

society, but its abolition probably could not be defended by reference to the principle of *ex ante* compensation, for some people who would pay higher taxes after the change would probably be worse off.²⁵ The consent (or *ex ante* compensation) ground of wealth maximization is applicable only in limited contexts, in particular that of common law adjudication.

4. Kronman states that the willingness-to-pay constraint that wealth maximization places on utility maximization is not imposed "out of respect for [the individual's] autonomy or independence as a person."²⁶ But it is, because in a well-ordered society wealth can normally be obtained only by inducing other people voluntarily to transact with one.²⁷

²⁵ It is possible that those who paid more taxes after the change would have higher after-tax incomes than under a progressive system, because of the increase (in which they would presumably share) in the wealth of society brought about by the change. No doubt at very high levels of progressive taxation this would be true. The *Hofstra Law Review* paper assumes it would not be true at current levels of taxation.

²⁶ Kronman, *supra* note 1, at 234.

²⁷ As stressed in Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 5, at 122-23.

B. comes - self if it references the common law.

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THE STATIC CONCEPTION OF THE COMMON LAW

RICHARD A. EPSTEIN*

I. THE THESIS

ONE of the most persistent themes in the legal literature is that the common law grows and matures in response to social change. For generations, legal historians have examined the common law in order to document this theme. Older principles are distinguished away or swept aside by judges who recognize their obsolescence. Today economists echo this theme when they claim there is, whether by conscious choice or by social necessity, a strong tendency for the common law to adopt "efficient" legal rules.¹ The primacy of change is underscored by the pantheon of great judges. Men like Bramwell, Pitney, and Mitchell are forgotten while Coke, Mansfield, Cardozo, and Traynor are praised for the new paths they opened.² Innovation, not stability, is the order of the day, and the hallmark of fame and recognition.

The thesis of this paper is that the importance attributable to changing social conditions as a justification of new legal doctrines is overstated and quite often mischievous. My point is not to defend old rules, much less the principle of *stare decisis*. Many of the rules that once graced the common law were indefensible abominations no matter how ancient their lineage. My far narrower concern is the types of *reasons* sufficient to justify doctrinal change. Cases too numerous to count make reference to the change in social conditions between the time that some common law rule is first announced and the time it is at last overthrown.³ The value of the rule is subject to

* Professor of Law, University of Chicago Law School.

¹ "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past." Benjamin Cardozo, *The Growth of the Law* 136-37 (1924).

² The strongest statement of the basic point is to be found in Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977). For similar sentiments, see Richard A. Posner, *The Economic Approach to Law*, 53 Texas L. Rev. 757, 762-63 (1975).

³ *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969), dealing with the implied covenant of habitability in leases, is one recent example. Others are cited at appropriate places in the text.

constant depreciation; while fit for the social era in which it first appeared, with changed conditions it must now give way to a new reality. The law, it is said, must thus evolve with the human institutions it governs if it is to preserve its own legitimacy.

In my view, this dynamic approach is often the wrong way to look at legal developments in common law rules. There are some rules for which it is possible to observe such social depreciation, but they are exceptions. In particular, if we confine our attention to the substantive principles of property, contract, and tort, and to their common law articulation, another truth dominates. Some rules are good, and some rules are bad. Sometimes the good rules are old; sometimes they are new. But in case after case, the proper result can and should be reached without taking into account any alleged dynamic element of the common law. Social circumstances continually change, but it is wrong to suppose that the substantive principles of the legal system should change in response to new social conditions. The law should not be a mirror of social organization. In private law matters, it can best perform its essential function only if it remains constant. Social dynamism is not an undesirable feature. To the contrary, it is wholly desirable, but not best implemented by judicial decision. The desired initiatives come best from private sources, who should be spared the burden of planning their affairs in an environment filled with unwanted legal uncertainties. The point is important because it speaks to the nature and the function of the private law.

In order to understand the case for the static conception of the common law, it is first necessary to get some sense of the nature and function of a legal system. Under one possible conception, the legal system must specify in great detail the precise courses of action that individuals are then bound to follow. In effect, the system makes most of the major decisions about the allocation of resources through its central, public agencies and allows individuals the right to make adjustments in their own cases only at the margins. Such is, for example, the way a system of rigid wage and price controls must in principle work. The system sets the terms on which exchange can take place; individuals can at most opt out of the system. Rules with such specificity are of course difficult to formulate and enforce. Yet even if these difficulties are surmounted, it remains clear that within this regime that rules as promulgated have a very short useful life, for the legal system must take quickly into account the exogenous changes in supply and demand in setting out its schedules for production and exchange.

I find another conception of legal rules more congenial.⁴ The purpose of

⁴ I have developed this theme in many of my recent writings. See, for example, Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973); Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J. Law & Econ. 293 (1975); Richard A. Epstein, Nui-

the system is to establish with reasonable certainty the boundaries in which individual decisions can take place free of public intervention and control. The point is not that there are only individual decisions under this second regime and only collective decisions under the first. Rather, it is that collective decisions under the second regime are designed to parcel out the available terrain, such that a second tier of individual decisions and voluntary exchanges can then determine the distribution of goods and services within society. Within this conception of the system, the function of the law is essentially threefold, where for each function there is an associated branch of law. The first function is to determine the original property holdings of given individuals, including rights over one's own body. Such is governed by the law of property, especially with the rules for the acquisition of unowned things.⁵ The second is the law of contracts (including conveyancing), which governs cooperative efforts among individuals and exchanges of things that are already owned. The third is the protection of persons and property (and their methods of transfer) from the aggression of third parties; such is the traditional function of the law of torts.

Looking at the legal system from this tripartite point of view, it becomes quickly clear that there are many areas in which the legal system need not take into account changes in either social behavior or technological patterns. The rules of the game have been worked out with sufficient clarity that the private parties can take these changes into account in the way in which they manipulate the rights in self and other things (protected by the law of torts) through voluntary exchanges (sanctioned by the law of contracts). It may well be, for example, that shifts in relative prices will lead to a greater demand for one good as against another. Such shifts will, of course, influence the way in which factors of production are combined by the different actors within the social system. Yet these changes are utterly without consequence to the legal rules that regulate the acquisition and transfer of property rights. The rules in question give to each owner absolute dominion over what they own, and allow all to offer (but not to compel acceptance of) their goods and services to the rest of the world on whatever terms they see fit.⁶ The very definition of the right contains within it all the flexibility necessary to respond to the changing situations. The right to offer goods on whatever terms seem fit permits a change of the terms of exchange without any parallel changes in the rules of exchange.

The variations in individual tastes and conduct can all take place within a persistent set of legal rules. In the aggregate they can and often do constitute

sance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979) [hereinafter cited as Nuisance Law].

⁵ See Richard A. Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979).

⁶ See Richard A. Epstein, Intentional Harms, 4 J. Legal Stud. 391, 421-41 (1975).

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major social changes, but in no way do they require, or permit, parallel changes in the legal order.

II. ILLUSTRATIONS

A brief examination of several legal rules shows how their justifications are essentially independent of social changes.

A. *Fraud and Duress*

In the law of contracts, a promisee who uses force or fraud cannot demand performance of the promise exacted from his promisor. It may well be that in ancient times the threat of force came only with a sword and not with a gun, or that fraud was committed in person and not by telephone. Yet it is clear that what is wrong about the promisee's conduct is not the particular instrument chosen either to deceive or coerce the promisor, but that such deception and coercion compromised the autonomy of the promisor in the first place.⁷ The legal system that argues that fraud is bad only because the telephone has been invented does not know the difference between a moral principle and a technological tidbit. The fundamentals of the fraud and coercion problem are timeless, even if techniques of implementation constantly vary. Anyone is free to argue that fraud and duress are in general good things, but they cannot draw any comfort from demonstrated changes in social behavior. That rules can and do change is of course a fact; but such change is not a justification for either the old order or the new.

B. *Release of Debts*

Another contract principle illustrates the same point. There is in the English law a rule that says a creditor's voluntary acceptance of partial payment of a debt to complete satisfaction will not bar his action for the unpaid residue.⁸ The reason given is that the debtor received no consideration for the original release. Such a rule was announced in *Pinnel's case*⁹ in 1602 and

⁷ For my views on this subject, see Epstein, *Unconscionability*, *supra* note 4.

⁸ See G. C. Chesire & C. H. S. Fifoot, *The Law of Contract* 78-88 (7th ed. 1969).

