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In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative

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IN SEARCH OF A GENERAL APPROACH TO LEGAL ANALYSIS: A COMPARATIVE INSTITUTIONAL ALTERNATIVE

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The law most relevant to the lawyer is the law of the future — legal decisions that the lawyer will be asked to affect or predict. Like all historical phenomena, past decisions and other raw material yield relevant insights about the future only if they can be ordered systematically. Such an ordering is becoming increasingly difficult in a world where the volume of legal decisions, variety of legal decision makers, and complexity of social issues are constantly expanding. It is, therefore, important to develop a basic set of relatively simple general questions that can yield useful insights about the law.

This Article is an attempt to aid in the construction of such a general approach to legal analysis. Its central thesis is that all legal decisions share a fundamental feature that should be a basic building block for any general analytic approach: they all involve a choice among imperfect alternative decision-making institutions. In all cases, legal decision makers must consider the relative merits or attributes of the alternative institutions. The analyst of legal decisions, therefore, should adopt a "comparative institutional" approach, which can be simply stated as follows: the determinants of legal decisions can best be analyzed when legal decision makers are viewed as though they were concerned with choosing the best, or least imperfect, institution to implement a given societal goal.

It is not my thesis that institutional comparison is the only feature of legal decisions, but rather that it is an important feature that

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may offer significant insights into all legal issues. As such, it provides a useful and relatively simple way to organize analysis.

Another general approach to legal analysis has evolved over the last decade. Described as "the new law and economics," "the positive economic analysis of law," or "the economic approach,"[1] it argues that legal decision makers pursue an efficient allocation of resources. Although the economic approach has been criticized, this criticism is but part of a larger and growing attention and interest. The attention is understandable because the approach promises and often delivers useful or at least provocative insights into a wide range of legal issues.

As the major existing general approach to legal analysis, the economic approach establishes a valuable context in which to explore the comparative institutional approach. Despite its contributions, the ability of the economic approach to provide insights about the determinants of legal decisions is limited. There are two distinct problems with this prevailing approach.

First, it is unclear whether the analytic concern of the economic approach is with the determinants or the effects of legal decisions. This ambivalence about analytic purpose has produced sweeping claims that the common-law judiciary tends to produce results that are allocatively efficient, while the legislature does not. These claims reveal important analytic flaws, are unnecessary if one is concerned

1. The term "economic approach" will be used throughout the article to refer to this positive legal analysis of law that has employed the tools of economic analysis. The major proponent of this economic approach is Professor Richard A. Posner. He has contributed substantially to the literature himself, and has summarized the work of others in his basic text, ECONOMIC ANALYSIS OF LAW (2d ed. 1977) [hereinafter cited as ECONOMIC ANALYSIS], and survey articles, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979) [hereinafter cited as *Uses and Abuses*] and *The Economic Approach to Law*, 53 TEXAS L. REV. 757 (1975) [hereinafter cited as *Approach*].

In this Article, Professor Posner's discussions will often be taken to represent the "economic approach" — positive economic analysis of legal rules and decisions. As Professor Posner is not the only contributor, the dominant use of his analysis is a simplification.

This simplifying choice is made more credible by Professor Posner's recognized position and his continuous attempts to organize and synthesize work in the area. The concern here is with the "economic approach" as a general mode of casting legal analysis. The Article is not meant as a review of all of the literature in the area.

It is important to distinguish between the positive and normative economic analysis of law. Only the former is considered here. There are many legal scholars who have used economic analysis to evaluate legal rules and institutions. A dominant figure here is Professor Guido Calabresi whose early work on rules of liability contributed to the extension of economic analysis to law. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

The importance of institutional comparison and the failure to integrate it adequately into economic analysis in general are themes manifested in the works of several economists; most dominantly the works of Ronald Coase. Professor Coase has continuously revealed a creative perception of the basic institutional implications in economic analysis. *See, e.g.*, Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

with the determinants of legal decisions, and create confusion about the role of economic efficiency. This distinction between legal analysis of the determinants and effects of decisions, and the problems caused by the failure of the proponents of the economic approach to limit their discussion to determinants, are discussed in Part I.

Second, and most important for this Article, when those employing the economic approach do search for the determinants of legal decisions, they reveal a distinct institutional myopia. The approach generally considers variation in the attributes of only one institution — the market. This approach is basically incomplete. If societal decisions are allocated to or away from the market, they are taken from or given to some other institutional alternative. A number of institutions are available and the adequacy of each of these institutions varies with the legal setting. Thus it is not enough to establish that in a given setting the market would not perform perfectly; one must also compare the market's performance with that of the available alternative decision-making institutions. Part II compares the economic and comparative institutional approaches in several contexts: property rights and remedies, the role of custom and penal statutes in the determination of tort liability, and the constitutional law issue of economic due process, among others.

A basic theme underlies much of this Article: all human institutions are substantially imperfect. This theme plays many roles. First, it provides the intuitive basis for the analytic approach suggested here. Judicial decision making is conceived directly in terms of a search among imperfect institutions. Indeed, the "searcher" — the common law or constitutional law judge — is perceived as aware of his or her own imperfections. Judicial decision making is a search in substantial uncertainty or ignorance rather than a confident march toward some perceived truth. Second, the failure adequately to consider institutional imperfection explains most of the difficulties with the economic approach. That approach has failed to provide a systematic explanatory role to variations in the attributes of nonmarket institutions. In addition, in its sweeping assertions about the outputs or effects of large institutions such as the legislature and the judiciary, it has confused the existence of institutional imperfection with the establishment of institutional failure.

Another form of imperfection — the imperfection of legal analysis — also forms a critical backdrop to this Article. The tools of legal analysis are primitive,[2] and the task of legal analysis is difficult. The

2. Komesar, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction: A Comment*, 22 J. L. & ECON. 387, 387-88 (1980).

basic characteristics of this Article are acceptable only in such a setting. This Article is exploratory and speculative. The suggested institutionally based analysis has been tested only in its author's experience and intuition, and the examples provided are illustrative rather than determinative.

In addition, although the analysis is intended to be general in the sense that it is applicable potentially in all areas of the law, it is partial in the sense that it explicitly analyzes only the institutional choice. It leaves the choice of societal goal external or exogenous to the analysis. This decision to emphasize the choice of institutions rather than the choice of goals may appear odd in a field that has lavished so much attention on debates about such alternative goals as individual liberty, equality of treatment, equity in distribution, and efficient allocation of resources. But it is consistent with the purpose of the Article, which is to understand the determinants of individual legal decisions, and with the author's perception that a significant part of what has traditionally been articulated as values and goals really represents unarticulated evaluations of institutional capacities and failings.

The primitive state of legal analysis also demands restraint and care in criticism. In a world in which the best tools will likely always be highly imperfect, revelation of imperfection is trivial. Efforts in the struggle to improve legal or social analysis can hardly be judged on their ability to capture perfectly the truth or to meet some ideal standards of scientific testing. Only a criticism which offers an available alternative or which at least reflects an understanding of the real state of the art is useful.

This Article criticizes the economic approach — based on its lack of a clear focus on institutional factors. The positive economic analysis of law is the target of criticism because it is the most productive existing approach. This Article attempts not only to point up the imperfections in the economic approach but also to suggest an alternative mode of analysis and its advantages.

I. The Alternative Purposes of Legal Analysis and the Role of Economic Efficiency

This Article attempts to construct a general approach to legal analysis, which is here taken to mean the identification of those factors or variables that explain past and predict future legal decisions — the determinants of legal decisions. This is one among many valid analytic purposes. This concern for the identification of deter-

minants is shared by the economic approach. The second part of this Article compares the analysis of determinants by the economic and comparative institutional approaches. However, apparently without realizing the distinction, the proponents of the economic approach have merged the analysis of the *determinants* of legal decisions with the analysis of the *effects* of legal decisions. This merger has been associated with sweeping claims about the efficiency of large institutional aggregates. These claims about effect reveal inadequate comparative institutional analysis and, more important, are irrelevant to an analysis concerned with determinants. This failure to distinguish analytic goals and the ensuing claims have confused the role of economic efficiency in the analysis of legal decisions. While economic efficiency is not irrelevant, its role must be more carefully circumscribed if it is to aid the analyst concerned with the determinants of legal decisions. This part of the Article considers the distinctions between various goals of legal analysis, the efficiency claims of the economic approach and their unfortunate consequences, and the potential role for an economic efficiency construct in the analysis of determinants.

A. *Goals of Legal Analysis*

Legal analysis has four general concerns: the articulated rationales of legal decisions, the determinants of legal decisions, the effects of legal decisions, and the evaluation of legal decisions. It is not uncommon to confuse and merge several of these concerns. This is especially likely when the distinction between "positive" and "normative" analysis is employed, as it is in the economic approach. "Normative" analysis — what the law ought to be — is the fourth concern, the evaluative concern. But "positive" analysis — what the law is — can be viewed as any of the first three. The first two — the rationales and the determinants — are the central concerns of the lawyer as practitioner. This Article emphasizes the search for determinants rather than rationales because an ability to discern these determinants seems the most important aspect of the lawyer's craft. It may be important to know how to translate one's message into the form preferred by the decision maker. But it would appear far more important to know what factors when presented might actually vary the decision.

The breadth of the law makes it difficult to discover the determinants of legal decisions, and neither rationales nor effects offer substantial guidance. Traditional legal analysis teaches that the reasons articulated by the decision maker are seldom sufficient — and are

sometimes irrelevant — as indicators of the actual determinants of decisions. Judicial opinions are more often observations to be explained than sources of explanation. They yield insights only to one who can approach them systematically. Similarly, although effects can sometimes indicate determinants, there are several basic problems with their use for that purpose. First, it is difficult to isolate the effects of a legal decision. Second, a decision may have many effects, even if the analyst considers only the most immediate or proximate. The question then becomes which of these effects reveals the concerns of the decision maker and which does not. Third, given the complexity of society and the interaction of so many societal decisions and decision makers, the correlation between intent and effect may be extremely low.

The differences between the three concerns of positive legal analysis can perhaps best be seen in a simple example of positive analysis in a nonlegal setting: a study of pool playing. Presumably a physicist, when asked to examine pool playing, would employ something akin to vector analysis, which deals with angles and forces. The physicist might be asked whether the players will get the ball in the hole (an "effect" question), or how the players would explain their behavior (a "rationale" question). Alternatively, the physicist might be asked to study the determinants of the pool players' decisions. Thus, we might want to know what the players would do if we moved the cue ball or the target ball farther apart or put them at different angles in relation to the hole. Would the players use more force or less, change the angle of their shot, or move themselves around the table?

The role and efficacy of the analytical construct — vector analysis — might vary with the question asked. Even if the construct worked well to describe the behavior of a player, it might not describe well the explanation offered by the player. Physicists talk in scientific terms; pool players may not. Similarly, the construct might work well to describe the behavior of both the effective and ineffective (albeit not totally random) player.

The pool playing example points out another subtle but important point. The argument that pool players behave as though they were using the precepts of vector analysis does not mean that they actually use those precepts. Their own intuitions and internal ruminations may relate only indirectly to a straightforward vector analysis. The scientific framework is a tool used by outside observers — in this example, physicists — to organize their observations and in turn to understand and predict the players' behavior.

The analysis of determinants that is central to this Article is thus distinct from an analysis of either rationales or effects. Blurring these distinctions may cause unfortunate analytic problems. This conclusion forms the basis for the next section's analysis of the roles of determinants and effects in the economic approach.

