

CRAFTING SOCIAL RULES: Common Law vs. Statute Law, Once Again*

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While a considerable literature has arisen seeking to compare the economic efficiency of common law and statute law processes, some scholars have argued that these efforts are misplaced because what should be assessed is not efficiency but stability of expectations. This paper argues that any generic comparison of common law and statute law must be inconclusive, because there is no such thing as *the* common law or statute law process. Rather, there are many particular processes, and any claim based on a comparison of generic alternatives will falter because it will fail to reflect essential institutional detail.

Introduction

A market economy is a self-ordered network of economic activities that results from people pursuing their interests within a framework of rules represented primarily by the principles of property, contract, and tort. Those rules, and the processes by which they are adopted and revised, provide the foundation upon which a market economy rests. Just as a substantial economic literature has explored the efficiency properties of a market economy, a more recent literature has sought to explore the efficiency properties of the legal order that governs market processes. In so doing, a contrast has been developed between common law, which emerges out of the activities of judges, juries, and lawyers, and statute law, which emerges out of the activities of legislators and bureaucrats.

It seems hardly surprising that scholars of law and economics would inquire about the economic efficiency of common law and statute law as alternative processes for producing the rules that govern a market economy, for such inquiry seems a natural extension of an economic assessment of alternative institutional arrangements. Much, though not

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all, of this literature accords common law processes higher standing with respect to economic efficiency than statute law. Indeed, some of this literature argues that the tendency toward efficiency within common law processes is quite strong, though it is fully possible to weaken those efficiency claims while still according a general advantage to common law over statute law.

The bulk of this literature notwithstanding, there would seem to be no universal statement that can be asserted about the comparative efficiency properties of common law and statute law. Primarily this is because any reference to common law and statute law invokes an excessive aggregation that ignores the wide variety of particular institutional formats that are possible. While it is always possible to deal with generic representations of common law and statute law processes, these representations are of little use in assessing particular institutional illustrations of either category, because their comparative properties will depend on particular institutional details pertaining to those processes. In exploring this theme, I shall first review the efforts to assess common law and statute law with respect to economic efficiency. Then I shall explain why generic comparisons cannot serve as substitutes for particular institutional comparisons. Following this, I shall explore some aspects of a widespread confusion between formal and substantive arguments.

I. Common Law and Economic Efficiency

In his 1973 treatise on the *Economic Analysis of Law*, Richard Posner advanced the thesis that common law rules tend to promote economic efficiency while statute law rules do not. Most of that book consisted of arguments seeking to reconcile a vast array of common law rulings and doctrines with notions of economic efficiency interpreted as aggregate wealth maximization. Similarly, in their detailed examination of tort law, William Landes and Richard Posner (1987) argue that "the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation" (1).¹

¹ Along similar lines see Steven Shavell (1987). In contrast, Peter Huber (1988) is resoundingly critical of tort law.

To be sure, no one claims that judges truly possess the knowledge necessary to promote economic efficiency, even should they have an interest in doing so. As for their interests it seems clear that these are highly variegated. Some judges might well be efficiency zealots, but there are many who seem to delight in striking down capitalist practices they find repugnant, as in overturning contracts on grounds of unconscionability, regardless of the subsequent economic consequences. Many hypotheses have been advanced about judicial motivation, and many different motives are doubtlessly at work in the judiciary. Judges hardly constitute a homogeneous group, and there is surely no reason to think that the pursuit of economic efficiency should be an object of judicial fetishism.

