent in the common law's reliance on case law to articulate rules, which they contended was an "incalculable evil" that "makes it impossible for individuals so to conduct their life or their business as to be secure against unconscious violation of the law on the one hand, and the

[161] Field, *supra* note 26, at 240-41. By the 1970s, specialization's impact was seen as a positive, allowing lawyers to focus on just the cases that were relevant to their practice. *See* Jacobstein, *supra* note 91, at 795-96 (noting growth of specialized reporters allowing many lawyers to ignore expansion of case law in general reporters).

[162] *Current Topics*, 35 ALB. L. J. 81, 82 (Jan. 29, 1887). *See also* John F. Dillon, *Codification*, 20 AM. L. REV. 29, 36 (1886) (calling for codification to free society from "chaotic, uncertain, obscure, and abounding in subtleties and refinements", the "remaining vestiges of the bondage of the Norman Conqueror"). Similarly, Montana codifier Decius Wade summarized the common law as "decisions contradictory and irreconcilable; decisions overruling, modifying, limiting or enlarging other decisions; right decisions supported by wrong reasons and wrong decisions supported by good reasons, by technicalities, or by no reasons at all; verbose and involved decisions, obscured by *obiter dicta* and speculative theories; broad and learned decisions, and narrow and ignorant ones; and decisions that decide the same thing over and over again." Wade, *supra* note 137, at 3. This argument was related to similar ones made for the adoption of the Code Napoleon in France, where "[p]eople complained quite commonly that the law [prior to the Code] was so confused, that nobody, including the judges, was able to know it with certainty, and that they were at the mercy of the courts." Tung, *supra* note 137, at 19.

[163] ROBERT LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK 44 (Albany, Weed, Parsons and Co. 1884) ("Now how far the English law of the eighteenth century is suited to colonial conditions is one of the most perplexing problems with which American judicatories have to deal.").

[164] 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 504 (EDINBURGH, 1843).

[165] Fowler, *supra* note 163, at 49.

incurring of unknown liabilities and responsibilities on the other."[166] To illustrate the scope of the problem, David Dudley Field compared the English Bills of Exchange Act to the common law, quoting the act's author that he had looked at 17 English statutes, 2,000 English decisions, and an American treatise citing 7,000 decisions in the course of drafting one hundred sections of statutory language.[167] Because it would reduce vast libraries of conflicting and hard to access case law to a single, organized body of rules, code proponents argued in effect that codes would reduce these significant transactions costs.[168]

A code would produce certainty in the place of the confusion caused by the "precedents [which] may generally be found on both sides of the question"[169] by reducing the law to a well-organized, clearly stated body of principles in which these conflicts had been resolved.[170] California codifier Charles Lindley saw this as a key advantage, arguing that codification would result in "[g]athering together and arranging in logical order the fragmentary elements of a legal system, the reorganization and re-expression of a body of laws for a people," which he claimed would be "an event that can have no parallel in magnitude in the history of that people."[171] The

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[166] Edmond Kelly, *Codification*, 20 AM. L. REV. 7, 9 (1886). Some claimed that this uncertainty deterred analysis because under the common law, the constant fear that the law would change and "consign the monuments of his industry to the hieroglyphic and undecypherable [sic] cenotaphs of unknown times" kept the best lawyers from writing legal texts. *The Civil Code of the State of New York, No. II., Relations of Case Law to A Code*, 2 ALB. L. J. 408, 409 (Nov. 19, 1870).

[167] Field, *supra* note 96, at 247-48.

[168] Fowler, *supra* note 163, at 52 (a code "will enable us to remove the enormities of the case-law").

[169] Wade, *supra* note 137, at 3.

[170] Field, *supra* note 96, at 245 ("Collection and arrangement are the essential idea; the rest are incidental."); Wade, *supra* note 137, at 10 ("there must be orderly system and arrangement as to subjects, sub-divisions, and sections" to make law useful to "judge, lawyer and people."); Dillon, *supra* note 162, at 45 (code is arranged "in a definite and systematic form"). Story conceded as much in his analysis of the merits of codification. A code "will show, what the existing law is, as far as it goes, in a clear and intelligible manner. It will have a tendency to suppress useless and expensive litigation. It will greatly abridge the labors of judges, as well as of the profession, by furnishing a starting point for future discussions, instead of imposing the necessity of constant researches through all the past annals of the law." Story, *supra* note 18, at 726. The organizational structure did not survive everywhere. The Dakotas eventually dispensed with their code structures, alphabetizing the provisions. *See* Fisch, *supra* note 31, at 51-2.

[171] CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES app. at v (1874).

creation of a body of well-organized law was certainly part of the appeal of codification to the Dakota Territory legislators who adopted Field's 1865 draft for New York "almost verbatim" in Dakota Territory in 1866,[172] as it generated a systematic body of law without the problems of distilling it from outside precedents.

Even some common law partisans conceded there was a problem with the volume of case law, as when Charles Platt agreed that "our substantive law has become a vast, disordered mass" while denying that the draft New York code solved the problem.[173] Indeed, complaints about the number of opinions are a constant feature of the U.S. legal system.[174] Common law partisans agreed that the volume of cases meant that "many points, which, though on the whole now established by a considerable weight of judicial authority, are not absolutely beyond the reach of forensic controversy, if learned counsel should choose to stir them."[175] They minimized the

[172] Fisch, *supra* note 31, at 37. Fisch describes the adoption by the five year old territory "still consisting of a few scattered settlements on the fringes of a vast Indian-swept, fort-flecked wilderness." Fisch, *supra* note 74, at 485. Sheldon Amos criticized the Field drafts for New York as possibly fit for "a new and undeveloped country" because of their "verbal simplicity" suitable for "a restlessly energetic and commercial community" but not for England, a nation which required "precision and accuracy of expression." Amos, , *supra* note 29, at 107-08.

[173] Platt, *supra* note 158, at 717. *See also* Mathews, *supra* note 27, at 21 ("The uncertainty of the law is proverbial.").

[174] *See, e.g.* Black, *supra* note 91, at 477-78 (listing complaints from 1671 forward); Jacobstein, *supra* note 91, at 791-92 (summarizing complaints from 1777 through 1970s that "the growing number of published court opinions is threatening to destroy our system of American jurisprudence"); Eugene M. Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134 (1962) (estimating the number of American printed judicial opinions at 2.25 million, up from 50,000 produced between 1790-1840); Francis Whitehair, *Some Suggestions for the Elimination or Reduction of Publication of Unnecessary Opinions*, 21 FLA. L.J. 225, 227 (1947) (estimating a minimum library size at 3,200 volumes and 530 linear feet); Samuel H. Sibley, *The Multitude of Published Opinions*, 25 J. AM. JUDICATURE SOC'Y 166 (1941-42) ("the bar and other courts ought not to be afflicted with the growing multitude of published opinions."); Justice John D. Martin, *The Problem of Reducing the Volume of Published Opinions*, 26 J. AM. JUDICATURE SOC'Y 138, 138 ("The lawyers are praying for general relief from the ever increasing landslide of published opinions."); John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 156, 158-59 (1915) (noting 65,000 opinions from the federal and state courts of last resort added from 1909-1913 and complaining that "[e]ven at the present time the volume of case law has become a burden"); Warren, *supra* note 103, at 472-73 (calculating that Harvard Law Library added 175,000 pages of opinions during year ending June 30, 1915); Wade, *supra* note 137, at 9 ("Surely, of the making of law books there is no end."); Field, *supra* note 96, at 256 ("A code would mitigate the prevailing evil of long dissertations in the shape of opinions."); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,, *supra* note 93, at 5-6 (discussing "evil" of "great increase" in reported cases).