B. *Efficiency Effects and the Economic Approach*

Professor Richard Posner, one of the leading advocates of the economic approach, has cast his most recent articulation of that approach in terms of the *effects* of broadly defined legal institutions:

> Scholars engaged in this branch of the positive economic analysis of law have advanced the hypothesis that rules, procedures, and institutions of the common or judge-made law — in sharp contrast to much legislative and constitutional rulemaking — promote efficiency. The hypothesis is not that the common law does or could perfectly duplicate the results of competitive markets; it is that, within the limits of administrative feasibility, the law brings the economic system closer to producing the results that effective competition — a free market operating without significant externality, monopoly, or information problems — would produce.[3]

This articulation is different from many of his previous general definitions, which were cast in terms of *determinants*.[4] Professor Frank Michelman, whose commentary appeared along with Professor Posner's recent summary of the economic approach, "corrected" the effects articulation to one consistent with determinants.[5] However, it is not clear that the recent variant is inadvertent. At other points, assertions about effects have appeared in general discussions of the economic approach.[6] These assertions have been accompanied by

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3. *Uses and Abuses, supra* note 1, at 288-89 (footnotes omitted).

4. In his other earlier summary of the economic approach to law he employed the following articulation of the positive economic analysis of the law:

> A second important finding emerging from the recent law and economics research is that the legal system itself — its doctrines, procedures, and institutions — has been strongly influenced by a concern (more often implicit than explicit) with promoting economic efficiency. The rules assigning property rights and determining liability, the procedures for resolving legal disputes, the constraints imposed on law enforcers, methods of computing damages and determining the availability of injunctive relief — these and other important elements of the legal system can best be understood as attempts, though rarely acknowledged as such, to promote an efficient allocation of resources.

Approach, supra note 1, at 763-64 (footnotes omitted).

5. Even here, I daresay Posner misdescribes his own theory by calling it "the hypothesis that common law rules and institutions tend to promote economic efficiency." A more accurate statement of the hypothesis, I believe, would be that the rules, taken as a whole, tend to look as though they were chosen with a view to maximizing social wealth (economic output as measured by price) by judges subscribing to a certain set of ("microeconomic") theoretical principles.

Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 306, 308 (1979) (footnote omitted).

6. *See* ECONOMIC ANALYSIS, *supra* note 1, at 404.

some general theorizing about legislatures and courts.[7] In turn, both these assertions and this theorizing have been reflected in attempts to explain the alleged tendency toward efficiency without recourse to the actions of the judicial decision maker.[8]

This section has two theses. It argues first that the broad assertions about effects are strained and unnecessary for an analysis concerned with determinants. It also argues that the failure to concentrate on the judicial decision maker leads to "evolutionary" theories which are largely irrelevant to an analysis of the determinants of decisions useful to lawyers.

1. *Institutional Efficiency*

The proponents of the economic approach assert that existing studies establish, or at least tend to establish, that the common law promotes efficiency while legislative and constitutional rule making do not. Although the works referred to provide valuable insights about the legislative and judicial processes, they do not support the sweeping propositions for which they are cited.

The works that allegedly prove that the legislative process reduces efficiency establish,[9] at most, two propositions:

(1) The actors in the legislative process (legislators, voters, administrators, lobbyists, etc.) are not motivated by and do not intend to promote the public interest in general and economic efficiency in particular (hereinafter the "private interest" proposition).

(2) The political process is distorted by special interests; because a perfect process would not have produced all of the regulations actually produced, the removal of the specific regulations in question would increase economic efficiency (hereinafter the "imperfect process" proposition).

The proponents of the economic approach extrapolate from these propositions to their assertions about institutional efficiency.

The "private interest" proposition, however, is largely irrelevant to a proof of inefficiency. It might be relevant as a refutation of the hypothesis that the legislature *intends* to operate in the interest of the public — an insight perhaps useful in some settings. But it is hardly evidence that the aggregate *effect* of the legislative process is the reduction of efficiency.

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7. *Id.* at 404-17.

8. *See generally* Goodman, *An Economic Theory of Evaluation of the Common Law*, 7 J. LEGAL STUD. 393 (1978); Priest, *The Common Law Process and the Selection of Efficient Rules*, 7 J. LEGAL STUD. 65 (1977); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

9. *See* ECONOMIC ANALYSIS, *supra* note 1, at 404 n.1.

This "private interest" proposition not only fails to indict the results of the legislative process, but also applies with equal force to the market. If proof that private interests are at work were sufficient to establish inefficiency, the market would be proved *a priori* inefficient. The notion of the "invisible hand" and its ability to turn private vice into public virtue is the core of economic analysis. Market actors (buyers, sellers, producers, consumers, etc.) do not seek to promote the public interest or economic efficiency. They do not care whether society's resources are well-allocated. They presumably care about lining their own pockets. The *motivation* of the legislative actors has been described as the unprincipled redistribution of income. But that is precisely the motivation postulated by economics for market actors. Such a motivation does not mean the aggregate *effect* of either institution is economically inefficient. In a world of complex interactions among large populations, the establishment of tainted motives, whether by Marxists, mercantilists, or free marketeers does not establish the existence of tainted aggregate outcomes.[10]

This brings us to the "imperfect process" proposition. It can be argued plausibly on both theoretical and empirical grounds that the legislative process is not only subject to private interest motives on the individual level, but is also subject to a skewed representation of interests on the aggregate level. One prevailing economic theory of regulation emphasizes the attempts by special interest groups to extract redistributive benefits from the political process.[11] Because the effectiveness of these groups is increased by their ability to pool funds and organize efforts, concentrated interests may have a disproportionate influence on the legislative process. Thus, the process of political "competition" may not perfectly represent intensity of preference and, therefore, may produce imperfect allocative results. Although the evidence is not conclusive, there is strong support for the

10. The pluralist theories of political science are based upon a notion of competition among political positions based on self-interest. Under the correct conditions, such a system can produce ideal allocations. That such conditions do not exist is the subject of the substantial criticism of a pluralist theory as normative analysis. A leading work in this connection is T. LOWI, THE END OF LIBERALISM (1969). Lowi criticized the pluralist approach as normative theory on the same basis as the criticism of laissez-faire economics as normative theory. He notes the validity of the theory on a positive or descriptive basis, but rejects its assumptions for ideology.

The pluralist analysis and its criticism as a perception of reality parallel the analysis of market behavior and its criticism. There is no *a priori* manner of determining that the deviations from ideal conditions (imperfections) in one context are greater than in the other. Sensitive normative or positive theory would likely be forced to compare the institutions in less sweeping contexts and in terms of their relative imperfections.

11. *See generally*, Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3 (1971).

hypothesis that the legislative process is highly imperfect in its allocation of society's resources.

But there is a major difference between "imperfection" and "inefficiency." Every human institution is imperfect. The market is highly imperfect, and its imperfection is one justification for the existence of legislatures and other political processes. Majority voting is a means of determining public desires in the context of public goods problems — instances in which the market mechanism will yield imperfect indications of intensity. Now it appears that the "replacement" for the market — the political process — is also imperfect. The majoritarian process can yield imperfect indications of public desires. But imperfection alone does not imply inefficiency. An institution is inefficient only when it functions less perfectly than an alternative available institution.

Since the judicial process and the market are also substantially imperfect,[12] there are no *a priori* grounds for asserting that the imperfections in one massive institutional configuration such as the market or the judiciary are less than those in another such as the legislature. Only examination of relative imperfections — a comparative institutional analysis of attributes — can yield valuable insights about efficiency.

Nor is the inefficiency of the legislative process as a whole established by empirical studies of selected outputs. The studies cited evince that specific outcomes of the studied legislative and administrative processes are inefficient, in the sense that it would be efficient to eliminate the law in question. But these studies examine a meager

12. The judicial process shares with the legislature the problem of concentrated interests. When a large social loss is dispersed over many unrelated interests, as may be the case for many consumer and pollution problems, *see* text at notes 27-28 *infra*, the difficulties of organizing and funding litigation may prevent the potential plaintiffs from seeking redress. If the same amount of injury is inflicted on a concentrated interest, it can more easily organize and fund litigation than the dispersed group could have. To the extent that litigation outlays affect the probability of success, the dispersed interest will be less likely to succeed, whatever the merits of its claim. This imperfection in the judicial setting may impair efficiency as much as does its counterpart in the legislative process.

There are reforms in the judicial process — such as class actions — that try to correct this problem. Analogous reforms — such as controls on lobbying or easier public access to information — also appear in the legislative setting. There are no grounds to assume that these legislative reforms are any less likely to be successful than the reforms in the judicial process.

The dispersed interest problem can also be associated with market imperfections. The market is affected only when people enter into transactions, just as the political process is affected only when people lobby or vote. Where an individual's interest is small, transaction costs — such as the acquisition of information — may discourage manifestation of demand which though small per capita, may be large in the aggregate.

The dispersed interest problem shows that there can be parallel imperfections across institutions. This seems to be a potentially valuable subject for inquiry, one that would aid and be aided by comparative institutional analysis.

and hardly random sample of the output of the legislative process. One observer, commenting on these same studies as representative even of economic regulation — let alone of legislation as a whole, stated:

> The empirical research has not been systematic. The researcher does not draw a random sample of, say, the economic legislation passed in the last ten years and ask how much of that legislation can be explained by the economic theory of regulation. Instead, he picks the cases that seem from a distance to support the theory and seeks to determine whether that initial impression was correct. I am not criticizing these studies. Had they shown that trucking, and airline, and railroad regulation could not be explained by reference to the operation of interest groups, the significance for scholarship would have been immense. But even a lengthy series of case studies cannot provide much support for the economic theory of regulation, given that the industries studies do not appear to be — and were not selected as — typical and that apparent counterexamples abound.[13]

The commentator was Professor Posner. If the sample is inadequate to establish that economic regulation is governed by a given model of legislative behavior — an express purpose of many of the studies, it is even more clearly inadequate to show that all legislative output (of which economic regulation is a small and not necessarily representative subset) reduces efficiency. It is difficult for an economist to determine whether any specific law, rule, tax, or other societal decision increases or decreases efficiency. The task of determining how an entire institution affects efficiency is awesome.

Even if the evidence established a tendency to overregulate commercial activity and indicated that the removal of certain regulations would increase efficiency, only imperfection would be established unless there was a feasible institutional arrangement that would achieve a better result. Two possible "better" mechanisms are imaginable: either the federal judiciary could review legislation to decide whether it is efficient, or we could eliminate all economic regulation. The first alternative is illustrated by the era in which the federal courts invalidated regulations under the banner of economic due process; this is discussed in Part II. The federal judiciary is hardly a perfect screener of inefficient legislation, and active judicial review of regulation is not obviously superior to the present system. What about eliminating all regulation of trade or commercial activity? Even assuming that one could determine where such regulation began and other legislation stopped, the studies viewed in their most

13. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MANAGEMENT SCI. 335, 353 (1974) (footnote omitted).

favorable light do not clearly indicate that "no regulation" — reliance on the imperfect market — is superior to the present system — reliance on the imperfect legislative process.[14]

We can now turn to the other half of the "effects" assertions — the theory that the "common law" promotes efficiency. The evidence for this theory is no stronger than the evidence on the inefficiency of the legislature. The studies cited here provide valuable insights into various rules of law.[15] They are the core of the attempts to analyze the *determinants* of legal decisions.

However, when cited as indicative of the *effects* of the common-law process, they are highly questionable sources. They do not establish that a given area of law is efficient, or tends toward efficiency. They establish that, given a plausible set of institutional assumptions — not always articulated — the legal decisions in question *could* be efficient. That outcome could provide evidence of efficiency were it not apparent that the number of plausible institutional assumptions is enormous. In each instance, one could construct a set of assumptions that would argue that the opposite rule or decision is efficient.[16] There are so many such potential failures in any setting that without substantial empirical effort one could not designate any one as the single dominant force, the correction of which would

14. Airline regulation is a frequent subject of the literature. But even if a form of legislation is inefficient (in the sense that eliminating the legislation would improve resource allocation), this does not establish that the legislative process in general tends toward or away from efficiency. It is interesting, however, that this form of regulation is on its way out, and that the institutional source of this alleged move toward efficiency has been the legislature itself. Is this evidence that the legislative process tends toward efficiency?

