

PSYCHOLOGICAL VARIABLES RELEVANT TO MODELS OF LEGAL EVOLUTION TOWARD EFFICIENCY

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Introduction

The notion that an “invisible hand” operates to enhance “the wealth of nations”¹—a notion that first sparked contemplation in economic contexts but has more recently been applied to legal thought²—suggests that, over time, judicially-produced rules progress toward efficiency, a utility maximizing allocation of resources,³ as a byproduct of biases governing the selection of cases that are litigated.⁴ Specifically, the decision to litigate a case involves a balancing of the costs of litigation with the potential gains—the “stakes”—of litigation.⁵ Arguably, because small stakes tend to

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¹ Adam Smith described a phenomenon by which efficiency results from the unintended outcome of decisions made by self-interested individuals. See Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 25-30 (R.H. Campbell & A.S. Skinner eds., LibertyClassics 1981) (1776).

² See Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. Legal Stud. 139, 140 (1980).

³ An efficient allocation of property rights, for example, awards such rights to those who most value them (e.g., a litigant for whom it would be relatively expensive to avoid a nuisance). For a brief discussion of efficient allocation of property rights in nuisance cases, see notes - and accompanying text.

⁴ See Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Legal Stud. 51, 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65, 65 (1977).

⁵ See John P. Gould, *The Economics of Legal Conflicts*, 2 J. Legal Stud. 279, 285-86 (1973); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 419 n.29 (1974); see also William M. Landes, *An Economic Analysis*

be dominated by litigation costs, and because inefficient laws created by prior judicial rulings (precedent) tend to involve higher stakes than efficient laws, disputes governed by inefficient laws may be litigated with greater frequency than those governed by efficient laws, resulting in natural propulsion toward a state of economic efficiency.

The decision to litigate a dispute, however, involves not only a balancing of pecuniary costs with pecuniary stakes. Rather, a host of psychological (and emotional) variables pervades such balancing. These variables, and their role in the common law evolution toward efficiency, are the subjects of the current paper.

I interviewed fifteen attorneys whose cases failed to settle and proceeded through litigation for the purpose of examining the prevalence of certain psychological factors involved in the decision to litigate.

My findings suggest that variables extraneous to the pecuniary costs and stakes of litigation, such as acrimony, stubbornness, acting on the basis of principle, and disinclination to treat property rights as readily commensurable with cash, are indeed prominent in cases that resulted in failed settlements.⁶ I conclude that such elements may retard evolutionary progress toward efficiency.

The paper begins, in Part I, by examining various theories of common law evolution toward efficiency. Part II briefly reviews conventional notions of rational economic choice with regard non-pecuniary variables. Part III discusses the general objective and methodology of my research. Part IV presents a synopsis and analysis of my research findings. Finally, the paper concludes, in Part V, by incorporating such findings into an existing model of legal evolution, followed by an acknowledgment of the limitations of my research and analysis.

I. The Evolution of Common Law toward Efficiency

Judge Richard Posner argues that “a necessary . . . condition for negotiations to succeed is that there be a price at which both parties would feel that agreement would increase their welfare.”⁷ Settlement negotiations fail and litigation ensues only if the minimum price that the plaintiff is willing to accept for his claim, determined by his expected gain from litigation, exceeds the maximum price that the defendant is

of the Courts, 14 J. Law & Econ. 61, 61 (1971).

⁶ See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. Chi. L. Rev. 373, 384 (1999) [hereinafter Farnsworth, *Parties to Nuisance Cases*].

⁷ Richard A. Posner, *Economic Analysis of Law* 435 (2d ed. 1977).

willing to pay to satisfy that claim, as determined by his expected loss from litigation.⁸ Expressed mathematically, litigation will occur only if:

$$P_p J - C + S > P_d J + C - S$$

where J is the size of the judgment if the plaintiff wins, P_p is the plaintiff's estimated probability of his victory, P_d is the defendant's estimated probability of defeat, C is each party's cost of litigation, and S is each party's cost of settlement.⁹

Posner's model implies that, *ceteris paribus*, larger stakes of litigation amount to greater likelihood of litigation, since smaller stakes tend to be dominated by litigation costs.¹⁰ Posner asserts that this analysis may help to explain the apparent common law tendency toward establishing efficient rules.¹¹ Fundamentally, stakes are greater in cases governed by inefficient rules as compared to those governed by efficient rules.¹² Thus, if it is assumed that judicial rulings have precedential value and remain "rules" until they are overturned by other judicial rulings, inefficient rules tend to be litigated with greater frequency than efficient rules, and thereby have a greater probability of reversal.¹³

Posner's insight that common law has a tendency toward efficiency is not a novel concept. The "evolutionary tradition in jurisprudence"¹⁴ has been examined in various contexts.¹⁵ "Today the idea that law 'evolves' is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor."¹⁶ Theories analyzing patterns of jurisprudence through Darwinian

⁸ *Id.*

⁹ *Id.* at 435-36. Posner assumes risk neutrality, constant stakes, constant costs of litigation, and constant costs of settlement (although he later relaxes some of these assumptions).

¹⁰ *Id.* at 436; Priest, *supra* note , at 65.

¹¹ Posner, *supra* note , at 439; *see also* Priest, *supra* note , at 65.

¹² Stakes must be greater in cases governed by inefficient rules, since one party can gain without implicating another party's loss.

¹³ Posner, *supra* note , at 440. Posner's assertion assumes that judges do not systematically desire inefficient principles. If judges "were desirous of implementing some inefficient principle (of just distribution or whatever), this tendency would be checked." *Id.* "Conversely, if the dominant judicial philosophy is favorable to efficient rules, the process described above will lead to an acceleration in the tendency for efficient rules to come to dominate the law." *Id.* at 441.