⁹ 5 Co. Rep. 117a, 77 Eng. Rep. 237 (1602). The crucial passage reads as follows: "Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. . . . The payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for per-adventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster,

reaffirmed by the House of Lords in *Foakes v. Beer* in 1881.¹⁰ The rule as announced stands in opposition to the earlier Roman Law rule on the same point which says that a bare promise can release a consensual obligation (or any part of it),¹¹ even though it cannot create an affirmative obligation to pay some additional sum.¹² As a matter of sound business policy, the English rule has long been condemned as a source of great mischief,¹³ which has been confined to narrow limits only through a set of contrived and artificial exceptions to the basic legal rule.¹⁴ The strong opposition to the rule

and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole: for the expenses to pay it at York is sufficient satisfaction." Note that the examples given in this passage indicate how early the exceptions to the rule were clearly established. Note too that with respect to these exceptions it cannot be said that there was any form of a bargain between the two parties, as the value given in exchange for the release may be known and understood by both *not* commensurate with the release itself. "A man may give, in satisfaction of a debt of £100 a horse of the value of five pounds, but not five pounds." *Sibree v. Tripp*, 15 M. & W. 23, 38, 153 Eng. Rep. 745, 752 (1846). And the acceptance of 10¢ on the dollar is treated as an equivalent of the dollar, if made a day before the original obligation is due. The pretense of equality thus introduces a jarring note of formalism into the legal system, as consensual releases are valid if cast into one form but not into another.

The criticism of the English rule is not that formalism is bad per se, but that it is a mistake to use as formal devices events that are not solely and unambiguously intended to perform that function. The requirement, for example, that a release be in writing need not be destructive; nor one that some special form of words be used, if done with certain formal classes of contracts as in Roman times. See Gaius, *Institutes*, Book III, § 169, at 209 (Francis de Zulueta trans. 1946), concerning the release of the verbal contract (i.e., formal) of stipulation by another verbal contract, known as *acceptilatio*.

¹⁰ 9 A. C. 605 (1884). A case, by the way, in which the overtones of fraud by the original debtor are present.

¹¹ Gaius, *supra* note 9, at Book III, § 169-170. The basic position was, in effect, that certain formal obligations only be released by other formal acts, but that consensual obligations could be released by words alone. At no point does the doctrine of consideration enter into the picture. The explicit requirement of formal releases is, moreover, far less mischievous than a rule treating something which on its face looks functional but which, in fact, is made to serve formal purposes.

¹² For the Roman rule, see Gaius, *supra* note 9, at Book IV, § 126, at 285; for an American case on the same point, see *Gillingham v. Brown*, 178 Mass. 417, 60 N.E. 122 (1901).

¹³ See the dissent on Lord Blackburn in *Foakes v. Beer*: "[A]ll men of business . . . do everyday recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. 9 A.C. at 622, quoted with approval in Chesire & Fifoot, *supra* note 8, at 80.

¹⁴ The common technique employed involved a reorientation of the doctrine of consideration. As formulated the doctrine was designed to limit the class of promises *prima facie* enforceable to those which were embodied in bargains—exchanges in which each party gave up something in order to get something in return, in the normal case of equivalent value. Yet in an effort to circumvent the release rule, transactions were cast into the form of a bargain even though the parties themselves knew that no equivalents were being exchanged. See generally Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941). The clever use of consideration is much in evidence in release cases. Thus the development in *Sibree v. Tripp*, 15 M. & W. 23, 153 Eng. Rep. 745 (1846), where it was held that substitution of a check for a banknote would escape the rule in *Pinnel's case*. Note that such a device had been rejected in the earlier case of

in the modern American cases, has not, however, completely overthrown it. The moral of the matter for these purposes, however, is that the old English rule was, and will be, *always* inferior to the Roman rule, for the simple reason that, whatever the ruminations of the judges, it goes against the shared expectations of business parties to these common transactions. That the Romans dealt in sesterces and slaves, the sixteenth-century merchants in malt and tobacco, and the twentieth-century businessmen in elaborate multi-national transactions has nothing to do with the matter. One can somewhat vainly hope that the legal strength of a rule as inefficient and inconvenient as that in *Pinnel's* case will depreciate in value over time. But the arguments in whatever terms for or against the justification of this rule, like so many others, do not depend in the slightest upon the changed conditions of commerce from ancient Rome to the modern day.

C. Trespass to Land

A similar point can be made with respect to the rules for trespass to land. The wrong involved is, *prima facie*, the entry of land owned by another. One justification for the entry is consent or permission; another might be the abatement of a nuisance. That the land may be used to farm hay in one culture and to house electronic installations in another is as irrelevant as it is dramatic. The rules with respect to real property and its unauthorized entry are very old, and they are very constant. They may be wrong or misguided, but if so, the reasons for change are as good now as when the rules were first formulated.

D. Negligence and Strict Liability

The basic theme of this paper carries over with undiminished force to more controversial subjects. One central issue concerns the recurrent tension between the principles of negligence and strict liability in cases of harm inflicted upon strangers. What is striking about this debate is that the essential arguments have been made in exactly the same fashion both in modern and in Roman times. In both systems the central choice has been seen as one between a system of strict liability with defenses and one in which the *prima facie* case requires, in addition to proof of causation, proof of wrongful intention (*dolus*) or negligence (*culpa*).¹⁵ In both legal systems, arguments for

Cumber v. Wane, 1 Strange 426, 93 Eng. Rep. 613 (1721), a view that was later resurrected by the English courts in *D & C Builders, Ltd. v. Rees*, [1966] 2 Q. B. 617. At no point in the historical debate have the changed circumstances of commerce influenced the discussion of the issue.

¹⁵ For a clear statement of the dilemma in the English common law, see the opinion of Lord Blackburn in *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866). An extensive discussion of the same conflict is found in O. W. Holmes, Jr., *The Common Law*, Lecture III (1881). The Roman

strict liability always dwell on the need for the protection of individuals against the harmful invasions of strangers. Likewise, the case for intention or negligence always rests on the familiar ground that an individual should not be held responsible for consequences that he did not wish to bring about and which he could not control. In both systems there is marked evidence of the same sources of intellectual confusion. The Romans, for example, never fully grasped the way in which affirmative defenses should be incorporated into their system of tortious liability, and much the same, as I have argued, is true of the modern common law rules.¹⁶ Both legal systems were unable to determine the best way in which to mesh the distinction between negligence and strict liability with that of direct and indirect harms: both made too much of the notorious distinction between trespass and trespass on the case.¹⁷ In both systems the debate over fundamental issues is always cast in terms of the constant and recurrent features of human actions and their relationship to individual responsibility, and in both attention has been paid either to the similarities or differences between the principles of legal and moral accountability and to the distinction between civil and criminal liability.

The changes from Roman times to the present are immaterial to the legal issue. What is the frequency of such wrongful acts? What is the appropriate level of compensation for them? What are the common instrumentalities by which harm is inflicted?¹⁸ (It is characteristic perhaps of Roman culture that

materials are collected in F. H. Lawson, *Negligence in the Civil Law* (1950), which contains, in addition to an able discussion of many of the basic issues, the key Roman texts from the *Lex Aquilia*, Digest IX, part 2. See *id.* at 81.

¹⁶ Thus in the *Lex Aquilia*, the organization of the text is such that they first consider those excuses and justifications for harm that are based upon the wrongful conduct of the plaintiff (i.e., as in cases of self-defense) Dig. IX, 2, 4, Lawson *supra* note 16, at 81-2. These are treated as situations in which the harm in question is not unlawful. The text then goes on almost without a break to hold that there is no unlawful conduct in situations in which there is no negligence, an approach that brings out a wholly different conception of excuse and justification. Dig. IX, 2, 5, Lawson, *supra* note 15, at 83. The same switch in the logic of excuses and justifications is found in the more modern cases, which are marked by a shift of harm attributable to the default of the plaintiff, to harm which the defendant caused without negligence or intention. For a discussion of the difference in the two conceptual approaches, see Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165, 169-79 (1974).

¹⁷ The distinction between trespass and case, as it finally evolved at common law, was one whereby actions for trespass lay for the direct and immediate application of force against the person or property of another, while case lay for all other harms, including throwing the log in the road where another could trip upon it. See, for example, *Reynolds v. Clarke*, 1 Strange 634; 93 Eng. Rep. 747 (1726); for the best account of the tangled history, see M. J. Prichard, *Trespass, Case, and the Rule in Williams v. Holland*, 22 Camb. L.J. 234 (1964); see generally Charles O. Gregory, Harry Kalven, Jr., & Richard A. Epstein, *Cases and Materials in Tort* 54-63 (3rd ed. 1977).

¹⁸ Such are, of course, the type of questions that economists like to ask. See, for example, John C. VerSteeg, *Strict Liability and Judicial Resources*, 3 J. Legal Stud. 217 (1974). See also, Richard A. Posner, *Economic Analysis of Law* 143 (2d ed. 1977).

There are of course differences between the nineteenth and twentieth centuries. Yet even if it could be demonstrated that there is a greater proportion of indirect sales now than then, the point is still immaterial. Such evidence shows only that there will be today more cases in which the possible abrogation of the privity doctrine will matter. It does not show how any case, to which the privity defense might be applied, should be treated. The justifications for or against the *Henningsen* decision in no way depend upon modern marketing conditions. Indeed, *Henningsen's* intellectual predecessor, *McPherson v. Buick*, contains an instructive, but futile challenge to Cardozo's repudiation of the privity limitation in negligence (as opposed to implied warranty) actions. Judge Bartlett said:

In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and unless the courts have been all wrong on this question up to the present time there would be liability to strangers to the original sale in the case of the horsedrawn carriage.²³

F. Assumption of Risk

The same basic theme is illustrated by the transformation of the assumption of risk whose twentieth-century decline is everywhere on the face of the law. Illustrative of the transition are two decisions by the Wisconsin Supreme Court. The first, *O'Shea v. Lavoy*,²⁴ decided in 1921, recognized that the defense was a complete bar to the plaintiff's actions in automobile cases. The second, *McConville v. State Farm Mutual Automobile Insurance Company*,²⁵ some 41 years later, reversed the rule and refused to allow the absolute defense, holding that comparative negligence principles applied exclusively to this area. As benefits our theme, the important point concerns the justification for the change in liability rule relied upon by the Court in *McConville*.