15. *See Uses and Abuses, supra* note 1, at 290 nn.33-41, and sources cited therein.

16. The argument here is not that it is impossible to establish efficiency by empirical evidence. It certainly is not that the attempt should not be made. Many of the works cited by Professor Posner are creative and able attempts at empiricism.

The problem lies in the impression created that any of these studies has *established* that the given area of law is efficient or tends toward efficiency. Such an impression is not consistent with either the state of the art or the complexity of the context. The difficulty of maintaining such a claim is captured in the following quote from Milton Friedman's article on positive economics:

> Evidence cast up by experience is abundant and frequently as conclusive as that from contrived experiments. . . . But such evidence is far more difficult to interpret. It is frequently complex and always indirect and incomplete. Its collection is often arduous, and its interpretation generally requires subtle analysis and involved chains of reasoning, which seldom carry real conviction. The denial to economics of the dramatic and direct evidence of the "crucial" experiment does hinder the adequate testing of hypotheses; but this is much less significant than the difficulty it places in the way of achieving a reasonably prompt and wide consensus on the conclusions justified by the available evidence.

M. FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 10-11 (1953).

The data and methods referred to by Friedman are generally substantially better than that available to those who test the hypotheses of legal analysis. For a recent and extensive discussion of the difficulties of establishing the efficiency of the common law, see Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 610-21 (1980).

move the economy toward efficiency.[17] The common-law courts may appear to react to perceived market imperfections; they may operate as though they were concerned with achieving economic efficiency. But this does not mean that the common law has actually correctly identified the market imperfections that if corrected would promote efficiency.

2. *Evolutionary Processes*

Whether alternative institutions actually achieve efficient results is not highly relevant to an analysis of determinants, but the mechanics of the decision-making process can be. Recent descriptions of the economic approach no longer speak in terms of judicial behavior.[18] A number of scholars now attempt to explain the alleged tendency toward efficiency in a manner that divorces it from the concerns or tendencies of judges. While these "evolutionary" theories have been debated on several grounds,[19] there are two unnoticed features that would severely constrain their value in legal analysis.

First, the evolutionary theories do not offer separate evidence that the common law tends toward efficiency. They assume the results discussed previously and attempt to explain them. These theories, which all depend upon the self-interested incentives of members of society to pursue litigation, attempt to show that, under varying conditions, inefficient rules will generate more cases, or more investment in cases than will efficient rules. Although the analyses are interesting and creative, the same arguments could be made about

17. The analysis of the *Boomer* case that appears later in this Article shows that the positions of both the dissent and the majority are consistent with a concern for and the potential achievement of efficiency.

Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), argues strongly that the negligence rules that he studied were consistent with efficiency. But elsewhere Professor Posner notes many serious imperfections in the torts process. For example, he argues that the existence of liability insurance can provide a pervasive block on the receipt of the signal sent by the negligence system. *See* ECONOMIC ANALYSIS, *supra* note 1, at 154. When one factors in these and other institutional problems, it is not persuasive that the law of negligence discussed by Posner actually moves the system toward efficiency.

18. *See* text at note 3 *supra*.

19. The evolutionary metaphor is employed by one of the proponents of this theory, Professor Paul Rubin: "In short, the efficient rule situation noted by Posner is due to an evolutionary mechanism whose direction proceeds from the utility maximizing decisions of disputants rather than the wisdom of judges." Rubin, *supra* note 8, at 51. Rubin has been joined by George Priest and John Goodman, *see* note 8 *supra*, in the pursuit of an evolutionary theory that divorces the efficiency of the common law from the attributes of the common-law decision maker. These three treatments take different approaches to the theory. They have been critical of each other's approach, and their analyses have been criticized by scholars outside the evolutionary school. *See* Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1957). There is little purpose in rehashing the arguments here.

the legislative process. Inefficient legislation produces more harm among the populace and, therefore, should produce more efforts to affect legislation — lobbying, campaigning, graft, etc. On this level of generality, one could as easily postulate conditions under which these efforts would drive the legislative process toward efficiency. Thus, these studies provide no additional reason to suppose that the common law is more or less efficient than any other mode of legal decision making.

Second, and most important, if the evolutionary theorists are correct, and positive theory is divorced from the judicial decision making process, their analysis is largely irrelevant to practitioners. If evolution occurs, it does so over a long period and a large number of cases. Such a process — even if it did evolve "efficient" rules — would hardly be relevant to anyone who wished to predict a given case or the evolution of a given area of law within a period that is relevant to most legal clients. The relevance of the theory to a legal analyst who wishes to alter or affect the decision is, by definition, nonexistent. The process is inexorable. Because it is not the product of the actions of the decision maker, it is immune to efforts by individual advocates. This difficulty with the evolutionary approach again reveals the need for the legal analyst to designate carefully his or her analytic purpose.

C. *The Role of a Modified Efficiency Hypothesis*

It is important to avoid the conclusion that economic efficiency has no place in an analysis of the determinants of legal decisions. I have argued that sweeping claims about the efficiency of alternative institutions disserve an analyst who is concerned with determinants. But if the analyst employs economic efficiency to approximate a goal that institutional decision makers attempt to promote, the construct can be useful. This section attempts to clarify the nature of an analysis in which such an efficiency construct could be used, and to find an intuitive connection between the concerns of judges and something so seemingly sterile as economic efficiency.[20]

A positive analysis that employs the construct does not assume that judges are actually concerned with economic efficiency. It asserts rather that they act *as though* they were concerned with it. That nuance provides a significant change that is reflected in the positive

20. Professor Frank Michelman, a critical and careful observer of the economic approach, has argued that there must be some normative basis to support the notion that economic efficiency is a postulated goal of judges. He wishes some intuitive basis to believe that judges seek to achieve economic efficiency. *See* Michelman, *supra* note 5, at 311-12.

analysis of pool playing discussed previously.[21] Presumably, pool players are not interested in successful vector analysis, good vector analysis, or any kind of vector analysis at all. They are interested in getting the ball in the pocket. Vector analysis is a method for *observers* to trace and predict the behavior of pool players. The assumptions, technical constraints, and mathematical trappings of vector analysis are irrelevant to pool players. The constructs do not affect the players' behavior; they are used by others to understand and interpret it.

Similarly, jurists need not have direct knowledge of or concern about the concepts and tools of economic analysis. Their minds are not filled with mathematical equations from Hick's appendix, Samuelson's dissertation, or the Theory of the Second Best. But we need only postulate that they are interested in something that can be described roughly *from the outside* as economic efficiency. Economic efficiency, like vector analysis, is a method for an analyst to understand observed behavior — in this instance, the behavior of judges.[22]

Given that the concepts of economic efficiency are merely external approximations of internal goals or intuitions, what could those goals or intuitions be? Here, of course, the process is highly speculative. "Economic efficiency" might describe a range of goals that do not actually resemble it, but the combination of which produces responses similar in external confirmation. There would be no connection between the intuitions of those who built the efficiency constructs and the intuition of the judges whose behavior is analyzed.

Economic efficiency could also represent judicial intuitions more closely related to its basic features. These intuitions could have two related strands: (1) that conflicts over the distribution of scarce resources should be resolved by reference to the needs or values of the members of society, and (2) that the weight assigned to these values or needs should reflect the intensity of the feelings of these individuals. These principles would not be universally acceptable, nor would they represent all of a decision maker's goals, but they are consistent

21. *See* text preceding note 3 *supra*.

22. This distinction can be overlooked even by sophisticated commentators. In a recent critique of the economic approach, Professor Lewis Kornhauser briefly discusses Professor Michelman's (*see* note 5 *supra*) determinants translation of the economic approach. Professor Kornhauser criticizes this variant because he does not believe that judges use economic tools and that if they did, it would be reflected in the language of their written opinions. Kornhauser, *supra* note 16, at 620. Such criticism misunderstands the role of the construct in an analysis of determinants. The hypothesis does not claim that judges employ economic tools. It argues that their behavior can be described as though they employed those tools. The economics is employed by the observer, not the judge.

with generally acceptable intuitions. The desires and values of people are attractive building blocks for a social system, and it seems plausible that societal decision makers wish to respect these desires and values.[23]

Thus, the construct of economic efficiency may be used to approximate one of the societal goals employed in a comparative institutional framework. Whether the construct of economic efficiency with all its trappings is the best available mode of this approximation is not obvious. The answer lies in the available alternative constructs and their track records. Although the economic approach has made excessive claims in the name of efficiency, the approach has sometimes productively analyzed the determinants of legal decisions. It thus seems plausible that a more carefully drawn and employed concept of economic efficiency can contribute to a comparative institutional approach.

II. The Role of Institutional Comparison

With a better sense of the distinctions among analytical purposes and of the place of a confined efficiency construct, we can turn to the central concern of this Article — the role of institutional comparison in legal analysis.

It is the thesis of this section that, even if one accepts the basic argument of the economic approach that economic efficiency is the goal or logic of the law, far more insight about the determinants of legal decisions will be gained from an analysis which explicitly focuses on the comparison of institutions.[24] The economic approach tends to focus on the attributes of only one institution — the market.

23. Although economic efficiency can be viewed as a conceptual apparatus capable of externally observing behavior based on this concern, it contains features that may seem to diminish its appeal. The most critiqued feature is the "willingness-to-pay" concept. *See* Michelman, *supra* note 5, at 311. *See generally* Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 Hofstra L. Rev. 671, 677-81 (1980). Thus, efficiency is often defined as a situation in which goods go to those who value them the most — that is, those who would pay the most for them. However, this reflects *ability* to pay. It suppresses distributional questions, and can be seen as favoring the wealthy, whose preferences receive greater weight. This presents troubling questions for resource allocation efficiency as a normative principle. Professor Posner has recently made an argument for "wealth maximization" as a normative principle. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103 (1979). This proposition has been criticized extensively. It received the critical attention of a wide range of scholars in a recent symposium. *See* 8 Hofstra L. Rev. 485-770 (1980). However, the existence of this efficiency construct should not be so troubling in a positive theory.

24. This section accepts the definition of resource allocation or economic efficiency employed by the economic approach: efficiency is the closest attainable approximation of the outcome of the perfectly functioning market. *See* text at note 3 *supra*. The term presupposes a given income distribution. It defines the value of resources to be the amount that individuals are willing to pay for them.

This focus reduces the potential coverage of legal issues and systematically suppresses a range of determinants which are as plausibly valuable as those which the economic approach emphasizes.

This section compares the comparative institutional and economic approaches in a number of contexts. It first considers the relative abilities of the two approaches to understand legal rules and decisions where the market is arguably an important institutional alternative. This area should be the strength of the economic approach. The second part of the section then considers areas of the law in which the market is not clearly an important institution.

A. *The Judiciary Versus the Market*

In order to see the implicit institutional focus of the economic approach and some of the advantages of the comparative institutional approach, let us turn to some passages from the leading treatise on the economic analysis of law, Professor Posner's *Economic Analysis of Law*. This section discusses two applications of the economic approach. The first involves the general question of property law remedies; the second involves the narrower issue of the role of custom in tort liability. In both instances, the economic approach has offered some useful insights. But, in both areas, it is unduly hampered by its consideration of only one institution.