¹⁴ See, e.g., E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 Colum. L. Rev. 38, 39 (1985) (reviewing theories of law based on "evolution,").

¹⁵ See, e.g., *id. passim*.

¹⁶ Elliott, *supra* note , at 38. Law "evolves," in the sense of "adapting" to its social, cultural,

lenses far extend into the more recent tradition of law and economics. Law and economics scholars of legal evolution argue that “processes akin to natural selection in biology are at work in the law.”¹⁷ According to the economic theory of legal evolution, a common interest shared among litigants to eliminate unnecessary costs—i.e., inefficiencies—drives the law toward rules of increasing economic efficiency.¹⁸ Accordingly, it is possible that “utility maximizing decisions of disputants rather than . . . the wisdom of judges,” drives the process of legal evolution toward efficiency.¹⁹

Paul Rubin observes that “[i]ntelligent judges may speed up the process of attaining efficiency; they do not drive the process.”²⁰ Rubin’s theory assumes that both parties to a dispute have an interest in the precedential value of the case.²¹ He asserts that when neither party has an interest in precedent, there is no incentive to litigate, and thus no pressure toward efficiency. Further, when only one party has an interest in precedent, that party continues to litigate until a favorable, albeit not necessarily efficient, decision is obtained.²² According to Rubin, parties litigate if “efficiency savings” from an overturned rule outweigh litigation costs.²³ Rubin’s theory assumes that a disputant’s decision to litigate is a function of the expected utility derived from achieving a rule favorable to his dominion over a property right.

Rubin qualifies his argument by assuming that both parties have an ongoing interest in the legal outcome of their dispute.²⁴ George Priest, in his comment simplifying and extending Rubin’s argument, eliminates the significance of Rubin’s qualification.²⁵ Priest’s analysis assumes positive transaction costs (e.g., litigation costs). According to Priest, such costs mean “that inefficient legal rules will impose greater costs than efficient rules on the parties subject to them,” raising the stakes of any given case under such rules, and thus raising the likelihood of re-litigation of

and technological environment.” *Id.*

¹⁷ *Id.* at 62.

¹⁸ *Id.* at 63.

¹⁹ Rubin, *supra* note , at 51.

²⁰ *Id.* at 55.

²¹ An insurance company, for example, is likely to have an interest in the precedential value of a case. It repeatedly litigates similar types of cases and is, therefore, concerned by the effect that one case’s ruling has on the outcome of future cases.

²² Rubin, *supra* note , at 55.

²³ Elliott, *supra* note , at 64-65.

²⁴ *Id.* at 66-67.

²⁵ Priest, *supra* note , at 66.

those rules.²⁶ Alternatively stated, disputes governed by inefficient rules cost more to settle than disputes governed by efficient rules, regardless of the cost of bargaining. Priest argues that inefficient assignments of liability are by definition more costly than efficient assignments of liability.²⁷ Therefore, stakes are systematically greater in cases governed by inefficient rules.²⁸ Consequently, cases governed by inefficient rules are litigated more frequently than cases governed by efficient rules; such cases are thus more susceptible to reversal.²⁹

Robert Cooter and Lewis Kornhauser argue that while evolutionary forces can improve the law relative to what it would be in the absence of such forces, it cannot achieve a maximum state of efficiency or even continually improve itself.³⁰ Rather, equilibria emerge, whereby “each legal rule prevails a fixed portion of the time.”³¹ Specifically, “both ‘efficient’ and ‘inefficient’ or ‘best’ and ‘worst’ rules recur perpetually.”³²

Cooter and Kornhauser attack not only Rubin’s conclusion that common law can achieve efficiency absent the help of judges, but also the underlying proposition that inefficient laws are litigated more frequently than efficient laws.³³ They argue that since precedent is usually sustained rather than overturned, a dispute governed by an inefficient rule is likely to result in inefficiency if litigated.³⁴ If an efficient rule

²⁶ *Id.* at 65.

²⁷ *Id.* at 67.

²⁸ *Id.*

²⁹ *Id.* Elliott criticizes Priest’s reasoning for failing to support an underlying proposition of his thesis. Elliott argues that Priest “commits the logical ‘fallacy of composition’ by jumping from the statement that an inefficient rule of law increases costs in individual cases to the quite different conclusion that costs are greater in the class of disputes arising under inefficient rules.” Elliott, *supra* note , at 68 (citing John Mackie, *Fallacies*, in 3 *Encyclopedia of Phil.* 169, 173 (1967)). Elliott rejects Priest’s “attempts to surmount this difficulty,” namely, Priest’s assumption that “‘other characteristics . . . that influence the litigation-settlement ratio . . . are unlikely to differ systemically [sic] between disputes arising under inefficient and those arising under efficient rules.’” *Id.* at 68 n.198 (quoting George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 65, 67-68 n.172 (1977)). Elliott argues that Priest’s assumption is invalid since he fails to show that “stakes differ systematically between disputes arising under inefficient and efficient rules.” *Id.*

³⁰ Cooter & Kornhauser, *supra* note , at 140.

³¹ *Id.*

³² *Id.* Cooter and Kornhauser use what is known as a Markov process to determine the probability that a legal precedent will be revised. *Id.* at 140 n.6.

³³ *Id.* at 155-56 n.33.