Whether judges might promote a network of efficient rules through some invisible hand process, regardless of their motivation, is a different matter. Paul Rubin (1977) and George Priest (1977) sought to develop such an explanation for common law efficiency, with efficiency resulting not from the intent of judges but from the self-interested actions of litigants. With respect to two-person accidents, efficiency requires that liability rest on the person for whom the sum of accident costs and prevention costs are lower. If the prevailing rule allocates liability to the higher cost avoider, that party will have a stronger incentive to litigate the case as the stakes involved become higher relative to litigation costs. In situations where both parties have a *continuing* interest in the precedent or rule, inefficient rules will invite litigation when efficient rules will not. The greater the inefficiency, the stronger the likelihood of litigation. Even should a judicial decision to overturn a precedent be purely a random event, inefficient rules will tend to be replaced by efficient rules.²

The papers by Rubin and Priest inspired a considerable literature. For instance, Goodman (1978), Landes and Posner (1979), Terrebonne (1981), and Heiner (1986) developed arguments generally supportive of the Rubin and Priest arguments about the efficiency features of common law processes. Cooter and Kornhauser (1980), however, developed a

² To be sure, the speed at which this process operates will depend on the likelihood that precedents will be overturned. If this random process were one where a precedent were overturned only if a Jack of Diamonds were drawn from a deck of cards, inefficient rules would have stronger persistence than if a head on a single flip of a coin were sufficient to overturn a precedent.

model with no tendency toward efficiency, unless a presumption were imposed to the effect that judges had a personal interest in promoting economic efficiency. And Rubin (1982) subsequently argued that while common law and statute law were both economically efficient in the 19th century, both had become economically inefficient by the early 20th century.³

The argument about common law efficiency is based on an analogy between litigation and bidding in auctions. A trial is viewed as a process by which a rule is put up for bid, with the parties bidding through their expenditures on litigation. The typical presumption is that the party that spends more is more likely to win, with the result being that legal rules tend to reflect the desires of highest bidders. However, as De Alessi and Staaf (1991) explain, the effort to use such a framework to characterize the economic efficiency of the common law involves an insoluble aggregation problem. For the litigation process involves two people only, with the rule subsequently applying to everyone. A statement about efficiency cannot be made without invoking some presumption about the preferences of those people who were not represented in the litigation. Without some way of aggregating those absent preferences, there is no way to determine whether the rules that emerge from a process of two-party litigation would be the same as those that would emerge from a process of collective choice operating under a rule of unanimity.

It should also be noted that the claim of common law efficiency arises from a setting where both parties have a continuing interest in the rule being litigated. If only one party has a continuing interest, with the other party concerned only with the particular case, the rule will tend to become that which is desired by the party with the continuing interest, regardless of the efficiency of the rule. The reason for this is that the party without the continuing interest will have a weaker incentive to litigate, because most of the gains from successful litigation will redound to people who will find themselves in the same position in the future. Without some ability to link those future interests to the present litigation, the party with the continuing interest will tend to spend more and to win. The persistence of an inefficient rule in this setting is explained on the same grounds as inefficiency is explained in the literature on

³ These efficiency claims are surveyed in Rowley (1989), as well as in several of the essays in Mercurio (ed) (1989).

rent seeking: concentrated interests dominate diffuse interests, because the latter cannot overcome the high cost of organizing for concerted action.

To be sure, the claim about possible inefficiency in this instance is not free from challenge. It may be readily acknowledged that in the absence of a continuing interest, the rule will tend to become that which is desired by the party with the continuing interest. Let it be granted that among the set of all such instances, there will be some cases where the rule is efficient and other cases where it is not. Even so, there is no way to determine which of those rules are the inefficient ones. One can always make claims about what would happen if transaction costs were zero, but without omniscience there is no way to test such a claim.⁴ It is always possible to assert the opposing claim, but there is no procedure for testing that claim. A higher bid is not offered, and there is no external vantage point from which it is possible to distinguish between cases where this is because there is no source of higher valuation and those cases where such a source does exist, but high transaction cost prevents its revelation. Transaction costs are ubiquitous, and there is no way to determine what people would have done had those costs been different from what they are.

