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The levers of legal design: Institutional determinants of the quality of law

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In the past decade a comparative law and economics literature has emerged that is largely organized around an effort to explain differences in country economic performance in terms of differences between common law and civil code systems. Assumptions about differences between common law and civil code regimes and the correspondence between legal regimes and judicial behavior are, however, still only weakly based in real institutional features of modern legal systems. In this paper, I examine the institutional determinants of the quality of law developed by a legal regime, drawing on a model from Hadfield which identifies five key parameters that influence legal evolution [Hadfield, G.K., 2006, *The quality of law in civil code and common law regimes*, *Judicial incentives, legal human capital and the evolution of law*. Manuscript]. I set out the institutional features that determine these parameters as dimensions along which real legal systems reside. These dimensions include: the organization of the judiciary and the extent to which judicial careers are organized on a bureaucratic career model or what I call a “capstone” model; the organization of the courts and the extent to which jurisdiction is general or specific; the mechanisms of information distribution and the extent to which information is distributed to a broad public audience or a more confined professional audience; the role of judges, whether active or passive, in finding facts and shaping the issues in adjudication; the role of public versus private entities in the enforcement of judgments (damages); and the degree to which the mechanisms by which legal services are produced, priced and distributed are competitive or professionally-controlled. My claim is that these key institutional dimensions, rather than conventional and more abstract distinctions based on the sources of law or judicial independence should be the primary focus of empirical efforts to evaluate and policy efforts to reform legal regimes. They are the levers of legal design. *Journal of Comparative Economics* ●●● (●●●●) ●●●—●●●. USC Law School, 699 Exposition Blvd, Los Angeles, CA 90089, USA.

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1. Introduction

In the past decade a comparative law and economics literature has emerged that is largely organized around an effort to explain differences in country economic performance in terms of differences between common law and civil

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code systems, whether understood in the abstract or in terms of a small set of legal families thought to establish the legal origins for most legal systems in the modern world. Empirical work suggests in particular that French-origin and (less so) German-origin civil code systems have not performed as well as English-origin common law systems (La Porta et al., 1997, 1998, 2004; Johnson et al., 2000; Mahoney, 2001; Djankov et al., 2002, 2003; Beck et al., 2003; Botero et al., 2004). Theoretical accounts of why this might be true have focused on two principal mechanisms. Mahoney (2001) and Glaeser and Shleifer (2002) emphasize judicial independence from the state and hence the capacity for courts to protect property and contract rights from incursion by the state; these authors claim that a common law regime generates greater judicial independence than does a civil code regime. Beck et al. (2003) emphasize adaptability and assert that common law regimes—specifically those in which judicial opinions are a source of law and judges can justify their results on equity and not merely statutory grounds—are better able to respond to changing circumstances than are civil code regimes in which law is only found in statutes. Anderlini et al. (2007) make a similar claim for caselaw based systems: ex post judging is better able to respond to local information than ex ante legislating, although judicial responsiveness to ex post evidence may generate a time-inconsistency problem that reduces the value of caselaw relative to statutory law. Djankov et al. (2003) can also be understood to attribute stronger economic performance to the capacity of judges to exercise discretion: their measures of formalism in the procedures for deciding simple disputes attempt to capture the extent to which judges are required to look to established legal rules, whether in statute or caselaw, and to follow externally-imposed procedures to decide or justify decisions.

We have gained considerable insight into the impact of legal institutions (as distinct from the substantive content of law) on economic performance from this common law/civil code, statutes versus judicial discretion, framework. It is clear, however, that making further progress on this comparative project will require substantially more refined understanding of the institutional features that define different legal regimes and more detailed analysis of how institutions determine the behavior of legal actors, particularly judges. As is now widely understood by comparative law scholars, the traditional picture of the common law/civil code dichotomy has been overdrawn (Mattei, 1997). It is not possible to differentiate modern regimes solely on the basis of whether they rely on a comprehensive legislative code or judge-made precedents as a source of law. Common law countries such as the UK, the US and Canada are infused with statutes, including broad-ranging comprehensive codes such as the Uniform Commercial Code or California's Business and Professions Code; civil code countries such as Germany and France are replete with topic-specific statutes that deal with matters such as environmental regulation in scope and detail that is indistinguishable from that found in English-origin systems.¹ At the same time, the idea that civil code judges, unlike common law judges, ignore what other judges have said and done in previous resolutions of similar cases or that they never think of their role as requiring active policymaking has been recognized as overly simplistic (Damaska, 1986; Merryman, 1985, 1996; Mattei, 1997; Lasser, 2004). La Porta et al. (2004) and Beck et al. (2003) recognize this when they code countries based on whether caselaw is considered a source of law in a legal regime, rather than whether or not there is a comprehensive code. Djankov et al. (2003) go still further to identify more detailed institutional differences across and within legal families. Atiyah and Summers (1987) provide a detailed analysis, largely focused on legal reasoning but attentive to institutional differences, of the significant differences in the role of caselaw and statutes, judicial discretion and formal rule-following, within the common law family, specifically between the US and the UK. As these efforts suggest, there clearly are differences between common law and civil code regimes, and within each category, but the conventional focus on sources of law obscures rather than illuminates most of them.

The more fundamental difficulty in the existing framework, however, has to do with the stylized theoretical relationship that is assumed to exist between how legal regimes, particularly judges, behave and the institutions that identify the regime as a "civil code" or "common law" system. The literature has largely conceptualized a common law system (or, as in Beck et al., 2003, a civil law system that recognizes caselaw as a source of law) as one in which judges exercise discretion to decide cases in independent and/or adaptive lawmaking ways, unlike the civil code system in which the state controls judicial outcomes and the content of law. In effect, however, this approach treats what is essentially a behavioral difference—the extent to which judges' decisions are determined by rules as opposed to their independent judgment and discretion at the time of decision—as if it were an institutional difference, as if the choice to establish a common law system, of itself, generated independent judicial behavior while the choice to adopt a civil law regime, of itself, constrained the actions of judges so that they merely implement rules written into a code. The

¹ Mattei (1997) has recently observed that "the number of statutes enacted outside the code in civil law jurisdictions is staggering." p. 83.

1 problem of legal design, however, is fundamentally the problem of how legal institutions can induce desired behavior 1
2 from legal actors. The thinness of the institutional account of how legal regimes differ thus has theoretical import: we 2
3 have yet to identify the particular institutions that generate judicial discretion and rule adherence in equilibrium. And 3
4 the thinness of our theoretical account of how legal actors such as judges behave has yet to suggest the institutional 4
5 attributes that our empirical work should seek out. The catalog of procedural and institutional differences presented 5
6 in Djankov et al. (2003), for example, is based on a very simple model of ideal ‘neighbor’ justice in which judges 6
7 decide in a Solomonic way with no procedural or substantive legal constraints. Their study then looks for any pro- 7
8 cedural or substantive constraints on judges, but does not identify the institutions that, in equilibrium, lead judges 8
9 in some regimes to require elaborate procedures to evict a clearly non-paying tenant while others develop short-cuts 9
10 and efficiencies; why judges in some regimes require citations to statutes in complaints for a simple matter such as 10
11 collection on a bounced check while others do not; why judges in some regimes are comfortable issuing decisions in 11
12 these simple cases with only brief, sometimes only equitable, reasons while others feel compelled to provide lengthy 12
13 rationales with extensive citation to caselaw or statutes. Glaeser and Shleifer (2002) suggest civil codes constrain 13
14 judges’ discretion more effectively than statutes adopted in common law countries, but do not identify the institutions 14
15 that generate this difference: why do judges in France respond differently to statutory language than judges in the UK 15
16 or US? 16

17 My goal in this paper is to develop a richer picture of the institutional landscape that influences the quality of law 17
18 produced by a legal regime. I start with a theoretical model of the quality of law that treats the problem of judicial 18
19 decision-making in the context of common law precedents, statutory texts or codes as a generic one of interpreting and 19
20 adapting legal rules, whatever their source, to a local or changing environment. As Berkowitz et al. (2003) emphasize 20
21 in their evaluation of the empirical evidence of the economic growth generated by transplanted legal regimes, and 21
22 Beck et al. (2003) also recognize, the quality of a legal regime is in part a function of its capacity to adapt to local 22
23 and changing circumstances. This is not to deny the importance of judicial preferences and the risk of corruption by 23
24 state or private interests, issues that Glaeser and Shleifer (2002) and La Porta et al. (2004) rightly emphasize; rather, 24
25 my goal is to draw attention to the institutional complexity of generating high quality law even in an environment in 25
26 which judges have socially-aligned preferences and to suggest that particularly in modern complex economies located 26
27 in largely stable democracies, the greater systematic threat to economic development may be judicial competence, not 27
28 judicial misconduct. 28

29 Section 2 first summarizes a model developed in Hadfield (2006) that separates out behavioral and institutional 29
30 elements in the analysis of a legal regime, specifically by endogenizing the extent to which judges follow established 30
31 rules or draw on what they learn from litigants to fashion a more appropriate rule. That is, what the existing literature 31
32 identifies as an institution—judicial discretion, development of new rules through caselaw, informality, etc.—is treated 32
33 as a behavioral consequence in this model. The analysis identifies five key parameters that influence judicial (and, it 33
34 will be seen, litigant) behavior and therefore the process and quality of legal adaptation. These are: 34

- 35 (1) judicial incentives, 35
 - 36 (2) exogenous legal human capital (understood as expertise in choosing and applying legal rules in a way that pro- 36
 - 37 motes economic welfare), 37
 - 38 (3) the processing of litigant information into judicial error-reducing legal human capital, 38
 - 39 (4) the cost of producing evidence and legal argument, and 39
 - 40 (5) the penalties (damages) levied in adjudication. 40
- 41
42

43 Sections 3 and 4 then turn to an analysis of the institutional features of legal regimes that determine these pa- 43
44 rameters. I first set out in Section 3 the institutional dimensions along which real legal systems reside, although our 44
45 comparative knowledge of the details of existing systems—particularly given the heavy focus on conventional distinc- 45
46 tions between code and common law sources of law—is relatively thin. These dimensions include the organization of 46
47 the courts and the extent to which jurisdiction is general or specific; the organization of the judiciary and the extent 47
48 to which judicial careers are organized on a bureaucratic career model or what I call a “capstone” model, the crown- 48
49 ing achievement of legal practice; the mechanisms of information distribution and the extent to which information is 49
50 distributed to a broad public audience or a more confined professional audience; the procedures followed in finding 50
51 facts and shaping the issues in adjudication; the role of public versus private entities in the enforcement of judgments 51
52 (damages); and the degree to which the mechanisms by which legal services are produced, priced and distributed are 52

competitive or professionally-controlled. Section 4 then analyzes how these institutional attributes can be expected to determine the parameters that influence the extent to which a regime adapts rules to new and changing environments. My claim is that these key institutional dimensions, rather than conventional and more abstract distinctions based on the sources of law or judicial independence, should be the primary focus of empirical efforts to evaluate and policy efforts to reform legal regimes. They are the levers of legal design. Section 5 provides conclusions and suggestions for further research.

2. A model of legal human capital and legal adaptation

The model in Hadfield (2006) starts with a simple two-period world in which there is a population of judges, defendants and plaintiffs and an established legal rule, R^e . This established rule, which could be either a statutory text or a common law case holding, determines the liability of defendants sued under the rule on the basis of information about a defendant's conduct that is costlessly observable to judges, plaintiffs and defendants, and judges make no mistakes in applying the rule. If a defendant is held liable it pays damages, D . For simplicity, it is assumed that all potential defendants are sued and all cases are tried to conclusion in each of the two periods, with no settlements and no appeal.

The model focuses on identifying the conditions under which the established legal rule will be adapted to new welfare-relevant information about the environment, producing a new rule R^n . This could be information about a new environment, as when a rule is transplanted, or it could be information about a changed environment, as when technology changes or even when theory develops so that a previously overlooked factor is now recognized as a welfare-improving distinction. Suppose, for example, that under the established rule all defendants are held liable for some conduct, such as selling a product that causes injury. (This would be a strict liability rule.) By assumption, this rule is sub-optimal in some new environment: perhaps the rule is being transplanted to an economy where sellers have little liquidity and hence are excessively deterred by strict liability from producing valuable products with unavoidable risks of injury. Perhaps there has been a technological development that allows buyers to more cheaply avoid injury than sellers, or simply a theoretical discovery that it is optimal to shift liability to buyers if they are the cheaper-cost avoider. In any event, the model is intended to analyze the conditions under which the law (judges) will learn this information about the environment and incorporate that information into the liability rule. If the rule is in a statutory text, the process by which this new information can be incorporated is through interpretation. Even an explicit statutory provision that "sellers shall bear all liability for injuries caused by their products" is subject to potential interpretation about when and where that applies. (If buyers are easily able to avoid the injury, is the injury "caused" by the product, or the carelessness of the user? Did the legislature intend sellers to bear liability for reckless use of their products—using a product in an unintended or unusual way or contrary to explicit warnings about proper use? Even where it is plain that such a rule, together with critical constraints on seller liquidity, is causing a crisis of undersupply of some important product such as a vaccine?) If the rule is derived from a body of case law articulating the reasons for holding defendants liable for product injuries in the past, the new information is incorporated through the process of doctrinal legal reasoning. (Past cases may have presented facts, not attended to in those opinions, in which avoidance of the harm by the buyer was not possible or seller liquidity was not constrained; a restatement of those prior decisions may be made that identifies avoidance of the harm or seller liquidity as a factor that determines when the rule is applied and when a different rule, such as negligence, is appropriate. Or a court may simply announce that the prior rule was ill-considered and adopt the new rule.)

Whether the established rule is in a statute or prior judicial decisions, the potential is always there for judges to make a move from R^e to R^n . The willingness of a court to make such a move can, and does, vary across legal regimes; this is a behavioral response that the model seeks to explain rather than assume.

