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TWO KINDS OF LEGAL EFFICIENCY

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In discussing the efficiency of the law there are two quite different problems. The first is whether the law itself is well designed to achieve goals that society regards as desirable. The second is whether the process of enforcing the law is efficient. To take an example from a totally different field, in the recent unpleasantness of Vietnam one could have made judgments as to the likelihood of the war accomplishing its proclaimed objectives independently from the question whether the American military forces were fighting the war in an efficient manner. It would have been possible to say that the army was doing an excellent job in a war that we would have been better off not fighting in, or that the military was doing a poor job fighting a war for which a victory was important.

The problem is a bit more complicated in a legal context.[1] On one hand, there is the apparatus for enforcing the law, from policemen and sheriffs to courts, juries, and prisons. On the other hand, there is the law itself, which is what this apparatus is designed to implement. Efficiency or inefficiency in the law can refer to either of these two areas.

As far as I know, no one has ever questioned the desirability of efficiency in the process of law enforcement, though if a law itself is undesirable, poor enforcement may be preferable. If the Ministry of Interior in Moscow, for example, became hopelessly incompetent and hence could not carry out its duties of political surveillance, this could be considered a step in the right direction because the law itself is undesirable. In most cases, however, although there is objection to a given law, enforcement of a few bad laws is a small price to pay for the efficiency of the legal system as a whole. Thus, attempts are made to change bad laws, but they are enforced until they can be changed.

Confining the discussion solely to process, as opposed to the law itself, one custom that is widely approved and that perhaps

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1. For a formal discussion of the problem, see A. BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT 20-26 (1974).

should be called an "inefficiency" is the deliberate biasing of process towards one side. For example, the law is frequently biased in favor of the accused in criminal actions. For reasons that are discussed both in *The Logic of the Law*[2] and *Trials on Trial: The Pure Theory of Legal Procedure*,[3] this author is not convinced of the desirability of this institution. Assuming that such a bias is desirable, however, it could be simultaneously desirable and inefficient. The problem here is essentially verbal, depending upon the meaning given to "inefficiency" in a particular context. Since such bias would be a method of achieving a goal desired by its advocates, the average economist would say that it is not inefficient even if it does lead to less accuracy in courts. But if the reader wishes to regard this as falling within the rubric "inefficient," then this would be deemed an exception in which that inefficiency is desirable.

There are other areas where people sometimes argue for bias. For example, if it is said that the law should be used to benefit the poor, a law suit between a wealthy corporation and an impecunious person would be biased in favor of the impecunious person to obtain a better distribution of income. There are many people who believe that this "deep pockets" approach is a good idea, and it has sometimes achieved favor with judges and juries. It is clear, however, that this is an inefficient institution, and it is fairly easy to demonstrate that it is an unduly expensive way of reducing inequality in society.[4] Any desired amount of equality can be obtained by direct tax and payment methods at lower social cost than could be obtained by biasing legal proceedings.

There is, however, an argument for this kind of bias, which this author usually calls the "well-intentioned Machiavellianism" argument. There are those who feel that the voters would not vote for the appropriate amount of income redistribution directly, but that they can be tricked into providing more equality indirectly by a technique such as biasing legal procedures. The first thing to be said is that the individuals making this argument are putting their own views as to the proper amount of equality above those of the

2. G. TULLOCK, THE LOGIC OF THE LAW 176-78 (1971).

3. G. TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE (1980).

4. Accepting for the moment Learned Hand's justification for tort law, *see* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), it is immediately obvious that if the courts regularly bring in decisions against the wealthy and in favor of the poor, the wealthy will be led to too many resources in avoiding accidents and the poor too few.

voters. If some people believe that their own judgment is better than that of other voters, it should be openly recognized that on the basis of this belief they are imposing their ideas on society. Second, and much more important, when one begins this indirect and covert type of egalitarian behavior, it is likely that other people will take advantage of it. The net effect is that some special interest group will get significant benefits and the poor will receive little or none.