[175] Story, *supra* note 18, at 724.

problem, however, noting that it was "necessary to consult but a small part" of the total number of law books to learn the law on most points.[176]

This debate identifies two important points that can be generalized. First, ascertaining the relevant legal rules governing a transition is a cost for those seeking to engage in transactions. Legal systems differ with respect to the degree of these costs, but we are skeptical that these costs are correlated with common law or civil law origins. We suspect that it is much more important whether a system focuses on enforcing the intentions of the parties to transactions,[177] providing clear default rules for when those intentions cannot be ascertained,[178] and avoiding circumstances under which government officials can override private parties' ordering of their transactions.[179]

Second, there are both costs and benefits to having multiple sources of authority. Legal systems with a clear, well-known, limited hierarchy of sources of legal authority (e.g. code systems) reduce the costs of identifying the relevant authorities. Legal systems with a diverse or diffuse set of sources of authorities increase those costs. At the same time, a more diverse set of authorities can increase the chances of finding a solution to a particular problem that suits the facts of the particular case. Moreover, a diverse pool of potential authorities reduces the constraints imposed by any particular authority on the decisionmaker, a potential cost. This tradeoff, between the benefits of finding particular outcomes that suit a set of facts and the costs of doing so and the degree of restraint imposed on the decision makers may be made differently in different societies at different times. It also maps poorly onto civil and common law,

[176] CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 21.

[177] Hayek, *supra* note 30, at 101-02. *See also* BRUNO LEONI, FREEDOM AND THE LAW (3d ed., 1991).

[178] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,* 99 Yale L.J. 86 (1989-90).

[179] Hayek, *supra* note 30.

categories which are better represented by the overlapping circles of a Venn diagram than by completely separate spheres. As we described earlier, civil law systems differ significantly in their attention to judicial opinions in earlier cases, treatises, and other sources. Similarly, common law systems differ in their respect for precedent from outside the jurisdiction, secondary sources, and their own precedents.

Code proponents identified a third source of uncertainty in the common law: judges' ability to change it. For example, a pro-codification editorial in the *New York Times* relayed an anecdote in which "an earnest debate over a decision occurred between two Judges, one of whom said to the other, 'I tell you this is the law,' and the other replied, 'It may be the law now, but it will not be the law after this case is decided.'"[180] Similarly, David Dudley Field told an audience at a speech that "[s]ome of us have heard this dialogue between counsel and judge: 'There is no precedent for this,' says the former; 'Then I will make a precedent,' says the latter."[181] A code would solve these problems, they argued, since judges could not create a new rule "if the old rule was written down in a statute, instead of an opinion."[182]

Anti-code advocates retorted that the process of codification was more error prone than the common law's decision making process. As a result, they contended that proposed codes often misstated or misunderstood the law, pointing to "cartloads of errors and uncertainties" in specific proposed codes.[183] More generally, they argued that statutes could not deal with "the

[180] *Common Law Fetichism*, N.Y. TIMES, Apr. 19, 1886, at 4.

[181] Field, *Law supra* note 96, at 254.

[182] William Reinecke, *Codification*, 5 KY. L. REP. & J. 867, 869 (1884).

[183] Carter, *Argument ... in Opposition, supra* note 29, at 25. *See also* CARTER, PROPOSED CODIFICATION, *supra* note 29, at 82-3 (describing codes' "necessary introduction into the law of a great mass of error").

infinite variety of the conditions which different cases present."[184] Simply stating general principles was insufficient to reduce uncertainty, since those principles were widely recognized and it was their application that was crucial.[185] The common law, on the other hand, offered "the examples of decided cases, precedents illustrating and applying these general principles" to enable people to better predict the outcome of applying principles.[186] The process of reducing the law to a code would thus produce uncertainty: the law addressed "the vastness and complexity" of human affairs and reducing the common law to a code would make it "artificial and arbitrary" instead of relying on "common sense."[187] Further, the process of codification was insufficiently transparent, with code bills being considered too quickly to allow for thorough evaluation.[188]

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[184] CARTER, PROPOSED CODIFICATION, *supra* note 29, at 21. *See also* CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 39 (explaining that statutes would lead to "the employment of the subtle arts of interpretation, and the obvious meaning of the language is *expounded* away in favor of the interests of justice.").

[185] *See, e.g.*, Carter, *A Communication to the Special Committee, supra* note 29, at 17 (arguing that proposed code sections on the law of general average accomplished little "for these eight sections are occupied wholly with a statement of rules of the most general character, concerning which there is not, and for half a century has not been, either doubt or question."). The report went on to charge that "*four* instances of doubtful and ambiguous meaning, involving future strife and litigation, and *four other* instances of positive error" in these eight sections would import "doubt, uncertainty and error" into "a branch of the law where everything is now certain and clear." *Id.* at 23.

[186] E. FLOYD CLARKE, THE SCIENCE OF LAW MAKING 209 (New York: Macmillan Co. 1898).

[187] JOHN R. STRONG, AN ANALYSIS OF THE REPLY OF MR. DAVID DUDLEY FIELD TO THE BAR ASSOCIATION OF THE CITY OF NEW YORK 8-9 (New York, Henry Bessey 1881); Clarke, *supra* note 121, at 209 ("as soon as the Codifier descends from glittering generalities to the enumeration of earmarks of classification to fit special instances, what is gained in definiteness is lost in equity.").

[188] *See, e.g.*, *Veto*, *supra* note 28, at 73 (justifying the veto of a bill of "nearly four hundred closely printed pages" that both houses had passed "within two hours of a single day" as being insufficiently vetted); Carter, *Argument ... in Opposition, supra* note 29, at 13 (noting no one in legislature had likely "carefully read" the entire proposed code); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' APPOINTED MARCH 15TH, 1881 5 (Oct. 21, 1881) ("The result of many inquiries was an inability to find any member of the [New York] Assembly who was willing to acknowledge that he had *read* [the proposed Civil Code], although one member did frankly confess that he had himself *voted* for it, in order to rid the Assembly of its presence as an element of disturbance."); Cornell, *Memorandum, supra* note 28, at 8-9 (inappropriate to pass Code knowing of defects, in reliance on future corrections); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT, *supra* note 28, at 1 (expressing surprise at "how many members of the Legislature (although apparently ignorant of the character of the proposed Code) were yet inclined to relieve that Body from the pertinacious vitality of that measure by voting in its favor, as the only apparently available means of achieving that desirable end."). Montana's hasty adoption also brought with it problems, as the discovery after adoption of numerous changes in existing law demonstrated. *See* Morriss, *supra* note 24, at 386-409 (discussing haste and post-adoption issues). The speed of adoption was also an issue in California. *See* Kleps, *supra* note 19, at 774 (discussing Charles Lindley's complaints about rushed process.). This was seen as a wider problem with legislation during the late nineteenth century. *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Code opponents claimed that changes to a code would introduce new problems of interpretation rather than resolving issues. New York anti-code campaigners pointed to California law professor John Norton Pomeroy's analysis of the California codes as evidence of how introducing a written code created uncertainty, reprinting as pamphlets his articles on interpretation under the codes in which Pomeroy had claimed that "[t]here is hardly a section, whether it embodies only a definition, or whether it contains the utterance of some broad principle, or some general doctrine, or some special rule which does not require to be judicially interpreted. . . ." to illustrate the point.[189]

The common law's defenders argued that code provisions made the law uncertain because they were written at a high level of generality (and not necessarily using a simple and clear language). One California lawyer was "inclined to think that much of the instability which appears to be an accompaniment of 'codification' … is due to the attempt to legislate in popular language on subjects essentially technical."[190] If written at a general level, a code could never

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REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE 15 (1885) (quoting governor in 1885: "One of the greatest evils incident to the hasty methods of modern legislation is the careless and imperfect manner in which bills are generally framed.").