II. Statute Law and Economic Efficiency

What about the economic efficiency of statute law? Much of the literature stemming from the theory of rent seeking views statute law as economically inefficient, as illustrated by the Tullockian rectangles (Tullock 1967; Tollison 1982; Rowley, Tollison, and Tullock 1988). The central claims about inefficiency are well known. People invest resources in seeking special legislative favors that otherwise could have been devoted to genuine production. They also invest resources in seeking to avoid being on the losing end of other people's rent seeking activities, as well as in striving to maintain present positions from erosion through future legislation (Tollison and Wagner 1991).

⁴ Margolis (1987) makes a similar point in his comparison of two approaches to the efficiency of the common law, where he argues the superiority of the approach that takes transaction costs as given over the one that speculates over what things would be like if transaction costs were zero.

It may be granted that such resources, considered as the cost of rent seeking, could be devoted to other uses were it not for the various incentives that propel rent seeking. But it is similarly true that resources devoted to such uses as locks, firearms, and karate lessons could be put to other uses, if only people would genuinely respect each other's rights of person and property. The necessity for such expenditures might well be regretted, but such a sentiment of regret would not warrant the claim that they were inefficient, because, ~~given human nature~~ as we know it, there might not be a better alternative that can be attained, even if there might be many that can be imagined. Rights will not be respected just because the world would be nicer if they were; conflict is endemic to the human condition. As a purely formal matter, people can be modeled as apportioning their resources between market production, defending against the predatory activities of others, and seeking to prey on others through offensive rent seeking, according to their individual values, talents, and capacities (Buchanan 1975). Pursuit of such a perspective would surely lead to a conclusion that statute law would, as a purely formal proposition, contain similar efficiency properties as common law, as Becker (1983) points toward and Wittman (1990) argues explicitly.

This claim is essentially a matter of the arithmetic of gains from trade. For if statute law is economically inefficient, dominant political support could be organized to change the law in the direction of efficiency. Should it turn out that a change is not made, the failure to change could always be attributed to high transaction costs, just as it could be with respect to common law. But such an attribution would be but one possible hypothesis. An alternative hypothesis would involve the contrary argument that the change is not prevented by high transaction cost, but rather is prevented by the inferiority of the proposed change. There is no external vantage point from which these hypotheses can be tested. Absent unanimous consent to make a change, there is no cognitive basis for asserting a claim of Pareto inefficiency (Buchanan 1959). It would thus seem equally plausible to give an account of economic efficiency under statute law as under common law, or at least to assert that the efficiency properties of such processes might seem generally to be similar.

III. Complaint, Judgment, and Rule Formation

Common law and statute law are commonly portrayed as sharply contrasting processes. Yet what strikes me as most notable about both

processes is their essential similarity. While these processes might differ in particular details, they possess the same formal structure. For both processes are activated by a complaint or petition. That complaint is then heard before some body, either a judge and jury or a legislative assembly, and that body subsequently renders a judgment. In a common law proceeding, a farmer might bring a complaint against a rancher because of the damage done to the farmer's crops by the rancher's cattle. If so, the case would be heard by a jury selected from among the people who live in the area, and the Court would eventually render some judgment. The statute law process would follow essentially the same form. The farmer's complaint about the damage done by wandering cattle would now be addressed to a legislative assembly. The remedy requested could vary greatly, covering such wide-ranging possibilities as a specific tax break or subsidy for the petitioner to the articulation of a rule requiring ranchers to fence their cattle.

To be sure, this similarity of form can hide many substantive differences that influence the particular operation of either process. These differences limit, if not eliminate, the ability to speak generically of differences between common law and statute law processes. Once it is recognized that there are many *particular* formats for common law and statute law processes, in the absence of some proof that the least efficient form of common law process will be superior to the most efficient form of statute law process it becomes impossible to assert any conclusive argument based on a comparison of generic alternatives.

