

EVOLUTION OF RULES IN A COMMON LAW  
SYSTEM: DIFFERENTIAL LITIGATION OF THE FEE  
TAIL AND OTHER PERPETUITIES

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I. INTRODUCTION

In our common law system, courts have the power to make new law and to change old law. As Judge Posner might say, judges are not potted plants.<sup>1</sup> They make law by deciding specific cases. For each case, there are at least two possible outcomes. In most cases, one of these outcomes will be more efficient than the other; that is to say, one outcome will generate greater total welfare in the future. After Posner argued that much of the common law could be explained in terms of efficiency,<sup>2</sup> Paul Rubin set forth an evolutionary theory of how the common law, pushed by an invisible hand, might evolve to an efficient set of rules.<sup>3</sup> His seminal idea was that disputes involving inefficient rules would settle less often than disputes involving efficient rules, with the result that litigation would more frequently overturn inefficient rules.<sup>4</sup> George Priest extended Rubin's thesis, ar-

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1. Richard A. Posner, *What Am I? A Potted Plant?*, NEW REPUBLIC, Sept. 8, 1987, at 23.

2. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, § 9.8, § 23.3 (1972).

3. Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

4. See *id.* at 61.

guing that inefficient rules should generate larger stakes and, hence, more frequent litigation.<sup>5</sup> And the discussion has continued to this day.<sup>6</sup> This Article presents a variation on the Rubin-Priest theme, offering the fee tail and similar restraints on alienation as examples of how inefficient rules can lead to inefficient uses of land, which cause owners to seek the help of courts in freeing their lands from the inefficient constraints. Unlike bad decisions in some tort cases, bad decisions in property cases may return to the courts for reconsideration. In other words, there is a feedback loop, a mechanism that returns the output of a system back to the system's input, that provides courts with opportunities to overturn inefficient common law property rules.

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5. George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977).

6. See, e.g., GORDON TULLOCK, *THE CASE AGAINST THE COMMON LAW* 35-44 (1997); Peter H. Aranson, *Economic Efficiency and the Common Law: A Critical Survey*, in *LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION* 51 (J. Matthias Graf von der Schulenburg & Goran Skogh eds., 1986); Peter H. Aranson, *The Common Law as Central Economic Planning*, 3 CONST. POL. ECON. 289 (1992); Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT'L REV. L. & ECON. 467 (1994); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Michael A. Crew & Charlotte Twight, *On the Efficiency of Law: A Public Choice Perspective*, 66 PUB. CHOICE 15 (1990); Louis DeAlessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 CONST. POL. ECON. 107, 107-12 (1991); Vince Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992); Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. L. & ECON. 1 (1982); Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127 (1988); Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); Evan Osborne, *What's Yours Is Mine: Rent-Seeking and the Common Law*, 111 PUB. CHOICE 399 (2002); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Mario J. Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980); Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982); Paul H. Rubin, Christopher Curran & John F. Curran, *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295 (2001); Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. (forthcoming 2005) (providing a thumbnail summary of key contributions to the efficiency debate); Paul H. Rubin, *Predictability and the Economic Approach to Law: A Comment on Rizzo*, 9 J. LEGAL STUD. 319 (1980); Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447, 1477-92 (1991); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981); Georg von Wangenheim, *The Evolution of Judge-Made Law*, 13 INT'L REV. L. & ECON. 381 (1993); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003) (providing both an overview and an important discussion of the "supply-side" efficiency ramifications of the competition among courts); Note, *The Inefficient Common Law*, 92 YALE L.J. 862 (1983).

## II. COMPETITION AMONG LEGAL SYSTEMS CAN LEAD TO EFFICIENT RULES

External competition can eliminate inefficient legal systems.<sup>7</sup> Legal systems compete with each other, and those that allow efficient use of resources will have survival advantages over others that are less efficient. An inefficient legal system—one in which resources are underutilized or wasted, one in which there are inadequate incentives and opportunities for production—undermines itself in a number of ways. A system that does not generate enough output for a sufficiently strong military may be conquered by invaders. A nation's survival depends on its ability to repel such attacks. There are two components to a legal system that can repel attacks. First, the system must create sufficient incentives and opportunities for production, and second, the system must have a mechanism for allocating some portion of its output to public goods such as defense.