[189] *See* JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA 6 (1884). *See also* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' APPOINTED MARCH 15TH, 1881 8 (1881) ("When we remember the conflicts of authority that have arisen in the past over necessary legislative remodeling of a few well settled rules of law, the mind shrinks appalled at the prospect of the interminably protracted war of uncertainty, inevitably involved in this colossal experiment of uprooting the landmarks of the law of the land."); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' REAPPOINTED NOVEMBER 1, 1881 10 (1882) ("It is confidently believed that while [the proposed code] would inevitably multiply doubt, uncertainty, and consequent litigation to an extent difficult to estimate, it would not settle any dispute that the text-books and adjudicated cases now leave open."); Clarke, *supra* note 121, at 196-97) ("a great mass of certainty under the common law system becomes a Province of new law to be reinvestigated and decided afresh under the code system."); Mathews, *supra* note 27, at 23 (arguing that one would have to rely on the same materials used to create a code to understand it). The use of Pomeroy's articles is described in Carter, *Argument … in Opposition, supra* note 29, at 23-5; CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 24-5. The New York anti-code activists also pointed out that the proposed Civil Code altered the language of many statutory provisions. *Arguments Against, supra* note 25, at 11 (noting 391 sections were based on New York statutes and only two were identical to the statutes).

[190] John T. Doyle, *Copy Second Letter of John T. Doyle, May 28, 1882, reprinted in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL

absorb all of the detail necessary to sufficiently specify the law.[191] But if written at a sufficiently detailed level, Story hypothesized that a code comprehending all of the common law "would be of such vast size and accumulated materials, that it would serve to perplex rather than to clear away difficulties, and would import into the administration of justice more mischiefs and doubts, and stimulants to litigation, than it could hope to remedy."[192] Even a statute clear on its face would be subject to lawyers' efforts to twist it to suit their clients' needs.

> The ingenuity of lawyers would be employed to show that the statute could not have been designed, and therefore should not be construed, to embrace such cases, and, though they might seem, upon a hasty and superficial interpretation, to be covered by the language employed, yet that such interpretation must be discarded in favor of one more agreeable to justice.[193]

This process made the law uncertain, as a statute "extended beyond its appropriate province" by a judge's interpretation "produces the very uncertainty which it was designed to avoid."[194]

Once again, this identifies an important dimension upon which legal systems differ. General rules have important virtues, including restricting rent-seeking and making the law adaptable.[195] More specific rules may reduce uncertainty in certain cases – whether articulated in case law or code provisions – while creating ambiguity in case where no specific provision is immediately applicable. Much will depend on how legal authorities treat gaps in the system of

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CODE;' REAPPOINTED NOVEMBER 1, 1881 28, 29 (1882). *See also* Mathews, *supra* note 27, at 8 ("not everything of common interest is susceptible of such simplification."); *Arguments Against*, *supra* note 25, at 3 (noting argument that "business transactions constantly taking place were not simple and no man could make them simple" and so a code could not simplify).

[191] *See, e.g.,* WILLIAM B. HORNBLOWER, CORPORATIONS UNDER THE PROPOSED CIVIL CODE 18 (1888) (using the California experience to argue that courts would "notwithstanding the Code, first examine the history of adjudicated cases and then refer to the Code to see its bearing upon these decisions.").

[192] Story, *supra* note 18, at 711. *See also* Mathews, *supra* note 27, at 14 ("It might be comparatively easy to lay down a few simple abstract rules, but so soon as the law-giver descended to particulars, in the absence of concrete facts to guide his judgment, the laws of his imaginary empire would be, necessarily, either tyrannical or abortive.").

[193] *See* CARTER, PROPOSED CODIFICATION, *supra* note 29, at 15; *see also* Mathews, *supra* note 27, at 27.

[194] CARTER, PROPOSED CODIFICATION, *supra* note 29, at 15.

[195] Hayek, *supra* note 30.

rules; an attitude of "everything not explicitly permitted is forbidden" is quite different from one of "everything not forbidden is allowed". Again, these differences map poorly onto the common law/civil law dichotomy.

As we have described, both pro- and anti-code partisans identified important issues involving the transaction costs of the legal system,[196] even if they tended to be blind to the defects of their preferred system. Crucially, under any system, some disputes will be readily settled by resort to well-settled, readily located legal rules[197] and there will also be cases on the margin where the parties disagree on the appropriate rule *ex ante*. An important question about the efficiency of a legal system concerns the number of marginal cases that occur under the various forms of organization.

The virtues each group identified in their own preferred systems reveal important transactions costs issues. Code proponents were correct that code systems provide well-organized and authoritative statements of legal principles, which were cheaper to identify than the relevant case authority in many instances. Code proponents were also correct that common law systems do not provide the same sort of well-organized and authoritative statements of principles, although there are non-authoritative sources that attempt to reduce this uncertainty[198] and there are poorly organized and authoritative statements of legal principles in the form of

[196] Clarke, *supra* note 121, at 196-97 ("All admit that there are grave defects of uncertainty and obscurity in the English law; and all admit similar defects in the law of all countries having Codes. Whether the amount of certainty in administration – in other words, the power of prediction – is as great under one system, as under the other, is a question on which authorities differ.").

[197] As code proponent Robert Fowler argued, "The administration of law is always in the main a struggle to include the contested case within a certain law, whether that law has emanated from the superior legislative body, or from the inferior legislative body—the judiciary." Fowler, *supra* note 163, at 13.

[198] Some commentators have suggested that the Restatement serves a similar function to a code in unifying and rationalizing the law. *See, e.g.*, Rene Cassin, *Codification and National Unity*, *in* THE CODE NAPOLÉON AND THE COMMON-LAW WORLD, *supra* note 6, at 46, 52.

judicial opinions.[199] Common law proponents were correct that the mass of precedent offered the potential for guidance in more situations than a general statement of a principle in a code (and not unusually in a complex legal language). Most importantly, the source of uncertainty in each system arises out of different sources. In a code system it comes from disagreements over which of the potentially competing, clearly-stated principles will govern a particular dispute.[200] In a common law system, it comes from disagreements over which precedents apply to a particular dispute. What both the nineteenth-century debaters and today's legal origins literature miss is that they reflect a continuum across both families of legal systems.