There are numerous ways in which common law and statute law processes could be made more or less similar. For instance, juries are typically empaneled for short periods of time whereas legislators can serve for long periods, depending on their success in future elections. But there is no reason why the period for which jurors serve could not be extended, which would make juries more like legislatures. Alternatively, the period of time for which legislators serve could be shortened, as through term limits, or even through selection by lot, which would make legislators more like jurors. Moreover, judges could be made more, or less, like legislatures, depending on whether they are elected, selected by the legislature with lifetime tenure, or selected by lot with lifetime tenure (or with fixed tenure, for that matter). In any case, the characteristics of those who issue common law rulings could be made very similar to those who issue statute law rulings, or they could be

made very disparate, depending on particular institutional details governing those processes.

In the common law setting, the complaint must be lodged against some specific person or set of persons, for it is these people who will be asked to provide a remedy. In the statute law setting, however, the complaint is typically more general, and is not addressed against particular defendants who will be asked to provide the remedy. Hence, the common law process marshals automatically the opposition of the defendant; the process itself enlists an opponent to the plaintiff's claim. This is generally not so with the legislative process. Opposition will be provoked only to the extent that the proposed legislative remedy threatens to reduce the net worth of some well organized interest group.

In the simple farmer-rancher setting, a farmer's proposal that the legislature initiate mandatory fencing at rancher's expense, and at standards that might even slow down a buffalo, would evoke strong opposition from the ranchers. But in a complex society, legislation would often have a diffuse pattern of costs. Consider, for instance, legislation to require buildings to be accessible to people in wheel chairs. Opponents of such legislation are less likely to provide resistance than they would under a common law process, because the common law process would involve a single case and a named defendant. The legislative process names no defendant who will have to pay a successful plaintiff, and, moreover, the organization of group interests in opposition may often be difficult because some producers may gain while others lose.

So long as legal processes are merely a reflection of the use of knowledge in society (Hayek 1945), this distinction between common law and statute law would seem to be inessential. But if to some extent legal processes of rule articulation are educational, the differences between the two processes may be more significant, because they can influence the very pattern of knowledge within a society. In particular, common law and statute law would seem to differ substantially in what it is they have to teach about individual liberty and responsibility in society. The common law process would seem to involve a basic presumption that people are responsible for their own circumstances. Individual unhappiness is a personal matter, to be dealt with by the individual as he sees best. A desire for a higher standard of living, then, would tell that person to find ways to produce services more highly valued by others. This presumption that people are responsible for their well being is to be challenged only when a plaintiff can identify particular

people who have violated his rights, a situation that in turn undermines the presumption that people are responsible for their circumstances.

The statutory process, for the most part, involves the starkly different presumption that people are not responsible for their own circumstances. Unhappiness with one's standard of living thus leads neither to a focus on possible activities that would lead to the production of services more highly valued by others nor to an identification of particular people who have violated the complainant's rights. Rather, the statutory process inspires a claim that the complainant's unsatisfactory situation is attributable to society in general, and not to anyone in particular. The problem resides with social structures, patterns, institutions, and the like, and not with the individuals who are seeking some improvement in their position.

Bruno Leoni (1991: 78f.) notes that the Athenian constitution of the 5th century B.C. was reformed to make the legislative process somewhat similar to the common law process in this regard. Any proposed legislation was submitted to a committee of magistrates who were charged with defending the existing body of statutes against the revisions that the proposed legislation would entail. Furthermore, a sponsor of legislation apparently could be sued by another legislator on the grounds that the legislation was defective or in conflict with other valid laws. In this manner, proposed legislation operated much like common law in automatically enlisting a strongly interested opponent. Without some such process, the existing body of rules is in much the position of a commons, when compared with proposed legislation, save to the extent that proposed legislation galvanizes the opposition of strong interest groups.

To be sure, juries are like legislatures, in that their decisions involve the expenditure of other people's money. Neither faces a budget constraint, although it is possible to envision legislative processes that do involve such a budget constraint. For instance, the Wicksellian system, with its emphasis on proportional representation and approximate unanimity, seeks to create a setting where representative assemblies would be more a reflection of fiscal sobriety than would seem to be possible for a jury, unless the jurors were to finance their verdicts from their own pockets.⁵

⁵ The Wicksellian system characterized here is examined in Wagner (1988).