Forty years ago automobiles were fewer; they were incapable of great speed, and automobile accidents caused by a defective vehicle, an inexperienced driver, or an unsafe course of driving were less frequent and probably had less disastrous results.

²³ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). In this context it cannot be argued that Bartlett, J., is wrong on the grounds that automobiles could well be driven at speeds much in excess of 8 miles per hour while carriages are in general confined to much lower speeds. First, this argument would require the distinction between carriages and automobiles to be maintained, when the very thrust of the Cardozo opinion is that the two types of cases would be in principle subject to the same rules. Second, this line of argument ignores the fact that lower speeds are always associated with very high risks of accident for horse-drawn carriages.

²⁴ 175 Wis. 456, 185 N.W. 525 (1921).

²⁵ 15 Wis. 2d 374, 113 N.W. 2d 14 (1962).

Modern, highly powered vehicles, with the ability to perform at great speeds, are capable of inflicting vast destruction and personal injury. In view of the seriousness of many injuries, and the burdens falling upon the community as well as the individuals and families affected, it is doubtful whether the type of consent or acquiescence to danger, heretofore called assumption of risk, should be permitted to cut off completely the right to recover damages.²⁶

The points about accidents are of course odd and the reference to changed conditions window dressing. A strong, even overwhelming, case can be made that automobile driving was safer in 1960 than it was in 1920 because cars and roads both improved with time. There were, perhaps, more automobile accidents in 1960 than in 1920, but the figure counts for little unless corrected, at the least, for the differences in miles driven, something clearly necessary in any systematic study of motor vehicle safety. The reference to uncompensated first-party losses, so clearly reminiscent of Justice Traynor's famous concurrence in *Escola v. Coca Cola Bottling Company*,²⁷ is equally odd, given the increased availability and extent of worker's compensation, health, and disability insurance in 1960 as against earlier dates. The entire discussion about changed conditions can be exposed for the empty shell that it is by noting that the *McConville* rule remains unshaken in 1980. U

Today cars are getting smaller and safer, roads are better than in 1960, driver education is more entrenched in the high school curriculum, and first-party health and disability insurance are more prevalent. Assumption of risk, however, has not made a comeback. The court in *McConville* rejected assumption of risk because it did not like that defense. Changed conditions were an excuse, not a reason. The court preferred collective control over individual volition as an organizing principle of the law.)

H. Landlord Tenant

One further illustration drawn from the law of landlord tenant reaffirms a conclusion that should by now be apparent. In *Javins v. First National Realty Corp.*,²⁸ the D. C. Court of Appeals, per Wright, J., held "that a warranty of habitability, measured by the standards set out in the Housing Regulations of the District of Columbia, is implied by operation of law into the leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of con-

²⁶ *Id.* at 382-83, 113 N.W. 2d at 19.

²⁷ "Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

²⁸ 428 F.2d 1071, 1072-73, (D.C. Cir. 1970).

tract." The decision in this case thus reversed two of the essential traditions of an Anglo-American lease law. It treated the question of habitability as a matter of public policy, not private agreement, and held that the tenant could, contrary to the traditional rule on independent promises, defend against an action for the rent by showing that the landlord was in breach of his judicially imposed obligations.²⁹ To justify its new set of rules, the court sought to show the obsolescence of those rules that it discarded.

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance . . .

Some courts have realized that certain of the old rules or property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases. Proceeding piecemeal has, however, led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead."

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.³⁰

²⁹ Note that the alternative analysis given by the Court in *Javins* was that the housing code of the District of Columbia required incorporation of the warranty of habitability in the lease in question. Yet only on the most strained interpretation is it possible to view *Javins* in this light. First, it was quite clear that the court regarded its common law arguments as sufficient to govern the case. Second, it was clear that the regulations in question had never before been read into private leases, and that nothing in their language required that result: a court interested in efficiency could have easily taken the position that it would not increase the ambit of socially unwise legislation beyond the point that it was required to go by legislation. Third, the cases that followed *Javins* relied on its view of the common law, and not upon its application of the District of Columbia legislation. See, for example, *Green v. Superior Ct. of City & County of San Francisco*, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). The case is made all the more dramatic given that the California Supreme Court was prepared to imply the warranty of habitability over an argument that Section 1941 of the California Civil Code had preempted the area by giving the tenant more restricted rights under its "repair and deduct" provisions. The impressive wealth of case support marshalled by the court in *Green* lays further proof to the proposition that the common law has, for ideological reasons, abandoned the principle of freedom of contract in many areas of life.

³⁰ 428 F.2d 1074-75.

This account of history has little more than fantasy to commend it. The distinction between the lease as contract and the lease as conveyance has nothing to do with this dispute. The older rules of independent covenants and *caveat emptor* were applicable not only to agrarian leases but to the urban leases of medieval times. Both rules, moreover, were always subject to variation by contract, if such were desired by the parties to the particular arrangement. The very fact that typical urban leases often do not contain provisions at variance with the older rules is evidence that the distribution of risks contemplated by the older cases continued to work well in a modern setting. The leases are not obligatory, and the markets are highly competitive. The irony of *Javins* is all too apparent. Judge Wright announced that fixed "property rules" must yield to contract rules. Yet by overturning the standard lease on public policy grounds, he mandated the use of the very fixed packages of rights independent of volition so characteristic of the property rules he had just rejected.³¹ The real question is, since a lease (like a conveyance) is contractual, do we believe in freedom of contract? Judge Wright does not. He tries, for example, to escape the usual contractual rules by noting that the tenant cannot be expected to inspect for latent defects before renting an apartment. Then, recognizing that the condition of most substandard premises is perfectly obvious, he concludes that its rules should apply in cases of obvious defects as well, because "the law must take note of the present housing shortage. Tenants may have no real alternative to accept such housing with the expectation that the landlord will make the necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected."³²

The point, therefore, comes down to the familiar, confused arguments against the enforcement of standard form contracts, even in competitive markets. Here the linkage between *Javins* and *Henningsen* (upon which *Javins* relies³³) is most manifest, because, at their core, both cases represent the repudiation of the principle of freedom of contract, which, as noted earlier, does not depend for its validation upon the particular social conditions of one age or another. Much housing was bad before the *Javins* decision; much has become worse because of it.

III. A PLACE FOR CHANGED CONDITIONS

The central thesis of the previous section is that there is little need to resort to arguments of changed conditions to either defend or attack the substan-

³¹ What counts as a rule of property in the traditional sense of that term is well illustrated by the rule in *Shelley's case*, 1 Co. Rep. 88b, 76 Eng. Rep. 199 (1581). It is called a rule of property because the language of a grant is construed in accordance with a fixed formula, which applies even if the results are at variance with the intentions of the grantor. The simplest application of the rule provides that a grant to A for life remainder to A's heirs creates the fee simple absolute in A and not a life estate in A and a contingent remainder to his heir.

³² *Javins v. First National Realty Corp.*, 428 F.2d at n.18.

³³ *Id.* at 1076 n.19.

tive rules of common law. It should not be assumed, however, that courts would do well in all situations to ignore changes in social circumstances in coming to legal decisions. Indeed there are several instances in which these changes play a key, but limited, role.

A. Custom

As argued in the previous section, the merits of freedom of contract in no way depend upon the accidents of time and place. Acceptance of that basic principle will not however put an end to all contractual disputes. It remains to discover the terms of given contracts, usually gathered from language itself, and the circumstances of its formation and performance. Even with these aids, many contractual gaps will remain, and the courts will be obliged, especially with partially executed contracts,³⁴ to fashion the terms which the parties have not fashioned for themselves. To fill in the gaps, the courts have looked often to the custom or industry practice. The judicial practice makes good sense, and for our purposes introduces an element of dynamism into the system. Consider the law of medical malpractice, which, even today, largely determines the physician's standard of care by customary tests³⁵ that can be kept constant over time. But it by no means follows that conduct in conformity with the custom of one generation is acceptable conduct in the next. The principles for the implication of terms, I believe, remain constant over generations. Yet the specific rules of conduct so implied will vary with time and with place. At one level, therefore, the major part of the thesis remains secure. At another level, it is subject to sensible modification.

B. Reciprocal Benefits

A similar distinction can be applied to the law of torts. In a recent study of the law of nuisance, I attempted to show how the appropriate legal principles were best generated by a combination of corrective justice and utilitarian principles.³⁶ The corrective justice principles had the stable characteristics found in the rules developed in the first part of this paper. The prohibition against the invasion of the land of another by smells, noise, gases, and

³⁴ The reason why partially executed contracts present occasion where courts should try to make some sense out of an imperfect agreement, is that the option of simply calling the contract off no longer is a viable one. This is especially the case where there is no possibility of returning to the status quo ante, as where services have been rendered, or goods have been sold or consumed.