An individual judge's decision to adopt R^n rather than applying R^e is a function of three factors: the judge's reward structure, the risk of judicial error understood in terms of social welfare²—adopting R^n when R^e is optimal—and the information presented to the judge by the litigants in the form of facts and legal reasoning. I normalize the cost of decision-making to zero, thus assuming the cost to the judge of adopting either R^n or R^e is the same. In particular, do not bear any personal cost in gathering facts or legal reasoning to evaluate R^n . This is a restriction on the model

² This meaning for judicial error should be distinguished from the notion of legal error as a failure by a lower court to properly apply legal rules as determined by an appellate court.

intended to focus on how a legal system gains information that is originally embedded with those affected by the law (potential litigants), and to abstract from the agency problem (leisure-seeking judges, as in ~~Posner, ?~~) that has dominated the literature thus far. Consider the three factors that do influence judicial decision-making in turn.

Judges have idiosyncratic evaluations of the rewards they enjoy for the choice they face in any individual case between rule-following and rule-adaptation. The model captures this by assuming all judges receive a uniform payoff $\gamma > 0$ if they follow the existing rule and an idiosyncratic payoff α_j (which may or may not exceed γ) if they adopt the new rule, R^n , and the result under R^n in the particular case they are deciding is social welfare-maximizing. They receive zero if they use R^n in a case in which the rule does not produce a social welfare-maximizing result. We can think of this as an effort to capture the idea that judges may be rewarded for working a valuable change in the law, but not for making change for change's sake. Thus the model assumes that judges have socially-aligned incentives in the sense that they seek only to adapt the law when it is socially optimal to do so; there is no private policy or other corrupting influence at work. This approach abstracts from the more extensively studied problem of judicial bias (see, e.g., Gennaioli and Shleifer, ?) to focus on the competence issue that faces even a well-intentioned judiciary.

The competence problem arises because judges make mistakes about when a new rule is social welfare-maximizing. This might be because of an incomplete understanding of the relationship between defendant characteristics, liability and welfare outcomes (what we could think of as an error of law), or it might be because of difficulty distinguishing between two types of defendants: *good defendants* who should not be held liable and *bad defendants* who should be (what we could think of as an error of fact.) The model in Hadfield (2006) explores both the case in which defendants are homogeneous and the case in which defendants are heterogeneous.

The risk of judicial error is important for two reasons. First, the potential for error influences judicial incentives to risk rule-change. Judges only enjoy a payoff for rule-change (if they do at all) when they are accurate in their choice and implementation of a new rule. High rates of error will then discourage even those judges who enjoy high payoffs for rule adaptation. Judges are also making an error when they stick with the established rule in a case with a good defendant but this error is ignored by the judge—the payoff for following rules does not depend on whether the rule is optimal. This captures the idea that judges can play it safe by doing what the ‘law’ tells them to do; they do not bear personal responsibility for what is a mistake of the system as whole. Second, the potential for error will also influence the willingness of litigants to invest in the resources necessary to present ~~(assuming the procedural rules allow them to do so)~~ evidence and legal argument geared towards convincing a judge to change the rule. Although both plaintiffs and defendants can, in theory, be in a position to need a change in the existing rule in order to prevail in a case, for concreteness and simplicity, the model assumes that the established rule holds all defendants liable and thus only defendants potentially face a question of whether to invest in trying to obtain a switch to a rule that will release them from liability. Good defendants will be discouraged from investing in the effort to obtain a change in the rule if the judge is highly likely to make an error and hold them liable anyway. Bad defendants, however, will be encouraged to invest by the likelihood of judicial error: they benefit when judges make mistakes.

Hadfield (2006) does not focus on a question that others in the literature have already explored, namely the extraction of reliable information from a strategic presentation of evidence by competing plaintiff and defendant (Milgrom and Roberts, 1986; Shin, 1994, 1998; Dewatripont and Tirole, 1999; Daughety and Reinganum, 2000). Judicial error is modeled in reduced form, as probabilities of type 1 and type 2 errors in each period and the analysis focuses on the systemic relationship between the information accumulated from litigants across multiple cases and the development of judicial capacity to distinguish good from bad defendants (assess when liability is optimal) over time. Specifically, it is assumed that the level of *shared legal human capital* available in period 1 is exogenously determined; the level in period 2 is determined by the aggregate of exogenous legal human capital plus the information presented in period 1. The likelihood of judicial error in any period—which is assumed for simplicity to be common across all judges—is then a function of the quantity of shared legal human capital available in that period. This is meant to capture the idea that individual evidentiary and argumentative presentations can be instructive to all judges when subjected to thoughtful reflection and review—by judges, by commentators—with the advantage of cross-case comparisons and time. The presentations in individual cases are essential in order to obtain a rule change, but they do not immediately alter the likelihood of judicial error.

This introduces the principal feedback mechanism and key insight in the model: judicial error can only be reduced by the joint willingness of judges *and* defendants to invest in the evaluation of costly evidence and argument, but both judges and (good) defendants are discouraged by the incidence of error. Bad defendants are encouraged by error but this is to no avail if judges, recognizing this, are unwilling to risk hearing the case for a change in the rule. Whether the

evidence and argument presented by bad defendants, if heard, increases or decreases the likelihood of judicial error is an open question of the model: this depends on an empirical assumption about whether efforts to mislead a court ultimately succeed in misleading an entire system, or whether they provide an instructive counterpoint to the evidence and argument presented by good defendants.

The first result of the model is the demonstration that in order for a legal regime ever to evolve to the new rule, three independent conditions must be met:

- (1) there must be enough judges with sufficiently high rewards to accurate rule change;
- (2) the cost of evidence and argument in an individual case, k , relative to the potentially avoided damages D , must be neither too high (discouraging good defendants) nor too low (encouraging excessive investment by bad defendants); and
- (3) initial judicial error rates must not be too high (initial or exogenous legal human capital too low).

What this tells us is that it is possible for a legal regime to remain stuck at a sub-optimal legal rule: judicial errors may be low enough to justify moving to a new rule, but judges and/or defendants may lack the incentive to invest in rule change even at this low level of risk. Note that one of the reasons k may be high, indeed infinitely so, is because of overt limitations placed on the capacity of litigants to present evidence. Alternatively, even with (or perhaps because of) the availability of cheap evidence and change-oriented judges, rule change may be stymied by the high risk of error and thus the potential for long-run reduction in error may not be realized.

The risk of error and the cost of evidence and argument, however, also mean that it may not be optimal to switch to a new rule. The issue is one of optimal capital growth: how much is it worth investing today in the form of legal costs and legal errors so as to generate legal human capital and reduce legal errors tomorrow? It can be worthwhile for some judges in a legal system to adopt the new rule, even if the same-period welfare benefits are outweighed by the error and legal costs, if in doing so they generate system-wide error reductions so that more judges can more accurately implement the new rule in the next period. Alternatively, if these first-period costs are too high (which is a function not only of the risk of error and expenditures in a given case but also of the distribution of judicial incentives, that is, how widespread is initial rule change) then the regime is better off sticking with the theoretically sub-optimal rule.

Hadfield (2006) presents a comparative analysis of legal regimes to determine what we can say about when legal regimes will do better or worse at achieving optimal rule adaptation. The analysis identifies five key parameters that affect optimal adaptation:

- the distribution of judicial incentives, α_j ;
- legal costs, k ;
- damages, D ;
- initial (exogenous) legal human capital, K_1 ;
- judicial information processing, $i(\Delta)$ where Δ is the total amount invested in evidence and legal argument by defendants in period 1 and $K_2 = K_1 + i(\Delta)$.

The impact of these parameters on the potential for optimal rule adaptation depends in part on the underlying value of rule change, and on the mix of good and bad defendants that will make their way into the pool of those presenting evidence and argument—seeking rule change—in courts. Put aside for the moment differences between regimes that lead to a scenario in which all defendants seek rule change in one regime but only good defendants do in the other. (This occurs if, given the risk of error, relative legal costs are high in one—so that only good defendants find it worth the investment to seek rule change—and relatively low in the other—so that both good and bad defendants are encouraged to invest.)

Compare first two regimes in both of which rule change in the first period—based on the initial or exogenous level of legal human capital and error rates—increases social welfare (the established rule is poorly adapted to new features of the environment). If the expected payoff of R^n in a single case justifies the expenditure on legal costs and error, then a regime that encourages more widespread first period change enjoys higher social welfare in period 1. Moreover more widespread first period rule change generates higher levels of second period legal human capital and lower levels of judicial error. Lower judicial error in period 2 has multiplier effects: more defendants are encouraged to incur the cost of seeking this (socially beneficial) rule change and more judges are encouraged to risk rule change. The welfare

1 gap between the two regimes therefore widens over time. We can thus expect a regime to enjoy higher social welfare 1
2 if it is characterized by: 2

- 3
- 4 ● higher judicial rewards for rule change; 4
- 5 ● lower legal costs; 5
- 6 ● higher damages, provided this induces investment by good defendants that is lacking in the other regime; 6
- 7 ● higher initial legal human capital; 7
- 8 ● more effective information processing. 8
- 9

10 Taking these in turn, if more judges enjoy higher rewards for rule change, more are encouraged to risk rule-change 10
11 in period 1. If legal costs in one regime are high enough to discourage even good defendants from investing in rule 11
12 change, only a regime with lower costs will enjoy the benefits of rule change; even if defendants in both regimes 12
13 are encouraged to invest, lower legal costs generate net benefits in reducing the cost of rule change. Higher damages 13
14 also encourage defendants to invest, by increasing the value of avoiding liability through rule change. The relevant 14
15 parameter for behavioral impact is, in fact, legal costs relative to damages, k/D , which may be reduced by either 15
16 reductions in absolute costs or increases in damages. Higher damages increase social welfare if they induce good 16
17 defendants—who are discouraged from investing in the low damage regime—to incur the costs of seeking rule change. 17
18 Higher initial legal human capital, which implies lower initial judicial errors, encourages a larger share of judges and, 18
19 potentially, more defendants to invest in period 1 rule change. Better judicial information processing means that one 19
20 regime does a better job of extracting error-reducing information from the accumulated investments in first period 20
21 litigation and hence enjoys lower errors in period 2 and thus more widespread rule change. 21

22 The more difficult set of comparisons involve regimes in which rule change is not justified in period 1. In this case, 22
23 it is no longer true that more widespread rule change is unambiguously beneficial in period 1: there is an optimal 23
24 extent of initial rule change (investment in legal costs and error) to reap (if possible) the benefits of reduced legal error 24
25 in subsequent periods. We can still conclude that a regime is better off under the following conditions: 25

- 26
- 27 ● lower legal costs; 27
- 28 ● higher damages, provided this induces investment by good defendants that is lacking in the other regime; 28
- 29 ● more effective information processing. 29
- 30

31 But higher judicial rewards for rule change and higher initial legal human capital—lower period 1 legal errors—do 31
32 not necessarily lead to higher social welfare in this more complicated setting. Higher judicial rewards and lower initial 32
33 errors—although both factors increase the potential value of second period rule change after sufficient reduction in 33
34 legal error—may lead to excessive first-period rule change. 34

35 Finally, consider the scenario excluded from the above, namely the case in which the differences between regimes 35
36 lead to differences in the mix of defendants who seek rule change, with both types seeking rule change in one regime 36
37 and only good types in the other. Bad types will be weeded out of the pool of defendants seeking rule change if 37
38 relative legal costs (k/D) are higher in one regime or the likelihood of a type 2 error is lower, sufficiently so that it 38
39 is not worth the investment to attempt to induce the court to switch rules and (mistakenly) release the defendant from 39
40 liability. Eliminating bad defendants from the pool of those seeking rule change would seem to be an unambiguously 40
41 good thing: legal costs and errors are reduced. The presence of bad defendants in the pool can, however, generate 41
42 social benefits. First, it is possible that having bad defendants in the pool reduces the expected error from the judge's 42
43 perspective: if judges are good at avoiding type 2 errors but bad at avoiding type 1 errors, then the decision to entertain 43
44 a defense is less risky if there's a good chance the defendant is an easily identified bad type. While this is theoretically 44
45 possible, it seems implausible: it seems unlikely that judges will see less risk in deviating from an established rule 45
46 when they know there are defendants in the mix who are trying to mislead them than when they believe that they face 46
47 only good defendants and only risk reaching the same result under a new rule (liability) that they would reach under 47
48 the established rule. 48

49 The second, more important, reason why having bad defendants in the mix of those seeking rule change may 49
50 generate offsetting social benefits is that these defendants may provide the legal system with information that, when 50
51 aggregated and processed, contributes to the accumulation of legal human capital and the systemic reduction of legal 51
52 error. This depends on some subtle questions, which are raised but not taken up, about the nature of judicial or legal 52

learning. It may be the case that information from bad defendants—which is of course intended to lead an individual court into a type 2 error—is disinformative, degrading what is learned from good defendants. This happens if, for example, the (accurate) conclusions one would reach from reviewing the evidence and argument of good types are clouded and hedged by confusing claims to the contrary from bad types. ~~Some~~ claim, for example, that this is the effect of sustained efforts by tobacco companies to sow doubt about the scientific evidence showing links between smoking and cancer (~~Proctor, 1995~~).³ If this is the case, then, ~~indeed~~, eliminating bad defendants from the pool of those seeking rule change through higher initial legal human capital or relative legal costs is welfare-improving.

But it is also possible that eliminating bad defendants from the pool reduces legal human capital and so is costly. Reviewing the evidence and arguments presented by bad defendants alongside the presentations made by good defendants may improve the quality of what is learned. In the absence of evidence from bad types, for example, it may be that the conclusions about good defendants will be overgeneralized: “all defendants are good.” This would be a common error in interpreting data: failing to take into account sample size and selection. Bad defendants increase the total amount and diversity of the information collected by courts and in general more information is better. If this describes judicial information processing, then higher relative legal costs may create the further problem of eliminating information; and the benefits of lower initial legal errors may be offset by the loss of opportunities for better learning.

3. Institutional dimensions of legal regimes

The model summarized above predicts that the quality of legal evolution in a given legal regime will depend on (at least) five parameters. How are these parameters determined? In this section, I present an overview of the institutional attributes that can vary across legal regimes. Before turning to this overview, however, let me first address the attributes that are generally used in the comparative law and economics literature to distinguish between legal regimes: judicial independence and the source of law. These concepts, I argue, confuse our analysis by treating what is essentially a difference in equilibrium behavior as if it were institutional.