IV. Form, Substance, and Claims of Common Law Efficiency

One of the most notable things about the literature on common law efficiency is its concentration on the *formal* structure of the argument to the neglect of issues of *substantive* conduct. Efficiency is a concept derived from the logic of comparative statics, and it has no ready applicability to historical processes independently of some prior evaluation that distinguishes what is good or desirable from what is not. Even Pareto efficiency is highly value laden (Rowley and Peacock 1975), and characterization of its value judgment as being minimal and innocuous is really a reflection of its typically formal and not substantive usage. And rather than enter into controversial discussions of value that would be required by any substantive treatment of efficiency, the discussion has stayed at the purely formal level. Nonetheless, it is surely the case that people think of efficiency as a substantive concept, as denoting something good. A statement that common law rules promote efficiency is thus regarded not simply as a statement about the formal structure of an argument, but as a substantive statement about the quality of legal rules and the economic well-being they promote. What this means, however, is that formal arguments are used to support substantive conclusions that they cannot possibly substantiate.

Consider the formal structure of tort argument concerning efficiency, as represented by Judge Learned Hand's formulation in *United States v. Carroll Towing Co.*⁶ A barge that had been left unattended in New York Harbor broke loose from her moorings, causing damage. Hand declared that any judgment about negligence "is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions." Hand continued, "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether . . . $B < PL$." Hand went on to note that even in a crowded harbor during wartime it would be unreasonable to expect the barge to be attended around the clock. But he also noted that it had been left unattended for 21 hours, which he declared to be excessive under the circumstances.

While *Carroll Towing* is not cited often, this is not to deny that it summarizes the economic content of tort law. This is certainly the

claim of Landes and Posner (1987), though they note that the relationship should be expressed in terms of marginal magnitudes and activity changes, as against the total magnitudes that Judge Hand used in his illustration. Consider just the first two of the 14 cases Landes and Posner (1987) examine in their section on "Judicial Applications of the Hand Formula" (96–107). In *Hendricks v. Peabody Coal Co.*,⁷ an abandoned strip mine that had filled with water was used as a swimming hole. A 16-year-old boy was injured upon diving into the water, because he hit a submerged shelf. The court ruled for the plaintiff, noting that "the entire body of water could have been closed off with a steel fence for between \$12,000 and \$14,000. The cost was slight compared to the risk to the children involved." The burden to the defendant of taking precautions, B, was low relative to the anticipated damage to the plaintiff, PL. Landes and Posner state that "the court was on safe ground in concluding that the defendant had failed to use due care" (97).

By contrast, *Adams v. Bullock*⁸ illustrates, according to Landes and Posner, a "situation where the cost of care is disproportionate to the expected accident cost, so that the failure to take care is not negligent" (97). A 12-year-old boy was swinging an eight-foot-long wire over the side of a bridge he was crossing, when the wire touched the defendant's trolley wire beneath the bridge, burning the boy. In this case the court ruled that the accident was an "extraordinary casualty, not fairly within the area of ordinary prevision." In terms of the Landes and Posner interpretation of the Hand Formula, P was so small indeed that $B > PL$ would have to hold.

To be sure, no suggestion is made that such computations are made explicitly. Rather the suggestion is that in any effort to make sense of the stock of rulings, where sometimes the plaintiff wins and sometimes the defendant does, the categories represented by B, P, and L, and the relationship represented by the Hand Formula, can provide illumination as to the pattern of outcomes of the cases. Perhaps so, but the law and economics literature surely errs when it treats such categories as B, P, and L as solid, concrete facts, more akin to eternal needs for food and water than to ephemeral fashions for particular types of cuisine. For the opposite is surely the case.

7 115 Ill. App. 2d 35, 253 N.E.2d 56 (1969).

8 227 N.Y. 208, 125 N.E. 93 (1919).

6 159 F.2d 169 (2d Cir. 1947).