1. *Property Rules and Remedies*

In his analysis of the law of trespass, Professor Posner employs the example of one neighbor attempting to use the garage of another without permission. If the owner of the garage seeks redress, the courts generally will not listen to a defense by the neighbor that his or her use is more valuable, and they will usually enjoin future trespasses. Professor Posner argues that this response is economically justified:

> The market is a more efficient method of determining the optimum use of land than legal proceedings. If my neighbor thinks his use of my garage would be more productive than mine, he should have no trouble persuading me to rent it to him. But if he merely *claims* that he can use my garage more productively, he thrusts on the courts a difficult evidentiary question: which of us would really be willing to pay more for the use of the garage?[25]

In a sense, the assertion that the market is more "efficient" than legal proceedings can be interpreted as a comparative institutional analysis: the market is the less imperfect (less costly, less often mis-

25. ECONOMIC ANALYSIS, *supra* note 1, at 40 (emphasis original).

taken) institution to make the valuation decision. Interpreted this way, the analysis of trespass is interesting and useful. But this general comparative institutional interpretation is inconsistent with Professor Posner's subsequent generalization about property rights and remedies:

> The discussion of remedies in this and the preceding section may be generalized as follows. In conflicting-use situations in which transaction costs are high, the allocation of resources to their most valuable uses is facilitated by denying property right holders an injunctive remedy against invasions of their rights and instead limiting them to a remedy in damages . . . . Where transaction costs are low, injunctive relief should normally be allowed as a matter of course . . . .[26]

This analysis — which represents a general theme in the economic approach — is institutionally one-sided. It focuses on variations in only one of the alternative modes of allocation of resources — only variations in transaction costs (imperfections) in the market are considered. When the market works well (*i.e.*, transaction costs are low), it is given the responsibility for establishing the value of resources and inducing correct behavior. The court can issue an injunction without concern for the value of the competing uses. When the market works poorly (*i.e.*, transaction costs are high), the court takes on the market's function: it prices the behavior in question, and sets a damage award. But the market is not the only institution whose imperfections vary in different factual settings. The economic analysis of legal remedies does not directly recognize the potential importance of judicial imperfections, or the possibility that the factors that affect the market's allocative abilities may also affect the judiciary's allocative abilities. If we postulate, as does the economic approach, a judiciary concerned with facilitating the most efficient allocation of resources, then the capabilities of *both* institutions would seem relevant.

Is there relevant variation in the capabilities of the judiciary in different property rights settings? To answer this question we should ask whether the factors that alter the market's abilities also alter the judiciary's abilities. Perhaps the most important source of variation in transaction costs between the "garage" example that typifies the injunctive remedy setting and the air and noise pollution examples that characterize the damage remedy setting is the number of persons potentially affected by the property use. The trespass case envisions one owner and one trespasser. The pollution cases involve at least one polluter and many victims. A second source of variation is

26. *Id.* at 51 (footnotes omitted).

the difference between the types of activity that typify the trespass and pollution (nuisance) settings: it is arguably easier to prove and evaluate damages in physical trespass cases. The direction of these variations is consistent with the proposition that the market will work more effectively as an allocative device in the trespass than in the pollution or nuisance setting. So far, so good.

However, there is similar variation in the abilities of the judiciary. First, on the simplest level, a larger number of victims per violation can mean a larger number of suits and more administrative costs for the judiciary. Second, it is quite possible that the costs of each case will be greater because the existence and extent of damage may be more difficult to evaluate in the pollution than in the trespass setting. Third, the difficulty in assessing the damage can increase the likelihood that opposing litigants will perceive the outcome of litigation differently. Such divergence in perception increases the chances of litigation rather than settlement.[27] Finally, and perhaps most important, air or noise pollution cases are often characterized by small per capita damage to a large number of people. While the injury may in the aggregate be substantial, it is likely that such low per capita losses will be unrepresented or underrepresented in litigation. To the extent that these losses are not fully represented, the potential polluter will not take into account the full social impact of his or her activity.[28]

When one realizes that the effectiveness of *both* available institutions varies, it is no longer obvious why variation in only one institution (the market) should be the dominant explanatory factor even for a decision maker who seeks allocative efficiency. This does not necessarily suggest that economic efficiency should be abandoned as

27. *See, e.g., id.* at 434-38.

28. Professor Posner is aware of this problem in the nuisance setting. He refers to it as "the lack of a procedural device for aggregating small claims." ECONOMIC ANALYSIS, *supra* note 1, at 47. He suggests that "developments in the class action . . . may help to overcome this procedural shortcoming." *Id.* at 46-47. As his subsequent discussion of class actions indicates, that reform — potentially valuable as it may be — leaves significant remaining imperfections in the aggregation of small claims. *Id.* at 449-51. The discussion of the *Boomer* case reveals the quite plausible perception by one judge that substantial problems remain. *See* notes 29-30 *infra* and accompanying text.

Most important, although Professor Posner recognizes the existence of this substantial imperfection in the judicial process in a property remedy setting, he does not integrate the potential for this or other judicial imperfections into his general articulation of the economic approach to property remedies. *See* text at note 25 *supra*. This treatment again reveals the use of market attributes as the dominant determinants of the law. A judge interested in economic efficiency would *not* be interested solely in the attributes of the market. This attraction to market attributes may be inherent in the use of economic analysis that is not cast explicitly in institutional terms. *See* text at note 41 *infra*.

part of a legal analysis. Rather, it indicates that an inquiry that considers only variations in market characteristics is too limited.

The opinions in *Boomer v. Atlantic Cement Co.*[29] suggest the value of an analytic framework that forces its user to recognize consistently the critical role of variation in the characteristics of both the judiciary and the market. In that case, a group of landowners were successful in a nuisance action against a polluting cement plant. However, contrary to past precedents, the court denied them an injunction, and granted permanent damages. There was substantial evidence that the loss to the plaintiffs, although significant in absolute terms, would be dwarfed by the cost of closing the plant that the majority thought an injunction would force.

The decision to refuse the injunction is consistent with the economic approach. But the dissent would have issued an injunction, and its approach is also consistent with a concern for efficient resource allocation. The dissent was concerned about the many people in the Hudson Valley injured by the particle pollution produced by cement plants like the defendant's. These people were unlikely to register their loss through the damage remedy. A judge concerned with economic efficiency could plausibly conclude that the damage remedy would not send the correct signal to potential polluters because many injured parties would not bring action. Such a judge could also find that the total social losses due to the pollution exceed the social losses from pollution abatement, even abatement in the form of plant closing. It is not obvious that the majority's decision is correct and the dissent incorrect in efficiency terms.[30]

The comparative institutional approach allows the legal analyst to understand the institutional assumptions that would yield either conclusion. It indicates what factors are important to a determina-

29. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

30. The opinions in *Boomer* raise broader issues of institutional comparison. The economic approach tends to emphasize only two institutions, the market and the judiciary, and even then it systematically considers variation in only one. But the judiciary has available to it more than the choice between itself and the market. Dominant among the alternatives is the legislature. Part of the debate in the *Boomer* case involved the role of the legislature in protecting the public from pollution. The majority argued that where difficult and extensive trade-offs are involved, the legislature is the superior institution to determine the relative values of the alternative land uses. This argument was presumably intended to answer the dissent's concern for the impact of the majority's remedy on the general public. Obviously, the dissent disagreed.

Where the judiciary senses that both its abilities and those of the market are inadequate, it is understandable that it would consider other institutional alternatives. One of the most interesting discussions of the relative capacities of the judiciary and the legislature in defining property rights appears in Justice Brandeis's famous dissent in International News Serv. v. Associated Press, 248 U.S. 215 (1918). This case and its opinions are helpful to a basic analysis of property rights.

tion of the strengths and weaknesses in a legal position. Lawyers who have an appreciation for the various institutional imperfections can attempt the difficult but necessary predictions either by introspection — asking how they would balance these factors in the given case — or by the use of any direct information that they have about the way that the specific decision maker might evaluate the relevant factors. The approach can also provide the lawyer with some idea of which facts to emphasize and which to refute to produce a favorable decision.

2. *The Role of Custom in the Determination of Negligence*

The determination of negligence is assigned to the trier of fact — the jury. Although the judge's instructions offer some guidance, in general the task of defining unreasonable conduct is left to the jury's discretion.[31] However, the jury's discretion is often channeled by the interjection of safety determinations made by other institutions. One example of this process — the role of penal statutes — will be considered in the next section. Here the issue is the role of the custom of the community.

Custom substitutes for the jury's independent assessment of the advantages and disadvantages of a safety step — the determination of due care. The jury is given information about the traditional behavior of a sector of the populace with the defendant's characteristics. The judge can control the impact of this custom evidence by excluding the evidence as irrelevant, varying the jury instructions, or by directing verdicts on the basis of unchallenged custom evidence. This range of judicial reactions is reflected in the leading treatise on the subject:

> In a particular case, where there is nothing in the evidence or in common experience to lead to the contrary conclusion, this inference may be so strong that it calls for a directed verdict on the issue of negligence. . . . Some few courts formerly made the effort to treat all customs in this manner, and to enlarge the normal inference into an "unbending test" of negligence, under which the ordinary usages of a business or industry became the sole criterion as to what the actor should, as a reasonable man, have done.
>
> Such an arbitrary rule proved in the long run impossible to justify. . . . [C]ustoms and usages themselves are many and various; some are the result of careful thought and decision, while others arise from the kind of inadvertence, carelessness, indifference, cost-paring

31. This determination of reasonableness arguably involves the implicit balancing of the advantages and disadvantages of the safety step which the defendant allegedly failed to take — a balance captured by Judge Learned Hand's famous articulation in United States v. Carroll Towing, 159 F.2d 169, 173-74 (2d Cir. 1947).

and corner-cutting that normally is associated with negligence.[32]

The economic approach offers an analysis of custom that goes beyond this conventional approach. The economic approach argues that the custom defense will be available where there is a market incentive, independent of the threat of liability, to take safety precautions. Situations where the potential victims are customers of the potential injurers provide one example. In such cases, there is reason to believe that the industry's customs meet the standard of reasonable care.

But this treatment is incomplete, because the market cannot be described in dichotomous terms (*i.e.*, it provides complete incentives or it does not). A fuller presentation of the institutional factors affecting the market's ability to yield the correct custom would reflect a spectrum of potential market imperfections. Because the market will never be perfect, the custom observed will always be imperfect. Thus, an analysis of custom that considers only the market does not really explain when custom would be relevant.

The comparative institutional approach, however, points to the missing considerations: the characteristics of the trier of fact. The judge and jury are also imperfect, and the *variation* in this imperfection and its integration into the analysis of legal rules are important.[33] One important factor is the jury's lack of technical expertise.[34] The jury is less attractive as a decision maker, the more technically complex the safety step involved in the case.

The contrast between the economic and comparative institutional approaches is revealed by an examination of the limited role of custom allowed by Judge Hand in the famous *T.J. Hooper*[35] case and the extensive role of custom in medical malpractice cases. *T.J. Hooper* involved the loss of barges in a storm. The barge owner (plaintiff) argued that the tug owner (defendant) was negligent in failing to have a radio that would have warned of the impending storm. The evidence indicated to the court that such radios were not customarily employed in the industry. Yet despite the fact that there

32. W. PROSSER, THE LAW OF TORTS 166-67 (4th ed. 1971) (footnotes omitted). The passage reflects the state of the conventional analysis, which tends to restate the issue, along with long lists of factors which are not linked to any clear conception of why and when these factors are important.

33. Professor Posner later raises the issue of custom in the context of his discussion of the general attributes of courts and legislatures. *See* ECONOMIC ANALYSIS, *supra* note 1, at 402. Again, while recognizing the existence of judicial imperfection on a general level, he did not integrate this perception into his analysis of the specific issues.

34. *See* note 63 *infra*.

35. 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

was a buyer-seller relationship, and that all the parties seemed sophisticated, Judge Learned Hand held that the custom evidence was unnecessary, and affirmed the decision for the plaintiff.