In general, process efficiency in the law raises few problems. In this context, efficiency clearly means the same as it does in manufacturing for example. If we say that the Chrysler plant in Altoona, Illinois, is highly efficient and the one in Brookhaven, Massachusetts, is inefficient, we know what we mean by the word. A similar notion is at stake in process efficiency in the law. Achieving this efficiency requires balancing two costs against each other. The first is the cost to society of the laws being badly enforced. If murderers go free we may expect more murders. On the other side, if the law is badly enforced innocent people may go to prison and people may be unjustly deprived of their property in civil suits. Weighed against these costs of bad enforcement are the costs of enforcing the law. Increasing the effectiveness of enforcement is presumably achieved by increasing the resources invested in it. The goal is to invest the resources in the most efficient way, which is possible by achieving the correct balance between the competing costs.[5] Most people would regard this goal as rather noncontroversial.

When we address the problem whether the substantive law itself is efficient in its choice of goals, then matters are unfortunately more complicated, even in the purely technical sense. The problem is further confused because this part of the law has traditionally been discussed in ethical terms.[6] A minor digression will demonstrate the way in which inefficient institutions may sometimes develop out of moral principles. In late nineteenth-century Brazil there was a great debate as to whether or not corporations should be permitted to exist. The popular point of view[7] was that

5. There has been surprisingly little research on improving the efficiency of court procedure. I hope this will change and indeed my book, *Trials on Trial: The Pure Theory of Legal Procedure*, is intended as a step in this direction.

6. People are executed for murder, for example, because murder is wicked and the guilty deserve death (an eye for an eye).

7. Apparently shared by W. S. Gilbert. *See* W. GILBERT, UTOPIA, LIMITED 30-32 (1893).

corporations are wicked because they permit people to avoid paying their debts. In other words, limited liability violates natural law. The progress of the Brazilian economy was set back for a number of years by this ethical argument, which most people today would regard as simply silly.[8]

As an empirical observation, there is fortunately little clash between ethical criteria and efficiency considerations. If we concern ourselves with the substantive law rather than with process, then the efficiency criterion leads to conclusions that are similar to those of most western law codes. There are occasional areas of conflict, but they are not generally very important.[9]

Basically, an efficient legal institution would be one that cannot be changed without making us worse off. This, of course, limits analysis to the present state of knowledge.[10] But all of this is based on the assumption that we can tell which of two states of nature

8. I do not wish here to argue against the use of ethical criteria, not because I believe in them, but because I have discovered that arguments with ethically minded people tend to be frustrating. The reader can imagine trying to explain to an Islamic leader that usury is desirable even though the Koran prohibits it. Most of the people with whom I have discussed the law on ethical grounds, have been, of course, much the same in cultural background to myself and I presume the reader is as well.

9. Legal scholarship, including judicial decisions and legislative discussions, has always addressed efficiency considerations to some extent. While justice and equity are frequently involved as well, laws regarding credit instruments, mortgages, and nonrecourse notes, in particular, are normally discussed in terms of their effect on the future credit market, which is an efficiency consideration rather than a consideration of abstract justice.

As an example of the type of conflict that may occur between ethical and efficiency considerations, consider the ethical rule that the punishment should fit the crime. Almost anyone interested in designing an efficient legal system would argue that the punishment should be calculated by a function that takes into account both the benefit the criminal gets out of the crime and the likelihood that he or she in fact will be punished. On occasion I have had discussions with people with strong ethical feelings in this area who argue that this is simply wrong. They claim that the grievousness of crime is the only thing that should be considered and this should be measured by the injury inflicted on society, not by the benefit to the criminal and certainly not by the probability that he or she will be caught.

Although I have on occasion, as I said, had arguments of this sort, I don't really think that most moralists would regard this as a major problem. Similarly, the other cases in which what I regard as an efficient law code deviates to some extent from conventional morality, are not too important. Thus, although I do indeed think that efficiency considerations should be dominant, I do not anticipate great difficulty from moralists when I urge improvements in the law.

10. One of the points of this Article is to urge that we increase our knowledge in these areas with the prospect that we will be able to make ourselves better off by changes. Such improvements in knowledge might also permit us to stave off ill-advised changes.

makes us better off. In general, the question of "betterness" is not very difficult, although there are cases where that raises problems. The word "us," however, is difficult. Suppose some change is urged that will benefit some of us and injure others. This has been a problem for a long time and this author proposes to solve it in much the same way other economists have.