Consider again the *Hendricks* and *Adams* cases. In *Adams* the plaintiff was ruled liable, but in *Hendricks* the liability was placed on the defendant. Landes and Posner attribute this difference to the illuminating power of economic reasoning, as represented by the Hand Formula. And it would surely seem that *B* was higher in *Adams* while *P* was lower. As for *L*, it is difficult to tell, probably more so for the 12-year old in *Adams* than for the 16-year old in *Hendricks*. But there is no objective ground whatsoever for concluding that $PL > B$ in *Hendricks* while $PL < B$ in *Adams*. *Hendricks* was decided in 1969, *Adams* in 1919. An alternative possibility would be that in 1919 liability would have been placed on the plaintiff in both cases, while in 1969 (or 1992) the defendant would have been liable in both cases. This would be because of a growing sentimentality nurtured by the dominance of legislation over law, and of the Samaritan's Dilemma that this has fostered (Buchanan 1977).

For further amplification, consider five of the many cases discussed in Peter Huber (1988), where plaintiff's received judgments in their favor. One case involved a man trying to mount a 16.5 inch tire on a 16 inch rim. Understandably, the man had difficulty in doing so, and had to inflate the tire to 48 pounds to get it to hold to the rim. With such high pressure, the tire subsequently exploded, the car crashed, and the man was injured. He sued the manufacturer for failing to warn him explicitly against the danger of over-inflating a tire and putting it on the wrong sized rim. He won his case. In a second case, a teenager was burning a candle in a room. Wishing to give the room a more pleasing aroma, the teenager poured cologne over the candle, and engulfed himself in flames. When the trial was over, the cologne manufacturer was ruled liable for the teenager's burns, for failing to issue a warning about the cologne's flammability. In a third case, a man who deliberately jumped in front of a subway train in New York City was mutilated. For this act he was awarded \$650,000, based on his claim that the driver should have stopped more quickly. Fourth, two men went sailing in a hot air balloon, which apparently got wet from a storm. The men later stuffed the balloon into a dryer in a laundromat. For their shrapnel wounds from the exploding dryer, the men were awarded \$885,000 from the manufacturer. Finally, a man entered a road race in southern California. Apparently not being fast enough to get attention, he strapped a refrigerator to his back. He got quite a bit of attention when his refrigerator slipped, sending him crashing to the ground. He

also received \$1 million from the manufacturers of the refrigerator and the belt.

It would certainly be possible to place these five cases into the formal structure of the Hand Formula. For the terms in that formulation appear to be precise and objective, and yet are subjectively grounded in people's beliefs and values. Consider *P*, the objective-sounding probability of an accident. In the case of the blown-out tire, it could well be admitted that it would be exceedingly unlikely that someone would try to mount a 16 inch tire on a 16.5 inch rim. Nonetheless, it would always be possible to imagine a situation where someone would try to do such a thing. And if that person were successful, the severity of a resulting accident might be so calamitous that the cost to the manufacturer of warning against such an activity would be less than the expected value of the accident loss. As a matter of pure form, this possibility would have to be admitted—just as no one has been able to refute the compelling quality of Pascal's wager.

But as a matter of substantive conduct, it might reasonably be wondered whether economic well-being is promoted by forcing a manufacturer into anticipating someone else's negligence and inattention, if not outright stupidity, as well as, perhaps, parental culpability through neglect in their bringing their children to adulthood in such an unfit condition.⁹ ~~People will do stupid things, some people apparently quite often. However~~ regrettable this might be, the cultivation of institutional processes and ideological beliefs that support the proposition that people are not responsible for their actions will surely intensify the prevalence of stupidity. Law, whether common or statute, is more or less a reflection of community values. These, and not some naturally occurring magnitudes, are reflected in the *Bs*, *Ps*, and *Ls* of the Hand formulation. The extent to which those values are good is a separate matter. The form of the economic argument will hold in any case, but the formal argument does not address concerns of substance.