3.0.1. Judicial independence

Judicial independence has figured prominently in the literature comparing the economic performance of common law and civil code regimes (Mahoney, 2001; Glaeser and Shleifer, 2002; Klerman and Mahoney, 2005). It is sometimes claimed that common law judges enjoy greater judicial independence, but this is far from clear as an empirical matter. Judges in many regimes are often protected against removal from office for purely political reasons through life or term tenure. And judges in many regimes are exposed to political consequences. Judges in many US states (where 98% of all litigation takes place), for example, are elected or subject to retention or recall voting. (Shepherd, 2007 reports that 80% of state supreme court judges are either initially appointed or retained on the basis of some form of election; see also Hanssen, 2004.) In the US federal system judges are dependent on politicians for appointment to higher courts; judges in many countries such as France and Japan are subject (in some but not all cases) to promotion and transfer by the government, if not removal. Those in common law regimes look at the civil service nature of judicial careers in civil code regimes and see in that the makings for a judiciary that is controlled by the executive, but the actual mechanisms for the selection, evaluation and promotion of judges, as discussed ~~above~~, appear to be heavily influenced, particularly at the lower trial and appellate levels, not by political or administrative actors but rather by senior judges. Those in civil code regimes, on the other hand, look at the political appointment and even election of judges at all levels in common law systems and the absence of systematic peer review by members of the judiciary itself and see in that the makings for a judiciary that is beholden to politicians and the electorate rather than the law.

The concept of judicial independence in the comparative literature is also unclear. Independence from whom? In most writing, the concern is about the independence of the judiciary from the government. But it is unclear how relevant this type of independence is for ordinary litigation and the overall performance of the legal system in supporting a market economy. Judges who are not beholden to the government will presumably be more effective at countering unlawful expropriation by government (as Glaeser and Shleifer, 2002 and Mahoney, 2001 argue), but this is surely a small determinant of the risk of expropriation, in light of the capacity of government to authorize expropriation through legislation. Constitutional protections against such legislation are characteristic not of common law regimes

³ Proctor reports, for example, that in an internal memo one tobacco company proclaimed with respect to the goals of its research funding: “Doubt is our product.”

in general, but rather of specific constitutional regimes; even in the United States, with a strong constitutional provision, the protection is limited to outright takings and very limited in protecting property against diminution of value through regulation or legislative modification of remedies for breach of government contracts. (La Porta et al., 2004 attend to the importance of constitutional constraints.) Most importantly, the vibrancy of a diversified market economy is far more dependent on the reliability of the enforcement of contract and property rights as between citizens than it is on the enforcement of contracts and property rights as between citizens and the state. For those cases, judicial independence from corrupting private influences would seem to be more important, as Glaeser and Shleifer (2002) note. Indeed, the greater risk of government control over judges would seem to be from expansion of the routes by which corruption from private sources can make its way into the system, rather than the overt distortion of decisions in favor of strictly government interests. (Shepherd, 2007, for example, finds that in US state supreme courts, more political judicial retention procedures are associated with outcomes in cases involving private parties that reflect the ideology of those with retention power.)

Ultimately judicial independence is a behavioral characteristic, not an inherently institutional aspect of legal design. Lifetime appointments and salary protection, often taken as indicia of judicial independence, are institutional attributes that predict that judges will behave independently, but they do not define independence. Judges may be appointed for life and enjoy salary protection and yet not behave in practice independently. Indeed, this is implicit in the frequent claim in the comparative law and economics literature (e.g., Mahoney, 2001) that civil code judges—who often are appointed for life with salary protection—do not behave independently. As the model described in Section 2 suggests, we are interested in which features of the institutional environment might generate the types of rewards that prompt judges to take the actions we want them to take (in this model, welfare-maximizing rule adaptations.) By keeping the distinction clear between what is a parameter (institution) and what is an outcome (judicial decision-making behavior) we can more carefully identify what is driving differential economic performance across legal regimes.

3.0.2. Precedent, codes and sources of law

The other defining feature of the difference between civil code and common law regimes that we find in the comparative literature is the source of law. Common law systems are identified by the use of caselaw as a source of law (precedent) (e.g., Beck et al., 2003); civil code regimes are identified as those in which only a written code (statute) is treated as a source of law (e.g., Anderlini et al., 2007). Again, however, this approach conflates institutions and behavior. *Stare decisis*—the practice of treating an earlier decided case as authoritative and an appropriate basis for decision—is exactly that: a practice. So too is *jurisprudence constante*: the practice followed in many civil code regimes of treating a string of harmonious decisions as authoritative. Judges in either regime can, in theory, decide cases either with or without reference to prior decisions; the more revealing question is why some judges behave in this way while others do not.

Relatedly, it is unclear what to make of the presence of a comprehensive code in a legal regime. To some extent, this could be understood merely as a matter of legislative organization, with all statutory provisions (at least with respect to private obligations in property, contract and tort) collected in a single title. The tremendous volume of legislation in Anglo-American countries belies the historical emphasis on the distinction between judge-made law and legislator-made law. Nor does there appear to be a systematic difference in the amount of detail in civil and common law statutes and regulations: although I am not aware of systematic efforts to measure this, both regimes evidence both brief, generally stated provisions (such as the French law of torts and the US Sherman Act) as well as lengthy detailed provisions (such as the environmental legislation and regulations enacted in many countries). In much of the comparative literature it is assumed that judges will be more constrained by rules written into a comprehensive code than those in ordinary statutes (Glaeser and Shleifer, 2002) or caselaw (Anderlini et al., 2007). But again the question is really one of behavior: when will judges be expansive and when will they be narrow in how they interpret the law? Lasser's (2004) comparative study of the French, European and US high courts emphasizes that judges everywhere must interpret the law, be it vague law that was enacted 200 years ago (as with the French code provisions governing tort actions) or detailed law that was enacted only 2 years ago. His study finds this as a constant across regimes. The question is how interpretation is done, whether with a view to continuity or to policy-based (welfare-based) adaptation of law to the particular circumstances of a case. It is often argued that, although apparently similar, civil codes and common law statutes invite very different methods of interpretation and application (Valcke, 1996). But this is a claim not about an institutional difference per se but rather about a behavioral difference, which I argue is a consequence of

1 other institutional differences that affect legal costs, judicial incentives and litigant incentives. The difference lies not
2 in the source of law, but in how law comes alive in the hands of litigants and judges.

3 The model presented above takes the stance that it is not enough to look to the source of legal rules—whether in a
4 comprehensive code, a collection of disparate statutes or judicial opinions—to predict judicial behavior: clearly writ-
5 ten rules in a comprehensive code or statute are not necessarily more constraining of judicial behavior than caselaw.
6 Instead the model directs attention to the incentive a judge faces to follow rules—wherever they are found—as com-
7 pared to the incentive he or she faces to exercise discretion and adapt the rule to new information. It may well be that
8 civil code countries, as Glaeser and Shleifer assume, are more effective at inducing judges to follow rules, but given
9 the presence of equivalently detailed (or not) statutes in common law systems, the form of the code itself cannot be the
10 explanation; rather, it must be explained by the particular institutions that often—but not always—are also adopted in
11 jurisdictions that rely on a code, institutions that generate the payoffs judges experience when they choose to be more
12 or less adherent to established rules. I now turn to examine what those institutions can look like.

13 First, a note of caution. The overview I offer should be understood as a set of generalizations about typical cases
14 and courts and an invitation to more detailed comparative empirical analysis. Largely because of the heavy focus in
15 comparative work on the source of law, there has been relatively little attention to systematic comparative analysis of
16 the finer institutional features of legal regimes and almost none that attempts to operationalize the extent of differences
17 for analytical purposes. Moreover, things can and do change in institutional settings: contingency fees, long prohibited
18 in the UK, are now allowed in some cases, for example. The following generalizations draw primarily on comparative
19 law treatises (Merryman, 1985; Merryman and Clark, 1978; Glendon et al., 1985, 1999; International Association of
20 Legal Science, various years) and information available from the websites of governments, courts and agencies in
21 different countries, together with conventional professional understandings of how legal systems in these countries
22 operate. The focus is on non-criminal law and procedure.

24 3.1. *Judicial careers: the career versus the capstone judiciary*

26 There appear to be two distinctive types of judiciary: the career judiciary and what I call the “capstone” judiciary.

27 Judges in the career judiciary are career civil-servants, typically with little experience outside of the judiciary. In-
28 deed, in some cases, such as (traditionally) France, judicial remove from the world of commerce and ordinary affairs
29 is prized. Judges in these systems generally enter the judiciary directly from law school with a first undergraduate
30 degree in law, undertake specific judicial training offered by the state, and progress through the system from junior
31 positions in low-level courts through to more senior judicial posts. The initial selection of judges is based on perfor-
32 mance on judicial exams. Promotion within the system can mean moving to a higher level court within an area or to
33 the head or presidency of a particular court, or being transferred to a more important or desirable location or type of
34 court. Promotion is generally described as being on the basis of performance reviews, in the civil service tradition,
35 and seniority. Performance reviews are conducted in general by senior judges. The panel that reviews performance of
36 sitting judges in the courts of ordinary jurisdiction in France, for example, is composed of (in addition to the President
37 and Justice Minister) five senior judges elected from the private law courts, a public prosecutor, and four members
38 appointed by the President, Senate, National Assembly and State General Assembly. These four members cannot be
39 private law judges but one must be from the Conseil d’Etat, the supreme court on the administrative side; the others
40 appear to be drawn largely from other parts of the legal profession. Since 1994, for example, of the three remaining
41 appointments, one was president of the Cour des Comptes, a court which oversees the administration of public funds,
42 and one was a law professor. This panel recommends to the President appointments to the 350 senior judgeships in the
43 ordinary courts, and has binding authority to determine all other judicial appointments. The panel is also a disciplinary
44 body, taking disciplinary action against judges, including removal from office. Similarly, in Germany promotion of
45 judges at all but the highest levels within the system is on the basis of evaluation and review by senior judges. In these
46 countries, this peer review of judges is understood as a requirement of judicial independence: judges are evaluated by
47 and as judges, and not by and as policymakers or politicians. The understanding of law as legal science (Germany) or
48 the guardianship of a complete, coherent and clear body of code (France) makes sense of the institution: judges can
49 be trained, selected and promoted on the basis of objective criteria evaluated by those who are specialists in law.

50 While some judges in countries such as the US are in a career judiciary (administrative law judges, for example)
51 the career of most judges in regimes such as those found in the US, the UK and Canada, ~~however~~, follows the capstone
52 model: appointment to the bench is the crowning achievement of a successful career as a practicing lawyer. Entry into

1 the judiciary in the US and Canada, for example, comes after completion of a first undergraduate degree in a subject 1
2 other than law, a graduate degree in law, admission to the bar and a fairly lengthy period of practice as an attorney (at 2
3 least 10 years, for example, in New York and Ontario). 3

4 In many capstone judiciaries, appointment to the bench is significantly affected by politics. Judges are either ap- 4
5 pointed by elected officials (the Attorney-General in Canada, the President, governors and legislatures in the US) 5
6 or elected by popular vote, sometimes based on political party nomination; in many US states, judges who are ap- 6
7 pointed initially by governors or legislators are subject to retention elections by popular vote (Hanssen, 2004). In the 7
8 UK selection among judicial candidates was formerly made by the Lord Chancellor—now also Secretary of State for 8
9 Constitutional Affairs—a Cabinet Minister drawn from the politically appointed House of Lords. As of 2006, however, 9
10 selection has been vested in an independent Judicial Commission; the Lord Chancellor must approve a recommended 10
11 appointment but cannot select alternative candidates. Whereas senior judges appear to play the primary role in evaluat- 11
12 ing the merit of judges in career judiciaries, evaluation of potential candidate for judicial office in capstone judiciaries 12
13 is substantially affected by the judgments made by practicing lawyers and members of the public. Utah state judges, 13
14 for example, are periodically evaluated by the judicial council based on surveys of lawyers and jurors. In Ontario, 14
15 the judicial nominating committee that determines the list from which judges are selected by the Attorney General 15
16 consists of 7 lay members and 6 members of the legal profession, including lawyers and judges. Promotion in the 16
17 capstone judiciary is far less routine than in the career judiciary; the vast majority of judges will remain at the court 17
18 and in the position they were appointed to for the duration of their judicial careers (Klerman, 1999). Promotion when 18
19 it does happen proceeds through the same process as initial selection. There is no formal role for peer review by senior 19
20 judges within a particular court system. 20

21 3.2. Court specialization 21

22 Legal regimes can be organized along more or less specialized lines. At one extreme, we could have a single general 22
23 jurisdiction court that hears all types of matters; at the other we could create separate courts for each individual area 23
24 of law. In practice, modern legal regimes all use some degree of specialization. Countries such as the US and the 24
25 UK rely heavily on general jurisdiction courts that are empowered to hear almost any type of claim (civil, criminal, 25
26 administrative and constitutional) but use specialized courts in areas such as small claims, traffic infractions, tax 26
27 matters, family disputes, bankruptcy cases, and so on. Although there can be overlaps in jurisdiction, countries such 27
28 as Germany and France typically have separate courts for ordinary private law matters (contract, tort, property), 28
29 criminal law, commercial law, employment law, social security matters, administrative law and constitutional law. 29
30 Specialization in all regimes may also occur *as-de facto*, as litigants flock to particular courts; examples include the 30
31 Delaware court for US corporate law, and some state courts that receive high volumes of tort or patent infringement 31
32 claims in the US. 32
33 33

34 The key distinction between these systems in terms of the extent of specialization is found in the pattern of appeal. 34
35 In the US and the UK, specialized courts (such as bankruptcy courts or administrative agencies) feed into general 35
36 jurisdiction courts. Sometimes the pattern is reversed, with more general jurisdiction courts feeding into specialized 36
37 appellate courts (such as the Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent 37
38 appeals in the US). Some specialized lower courts (notably Article I courts in the US such as the Court of International 38
39 Trade or the Court of Federal Claims⁴) feed into specialized intermediate appellate courts (e.g., the Court of Appeals 39
40 for the Federal Circuit). In all these cases, however, ultimate appeal is located in a single supreme court. In the US 40
41 the only separation at the final appellate level is along state and federal lines. In countries such as Germany and 41
42 France, however, the lower specialized courts generally feed into higher specialized courts, with a separate supreme 42
43 court for that area. In France, the division at the highest level is between three areas: public law matters (administrative 43
44 44

45 45
46 46
47 ⁴ Most federal courts in the US are Article III courts, which are created by the Constitution and which must be overseen by judges with lifetime 47
48 appointment; these are general jurisdiction courts which may hear any matter arising under federal law, involving the federal government as a party 48
49 or involving parties from different states (diversity jurisdiction) provided the matter involves a minimum dollar amount in dispute. Under Article I, 49
50 Congress may create special courts, which may be staffed by judges who do not enjoy lifetime appointment; examples include the courts established 50
51 within federal agencies and staffed by administrative law judges who hear, for example, appeals from social security determinations, the Court of 51
52 International Trade, the federal Tax Court, and the Court of Federal Claims. Appeal from these courts is to an Article III court, ultimately the US 52
53 Supreme Court. 53

jurisdiction, actions between citizen and the State), private law matters (ordinary jurisdiction, actions between citizens) and constitutional matters. At the highest court for ordinary jurisdiction, the Cour de Cassation, specialization is maintained with separate chambers that hear appeals in different areas. (In some cases, an appeal may be heard by judges drawn from multiple chambers.) In Germany, the divisions are more extensive, with separate supreme courts for constitutional, administrative, tax, labor, social insurance and private matters (including criminal law).