³⁴ *Id.* at 155.

governs, however, litigation will probably result in efficiency. Parties, therefore, can avoid results likely to be inefficient by settling disputes governed by inefficient rules, and can invite results likely to be efficient by litigating disputes governed by efficient rules.³⁵

Cooter and Kornhauser praise Posner's countervailing approach as "interesting and worthy of investigation," but argue that the "connection between the size of the surplus and the likelihood of litigation is an open empirical question which cannot be answered by a priori models."³⁶ In other words, Cooter and Kornhauser assert that countervailing forces are at play in the decision to litigate a case. Absent empirical data, there is no compelling reason to assume that increased incentive to litigate derived from the heightened stakes involved in litigating a case governed by an inefficient rule overrides the disincentive to litigate resulting from the increased likelihood of an inefficient outcome.³⁷

II. Defining Rational Behavior

In this section, I discuss the concept of rational economic choice, a critical element to understanding the decision to litigate a legal dispute.

Economic models often assume that strategic behavior³⁸--conduct based on rational profit-maximizing--tends to impede settlement.³⁹ Cooter, Marks, and Mnookin argue that, contrary to Coase theorem predictions, "it is not true that a settlement will occur if the costs of sending messages and policing agreements is nil."⁴⁰ Rather, "[t]he obstacle to agreement is the strategic nature of bargaining, not the cost of communicating."⁴¹ The model assumes "rational" conduct and is largely

³⁵ *Id.* Cooter and Kornhauser present a formal argument showing that efficient rules are litigated more often than inefficient rules. *Id.*

³⁶ *Id.* at 156.

³⁷ *Id.*

³⁸ See Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. Legal Stud. 225, 228 (1982) (explaining strategic behavior in pretrial bargaining); John Kennan & Robert Wilson, *Strategic Bargaining Models and Interpretation of Strike Data*, 4 J. of Applied Econometrics S87, S87 (1989). "Much of the ensuing discussion in the literature focuses on the complications created for such bargaining by rational, strategic, profit-maximizing behavior by either party." Ward Farnsworth, *The Economics of Enmity*, 69 U. Chi. L. Rev. 211, 211-12 (2002) [hereinafter Farnsworth, *The Economics of Enmity*].

³⁹ See Farnsworth, *Parties to Nuisance Cases*, *supra* note , at 378 (citing theories proposed by Calabresi and Malamud).

⁴⁰ Cooter et al., *supra* note , at 247.

⁴¹ *Id.*

consistent with theories presuming that litigation results from excessive optimism—faulty expectations among disputants regarding their prospects for winning a litigated dispute.

Economic theory, however, largely does acknowledge concepts of emotional and psychological utility, and that actions based on such utility are often, in fact, rational. For example, Ward Farnsworth asserts that:

it is an economic commonplace that people seek to maximize not pecuniary wealth but their satisfaction. Thus if people take satisfaction in avoiding bargaining and are willing to forgo benefits to indulge this preference, there is nothing inconsistent with economics in recognizing and accounting for this. At least much of the time, then, commodification preferences might best be considered aspects of the parties' ends: part of what they want, not impediments to their obtaining what they want.⁴²

Similarly, according to Posner,

[t]he individual imagined by economics is not committed to any narrow, selfish goal such as pecuniary wealth maximization. Nothing in economics prescribes an individual's goals. But whatever his goal or goals . . . he is assumed to pursue them in forward-looking fashion by comparing the opportunities open to him at the moment when he must choose.⁴³

Thus, economics does not presume the propriety or impropriety of values that may enter rational calculation, but only that such calculation maintains a linearity of sorts in comparing the alternatives at hand (in the sense that one may rank preferences or decide that he is indifferent between them, and pursue such preferences consistently with their ranking).

A finding that disputants often act on the basis of “psychological” variables in determining whether to litigate legal disputes arguably calls into question classical assumptions of rational conduct. These elements may, at least occasionally, hinder a disputant's ability to pursue his goals rationally by comparing opportunities open to him.

Such factors, however, are often quite *rational*. Notions of principle, for example, are often central to long-term goals and welfare. Acrimonious feelings toward a tortfeasor may quite rationally result in disinclination and unwillingness to discuss possible settlement.

⁴² Farnsworth, *The Economics of Enmity*, *supra* note , at 216-17.

⁴³ Farnsworth, *Parties to Nuisance Cases*, *supra* note , at 399 n.50 (quoting Richard A. Posner, *Overcoming Law* 16 (Harvard 1995)).

Conventional economics assumes “rational players” in the sense that market players can rank their preferences. That is, an actor can determine that one bundle of goods—or “consumption bundle”—is strictly better than the other, or decide that he is indifferent as between the two.⁴⁴

Arguably, acting on the basis of psychological variables, such as acrimony or principle, is irrational in the sense that such notions may be described as extraneous to one’s preference rankings. To the contrary, I acknowledge that such behavior is largely quite rational. Indeed, I associate a utility value with such behavior. For example, a disputant may derive utility, or equivalently, avoid negative utility, by refusing to negotiate with another toward whom he feels great ill-will. Such refusal may take various forms and can be described in numerous ways. One possibility is to describe psychological variables as costs of settlement. If a disputant derives utility from *avoiding* settlement negotiations, then forgoing such avoidance in order to reach a settlement constitutes a cost of that settlement.

III. Research

I interviewed fifteen attorneys from across the U.S. in order to study the relevance of certain non-pecuniary variables to the decision to litigate a legal dispute. I examine the prevalence of numerous psychological factors that may relate to Posner’s prediction that settlement will fail when “the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim.”⁴⁵

Objective

Professor Ward Farnsworth studied the issue of whether bargaining took place *after judgment*.⁴⁶ He studied twenty “old-fashioned nuisance cases litigated to judgment,” contacted and interviewed lawyers from each case, and found no evidence of bargaining after judgment.⁴⁷ Attorneys opined that bargaining would not have occurred even if the loser had won.⁴⁸ The attorneys interviewed by Farnsworth “attributed the lack of bargaining after judgment to acrimony between the parties and

⁴⁴ Hal R. Varian, *Intermediate Microeconomics, A Modern Approach* 34 (5th ed. 1999).