The disagreements over uncertainty also identified a second important area in which to compare legal systems. Common law proponents were correct that common law systems produce their statements of authority when disputes arise, potentially faster than a code revision or legislative process could provide new principles for new problems under code-based or statute-based system. However, this ability also imposes uncertainty costs since some of the uncertainty in the common law system comes from disagreements over how to fill gaps in the law,[201] whether a precedent should be overturned,[202] or which precedents govern.[203] Code proponents

[199] To take one particularly dramatic example, consider the exception to the employment-at-will rule created by the New Hampshire Supreme Court in Monge v. Beebe Rubber Company, 316 A.2d 549 (N.H. 1974). As set out in *Monge*, and interpreted by virtually everyone thereafter, the exception was an extremely broad establishment of an implied covenant of good faith and fair dealing applied to employment law. However, in Howard v. Dorr Woolen Co., 414 A.2d 1273 (N.H. 1980), the New Hampshire Supreme Court radically rewrote the rule to be a narrower public policy exception, while claiming it had not made a change in the law. *See* Bergeron v. Travelers Insurance Co., 480 A.2d 42 (N.H. 1980) (*Dorr* "clarified and construed" *Monge* and "did not create a new rule of law or significantly depart from *Monge*.").

[200] STEINER, *supra* note 137 (on sources of law).

[201] For example, in Pennsylvania between 1959 and the early 1980s, the Pennsylvania Supreme Court paid little attention to the employment-at-will rule. Federal district courts hearing cases in the state created a body of common law addressing the issue, which proved an inaccurate forecast of what Pennsylvania state courts later decided. *See* Mark R. Kramer, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227, 253 (1984) (discussing thirty-seven federal district court opinions).

[202] *See* note 107 *supra.*

[203] *See, e.g.*, Jordan v. Duff & Phelps, 815 F.2d 429 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988) (disagreement

were correct that the thoroughness of a code offered the possibility of resolving disputes in advance of actual disagreements. Finally, both identified opportunities for errors by courts and lawyers to increase uncertainty; legal systems likely differ in how often such errors occur.[204]

B. Adaptability

Preventing uncertainty requires stable rules. But legal systems must also adapt to changed circumstances to remain efficient, as our earlier discussion of multiple equilibria suggested. This requires granting courts a degree of discretion.[205] As a result, the cost of adapting to new circumstances should be a consideration in assessing the overall efficiency of a legal system, particularly to the extent that economic growth itself changes the efficient choice. Advocates of the common law identified its adaptability as a significant advantage derived from its incremental approach.[206] They argued that courts lay down rules "*provisionally* only"[207] while codes and statutes, based on an understanding of potential issues before they occurred, produced fixed rules that might miss important distinctions. As Story noted, "[t]he principles of law, which might suffice for the ordinary transactions of one age, would be wholly insufficient to answer the

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between Judges Posner and Easterbrook over whether a case presented an issue of employment law or corporate law). *See* J. Mark Ramseyer, *Not-so-ordinary Judges in Ordinary Courts: Teaching* Jordan v. Duff & Phelps, Inc., 120 HARV. L. REV. 1199, 1209 (2007) (case demonstrates that "many cases are simply beyond the capacity of most real-world courts to handle cost-effectively.").

[204] *See, e.g.,* Robert G. Natelson, *Running with the Land*, 51 MONT. L. REV. 17, 55-87 (1990) (describing how Montana courts created problems by erroneously ignoring code language).

[205] Sereni, *supra* note 8, at 69.

[206] *See, e.g.*, Mathews, *supra* note 27, at 14 ("By a natural process, as from an oft-repeated application of a principle of justice, morals, or policy to varying facts, such principle is found capable of being expressed in the same or similar language, the unwritten law always steadily progresses toward such self-codification.").

[207] CARTER, PROPOSED CODIFICATION, *supra* note 29, at 25 ("The essential nature of classification consists in *selecting* qualities of objects, and declaring that all which possess such qualities, whatever others they may exhibit, belong to the class. When, therefore, any case arises for disposition under a Code, if it present the features belonging to a class created by it, it must be dealt with the same as other instances in that class, no matter what additional and theretofore unknown features it may present, which ought to subject, and would have subjected, it to a wholly different disposition, had the new features been present to the mind of the codifier.").

exigencies of the next age."[208] By incrementally deciding which cases belonged within a particular rule, the common law was able to postpone drawing distinctions until it had the necessary facts to decide which distinctions were relevant.[209] Common law partisans believed that codes and statutes set out fixed categories that left little room for such adjustments except by amendment.[210] Of course, another name for adaptability might be "uncertainty". Common law proponents claimed that this adaptability was not the indeterminacy with which the critics charged the common law, largely because they believed that the existing common law restrained judicial innovation, restricting judges' choices through the need to harmonize with prior decisions.[211]

Codes, on the other hand, required constant adjustment. This meant that codes' apparent stability would ultimately prove illusory because of "the immense amount of amendment which

[208] Story, *supra* note 18, at 708.

[209] *Remonstrance of June 1882, in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' REAPPOINTED NOVEMBER 1, 1881 20, 21 (1882) (the common law's "distinguishing feature has been that it is never declared apart from the actual facts out of which the questions grow which are to be decided, and it is so declared by learned and skilled tribunals, after discussion by a learned Bar; not by popular legislative bodies, incapable of that cautious deliberation which is absolutely essential to the determination of truth."); Mathews, *supra* note 27, at 16 (describing incremental process as an advantage); CARTER, PROPOSED CODIFICATION, *supra* note 29, at 86 (codification would cause "the arrest of the self-development of private law").

[210] *See, e.g,* Mathews, *supra* note 27, at 17 ("when that rule is to be found only in the Procrustean Bed of a written Code, the letter of the statute must prevail over any fitting modification of that rule which unforeseen circumstances may come to require, and justice may be thus surely defeated."). One later analyst noted that opposition to Field's New York drafts focused on "attempts to liberalize some of what we would now generally agree were the inequities and rigidities of the common law of that day." Fisch, *supra* note 31, at 17.

[211] Mathews, *supra* note 27, at 37 (common law "cannot be created by the *fiat* of an autocrat."); CARTER, PROPOSED CODIFICATION, *supra* note 29, at 8 ("The equality of all men before the law, the harmonious blending of law and liberty, the learned, independent, and uncorrupt judiciary, are all the fruits, in large measure, of the free and natural method of growth under which our jurisprudence has become what it is."); CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 13 (describing role of judge as limited by "the fabric of the national law" which is "a vast system of rules" set out in opinions). Somewhat paradoxically, they claimed that the common law was simultaneously more stable and more elastic than statutes. *See* CARTER, PROPOSED CODIFICATION, *supra* note 29, at 83 ("Next to absolute *right*, stability is the chief excellence in jurisprudence.").

they invariably entailed, and of the methods in which amendments were invariably made."[212] As a result, "[c]odes were peculiarly uncertain and unstable."[213]

Some code proponents agreed that some degree of elasticity in the law was a virtue.[214] However, they believed that the supporters of the common law mistook obscurity for elasticity. What the common law really provided, they argued, was the "doubt and uncertainty that comes from contradictory or obscure decisions." If those principles were discernible, they would "be none the less elastic or comprehensive" if reduced to a statute "from time to time."[215] Even a code skeptic like Joseph Story argued that codification need not reduce this important advantage

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[212] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT, *supra* note 28, at 12. *See also* CLARKE, *supra* note 121, at 293 ("In France the code is buried under a heap of subsequent enactments of the Legislature and of the judiciary law subsequently introduced by the tribunals. In Prussia the mass of new Laws and authoritative interpretations which have been introduced subsequently to the promulgation of the code, is many times the size of the code itself."); CARTER, PROPOSED CODIFICATION, *supra* note 29, at 68 (codes would require constant amendment); Carter, *Argument ... in Opposition, supra* note 29, at 5-6. New York had extensive experience with a high volume of legislation during the 1870s and 1880s. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE 1 (1885) (more than 600 amendments in 1874 and 550 in 1884). Much of this was special interest legislation. *Id.* at 4 ("it is safe to say that one-half of the changes in the general law are moved and brought about by some special or personal interest and with the specific purpose to meet a special case."). The prediction of numerous amendments proved correct in the case of Montana. Morriss, *supra* note 24, at 409-17, 443-50.