3.3. Information distribution

One of the critical attributes of the institutional setting for a legal regime is the nature and extent of information sharing. I will focus on two particular types of information: information about cases and decisions, available to those other than the judge(s) who decided the cases; and information about the performance of individual judges. Legal regimes differ substantially with respect to the sharing of information of both types.

As a starting point, it is important to remember that most courts prepare written statements of their decisions, which are held in the case file. The question concerns when, how and to whom the contents of those decisions are distributed beyond the parties and at what cost. The written accounts of case decisions are more widely, probably much more widely, available and at lower cost in some legal regimes than in others. In countries such as the US and Canada, for example, electronic access to the decisions of both trial and appellate courts in the state and federal systems is widely available both to the legal profession and to the public at large. Even decisions that are not “published” in the US, in the sense of being citable as precedent, are generally available in electronic databases. In countries such as Germany and France, on the other hand, there has traditionally been more restricted publication, with an emphasis on important cases from higher courts. Although this is changing, perhaps rapidly, electronic access is more limited, making court decisions less available to the legal profession and the public at large.

Even if court decisions are published, however, the amount and type of information conveyed by the published decision varies across legal regimes. Although I know of no systematic effort to measure this, it appears to be the case that case decisions in the US and Canada, for example, are substantially more detailed in their narration of the facts and substantially more expansive about their reasons than in France and somewhat more so than in Germany. With respect to decisions from higher courts, [Lasser \(2004\)](#) has documented the sharp divide in information distribution as between the French Cour de Cassation, the European Court of Justice and the US Supreme Court. In the French Court, although extensive judicial analyses of a case (including policy arguments and citations to precedent) may be distributed to other members of the Court, the published decision is exceedingly brief, written in the style of an extended multi-clause sentence, and *conclusive* in the sense that it states simply that a particular legal conclusion is or is not reached. As some scholars have observed, “French decisions are not considered to be very enlightening as to the true bases of a court’s decision or of the difficulties encountered in arriving at it” ([Glendon et al., 1999](#)). German court decisions appear to be lengthier, provide greater factual detail and more discussion of reasons but still appear to be systematically shorter and less detailed than American cases. Commentators (legal academics) play a key role in France and Germany with their detailed analysis of cases often published alongside judicial opinions, but these no doubt vary in the extent to which they focus on legal reasoning as opposed to facts. Unlike the trial court judge who both hears the evidence and writes the opinion, commentators must rely on whatever version of the facts are made available outside of the court. Systematic empirical study of variations among countries would give us a much better sense of how this important attribute varies, particularly within the conventional “common law” and “civil code” categories. Those in the common law world, for example, are well aware that modern American cases are generally far denser in facts and reasoning than modern Canadian and British cases or older American cases.

The publication of cases in different regimes also reveals different degrees of information about particular judges. In Anglo-American systems, the identity of the judge or judges who decide a case is uniformly included in the decision of the court. American court opinions are almost always signed by an authoring judge. At the appellate level with multi-judge panels, identification of the authoring judge is the rule, with an indication of which judges joined in the opinion; concurring or dissenting opinions are not uncommon and indeed routine at the Supreme Court level. An opinion from a British or Canadian court also identifies the author at the trial level; cases at the appellate level increasingly identify the author of a particular opinion and carry concurring or dissenting opinions. Even where an appellate decision is unanimous (as is the older tradition in British and Canadian courts), however, the identity of the judges on the panel is known. In some courts, judges can even attain a level of celebrity—Supreme Court judges are often the subject of biographies, appellate judges (such as Judge Richard Posner) the subject of profiles in popular magazines such as

1 *The New Yorker*, and even trial court judges may, in cases of sufficient public interest, find themselves the subject 1
2 of newspaper articles and (increasingly) blogs on the Internet. In contrast, French and German judges are far more 2
3 invisible to the public. Decisions in France and Germany generally do not identify an author of a decision. Dissenting 3
4 or concurring opinions are rare if not unheard of. Senior judges may be known within broader professional circles but 4
5 are unlikely to be the subject of popular commentary. 5
6

7 3.4. Procedure 7

8
9 It is conventional to identify common law courts as following an adversarial process, in which lawyers are active 9
10 and judges are passive in shaping issues and collecting evidence, and civil code courts as following an inquisitorial 10
11 process, in which judges are responsible for shaping issues and collecting evidence. The distinction is generally 11
12 overdrawn: judges in common law jurisdictions are increasingly active in pre-trial stages in managing the identification 12
13 of issues and the collection of evidence through discovery; lawyers in civil code jurisdictions are able to propose issues 13
14 and sources of evidence (Langbein, 1985). 14

15 But even accounting for the overstatement of the differences, it is true that lawyers play a much greater role in 15
16 shaping issues and collecting evidence in some legal regimes than in others and that the differences are to some ex- 16
17 tent located in institutional, as opposed to behavioral, differences. Judges in some regimes (Germany, for example, 17
18 Langbein, 1985) are authorized to seek out evidence on their own account, contacting authorities for copies of doc- 18
19 uments, for example, or appointing experts; judges in a typical Anglo-American regime must look only to evidence 19
20 that is presented by the parties and would violate clear rules against *ex parte* contacts if they engaged in their own 20
21 fact-finding. Moreover, there is no general practice of American-style discovery in many regimes, in the sense of the 21
22 document and deposition (oral examination) demands made and carried out by the parties themselves, subject only to 22
23 supervision by the court for abuse ~~when parties resist such demands and seek judicial protection.~~ In countries such as 23
24 France and Germany, for example, evidence is sought by an individual party by making a request that the court obtain 24
25 particular documents or testimony. Lawyers for the parties propose lines of questioning to be conducted by the judge; 25
26 no lawyer-conducted cross-examination is available. 26

27 The collection of evidence in many legal regimes is also affected by the use of a different judge, an examining 27
28 or hearing judge, for purposes of collecting evidence. This judge then prepares a summary of testimony (which may 28
29 not be otherwise recorded), which is forwarded to the judges (often more than one) who will decide the case. In 29
30 Anglo-American trial courts, in contrast, evidence is heard in the first instance by the same judge (usually one) who 30
31 will decide the case. The evidence is not reduced to a judicially-determined record but rather is retained in its original 31
32 received form through transcripts, exhibits, etc. 32

33 Judges in some regimes have greater opportunity than others for shaping the content and sequencing of issues, 33
34 with important implications for the collection of evidence and legal argument. In Anglo-American regimes, although 34
35 there are pre-trial motions governing the collection of evidence or the resolution of questions of law, evidence itself 35
36 is heard during a single event—the trial—at the conclusion of which a final decision is rendered by judge or jury. 36
37 In regimes such as those in France and Germany evidence is heard and decisions made in a series of short hearings, 37
38 in piecemeal fashion, and often on the basis of documents and written submissions alone; there is no ultimate ‘trial’ 38
39 at which evidence is presented orally by the parties and a final decision rendered. Judicial control over fact-finding 39
40 in such a regime is thus importantly exercised through judicial identification of disputed issues of fact and judicial 40
41 determination of how and in what sequence disputed facts will be resolved. 41

42 The use of juries is sometimes identified as a key difference between common law and civil code regimes, but in 42
43 reality the use of juries beyond the criminal setting is relatively rare outside the US. Civil juries are virtually non- 43
44 existent in the UK. In Canada, some provinces prohibit civil juries entirely, while in other provinces the availability of 44
45 juries is a matter of judicial discretion; in one study, it was estimated that juries heard cases in 3–10% of civil trials in 45
46 British Columbia, and 22% in Ontario in the early 1990s (Bogart, 1999). Even in the US the actual incidence of jury 46
47 trials is low; Hadfield (2005) estimates, for example, that in 2000 approximately 37% of contested⁵ US federal civil 47
48 cases were disposed of by judicial decision on a pre-trial motion or a bench trial while only 2.5% were disposed of 48
49 after a jury trial; there were almost three times as many bench trials as jury trials. In the states, jury trials are generally 49
50

51 ⁵ The calculation of trial rates here excludes cases that are abandoned or defaulted or terminated without a final disposition (such as by transfer 51
52 to another court). 52

not available in small claims matters, which are estimated to comprise roughly half of all civil filings (Schauffler et al., 2006); very roughly speaking, approximately 1% of other civil matters (contract, tort, probate, property, etc.) are resolved by a jury trial, 7% by a judge trial.⁶

Juries are not the only method by which members of the lay public may participate in court. In many countries such as France and Germany, first-instance courts are composed on panels of judges which combine professional judges with lay judges who possess expertise in the court's area of jurisdiction (for example, commercial law).

Legal issues, and hence evidentiary investigations, are also shaped by the rules governing appeal. In Anglo-American regimes, the trial court has primary control over the determination of evidentiary issues; appeals are largely limited to legal questions with only narrow review of factual determinations to identify gross errors; review of jury factual determinations is highly limited, allowing a reversal or remand on appeal only in the event that there exists no evidence to support a jury's (often implicit) factual findings. Litigants forego their opportunity to appeal on legal issues they have not raised, and presented evidence about, to the trial court in the first instance. If an appellate court in these regimes determines that the correct legal rules require additional fact-finding the case is sent back to the trial court to conduct further evidentiary proceedings, but the successful appellant must have sought to raise this issue and enter this evidence at the original trial. In many legal regimes, however, appellate courts are generally free to re-examine facts as well as legal issues. Moreover, if a case is remanded by the appellate court (as it must be in France, for example, if the Cour de Cassation finds legal error; as that court generally cannot enter a decision, it can only annul the first decision) it is sent to a different (set of) judge(s) than the one that entered the initial decision. The new trial court is often not bound by the higher court's interpretation of the law (although this is clearly persuasive) and new factual investigations may continue, whether they were raised in the first instance proceedings or not.

At the final stage of procedure, in some legal regimes a judgment (to pay damages, for example) is a court order; even private settlements can be entered as court orders. As such, failure to comply with the judgment or settlement is not merely another private wrong or breach of contract; it is contempt of court, a public wrong enforceable using public enforcement techniques, including fines and imprisonment, as well as the services of public officers such as the local sheriff (although the identification of assets is still largely up to the judgment holder, a process that may require private services). In other regimes, in contrast, a judgment merely gives the holder of the judgment the right to proceed (often privately, through the services of another legal professional known as a bailiff or enforcer) to identify assets against which the judgment can be exercised; there is no sense in which the failure to comply with the order is a public wrong, merely another private wrong. Thus there is no procedure for seeking a contempt order enforced by punishments such as fines or imprisonment.

3.5. Markets for legal services

Although much is made of the different 'style' of legal practice in the US as compared to civil law (and indeed, other common law) countries, differences in the organization and regulation of the legal professions across countries have historically been small. The legal profession in most regimes is a self-governing entity with substantial controls over entry and practice, including restrictions on the form of practice (generally a restriction to partnerships) and competition. Changes in the professions worldwide over the last several decades have increased the extent of differences across countries, although the greatest divergence appears to be between the US and most other countries.

The US and Canada have among the most restrictive rules limiting who may practice law: anyone who has not been admitted to the state (provincial) bar and who provides either advice or advocacy services in that state engages in the unauthorized practice of law and is subject to civil or criminal penalties. The UK, in contrast has few limits on who may provide advice or advocacy services; there is a small set of tasks (such as drafting particular documents) that must be done by a licensed solicitor and only some members of the bar (or other professional associations⁷) may appear in

⁶ These are rough approximations only, based on samples drawn by the National Center for State Courts. Analysis of the more complete data available for the federal courts in Hadfield (2005) determined that the error rate in the federal data was very high and used auditing techniques to correct the estimate based on trial data. A similar method has not been employed with respect to the state data and these estimates should be viewed with enormous caution.

⁷ The UK, which has long had the distinction between solicitors and barristers, has recently introduced a third professional category: legal executives. There are various levels and types, as well as training opportunities, for legal executives; some are granted the right to appear in some courts. See <http://www.ilex.org.uk>.