Professor Posner finds this treatment of custom inexplicable.[36] However, he argues that the treatment of custom in the medical malpractice context is quite consistent with his analysis. Rarely can a plaintiff prevail in a malpractice case without strong testimony that the defendant has violated the custom of the industry. Standard jury instructions are cast in terms of custom. Professor Posner argues that this is explained by the "buyer-seller relationship" between patient and physician. But the market for health services hardly ranks among the best functioning markets. Patients generally are unsophisticated and unknowledgeable consumers of this complex service.[37] The market in the medical malpractice setting is substantially less perfect than in the *T.J. Hooper* setting.

The different role for custom in the two situations is sensible when one considers that medical malpractice presents a much more difficult and complex issue than did the simple safety question in *T.J. Hooper*. In that case, the question was merely whether ships should be equipped with radios to hear weather reports. Judge Hand considered the issue relatively straightforward and capable of decision by the normal trier of fact. On the other hand, medical malpractice questions are highly technical and substantially beyond the ability of the normal trier of fact. In this example, the role of custom depends on the perceived capacity of the nonmarket institution, the fact-finder. The economic approach considers only the variation in the market. Comparative institutional analysis takes into account variations in the capabilities of both the market and the fact finder, and can thereby point us to the most important determinants of decisions.[38]

These two areas of the common law involve situations where the market is plausibly an important institutional alternative. Both

36. *See* ECONOMIC ANALYSIS, *supra* note 1, at 126.

37. *See* Schwartz & Komesar, *Doctors, Damages and Deterrence — An Economic View of Medical Malpractice*, 298 NEW ENGLAND J. MED. 1282 (1978).

38. Interestingly, the lists of factors employed by traditional torts scholars to explain custom include consideration of the technical expertise of the jury. Thus, after trying a number of factors, in connection with the role of custom in medical malpractice, Professor Prosser makes the following observation: "It seems clear, in any case, that the result is closely tied in with the layman's ignorance of medical matters and the necessity of expert testimony." W. PROSSER, *supra* note 32, at 165.

However, these analyses not only slight consideration of variation in the attributes of the market, but they also generally fail to construct a succinct framework that integrates the factors that they suggest and the facts of the case.

areas present questions of institutional substitution. Yet the traditional approaches involve no basic institutional analysis, and the economic approach considers only one, and always the same, institution — the market. The comparative institutional approach seems a more sensible and complete mode of analysis.[39]

The failure of the economic approach to consider systematically variation in the attributes or imperfections of nonmarket institutions does not appear based on a general unawareness of these imperfections.[40] The problem lies in the failure to include systematically

39. There is, arguably, a subtle methodological point involved here. Professor Posner's analysis could be restated as a variant of the comparative institutional approach. The economic approach could be cast as one that assumes that the legal decision maker is interested in the least imperfect institutional alternative and that, at least in the context of the common law, the only important institutional *variation* occurs in the market. The assumption is that, for analytical purposes, the judiciary is viewed as imperfect *at a constant level*.

The use of the comparative institutional approach requires making choices: not every institution will seem a plausible alternative; not every attribute will seem a plausible source of variation. If I were to design a narrow version of the comparative institutional approach to deal with custom and perhaps property rights and remedies, it would seem reasonable to consider only two institutions — the market and the judiciary. But it seems far less sensible to narrow the focus by a general assumption that of these two institutions only the market reveals significant variation in its abilities. That is the most dubious element of the economic approach to property rights and custom in particular and to the common law in general.

At first blush, contract law seems an area where this extreme version of the comparative institutional focus might survive. However, the evolution of work in this area reveals the value of a broader comparative institutional approach. Professor Posner's treatment of contract remedies reveals the same problems noted in connection with property remedies. *See* ECONOMIC ANALYSIS, *supra* note 1, at 88-93, 95-97. In particular, his claim that the expectation damages remedy is superior to specific performance cannot be argued without some recourse to the characteristics of the judicial decision maker. The subsequent discussions by Kronman and Schwartz reveal this. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979). Even these treatments would have benefited from a more balanced consideration of the variation in judicial capabilities.

Professor Posner's treatment of contract law has been most effective when he has been forced to consider the attributes of the judiciary. Such a step was necessary to understand the law on gratuitous promises, where some but not all voluntary transactions are enforced. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977). But this insight was not consistently applied in the economic approach to contract law. Consider Professor Posner's treatment of incapacity, where he again relies only on variation in the market. *See* ECONOMIC ANALYSIS, *supra* note 1, at 80. Incapacity is not necessarily dichotomous — one is not either capable or incapable. The courts are not perfectly able to determine the correct substance of the contract. A comparative institutional approach would look for variation in the conditions for contract validity under incapacity or the substitution of alternative decision makers such as parents, guardians, and trustees.

In general, contract law should be more amenable to consistent treatment by an explicit comparative institutional approach than by an implicit single institutional approach.

40. *See* note 28 *supra* for a discussion of Professor Posner's recognition of the problem of "aggregating claims."

Professor Posner recognizes and discusses the comparison between the judiciary and the market in general terms in a chapter separate from the analysis of the common law. Although this treatment does not correct his failure to compare institutions in interpreting common-law rules, its existence paradoxically emphasizes the need to do so.

Professor Posner's discussion itself reflects the disadvantages of an approach not cast explicitly in terms of imperfect institutions. The thrust of his brief discussion is captured in the

these considerations in the actual analyses of legal rules and decisions.[41]

B. *The Judiciary Versus Other Institutions*

This section will consider some examples of legal issues in which the market is not clearly an important alternative institution. In general, as might be expected, the economic approach has afforded these issues less attention. The first part of the section considers another

following passage: "The fundamental difference between law and the market as methods of allocating resources is that the market is a much more efficient mechanism of valuing competing uses. In the market people have to back up their value assertions with money (or some equivalent sacrifice of alternative opportunities)." ECONOMIC ANALYSIS, *supra* note 1, at 402.

If the market were "a much more efficient method of valuing competing uses," why would we ever have the intervention of the courts and their damage remedy? Professor Posner means that the market has an advantage in evaluation because, *when the market functions well*, actual expenditures reveal preferences better than the adversary process where people do not "back up their values." But that suggests that the "fundamental difference" does not exist in the form articulated. Sometimes the judiciary is "a much more efficient mechanism of valuing competing uses." The judgment as to when this is so depends on a comparison of imperfections in the particular factual setting, not on the articulation of the imperfections in only one institution.

41. This failure may well be the inadvertent product of the application of economics outside its conventional setting without careful consideration of the full implications of the change in settings.

In a recent article, suggesting that there are inherent limits on the march of economics into areas of human choice previously the bastions of other social sciences, Ronald Coase offers the following definition of economics: "What economists study is the working of the social institutions which bind together the economic system: firms, markets for goods and services, labour markets, capital markets, the banking system, international trade, and so on. It is the common interest in these social institutions which distinguishes the economics profession." Coase, *Economics and Contiguous Disciplines*, 7 J. LEGAL STUD. 201, 206-07 (1978). This definition emphasizes the social institutions traditionally associated with the economic system. This definition is important not because it is the only or even best definition of economic analysis, but rather because it reflects the traditional setting in which the tools of economics have evolved. It is all too easy to carry over the traditional focus on the attributes of the market and then to concentrate only on variations in these attributes. When variation in nonmarket institutions is likely, it is clearly better to use an analytical framework that avoids this tendency.

It is important to recognize the central role that economists have played in the consideration of variation in nonmarket institutions. Ronald Coase and Gary Becker, among others, have contributed mightily in this vein. Coase's article on the firm provides an imaginative perception of the institutional underpinnings of economic analysis. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Coase's classic article, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), again stressed the underlying institutional nature of economic analysis and the errors of economists who failed to focus on these institutional factors.

Gary Becker has espoused the application of the tools of economic analysis to nontraditional areas. He has produced many interesting insights into nonmarket behavior. *E.g.*, G. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

In general, economists have contributed substantially to the understanding of nonmarket phenomena, and they can be depended upon to aid the effort to fill out our understanding of institutional attributes. However, the failure of economic analysis explicitly to consider institutional attributes can contribute to applications that miss the sort of institutional variation to which economists like Coase are sensitive. This is especially true in nontraditional settings. The quality of economic analysis in general might profit from a clearer emphasis on institutional attributes. Coase made an analogous suggestion twenty years ago. *See* 3 J. L. & ECON. at 42-43.

substitution for the jury in the torts context — the use of penal statutes to determine negligence. The second part briefly overviews institutional decisions within the judiciary — the traditional categories of procedure and evidence. The third part turns to an area of law that the economic approach has generally omitted or abandoned — constitutional law.

1. *The Role of Penal Statutes in the Determination of Tort Liability*

If a party charged with negligence in a tort action has violated a relevant penal statute, the violation may evince negligence. Like custom, the role of penal statutes in determining tort liability is an important example of substitution for the determination of the jury. Common-law judges are faced with the choice of whether to substitute the legislature's determination of due care for that of the jury.[42] But unlike custom, there is no treatment of the role of penal statutes by the economic approach. The omission is consistent with the narrow institutional focus on the market. When the judge determines whether violation of a penal statute is to affect or preclude the jury's determination of due care, he or she is choosing between the jury and the legislature. The market is not an important alternative. Whatever the reason for the omission by the economic approach, the role of penal statutes can be cast comfortably in comparative institutional terms.

A number of criteria affect the role of penal statutes in negligence cases. Quite sensibly, the courts have required that the legislation be relevant to the fact situation in the case. The legislation must have a safety purpose and that purpose must be relevant to the type of mis-

42. The statement of the issue here may be considered too insensitive to the position of the legal positivist. The legislature has the power to define the duty of care and designate its mode of determination. Therefore, it may be disturbing to some for me to say that the choice belongs to the judge. However, there are several considerations that should obviate this reaction.

First, the use of penal statutes is an area where the legislature has not clearly indicated a desire to change the mode of determining civil liability. The analysis that follows can be recast in terms of the search for legislative intent. In the context of penal statutes, the court does not receive much aid from the legislature and, therefore, even a positivist would admit the need for significant recourse to the judge's own intuitions in order to reconstruct the legislature's intent. The discussion that follows could be stated in those terms without changing its basic meaning.

Second, this analysis is not normative: it need not argue that judges ought to exceed a position assigned them; it need only argue that there is a tendency to do so. Vaguely worded statutes, constitutions, or contracts require judges to go beyond simple reliance on the express language. A positivist judge may feel more constrained than a realist judge, but he or she still needs guidelines beyond the language, whether these guidelines are called discretion, principle, policy, or power.

This issue is raised more dramatically by my analysis of constitutional law. Most of the above points are relevant even there.

hap and actors involved in the case.[43] But even if the legislature has spoken to the general safety problem involved in the case, its safety determination does not always prevail in the civil setting. In some instances, violation of the penal statute is determinative. In others, it is only evidentiary. In still others, it is ignored.

A comparative institutional approach would look for explanations of these variations by examining the perceived relative abilities of two institutions: the jury and the legislature. This approach would parallel the earlier analysis of custom which stressed variation in the jury and the market. In this connection, the traditional legal scholarship on the role of penal statutes is instructive.

One of the earliest and most famous works on the use of penal statutes is Thayer's, *Public Wrong and Private Action*.[44] Thayer felt that violation of a criminal statute was inconsistent with the definition of a reasonably prudent man.[45] He argued for a negligence per se approach, rather than one that allowed the jury to view a violation as merely indicative of negligence. This approach was criticized by Lowndes, who thought that it undermined the role of the proper determiner of the "social standard of conduct in negligence" — the jury.[46] It was clear to Lowndes that the jury should be the sole and final determiner of the standard of care. Violation of penal statutes was at most evidence of negligence to be weighed by the jury after its fashion.[47]

This exchange represents two "single institution" approaches to the problem. Thayer believed that a safety determination by the legislature was superior; Lowndes thought that the jury's determination should prevail. From a comparative institutional viewpoint, positions that declare the absolute superiority of one institution over a large range of issues are questionable.