³⁵ For a more detailed treatment of my views on this subject, see Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 Am. Bar Found. Res. J. 87, 108-13 (1976).

³⁶ Epstein, *Nuisance Law*, *supra* note 4, at 74-79, 82-87.

the like is a fixed requirement of justice that is independent of time and place. In addition to these corrective justice rules, however, the law of nuisance rightly contains explicit reference to the relative costs and benefits of certain activities which shift continuously between persons and over time. The legal response to these activities is governed by the so-called "live and let live" rule, which requires all individuals to tolerate the low level of nuisances created by their neighbors, even though all such nuisances would be actionable under the rigid corrective justice principles. In effect the justification for this approach is that all parties concerned are better off if they are forced to relinquish their causes of action for these minor invasions, given that each will thereby be free to inflict such low level harms upon others. The implicit *in-kind* compensation for this forced redefinition of property rights is, or so I would argue, sufficient to oust the older corrective justice rules.³⁷

Once these redistributions are tolerated, there is still the further question of which kinds of harms should be governed by the live and let live rule. On this question, there can be a great deal of variation in response to social conditions. Where income levels are low, it may well be appropriate to permit substantial levels of pollution as each person is better off suffering the harms inflicted by others because of the increased freedom of action that he receives in exchange. There are also questions of the relative costs of the avoidance of the harms in question. The smells of horses may be acceptable where they are essential to transportation, but they may be viewed in a very different manner in an age dominated by the automobile. A good common law judge may and should accept the fixed principle of live and let live, subject to the vital *caveat* that activities within the scope of this constant principle will change as circumstances change.

C. Changes in Statutory Environment

There is yet another source of depreciation of common law rules that ought to be observed. In many circumstances, the judges work in "second-best" situations. The common law, for example, has long recognized a large proliferation of legal interests or estates in any given parcel of land.³⁸ Some of these interests were vested in identifiable persons. Others were made conditional upon the occurrence of certain events, and still others were for the benefit of persons yet unborn. A rich profusion of interests in any parcel made it difficult, if not impossible, for any purchasers to acquire absolute ownership in land. The large number of potential sellers made it difficult to

³⁷ *Id.* at 74-94.

³⁸ For an excellent modern account of the common law of estates, see Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* (1966).

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negotiate a transfer, because of the high transaction costs involved. The absence of an identifiable seller (as with interests in unborn persons) made other transactions simply impossible. In partial response to this problem, the English courts developed a rule against perpetuities which invalidated some future interests contained within the grant.³⁹ By the Law of Property Act, 1925,⁴⁰ all legal interests in England were abolished, except for the fee simple and the term of years. Holders of the rich variety of contingent remainders and executory limitations could no longer prevent the tenant in possession from selling the property to third parties; indeed the tenant in possession was authorized by the statute to convey out the fee simple, and the rights of the various remaindermen were limited to a trust fund created out of the proceeds of sale.⁴¹

Within this new legal regime, it seems quite permissible for a common law judge to reevaluate the desirability of the perpetuities rule. The great objection to the rule was that it frustrated the grantor's intent; the justification for that frustration was the need for the alienability of land. That last objective was achieved in a far more sensible and direct way by the Law of Property Acts.⁴² Is there, therefore, any further justification for the retention of the rule against perpetuities now that its function has ceased? The rule in fact has largely been displaced by statutory reforms and by drafting techniques. But English common law courts showed a real reluctance to upset a settled rule of law without a clear lead from the legislature.

Radical revision in one area of law thus has major impacts upon other areas of law. Such revision, therefore, raises the question of whether further changes are justified, and whether they should be implemented by legislative or judicial means. With the rule against perpetuities there was little judicial willingness to abolish or modify the rule even after its original justifications were undercut by statutory reform, and the subsequent (if mistaken) changes

³⁹ In its classical form the rule read as follows: "No interest is good unless it vest, if at all, not later than 21 years after some life in being at the creation of the interest." *Id.* at 183. The most exhaustive treatise on the subject is John Chipman Gray, *The Rule against Perpetuities* § 201 (4th ed. 1942). No one (whether or not a life in being) would ever defend this rule on efficiency grounds. Indeed the most eminent twentieth-century expositor of the rule, the late W. Barton Leach, made a career of denouncing the rule. See, for example, W. Barton Leach, *Perpetuities Legislation*, *Massachusetts Style*, 67 *Harv. L. Rev.* 1349 (1954).

⁴⁰ 15 & 16 *Geo. 5*, c. 20.

⁴¹ See generally R. E. Megarry & H. W. R. Wade, *The Law of Real Property*, esp. 139-48 (1966).

⁴² The English statute, while not passed in any state in this country, given that the rule applies today not so much to land but to equitable interests behind a trust. Such has indeed led to a reevaluation of the rule, see, for example, Lewis M. L. Simes & Allan F. Smith, *Future Interests* § 1117 (2d ed. 1956), but usually proposals for its abolition are with the invention of new rationales for the rule. See *id.* Much piecemeal legislation on the rule has been passed especially in the 1960s. See generally, Robert J. Lynn, *The Modern Rule against Perpetuities* (1966).

of the law, at least in England, came in the end through legislation.⁴³ In situations such as this, there is a case for legal change, but it in no way rests upon vague and inaccurate assertions about dominant social institutions and practices found in earlier cases but upon a precise demonstration of a clear change in the appropriate legal universe. How courts should respond to such changes in principle is never clear, but in these cases, at least, little can be gained from any insistence upon the timeless nature of legal principles.

IV. WHAT ACCOUNTS FOR LEGAL CHANGE

The discussion of common law rules in the last section of this paper has dealt exclusively with the normative aspect of the subject. Its largely negative results have, however, equally negative implications for the positive claim that the common law, whether in its static or dynamic aspects, relentlessly pursues any single value. The point can be made about the protection of liberty, or about the promotion of efficiency. No one to my knowledge has developed the descriptive claim that the common law never wavers in its protection of individual liberty. Such a claim is made for efficiency, and it is painfully false.⁴⁴

Take, for example, the question of whether a manufacturer and consumer should be allowed to exclude by contract the implied warranty of fitness between them. Such a rule could be either efficient or inefficient but not both. No change in social conditions can account for any drift in legal approach. In particular the greater technology and complexity of modern life do not account for the abandonment of the traditional legal rules. One clear point is that technological sophistication reduces the costs of voluntary transactions, and thus decreases the need for public intervention. A second is that complexity in some product features leads to simplicity in others. Automobiles today are doubtless more complex than in previous years; yet there is no question that modern ignition devices are easier to operate than the cranks used on the earlier models. Notwithstanding that the case for contracts is, if anything, more propitious today than ever before, we find that in the nineteenth and early twentieth centuries the exclusions were generally permitted, while today they often are not. How in positive terms can one account for this shift in development when by assumption the body of common law rules promotes economic efficiency.

One possible line of argument is that there often is an initial shakedown period. As the rules crystallize they are subject to such pressures and criticism that they change with time. By this argument, the system may not be efficient in its initial stages, but nonetheless becomes efficient over time with

⁴³ *Perpetuities and Accumulations Act*, ch. 55 (1964).

⁴⁴ See, for example, Posner, *supra* note 2, at 763-64.

the correction of its original errors. The papers of Rubin and Priest are designed to show that such mechanisms of correction exist at common law wholly apart from the intellectual preferences of the judges that decide cases. Others may see the transformation as the product of a more conscious process.

In order to defend the efficiency thesis, there must be efficient rules. In many areas, however, especially consumer warranties, evidence suggests that the shift is in the other direction.⁴⁵ In this connection, it is especially important that the rules discussed in the earlier section were all chosen, by design, to deal with one substantive matter on which the descriptive theory of economics has a great deal to say. *Javins*, and its progeny, for example, involve the restriction of freedom of contract in residential leases. No economist could ever support such restrictions on the basis of efficiency. Rental markets are intensely competitive. The condition of the premises is obvious to almost everyone at the time the contract is made. Individual instances of fraud and misrepresentation occur, but surely not in every, or even most, lease transactions in Washington, D. C. Remedies for fraud are welcome, but it is a classic case of overkill to insist that a whole host of contractual terms be prohibited because they might be abused in some cases; surely rescission and damages in the individual case are more appropriate in the absence of powerful evidence of widespread abuse. In these circumstances, the market must give the best allocative answer. Judge Wright's remarks are sophomoric in any serious analysis of the problem. They gain influence, but not sense, from the judicial forum.