1 some courts. In countries such as France and Germany, lawyers must be duly admitted to the relevant bar association 1
2 in order to engage in private practice, but need not be bar-admitted to provide legal services as an employed company 2
3 lawyer to their employer. In these cases, employed lawyers are sometimes prohibited from appearing in court or 3
4 engaging in private practice. Essentially all countries restrict the practice of law to those who have been admitted to 4
5 practice in that country and many limit the capacity of foreign lawyers to form associations with domestic lawyers. 5
6 (For an overview, see Hadfield, 2007_k) 6

7 Restrictions on the provision of legal services are also imposed on the form of organization offering legal services. 7
8 By and large, legal practice is restricted in most countries to solo or partnership forms. In the US non-lawyers may not 8
9 own or share in the revenues of a firm providing legal services; one implication of this is that a law firm cannot engage 9
10 in ‘multi-disciplinary practice,’ providing legal advice within the same firm as those providing accounting services, 10
11 for example. Multi-disciplinary practice is not, however, prohibited in countries such as France and Germany. In some 11
12 countries, lawyers have historically been prohibited from being employed by other lawyers (requiring all lawyers to 12
13 practice as partners with direct client relationships) and from opening more than a single office, thus restricting the 13
14 size of firm; the US and the UK lack such restrictions. Advertising restrictions have largely been eliminated in the US 14
15 and (more recently) other Anglo-American jurisdictions such as Canada and the UK, whereas they continue in many 15
16 regimes in forms ranging from outright bans on anything other than a nameplate to prohibitions on the identification 16
17 of past clients or specialties. Similarly, whereas bar association price controls have long been struck down in the US 17
18 as antitrust violations, statutory fees continue to be found in many countries. In Germany, for example, the fees for an 18
19 uncontested divorce are calculated by the court based on the income in the marriage. In Canada and the UK, review of 19
20 the reasonableness of fees by the law society can be obtained (called assessment) and excessive fees reduced. Many 20
21 jurisdictions follow the practice of requiring a losing party to pay the winner’s legal fees (the “British rule,” generally 21
22 limited to a judicial determination of reasonable fees, not actual fees, unless there has been misconduct); the US 22
23 appears to be an outlier in following the “American rule” under which parties, win or lose, are responsible for their 23
24 own legal fees in the absence of express statutory provisions shifting fees to the losing party. The US is also an outlier 24
25 in allowing extensive use of contingency fees and class actions. Finally, many countries, such as Germany, Canada 25
26 and the UK, subsidize legal fees, providing state-compensated lawyers for low-income litigants (including plaintiffs) 26
27 engaged in civil or criminal lawsuits; in the US, the state provides legal assistance only for criminal defendants. 27
28

29 3.6. Summary 29

30
31 Table 1 provides a summary overview of the typical institutional features of four major legal regimes: the US, the 31
32 UK, France and Germany. In the common law versus civil code literature, the US and the UK are generally identified as 32
33 the paradigmatic common law regimes, while France and Germany are the paradigmatic civil code regimes. It is clear, 33
34 however, that when we look beyond the conventional focus on the source of law, there are substantial overlaps and 34
35 differences that do not map one-to-one with the common law/civil code distinction. Moreover, there is intra-category 35
36 variation, even in this small set of example regimes. 36
37

38 4. Institutional determinants of adaptation parameters 38

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40 In this section I turn to analysis of the relationship between the institutional attributes discussed above and the 40
41 parameters identified in the model as determinative of the extent to which a legal regime will adapt its legal rules to 41
42 new and changing conditions. 42
43

44 4.1. Judicial rewards for legal adaptation (α_j) 44

45 4.1.1. Judicial careers 45

46
47 The differences between the career and the capstone judiciary suggest the possibility for important differences in 47
48 judicial incentives. The key observation is that the nature of the judiciary determines the judge’s audience—the set of 48
49 evaluators who determine the rewards associated with judging, whatever they might be (prestige, money, promotion, 49
50 etc.) The model predicts that differences in judicial incentives can lead to differences in judicial behavior, specifically 50
51 the tendency of judges to follow or adapt rules and their receptivity to arguments based on the welfare effects of 51
52 established rules. 52

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Table 1

Institutional attribute	US	UK	France	Germany
Judicial career	Capstone	Capstone	Career	Career
Court specialization	Low	Low	High	High
Information distribution	High detail legal reasoning. No detail facts (jury trial). High detail facts (bench trial). Extensive, public distribution. Judges publicly identified.	High detail legal reasoning. No detail facts (jury trial). High detail facts (bench trial). Extensive public distribution. Judges publicly identified.	Low detail legal reasoning. Low detail facts. Limited, professional distribution. Judges publicly anonymous.	Medium detail legal reasoning. Medium detail facts. Limited, professional distribution. Judges publicly anonymous.
Procedure	Single event trial. Extensive discovery and admissibility of evidence. Issues defined and evidence sought only by litigants. Widespread use of lay jurors. Single judge (first instance). Appeal on law only. Public enforcement of judgment.	Single event trial. Substantial discovery and admissibility of evidence. Issues defined and evidence sought only by litigants. Restricted use of lay jurors. Single judge (first instance). Appeal on law only. Public enforcement of judgment.	Sequenced hearings. Narrow discovery and admissibility of evidence. Issues defined and evidence sought by judges and litigants. Restricted use of lay judges. Single judges and panels (first-instance). Appeal on facts and law. Private enforcement of judgment.	Sequenced hearings. Narrow discovery and admissibility of evidence. Issues defined and evidence sought by judges and litigants. Restricted use of lay judges. Single judges and panels (first-instance). Appeal on facts and law. Private enforcement of judgment.
Legal services market	Closed profession. Unregulated fees. Law firm organization restricted. Contingency and class actions allowed. Loser pays own fees only.	Open profession (advice, lower court advocacy). Closed profession (higher court advocacy). Professional review of fees. Law firm organization unrestricted. Contingency and class action restricted. Loser pays own and winner's fees.	Closed profession (private practice). Open profession (corporate counsel). Statutory regulation of fees. Law firm organization highly restricted. Contingency and class action not allowed. Loser pays own and winner's fees.	Closed profession (private practice). Open profession (corporate counsel). Statutory regulation of fees. Law firm organization highly restricted. Contingency and class action not allowed. Loser pays own and winner's fees.

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1 Many traditional comparative studies conclude that a defining difference between the common law and civil code 1
2 judiciary is a differential orientation to the trade-off between legal certainty and flexibility (Merryman, 1985). Legal 2
3 reasoning in civil code jurisdictions, particularly those based on Germanic legal science, is conventionally thought to 3
4 favor a process that extracts and refines abstract principles of law whereas legal reasoning in common law jurisdictions 4
5 favors outcome-oriented and pragmatic analysis. In the recent law and economics literature, Georgakopoulos (2000) 5
6 argues that there is a greater likelihood that civil law judges in a career bureaucracy, as compared to common law 6
7 judges, will follow rules in order to please senior judges who control promotion and transfer. Posner (2005) also 7
8 predicts that civil code judges in a career bureaucracy will tend to follow rules and not to innovate. Ramseyer and 8
9 Rasmusen (1997) reach similar conclusions based on their study of judges in Japan's civil code regime. Levy (2005) 9
10 develops a model of common law judging in which judges are influenced by career concerns—specifically the extent 10
11 to which they will be judged to be of high ability—and predicts that judges who are evaluated by legal outsiders who 11
12 learn about the judge's ability only through appeals (which are endogenous) will be more 'creative' (contradicting a 12
13 prior line of cases) than those who are evaluated by insiders (other judges who can audit the quality of a judge's work 13
14 whether the judge is appealed or not). 14

15 My claim is that differential judicial rewards for rule adaptation and rule following are structured by institutional 15
16 features that imply that career and capstone judges are, in effect, evaluated by different audiences. As a broad gen- 16
17 eralization, career judges are assessed by a relatively insulated and homogeneous audience—primarily senior judges. 17
18 Capstone judges, in contrast, are evaluated by an audience that can include litigants, practitioners, politicians, the 18
19 media and the general population. An audience that is composed of those affected by legal decisions and those who 19
20 have intimate knowledge of the environment in which the legal rule is operating is potentially more interested in the 20
21 end result of legal decision-making and thus in the adaptation of rules to local or changing circumstances than is an 21
22 audience dominated by senior judges who must manage a judicial bureaucracy. This not to say that either audience 22
23 is disinterested in the alternative approach to judicial decision-making: senior members of the career judiciary no 23
24 doubt do care about rule adaptation, and members of the wider public in countries with a capstone judiciary do care 24
25 about whether judges follow rules. It is to say, however, that the distribution of judicial rewards in these institutional 25
26 environments is likely to be different, and in particular for more judges to derive higher rewards from rule-adaptation 26
27 in a capstone setting than a career setting. 27

28 Even if there were no inherent differences in the evaluative criteria that the capstone and career judicial audiences 28
29 might bring to bear, differences in the information available to these audiences can support the claim that judges in 29
30 capstone regimes face judicial rewards that place greater weight on rule adaptation. The capstone audience often con- 30
31 tains those who bear the welfare effects of legal rules (litigants and potential litigants), and those who have incentives 31
32 to discover, publicize and respond to welfare effects (the media, politicians, etc.). The career judge's audience, on the 32
33 other hand, is much more insulated. Even if senior judges in the career judiciary are interested in the welfare effects of 33
34 the rules implemented by the judges they supervise—as they undoubtedly are—they face higher costs of discovering 34
35 and interpreting those effects. Indeed, it is hard to see how any judges learn about welfare effects systematically other 35
36 than through the evidence and argument presented to them in the course of their work as judges. 36

37 Finally, although the model presented above abstracts from judicial corruption and assumes that all judges pay 37
38 the same normalized price when they make rule changes that are later judged to be erroneous (receiving a payoff of 38
39 zero), in a more general setting we might expect that judges in a capstone judiciary are less vulnerable to penalties 39
40 for errors. Capstone judges clearly have better 'exit options' than career judges, in that they can (and do) return to the 40
41 practice of law. Moreover, judges who establish reputations on the bench are increasingly drawn out of the courts into 41
42 private judging and arbitration positions in the US and Canada. Career judges, particularly if they are invisible, likely 42
43 have fewer exit options. This effectively increases the net expected reward for welfare-promoting rule adaptation by 43
44 reducing the downside for capstone judges as compared to career judges.⁸ 44

45 Some of the attention to welfare effects in the capstone regime may be problematic, as judges seek to please 45
46 particular factions or interests. And, indeed, the function of the career judiciary can be understood as an institutional 46
47 effort to move the evaluation of judges away from outcome-based criteria to meritocratic and objective criteria that 47
48 are impervious to the consequences for particular individuals or groups. Recent reforms in the UK, for example, 48
49 emphasize the effort to shift selection from political to meritocratic criteria. But as a generalization, it seems fair to 49
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51
52 ⁸ I am grateful to an anonymous referee for pointing out the importance of exit options here.

1 suggest that the career judge's audience and the capstone judge's audience place different weights on rule-following
2 and rule-adaptation.

3 4 4.1.2. Court specialization

5 Specialized court systems may also generate different judicial incentives than more generalized systems. The model
6 summarized in Section 2 assumes that judicial incentives are sensitive to ex post assessments and valuations of whether
7 a judge who adopted a new rule "got it right." In this sense, judicial incentives can be sensitive to how well-informed
8 is a judge's audience and how much that audience values welfare-promoting rule change. If the judicial audience is
9 dominated by those outside the court system, court specialization may have little impact on the capacity of that audi-
10 ence to judge the welfare effects of rule adaptation or on the audience's valuation of welfare-promoting changes. If,
11 however, the judicial audience is primarily other judges, particularly senior judges in the same specialized court, then
12 specialization may influence a judge's expectations about the risks of how rule-change will be assessed. Specializa-
13 tion often promotes more detailed and expert knowledge, suggesting that specialized reviewers may be more able to
14 identify the welfare implications of legal change. Specialization may also, however, inhibit innovation and creativity,
15 by leading reviewing judges to over-value the established way of resolving a dispute, undervaluing the benefits of
16 adaptation. A senior judge who has seen hundreds of patent disputes may be less open to new information or ways of
17 thinking than a judge who has seen only a few.

18 Court specialization may also lead to an inadvertent form of capture, as courts, whether organized in a career or
19 capstone judiciary, identify with the interests of a particular set of litigants and are less attuned to the interests of
20 other, particular, new sets of interests. In the US, for example, there is some concern that specialization of appellate
21 jurisdiction over patent cases in the Federal Circuit has led to an overly pro-patentee orientation. This may come from
22 outright elevation of the interests of a sub-group—a form of judicial corruption—but it may also come from the impact
23 of exposure to the facts and arguments of repeat players in a specialized court. Conversely, if litigants are limited to
24 having their cases heard in only a particular court—and therefore do not have the capacity to shop for a forum—court
25 specialization may blunt judicial incentives precisely because the audience is captured. One of the ways a court system
26 may learn about the welfare impact of its rulings is through litigants' decisions about which courts they prefer to have
27 hear their cases. More generalized jurisdiction courts may thus be in greater 'competition' for cases and hence do a
28 better of job of identifying what is and what is not a welfare-promoting rule change.⁹

29 30 4.1.3. Information distribution

31 The distribution of information in a legal regime can have a significant impact on judicial incentives. Consider
32 first the extent to which information about a judge's identity is shared. A judge will see a potential return to welfare-
33 promoting rule adaptation ~~only~~—beyond personal satisfaction ~~only~~—if that judge is identified [^]an audience as the
34 source of the rule change. A judge who is anonymous to the public and whose identity, linked to [^]the judge's work,
35 is known only to court insiders will see returns to rule adaptation only to the extent that these insiders value rule
36 adaptation. A judge who is identified to a broader public audience, in contrast, may evaluate rule adaptation in ways
37 that take into account how litigants, lawyers, experts, the media and so on value rule change. Similarly, if a judge
38 is identified but only as a member of a multi-judge panel, with decisions issuing from "the court" and not with the
39 opinion of particular judges, then while it may be possible for close observers to extract information over time about
40 the role any individual has played in rule adaptation, this process will result in lower returns to rule adaptation, *ceteris*
41 *paribus*, than a system that links an opinion directly to a particular judge.

42 The ability of a judicial audience to reward rule adaptation or not is clearly much more limited if a shared document
43 is not produced or if any shared document fails to reveal the facts or reasons in play. If the potential for legal error
44 cannot be judged, its avoidance cannot be rewarded. Where the judicial audience is limited to senior judges and court
45 insiders, this is just a matter of how information is generated and made available within the review process. Where
46 the judicial audience ostensibly includes a wider public, however, differences in incentives can arise as a result of the
47 extent to which judicial opinions discuss evidence, factual findings and legal reasoning. Short, conclusive [^]opinions
48 seem likely to generate weaker judicial incentives for rule adaptation than extensive opinions, provided (an empirical
49 assumption) that an audience is able to accurately interpret the reported facts and reasoning; if the volume of facts and
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52 ⁹ I am grateful to an anonymous reviewer for suggesting this connection to the jurisdictional competition literature.

reasons is excessive, it is conceivable that the audience will make more rather than fewer errors in identifying when rule adaptation is welfare-promoting.