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43. This threshold is illustrated by Gorris v. Scott, L.R. 9 Ex. 125 (1874). The plaintiff's sheep were washed overboard from the defendant's boat. The plaintiff claimed that the defendant was negligent in failing to provide separate pens for the sheep, and attempted to establish the defendant's liability by pointing to a violation of a penal statute that required separate pens. The court refused to allow liability to be based on such a violation because the statute was enacted for sanitation purposes. The legislature had not concerned itself with the safety issue involved in the case.

44. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

45. *Id.* at 323.

46. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 367 (1932).

47. [T]he qualities of this superb individual [the reasonably prudent man] are not determined by legal rules, but by the social judgment of the jurors. . . . The formulation of the social standard of conduct for unintentional injuries is for the jury, not for the court, and, consequently, it would appear to follow that the jury must determine whether the violation of a criminal statute is or is not negligence.

Id. at 369.

Three extensive articles by Clarence Morris present a more balanced position.[48] Morris argued for and noted a wider variety of responses to penal statutes.[49] The problem with Morris's approach is that, although it stresses flexibility, it only hints at when courts should or do vary their use of the legislation. He suggests that courts apply legislation vigorously only when it is "an acceptably more exact standard by which to measure the breach of duty," but not when the legislature has enacted "a requirement of extra precaution which even those who use great care would ordinarily suppose unnecessary," or when the enactment is "a dangerous technical mistake."[50]

This vague mandate might be sensible if there were an institution that would easily discern whether the legislation comports with due care. The institution that Morris had in mind is the appellate court. However, even appellate courts do not generally view themselves as the best determiners of the standard of ordinary care.[51] When appellate courts are forced to decide whether the legislature or the jury will determine due care, their decisions are more likely determined by their view of the relative abilities of the alternative institutions, rather than by a desire to substitute their own safety decision.

Three decisions of the New York Court of Appeals that have become casebook traditions further illustrate the subtle variations in the law and the operation of the comparative institutional approach. In *Martin v. Herzog*,[52] the defendant drove an automobile in the wrong lane around a curve in the highway and collided with the plaintiff's horse-drawn wagon. The defendant argued that the plaintiff's deceased husband had been contributorily negligent per se because he was travelling without lights in violation of a penal statute. The trial court submitted the negligence issues to the jury with an instruction that allowed the jury to decide whether the violation of the legislative standard of due care was excusable under the circumstances. The jury decided that the violation was consistent with due care, and allowed the plaintiff to recover. Judge Cardozo, writing

48. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); and *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143 (1949).

49. "If the decisions of courts in torts cases are to be best calculated to serve the needs of society, the judge should rule that the defendant's criminal conduct constitutes negligence in some cases, while in others a different course should be followed." 46 HARV. L. REV. at 453.

50. 49 COLUM. L. REV. at 42.

51. This issue will be raised on a more general level in the subsequent discussion of constitutional law.

52. 228 N.Y. 164, 126 N.E. 814 (1920).

for the majority of the Court of Appeals, reversed. He held that the violation of the safety statute was negligence per se. The jury was not to be allowed to dispense with the legislature's standard of due care.

The subsequent case of *Tedla v. Ellman*[53] appeared to raise the same issue. There a brother and sister walking along the side of a busy highway were struck from the rear by a passing car. The pedestrians were walking on the right side of the highway with their backs to traffic. A statute required that pedestrians "keep to the left of the center line" of the highway. This provision was enacted to allow pedestrians to "step aside for passing vehicles with least danger to themselves and least obstruction to vehicular traffic." The defendant requested a dismissal of the complaint based on the violation of the statute — a request that seemed consistent with *Martin*. However, despite what appeared to be a clear violation of a relevant statute, the trial judge allowed the jury to decide the relevance of the violation to the plaintiffs' contributory negligence.

The Court of Appeals found no error in allowing the jury to decide that the violation was consistent with due care, and it affirmed the verdict for the plaintiff. Two judges dissented and simply cited *Martin*. The majority, in an opinion by Judge Lehman, distinguished the statute in *Tedla* because it was intended to embody common-law pedestrian practices, which permitted exceptions where it was safer to walk on the other side of the highway. The majority pointed to no language in the statute or the legislative debate to support this alleged intent.

It is difficult, at first glance, to distinguish the two cases. The plaintiffs' choice to violate the statute in *Tedla* was arguably justified because it represented due care, but the jury in *Martin* had also decided that the violation was justified. Yet Judge Cardozo, a past master in discovering implicit legislative intent,[54] refused to read a flexible intent into the statute in *Martin*. Both cases involve instances in which the legislature had offered a seemingly relevant determination of due care. In both cases, there are indications that the violations were justified. In both cases, the statutes embodied sensible general rules. Yet the *Tedla* court permitted the jury to make an exception to the statutory standard, while the *Martin* court did not.

The cases are, however, consistent with a sensible and simple institutional comparison. The jury is commonly suspect because it has

53. 280 N.Y. 124, 19 N.E.2d 987, 300 N.Y.S. 1051 (1939).

54. A classic example of this Cardozo touch can be found in the second part of his famous opinion in Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917).

little expertise or experience with public policy questions. The legislature is commonly seen as more capable in both of these senses. It can look at the broad context of the rule, it has access to experts outside of the strained adversarial setting, and it has greater experience in assessing the information that it receives. It is not surprising, therefore, that Judge Cardozo gave so much weight to the legislative determination in comparison to that of the suspect jury in *Martin*.

But the comparative advantage does not all fall in one direction. The legislature and the jury have different perspectives. The jury is privy to the particulars of the individual case; the legislature must generalize. If the general rule set by the legislature is potentially subject to many exceptions, it is attractive to find a role for a case-by-case decision maker. The legislature may generally be correct, but if an institution is available that can pick out the exceptions and still apply the general rule, it may be prudent to choose it.

Unlike Morris's approach, this analysis does *not* presuppose that judges — appellate or trial — view themselves as better determiners of safety. The issue is not whether the particular case is an exception or the particular legislation "a technical mistake." The court may assume that the standard set by the statute is in general the correct one. But if there are a wide range of potential exceptions, the court may sensibly see the case-by-case decision maker as the superior (albeit still imperfect) decision maker. The court in *Tedla* emphasized its perception that there could be many instances in which it might be safer to walk with rather than against the traffic. The court ascribed this perception to the legislature and read the exception into the statute.

Brown v. Shyne[55] reflects the comparative institutional analysis just employed, and suggests another potential source of legislative imperfection. *Tedla* and *Martin* can be explained by reference to whether the legislative rule is one that admits of exceptions; in *Brown*, the explanation lies in the imperfections of the legislative process itself.

In *Brown*, the plaintiff alleged that she had been injured because of negligent treatment by a chiropractor. The chiropractor had clearly violated a statute prohibiting unlicensed physicians from treating patients. Unlike *Tedla*, the defendant could not argue that he was providing safer medical care by violating the statute. And the legislation here apparently was intended to reduce mishaps due to treatment by unqualified practitioners. The trial court instructed

55. 242 N.Y. 176, 151 N.E. 197 (1926).

the jury that they might consider the violation as "some evidence, more or less cogent, of negligence which you may consider for what it is worth, along with all the other evidence in the case."[56] The instruction resembles the one that Judge Cardozo rejected in *Martin* because it gave too little weight to the statutory violation. However, the jury decided that negligence was established by all of the evidence, presumably including the statutory violation.

The Court of Appeals reversed and ordered a new trial. It held that the trial court had erred in instructing the jury that the violation had any relevance. The majority opinion, again by Judge Lehman, noted that there was direct evidence of the defendant's actual behavior, training and skill, and that "the absence of a license does not seem to strengthen [the] inference that might be drawn from such evidence . . . ."[57]

Such a statement avoids the issue. In most cases involving a statutory violation, there is other evidence on the issue of ordinary care. However, presumably because many safety questions are complex, the fear of jury error provides a reason to give weight to a legislative determination of due care — often allowing it to replace the jury's assessment. Whether someone possesses the necessary skill to provide medical care is a technically complex issue,[58] the legislature has suggested that the licensing decision could evince the defendant's training and ability.

The decision not to treat the violation as negligence per se is understandable. Even if, in general, unlicensed practitioners provide insufficient care, there is a strong enough possibility of exceptions to justify finding a role for a case-by-case decision maker.

It is less obvious why the *Brown* court allowed the violation of the statute no role at all, given the complexity of medical practice and the expertise of the licensing board. The answer may be that the key variable is not expertise, but rather institutional bias. The issue is analogous to the treatment of industry expertise when analyzing the role of custom. The industry presumably always has technical expertise, but it does not always have the correct incentives to use it. Special interest groups, such as the medical profession, may be overrepresented in legislative or administrative decisions concerning

56. 242 N.Y. at 179, 151 N.E. at 198.

57. 242 N.Y. at 182, 151 N.E. at 199.

58. Consider the discussion of the unusually strong role of custom in the medical malpractice context. *See* text at notes 36-38 *supra*. This complexity provides an institutionally based distinction from the easier case where an automobile accident involves an unlicensed driver. There one would more easily accept complete reliance on a jury, since the average person generally has substantial experience with the techniques of safe driving.

medical licensing statutes. This distortion of legislative incentives may not have been lost on the *Brown* majority.[59]

2. *Decisions Within the Judicial Institution — Jury Substitution in General*

The use of penal statutes and custom in tort liability are examples of a more general comparative institutional issue — the role of the jury versus a range of other imperfect institutions. This theme cuts across many areas of procedure and evidence on common law, statutory, and constitutional levels.

The economic approach has offered some useful analytic contributions to the understanding of procedure. In particular, the simple model of settlement has provided significant insights and has aided analyses of discovery and other procedural issues.[60] But the economic approach has again focused its attention on the attributes of private decision makers — litigants, potential injurers, and potential victims — as the basic determinants of procedure. It has largely ignored the attributes of the nonmarket decision makers — the jury, the judge, the legislature, and administrative agencies. The result is an interesting, but systematically skewed, representation of procedure.

The economic approach, like most of the conventional approaches, emphasizes trade-off between the benefits and costs of increased accuracy. It is sensible to emphasize that the reduction in error is not costless. The economic approach also discusses the implications of error rates on the amount of litigation, the rate of settlement, and the response of the actors whose behavior society wishes to affect by its substantive laws.

But the economic approach generally has emphasized the *effects* of changes in error, not the *sources* of changes in error — the decision-making institutions. While it is quite plausible to envision the

59. *Cf.* Hawkeye Lumber Co. v. Day, 203 Iowa 172, 210 N.W. 430 (1926), where, explicitly reacting to its perception that a board materialman's lien statute had been framed with no effective representative for property owners involved in the legislative bargaining, the court imposed special constructive trust requirements on the materialman to prevent harsh application of the statute against a property owner. The issue of legislative bias is raised in the discussions of constitutional law, *see* text at notes 68-84 *infra*, and the treatment of legislative efficiency by the economic approach. *See* text at notes 10-14 *supra*.

The recurrence of this issue indicates that insights evolved from a comparative institutional analysis in one area can assist the analysis of seemingly different issue areas. As such, it reveals a potential advantage of applying this approach to law in general.