[213] *Arguments Against, supra* note 25, at 11. Carter, *Argument ... in Opposition, supra* note 29, at 18 (quoting Sheldon Amos arguing that "The greatest possible uncertainty and vacillation that have ever been charged against English law are little more than insignificant aberrations when compared with what a French advocate has to prepare himself for when called upon to advise a client."). A California lawyer wrote to the Association of the Bar of the City of New York, urging rejection of the proposed New York Civil Code on the basis of his experience with California's Civil Code. As an example, he noted a case where a code provision was amended to change a rule of property law, "undoubtedly a case in which facility of amendment operated as a temptation to it." John T. Doyle, *Extracts from Letter of John T. Doyle, April 22, 1882, reprinted in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE 'TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;' REAPPOINTED NOVEMBER 1, 1881 24, 26 (1882).

[214] *See, e.g., Arguments Against, supra* note 25, at 3 (reporting that N.C. Moak "was opposed to establishing a hard and unyielding system of law in place of the elasticity of the common law."). A few code proponents saw little need for further legal developments. Montana's Decius Wade, for example, argued that "[I]n this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions." Decius S. Wade, *The Bench and Bar 1880-1884, in* JOAQUIN MILLER, AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA 634, 670 (1894). Similarly, Field saw English codifiers as "seeking … a more useful form into which to cast a legal system whose substance is at least generally settled." Fisch, *supra* note 31, at 13.

[215] Wade, *supra* note 137, at 5. Story also conceded that allowing disputes over the "many nice distinctions and differences, and many incidental dicta which serve greatly to perplex the inquiries of the ablest lawyers" might be resolved more quickly by "four or five lines of text in a code, stating the true general rule, deducible from the best of them, would have at once put aside the necessity of any further consideration of most of these cases." Story, *supra* note 18, at 720.

of the common law "to a hard and unyielding character" if proper rules of interpretation were included.[216] Similarly, a codification advocate contended that interpretation would provide the common law's adaptability within a code system: "the judicial operations do not change; with a fearless bar and an intelligent judiciary, there will be in the future, as in the past, the same effort to arrive at exact justice, the same effort to distinguish the given case …."[217]

The most important difference between the two sides of the debate was not about *whether* adaptability was valuable but over *how* the law should adapt.[218] Code proponents vigorously contested the merits of the common law process, often quoting Jeremy Bentham to make their point: "Do you know how Judges make the common law? Just as a man makes laws for his dog. When your dog does anything you want to break him of you wait till he does it, and then beat him for it. This is the way the Judges make law for you and me."[219] Beneficial legal changes to handle changed circumstances came, code proponents argued, from the legislative process rather than the common law. As examples, they pointed to statutory changes in English law that allowed the negotiability of notes and to the modification of the common law to allow married

[216] Story, *supra* note 18, at 720. In part, this disagreement reflects the unfamiliarity of the debate's participants with the day-to-day operation of code systems. As we noted earlier, interpretation remains a key part of civil code legal systems, with the primary difference between civil code systems and common law systems resting on the former's lack of deference to precedent. *See* Tung, *supra* note 137, at 27 (describing the "secondary place of the law made by judges and lawyers" in the French system).

[217] FOWLER, *supra* note 163, at 15. *See also Codes and Reports*, N.Y. TIMES, Apr. 5, 1887, at 4 ("When new cases arise common law Judges decide them upon legal analogies by a consideration of the principles governing all cases nearest similar, and with due regard to the 'national standard of justice.' That is what the Code Napoléon directs Judges administering it to do, while the Prussian Code directs new cases to be reserved for legislative action. As regards new cases codes are at no disadvantage, while as regards the immeasurably greater number of cases under the old law they give advantages . . . .").

[218] Field, *supra* note 96, at 249 (conceding that a code could not answer all future questions).

[219] *Common Law Fetichism*, *supra* note 180, at 4.

women to own property in their own right.[220] Common law partisans rejected this, seeing case law's gradual development as the better way to adjust the law to changed circumstances.

The adaptability discussion suggests an important dimension on which the efficiency of legal systems should be assessed. The law must adapt to new conditions by modifying the substance of rules quickly enough to accommodate the changed conditions but not so quickly as to undermine the certainty of the law. Further, it must identify the right adaptation and introduce it into the law. Assessing which system solves this problem at the lowest cost is difficult. The answer depends in part on the likelihood that cases not solved by existing bodies of law will arise. One source of new problems is technological change, although not all such changes require new legal principles but can be addressed by straightforward application of existing principles.[221] Other sources of change include changes in the economy, which create demands for new forms of organization,[222] new relationships among economic actors,[223] and means of accommodating new activities.[224]

Common law partisans argued that the common law has an advantage in adaptability by virtue of its continual opportunities for incremental change, as the evolutionary models of efficiency suggest. They contended that precedent served as a guide, rather than an inflexible

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[220] Field, *supra* note 96, at 254 ("The careful student of history will find that from the time when the English judges resisted the negotiability of the notes of merchants down to the hour when the last shackle was stricken from the hands of woman holding of her own property and taking the fruit of her own labor, the real and healthy growth of the law has proceeded not from the seats of judges, but from the halls of legislative assemblies.").

[221] *Compare* Frank Easterbrook, *Cyberspace and the Law of the Horse,* 1996 U. CHI. LEGAL F. 207 (1996) and Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach,* 113 HARV. L. REV. 502 (1999).

[222] *See* Larry E. Ribstein, *The Evolving Partnership*, 26 J. CORP. L. 819 (2001) (describing the evolution of the LLC).

[223] *See* Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703 (1998) (describing evolution of landlord tenant law).

[224] *See, e.g.*, Hinman v. Pac. Air Transp. Corp., 84 F.2d 755, 758 (9th Cir. 1936) ("utterly impracticable" for landowners to "stake out, or assert claims to definite, unused spaces in the air"); Mark de Figueiredo and Adeeb Fadil, *Emerging Property and Liability Issues for Carbon Sequestration*, BLOOMBERG FINANCE, 2008, http://www.simpsonthacher.com/content/news/news1382.pdf (discussing ownership of "pore space" underground).