⁴⁵ Posner, *supra* note , at 435.

⁴⁶ Farnsworth, *Parties to Nuisance Cases*, *supra* note , at 373.

⁴⁷ *Id.* at 421. Most of Farnsworth’s “old-fashioned nuisance cases” refer to disputes between two homeowners or disputes between a homeowner and a small business. *Id.* at 383.

⁴⁸ *Id.* at 421.

to attitudes the parties held toward their rights that made them reluctant to bargain.”⁴⁹ Farnsworth concluded that bargaining was foreclosed by “transaction costs”—not of the typical kind predicted by economic models, but rather of distaste for dealing with one another and disinclination to deal with property rights as commodities.⁵⁰

Farnsworth’s conclusions concern the variables foreclosing *post-judgment* bargaining. I set out to study the prevalence of such variables in failed *pre-judgment* settlement.

Methodology

I began by surveying published judicial decisions for nuisance cases. A nuisance is “[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property. . . . The condition constitutes a tort for which the adversely affected person may recover damages or obtain an injunction.”⁵¹ Nuisance law is based on the theory that “truly exclusive (absolute, unqualified) property rights would be impossible.”⁵² Some economic theorists of nuisance law have suggested that efficiency demands that property rights be awarded to the party that most values the right.⁵³ Conversely, a rule awarding a property right to the “least-cost-avoider,” the party who can avoid the nuisance least expensively,⁵⁴ would be inefficient. Other theorists assert that, assuming zero post-judgment bargaining costs, a property right is bound to end up in the hands of the party who values it most, regardless of to whom the original award was granted.⁵⁵ Nuisance cases

⁴⁹ *Id.*

⁵⁰ *Id.* at 395-410.

⁵¹ Black’s Law Dictionary 1096-97 (8th ed. 2004).

⁵² Richard A. Posner, *Economic Analysis of Law* 49 (1992)

⁵³ See, e.g., *id.* at 32 (noting that “efficiency is promoted by assigning the legal right to the party who would buy it”); Robert Cooter, *The Cost of Coase*, 11 J. Legal Stud. 1, 18 (1982) (interpreting the Coase Theorem to mean that “the role of law is to assign entitlements to the party who values them the most, so that the costly process of exchanging the entitlement is unnecessary”). But see Posner, *supra* note , at 32 (“Unfortunately, the solution of assigning the property right to the party to whom it is more valuable is incomplete as an economic solution both because it ignores the costs of administering the property rights system, which might be lower under an alternative definition of rights, and because it is difficult to apply in practice.”).

⁵⁴ Coase first articulated the “least-cost-avoider” rule. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 30-39 (1960) (suggesting that we should assign responsibility for solving the harm to the party who could do so at the least cost).

⁵⁵ See, e.g., Posner, *supra* note , at 35 (“[T]he initial assignment of legal rights does not determine which use ultimately prevails. The efficient value-maximizing accommodation of the conflict will be adopted whichever party is granted the legal right to exclude interference

provide models of limited resources and incompatible uses, and, therefore, provide good context for examination of economic theory.

I searched for nuisance cases that were recent⁵⁶ and simple—cases that were litigated no more than ten years ago, and that involving seemingly low bargaining costs, few parties,⁵⁷ and few claims. Additionally, I chose cases in which the nuisance claim was not dependent on or commingled with other claims.

I further narrowed the search to cases in which an injunction was sought and a property right was granted to one side or the other.⁵⁸ These cases are relatively simple, since they do not require particular valuations of property rights; rather, they involve only the possibility of the defendant's ownership or the plaintiff's ownership of the property right.

Using the above criteria, I narrowed the sample set to fifteen cases, almost all of which had been appealed. Each case involved either a business against another business, a homeowner against another homeowner, or a homeowner against a business.

I was unable to contact some of the attorneys that I had hoped to interview. Every attorney whom I did contact provided me with an interview, but each described settlement discussions with varying degrees of specificity.

In total, I surveyed thirteen independent cases and interviewed fifteen attorneys involved in those cases.⁵⁹ I began each interview by asking whether there were settlement discussions and requested a general description of such discussions. I then asked whether discussions concerned monetary settlements, and whether money could have served as an acceptable settlement to the attorney's client.

The first segment of each interview concerned general issues of settlement and

by the other.”); Cooter, *supra* note , at 14 (explaining the Coase theorem, under which “the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil; bargaining will result in an efficient outcome no matter who bears the burden of liability”).

⁵⁶ I searched for recent cases, since they are likely to be relatively fresh in the minds of attorneys.

⁵⁷ Most of the cases dealt with one or two plaintiffs against one or two defendants. I did, however, include, cases that dealt with a greater number parties, so long as the number of parties did not seem to inhibit settlement.

⁵⁸ I did not discriminate on the basis of whether the injunction was granted (plaintiff prevailed) or rejected (defendant prevailed).

⁵⁹ Transcripts of each interview, along with a list of questions asked, are on file with the author.

attitudes toward property rights. The second segment requested that attorneys rate on a scale of one to ten, to what degree certain psychological elements affected settlement. Additionally, explanations were requested for each response. I specifically inquired as to the prevalence of acrimony, as well as any other emotions that may have affected settlement negotiations; strategic bargaining, which entails refraining from settling for the purpose of extracting additional surplus;⁶⁰ stubbornness, or refusal to move from one's position solely for the purpose of sticking to previous decisions; and principle-based decision making—decision making grounded in notions of personal morals or ethics. Additionally, I asked each attorney to rate his or her effort to settle the case, as well as estimate (on a one-to-ten scale) his or her opponent's effort to settle.