⁹ In light of such scholarship as that presented in Charles Murray (1984), which shows the impact of welfare state programs in promoting parental neglect of children along many dimensions, such culpability would perhaps extend to the legislative sponsors of such programs as well. This would certainly be an implication of the Athenian process noted by Bruno Leoni, and discussed above.

V. Efficiency, Order, and Social Rules

It is quite possible to reject the meaningfulness of Pareto efficiency as a substantive concept, while nonetheless recognizing that social processes regarding the formation of rules can be assessed in terms of their ability to provide a framework of stable rules within which people can plan their economic activities. Those activities do get coordinated, even if it is admitted that substantive claims about efficiency cannot be made without importing values into the judgment. As Hayek (1973) explains, it is the order of rules governing economic relationships that generates the observed order of actions. Relatedly, Lachmann (1971) argues that social institutions supply points of orientation around which people pursue their plans and projects. And in similar fashion, De Alessi and Staaf (1991) argue that what is important about the common law is its stability and certainty, its slowly changing nature, which provides a framework of stability within which people can undertake their economic activities.¹⁰ The ability of the common law to provide such orientation would be understandable, even if any claim about Paretian efficiency would be judged problematical.

It seems to be widely presumed that statute law changes more rapidly than common law, thereby producing less stability than common law. The plausibility of such an argument is probably reinforced by notions arising out of the public choice literature on voting cycles, for which any existing outcome can be defeated by some alternative proposal. Yet the point of the literature on structure-induced equilibrium is that stability is provided not by the structure of preferences but by the structure of rights and expectations created by political institutions (Shepsle and Weingast 1981; Ordeshook 1992). Even though any statute can be defeated by some alternative, that alternative typically will be blocked from the agenda by virtue of the structure of rights created within a particular constitutional framework. Hence, stability and order would seem to be a dominant feature of statute law as well as common law. To be sure, there might well be differences in the expected durabilities of common law and statute law. But in the absence of evidence

¹⁰ Similar outlooks are developed in Epstein (1980) and Rizzo (1980). To be sure, stability of rules is not sufficient independently of some substantive consideration of working properties. For Stalin's constitution surely provided a framework that offered relative stability and predictability.

on this point, common law and statute law would both seem to provide some combination of stability and change.¹¹

The inconclusive character of any assessment of common law and statute law processes calls attention to the possibility that the very distinction between common law and statute law is overdrawn, at least within the contemporary nation-state where the reach of the secular authority is ubiquitous. Before the emergence of the nation-state, social rules were crafted within a process involving multiple sources of authority with overlapping jurisdictions. The two primary sources of authority were the ecclesiastical and secular authorities, with each possessing spheres of autonomy that were characterized by jurisdictional conflict along various boundaries. Civil order in this setting required some modicum of mutual respect and tolerance. The common law articulated by secular judges was surely constrained by the existence of a competing, ecclesiastical source of authority.¹² Law could transcend politics in this setting, because neither the secular nor the ecclesiastical authority commanded anyone's full allegiance. Unconstitutionality was synonymous with illegality. But with the Church evolving into just one among many voluntary associations within the state, as against transcending the state, the state became the sole or residual source of authority. Competing sources of authority no longer exist, or rather exist only with the forbearance of the nation-state, so we should not be surprised that the substance of common law rules differs as a result. The dichotomy between statutory and common law is largely irrelevant in the contemporary nation-state, because both derive from the same source in a setting where there no longer exist polycentric sources of competing authority. This is not to deny that different processes for generating social rules can have significant implications for economic well-being, but rather is to deny that the distinction between common law and statute law is of any categorical significance within the contemporary nation-state which has the capacity to absorb all alternative sources of authority into itself.

¹¹ Huber (1988) explains that the revolution in tort law over the past generation, which overturned a wide variety of long-standing practices and expectations, largely occurred through common law processes.

¹² For a valuable examination of this see Harold Berman (1983, esp. pp. 255-69).

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