As another example, an inefficient legal system may fail to provide food for its people. Starving people may be eager to overthrow the system and replace it with a new system. Even attempts with a low probability of success may be rational if conditions are bad enough. Nor do conditions have to be that extreme for people to recognize that some other legal regime could generate greater material wealth. The information revolution allowed people of the former Soviet Union to learn that other legal systems with markedly different rules regarding the ownership of capital were producing greater consumer wealth.

Hernando De Soto has extended this observation about the importance of property beyond the differences between capitalism and communism to smaller differences between capitalist legal systems.<sup>8</sup> Such observations can lead to revolution and a subsequent copying of the apparently more successful system. Legal systems might be seen as organisms that compete for human adherents, the essential nutrients that allow them to survive and multiply. Since replicating bits of cultural information are called memes, perhaps legal replicators could be called "lemes." Lemes marshal human resources to replicate themselves.

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7. For two reasons, this does not mean that surviving systems are efficient. First, the competition is not finished, and never will be. Second, having the ability to survive over a long period of time may not be the same thing as being efficient. See Roy Radner, *Economic Survival*, in *FRONTIERS OF RESEARCH IN ECONOMIC THEORY: THE NANCY L. SCHWARTZ MEMORIAL LECTURES, 1983-1997*, at 183-209 (Donald P. Jacobs et al. eds., 1998).

8. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

A similar sort of competition can exist within a nation. Following Adam Smith,<sup>9</sup> Todd Zywicki has examined the English market for systems of rules and the competition that existed between courts.<sup>10</sup> The courts of law competed with the courts of equity for business, and he argues that the courts offering the more efficient rules were more attractive to the parties.<sup>11</sup> Thus, the courts had an interest in offering better legal schemes.<sup>12</sup> He calls this a “supply-side” push in the direction of economic efficiency and argues that it may coexist along with a demand-side pull.<sup>13</sup>

### III. MECHANISMS INTERNAL TO THE COMMON LAW CAN LEAD TO EFFICIENT RULES

My primary concern here is not with those sorts of macroscopic legal competition, where systems of rules fight for adoption and systems need to be efficient to survive. My concern here is whether one legal system in particular, the common law, is biased toward efficiency because of internal forces rather than external competition. There are at least five different ways the common law might, without any external competition, evolve toward efficiency. Three theories cast judges as the directive agents in the development of efficient law. Clearly, if judges are biased, that might be manifested in their opinions. These theories are summarized in Part III.A. In the other two theories, the selection or litigation of cases by parties is the engine of efficiency. If a rule is inefficient, benefits may be realized from replacing it. Part III.B introduces these two theories and the remainder of the Article explores them in more detail. These five mechanisms are not mutually exclusive, so some or all may play a part in the evolution of laws.

#### A. *Judges as the Directive Agents in the Development of Efficient Law*

The most obvious theory is that judges seek to achieve societal goals, and one of those goals is efficiency. Those judges with formal economic training might be especially likely to apply economic principles in their judging. Judges without formal training may learn the principles and desirability of economics through informal culture.

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9. “During the improvement of the law of England there arose rivalships among the several courts.” ADAM SMITH, *Report Dated 1766*, in LECTURES ON JURISPRUDENCE 423 (R.L. Meek et al. eds., 1978); see also HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (Harvard, 1983); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 652-54 (1989).

10. See Zywicki, *supra* note 6.

11. See *id.* at 1585.

12. See *id.*

13. *Id.* at 1553.