First, in connection with the law it is frequently true that changes will not actually injure anyone although they will benefit someone. The reason is simply that the improvement of some particular legal institution may not affect any interests now in being. It may, for example, provide that contracts drawn in the future may make use of a new opportunity that was not previously in existence. The English, for example, have drastically changed their law on commercial arbitration to provide people who want commercial arbitration with more freedom in selecting procedures that meet their needs.[11] This is merely one of many examples; there are numerous cases in which efficient changes in the law do not injure anyone because everybody can adjust to the new law.

Second, there are many changes in the law that will make everyone better off ex ante, although they will indeed make somebody better off and somebody worse off in the future. Suppose, for example, that the law of torts is changed and that it is possible to reliably predict that the change will reduce the total number of accidents without markedly increasing accident avoidance costs. As of now, since nobody knows when they will be in an accident or on which side they will be in the resulting law suit, the change is a net benefit for everyone. Once an accident occurs and the law suit begins, some of the parties may find that they are worse off than they would have been under the previous law. Still, ex ante everybody benefits and rational persons would choose the improved law simply because it gives them a better gamble, even though as a matter of fact they may lose that gamble.

Lastly, however, and this is the most difficult problem, there may be changes in the law that benefit some yet directly injure others. The first thing to be said about such changes is that every effort should be made to minimize resulting injuries. The law might be drawn, for example, to take effect some time in the future so that people will have an opportunity to adjust and hence reduce their losses. Another simple way of lowering the cost to

11. *See* Arbitration Act 1975, § 1, *reprinted in* 8 HALSBURY'S LAWS OF ENGLAND ¶ 411 (4th ed. Supp. 1979).

those injured is to compensate them.[12] If the people who will be injured cannot be identified beforehand, then everyone is only better off ex ante. If, however, it is possible to identify who will be injured, then there is no reason for compensating them, either with direct payments or by some other change in the law. Preferably this change should offer an improvement in efficiency, but in any event it should be one that does not lower efficiency. If a law must necessarily injure some group of people, then the calculation is whether the benefits are great enough so that in theory those injured could be compensated. If so, then there is an improvement in efficiency, even though it will injure these people.

There is a great deal of debate in economics as to whether this kind of calculation is actually legitimate. However, if there are a very large number of changes, then it is possible to consider not whether the individual change benefits everyone, but whether the policy of making such changes would be ex ante beneficial. Suppose, for example, a policy is adopted of calculating the gains and losses from a potential change in the law, and the change is made if the gains exceed the losses. If this happens over a large number of specific changes in the future, then the odds that any individual will benefit more often than he or she loses are better than even. Thus, ex ante everyone is made better off by adopting this particular policy. It may, of course, be true that some people will have a long run of bad luck and will find themselves on the losing side for a very large number of these changes. However, because it is impossible to predict in advance what changes will be suggested in the future or what position any individual will be in with respect to these changes, everyone is better off ex ante.

The actual calculation of benefits and costs is an extremely difficult task, and there is every reason to believe that present techniques lead to errors. While existing measurement techniques need improvement, the fact remains that the ex ante paradigm developed here makes it possible to use imperfect methods. Suppose that careful studies of individual institutional changes have a reasonably good chance of producing the right decision on whether the benefit or loss is greater. Using the ex ante technique, making

12. Ideally, the cost of the compensation should be paid by the people who gain from the change in law. In practice this will be difficult or impossible to arrange in many cases. When it is not possible, spreading the cost over the entire population by paying compensation from a general tax fund seems sensible. Even here, however, it should be emphasized that we are unlikely to be able to exactly measure the cost and hence the compensation will be approximate at best.

the changes that are recommended by such studies and refraining from making those that the studies indicate are undesirable would, over a long series of decisions, produce a net gain. In sum, although the calculations in this area are frequently difficult, it is possible to adopt policies that improve the law's efficiency.