The assumption of risk cases are somewhat more complicated, but they too illustrate the same general pattern. The point of the defense is that individuals are allowed to trade away the possibility of injury for some more immediate benefit. The prohibition upon the defense is a limitation of that contractual freedom, which always requires a heavy burden of justification when third-party interests are not at stake. The issue is, perhaps, less important than the institutional transactions of *Javins* and *Henningsen*. By the same token, assumption of risk is also more difficult to analyze, for circumstances may be present that cloud judgment and foster misguided choices. Yet the earlier cases accepting the defense had a view of individual rationality that tended to downplay these individual weaknesses, and thus were in closer harmony with the postulate of individual competence at the heart of so much economic thought. Cases like *McConville* do not repre-

⁴⁵ George Priest, for example, noted at the conference that his examination of the recent judicial treatment of various warranties and disclaimers indicated that the judges had misunderstood the efficiency benefits of various standard provisions in each of the 30 or more cases that he examined. An earlier workshop paper delivered by George L. Priest, A Theory of the Consumer Product Warranty (Jan. 1979) (Law and Economics Workshop, Univ. of Chicago Law School), presented extensive data to support that claim.

sent deviations from efficiency compatible in magnitude to those found in *Henningsen* and *Javins*, but they are hardly support for the position that the common law judges move over time to the efficient economic position.

There is no reason to belabor the obvious. Efficiency may be a value; it may influence some judicial decisions at some time. But it is not the sole, and today not the main, explanatory variable of the common law. The real question is not, why the common law rules must be efficient, but why so often they are not.

The answer rests upon the types of assumptions made about judging. The efficiency school takes little account of the traditional techniques used to evaluate and understand legal opinions. They do not believe that close reading of texts of opinions gives any real clue as to what the judges do,⁴⁶ even if it gives some clue as to how they might think or, at least, think they think. Typically they give little weight to precedent as a source of constraint upon behavior;⁴⁷ nor do they consider the ways in which statutes might limit discretion or influence decision. Most importantly, they place no weight on the different intellectual predilections of the judges, many of whom vehemently reject market arguments. In some models, such as Priest's, these predilections are explicitly ruled out. In others, like Posner's, the entire question is suppressed as if it were somehow unimportant. Instead the emphasis is placed upon *behavior*; that is, the asserted congruence between the common law rule and the efficient result.

This rigorous behaviorism will not explain judicial behavior. Judges do not view themselves as pawns in some great game that is played with them and through them. Some judges, at least, regard themselves as responsible agents who shape the flow of events in accordance with their own conceptions of right and wrong. It may well be that (some) businessmen follow the rules of marginal cost pricing, even if they know not a word of economics. But it is very doubtful that judges follow them when they are every bit as ignorant or unpersuaded. The differences in role preclude any effort to

⁴⁶ This is often explained by noting that the economic logic is "implicit" and not explicit. See Posner, *supra* note 2, at 763-64. Yet resort to arguments of implication are as dangerous for economists as they are for lawyers. Where there is an express body of thought upon a subject, it should, at the very least, be examined before making assertions about the implicit motivations of conduct.

⁴⁷ Such an attitude has been important in connection with the law of restrictive covenants. See, for example, *London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.), where Scrutton J., after denying suit by the London County Council to enforce a covenant against the defendant because it did not continue to own land in the housing development in question, noted: "... I regard it as very regrettable that a public body should be prevented from enforcing a restriction of the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighborhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this Court compel me so to hold." 3 K.B. at 673.

analogize the conduct of the judge to the businessman.⁴⁸ The businessman labors under a whole series of economic constraints. For him, words are idle: behavior matters. For the judge, words (and thoughts) are his behavior. If the businessman does not follow economic rules, he will lose his customers to those competitors whose conduct better approximates the efficient ideal. The principles of natural selection do not work well on the judiciary. For political reasons, the entire thrust of our legal system is to insulate judges as much as possible from the day-to-day pressures of politics and the marketplace. Their tenure of office is virtually guaranteed; their salary in no way depends upon their competence in forming of rules or in the decision of cases. Their jurisdiction is secure in the monopoly of force that is the state. The ever rising tide of statutes directs a ceaseless flow of business in their direction. Their decisions are never subject to any independent competition or rigorous peer review. Their social status depends in some measure upon their perceived capacity to innovate, even when the sound discharge of their function demands only the reaffirmation of principles that were better articulated by some judge fifty or a thousand years before. Systematic efficiency has no special rewards for them. To the contrary, a set of efficient rules might compromise their position. In speaking of this general problem, Posner has written: "The methods of judicial compensation and the rules governing conflicts of interest exclude a choice among the competing activities [e.g., 'owning land,' 'growing tulips,' 'walking on railroad tracks,' etc.] based upon the judge's narrowly economic self-interest. In these circumstances, it is natural if not inevitable that he should ask which of the competing activities is more valuable in the economic sense."⁴⁹ Yet why does the absence of a narrow economic self-interest demand that judges decide cases in accordance with some grander theory of economic welfare? There is simply no inevitability here. Posner has only demonstrated that judges are able to escape one type of pitfall. He could have said as well that the absence of any narrow self-interest paves the way for decisions based upon a general theory of corrective justice or for those based upon the need to redistribute income to the poor. Efficiency in legal results comes not from unavoidable behavior, but only from conscious and learned conviction.

⁴⁸ See, for example, Richard A. Posner, *Some Uses and Abuses of Economics in law*, 46 U. Chi. L. Rev. 281, 292 (1979), where it is pointed out that the decisions in many instances were made before the technical conceptions of economics were developed. Yet in the same article Posner argues that one of the most conspicuous efforts to apply economics to legal decisions, *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), contains numerous economic errors even though it reaches the sound result. *Id.* at 298-301. The decisions in *Oppen*, which allowed recovery in negligence for pure economic losses, was a departure from the traditional common law, a point which lends some embarrassment to his claim of the general efficiency of the nineteenth-century tort law. See, for example, Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

⁴⁹ Posner, *supra* note 18, at 405.

We are thus driven back to ideology. Few institutional constraints prevent judges from consciously asserting their values into the course of the decision-making process, especially if public policy is a proper subject of judicial concerns. Ideology does not dominate all judges and all times, but often it asserts itself in precisely those bedrock cases that mark a major departure from established principle. Judges who believe in markets can write opinions that defend market institutions. Such was the preference of Justice Pitney, but not of Justice Frankfurter. Those who deplore markets can write opinions that undercut their strength without having the economic consequences of their decisions visited upon them. Such is Judge Wright. Evolution and market behavior work very well with processes that are not expressly and explicitly cognitive; but just as sociobiology has trouble explaining the myriad features of human culture, so economics has trouble accounting for the behavior of judges. It would be amazing if individuals within this institutional framework responded to any single value. Judges are products of the modern culture, blessed with its strengths, prey to its weaknesses, and subject to its ambiguities.

Thus far we have concentrated the analysis upon the proposition that common law decisions must, or do, promote efficiency in fact. But little is changed when the argument is extended to statutes. As a group, statutes are extremely diverse. They can extend from such modest endeavors as the reordering of priorities under a recording statute to full-scale revision of the entire commercial code. They can call for new boundaries for municipal courts or implement a system of social security legislation. The statutes so passed must, of course, be interpreted and administered by the court. There is no simple explanation of what particular values will dominate the process, and no assurance that efficiency (or, for that matter, liberty) arguments will be given pride of place on all, or even most, doubtful matters. Some statutes may never pique the interest of consumer groups, while others will intensely involve them. The variations within the legislative process can be very great, and so too with the attitudes of the judges who must construe and apply them. With much of the nineteenth-century statutory reform, for example, it seems clear that the central objective was to rid the common law of the clumsy fictions, grown hoary with age. Such is surely the best explanation for the civil procedure acts, both in England and in this country. It explains most of the revision in the law of real property and the movement towards codification of commercial law. Whatever the precise features of this reform movement, it bears little relationship to the complex statutory and administrative schemes that have been introduced during the twentieth century. It would be strange indeed if much of anything could be learned by categorizing a reform, statutory or judicial, without paying very close attention to the institutional context in which it arose.

The point can be reinforced by yet another observation. Sometimes it is very difficult to tell the difference between a common law and statute rule. In the nineteenth century, for example, American courts were often required to apply statutes which said that the common law of the state was the common law as it stood in England as of some certain time, unless modified thereafter. In connection with real property transactions, the judges construed common law to include many of the famous statutes that dot the history of English land law—*quia emptores*, and the statute of uses, for example—simply because these had been so incorporated into the fabric of English land law that the rest of the structure was quite unintelligible without them.⁵⁰

A picture of mixed ancestry can be found in many other areas of American law. The antitrust laws had uncertain common law roots which were carried over into the Sherman Act, itself influenced by populist sentiment as well as efficiency justifications. The early judges who construed the statute seemed to keep it within reasonable bounds, but the opinions of the United States Supreme Court in the 1950s and 1960s often carried its application to unfortunate lengths with uninformed and anticompetitive results.⁵¹ Little can be said here about the relative efficiency of judges and legislators. The full tale of their respective contributions to the emergence of the current doctrinal position would take a full volume or more, but we can be confident even today that any dichotomy between the natural tendencies of legislators and judges will shed little light on the problem.

The same story can be told with respect to much of the modern communication law developed under the Federal Communications Commission. Here the statute itself does contemplate a regulatory framework, yet what is so curious and interesting about the modern law is that an early decision of Felix Frankfurter (no market economist he) thrust it into the business of making comparative evaluations of licenses.⁵² What is even more bizarre is that the commission itself has sought time and again to cut back its

⁵⁰ Van Rensselaer v. Hays, 19 N.Y. 68 (1859).