“Waste not, want not” expresses the general warning to be efficient; “Don’t throw good money after bad” teaches us to ignore sunk costs.<sup>14</sup> Judges are selected, in part, because they are expected to make decisions that are good for society, decisions that achieve widely shared goals. It seems likely that, if efficiency is a cultural priority, judges will give substantial weight to that value in their decisions. One problem with this hypothesis—that judges have consciously sought efficient results—is that they have not made this value explicit in their writings. If efficiency were a primary goal, we would expect more references to economic principles than we find in their opinions.

It is also possible that judges lean toward efficient decisions without intending to do so, unaware of their inclination. To some extent, judges do what comes naturally. There are evolutionary reasons to believe that humans have a distaste for inefficiency. Since inefficiency is essentially wastefulness, those who had the power to perceive inefficiency and had the inclination to avoid it would have had more resources with which to survive and support their descendants, leaving more of their genes in the population. It is easy to see that an inclination to avoid wastefulness is adaptive and that judges might be endowed with just as much of that inclination as anyone else. This is not to argue that judges do not have other values, such as justice and religion, that may play the greater role in many decisions. The point is only that judges may have a taste for efficiency.

Because the inefficient effects of a decision are external to an ethical judge, this theory needs some mechanism for bridging the gap between seeking efficient results for oneself and seeking them for others. Empathy can make the connection. It could be a survival advantage to have the ability to project oneself occasionally into the shoes of another, to learn vicariously the dangers of her situation. That same empathy, coupled with the distaste for waste, could lead a judge to feel uncomfortable with decisions that would leave others in inefficient situations.<sup>15</sup>

There is a third argument that judges make the common law efficient, or at least more efficient than the civil law. The idea, which can be traced back at least to Hayek, is that the greater prestige and independence of judges in a common law system allow them to protect rights of property and contract more fully than do civil law judges.<sup>16</sup> Paul Mahoney finds greater growth in common law jurisdictions and attributes it to this cause.<sup>17</sup>

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14. Sunk costs are amounts already invested that cannot be retrieved.

15. Perhaps Priest and Klein’s results support this theory. They found that the party with the higher stake in the outcome prevails more often. See George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 28-29 (1984).

16. Mahoney, *supra* note 6, at 523.

17. *Id.*

*B. Efficiency Resulting from Processes Internal to the  
Common Law*

The harder question is whether the common law system of decisionmaking, relying heavily on precedent, could be biased toward efficiency without any predilections for efficiency within the judges making the law. It seems that, in a world where Coasean bargains can be struck,<sup>18</sup> the more efficient outcome ought to prevail, whether that outcome is corn or cows, capital or communes. But there are transaction costs, so obtaining efficient rules is not so simple. Before examining the mechanisms, however, it should be noted that these evolutionary theories do not gainsay the role of human intentionality in shaping the law. Darwin did not try to argue that human goals had not influenced evolution, for he knew and was inspired by the fact that breeders had played a large and deliberate role in the development of domesticated animals.<sup>19</sup> He showed that natural selection could work both like and alongside human selection. Similarly, judicial preferences play a role in the evolution of the common law, but judges' attitudes are not the whole story either; the system has biases of its own.

In the common law system, private parties have the power to bring suits against other private parties and have the right to have those disputes heard by independent, disinterested judges. One special feature of the common law is that judges are empowered to make new rules for situations not previously addressed by the law. Once such a rule is made for a jurisdiction, judges are bound by precedent.

Decisions do not always follow precedent, however. Another special feature of the common law is that judges, at least those at the top of the pecking order,<sup>20</sup> can deviate from precedent without suffering loss of job or income or perhaps even prestige. Moreover, judges do not know every previous case. They rely heavily on lawyers to bring relevant precedent to light during litigation, and lawyers do not find all of the relevant cases.<sup>21</sup> Additionally, lawyers may fail to cite relevant precedent because they have forgotten their own theory

18. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

19. ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994).

20. See *United States v. Booker*, 375 F.3d 508, 516 (7th Cir. 2004) ("The Supreme Court alone is entitled to declare one of its decisions defunct.") (Easterbrook, J., dissenting), cert. granted, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004).