60. *See generally* Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 284-95 (1973); Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

common-law decision maker as concerned with the potential effects of reduced error in the formulation of rules, it seems implausible that this concern would not be joined with — and likely dominated by — a concern for the sources of reduced error. In this connection, it would be odd if the attributes of only one set of actors — litigants — was relevant. There are many potential sources of error within the judicial setting: jury, judge, expert witnesses, legislative input, and so on. In particular, the perceived characteristics of the jury — ostensibly the basic fact finder in litigation — would seem relevant in determining the rules of procedure and evidence. The economic approach has seldom considered the role of the jury.[61]

The issue of whether to use a jury or a more expert, but more general decision maker — which surfaced in the discussion of penal statutes — can be extended to instances where an appellate or even a trial court is asked to substitute a general rule for case-by-case jury determination. The evolution of absolute liability and the related issue of *res ipsa loquitur* in tort law, and the imposition of simple standards by directed verdict that prompted the famed Holmes-Cardozo confrontation (the "stop, look and listen" cases), reflect such a choice.[62] In none of these issue areas do we see either complete abandonment of or complete deference to the jury, and analyzing these cases in terms of the comparative skills of judges and juries might provide useful insights.[63]

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61. Professor Posner gives the jury barely two pages in his book. ECONOMIC ANALYSIS, *supra* note 1, at § 21.11.

Although not every institution deserves sophisticated treatment, it is difficult for a legal analyst to argue that the jury does not have a presumptive claim to intellectual attention as great as that of the market, especially when procedural rules are at issue.

62. Holmes articulated his famous "stop, look, and listen" maxim in Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927). This attempt to prompt trial judges to formulate and apply rules generalized from their observations of jury decisions reflects Holmes's concern for consistency in the law. *See* O.W. HOLMES, THE COMMON LAW 110-11, 120-24 (1881). This same theme and its implications for the litigant and for the potential violator's behavior has been expanded productively in Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

However, this attempt was short lived as the Court, per Justice Cardozo, denounced this particular attempt at consistency in Pokora v. Wabash Ry., 292 U.S. 98 (1934). As we have seen in the penal statute context, Cardozo was not an unyielding devotee of the jury. Nor can one imagine that Justice Holmes was an unyielding supporter of the trial judge as the sole determiner of fact. The exchange — about directed verdicts — reflects a difference in view about the same two-part issue — (1) whether the inaccuracy of the jury as a case-by-case determiner was greater or less than the inaccuracy of a general rule, and (2) even if the jury was more accurate, whether greater complexity in the pattern of fluctuating jury outcomes costs society more than would a less accurate, but clearer, general rule.

63. The role of the jury is an important and controversial issue within the federal judiciary. The expansion of the seventh amendment right to a jury in Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959), the subsequent attempts to narrow this right in Atlas Roofing Co. v. Occupational Safety & Health Review Commn., 430 U.S. 442 (1977), and Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), and the growing number of lower court cases that have split

Whether a comparative institutional approach will aid the analysis of procedural rules must await specific applications. However, relative to the economic approach, a comparative institutional approach seems better able to address the full range of procedural issues. The economic approach to procedure and evidence is defective because here, as elsewhere, its limited institutional focus constrains its coverage.

3. *Beyond the Common Law — Constitutional Law*

Although an extensive comparative institutional analysis of constitutional law must await a work whose major theme is constitutional law and judicial review,[64] it is consistent with the theme of this Article to consider a brief application to show that the same analytic approach can be used for both common-law and constitutional-law

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over the issue of the right to a jury in highly complex cases, *see, e.g.*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Calif. 1978); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976); Bernstein v. Universal Pictures, Inc., 379 F. Supp. 933 (S.D.N.Y. 1974), *revd.*, 517 F.2d 976 (2d Cir. 1976); *In re* U.S. Financial Sec. Litigation, 375 F. Supp. 1403 (Jud. Pan. Mult. Lit. 1974), *revd.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980), have produced an important controversy over the role of the jury — a controversy that will likely force a decision from the Supreme Court.

Such a decision involves evaluating the relative merits of the jury and alternative decision makers. On a normative basis, the Court could be aided by insight into the relative merits of various alternative decision makers, such as their ability to handle information and their institutional biases. The seventh amendment area has long been a bastion of "historical analysis," but the vast mass of history requires a framework or grid by which to be read. The framework may often be unarticulated, but some framework is usually there. Perhaps a comparative institutional analysis would be useful here. There have already been indications that the Court is searching for a mode to resolve the problem which allows some leeway in the historical interpretation. *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

64. Although a thorough consideration of the literature on constitutional judicial review is beyond the scope of this Article, an institutional focus can be found in this rich body of scholarly endeavor. Discussions of the institutional competency of the judiciary are found, for example, in Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957), and Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

Recently, the works of John Hart Ely have presented a broad treatment of judicial review which relies heavily on the attributes of the legislative or democratic process. These works have culminated in J. ELY, DEMOCRACY AND DISTRUST (1980). Even from the title, one can see that Professor Ely's analysis focuses on the malfunctioning of the majoritarian institutions. He argues effectively for the need for a process or institutional approach. In a very effective treatment, he compares this approach to the existing basic approaches to judicial review. In another recent publication, Jesse Choper has also attempted to integrate attributes of the legislative process into constitutional analysis. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

The approaches of both Ely and Choper have drawn criticism. The most sweeping comes from Professor Laurence Tribe who discounts the role of a process-focused analysis. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). A discussion of the differences between the comparative institutional approach and Professor Ely's approach, as well as a consideration of Professor Tribe's concerns, belongs in a fuller treatment of constitutional law. It will have to suffice for the present simply to note that the institutional approach to constitutional law has attracted both interest and criticism.

issues. This application will accept the efficiency goal postulated by the economic approach, and will attempt to demonstrate that even given this assumption, an analysis sensitive to the more complete institutional picture can yield useful insights in the constitutional-law context. To this end, this section considers an area of constitutional law that the proponents of the economic approach consider indicative of the differences between the analytic underpinnings of the common law and constitutional law — the rise and fall of economic due process.[65]

The economic approach has lavished little attention on constitutional law,[66] perhaps because of the economic approach's preoccupation with market attributes. In constitutional-law cases, courts must settle controversies that directly involve the public sector. They are often asked to review actions of the legislature, or to otherwise determine the roles to be played by various public sector institutions. Here the courts must choose between the federal and state public sectors, or between the various branches of government. The attributes of the market and voluntary choice are not necessarily dominant, even when individual rights are at stake. Thus, a framework such as the economic approach, whose major analytic bulwark is the market, may despair of understanding constitutional law.

But constitutional law decisions can be organized with a compar-

65. *See* ECONOMIC ANALYSIS, *supra* note 1, at 497-509.

The issue of substantive due process, of which economic due process is a prominent example, is among the most controversial areas of constitutional law. It is an area commonly analyzed in terms of ideological concerns and natural law principles — a tendency consistent with the Court's use of such terms as "fundamental rights." Even those attracted to an institutional analysis have eschewed substantive due process as an unfortunate aberration. Thus, Professor Ely, who seems to favor an institutional or process analysis, rejects both the *Lochner* era and the more recent right of privacy cases as unrelated to the concern for process defects that he argues should be the core of constitutional judicial review. *See* J. ELY, *supra* note 64, at 14-15.

66. Constitutional law apparently receives the same general treatment as legislation — both are unconnected to economic efficiency and therefore, the economic approach. *See* text at note 4 *supra*. The exclusion of constitutional law from the economic approach to legal decision making seems *a priori* less plausible than the exclusion of legislation. The basic efficiency principle of the economic approach is articulated in the context of "judge-made or common law." One could understand why the theory might fail when the locus of decision making switched from the judiciary to the legislature. But it is somewhat more difficult to fathom why the failure should occur when one retains the same decision maker — the judiciary.

Recently, Professor Frank Michelman has attempted a brief economic analysis of constitutional law. Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431 (1980). Although the approach differs substantially from my own, it seems to share my view that a single approach should handle both areas. Professor Michelman's treatment is, at the least, ambivalent about the economic approach in general. His exercise appears aimed as much at questioning the application of the economic approach to common law as at expanding its application to constitutional law. A consideration of the substance of his approach and its relationship to a comparative institutional analysis of constitutional law must await an article whose basic purpose is constitutional law.

ative institutional approach. A constitution allocates responsibility among social institutions. In our system with its federal tradition, its multiple branches of government at each level, and its commitment to individual freedom and voluntary choice, the variety of institutional alternatives available to the constitutional decision maker is substantial. Because each of these institutions possesses its own imperfections and attractions, the constitutional choice is staggering. Yet constitutional law — whether it is drawn from the words of the founding fathers, the notions of natural law, the text of the document, or the psyche of the judge — is necessarily a choice among imperfect institutions.

A comparative institutional approach visualizes the constitutional-law judge, like the common-law judge, allocating responsibility among imperfect institutions. An obviously important institution involved in the constitutional decision is the entity whose action is reviewed. In the context of substantive due process issues, that entity is the legislature.[67] Consistent with the comparative institutional focus, the jurist is concerned with more than just the institution being reviewed. As with the analysis of the common law, the comparative institutional analysis of constitutional law initially can focus its attention on the judiciary (the reviewing institution) as the alternative to the legislature. Variations in judicial competence and availability of judicial resources are central, as are similar variations in the legislature. Again, there are parallels to the comparative institutional analysis of the common law.

The *Lochner* era discussed here spans at least thirty years and numerous changes in the personnel of the Court. The discussion largely abstracts from these changes in personality and perception. The major value of a general framework is its ability to produce basic insights into complex legal issues and, thereby, to provide the organization and basis for more extensive study. The approach does not deny that individual jurists differ; it claims only that there are sufficient similarities to enable a simple framework to capture important insights, and to allow more systematic identification of the differences.

The beginning of economic due process is commonly associated

67. A major component in an institutional analysis would be a workable theory of public sector or legislative imperfections. Although the range of possible models and failures is substantial, there are a limited number of simple models that may provide substantial insights into constitutional law. For a treatment of two simple, polar models, see Komesar, *Housing, Zoning, and the Public Interest*, in WEISBROD, HANDLER & KOMESAR, PUBLIC INTEREST LAW (1978).

with the 1905 case of *Lochner v. New York*.[68] In *Lochner*, the Court declared unconstitutional a New York statute which set minimum hours for bakers. The Court based its holding on the notion of liberty of contract, which it read into the due process clause of the fourteenth amendment. Thus, the Court gave the federal judiciary greater power to determine whether and under what conditions the legislature could interfere with the rights of individuals, especially in commercial settings. The demise of this doctrine occurred in the mid- to late-1930s,[69] and the Court moved to the opposite extreme in the "hands off" cases of the 1950s and 1960s.[70]

The question is whether one can understand the rise and fall of economic due process as a series of choices among imperfect decision makers consistent with a societal goal approximated by the efficient allocation of resources. We could begin with a single institutional focus like that of the economic approach and generate an explanation for at least the rise of economic due process which parallels the economic approach to property rights discussed previously: the Court believed that voluntary choice and the market generally operated well, and it allocated most decisionmaking to that mechanism, allowing exceptions only where there were grounds to believe that significant market failures existed.[71]

From the outset, the decisions of the *Lochner* era recognized grounds for governmental intervention in the market. These grounds roughly paralleled the conventional varieties of market failure employed in the economic approach to the common law — "externality, monopoly, or information problems."[72] The *Lochner* opinion itself recognizes the role of governmental intervention where the parties are not *sui juris* — the extreme version of an information

68. 198 U.S. 45 (1905). The notion of "liberty of contract" was first employed to invalidate legislation under the fourteenth amendment in Allgeyer v. Louisiana, 165 U.S. 578 (1897), where the Court struck down a Louisiana insurance law that was applied to prohibit using the mails to make a business deal with a maritime insurance company operating in another state. Although the era took its name from the *Lochner* case, its beginning is more accurately associated with *Allgeyer*. *Lochner* is the more controversial and famous case perhaps because of its broad pronouncements and its dissents by Harlan and Holmes.

69. The moment of major decline is generally marked by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). There the Court validated a minimum wage law for women, in effect, overruling a case decided the previous year.