Finally, I asked whether there were any significant obstacles to settlement not already discussed, and whether parties generally behaved rationally in making decisions.

IV. Findings

The reports I received from attorneys suggest that psychological factors such as acrimony, stubbornness, and acting on the basis of principle were associated with failures to settle disputes. Additionally, only rarely did disputants⁶¹ indicate any willingness to place a money value on property rights or to think of property rights as readily commensurable with cash. Rather, attorneys repeatedly asserted that clients “were not interested in money,”⁶² or that “economics” were irrelevant.”⁶³

I now discuss three cases and interviews that I found to be typical of the responses I received. I then describe certain psychological elements individually and draw general conclusions from the interviews.

Dowdell v. Bloomquist:⁶⁴

Bloomquist planted four large trees on his property, effectively blocking Dowdell's

⁶⁰ Alternatively stated, refraining from settlement for the purpose of achieving a larger settlement for oneself, at the expense of the other party.

⁶¹ I use the term “disputants” to refer to disputants as well as their attorneys.

⁶² See Telephone Interview with Attorney for Geddes (Oct. 21, 2004) (transcript on file with author) (Geddes v. Mill Creek Country Club, Inc., 751 N.E.2d 1150 (Ill. 2001)).

⁶³ See Telephone Interview with Attorney for Omega Chemical Co. (Oct. 20, 2004) (transcript on file with author) (Omega Chem. Co., Inc. v. United Seeds, Inc., 560 N.W.2d 820 (Neb. 1997)).

⁶⁴ 847 A.2d 827 (R.I. 2004).

ocean view.⁶⁵ Dowdell brought a nuisance suit alleging that Bloomquist violated the spite fence statute⁶⁶ by planting trees in retaliation for her expressions of concern to the zoning board about Bloomquist's petition for a zoning variance.⁶⁷ The court, relying on nuisance law, granted injunctive relief, ordering the trees be "topped off at six feet, or otherwise removed entirely."⁶⁸

Notwithstanding a Rhode Island Supreme Court order for mandatory mediation, the disputants failed to settle. Hostility and ill will pervaded all settlement efforts according to the court, which noted, "the curtains between the neighboring parties have long since been drawn, forever dividing what was once an amicable relationship between them."⁶⁹ According to Dowdell's attorney, acrimony stood as an unbreakable barrier to compromise.⁷⁰ He cited acrimony as a chief component of the settlement's failure, and ranked it a ten out of ten as an impediment to constructive negotiation.⁷¹

The disputants' attitudes toward property rights may have further impeded settlement. Despite trial court testimony explicitly valuing the trees' detrimental effect on Dowdell's property at \$100,000,⁷² the parties apparently were disinclined to accept the possibility of a money settlement.⁷³ According to Dowdell's attorney, the parties never considered money settlements.⁷⁴ When asked why money was precluded from consideration, Dowdell's attorney responded: "[m]y client was not interested in accepting money . . . [because] there isn't enough money to compensate

⁶⁵ *Id.* at 828-29.

⁶⁶ Spite fences.—A fence or other structure in the nature of a fence which unnecessarily exceeds six feet (6') in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance, and any owner or occupant who is injured, either in the comfort or enjoyment of his or her estate thereby, may have an action to recover damages for the injury. *Id.* at 828 (quoting R.I. Gen. Laws § 34-10-20 (1956)).

⁶⁷ *Id.* at 829.

⁶⁸ *Id.* at 832.

⁶⁹ *Id.* at 828.

⁷⁰ Telephone Interview with Donald J. Packer, Attorney for Dowdell (Oct. 26, 2004) (transcript on file with author) (*Dowdell v. Bloomquist*, 847 A.2d 827 (R.I. 2004)).

⁷¹ *Id.*

⁷² *Dowdell*, 847 A.2d at 829.

⁷³ The court's disinclination to consider money as an adequate remedy may have exacerbated the parties' disinclination to settle. The trial court found that "money damages could not adequately compensate [Dowdell] and . . . equitable relief was more appropriate." *Id.*

⁷⁴ Telephone Interview with Donald J. Packer, *supra* note .

[for] losing an ocean view.”⁷⁵ Dowdell was “prepared to agree to keep one tree without blocking the entire view [and] may have accepted two trees,” but monetary compensation was not an option.⁷⁶

Wieland v. Neal.⁷⁷

In 2000, the Neals acquired approximately fifty acres of land in rural Washington County, Iowa.⁷⁸ They built a motorcycle track on their property directly across from the Wieland residence.⁷⁹ The Neals and their guests used the track at various times during the day.⁸⁰ Following complaints by the Wielands regarding the disruptive motorcycle noises, Mr. Neal indicated that he would consider moving the track.⁸¹ The Neals, however, did not move the track and refused further requests to move it.⁸² The Wielands sued, alleging that the constant motorcycle noise constituted a nuisance.⁸³ The court ruled that the only appropriate remedy was an injunction.⁸⁴ The court noted that the Wielands had tried to resolve the noise problem on “several occasions and were unsuccessful.”⁸⁵ The court further commented that the injunction created a “hardship on the Neals of far less magnitude than the hardship the noise creates for the Wielands.”⁸⁶

As in Dowdell, settlement negotiations were infused with acrimony. The Neals’ attorney attributed failure of settlement “totally” to factors unrelated to “economics.”⁸⁷ He ranked acrimony, or “bad blood,” at a nine on a scale of one to ten.⁸⁸ Stubbornness also played a large role in the parties’ failure to negotiate a

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ No. 02-0777, 2003 WL 1969237 (Iowa Ct. App. Apr. 30, 2003).

⁷⁸ *Id.* at *1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at *4.