21. See *Hannah v. Peel*, 1 K.B. 509 (1945). In *Hannah v. Peel*, the owner of a house in which a brooch was found could have won if the King's Bench had applied the ordinary American rule that mislaid items go to the owner of the locus in quo. It is likely that the owner's lawyer failed to find *McAvoy v. Medina*, 93 Mass. (11 Allen) 548 (1866), but it is also possible that he felt there was no chance of convincing the King's Bench to adopt the distinction between lost and mislaid items recognized by American courts.

of the case.<sup>22</sup> It is hard to say whether lawyers today are better or worse at discovering precedent than they were in the past. There is certainly a lot more precedent to discover; they are looking for needles in larger haystacks. However, the tools of research at their disposal are much improved. In addition to extensive indexes and digests, search engines enable lawyers to find cases that would have eluded lawyers of yesterday. The net result is probably that there are fewer opportunities for errors based on ignorance today than in years past.<sup>23</sup> Nevertheless, errors are still possible. Precedent is not entirely binding, and rules do mutate over time.

#### IV. THE COMMON LAW PROCESS FAVORS EFFICIENT RULES

Explicitly applying the mathematics of biological evolution, Robert Cooter and Lewis Kornhauser showed that, under reasonable assumptions, a legal system tends toward a condition in which it is more often good than bad.<sup>24</sup> We cannot conclude that any particular common law rule or set of rules is efficient, but the system could lean in that direction without the help of judges. Two of Cooter and Kornhauser's key assumptions were that more is spent by litigants preparing briefs against inefficient rules and that inefficient rules are litigated more often than efficient ones.<sup>25</sup> They left open the validity of those assumptions.<sup>26</sup>

##### A. *Differential Investment: Litigants on the Side of Efficiency Fight Harder*

It is not hard to see how differential investment might lead to efficient rules. If one outcome is more efficient than another, by definition those who gain from that outcome gain more than those who

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22. See *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805). The plaintiff's lawyer failed to make his best argument on appeal even though he had filed pleadings that would have allowed that argument. The action was in trespass upon the case, which, following *Keeble v. Hickeringill*, 11 East. 574, 103 Eng. Rep. 1127 (Q.B. 1707), should have allowed the plaintiff to recover damages for interference with his fox hunt without proof that he had any property in the animal by first possession. Instead, the decision was rendered on the theory that Pierson needed to prove possession. It is possible, however, that the court and lawyers failed to follow *Keeble* because of an untrustworthy report of the *Keeble* opinion. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 33 (5th ed. 2002).

23. At least one experienced lawyer has complained that this has made good judgment and argumentation less important, and therefore has made lawyering less enjoyable. (Statement of law firm partner to author.)

24. Cooter & Kornhauser, *supra* note 6, at 144, 149 (modeling judicial decisionmaking as a Markov process). Implausible assumptions are required, however, for evolution to eliminate all bad rules.

25. See *id.* at 150.

26. Cooter and Kornhauser reached their conclusion that the law might tend toward efficiency by making both assumptions, but their discussion of Goodman suggests that one might be enough. See *id.* at 156. It would seem that either should suffice as long as the other is not working in the opposite direction.

gain from the alternative. If we assume that there are no transaction costs to impede collaboration among those preferring the efficient outcome, all the gains from the efficient rule will be brought to bear on their side of the case. Since the benefits on the efficient side are, by definition, greater, more wealth is available to be spent on the side of efficiency. With a greater investment supporting the efficient rule, the efficient rule can buy better lawyers and more of their effort in research and investigation. With more effort and better lawyers, there is a greater chance of convincing the judge. The greater odds of victory should lead, in turn, to more frequent victories for the efficient outcomes.

Of course, transaction costs can prevent some of the beneficiaries on the efficient side from joining forces in litigation. To take an easy example, suppose that all neighbors benefit from the enforcement of a private covenant against a single owner and that the gains to the owners of the dominant parcels outweigh the losses to the owner of the servient parcel. The servient owner refuses to comply and some owners of the dominant parcels bring suit to enforce the covenant. Other dominant parcel holders feign lack of interest, though, and refuse to contribute to the suit, with the result that the servient parcel holder spends more on the litigation than the plaintiffs.