70. The classic due process cases here are Williamson v. Lee Optical Co., 348 U.S. 483 (1955), and Ferguson v. Skrupa, 372 U.S. 726 (1963). The latter is especially interesting because it represents the most explicit announcement of the wide discretion lodged in the political process, and because it precedes by only two years the apparent resurrection of substantive due process in the "privacy" area in Griswold v. Connecticut, 381 U.S. 479 (1965).

71. *See* text at notes 25-28 *supra*.

72. These are the market imperfections enumerated by Professor Posner in his recent articulation of the economic approach. *See* text at note 3 *supra*.

problem.[73] The Court throughout the era allowed both state and federal legislatures to regulate businesses "affected with a public interest."[74] Although the coverage of this exception varied throughout the period, it apparently always allowed regulation of certain monopolies, such as railroads and public utilities.[75] The Court also approved regulation of private land use decisions[76] — a setting in which complex interactions among many persons cause substantial transaction costs that reduce the plausibility of a bargain and create significant externalities. In general, the Court avoided any sweeping preclusion of legislative action. Instead it accompanied the broad language of "liberty of contract" with a series of distinctions engineered for specific areas and, in the process, validated a substantial amount of regulation.[77]

However, this analysis is basically incomplete. Consistent with the economic approach, it emphasizes only variation in the effectiveness of the market. While it yields some useful insights, it excludes consideration of the imperfections in other dominant institutions. The comparative institutional approach would consider not just the market, but at least two other alternative decision makers: the legislature and the courts. The issue would not be just whether the mar-

73. The Court followed its assertion that there were possible grounds for interference with the liberty to contract with the following comment:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.

198 U.S. at 57.

The Court subsequently validated legislation that set maximum hours for women in Muller v. Oregon, 208 U.S. 412 (1908). This gender distinction is consistent with the traditional common-law rules which viewed women as incapable of contracting.

74. This concept was first articulated in this context in Munn v. Illinois, 94 U.S. 113, 122 (1877).

75. For a general discussion of these cases, see B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 155-58 (1942). The monopoly or monopsony effect may also have been reflected in the *Lochner* case itself. There the court distinguished Holden v. Hardy, 169 U.S. 366 (1898), and Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901). These cases came after the *Allgeyer* decision, and allowed legislative interference with the market processes for labor contracting. *Holden* involved limits on hours and *Harbison* controlled the manner of compensation. Both cases involved mining and the Courts apparently recognized the prevalence of company towns — a presumptive instance of monopsony.

It is not the argument here that legislation was the correct solution to the perceived problems in the market. It is rather that the Court tended to allow the legislature discretion when it perceived substantial market imperfections.

76. The classic case approving zoning was decided by the Court during the height of the *Lochner* era — Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). When it made this decision, the Court was not totally unaware of the far-reaching nature of the regulation of private choice in the land use area. The district court's opinion in the case outlined the consequences in great detail and portrayed serious results. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 309-10 (N.D. Ohio 1924).

77. *See* B. WRIGHT, *supra* note 75, at 148-99.

ket worked well or poorly, but also, because legislation would be the subject of the litigation, whether the legislature worked well or poorly.

Given the traditional presumption in favor of the democratic process as a means of determining the public interest, and the important potential role of the democratic process as an indicator of intensity of preference where the market is imperfect, there is good reason to see a substantial respect for the political process even where the basic concern is resource allocation efficiency. But, as indicated in the prior discussion of legislative efficiency,[78] strong arguments can be made that the democratic or political process is itself a highly imperfect allocator of resources. It is plausible that the Supreme Court of the late nineteenth and early twentieth centuries was aware that special interests could distort the political process. From the butcher's monopoly in the *Slaughter-House Cases*[79] to the exclusion of insurance competition in *Allgeyer*,[80] the Court's own docket, as well as its observation of state legislatures, might easily have indicated that concentrated special interests prevailed to the detriment of the general populace.

Thus, the economic due process cases might be characterized as attempts by a Court aware of the imperfections of both the market and the legislature to set out the conditions under which the flawed legislature is allowed to take over the responsibilities of the flawed market.[81]

But such a characterization is still basically incomplete. It fails to recognize the imperfections in the institution which would then have

78. *See* text at notes 9-17 *supra*.

79. 83 U.S. (16 Wall.) 394 (1873).

80. *See* note 68 *supra*. In this connection, it is instructive to note that one of the early attempts to find a workable test for judicial invalidation of state legislation under the 14th amendment occurred in a case involving restrictions on the sale of oleomargarine. Powell v. Pennsylvania, 127 U.S. 678 (1888). Although the Court did not invalidate this legislation, Justice Harlan's opinion reflects distrust of the legislation as well as reluctance to intervene. It is not difficult to believe that the Court was aware of the influence of such special interests as the dairy industry.

81. This balance is reflected in the stances of individual justices. The dissents in *Lochner* were authored by Justices Harlan and Holmes. However, Justice Harlan had sounded warnings about judicial intervention in Mugler v. Kansas, 123 U.S. 623, 660-61 (1887), and *Powell*, and had voted with the majority in *Allgeyer*. Justice Holmes authored the opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). There the Court invalidated Pennsylvania's attempt to control subsurface coal extraction. At the very least the Court was rejecting the legislative judgment on the payment of compensation — a position criticized by Justice Brandeis on grounds similar to those in Holmes's own dissent in *Lochner*. In turn, even Justice Sutherland supported some significant governmental intervention. He authored the opinion in *Euclid* that approved zoning. Using the comparative institutional approach, one would argue that the Justices all manifested the same institutional balance albeit often with different final results.

to decide on this allocation of responsibility: the judiciary itself. The judiciary is not aided by the "invisible hands" of either market or political transactions; without the vote of the dollar or the ballot, it is a highly imperfect determiner of intensity and trade-off. It may be called upon to enter the breach created by substantial problems with another institution, but it is not the preferred general determiner of resource allocation (or most other policy goals). Thus, it is understandable why a Court, faced with two highly imperfect institutions and aware of its own imperfections, constructed a rough patchwork of traditional distinctions aimed at carving one world for the market and another for the legislature.

It is now possible to consider the disintegration of this patchwork in the 1930s and its eventual vilification in the decades that followed. One might argue that the Court became disenchanted with the market or enamored of the legislature. Such explanations would translate the usual perceptions into institutional terms. But, unless one believes that the Court viewed voluntary choice as totally impoverished or the legislative process as perfect, these common perceptions seem insufficient to explain its complete renunciation of economic due process.

A more plausible explanation is that the Court lost confidence in the abilities of the judiciary itself. The Court decided that its piecemeal system of review was unworkable — at least on such a broad scale — and it substantially revised its approach. This revision can be explained without arguing that the Court had abandoned either its postulated concern about the allocation of resources or its perception that both the legislative and market processes were highly imperfect.

The potential for market failures in the real world is enormous. For example, the problem of lack of knowledge or sophistication — captured in the *Lochner* Court's traditional reference to the *sui juris* status of the contracting parties — is present to some degree in almost any economic transaction. The potential for externality and even monopoly problems is similarly pervasive. When the *Lochner*-era Court employed rough categories to define market failure and the scope of allowable intervention, it might have hoped that they were workable, narrow categories. But it invited and received assaults on that notion. The famed Brandeis brief and its use in early *Lochner*-era cases was the natural outcome of the Court's categories.[82] If the Court declares that the legislature shall not decide but

82. The so-called "Brandeis Brief" was first used by Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908). It presented social, psychological, and economic information to establish

does not clearly define the scope of the prohibition, the judiciary often becomes the substantive policy maker on a case-by-case basis.

A Court faced with an increasing volume of legislation, and the increasing complexity of its patchwork categories,[83] might understandably reconsider its approach to legislative scrutiny. The Court in the 1930s reacted in two seemingly conflicting ways. In the early part of the decade, it broadened its attacks on legislative attempts to regulate market choices.[84] By the end of the decade, it had begun the diminution and eventual virtual extinction of the liberty of contract construct.[85] There are many explanations for the Court's actions, including pressure from the political branches that threatened the structural integrity of the Court. But the Court's actions are also consistent with those of a decision maker growing more uneasy with its own ability to choose between the market and the legislature. Its reactions can be seen as attempts to remove itself from so central a role in decision making by more completely allocating responsibility to one of these other institutions — first to the market, and then to the legislature.

So general an overview of this complex era omits substantial "realities." The omission is partly the product of the limited scope of this particular exercise, but it is also a necessary characteristic of any attempt to organize the mass of reality in a simplifying intellectual framework.

CONCLUSION

This Article has argued that legal decisions are best understood as choices among imperfect institutions. The decision maker is viewed as assessing the relative imperfections of the alternative institutions, and choosing the one most capable of promoting the desired societal goal. The Article presented several examples of this comparative institutional approach in both common- and constitutional-law contexts, and compared it to the economic approach. The economic approach is, in a sense, a special form of the comparative in-

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the reasonableness of social legislation limiting women's working hours, thereby providing factual support for the presumption of its constitutionality. *See generally* Doto, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958).

83. A reading of the opinions in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), reveals a substantial set of distinctions and categories in use just in the employment contract context.

84. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The last three overturned New Deal programs on other than due process grounds. The first case was overturned in *West Coast Hotel*.

85. *See* notes 69-70 *supra*.

stitutional approach, in which only one institution — the market — and one goal — economic efficiency — are considered important. As this Article demonstrates, even if we assume that the goal is economic efficiency, we need not be limited to a consideration of only one institution.

The Article did not explore the interaction between institutional choice and other societal goals. There are several reasons for this. First, the Article has compared the institutional approach with the dominant approach to the analysis of the determinants of legal decisions — the economic approach. Because the economic approach assumes the goal of economic efficiency, that goal was employed in the discussion. Second, perhaps because no attempts have been made to offer alternatives to the economic approach that embody other goals, alternative goals have not been well-defined. I neither claim nor believe that no other goals guide legal decision making. But these goals are so loosely defined that, even given an extensive attempt to define them here, the ensuing institutional analysis would likely have been overshadowed by controversy about the definition of the goal. Such an endeavor may well be required, but it is probably better achieved either after alternative goals have been better defined elsewhere, or in the context of a comparative institutional analysis of a particular area of law.

At this stage, a few general comments about the relation between societal goals and institutional choice will have to suffice. Whatever the assumed societal goal, it will require implementation. It will require the application of general pronouncements to a wide variety of factual settings. It will be applied in a world where uncertainty and conflict create efforts to influence or manipulate the determination. Ignorance, complexity, manipulation, and uncertainty will be important, if unfortunate, aspects of implementation. We must, therefore, consider the imperfections of the institutions that are to implement the goal. I would not argue that the mix of relevant institutional attributes will not change with a change in the perceived goal. But implementation and, therefore, institutional choice are critical features of legal decision making whatever our goal.

At the outset, this Article was described as exploratory. It is a first step in the creation of an analytical framework built on institutional choice. Little formal information is available about the relative merits of alternative social decision makers. A substantial amount of insight may be stored in our accumulated intuitions and unarticulated perceptions. Unfortunately, much intellectual effort seems expended on the promotion of one institutional configuration

or another rather than on understanding them. We have seen a continuous cycle of proposed institutional panaceas with the inevitable result — last generation's savior is this generation's villain. Too often social critique is little more than the empty revelation of imperfection. However unattractive the image, human institutions are constrained and limited. The best choice will always be highly imperfect. The important if less dramatic work lies in understanding the real parameters of choice.

At its core, this Article reflects the basic belief that societal decisions are highly complex and difficult and that this difficulty is reflected in the decision-making process itself. Decisions are conceived of as struggles in uncertainty rather than confident moves toward some clearly perceived objective. In the last analysis, a comparative institutional approach is attractive — if at all — because it captures a basic sense of decision making in an imperfect world.