Finally, a detailed explication of a judicial opinion in the form of commentaries by legal academics, while undoubtedly providing substantial material of value to future litigants and judges, is critically different from the detailed explication of a judicial opinion provided by the judge who rendered the opinion: the latter is attributable to the judge while the former is not. In addition, an opinion is written as a first-hand account of evidence heard, not on the basis of distilled evidentiary findings. Moreover, if commentaries are confined to a professional audience, they cannot support the generation of judicial incentives based on public evaluation of a judge's work.

Procedure Procedural elements can influence judicial incentives also through the extent to which the actions of a particular judge are linked to rule adaptation and made visible to a broad audience. If a legal regime adopts the practice of using a separate examining judge to hear evidence and prepare a judicial summary of factual findings, which is then forwarded to a hearing judge or panel which decides the case, this may blunt incentives for rule change for both examining and hearing judges. Rule change, as made clear in the model, requires decisions about whether to admit evidence and/or hear novel arguments; often the two will be tightly intertwined. An examining judge making evidentiary decisions is likely to see little or no return to potential rule adaptation that depends, ultimately, on what the hearing judge(s) do; and the role of the evidentiary decisions is likely to be particularly hidden from public view. Less obviously, the hearing judge who is presented with factual findings may expect lower rewards for rule change because of his or her constrained capacity to support the decision through the development of the evidentiary record, leading to a reduced likelihood that the decision is seen by the judicial audience to be welfare-promoting.

Other procedural elements can also break or weaken the link between rule change and the actions of a particular judge. If decisions at trial are made by a multi-judge panel, we would expect individual judges to imperfectly internalize the full return to welfare-improving rule adaptation. This effect may not be as strong where the other judges on the panel are lay judges. Where juries are expected to make final judgments, judicial incentives to admit evidence or novel legal theories (which is still controlled by the judge in a jury trial) may be diminished by the judge's lack of control over how the novel evidence or theories are implemented by the jury. Alternatively, judges overseeing jury trials may feel safer in allowing novel theories to proceed precisely because they anticipate that any errors in outcome will be attributed not to their decisions but to the jury's verdict.

4.2. Exogenous legal human capital (K_1)

4.2.1. Judicial careers

The capstone and career judiciaries reflect very different approaches to the process of generating the expertise that judges bring with them to new issues and dilemmas. The capstone judiciary largely relies on the practical experience of lawyering to build the expertise thought necessary; the career judiciary relies on formal training for entry-level judges and then the experience of judging. It is not clear *a priori* which system—in theory—is capable of generating higher levels of exogenous legal human capital.

Judges entering the career judiciary do so directly from a first undergraduate degree in law; their entire professional experience then is accumulated through the lens of what the judge sees. Judges in capstone judiciaries, in contrast, enter the judiciary with an educational background that often includes an undergraduate degree in a subject other than law and only after a relatively lengthy period of time in practice. Their professional experience therefore reflects exposure to the impact of legal rules, particularly through their close relationship with clients and the facts about their legal predicaments. Capstone judges on average are also simply older and more experienced in legal matters. These factors suggest higher exogenous legal human capital in a capstone judiciary.

Career judges, however, receive specialized judicial training, unlike capstone judges who transition directly from practice to the bench. The capacity for formal judicial training to generate exogenous legal human capital then depends on what it is possible to teach in formal ways and what is in fact taught in these programs. Conceivably, a career judiciary system could educate its judges extensively in welfare and policy analysis and the problems of interpreting evidence and drawing inferences from small and biased samples. The process of systematic peer review within a career judiciary could also contribute to the generation of broad-based expertise in deciding when and where rule adaptation will promote social welfare. The capstone regime lack these opportunities for systematic training of judges. Judges are not subject to structured peer review beyond (as is true in both regimes) the assessments made in cases that go

up on appeal. Moreover, lawyers who spend their pre-judicial careers as advocates, with an obligation to look to the welfare of their client and not society as a whole, may be particularly poorly equipped to engage in welfare analysis and entrenched in practical rather than methodical approaches to interpreting evidence.

Ultimately, then, it is an empirical question whether judges with specialized training and experience and subject to peer review in the career judiciary will be more or less equipped to develop welfare-regarding rule adaptations, experiencing lower rates of initial legal error, than capstone judges with practical but ultimately anecdotal experience.

4.2.2. Court specialization

The extent of judicial specialization is likely to have an impact on the exogenous level of judicial legal human capital that a judge brings to a novel issue in the law. To some extent we might expect that a judge who specializes in, for example, commercial or intellectual property matters, has a higher level of legal human capital available when a novel commercial or IP issue arises, and hence is less likely to make errors in recognizing the relevance of new information or distinctions between litigants, facts and cases; as we have seen, this can encourage more extensive rule change in the initial phases (period 1 in the model) both because judges perceive less risk in rule-change and litigants (good defendants in the model) perceive higher expected returns from their investments in efforts to educate the court about the novel features of the environment. Again, however, this is ultimately an empirical question. Specialization may also lead to entrenchment, bias, and higher rates of error arising from exogenous sources.

4.2.3. Procedure

The use of lay jurors or judges in a legal regime may increase the exogenous level of legal human capital in a court system. Historically, the English jury was selected not for their (as now) lack of experience with a case but because of their likely familiarity with the facts and parties prior to trial (Klerman, 2003). Lay judges in modern legal regimes are largely selected because of their prior expertise in a field, such as commercial activity. Depending on who is selected as a lay participant, then, this may be a mechanism for reducing initial legal error, particularly with respect to an understanding of the facts and welfare implications of a case, if not the law.

4.2.4. Codes and statutes

Although I have discounted the conventional emphasis on the source of law as a determinant of differences in the performance of legal regimes, in part because of the widespread presence of statutes in most modern regimes and because different approaches to interpreting statutory language are ultimately the behavior we wish to explain, there is an important way in which differences in legislative practices (i.e., outside the judiciary and hence ‘institutional’ from the perspective of judicial behavior) might influence exogenous levels of judicial legal human capital.

The legislative and/or administrative process by which statutes, regulations and codes affects the quality of the information that makes its way into statutory or code provisions. If legislatures, regulators or private law drafting bodies (such as law reform commissions or committees of legal academics¹⁰) are capable of identifying the need for rule adaptation, obtaining the necessary information to adequately modify the rule, and transmitting that modified rule to courts, then there is less demand from a social welfare point of view for judicial rule adaptation in the context of adjudication. In effect, the scope of judicial adaptation is smaller and the level of exogenous legal human capital (the capacity to make any further adaptations accurately) is higher. Relatedly, if legislation is accompanied by extensive background material that educates the court about the environment in which the rule is to be implemented, judges are likely to come to a new issue with a better grounding in the facts and implications of legal change.

The open empirical question is whether, indeed, legislative bodies are capable of becoming better informed about optimal rule adaptation and implementing rule change as needed than judges. Legislatures may be better able to focus on social welfare, but they might also be distorted by special interests. Legislatures may be better able to research optimal rules systematically, drawing on a wide range of expertise and input; but they may also under-invest in this process because of resistance to public subsidy of rulemaking. Moreover, those with information about the need for and prospective shape of rule change—those directly affected by legal rules—are likely to face free rider problems

¹⁰ In the US, the American Law Institute, a non-governmental organization composed primarily of law professors, judges and other legal experts, drafts model laws which are often enacted largely unchanged by state legislatures, as well as authoritative *Restatements* of the law in specific areas (torts, contracts, etc.) which are widely used by judges in resolving cases. Mattei (1997) notes the similarity between this role for academics in statutory development in the US and the conventional role for academics in the generation of code revisions in civil law regimes.

1 in generating investment in the cost of informing the legislature. One of the virtues of the judicial process of rule 1
2 adaptation made clear by the model in Section 2 is that by harnessing rule adaptation to litigation, litigants are given 2
3 private incentives to invest in generating and conveying the information the public actor (the judge) needs to adapt the 3
4 law. 4

5 6 4.3. Information processing ($i(\Delta)$) 6

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8 Whereas the implications of the above parameters are somewhat ambiguous—higher judicial rewards for rule 8
9 adaptation and higher levels of exogenous legal human capital may, but need not, improve the performance of a legal 9
10 regime—the model described in Section 2 predicts that improved mechanisms of information processing within a 10
11 judicial system will unambiguously improve economic outcomes. The quality of information processing—both the 11
12 volume of information generated in the system and the capacity of the system to use information to reduce judicial 12
13 error—is affected by numerous institutional attributes. As we will see, however, much more empirical evidence about 13
14 how institutions such as courts process information is necessary to make ultimate predictions about how differences 14
15 in these attributes will affect the quality of information processing and thus the capacity of a regime to reduce legal 15
16 error. 16

17 18 4.3.1. Judicial careers 18

19 Judges in a capstone judiciary may be more or less able than career judges to extract error-reducing information 19
20 from the evidence and arguments presented to them and their fellow judges. Again, the question is one of the relative 20
21 importance of practical lawyering as opposed to formal judicial experience for judicial learning. Capstone judges are 21
22 more likely, it would seem, to understand the practical realities of the environments in which litigants operate both as 22
23 a consequence of their personal experience as a lawyer and because of their ongoing membership in a professional 23
24 community of lawyers (rather than judges). On the other hand, judicial remove in the career judiciary may promote 24
25 more systematic and analytical review of the accumulated evidence and arguments presented across multiple cases, 25
26 muting the distortions and biases that can come from anecdote and small samples. So too can the system of regular peer 26
27 review in a career judiciary increase the capacity of a legal regime to extract valuable shared legal human capital from 27
28 the work of individual judges—as cases are reviewed on a systematic merit basis, presumably with the opportunity 28
29 for feedback to members of the judiciary and considered judgment about the quality of decision-making. Capstone 29
30 judges, in contrast, may work in greater isolation, with little systematic review of their cases other than when their 30
31 decisions are appealed to a higher court. 31

32 33 4.3.2. Court specialization 33

34 The extent of judicial specialization is likely to have an impact on the nature of judicial information processing of 34
35 what is learned through litigation. Across a set of judges who specialize in a given court, we might expect that the 35
36 system as a whole does a better job of extracting and aggregating information over time and hence achieves more 36
37 significant reductions in legal error, promoting more accurate adjudication and, again, more extensive adoption of the 37
38 changed rule. A specialized court is likely to see a higher volume and perhaps wider distribution of cases raising a 38
39 particular issue than a generalist court and so may have a better information base on which to operate. 39

40 41 4.3.3. Information distribution 41

42 More restricted transmission of judicial analysis and opinion translates into a lower rate at which individual in- 42
43 vestments in evidence and legal argument accumulate as shared legal human capital throughout the profession and 43
44 specifically beyond a particular court at a particular time. If judges never publish decisions, for example, investments 44
45 made by individual litigants to educate the judge in a particular case may never diffuse into the legal system as a 45
46 whole; they are then largely lost in terms of reducing the rate of error in the court system. 46

47 Restricted publication and opinion-writing practices might also imply not only a lower quantity of information 47
48 available for processing but also less informative processing. This would follow if the ability to ultimately improve the 48
49 judicial capacity to distinguish good and bad defendants depends on the capacity to analyze individual presentations 49
50 as a group, if it is only clear what is ‘good’ about a good defendant when one has seen what a bad defendant presents, 50
51 for example. It would also follow if the systemic ability to evaluate, ex post, the evidence and argument presented by 51
52 good and bad defendants depends on commentary from a variety of sources, such as experts in fields other than law, 52

1 journalists and other members of the wider public. If more information is available to a wider audience this suggests
2 an increased capacity for the regime to squeeze information out of the material presented by interested litigants.

3 If, however, there is a substantial risk that shared legal human capital, based in part on the presentations of bad
4 defendants seeking to lead court into error, will be disinformative, degrading the capacity of judges to distinguish good
5 from bad, then limitations on the distribution of information throughout a regime may protect against error. Indeed,
6 one way of understanding the theory of the career judiciary's greater emphasis on specialized judicial training and the
7 insularity of the professional dialog among the judiciary, the bar and legal scholars is that it is based on the belief that
8 non-experts in law will introduce error and that legal expertise is required to properly filter information.

10 4.3.4. Procedure

11 The structuring of evidentiary proceedings and issue determination has critical implications for the type and quan-
12 tity of information produced in the course of litigation. As most litigators are aware, and the generous approach to the
13 amendment of complaints in some systems recognizes, facts and legal issues often only make their relevance plain
14 as investigation and engagement with the arguments of the opposing side progress. Moreover, some facts and legal
15 issues will only become relevant if other factual and legal issues are resolved one way rather than another: the exis-
16 tence of a contractual term affecting liability will alter the nature of a tort claim, for example. If the term is found
17 to be unenforceable or interpreted not to apply to a particular case, the tort claim will be analyzed in one way; if the
18 contract term is found to be enforceable and applicable in some way, the tort claim will be analyzed in another way.

19 A sequenced approach to resolving the multiple legal questions that are presented in a case will shape the body of
20 evidence ultimately produced by the parties. For example, if the court resolves a contract defense in a tort case early,
21 and in favor of the defendant, the evidence on tort issues may never be heard by the court (and, one can imagine,
22 never investigated by the parties). By way of contrast, if cases are resolved in a single event trial, the presentation of
23 evidence and argument on all issues remains before the court throughout the litigation. This implies that evidence on
24 all issues is generated by the parties and presented to the trial court: even if tort issues are mooted by the ultimate
25 determination of a contract defense, this occurs after the evidentiary proceedings are concluded.¹¹

26 Relatedly, a system that limits appellate jurisdiction to legal review of issues raised at trial and the factual record
27 made in the first instance, may generate more investment in and processing of information than a system that allows
28 appellate courts to raise new legal issues, to seek their own facts and to more freely send matters back for further
29 evidentiary development. In the limited appellate jurisdiction case litigants must try to anticipate and keep open for
30 appeal more issues that appear, initially, only peripherally important as they will have no opportunity to supplement
31 the record if later they emerge as pivotal. In a regime with more generous appellate jurisdiction, late-emerging issues
32 can be subject to investments in evidence only after they emerge. It may be, however, that the more generous system
33 that allows litigants to revisit evidentiary decisions after appeal produces more information—if litigants in restricted
34 regimes forego (or fail to adequately forecast the need for) initial evidence on less obvious issues.