Clearly, there will be many such cases in which transaction costs thwart the side of efficiency. But transaction costs can likewise afflict the side of the case hoping for the inefficient result. So as long as transaction costs are neither systematically greater nor more frequent on the side of efficiency than on the side of inefficiency, the net result could be that they only reduce, but do not eliminate, the edge that the efficient rules have in litigated cases.

*B. Differential Litigation: Inefficient Decisions Are More  
Frequently Challenged*

Like the differential investment theory, the “differential litigation” theory makes use of the fact that there are greater stakes on the side of efficient rules. But instead of focusing on the amount spent on litigation, this theory says that inefficient rules will be litigated more often. Consequently, more efficient rules will prevail a higher percentage of the time. It is this argument that I would like to explore in somewhat more detail.

Given the variation inherent in a common law system, the controlling precedent on any issue may change over time. The question, then, is whether there is any way for the more efficient outcomes to be the operative precedent for more time than the inefficient outcomes. Suppose it were the case that an inefficient decision on a certain set of facts would lead to more cases arising in the future than

would arise if the more efficient outcome were reached. To put it in numerical terms, suppose that cases involving a particular choice between two rules will arise ten times per year if the court resolves it by adopting the efficient rule. The same sort of case will arise 100 times per year if the court resolves such situations by adopting the inefficient rule. Now suppose also that the court is a random decision generator heavily biased toward precedent. The court follows previous decisions in 999 cases out of 1000 and breaks from precedent in one out of 1000. It should be obvious that once the court adopts the efficient rule, it will change the rule back to the inefficient rule in only one case in a hundred years, on average. On the other hand, once the court adopts the inefficient rule, that decision will generate 1000 cases in ten years, enough cases that the court is likely to change back to the efficient rule sometime relatively soon.

The analysis of the possibility of reversal is complicated, of course, if courts are more likely bound when precedent is recent. That effect would reduce the advantage for the infrequently litigated efficient rules; it would be harder to get out of the rut. Indeed, this effect could be strong enough to overcome the bias in favor of the infrequently litigated rule. Nevertheless, it is still possible for infrequently litigated rules to prevail for longer than their frequently litigated opposites.

### 1. *Some Kinds of Inefficient Rules Are Challenged More Often*

Supposing that more frequent litigation does lead to more frequent reversal, is there any way for inefficient rules to lead to more frequent litigation? I think so. Consider the difference between a clear rule and a fuzzy one. In *Pierson v. Post*,<sup>27</sup> the court could have awarded title to the first person to have actual control of the fox or to the first to have a reasonable chance of capturing it. Had the court chosen “first reasonable prospect of capture” as the standard, it seems likely that such a fuzzy standard would have attracted many subsequent cases for determination. The court instead chose the clearer rule and, in doing so, reduced the opportunities for the rule to be overturned. The majority showed that it appreciated this point by saying that it was making the decision in favor of “certainty,” to avoid creating a “fertile source of quarrels and litigation.” If clearer rules, that is, more determinate allocations of rights, are more efficient,<sup>28</sup> then the greater relitigation of fuzzy rules may bend the law toward efficiency.

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27. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

28. *But see* Priest, *supra* note 5, at 68 (“[T]here is no reason to believe that inefficient rules are any more or less clear in general than efficient rules.”).

There is a countervailing force that could work against efficiency in this example. Since fuzzy, indeterminate rules tend to call for more litigation and since some lawyers make a living litigating, they have a personal stake in the outcome of cases that pit fuzziness against clarity. That personal stake might lead them to fight harder on the side of the fuzzy rule or less hard on the side of the clearer rule. Assuming that the efforts of lawyers actually have some effect on the outcome or that judges share the interests of litigators,<sup>29</sup> the law will tend toward the fuzzier rule and away from efficiency. If the lawyers have an interest in the outcome, the law may advance toward their interests rather than in the direction of clearer rules. Despite this countervailing effect, it is still possible that relitigation of fuzzy rules would be a strong enough force to lead eventually to clarity and efficiency.