⁵¹ See, for example, Utah Pie v. Continental Baking Co., 386 U.S. 685 (1967). For excellent criticism, see Ward S. Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L.J. 70 (1967). On the demise of the Utah Pie Company, see, Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie* and The Consequences of Robinson-Patman, 21 J. Law & Econ. 427 (1978).

⁵² "But the [Federal Communications] Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply." National Broadcasting Co. v. United States, 319 U.S. 190, 213, 215-16 (1943). From here Justice Frankfurter took the fatal step to give a broad construction to the statutory language of "public interest, convenience or necessity." For a powerful critique of the entire trend, see R. H. Coase, The Federal Communications Commission 2 J. Law & Econ. 1 (1959).

regulatory powers, only to be rebuffed from the D.C. Circuit that has ordered the agency to maintain a strongly interventionist posture.⁵³ Only a detailed institutional explanation will account for this tangled state of affairs. The simple dichotomy between statutory and common law rules explains nothing. And the same can be said for the naive belief that efficiency considerations must, or do, organize or explain, especially at the positive level, the body of common law rules.

⁵³ See, for example, Citizens Committee to Save WEFM v. F.C.C., 506 F.2d 246 (D.C. Cir. 1974).

THE STATIC CONCEPTION OF THE COMMON LAW: A COMMENT

STEPHEN F. WILLIAMS*

INTRODUCTION

PROFESSOR EPSTEIN'S paper unmasks a good deal of nonsense.¹ Analyzing a variety of legal changes, he concludes that in each instance the court's discussion of "changed social conditions" was at best irrelevant and at worst a smokescreen used to justify abandonment of a precedent which the court apparently disliked for some completely different reason. On the whole, I found the examples persuasive ones. Obviously they do not exhaust the possibilities. Epstein's paper also identifies some qualifications to his viewpoint which are correct and necessary. With one exception, I will not discuss them.

It is appropriate to mention briefly a further qualification, which I think is implicit in Epstein's thesis—the link between social conditions and ideology, and between ideology and judge-made decisions. If ideological trends alter judicial outcomes, and if ideological trends are the product of changes in social conditions, then clearly changes in social conditions affect legal principles. I take Epstein not to object to this—indeed to assert it. He is saying that many of the specific social conditions invoked to justify some legal changes do not, *in themselves*, do the trick. But social changes as a whole—affecting ideology in ways that we can only dimly guess—are genuine sources of change in the common law. In conclusion, Epstein expresses his skepticism of the view that common law decisions have an inevitable trend toward efficient rules.

My comment will address the following: (1) I will restate and develop a distinction Epstein makes between what I will call boundary-setting and managerial types of decisions. I will argue that Epstein's thesis is largely inapplicable to managerial decisions. (2) I will consider possible trends in the common law, particularly between boundary-setting rules and managerial

* Professor of Law, University of Colorado.

¹ Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. Legal Stud. 253 (1980).

ones. (3) Finally, I will assess the extent to which different types of managerial decisions threaten individual liberty.

BOUNDARY-SETTING V. MANAGERIAL JUDGMENTS

Central to Professor Epstein's analysis is the distinction between judicial decisions that merely set general boundaries for individual behavior and those that manage individual behavior. The distinction is worth a little more elaboration.

Let me start with clear examples of the two types. An odd case called *Geragosian v. Union Realty Co.* is the epitome of pure boundary setting.² Through an apparently inadvertent error, a pipe draining the defendant's land went through a part of the plaintiff's land. The cost to the defendant of finding some alternative drainage was given as over \$4,000; the entire value of the plaintiff's land was only \$3,000. Moreover, the plaintiff's sole purpose in acquiring its parcel was to be able to use the cause of action running with the parcel to "make trouble" for the defendant. The court followed the standard rule of enjoining a continued trespassory invasion and ordered the defendant to stop use of the drain.³

At the opposite end of the spectrum is *Robinson v. Diamond Housing Co.*, a retaliatory eviction case.⁴ It represents the last of Judge Skelly Wright's efforts to solve the housing problems of the poor in Washington, D.C.⁵ Mrs. Robinson was a month-to-month tenant in an apartment owned by the defendant. The defendant had failed to comply with an oral agreement to make certain repairs. Mrs. Robinson then exercised her right to withhold rent but remain in the apartment. After prolonged maneuvering between the parties, the defendant tried to exercise its historic right to recover possession of its property by terminating Mrs. Robinson's periodic tenancy. In the ensuing litigation, the defendant asserted that it intended to take the unit off the market. The court held that even such an intent would not entitle Diamond to end the tenancy unless it also showed that its purpose in removing the unit from the market was untainted by any desire to retaliate against Mrs. Robinson for her behavior. The court suggests that Diamond could

² 289 Mass. 104, 193 N.E. 726 (1935).

³ At least when the invasion is "innocent," some courts will deny injunctive relief if they find the balance of virtues to tilt overwhelmingly in favor of the defendant. See Annot. 28 A.L.R. 2d 679 (1953).

⁴ 463 F.2d 853 (D.C. Cir. 1972).

⁵ Before the *Robinson* decision, Congress enacted a statute modifying the jurisdiction of the D.C. Circuit Court of Appeals to exclude cases of such local character. Because the lower court decision in *Robinson* occurred prior to the statute's effective date, the D.C. Circuit had jurisdiction of the case. See 463 F.2d 853, 871 (Robb, J., dissenting).

meet that burden only by proving that it was "unable" to correct the defects.⁶

I see three basic differences between the boundary-setting and managerial decisions. First, the boundary-setting decision may proceed without any judicial interest in the nature or value of the activities of the parties.⁷ Once the defendant is found to be engaged in a continuing invasion of the plaintiff's land, the decision is simple: he must stop. It is simply no concern to the court that the value of the defendant's use may exceed the value to the plaintiff in being free of that use. By contrast, the *Robinson* rule leads the court into an elaborate evaluation of the options open to Diamond Realty. Diamond can recover its property only if it proves its "inability" to repair the defects. How is "inability" to be measured? The court did not say. Perhaps the defendant can escape by showing that the repair would be a waste of resources, demonstrated by proof that it could not recover its cost over the life of the building. Perhaps it can succeed by showing lack of the necessary cash, coupled with inability to borrow it. In any event, Judge Wright's mandate seems to entail evaluation of the range of alternatives open to the defendant.

The second difference is implicit in the first: boundary-setting decisions usually entail only simple information gathering by the court. Managerial decisions, by contrast, typically require the court to extract, from biased parties, all the information that the manager of a business would need.

Third, the social purposes implicit in the boundary-setting decision are rather neutral. There is no ranking of the merits of the defendant's drainage against the plaintiff's freedom from drainpipes. What purposes are at work? Certainly all that meet the eye are (1) a purpose to define for the individual a sphere of activity where he is very largely his own master, and (2) a purpose to keep collisions between individuals, inevitable in their pursuit of disparate aims, down to some reasonable level.⁸ When boundary-setting decisions involve contract, a third purpose is added: that of facilitating the efforts of individuals to coordinate their activities.

By contrast, Skelly Wright's purpose in *Robinson* is anything but neutral—it is explicitly to "increase the stock of livable low-cost housing in the District."⁹ This is quite different from merely trying to facilitate mutually advantageous voluntary transactions between Robinson and Diamond (and others similarly situated).¹⁰

⁶ 463 F.2d at 866.

⁷ Compare Michael Oakeshott, *Rationalism in Politics* 168-97 (1962).

⁸ See especially *id.* at 188-90.

⁹ 463 F.2d 853, 860 (D.C. Cir. 1972).

¹⁰ One can imagine a non-neutral rule that would operate on very simple data about the litigants. For example, in *Robinson* Judge Wright might have declared that the landlord could recover his property only by making the repairs. Apart from constitutional objections, rules of that sort seem unlikely. As soon as one non-neutral value is introduced, it becomes necessary for

By focusing his concern on the boundary-setting decisions, Professor Epstein makes his conclusion virtually inevitable. He is speaking of rules that are detached from the value of the parties' activities, that need almost no information about those activities, and that serve only a rather abstract and neutral social purpose. It would be surprising, indeed, if such rules had much occasion to respond to changes in social conditions. The more managerial the decision, however, the less is the isolation from social conditions. Let me address two types of such decisions that occur frequently in the common law.

The first is gap filling, which I will classify as quasi-boundary setting. Epstein explicitly notes that where a court looks to custom for gap-filling material, the material will obviously change as custom changes. He gives as an example the physician's standard of care in medical malpractice suits.

I think the extent to which gap filling alters with social changes is a good deal broader than the discussion of custom might suggest. In gap-filling cases, the object of the court is presumably to resolve the issue as the parties would have if they had addressed it. As they would most probably have resolved it in an efficient way (a way that maximizes the total value created by their contract), the court is likely to approach the matter with the same goal in mind. Custom may be evidence of the efficient resolution, but it is only evidence. The judicial search for the efficient allocation of the risk or duty would proceed in the absence of custom; and social change is likely to alter the outcome irrespective of the existence of custom.