35 If judges have authority to seek out evidence and to develop legal issues on their own, not merely at the behest of the
36 parties, then they may be able to process the information they do receive more accurately. A judge who is dependent
37 on resolving the contradictions in testimony from experts presented by the opposing parties, for example, is likely
38 at a disadvantage relative to one who can seek out independent advice from alternative sources. Analytical efforts
39 to compare the information-processing quality of judge investigation to adversarial party investigation (Milgrom and
40 Roberts, 1986; Shin, 1998; Dewatripont and Tirole, 1999; Froeb and Kobayashi,²), while relatively optimistic about
41 the capacity of adversarial methods to generate reliable information, compare regimes in which investigation is only
42 conducted by judges to regimes in which investigation is only conducted by litigants, rather than regimes in which
43 judges are able to supplement party presentations to ones in which they are not. (For an exception, see Parisi,²)
44 Boudreau and McCubbins,² show, however, that competition between litigants is more likely to produce reliable
45 information when there is some means of verification; the capacity for a decision-maker to independently investigate
46 facts may provide this. Hadfield (1992) also suggests that the capacity for a judge to go beyond the evidence presented

49 ¹¹ This assumes that the contract defense has some contested factual element in it; if it is a purely legal defense, it can be resolved on a pre-trial
50 motion (summary judgment). While in theory this means that the evidence on the tort claim may not be developed until after the summary judgment
51 motion is decided, in modern American trial practice however, it is commonplace for the summary judgment motion to be decided very late in the
52 preparations for trial, even days before a trial is set to begin.

1 in a particular case may help to overcome the inherent bias in the sample of cases that are generated by an established 1
2 rule. 2

3 The limitations on ex parte contacts by judges that we find in adversarial legal systems, however, can also be 3
4 understood as an effort to avoid the potential for independent judicial investigations to be biased. The model in 4
5 Section 2 abstracts from overt bias in the form of a divergence between judicial preferences and social welfare, but 5
6 bias may also arise from the limited investigative capacity of individual judges and the likelihood that any sample of 6
7 information they draw independently will be small. 7

8 A system that grants the parties widespread latitude to seek facts in discovery will accumulate a greater quantity of 8
9 information that may be proffered in evidence. So too will a system that has fewer limitations on what is admissible 9
10 evidence. If a regime is able to reliably sort good from bad evidence and reasons, then this increase in sheer volume 10
11 will increase the effectiveness of information processing. A regime that sorts poorly, however, may merely be led 11
12 further astray when there are few external constraints on what may be heard and processed; this is the problem of 12
13 disinformation, a matter on which there appears to be little research. 13

14 The expectation of a jury trial may also impact the quantity and type of evidence accumulated, even in matters 14
15 that do not ultimately reach a jury but which settle or are disposed of by a non-trial motion (summary judgment, 15
16 for example). Defendants anticipating a jury trial will base their decision to invest in producing evidence and legal 16
17 argument in substantial part on the anticipated errors that juries might make. If the level of errors made by juries is 17
18 higher than that made by judges then the model suggests that the impact of jury trials will depend on relative legal 18
19 costs. If legal costs are sufficiently high that only good types present evidence, then this higher rate of error will 19
20 reduce legal human capital accumulation as fewer defendants seek to present evidence, and judicial willingness to 20
21 admit evidence is unchanged. If legal costs are sufficiently low that bad types are also seeking to present evidence, 21
22 then the higher rate of error in the jury system may increase legal human capital accumulation. 22

23 Where it exists, jury decision-making may also have an impact on legal human capital accumulation through the 23
24 impact on how evidence that is presented is ultimately processed beyond the court that hears the case. Juries generally 24
25 provide no written account or reasons for their judgments; a case resolved by a jury only produces written analysis 25
26 if the judge is called on to rule on matters of law, such as whether the evidence presented was sufficient to justify 26
27 the jury's result or what is the proper legal standard. A system that relied heavily on juries, then, might be one that 27
28 generated less information and shared legal human capital to inform future decision-makers, including judges. 28

29 Finally, the practice of using a judicial summary of evidence—prepared by an examining judge—as opposed to 29
30 verbatim testimony and documents may also restrict the production and processing of information. This depends, 30
31 however, on our assumptions about the quality of information and analysis generated by the different evidentiary 31
32 processes. It is conceivable that specialized examining judges are better able to sift through evidentiary presentations 32
33 to render these presentations informative in the sense of contributing to legal human capital. But it is also conceivable 33
34 that a messier raw database, which includes the full presentations from opposing sides, provides a richer basis for 34
35 learning, particularly if this database is widely available to a diversity of analysts including commentators, journalists, 35
36 regulators, non-legal experts, and future legal providers. The recent federal practice in the US courts, for example, 36
37 of putting all documents filed in a case (not under seal) on a publicly-accessible website¹²—rather than a distilled 37
38 judicial statement of evidence that may directly or indirectly resolve contested factual claims—has substantial impli- 38
39 cations for the availability and processing of information into systemic shared legal human capital. The capacity to 39
40 extract informative legal human capital from case-specific information depends not only on the quantity of informa- 40
41 tion available but also the quality of the analysis of the information, something that may be better done with a diversity 41
42 of perspectives or with attention from specialized legal experts. 42

43 4.3.5. Legal markets 44

45 The structure of the legal services market in a legal regime may also affect judicial information processing. If a more 45
46 competitive market for legal services generates higher quality legal work, then judges will presumably have access to 46
47 higher quality evidence and legal argument. Various restrictions on the market for legal services—statutory fees, bar 47
48 restrictions on admissions, limits on the organizational structure of law firms—may therefore lead to less effective 48
49 learning in courts. If, however, a competitive market does a poor job of generating high quality legal services— 49
50 50

51 ¹² This is the PACER system: <http://pacer.psc.uscourts.gov/>. 51

1 which is the conventional justification for professional control over who may provide services and through what
2 delivery mechanisms—then more highly regulated markets may promote higher quality judicial decision-making.
3 Unfortunately, we have little analytical or empirical evidence on the impact of legal market regulation on the quality
4 of legal efforts.

5 If legal markets tend to be monopolized (as Hadfield, 2000 suggests) then various mechanisms that increase access
6 to legal services may increase both the volume and diversity of information collected by courts and hence improve
7 information processing. Statutory fees, contingency fees, class actions and loser-pays rules, for example, may ensure
8 that courts hear from those who otherwise would not be heard from—consumers, employees, non-repeat players—
9 and thus obtain a fuller picture of the welfare-implications of existing and proposed legal rules. These fee structures
10 may also simply increase the volume of litigation and hence the amount of information made available to courts for
11 learning purposes. On the other, statutory fees which provide inadequate compensation for legal efforts to investigate
12 cases and craft novel legal arguments may limit the quality of information processing.

14 4.4. Legal costs (k)

16 4.4.1. Judicial careers and court specialization

17 The structure of the judiciary and the extent of court specialization could affect the cost to litigants of presenting
18 evidence and legal argument if these institutional attributes, by raising the level of exogenous legal human capital,
19 reduce the expenditure that litigants must make in order to educate a court about new features in the environment.
20 Judges that are relatively expert in commercial law or intellectual property law, for example, probably require less
21 intensive presentations of evidence and legal argument in order to process a case. Specialization seems to be the major
22 source of cost reduction, but it is also possible that capstone judges that are experienced with, for example, litigating
23 commercial cases in their pre-judicial career require litigants to expend fewer resources on demonstrating the context
24 and implications of a proposed legal rule in commercial cases.

26 4.4.2. Information Distribution

27 Publication and explication practices may affect the cost of presenting evidence and legal argument. A broader
28 source of materials on which litigants can draw and more information about how courts in the past have responded to
29 presentations of evidence and argument are likely to reduce the costs to new litigants when crafting their cases. More
30 extensive case opinions, published widely, however may raise the complexity of legal analysis. Hadfield (2000) argues
31 that the level of complexity in law is an important determinant of the level of legal fees, not only via a straightforward
32 cost mechanism but also through the impact of complexity on the competitiveness of the market for legal services. As
33 the model discussed above suggests, the impact of higher legal fees is itself difficult to predict and sensitive to several
34 factors. Higher legal fees may limit the accumulation of legal human capital and hence error-reduction—but in some
35 cases this can eliminate excessive investment in rule change where the benefits of rule change are only realized over
36 time. Higher legal fees can also screen out bad defendants, a benefit if this encourages judges to risk rule-change when
37 it is socially beneficial to do so and/or if information from bad defendants is disinformative, but a cost if judges are less
38 likely to entertain rule change from a pool made up exclusively of hard-to-identify good defendants or if the evidence
39 and argument collected from bad defendants contributes overall to shared legal human capital and error-reduction.

41 4.4.3. Procedure

42 Judicial control over the shaping of issues and evidentiary processes has implications not only for the quantity
43 and quality of information, but also for its cost. The Anglo-American systems, particularly the wide-open discovery
44 of the American system, are much more costly than the systems in traditional civil code regimes such as France or
45 Germany. There is something quite rational, from an expenditure point of view, about structures that allow investments
46 in evidence to be delayed until it becomes clear whether or not the evidence is needed to resolve a relevant issue—until
47 the contract defense has been rejected by either the first instance or the appellate court, for example, putting the tort
48 claims into play. Lower legal costs are inherently economizing. This is the claim made for the “German advantage”
49 made by Langbein (1985). The question, as we have seen however, depends critically on the mix of defendants: costs
50 must be low enough to encourage good defendants to incur the expense of educating a court that makes mistakes, but
51 if they are too low they may encourage bad defendants to enter the game, and hence discourage judges from risking
52 rule-change. The question also depends on the resolution of yet another empirical question, namely the impact of

1 information from bad defendants on information processing and legal human capital: lower cost systems are better 1
 2 if bad information degrades legal human capital but inferior if such information serves to (sufficiently) improve our 2
 3 understanding over time. What is clear is that the institutional shaping of evidence and issues through the role of 3
 4 judges is an important determinant of this cost parameter. 4

5 There is another cost-related implication of different institutional roles for judges in shaping evidence and issues. 5
 6 In the model above it is assumed that litigants can invest in evidence production in all regimes. This not only captures 6
 7 what must be true in practice, even in regimes where judges have the authority to seek their own evidence—even in 7
 8 such regimes litigants may offer to produce evidence—it also makes the results in the model conservative. If litigants 8
 9 are not permitted to present evidence, this effectively makes the cost k infinite. More generally, if judges simply play 9
 10 a larger role in evidence production, we might conjecture that judicial incentives to collect evidence directly are, on 10
 11 net, weaker than those facing defendants seeking to avoid monetary damages. Moreover, it may be that the cost of 11
 12 evidence to the court is higher than it is for defendants, particularly if the premise of the model is met, namely that 12
 13 the circumstances that occasion the potential for rule-change are local and changing and hence better known to the 13
 14 participants in the underlying economic activity than to outsiders. Abstracting from potential differences in the cost 14
 15 of producing evidence, however, systems with a more active role for judges in the production of evidence, however, 15
 16 are characterized by a public subsidy of legal costs which may reduce the cost to litigants and hence produce the 16
 17 behavioral consequences—encouraging more defendants, good and bad, to seek rule change—analyzed in the model. 17

18 4.4.4. Legal markets 18

19 The organization and regulation of the markets for legal services has significant implications for the evolution of 19
 20 legal rules because of the effect on legal costs. In general we would expect less competitive legal markets to generate 20
 21 higher legal costs than more competitive markets. Greater restrictions on entry, advertising, pricing, forms of practice, 21
 22 *a priori*, lead to higher costs. But markets for legal services are complex and subject to multiple, more subtle, sources 22
 23 of non-competitiveness. Legal work is a credence good: its quality is difficult to judge, even *ex post* by experts; as a 23
 24 consequence it is difficult for consumers to compare across providers or select an appropriate cost/quality combination. 24
 25 Legal work is also often highly specialized, both across fields and across clients and cases; as a consequence, there are 25
 26 natural entry barriers that reduce competition among suppliers. Litigation services are often supplied in the context of 26
 27 a process akin to a sunk cost auction: marginal decisions about investing in the next steps of litigation are determined, 27
 28 at each step, by how much is at stake and not how much has already been spent. This is true in a system in which the 28
 29 court is empowered to enter a default judgment against the litigant who stops showing up and incurring legal costs, 29
 30 for example. As a consequence it is easy for legal expenditures to exceed the amount at stake.¹³ 30

31 These features of legal markets are to some extent independent of the legal regime, and inherent in the nature of the 31
 32 nature of the service being provided. But nonetheless we may expect that features of the institutional environment will 32
 33 affect costs. The credence quality of legal services and the extent of specialization is, at least in part, a function of the 33
 34 level of legal complexity; this in turn is a function of the quantity of legal information available and the elaboration 34
 35 of rules that emerges through legal adaptation to new and changing circumstances. The model in Section 2 does not 35
 36 allow for this feedback effect, but we can certainly see that it may be relevant: as law adapts, it becomes more complex 36
 37 and hence potentially more expensive as legal markets become less competitive. Institutional restrictions on lawyer 37
 38 specialization, which include regulations that directly or indirectly limit the size of law firms, may thus help to keep 38
 39 legal costs in check. We might also expect that institutional features of judicial process might influence the extent to 39
 40 which legal costs are subject to the over-investment problem of the sunk cost auction: judicial control over evidentiary 40
 41 proceedings may give litigants greater capacity to shape their investments to the marginal value of the investment. In 41
 42 addition, some legal regimes do not give the court the authority to enter a default judgment, which is what makes past 42
 43 investments irrelevant for a litigant who is contemplating whether to make further investments in order to protect the 43
 44 full amount at stake. The litigant who quits before the end in the Anglo-American litigation process foregoes the full 44
 45 amount at stake through default judgment. More generally, where there is greater responsibility placed on the court 45
 46 to adduce evidence and argument, litigants face less risk that if they fail to present evidence rebutting even a weak 46
 47 presentation from the other side they will lose¹⁴; passive courts judge only the relative legal arguments and evidence 47
 48 made, not their absolute quality. 48

51 ¹³ For a more extended analysis of distortions in the market for legal services, see Hadfield (2000). 51

52 ¹⁴ For an analysis of how this attribute of procedure affects contracting costs see Langbein (1987). 52

4.5. Damages (*D*)

The level of damages in a legal regime is largely determined by substantive legal rules and thus not an inherently institutional attribute. Legislatures in any regime can allow, or not, the award of punitive or non-compensatory damages, for example.¹⁵ But aspects of procedure can also influence the level of damages that emerge in practice, quite apart from substantive legal rules on damages.