Sometimes the problem of whether a given law is efficient is fairly easy and requires little in the way of research. Consider an example from *The Logic of the Law*:[13] Should the law against theft be repealed? This author's conclusion that the law should not be repealed is based on the following line of reasoning: Imagine a society in which there is no law against theft. There is a saving over our present society because the police force can be smaller, but there is a very sharp increase in cost in other areas. In such a society individuals would be forced to divide their time between producing real goods, attempting to steal others' goods, and protecting their own goods. It is clear that the effort invested in protecting your own property and attempting to steal others' does not add to the total wealth of society.[14] Thus, the total quantity of goods produced in society will be less and the individual well-being less on the average than in a society where there is a law against theft.

This line of reasoning is simple and straightforward, but note that it does require certain assumptions about the real world. The first is that the cost of maintaining a police force is relatively small compared to the effectiveness of that police force in preventing crimes. Consider, for example, the total cost under the system with a law against theft. First, there will still be some people putting part of their time into trying to steal things. Second, there will still be some effort put into protecting property. We all have locks on our doors. Indeed, unless the police are superefficient it will always be sensible to retain at least some private protection instead of depending entirely on the police.

The question then is whether the net "waste" imposed on society by the institution of legalized theft is greater than the "waste" imposed by the laws against it. In the first case the wasteful activities are the time spent in attempting to steal and the time spent in private protection. In the second, there is once again the time spent in attempting to steal and on private protection plus the cost

13. G. TULLOCK, *supra* note 2, at 211-27.

14. It should be noted that one way of protecting your own property is not to acquire it, *i.e.*, to consume that unstealable commodity, leisure.

of the police. The conclusion that the costs are lower in the second society is essentially a technological judgment on the net cost of a police force in lowering the rate of crime as opposed to the net cost of private protection. It is a technological judgment that few people will disagree with, but there are some, for example the anarchists of the right, who would argue that this is simply wrong on moral grounds. The basic structure of the law appears to be efficient on much the same simple arguments as above. This appears to be true of the law of most countries insofar as it deals with such simple matters as theft and murder. Since these are the basic issues that moralists concern themselves with, the prospect of conflict between morality and efficiency in these areas is small.

The problem becomes much more difficult, however, when discussing the details of the law. A good deal of research is needed for each detailed provision to find out whether it is efficient and, if it is not, what improvements could be made. Apparently most of the decisions regarding the efficiency or inefficiency of detailed provisions of the law are normally made without much research. Let me illustrate with a fairly simple example drawn from Professor Richard Posner, a well-known proponent of the view that the common law is indeed efficient:

> Another common law rule was that a railroad owned [*sic*] no duty of care to people using the tracks as paths (except at crossings). The cost to these "trespassers" of using alternative paths would generally be small in comparison to the cost to the railroad of making the tracks safe for them. The railroad's right, however, was a qualified one: the railroad was required to keep a careful lookout for trespassing cattle. It would be very costly for farmers to erect fences that absolutely prevented cattle from straying, so we would expect that, if transactions between farmers and railroads were feasible, farmers would frequently pay railroads to keep a careful lookout for animals on the track.[15]

In truth, the least costly way of dealing with cattle on the track is by no means obvious. The cost of fencing, which is an important matter in farm areas, can be dealt with in many different ways. One possible approach is to put the entire burden on individuals who wish to keep cattle out of their crops. These farmers would be required to put up their own fences, while the cattle owners are not burdened with any duty to keep their animals from straying. An alternative approach is to require farmers to fence the

15. R. POSNER, ECONOMIC ANALYSIS OF LAW § 3.4, at 37 (2d ed. 1977).

northern and western sides of their land, with no responsibility for the eastern and southern sides except where the land is contiguous to a road. This approach makes certain that all land is fenced and allocates the responsibility unambiguously. Nevertheless, it requires individuals to put fences up to protect their neighbors' property as well as their own. The relative efficiencies of these institutions is a difficult empirical problem.

The allegation that the particular institution discussed by Professor Posner is efficient is based on a completely ad hoc view as to the costs, together with a statement about what bargain would be made if transaction costs were nil. Professor Posner may be perfectly correct, but it would be mere coincidence. Although I have not carefully examined his research methods, I feel confident in saying that Professor Posner has done no research whatsoever on the relative costs of the various ways of containing cattle near railroad tracks.