The point is relevant to Professor Epstein's discussion of the "implied warrant of habitability." Suppose (contrary to the facts in *Javins*)¹¹ that at the outset of a short-term residential lease the apartment house and the particular apartment rented give every evidence of good maintenance.¹² The lease says nothing at all on the subject of repair or maintenance. During the term the garbage disposal unit dies of old age. The landlord refuses to replace or repair it. The tenant seeks relief, and the court is required to fill the gap in the contract.

the decision maker to start trading off other values. Judge Wright's zeal to meet Mrs. Robinson's housing needs in the short run, for example, immediately runs into the problem of the long-run impact on housing supply. Even Judge Wright is bound to notice that at some point a rule would be so draconian that it would induce landlords to withdraw their units from the market to avoid being exposed to the penalty that he has in store for them. Compare Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 *Stan. L. Rev.* 379 (1975).

¹¹ *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

¹² In *Javins* itself, the tenants alleged housing code violations existing both at the outset of their tenancies and thereafter. For reasons which do not appear, they confined their offer of proof to the latter type. 428 F.2d at 1073. At no place in the opinion does the court suggest that the units were well maintained at the outset of the tenancies. It seems safe to infer that the landlord's level of maintenance during the term was precisely what the tenants expected it would be when they entered into their tenancies.

Here, it seems to me, changed conditions are relevant. Judge Wright's observations that formerly a tenant could readily make most repairs himself,¹³ and that the cost of repairs was likely to be small in relation to the value of his leasehold interest,¹⁴ do help explain why courts filled the contract gap by rejecting any repair duty on the landlord's part. Circumstances have changed in a way that justifies a different filling of the gap. In my example, changes in technology have led to a defect for which the cost of correction is high in relation to the value of the leasehold; and most of the value of the correction would go to the landlord at the end of the term. (The tenant could, of course, install a new disposal unit and remove it at the end of the term, but that would absurdly waste resources.) The facts suggest that the parties contemplated a high-quality dwelling for the period of the term. Unless the duty to repair is allocated to the landlord, that contemplation will be defeated.

Of course, a very similar case could have arisen 300 years ago. Assume the same circumstances, but the collapsing item is an elaborate built-in bookcase. All the arguments I have made above would call for the same gap-filling solution. It is not crystal clear what a court would have done.¹⁵ In any event, changed conditions have greatly increased the frequency with which it makes sense to fill the gap by placing the repair duty on the landlord.

A court adopting this view *might* in part rely on custom. In the ordinary residential lease, where the property starts out in good shape, the landlord *does* repair defects not attributable to tenant misbehavior. But the custom would, I believe, be merely evidentiary of the allocation that the parties would have arrived at had they addressed the issue.¹⁶

Now let me turn from gap filling to a clearly managerial type of decision. These are decisions where, typically, transaction costs between the parties are high. Two archetypes are negligence and nuisance. In the typical negligence case, the parties cannot possibly have negotiated in advance as to what degree of care each is to exercise. At least one solution is for the court to impose liability only in those cases where the defendant's act showed less care than what the parties would have agreed upon had there been no transaction costs—to apply the so-called "Hand test" of *Carroll Towing*.¹⁷ It

¹³ 428 F.2d at 1077, 1078.

¹⁴ 428 F.2d at 1078.

¹⁵ It appears that a "custom" of London required the landlord to repair. See William M. McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 *Tulane L. Rev.* 659, 666 (1978). There is, therefore, reason to doubt Professor Epstein's view that the *caveat emptor* rule fully applied in urban as well as rural leases. See Epstein, *supra* note 1, at 264-65.

¹⁶ I will deal shortly with the case of divergence between the customary lease provisions on landlord repair and the customary landlord behavior. See text at notes 21-23 *infra*.

¹⁷ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). To apply the "Hand test" one can ask whether, if the plaintiff had enjoyed a right to be free of the injury, he would

seems clear that as changes occur in the technology of risk control and the values attached to differing injuries, application of the test will produce varying results.

Professor Epstein has worked out a nonmanagerial scheme for dealing with issues that the courts deal with under negligence concepts.¹⁸ For better or for worse, however, the law of negligence goes on, and its application varies with changing social conditions. A current example is the emergence of a tort of "wrongful conception": a couple recovers where a physician's botching of a surgical birth control procedure leads to an unplanned pregnancy.¹⁹ The existence of such a tort presupposes (1) various medical advances that make this kind of malpractice a possibility, and (2) increased social readiness to accept the couple's assertion that the child's net value to them is negative.

In nuisance cases, courts may adopt a similar market simulation. They may find liability only when the value lost by the plaintiff from the conduct's persistence exceeds the value that would be gained by the defendant from being allowed to proceed. Obviously, "social conditions" may radically alter the outcomes under such a managerial approach. If sensitivity to pollution has sharply increased over the last 100 years, and technological advances have provided new and cheaper ways by which the defendant may reduce his pollution, a nuisance plaintiff today may win many cases that he would previously have lost.

Again, Professor Epstein has worked out a system of nuisance law that largely circumvents such calculations and might vary a good deal less with changes in social conditions.²⁰ But again the courts, at least to some extent, seem to engage in the managerial approach, with a fluidity of outcomes resulting in part from changes in social conditions.

In contract matters also, there may be cases where a managerial approach may be appropriate even though the contract, rather than leaving a gap,

have sold it to the defendant had transaction costs been zero. Where the costs of prevention would exceed the expected value of the damage (damage adjusted for probability), and the plaintiff was risk-neutral, he and the defendant could (and if transaction costs were zero would) arrive at a bargain by which the plaintiff would release his right. Both parties would have gained from the exchange. Denial of recovery leaves the parties in the condition they would have occupied had the exchange been made, except of course that the plaintiff is not compensated for exchanging the right. This is completely consistent with the approach, as the law never allocated the right to him.

¹⁸ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165 (1974).

¹⁹ For some of the cases on the subject (with mixed results), see Joseph F. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. Miami L. Rev. 1409 (1977).

²⁰ Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49 (1979).

purports to establish a rule. Here I question Epstein's dismissal of the idea that efficiency might justify judicial interference with warranty terms in leases or commercial sales.²¹ Suppose, as in my first variation on the facts of *Javins*, that the apartment house and specific apartment have clearly been well maintained by the landlord as of the moment when the lease is signed. The landlord has been diligently repairing for years. But the lease says that he shall have no duty to repair (except areas under his control). Here, clearly, "gap filling" does not justify imposing such a duty on him. There is no "gap" in the lease. Is there any basis for doing so?

An argument can be made, although I am not fully persuaded by it. It depends upon an assertion that the lease terms deviate from the parties' true expectations. Such a claim runs head on into the fact that residential rental markets are, as Professor Epstein correctly says, highly competitive. Moreover, they are competitive not only in price, but in levels of maintenance. The maintenance level prevailing when the prospective tenant inspects is a vital feature in his willingness to sign the lease. But the lease forms seem typically to absolve the landlord of repair responsibility. Why might landlords not find it profitable to compete as to lease provisions on maintenance? I suspect it is because tenants are far more interested in apparent landlord behavior than in the lease form, and this probably makes sense for them. Why should a prospective tenant spend valuable time checking the meaning of lease provisions when, in 999 cases out of 1,000, the landlord will persist in the level of maintenance prevailing at the outset? For the landlord, however, the cost of reviewing and drafting lease terms is spread over as many units as he owns and over a succession of leaseings of each unit. Since tenant provisions in the repair clause will probably not increase the rent that he can obtain in the market, he is likely to adopt language favorable to himself. This discrepancy between the information costs faced by the different parties may result in a lease term that is different from the parties' genuine expectations.²² On this basis I think a court might reasonably disregard the lease's assignment of repair responsibilities.

²¹ Epstein, *supra* note 1, at 270.

²² See M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. Toronto L. J. 359, 374-76 (1976); Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. Law & Econ. 461, 483-86 (1974); R. H. Coase, *The Choice of an Institutional Framework: A Comment*, 17 J. Law & Econ. 493, 494-95 (1974).

Professor Epstein suggested at the Conference that the real effect of a clause absolving the landlord of any duty to repair, and assigning repair duties to the tenant, in contexts where the landlord fully intended to repair any defects not caused by the tenant's fault, is to reserve to the landlord a nonreviewable power to make the judgment on the causation of the defect. Thus, he argued that the landlord would place a higher value on retaining the clause than tenants would place on its modification, so that even if transaction and information costs were zero the clause would survive.

upset the rule rather than accept in settlement some estimate of the damages that would be awarded.²⁹ Whichever rule produces a smaller aggregate "sum" of value over the long haul will be exposed to more frequent, and more aggressive, attack.³⁰

Thus, I see some tendency towards natural selection of efficient rules, in addition to the suggestions of Rubin and Priest. Nonetheless, I tend to share Epstein's hunch that the trend is against efficient rules. Possibly the explanation lies in the other issue: the question of a trend as between boundary-setting rules and managerial decisions.