4.5.1. Procedure

The use of juries to set damages can alter the implementation of substantive legal rules governing the levels and categories of damages available. There is widespread belief that American juries award higher damages than a judge would in a comparable case, but the evidence on this question is thin (Clermont and Eisenberg, 1992; Eisenberg et al., 2002). What is at least analytically clear is that the determination of damages by one-shot juries is likely to lead to different awards than judges, who are professionalized in this role, will make. Juries have less context for their decision and little basis for comparison across cases. Moreover, jury awards (like jury verdicts) are generally not explained; there is no reasoned statement of how the jury responded to various arguments about how damages should be set. They are thus largely unreviewable. Judges, on the other hand, to the extent they provide reasoned decisions, must explain and defend their assessment of damages. This likely alters the process of arriving at a number, the number reached, and the extent to which an appellate court can modify an award.

The institutional setting for enforcement of judgments also has implications for the level of damages. Defendants' decisions to invest in the production of evidence and legal argument—to seek rule change—are determined not by the ordered amount of damages but rather by the amount they expect will ultimately be collected. ~~(If we recast the model so that plaintiffs are the ones who may seek rule change and have to decide how much to invest in producing evidence and argument, the enforcement scheme will affect how much they expect to collect in damages if they prevail, and the costs of that collection process.)~~ It seems reasonable to conjecture that a regime that treats failure to pay up on a judgment as a public offense—contempt of court punishable by fines or imprisonment—and that subsidizes the collection process through the employment of public resources such as the sheriff's office translates a larger share of ordered damages into collected damages, effectively raising the level of damages that influences defendant behavior and hence the dynamics of legal evolution. Public enforcement regimes are predicted by the model, therefore, to generate greater incentives for defendants to seek legal change and invest in producing evidence and legal argument. Again, whether this improves the welfare of the regime then depends on whether judges are discouraged by an increase in the likelihood that bad defendants seek rule change and the impact of evidence from bad defendants on legal human capital.

4.6. Summary

In highly generalized terms, the analysis in this section suggests a multi-dimensional institutional continuum that can help explain the quality of law generated by legal regimes. At one extreme point is an open-access public regime in which judges are evaluated by a wide and diverse public audience with access to a large body of individualized information about the decision-making of particular judges and the welfare effects of rules; evidence and legal analysis is cheap to generate, collected by courts in large quantities on the full range of issues implicated by a case and preserved in raw form for future analysis by a wide range of individuals capable of (collectively) evaluating the welfare implications of legal rules; judges come to the bench with extensive knowledge about legal environments and welfare effects and large numbers of judges are highly rewarded for welfare-promoting legal adaptation; and defendants face high penalties under existing rules.¹⁶ At another extreme point is a closed professionalized regime in which judges are evaluated by an insulated audience of other judges with little information about the welfare effects of rules; a more public audience that can evaluate welfare effects is provided little in the way of individualized information about the decision-making of particular judges; evidence and legal analysis is expensive, courts focus their collection of evidence on a narrow set of issues and evidence is not preserved or is preserved only in summary form; judges come

¹⁵ There are notable differences in the substantive law of damages across different regimes. In general the US system allows for higher damages—punitive damages, multiple damages, non-compensatory (pain and suffering) damages—than is the case in most other regimes.

¹⁶ But not so high that they abstain from the activity for which they might be sued altogether.

1 to the bench with little expertise about the relationship between legal environments and welfare effects and few are 1
2 rewarded for welfare-promoting legal adaptation; and defendants face low penalties under existing rules. 2

3 Neither of these extreme points is clearly associated with the paradigmatic common law or civil code regime and 3
4 the analysis demonstrates that the effort to work within that conventional dichotomy obscures factors that play a 4
5 role in the regime's capacity to generate quality law. For example, the open access regime obviously shares features 5
6 with common law systems, but whether the generalist capstone judiciary that also tends to characterize these regimes 6
7 produces higher exogenous legal human capital than the specialized career judiciary that tends to characterize civil 7
8 law systems is uncertain. As another example, as we have seen, it is unclear whether legal costs, particularly relative 8
9 to damages, are systematically higher or lower in common law as compared to civil law systems. The US system, 9
10 for example, displays features that lead to higher fees but also more mechanisms for fee-sharing through contingency 10
11 and class-action (but not loser-pay). Moreover, as damages also appear higher in the US, it is not at all clear whether 11
12 relative fees are higher or lower than those found in other countries. 12

13 5. Conclusion 13

14 We began with the question of which legal regimes better support economic activity and the development of mar- 14
15 kets. The analysis in this paper suggests that making progress on that question will require moving beyond the simple 15
16 dichotomy between common law and civil code regimes that has thus far dominated the literature. This model suggests 16
17 that, abstracting from (admittedly important) issues of judicial corruption and the quality of law enacted in legisla- 17
18 tures, the important distinctions between legal regimes are found not in the reliance on code versus caselaw but rather 18
19 in the institutional determinants of judicial incentives and the capacity for a legal regime to generate investments in 19
20 legal human capital that reduce legal error. Legal regimes lie on a multi-dimensional continuum that we can think of 20
21 as varying from an open access public regime to a closed professionalized regime. 21
22

23 Neither extreme point on this continuum, however, is clearly associated with lower or higher quality law. As a gen- 23
24 eralization, the open public regime with cheap evidence, high damages and high exogenous legal human capital will 24
25 be more likely to experience rule adaptation—provided that there is no influx of disinformation from bad defendants 25
26 generated by cheap relative legal costs and change-happy judges who see a high expected return to rule-change even in 26
27 the face of this influx. As a generalization, closed professionalized systems are likely to produce more rule-following, 27
28 assuming that a career judiciary with professionalized training and evaluation does not generate better welfare evalu- 28
29 ations than an open system—an assumption that might be unwarranted if disinformation poses a significant obstacle. 29
30 Even assuming these generalizations hold, however, it is not clear that—given the potential for judicial error and the 30
31 cost of evidence and legal argument—more adaptation is better than less, even under the premise that an established 31
32 rule is sub-optimal. As we have seen, more extensive rule change prior to long-term reductions in legal error may 32
33 represent an over-investment in change, and the system that engages in a more gradual shift may do better. What does 33
34 seem clear is that better judicial information processing is unambiguously good and that wider distribution of judicial 34
35 information (about cases and about judges) promotes higher quality law *provided* that this wider distribution is effec- 35
36 tive, over time, at extracting expertise from a mix of good and bad information. If this wider distribution includes a 36
37 diversity of commentators, this criterion seems more likely to be met. Thus regimes that generate publicly available 37
38 data about reasons and facts, and incorporate the welfare lessons from those data into the system of rewards facing 38
39 judges appear likely to do better than those that produce and distribute little to a broader audience. 39
40

41 These are stylized conclusions only, however, based on what we know to be overly generalized pictures of real 41
42 world legal regimes. My review of the institutional landscape thus highlights the need for two important empirical 42
43 projects. First, we clearly need to deepen our attention to the specifics of the institutional environments in different 43
44 countries that affect judicial incentives and the accumulation of legal human capital. Classifying regimes as either 44
45 civil code or common law is not likely to prove helpful. Rather, we need to know far more, country-by-country, 45
46 about the structure of judicial rewards and the information available to those who judge the performance of judges 46
47 and hence influence the structure of judicial rewards and penalties. This suggests a far more refined comparative 47
48 project than the one that currently engages comparative law and economics scholars. My analysis suggests that the 48
49 key variables include the identity of those who evaluate judges and thus determine their reward structure (senior 49
50 judges? politicians? lawyers? journalists?) and the information available to those evaluators (are decisions published? 50
51 with what level of detail on factual findings and reasoning? is the information filtered by a judge or available in its 51
52 original form as verbatim testimony and exhibits?). The structure of courts is important (are judges identified? do 52

they sit alone or in panels? how collegial are courts? are opinions attributable to individual judges? who determines evidentiary questions?). The exposure of judges to the welfare effects of their decisions may also be important (have judges been exposed to the practical problems of clients? do they enter the judiciary directly from their legal education or only after a period of practice? what training do judges have in evaluating evidence about the impact of legal rules and assessing policy questions?). And, critically, how is information learned by judges in a particular case diffused through the system (again, are decisions published and how detailed is the presentation of facts and reasoning?).

We also need to learn more empirically about the information processing that occurs within judicial institutions. At numerous points, it is only possible to make predictions about how institutional features might affect the parameters of legal evolution if we know as an empirical matter whether bad information improves or degrades the capacity of judges to extract accurate information from the body of evidence they see, or how practical experience compares to formal training in promoting judicial learning, or whether specialization promotes, in fact, reduced legal error. Lack of data on these key attributes of learning processes within judicial institutions is a major source of ambiguity in the model described above.

With a more refined descriptive catalog of differences between legal regimes and better data on information processing, we will be in a position to conduct a second important empirical project: more careful study of the relationship between these institutional variables and economic welfare. As many have noted, the classification of regimes on the basis of legal origins is somewhat crude and makes it difficult to sort out the effect of a particular legal history from other cultural or human capital imports. To be fair, legal origins is often chosen as an explanatory variable because it is exogenous. The slide from that econometric technique into generalizations about the legal institutional environment and policy recommendations, however, is not warranted. My analysis suggests more specific legal variables—which undoubtedly vary across countries that are otherwise classified as belonging to a particular legal family—on which empirical work can focus in the effort to assess the role of legal factors in economic performance and development. Not only might this help disentangle confounding effects from the inheritance not only of legal rules but also human capital and other cultural attributes, but it may also help to increase the precision of our estimation techniques, as we can make use of the substantial variability in legal regimes, variability that is masked by the macro division into legal families.

~~The policy prescriptions that flow from the analysis I have presented suggest that the choice facing transition and developing economies is not between writing codes or borrowing volumes of caselaw. Rather it is a series of choices about institutional attributes such as the publication and expansiveness of legal opinions, the institutional structuring of judicial incentives for rule adaptation and the mechanisms by which information about the welfare effects of particular rules makes its way to judges and those who evaluate judges. The model also links the effectiveness of courts to the organization and regulation of the legal profession. Lawyers play a key role in the generation and transmission of specialized legal human capital, specifically expertise about the relationship between legal rules and welfare. As the model makes clear, the adaptation of law to local and changing circumstances over time requires that litigants face incentives to invest in lawyers' efforts to produce evidence and innovate legal arguments. The organization and regulation of the legal profession—the extent to which the market for lawyers is competitive, for example—will influence the path of the law, both through the cost of legal services and the cost of generating a certain level of expertise. Rules governing the organization of legal practice—limitations on firm size or prohibitions on employment for example— influence the extent to which legal human capital is shared among those in the profession. Professional control over legal ethics will also have an impact on the potential for disinformation in courts. The model also suggests that countries attempting to transition quickly to a legal regime that supports economic growth and market development may need to take specific steps to overcome both inadequate judicial incentives and an initially high level of legal error. Particularly in systems transitioning from socialist or communist governance to market democracy, it is likely that the shared level of legal human capital about the relationship between legal rules and outcomes will be low by virtue of the lack of experience with markets. In these settings, policy efforts to effectively import legal human capital into the profession and judiciary may be necessary. This has implications, for example, for the rules governing the access of foreign lawyers and law firms to practice in the new regime as well as for the access the profession and judiciary has to the work of lawyers and courts in other jurisdictions.~~

Moving beyond the common law/civil code dichotomy to a richer institutional landscape also promises to improve the richness of our theoretical models of the institutional factors that influence the capacity of a legal regime to support economic activity, in a way that is sensitive to the undoubtedly different legal needs facing developing, transition and mature market economies. As the theoretical framework used to develop the institutional overview in this paper

suggests, optimal legal institutions depend in part on the level of legal human capital (judicial error rates), the capacity of a judicial audience to evaluate judicial efforts to adapt law in welfare-improving ways and the costs of generating sufficient evidence and legal analysis to improve judicial decision-making, as well as the extent to which established (or imported) rules deviate from optimal rules. These factors undoubtedly vary with the level of development in a legal regime, and thus institutions well-suited to a mature legal setting may be counterproductive in a developing or transition environment.

Finally, a richer institutional landscape is likely to help us make progress on understanding the determinants of a problem I have set aside in this paper but which has dominated the comparative economics of legal institutions, namely the problem of corruption and the divergence between judicial preferences and social welfare. A thicker description of the institutional settings in which judges (and lawyers, who participate in corrupt judicial practices) operate can help to understand the environmental factors that contribute to corruption. The emphasis in this paper on the mechanisms that support the generation and distribution of information and the level of shared legal human capital, together with the structuring of judicial incentives and the organization of the legal profession, provide clues about how we might advance our analysis of corruption. Identifying corrupt judicial decision-making is in part a problem of legal competence, monitoring and information: a closed legal system that produces little information shared with a wider audience capable of interpreting judicial decisions (and hence identifying cases in which courts ‘get it wrong’) is likely to foster corruption. Relatedly, if shared legal human capital is low (sincere judicial error rates are high) it is likely to be the case both that corrupt decision-making is difficult to distinguish from sincere error, and that a judge’s audience lacks the expertise to make the distinction. Efforts to control corruption may, indeed, be part of the explanation for why legal regimes with high rates of error establish institutional mechanisms that generate high rewards to rule-following and low rewards for even accurate rule adaptation; as we have seen, restricted information dissemination and judicial anonymity are likely to promote greater rule following as this hampers the capacity for judges to be recognized for their rule adaptation. As we have also seen, however, such mechanisms are also likely to retard the accumulation of the shared legal human capital that, in the long run, can improve the capacity for identifying corrupt decisions and hence reduce the incidence of corruption. Moving beyond the common law/civil code dichotomy to richer empirical and theoretical models of the relationship between legal institutions and legal behavior is thus a critical next step in furthering our understanding of the relationships between legal regimes and economic well-being and development.

55 Uncited references

(Posner, 1993)



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