"dictator" and so allowed the law to evolve.[225] But the mechanism by which the common law would be guided to evolve in the right direction sounds much like the models reviewed earlier. As in Posner's judicial preference model, common law advocates argued that judges apply a "social standard of justice" that they "know" and "feel … because they are a part of the community."[226] Similar to the evolutionary models, they also contended that the adversary process – with lawyers "animated to the highest endeavors" by "a sense of duty, professional ambition and pecuniary reward" – would lead to a "sound" determination of the result, superior to that possible in discussions among a group of codifiers.[227] This process was leading "the private law of all English speaking States to a unity,"[228] which suggests an affinity for the single equilibrium theory.

Not only do these mechanisms require greater specificity in the dimensions we discussed earlier, they also risk under-valuing the role of interpretation within code systems, a dimension on which code systems differ. Moreover, the common law's advantages in this dimension (if any) are potentially offset by its difficulties in easily correcting erroneous changes, as some courts defer to legislatures to overturn rules based on prior precedent. This brings us back to the issue of the impact of the differences of treatment of precedent across common law systems, which we discussed earlier.

Undoubtedly, the adaptability of a legal system to changed circumstances is a critical variable in assessing its contribution to economic growth.[229] But adaptability is not a characteristic limited to a single type of legal system. The Code Napoléon's survival in France

[225] CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 36.
[226] *Id.*, at 48.
[227] *Id.*, at 47.
[228] *Id.*, at 51.
[229] *See* note 221 *supra*.

for over three hundred years and through multiple constitutions is an impressive testament to its adaptability, as is the survival of the German 1896 Civil Code. Moreover, adaptability represents just one dimension upon which to evaluate legal systems and a dimension that, at least in part, represents a tradeoff with uncertainty.

C. Accessibility

The proponents of codification in nineteenth century America argued that a code made law accessible to the general public while the common law has hidden the rules "in [the] sealed books" of judicial opinions, accessible only to lawyers.[230] For example, the *New York Times* summed up the case for codification in 1888 as "We can put the argument for the code into three words: 'Publish the law.'"[231] Moreover, the code advocates also argued that not only was the law scattered across statute books and court opinions, but the common law was written in a format which non-lawyers could not understand.[232] Under the common law, code proponents argued,

> [n]ot only does the law when discovered often take the shape of a sphinx riddle, but it is always set in the center of a labyrinth, the key to which has to be laboriously sought and the mazes of it with painful perseverance worked out

[230] Field, *supra* note 26, at 239.

[231] *A Reproach to the Bar*, N.Y. TIMES, Mar. 22, 1888, at 4. Story argued that this was necessary for the criminal law. Story, *supra* note 18, at 731 ("One of the most obvious dictates of reason is, that public crimes, which are to affect every citizen, should, as far as practicable, be made known to all."). Yet Britain proved unable to adopt any of its several efforts at criminal law codification during the nineteenth century. *See* note 36 *supra*. *See also* JEREMY BENTHAM, FRAGMENT ON GOVERNMENT 156-7 (Montague ed., Oxford University Press 1891) ("if the laws which concern every member of the community were arranged in one volume … if the general code were universally disseminated; if a knowledge of it were required as preliminary to the enjoyment of political rights;-the law would then be truly known; every deviation from it would be manifest; every citizen would become its guardian; its violation would not be a mystery; its explanation would not be a monopoly; and fraud and chicane would no longer be able to elude it."). Napoleon made this one of his main goals in creating the Code Napoleon. Friedrich, supra note 67, at 10. There are some claims that clearly written codes increase popular understanding of the law. *See* Tung, *supra* note 137, at 23 ("Those engaged in the practice of law in France are often surprised to see to what extent the law is known by ordinary people, or at least the law of property by the owners of land and persons living in the country, the laws of business by businessmen, and the law of the family by everybody.").

[232] *See* Wade, *Necesssity*, *supra* note 137, at 2-3 (noting that people do not have necessary training to understand court opinions).

> before the weary searcher can know whether he is to be rewarded by the revelation of a positive rule, or only end in being baffled by a conundrum.[233]

The result was that judges and lawyers "spend their lives in searching for decisions that will determine the question in hand."[234] Reducing the common law to clearly written principles – which would be necessary to apply any law[235] – and putting those principles into an organized framework, the codifiers argued, was the only way to make it accessible to those who needed it. As a committee of the New York Chamber of Commerce argued, "the law is meant for the affairs and business of men, and that its general principles can be perfectly understood by the exercise of ordinary common sense."[236] Optimistically, the *New York Times* editorialized that the proposed New York Civil Code was written "in a manner so systematic, upon a scheme so comprehensive, and in language so plain that the ordinary man can learn in half an hour nearly all that the best counsel can tell him upon any question of law included within it."[237]

By contrast to this, the codifiers argued, the common law required first searching a particular state supreme court's cases, then the "list of 'cases cited, criticized, distinguished, or overruled," then the decisions of lower courts, then "abroad into other States or across the sea." This required examining "volumes upon volumes, with no guide other than an index at the end of each volume, or a compilation or collection of indexes called digests, of many volumes." Some

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[233] Kelly, *supra* note 166, at 10.

[234] Wade, *supra* note 137, at 3.

[235] Fowler, *supra* note 163, at 51.

[236] *Current Topics*, 33 ALB. L. J. 221, 282 (Mar. 20, 1886) (quoting chamber report).

[237] *The Code–Here and Else Where*, N.Y. TIMES, Feb. 28, 1825, at 4. *See also* Wade, *supra* note 137, at 10 (noting that "there must be orderly system and arrangement as to subjects, sub-divisions and sections."). California Governor Leland Stanford argued in 1863 that California's statutory output since 1849 was already so great that "Citizens not versed by constant familiarity with their contents, and desirous of investigating the laws, stand aghast as they survey the fourteen ponderous tomes that constitute the statutes of this youthful state…."), quoted in Kleps, *supra* note 19, at 769.

of these digests were "made by men of sense, and sometimes by men of no sense, without any agreement upon a plan or a classification of subjects."[238]

Code opponents were skeptical that that a code would produce a broad, general understanding of the law. They agreed that organization and arrangement could improve lay (and professional) understanding of the law, but saw that as the function of treatises rather than codes.[239] Moreover, they claimed that no Code could provide the clarity the codifiers claimed would result, for every lawyer knew that "the points upon which he is most frequently applied to for advice" concerned statutes, not the common law.[240] Most importantly, however, the common law's defenders argued that "positive legislation, however rapid and constant, can never keep up with in any just proportion the actual permutations and combinations of the business of an active, enterprising, and industrious people."[241] A code would need regular revisions, but those revisions would have to wait while cases worked out "the proper remedy or principle, which ought to be generally applied, could be clearly perceived or safely adopted."[242]

Once again, both sides to the debate identified an important element in the efficiency of a legal system: the cost of access. Even with the most efficient set of rules, a legal system that is not accessible to the people who wish to make use of it cannot promote growth, operating only

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[238] Field, *supra* note 26, at 240-41.

[239] *See, e.g.*, Strong, *supra* note 187, at 9 (stating "I submit that the Legislature appoint a commission of eminent gentlemen of the bar to prepare systematic and simple statement or text books" rather than codify the law.").