Although the evidence may be mixed, I suspect a trend toward managerial approaches. One force pushing in favor of the boundary-setting approach is the steady increase in the complexity of the relevant data. Managerial decisions that were iffy 100 years ago must be doubly so today. It is always difficult for a third party to squeeze out of the contestants reliable information on the range of alternatives open to them, and the associated costs and benefits. Modern technological complexity compounds the difficulty.

What pushes in the other direction? Here I find a suggestion of Hayek's useful. "Increasingly and inevitably," he writes, "an assembly occupied in the former way [making general rules on conduct] tends to think of itself as a body that not merely provides some services for an independently functioning order but 'runs the country' as one runs a factory or any other organization."³¹ He is, of course, thinking of the legislature, and that transformation in the legislature is quite evident. Congress seems to feel that it should "run" the production and consumption of energy, occupational safety, consumer product safety, the control of pollution, etc.

Why? And what significance does it have for modes of judicial behavior? I suspect that war and preparations for war may be relevant. Of these activities, Congress and the executive branch *are* managers. It does not seem extravagant to suggest that in the "century of total war" they have developed a taste for management. There is no reason why the taste, once acquired, should be confined to the sphere of activity where management by the government is inevitable. It spreads. Moreover, there seems no reason why it should not spread from one institution to another.³² Judges have almost

²⁹ In any case where the value of plaintiff's interest to *him* exceeds readily ascertainable market value, judicially computed damages will undercompensate the plaintiff. Because it is hard to obtain reliable information about values special to the plaintiff, such special values are excluded. The concept that land is "unique" represents a judicial intuition that such special values will typically be present where land is involved. Compare Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 355-65 (1978).

³⁰ See Goodman, *supra* note 28.

³¹ Hayek, *supra* note 25, at 143.

³² It seems more than coincidental that the great impetus for highly discretionary judicial behavior came from an institution, separate from the law courts, which was involved in administration and not exclusively in judicial processes—Chancery.

invariably been involved in politics; as the managerial mode becomes dominant there, it seems bound to influence judges. After all, managing is a good deal of fun. The third distinction between boundary setting and management is relevant here: management enables the decision maker to advance his own ideological purposes, while boundary setting confines him to a dull neutrality. This may bear upon the likely trend against efficient decisions. As the managerial approach becomes dominant, judges have a kind of license to employ whatever values please them. They *may* manage pursuant to wealth-maximizing criteria, but then again they may not.

POSSIBLE HIERARCHIES AMONG TYPES OF DECISION

I have already suggested some anxiety about the managerial type of judicial decision. Can we rank them as to risk, particularly their risk to human freedom? Some rankings do seem possible.

Gap-filling decisions have some managerial elements, in that they may require a court to grasp a good deal of data about the likely costs and benefits associated with alternative allocations of a risk or duty.³³ But they do not depend on any non-neutral principles, and they seem to me to pose no problem for human freedom. In essence all such a decision does is to say what will happen if parties similarly situated do not, in future contracts, expressly provide some alternative. Since we are speaking of situations where transaction costs are by hypothesis modest—we are dealing only with cases in which parties reach some agreement³⁴—an erroneous decision, or a decision that one set of parties views as inappropriate for themselves, can be corrected fairly readily. So long as the criterion of judgment is what the parties would most likely have agreed upon had they faced the issue, *correct* decisions will also advance individual liberty in the sense that Stigler suggests—increasing the range of opportunities open to individuals.³⁵ They obtain the terms they would have agreed upon without bothering to do so.

Can one successfully argue that managerial decisions based on wealth-maximizing criteria are not a threat to liberty? Here, I think, the argument becomes far more difficult. Stigler solves the issue linguistically, by equating wealth with liberty.³⁶ It is true, of course, that wealth is a kind of liberty; it enables the holder to choose among more options than he otherwise could.

³³ Of course, the calculus does not require all possible data as to the comparative ability of the parties to deal with the issue. Certainly no more is required than the amount of information which the parties themselves would have bothered to acquire in drafting the contract if someone had insisted that they expressly resolve the issue.

³⁴ In gap-filling matters in property, an incorrect judicial decision can often be unilaterally corrected by subsequent draftsmen.

³⁵ See George J. Stigler, *Wealth, and Possibly Liberty*, 7 J. Legal Stud. 213 (1978).

³⁶ *Id.*

But in at least two respects, the equation misses what people *mean* when they speak of liberty. First, a constraint imposed by government coercion is simply felt as different from one imposed by the shortness of life or the scarcity of resources. Perhaps people are foolish to have such an antipathy, but many do, and to them a crucial component of liberty is freedom from government coercion. Second, many feel their liberty is specially threatened when government decisions made on an *ad hoc* basis (including judicial decisions) bring about abrupt shifts in values to which they have become accustomed. (In the nuisance context, an example would be the interruption of a property owner's longstanding enjoyment of environmental amenities as a result of its becoming efficient or wealth maximizing for a large industrial plant to locate upwind.) Judicial decisions of the managerial type obviously do imperil this aspect of liberty.

Further, the analysis up to now has blithely assumed that a managerial decision based on wealth-maximizing criteria will *be* wealth maximizing. No such happy result is certain, and, as I have already argued, the increasing complexity of the relevant data suggests an increasing likelihood of error.³⁷

Finally, when courts embark upon managerial decisions (outside the gap-filling context), they breach an important conceptual barrier, somewhat like the implicit agreement to refrain from use of nuclear weapons. Once any nuclear weapon is used, a strong psychological barrier against any such use is lost. Once courts feel free to make managerial decisions based on wealth-maximizing criteria, a crucial barrier to their making them on other grounds has been removed. One may fairly expect judges to embark upon the implementation of all kinds of social goals. Since their efforts will almost certainly fail,³⁸ and will probably also be wealth contracting, the upshot will be an unqualified reduction in liberty: more subjection to state power exercised on the basis of *ad hoc* discretion, and less wealth. For this reason, Professor Epstein's efforts to design rules of accident liability and nuisance which are more or less free of the managerial approach are enormously welcome.

One might argue that managerial decisions based on wealth-maximizing criteria are mere substitutes for voluntary agreements that parties would have arrived at had transaction costs been zero. Insofar as they parallel voluntary agreements, one might claim that they pose no threat to liberty.

³⁷ Mario J. Rizzo, *Law amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 *J. Legal Stud.* 291 (1980), develops the potentialities for error at length.

³⁸ See Meyers, *supra* note 10, for a careful description of why imposing a covenant of liability is unlikely to produce the intended results in the long run. As a general matter, distributive goals are not susceptible to implementation by courts, because the suppliers of goods and services can and will respond to judicial misallocations (allocations deviant from what parties would have voluntarily agreed upon) by supplying less at a higher price.

The argument has some serious drawbacks. Superficially, one might say that they deviate from the results of voluntary agreements in that the "loser" gets no compensation. Of course, the answer is that the "loser," although he loses the litigation, has not lost any right that he had. If his only right, in a nuisance case, was to be free of *inefficient* invasions of noxious particles, then he has lost nothing when it is adjudicated that the defendant's emissions are efficient and that therefore the plaintiff must suffer them without compensation.

But this is less than satisfying. The way in which his rights have been defined might, itself, be viewed as a substantial impairment of the liberty he would have enjoyed under rules whose application would entail less risk of abrupt losses inflicted through government (judicial) decisions. The notion that decisions based on wealth-maximizing criteria are a substitute for voluntary agreements fails if we consider an alternative world in which the citizen is free of the uncertainties imposed by managerial decisions of this sort. One might well say that a presupposition of the high value attached to voluntary agreements is that parties who chose *not* to enter into such agreements can know where they will stand. Managerial decisions, even when based on wealth-maximizing criteria, undermine that presupposition.

Still, I hesitate to join unqualifiedly those who condemn such decisions, especially when matters of remedy are involved. Two writers who are normally most anxious about judicial decisions of the managerial style, Hayek and Fuller, both seem perfectly content with a "fault" system.³⁹ To some extent, of course, their acceptance of "fault" may be based upon a notion of fault that is different from the wealth-maximizing criterion. But this explanation is not wholly satisfying, for any conception of fault seems so elusive as to lead courts into the managerial mode.

Further, there is an element of truth in Stigler's attempted equation between wealth and liberty. Efficiency does broaden options; it *is* a kind of liberty. It is not at all clear how much we have to give up in order to get courts completely out of managerial activity (other than gap filling).⁴⁰

³⁹ See 2 Friedrich A. Hayek, *Law, Legislation, and Liberty: The Mirage of Social Justice* 40 (1976); Lon L. Fuller, *The Morality of Law* 167 (1964).

⁴⁰ The efficiency impact of providing specific relief for any nuisance as defined in Professor Epstein's approach (see note 19 *supra*) seems likely to be astronomic, since transaction costs would in the typical case prevent the polluter from buying out all the potential plaintiffs. Even damage awards would, in some cases, lead to sharply skewed incentives, especially if courts failed to adjust the damage award downward for damage-mitigating steps that the plaintiff might take. To the extent that a damage mitigation principle is applied, however, it would undermine the hard-edged certainty of Epstein's system.