⁸⁶ *Id.*

⁸⁷ Telephone Interview with Attorney for Neal (Oct. 27, 2004) (transcript on file with author) (Wieland v. Neal, No. 02-0777, 2003 WL 1969237 (Iowa Ct. App. Apr. 30, 2003)).

⁸⁸ *Id.*

settlement.⁸⁹ The Neals' attorney also noted that the property right was not up for sale: "[p]laintiffs argued that the [Neals'] motorcycle riding was so onerous that money would not compensate for the nuisance. . . . [Plaintiffs] just wanted an injunction."⁹⁰

Geddes v. Mill Creek Country Club, Inc.:⁹¹

Plaintiffs owned approximately sixteen acres in Kane County, Illinois.⁹² They lived on the land and used it for their landscaping business.⁹³ Defendant Mill Creek constructed and owned a golf course adjacent to the Geddes' property.⁹⁴ Prior to the construction of the golf course, the parties had negotiated development plans.⁹⁵ After the golf course had been operational for a few years, the Geddes filed a nuisance suit based on errant golf balls hit onto their property.⁹⁶ The Supreme Court of Illinois held that plaintiffs knowingly agreed to the fairway, and therefore were estopped from asserting a claim against the Country Club.⁹⁷

Once again, the parties' attorneys reported that issues extraneous to the parties' expectations regarding the case's outcome pervaded settlement negotiations. The attorneys disagreed on almost every aspect of the case.⁹⁸ They did, however, agree on the prominence of certain psychological factors in preventing settlement, such as stubbornness and the parties' unwillingness to settle as a "matter of principle."⁹⁹ For example, Mill Creek was disinclined to strike a bargain after, according to Mill Creek's Attorney, Geddes reneged on the original agreement.¹⁰⁰ According to Mill

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 751 N.E.2d 1150 (Ill. 2001).

⁹² *Id.* at 1152.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1153-54.

⁹⁶ *Id.* at 1152. "During the 1997 and 1998 golf seasons, plaintiffs collected 2,128 golf balls on their property." *Id.* at 1154.

⁹⁷ *Id.* at 1159.

⁹⁸ See Telephone Interview with Attorney for Geddes, *supra* note ; Telephone Interview with Michael Reagan, Attorney for Mill Creek (Oct. 22, 2004) (transcript on file with author) (Geddes v. Mill Creek Country Club, Inc., 751 N.E.2d 1150 (Ill. 2001)).

⁹⁹ Telephone Interview with Michael Reagan, *supra* note; see also Telephone Interview with Attorney for Geddes, *supra* note .

¹⁰⁰ Telephone Interview with Michael Reagan, *supra* note .

Creek's attorney, "[h]undreds of thousands [of dollars] were spent accommodating the plaintiffs....We redesigned the course for them and then got sued. . . . Once the course was built, there was no way to settle."¹⁰¹ It seemed obvious to Mill Creek that the plaintiffs were in the wrong and that their dealings were dishonest.

Mr. and Mrs. Geddes took the opposite view. According to them, Mill Creek had dealt unfairly. Mill Creek persuaded the Geddes to agree to the construction of the golf course by offering concessions such as "a 40-foot 'green area and landscape easement' along the south boundary of plaintiffs' property."¹⁰² Yet, Mill Creek did not warn the plaintiffs of the risk of errant golf balls, and the agreement between Mill Creek and Geddes did not address the issue.¹⁰³ The Geddes "testified that they knew nothing about the game of golf. If [they] had anticipated the golf ball problem and its impact on their property, they would have objected to the golf course."¹⁰⁴

Interviews with the attorneys of both sides illustrated that issues of "principle" and stubbornness pervaded the settlement equation.¹⁰⁵ Additionally, settlement was made more difficult by the parties' disinclination to view money as a solution to the nuisance.¹⁰⁶ In response to inquiries regarding what price the plaintiffs would have been willing to accept to forgo the property right, the plaintiffs' attorney replied that his clients "were not interested in money. . . . [They] were looking for the other side to do something to alleviate the golf balls."¹⁰⁷

While plaintiffs' attorney ranked the defendant's effort to settle at zero out of ten and noted that "[w]e would have loved to settle but we got no response,"¹⁰⁸ Mill Creek's attorney ranked plaintiffs' effort to settle at a one and his client's effort to settle at eight.¹⁰⁹ Such illusions regarding relative effort to settle do not detract from the current analysis, but are indeed likely to have hindered settlement.

¹⁰¹ *Id.*

¹⁰² *Geddes*, 751 N.E.2d at 1154 (citing the written agreement between the golf course developer and the plaintiffs).

¹⁰³ *Id.* at 1155.

¹⁰⁴ *Id.*

¹⁰⁵ See Telephone Interview with Attorney for Geddes, *supra* note ; Telephone Interview with Michael Reagan, *supra* note .

¹⁰⁶ See Telephone Interview with Attorney for Geddes, *supra* note ; Telephone Interview with Michael Reagan, *supra* note .

¹⁰⁷ Telephone Interview with Attorney for Geddes, *supra* note .

¹⁰⁸ *Id.*

¹⁰⁹ Telephone Interview with Michael Reagan, *supra* note .

As evidenced by the cases discussed above, acrimony was generally reported to have prevented settlement.¹¹⁰ Specifically, attorneys reported that acrimony impeded settlement with a median rating of nine. The most frequent rating, the mode, was ten. Only one attorney answered that acrimony was not an important factor.¹¹¹ Rather, she reported that the dispute was about “the principle of the thing.”¹¹² Below is a chart listing the psychological factors researched. The median rating and mode rating reported by the attorneys accompanies each element.