## 2. *The Fee Tail*

For an example of a relatively clear, but still inefficient, rule that has generated litigation, consider the estate in fee tail. For centuries, patriarchs have tried to set up dynasties by preventing subsequent family members from selling the family assets. One means to this end has been to divide ownership temporally—in other words, to give each owner an interest that lasts for a limited period of time. Temporal division of rights prevents each owner from selling the asset out from under the following generations and keeps the asset in the family through the ages.

In England, owners tried to set up such dynastic estates by conveying land “to A and the heirs of his body.” The intent was for the first tenant to take the land, and then on his death his eldest son would take, then on the son’s death his eldest son would take, and so on down the line. Thus, transfers “to A and the heirs of his body” and similar transfers were intended to create a series of ownerships that would prevent each holder from selling or leasing the land for a period of time greater than his own life. At a tenant’s death, no matter what transfer he had made or indebtedness he had suffered or treason he had committed, the land was to pass unencumbered to his lineal heir. In short, according to the intent of the original transferor, no owner could alienate a complete, permanent interest in the land. This feature of inalienability made the fee tail or “entail” of 1450 dramatically different from the fee simple,<sup>30</sup> which, by virtue of the Statute Quia Emptores, had been freely alienable since 1290. Once a fee tail was established, no tenant in tail could sell or otherwise

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29. Since judges are not paid by the case, it would seem to be contrary to their personal interest to decide the case in a way that will make more work in the future.

30. A fee simple is an estate that lasts potentially forever.

transfer full ownership. He could transfer control for the duration of his life, but at his death his heir would have the right to possession.

(a) *The Inefficiency of the Fee Tail*

This estate is not easy to defend on economic grounds. Of course, freedom to transfer on whatever terms transferors desire makes them happy, and in addition, that happiness has the salutary secondary effect of maintaining incentives for people to work and save rather than consume. But the essence of the fee tail is its extremely restricted alienability, and that feature brings with it familiar costs. First, when land is inalienable, it might not move to its most appreciative owner. It is possible that family *X* will enjoy the land more than family *A*, yet there is no way for family *X* to buy the land. It is true that *X* could have bought the land from *O* before *O* created the fee tail in *A*, but that fact is of little consolation once the opportunity has passed. It seems extremely likely that, at least in some cases, the person having the highest valued use for the land will not discover that fact until it is too late to purchase a permanent interest.

Second, inalienable land is less likely to be developed to an efficient level. The owner of the entail, *A*, might see that the land would be more productive if it were improved, yet *A* will hesitate to make the investment. One reason for *A*'s reluctance is that any long-lasting investment will be sunk into future generations. Not only is it completely impractical to move a house to a new location, but the law of fixtures turns *A*'s investment into realty and, once lumber becomes realty (again), the law of waste prevents *A* from detaching the fixture from the land. The house, too, is owned in fee tail, which prevents *A* from selling a permanent interest in the house. Thus any investment by *A* is partly an immediate and irrevocable gift to the following generations—the longer lasting the improvement, the larger the portion that is a gift to them.

Since *A* cannot sell the land beyond the tenure of his own life, *A* cannot easily reallocate his investment or liquidate it for current consumption. Portability was perhaps less important in the past because people tended to stay put, but even then an owner's inability to move an asset could cause reluctance to invest in it. Yet another reason for *A*'s failure to invest in the land is that he lacks the capital to do so. Because his fee tail is inalienable, he cannot mortgage the land and, since he cannot give a security interest, *A* is unable to borrow the capital he needs.