[240] CARTER, PROPOSED CODIFICATION, *supra* note 29, at 92. *See also* Strong, *supra* note 187, at 4 ("Can he say that these brief isolated formulae [in the code] are of any use except to a lawyer who knows the relative position and bearings of the principle each one is founded upon?"); Mathews, *supra* note 27, at 27 ("statute law is the nursing mother of technicality."); WILLIAM B. HORNBLOWER, CORPORATIONS UNDER THE PROPOSED CIVIL CODE 19 (1888) (noting that Code sections would "require to be adjudicated on, construed, limited and explained, so as to bring it into harmony with subsisting rules of law and with the principles of justice and equity. Innumerable questions will arise as to the meaning of particular phrases, on which astute Courts will differ….").

[241] Story, *supra* note 18, at 708.

[242] *Id.*, at 709.

within a "bell jar," as Hernando de Soto argued.[243] But accessibility is more than the ability to find a relevant passage in a reference work. Lawyers in civil code countries are well paid, just as lawyers in common law countries are,[244] not because they have memorized lists of rules but because they understand how to structure transactions within a framework of rules or to present facts and law to a decision maker in a fashion which increases the likelihood of a favorable decision. Accessibility requires a legal system with sufficiently predictable outcomes that practitioners can provide meaningful advice and rules of sufficiently general applicability that those planning their affairs need not worry that their plans depend on the political connections of potential parties to a dispute or transaction.

In addition, accessibility requires the ability to identify relevant legal rules. The structure of common law court opinions render identifying the decisional rule difficult; much of the first year of American legal education is taken up with efforts to teach students how to properly read decisions.[245] Codes, if not statutes generally, are easier to read but can also be challenging to apply. Law school in civil law countries involves five years (rather than the eight total required in the U.S.) and code classes within that education are not simple.

A further dimension of accessibility is the degree to which legal systems decide cases according to known criteria. Even if one can decode the written opinion, the reader may not be particularly close to understanding the court's decision process. Writing in 1961, a former state supreme court justice noted that opinions did not always reflect the reason for the decision:

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[243] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2001).

[244] *See* discussion by Nuno Garoupa, *Providing a Legal Framework for the Reform of the Legal Profession: Insights from the European Experience*, 9 EUR. BUS. ORG. L. REV. 463 (2008).

[245] *See* Orin S. Kerr, *How to Read a Legal Opinion*: *A Guide for New Students*, 11(1) GREEN BAG 2d 51 (2007). Code proponents argued that "[t]he process of extracting principles from adjudications is a very laborious one, requiring the highest order of mental effort." Fowler, *supra* note 163, at 50.

> The reasons for the decision relied on in the conference may have been neither fully developed nor expressed in terms of formal legal principles or rules, but they were real reasons. The judge to whom the case is assigned is then in effect told to make it look good. That is an overstatement, because he is expected to be honest in what he writes, and is expected to set forth the case accurately. But he *is* expected to make the court's decision, or the majority's position, look good.[246]

Appellate judges agree to opinions for a variety of reasons, not necessarily related to the merits of the arguments made in the opinions:

> Other judges, and sometimes the author of the opinion, may not recognize its full import. If they do recognize the import they still may not want to hurt [the author's] feelings by insisting on a change that is not immediately urgent. It may just be too much trouble to get the opinion rewritten. The case may have been poorly briefed, and a crowded calendar may leave too little time for new research and study. When a case comes out of conference assigned to a particular judge for writing, after majority or even unanimous vote, it is an incomplete thing; much is left to the judge who has the writing assignment, and there is a tendency in some courts to let each judge do his job his own way.[247]

More generally, the legal realist critique of the common law undercuts key supporting assumptions about how judges treat precedent and disputes relied on by nineteenth century common law advocates.[248] More importantly, to the extent judges, lawyers, and others behave as if this critique (or the similar critiques offered by CLS and other left critics of the American legal system)[249] is correct, the law becomes less accessible as the reasons for decisions become more opaque.

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[246] Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 817 (1961).

[247] *Id.*, at 818. Even review mechanisms may differ across courts. Leflar notes that when he joined the Arkansas Supreme Court, the practice was for judges to read their drafts to their colleagues in conference rather than circulating written drafts. "Complete alertness for three hours of such reading was humanly impossible. Listening judges could do little more than give agreement to blobs of words, toward the end of the reading time." *Id.* at 818, n. 6.

[248] *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

[249] *See* Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

The debate over accessibility suggests another important point in assessing the efficiency of legal systems: whether parties can contract around legal rules.[250] The nineteenth century debaters did not discuss this much, perhaps because mandatory legal rules made up a much smaller proportion of their legal environments than such rules do today in most developed countries. Inefficient rules matter much less when they can be contracted around cheaply. This makes up an element of accessibility because the ability to create privately agreed rules governing the parties' relationship means law making is accessible to the public. Paul Rubin suggested a single public law making agreements to arbitrate enforceable would be an important step in "growing" a legal system in a society where legal resources were scarce.[251] We extend that argument and argue that making it cheap to contract out of state-provided rules is an important part of making a legal system efficient.

III. Conclusion

There are six important factors identified from the nineteenth century codification debate and our review of the efficiency literature for legal systems' ability to generate economic growth: (1) the costs of identifying and applying efficient rules; (2) the system's ability to restrain rent-seeking in rule formulation and application; (3) the cost of adapting rules to changing circumstances; (4) the transaction costs to parties needing to learn the law; (5) the ease of contracting around rules; and (6) the costs of transitions between systems. We briefly address each.

Much of the efficiency literature focuses on explaining the efficiency of particular rules produced by the common law. As the nineteenth century American debate showed, identifying

[250] *See, e.g.,* Butler, *supra* note 94, *at* 282 (stressing importance of ability to opt-out of rules).
[251] Rubin, *supra* note 43.

the relevant rules was a key concern of lawyers and lay people alike. Both the common law and the civil law have advantages and disadvantages and the choice between them is likely to depend on a wide range of details. Even within the two broad families of legal systems, there are substantial differences, which may be more significant than the category-level distinction. In fact, the original understanding of common and civil law legal families referred to the rules regulating private law (contract, torts, and property). These rules are embedded in constitutional and administrative law settings that differ substantially within common law and within civil law jurisdictions. While these details are difficult to identify at a level necessary for empirical analysis, further investigation into them could improve the legal origins literature.

Next, both the Posnerian judicial preference version and the evolutionary versions of the efficiency hypothesis contrasted a common law free of special interests with a version of statute law afflicted with public choice issues. As the American experience has amply demonstrated, the common law is not immune to these problems. More importantly, these analyses reflect a naïve view of the constraints present in civil law systems. French codification prior to the Code Napoléon was resisted by local *Parlements,* anxious to preserve their privileges and resistant to creating a national legal system.[252] Under such circumstances codification undoubtedly reduced rent-seeking by forcing more consistency and logic on a system of local privileges.[253] Once

[252] Tung, *supra* note 137, at 21.