Potential Impediment	Median Rating	Most Frequent Rating (Mode)
Acrimony	9	10
Stubbornness	9	9
Principle	7	7
Strategic Bargaining	0	0

I defined stubbornness as refusal to alter one’s position solely for the purpose of sticking to his previous decisions. This, as the chart above suggests, was reportedly an important encumbrance on potential settlement. Attorneys often associated stubbornness with other factors, indicating that principle or acrimony sometimes led to a party’s stubbornness.

I defined principle as the association of a moral or ethical standard with a decision. For example, a party may demand that his neighbor remove a nuisance, not so much because it annoys him, but rather because it is “right” to do so.¹¹³ Attorneys reported that parties often acted on the basis of principle and that such principle-based-actions impeded settlement.

I defined strategic bargaining as resisting settlement for the sake of extracting additional surplus. Contrary to the predictions of many economic models, strategic bargaining was reportedly not an important factor in preventing settlement.¹¹⁴ It is possible that attorneys merely failed to recognize their negotiating techniques as forms of strategic bargaining, when in fact they may have been. Further, attorneys may have overemphasized moral motivations for the suit and deemphasized

¹¹⁰ See *supra* notes - and accompanying text.

¹¹¹ Telephone Interview with Marian Nettles, Attorney for FOC Lawshe Limited Partnership (Oct. 20, 2004) (transcript on file with author) (FOC Lawshe Ltd. P’ship v. Int’l Paper Co., 574 S.E.2d 228 (S.C. 2002)).

¹¹² *Id.*

¹¹³ Or, alternatively, the nuisance should be removed simply because it is wrong to annoy your neighbor.

¹¹⁴ But see *infra* Part VIII.

pecuniary motivations. The nearly complete absence of acknowledgement of such bargaining, however, should be surprising in light of the vast attention such tactics receive with regard to settlement negotiations (often construed as a predominating variable in failures to negotiate settlements).¹¹⁵

In addition to reports that acrimony, stubbornness, and principle-based decision making impeded settlement, every attorney (whether representing a plaintiff or a defendant) who reported both sides' settlement *efforts* rated his (and his client's) own effort to settle at least as great as, but usually greater than, his opponent's effort to settle. Attorneys generally seemed to believe that, contrary to their opponent, they generously exerted willingness and effort to settle. It is possible, however, that such reports may merely evidence a lack of mutually agreeable settlement terms rather than illusions of actual effort to settle.

Finally, as mentioned above, attorneys exhibited a strong disinclination, on behalf of their clients, to negotiate property rights in monetary terms, or even to think of such rights as readily commensurable with money.¹¹⁶

Money is a device by which exchange is exacted. It provides a convenient system by which resources are valued. Resources themselves, including property rights, often lack small units by which exchange is facilitated. Absent a valued monetary system, many pareto efficient transactions would not occur. For example, without a complicated trading apparatus, to trade my computer for Bob's motorcycle,

I must value Bob's motorcycle greater than I value my computer, and Bob must value my computer greater than his motorcycle. If, however, we deal in monetary units, such overlapping discrepancies in valuation are unnecessary. Even if I value my computer at \$2,000 and his motorcycle at \$3,000, and he values his motorcycle at \$1,500 and my computer at \$1,000,¹¹⁷ I can acquire his motorcycle by selling my computer for \$2,000¹¹⁸ and using \$1,500 of the proceeds to buy his motorcycle. This is a pareto efficient transaction; it provides me with a \$1,500 (wealth) surplus gain¹¹⁹ without decreasing Bob's (wealth) surplus.¹²⁰ Absent our ability, or willingness, to convert property into monetary units, the efficient transaction may not have occurred.

¹¹⁵ See *supra* notes - and accompanying text.

¹¹⁶ See *supra* notes - and - and accompanying text.

¹¹⁷ In this case, Bob would not directly trade his motorcycle for my computer, since he values his motorcycle more than my computer.

¹¹⁸ This assumes that someone else also values my computer at \$2,000 or higher.

¹¹⁹ I began with a computer worth \$2,000 to me and ended up with \$500 plus a motorcycle that I value at \$3,000.

¹²⁰ Bob began with a motorcycle worth \$1,500 to him, and ended up with \$1,500 in cash.

Bob would not have traded his motorcycle for my computer because doing so would decrease his surplus by \$500.¹²¹

Property *rights* are no different. They are “goods” comparable to a computer or motorcycle. They are valued by their holders and can generally be exchanged for other goods. If disputants are unwilling to treat legal property rights as commodities that can be bought and sold for cash, they may forgo pareto efficient transactions that would benefit one or both parties without harming the other.¹²² Note that such treatment is not always necessary to exact pareto efficient settlement but certainly facilitates many such settlements that would otherwise not occur.

A vast majority of attorneys reported that negotiations were never expressed in monetary terms. In fact, most attorneys explicitly stated that their clients would not accept money for the property right at issue.¹²³ Some attorneys even acknowledged the effect that treatment of property rights as incommensurable with cash has on prospective settlements. One attorney noted, “I don’t think my clients would have accepted money. There’s obviously some price to move them but in these kinds of cases, people just want their homes to be like they were. Their objective is to stop the nuisance. . . . They’re not looking for a dollar fee. It makes it much harder to fashion a settlement.”¹²⁴

In total, only three attorneys reported that money was considered as a means of settlement.¹²⁵ Full compensation for their property was demanded, however, and

¹²¹ Bob would be getting a \$1,000 computer for a motorcycle that he valued at \$1,500.

¹²² This applies to multiple-party disputes as well.

¹²³ Such responses do not necessarily imply that disputants would, in fact, not accept a monetary reward in exchange for their property rights. It merely suggests that they do not *think* of their rights as readily commensurable with cash. Attitudes, however, affect conduct.