One might argue that if it is clear before he sets up a fee tail that *O* should develop his land, *B* could trade him different land—land less suitable for development—for *O* to entail. There are a couple of reasons we cannot rely on this possibility of exchange to eliminate

the inefficiency of the fee tail. First, the land in question might be *O*'s home, and *O* might not be willing to move to new land. Second, it is unlikely that any generation can predict accurately which land will need developing three or more generations hence. For an amusing example of this inability, review again the two-century-old opinion in *Pierson v. Post*,<sup>31</sup> in which the court referred to the Long Island beach as "waste and uninhabited land." For a more infamous example, consider the forecasting that caused the United States government to give Native Americans land that contained gold.<sup>32</sup>

Because it is hard to predict new uses and because population growth and prosperity often lead to expansion into new lands, the market will be unable to determine accurately in advance which parcels will never need developing. A valid fee tail estate could have easily prevented development of land which ought to be developed. Once land was entailed, there was no way for the market to correct the error because the land was inalienable. Only if the market was so far-sighted that it could anticipate which lands would never need further development (if such lands exist) and trade them to *O* would the fee tail have not resulted in reduced development. And even if the market could have seen that far into the future and offered *O* more land elsewhere, it is possible that *O* would have been willing to ignore the market's offer and pay the price of reduced development so that he could stay where he was and pass his particular lands down through the generations. The result is that enforcement of the original transferor's intent would very likely result in diminishing the chances that entailed lands would be employed most profitably at some point in the future.

A third, and similarly obvious, cost of the fee tail is that it raises transaction costs. Here the transaction is especially unwieldy because it cannot be completed by private parties. When the owner of the entailed land realizes that he might increase the value of the land by disentailing it,<sup>33</sup> his only hope is to obtain the help of a court. Suits to wrest the land from the dead hand of the past are clearly costs of the fee tail.

Temporal division of rights usually creates wasteful incentives not fully cabined by the doctrine of waste. In the fee tail setting, temporal externalities are less of a problem because the next possessor will be the child of the current possessor. But it remains possible that the temporal division maintained by the fee tail decreased incentives for proper upkeep of the premises. And there were other incentives also

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31. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

32. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374-83 (1980) (explaining that although the Fort Laramie Treaty of 1868 gave the Sioux land in the Black Hills, the government took back the land in 1877 after gold was discovered).

33. Disentailing land converts it from a fee tail to a fee simple.

created by the fee tail that are arguably inefficient. The fee tail decreased incentives for children to treat their parents well because their chances of inheriting entailed lands did not turn on their treatment of their families.<sup>34</sup> In England before 1534, the fee tail also reduced the disincentives for treason.<sup>35</sup> The treasonous tenant would forfeit the land for his life, but his son would still inherit the land and might even be well-positioned to start a new battle with the King. This may be one reason that Edward IV did not oppose the disentailing opened up by *Taltarum's Case*.<sup>36</sup>

There is yet one more inefficiency of the fee tail. The fee tail reduced the number of generations that could enjoy controlling who would take possession next, separate from the enjoyment of actually using the land. At least some, and perhaps many, of those who inherited entailed lands were less happy than they would have been if they could have controlled who took next. This point is easy to see in those instances where the fee tail heir did not want the land to pass to his heir. Although people usually pass their assets to family members, they do not always do so, and they do not always pass their lands to the eldest male, as is contemplated by the fee tail. In such cases, fee tail heirs were less happy because they did not have control of subsequent devolution.

Even those who want to pass their lands along to their heirs in tail might be less happy doing so involuntarily than if they inherit a fee simple and have the ability to pass on a fee simple. Suppose that you want to set up a fee tail for a succession of heirs. Would you be happier if you inherited such an estate and could not do anything to control it or if you inherited a fee simple and could pass along only a fee simple?<sup>37</sup> The answer depends, of course, on your constellation of reasons for wanting to set up the fee tail. If you want simply to provide for your family in perpetuity, you might prefer to inherit the fee tail and pass it on, involuntarily. But if, in addition, you want credit for having done so, if you want to write your name in the family history books as one of a series of farsighted providers rather than a powerless conduit, you might prefer to inherit a fee simple and willfully pass it on. As evidence that there are people who enjoy assert-

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34. "[T]he land being so sure tied upon the heir as his father could not put it from him, it made the son to be disobedient, negligent, and wasteful, often marrying without the father's consent, and to grow insolent in vice knowing there could be no check of disinherison over him." FRANCIS BACON, *Reading on the Statute of Uses*, in THE WORKS OF FRANCIS BACON 490 (Spedding ed. 1859).