[253] A Code is "not a mere collection of rules, but a collection of rules with such inner consistency that logical reasoning could be a part of legal reasoning." Tung, *supra* note 137, at 30. As Sereni describes, this affects the scope of discretion for courts as well:

> The dogmas of the completeness and self-sufficiency of the written law and of a civil-law system not only affect the scope and the limits, but also the method of interpretation, of the legal rules on the part of the courts. An important corollary of these dogmas is that each decision of a court must find its ultimate justification in some specific provisions of the written law. The broad statements embodied in the various provisions of the various legislative enactments constitute a co-ordinated group of major premises from which the solution of each particular legal problem may be derived by means of a process of deductive reasoning.

again, details matter in evaluating efficiency claims. If we step back from the caricatures of both systems relied on in the literature, we can see that the relevant dimension is the resistance of a legal system to rent-seeking, not whether it is judge-centered or code-centered. Moreover, the differences in the extent to which issues are treated as issues of law and issues of fact vary across systems and affect the relative importance of rules, the level of certainty, and the cost of resolving the disputes.[254]

Third, as the multiple equilibria issue suggests, the choice is rarely of "the" efficient rule over inefficient alternatives. Rather, it is likely that changing circumstances produce shifts in the relative efficiency of different rules. The cost of adaptation is thus an important factor in evaluating a legal system's contribution to economic development. Again, both families of legal systems have advantages and disadvantages. The common law adapts slowly but steadily, is vulnerable to finding itself in blind alleys, and works fastest on the areas causing the most problems for litigants. The civil law avoids creating inconsistencies through the need to keep individual provisions of a code in synch with larger principles, allows a range of adaptation through interpretation (although perhaps less of a range than the common law), but may move

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Sereni, *supra* note 8, at 63. *See also id.*, at 65 ("not only the methods of interpretation resorted to by the courts in civil-law and in common-law systems are basically different, but also that the relationship between legal rules and the judicial function is differently understood."). Thus within a code system, the judicial opinion's "purpose is to compel the court to reach the solution of the case through an independent process of legal reasoning and to offer a legal justification for the result obtained." *Id.*, at 67.

Two important points flow from this difference. First, this constraint can be powerful. Even a cursory examination of any U.S. state's statutes will reveal what a powerful constraint this would apply to legislation. In pre-Code France, "The nobles and their property had their own huge number of privileged rules; and so did the clergy." Cassin, *supra* note 198, at 47. A key innovation of the Code Napoleon was "[s]uppression of all the old privileges and equality of all Frenchman, regardless of status, sex, or social condition." *Id.*, at 49. Second, there is not reason to expect all code systems and all common law systems to have the same understandings with the groups of this relationship between legal rules and judges. Understanding that relationship will therefore be critical to understanding the efficiency properties of the legal systems in question.

[254] Sereni, *supra* note 8, at 74-5.

more slowly to change.[255] Which set of characteristics maximizes efficiency will vary depending on the pace of change, the type of change, and the qualities of the decision makers. This is widely recognized in the literature on constitutions, where the American constitution's longevity is often cited as an example of the virtue of brief, principles-oriented constitutions. The French Code Napoléon has survived almost as long and its survival suggests a similar advantage.[256] Moreover, within families, legal systems will vary with their attachment to precedent or the degree to which courts are allowed to interpret. And too much adaptation risks undermining the certainty critical to economic activity.

Fourth, as Robert Ellickson showed in *Order without Law*,[257] legal systems that do not communicate their rules to those subject to them risk irrelevance. The cost of learning the relevant rules and of applying them is related to both the methods by which the legal system organizes its resources and the effort needed to translate them into practical advice. The advent of Westlaw and Lexis reduced the cost of acquiring precedents in the U.S. legal system (compare the Cayman Islands legal system, where court reports are available only in hard copy form) but may have increased the price of comprehensive advice by increasing the number of opinions that had to be searched. The development of databases of judicial decisions for code systems likely expands the role of judicial interpretations, at least in practice. Other factors also influence these costs: a legal system that primarily offers default rules in areas of private law will be cheaper for participants than one with many mandatory rules. Clearer rules are cheaper, as the unfortunate experience of the U.S. federal income tax code suggests by negative example.

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[255] As one commentator summarized the French system, "The Civil Code combines the reformist with the traditionalist outlook, progress with stability, justice with order. This balancing of countervailing values is no doubt the secret of its success." Friedrich, *supra* note 67, at 6.

[256] Tung, *supra* note 137, at 42.

[257] ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

The ability to contract around a legal system's rules makes it much less important that the rules themselves be the efficient choices. Neither system has a clear advantage in this regard, since either judges or legislatures can make particular rules mandatory. There are examples of both systems providing for easy exit. For example, the Code Napoléon provided for freedom of contract.[258]

Even if a particular system is found to be more efficient, there are significant transition costs in moving from a code to common law or vice versa (in particular, adjusting the stock of human capital to a new legal system is extremely costly and realistically unfeasible in modern economies). These costs may be worth bearing in some instances and not in others.[259] For example, French codification led to greater uniformity of law within France where, prior to the Code Napoléon, Voltaire had claimed that a traveler would have to change laws as frequently as he changed horses.[260] The nineteenth century American debate occurred in the context of an effort to replace the common law with a civil code in a number of jurisdictions. In some of those jurisdictions, new codes were adopted. A final lesson from both the debate is that the transition costs matter a great deal. Dakota Territory had few legal resources in 1866; its adoption of a code system gave it an immediate body of authority, compact enough for frontier use. At the same

[258] Cassin, *supra* note 198, at 49.

[259] Mathews, *supra* note 27, at 11 (explaining why western states and territories found codification attractive); *Arguments Against*, *supra* note 25, at 21 (explaining why France, Italy, Switzerland, and Germany codified to unify disparate bodies of law); CARTER, PROPOSED CODIFICATION, *supra* note 29, at 60-2 (explaining French and German codification as need for national unity); CARTER, WRITTEN AND UNWRITTEN, *supra* note 29, at 19 (codification would be "laborious, expensive, and hazardous" and so benefits would need to be large); Tung, *supra* note 137, at 20 (citing need for uniform national law as key reason for French codification); Rubin, *Growing a Legal System*, *supra* note 43.

[260] Cited in Fowler, *supra* note 163, at 30. *See also* Cassin, *supra* note 198, at 46-7 ("*Diversity* of laws was actually the dominant characteristic of the *Ancien Regime*. There was such diversity, first of all, with regard to the sources of the law." Roman law in the south, customary law in the north; on the eve of the Revolution there were "about sixty general and three hundred local sets of customary laws."). Similarly, it was claimed that until 1848 "a single commercial bill would sometimes fall under half-a-dozen rules of law within a comparatively small circuit" among German states. *Id.*, at 35.

time, Dakota Territory lacked the resources to adapt the code to its circumstances or to maintain it, leading to the re-codification in 1877. The massive resistance of the New York City bar to the proposed New York codes from 1879 to 1889 undoubtedly reflects the much larger transition costs a change in legal system would have imposed there.

Developing and maintaining a code requires a significant commitment of legal resources. However, maintaining a common law system also requires a continual application of resources to ensure the judiciary is competent and honest. Developing a system of case law reporting that provides accurate, timely, and locatable precedent is also critical to the success of a common law system and expensive. Paying attention to the costs of transition and future operations is crucial to evaluating proposals for changes in legal systems. Attention to these elements would provide a better focus for comparison of legal systems than the formulaic identification of systems as "common law" or "civil law". Both systems represent efforts to solve "the basic problem of retaining the flexibility of a legal system while securing a reasonable amount of certainty with regard to the solution of legal problems and of predictability for the event of litigation."[261]

[261] Sereni, *supra* note 8, at 69.