¹²⁴ Telephone Interview with Attorney for Wootten (Nov. 2, 2004) (transcript on file with author) (*Wootten v. Ivey*, 877 So. 2d 585 (Ala. 2003)). *Wootten* is a good example of the importance of dealing in monetary units. 877 So. 2d at 585. In *Wootten*, neighboring landowners sued a hog farm, alleging that the odor from the farm amounted to a nuisance. *Id.* at 586. There were few reasonable ways to abate the nuisance besides shutting down the farm (there were talks of aerating the farm, but it was prohibitively expensive). Absent the possibility of money-exchange, there is little room for negotiation.

¹²⁵ Telephone Interview with Attorney for Omega Chemical Co., *supra* note ; Telephone Interview with J. Douglas Drushal, Attorney for Angerman (Oct. 27, 2004) (transcript on file with author) (*Angerman v. Burick*, 2003 WL 1524505 (Ohio App. 9 Dist. 2003)); Telephone Interview with Attorney for Edmunds (Oct. 27, 2004) (transcript on file with author) (*Edmunds v. Sigma Chapter of Alpha Kappa Lambda Fraternity, Inc.*, 87 S.W.3d 21 (Miss. 2002)). Two attorneys reported that negotiations did not even reach a level of seriousness as to consider such issues. Telephone Interview with Attorney for Hanes (Oct. 25, 2004) (transcript on file with author) (*Hanes v. Cont’l Grain Co.*, 58 S.W.3d 1 (Miss. 2001));

such demands were never seriously considered.¹²⁶ Further, most attorneys who reported that money *was* not a consideration also reported that money *would* not be a consideration either.¹²⁷ The disputants who were willing to consider a monetary settlement demanded at least the full value of their respective properties.

Generally, disputants displayed unwillingness, or at least disinclination, to treat property rights as readily commensurable with cash. The exceptions to such treatment entailed arguably unreasonable demands.¹²⁸ Note, however, that various theories may explain the described treatment of property rights. For example, it is possible that each party avoided consideration of monetary settlement because it was viewed as weakening that party's bargaining position. There is, however, no evidence of such strategizing. Irrespective of possible explanations of the failure to treat property rights as readily commensurable with cash, it is apparent that the failure to treat property rights as such was prevalent in the cases surveyed and may have been a key factor in preventing settlement.

V. Conclusion

Recall Posner's assertion that settlement discussions fail and litigation ensues only if the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim.¹²⁹ Litigation will occur only if the following equation is satisfied:

$$P_p J - C + S > P_d J + C - S^{130}$$

My findings suggest that variables extraneous to the pecuniary costs and pecuniary stakes of litigation indeed pervade the decision to litigate. Specifically, certain psychological factors were reported to have impeded the possibility of

Telephone Interview with Attorney for Tomasso Brothers, Inc. (Oct. 20, 2004) (transcript on file with author) (Tomasso Bros., Inc. v. October Twenty-Four, Inc., 646 A.2d 133 (Conn. 1994)).

¹²⁶ See Telephone Interview with Attorney for Omega Chemical Co., *supra* note ; Telephone Interview with J. Douglas Drushal, *supra* note; Telephone Interview with Attorney for Edmunds, *supra* note .

¹²⁷ See Telephone Interview with Donald J. Packer, *supra* note . As discussed earlier, this may well be a reflection of the attorneys' injection of moral purpose and de-emphasis of pecuniary motivations.

¹²⁸ Presumably, buying the other party's property at the price at which he values it, is almost always an option even without any negotiation.

¹²⁹ Posner, *supra* note , at 435.

¹³⁰ *Id.* at 435-36.

settlement and to have thus forced the dispute to proceed through litigation. Such factors may be incorporated into Posner's model in various ways. For example, the psychological variables may be incorporated into the value of judgment. Another approach is to integrate the variables into the costs of settlement (represented by " S " in the equation above). In such terms, settlement costs, according to the reports obtained from attorneys, were sufficiently high as to preclude the possibility of settlement. Re-arranging Posner's formula to isolate the costs of settlement,

$$2S > P_d J - P_p J + 2C.$$

The formula indicates that settlement will fail if the parties' combined settlement costs exceed the aggregate of both parties' litigation costs and the difference between the defendant's expected loss from litigation and the plaintiff's expected gain from litigation. Cost-premiums imposed by psychological sub-variables (of " S ") can sometimes be so high as to "force" certain cases to litigation only as a result of such premiums. Some such cases are litigated regardless of whether the rule governing the dispute is efficient or inefficient. In turn, "forced" litigation of efficient rules dilutes the proportion of inefficient rules to efficient rules litigated, weakening the relative susceptibility of inefficient rules to reversal. The rate of evolution toward efficiency is thereby slowed.

It is important to recognize that the foregoing analysis is far from complete. The research methodology contains numerous deficiencies and my analysis with respect to the evolution of law is merely introductory. Specifically, the interviews conducted were both too few in number and too informal to yield conclusive results. Further, my research contained numerous biases that may affect the general applicability of the results. First, my research focused on cases that failed to settle, ignoring cases that succeeded in settlement. Thus, while my research *suggests* a causal relationship between the behavioral variables researched and failed settlements, it does not necessarily *imply* such a relationship. Second, my analysis assumes that nuisance cases are, to some degree, representative of common law cases generally. It is likely, however, that each area of the common law involves important elements not represented by nuisance cases. Thirdly, the psychological factors described may reflect the attitudes and experiences of attorneys rather than those of their clients, and, further, the reports are, to some extent, open to corruption due to lack of memory or the possibility of incentive to provide self-serving responses.

Finally, my analysis is not meant to be an exhaustive survey of the implications of my findings with respect to theories of evolution of common law toward efficiency. Rather, it is merely an introduction to a context for which my findings, if accurate, carry important implications.