But there are other difficulties with Professor Posner's discussion. Let me pick another quotation:

> *Ploof* may be viewed as a special application of the "last clear chance" doctrine. A man is using the railroad track as a path. Since he is a trespasser, the railroad has no duty to keep a careful lookout for him. But if in fact the crew sees him, it must blow the train's whistle and take any other necessary and feasible precautions to avoid running him down. The economic rationale is that, even though the accident might be prevented at low cost if the trespasser simply stays off the track, at the moment when the train is bearing down upon him it is the engineer who can avoid an accident at least cost, and this cost is substantially less than the expected accident cost. Alternatively, the case may be viewed as one where, although the cost to the victim of preventing the accident is less than the accident cost, the cost to the injurer of preventing the accident is lower than the victim's accident prevention cost.[16]

Note that the apparently superior position of cattle over human beings given by the previous rule vanishes here. If the railroad crew is keeping a sharp lookout for cows they would surely see the man on the track. Indeed, I have great difficulty imagining an attorney arguing to a jury that the railroad is not liable for hitting the plaintiff because the engineer, drunk perhaps, was not watching where the train was going. Professor Posner's belief that the engineer has

16. *Id.* § 6.7, at 129 (footnote omitted).

a positive duty to look out for stray cattle but not for stray human beings may be a good statement of the law in the way it is written, but it certainly is not a good statement of law as it is in fact applied. In fact, the last-clear-chance doctrine invalidates the basic efficiency argument normally offered for efficiency of the negligence-contributory negligence rule. The resources I would put into preventing an accident are clearly lessened if I know that my liability can be eliminated by way of the last-clear-chance rule. It might be possible for advocates of the efficiency argument used in *United States v. Caroll Towing Co.*[17] to demonstrate that the combination of both of these rules is efficient provided the original negligence-contributory negligence conditions are properly interpreted, but they have not done so.

This particular example, which in fact is merely the first one that I came across in rereading Professor Posner's book, is simply part of what is now a very large literature. Various common law rules are stated, sometimes incorrectly, and then the statement is made that because of transaction costs this particular rule is the most efficient. It may or may not be. The only way to tell is to engage in careful research, making an effort to measure all the costs and to figure out the most efficient way of accomplishing a stated goal. For example, Burrows, Rowley, and Owen examined the problem of cleaning oil tanker's crude-oil tanks without causing too much pollution.[18] The study was lengthy and detailed and the authors reached the conclusion that the cheapest way of dealing with the problem was to wash the tanks in port.[19] Efforts to determine whether any law is efficient or to suggest improvements in existing laws require further research of this sort. Unfortunately it is difficult and requires fairly large applications of highly skilled labor.

As one other example, Burrows, Rowley, and Owen studied the Torrey Canyon disaster, and as a result of this study suggested that the basic law of marine salvage should be changed.[20] The authors suggest, rather than firmly recommend, because they did

17. 159 F.2d 169, 173 (2d Cir. 1947).

18. Burrows, Rowley & Owen, *Operational Dumping and the Pollution of the Sea by Oil: An Evaluation of Preventive Measures*, 1 J. ENVT'L ECON. & MANAGEMENT 202 (1974).

19. *Id.* at 218. As an interesting sidelight, washing the tanks in port was not the technique preferred by the oil companies and the oil companies had hired Burrows and company to carry out the research. This was a case in which the sponsorship did not control the outcome.

20. Burrows, Rowley & Owen, *Torrey Canyon: A Case Study in Accidental Pollution*, 21 SCOTTISH J. POLITICAL ECON. 237 (1974).

only a single case study. Nevertheless, they do offer strong arguments to indicate that a major research project on these lines should be undertaken. Simply speculating on whether or not the current law minimizes transaction costs will not do.

CONCLUSION

I hope by now I have convinced the reader that efficiency is indeed an important consideration in designing the law. I myself tend to feel that it is almost the only consideration we should take into account. For those people who want to maintain moral principles as a foundation for the law, it is fortunate that the conflicts between efficiency and morals are not very great. In most cases where efficiency considerations dictate a change in the law, moral principles are either irrelevant or unimportant.

There remains the question whether our present law code is efficient. Although I think the general outlines probably are, I also think that we should retain an open mind. Detailed research would either prove that the law is efficient or provide us with a number of opportunities for changing it to make it efficient. This research, even though lengthy and hard to do, should be given a high priority in any plans for social reform.