35. In that year, the fee tail became forfeitable for treason by statute. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 210 n.2 (2d ed. 1986).

36. See DUKEMINIER & KRIER, *supra* note 22, at 217. This case is discussed below.

37. Of course, there are intermediate possibilities, such as the life estate plus remainder in fee simple, but even that division can prevent one generation from exercising any control over who takes in a subsequent generation.

ing control, consider that some owners pay to write wills devising assets to the same persons who would have taken without a will.

When one owner exercises the power to control devolution via a fee tail, all his heirs lose the power to control devolution and the enjoyment taken from exercising control.<sup>38</sup> Seeing it as an issue of individualism, Sidgwick wrote in his *Elements of Politics*:

[A]ny such posthumous restraint on the use of bequeathed wealth will tend to make it less useful to the living, as it will interfere with their freedom in dealing with it. Individualism, in short, is in a dilemma . . . . Of this difficulty there is, I think, no general theoretical solution: it can only be reduced by some practical compromise.<sup>39</sup>

Sidgwick is right that any solution will be a compromise. But theory might help us determine the efficiency of the compromise embodied in the fee tail, which allows a current owner to control ownership long into the future. If there is to be private control of an asset, there must be some person who chooses which members of each generation will have the rights in that asset. We might, to take two extreme possibilities, give that power to control future ownership to any owner in any preceding generation who chooses to exercise control, or we might give that power to an owner only in the immediately preceding generation. There are two reasons it might be better to limit control of who takes in generation *X* to the owner in generation *W*. First, a sort of diminishing marginal utility argument might be made. It is better to let twenty-two persons in each of the twenty-two preceding generations have a small bit of control than allow one person in generation *B* to have twenty-two times as much control. Second, it is not hard to believe as a general matter that the owner in generation *W* would enjoy controlling the ownership in generation *X* because she knows the people in generation *X* far better than the owner in generation *B* could ever know those people. In short, the exercise of control of future ownership will be enjoyed more if it is divided across the generations, with each generation allowed to make a choice only for the following generation.

In sum, the creation of a fee tail bears some resemblance to a decedent's instructions to destroy his assets after his death.<sup>40</sup> In both cases, the decedent reduces the value of his assets in order to achieve his distributional goals. In the case of instructions to destroy, the distributional end is that no one gets the asset, so it might be more ac-

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38. Of course, there may be others who do not like having choices. But can they not simply do nothing and rely on the rules of intestate succession?

39. Henry Sidgwick, *Freedom of Bequest, from the Individualistic Point of View*, in RATIONAL BASIS OF LEGAL INSTITUTIONS 445, 449-50 (1923).

40. See, e.g., *In re Scott's Will*, 93 N.W. 109 (Minn. 1903).

curately called an “antidistributional” end. There is, however, another difference, a practical one. It is unusual for people to ask executors to destroy the assets in their estates. In contrast, it was not unusual for owners to create estates in fee tail. Indeed, the desire was so strong and broadly shared that the Parliament gave it voice in the Statute De Donis Conditionalibus in 1285.<sup>41</sup> It is possible, of course, that the enjoyment taken by a decedent from reaching his distributional goals outweighs the enjoyment lost by the reduction of assets. For that reason, we cannot know how often the fee tail is inefficient. Nevertheless, it is clear that entailed lands might never reach their best uses because the ancestor has made them inalienable.

Economically inclined readers might ask why a transferor would do something that is inefficient. The answer is that some people have a taste for a certain pattern of donative distribution and are willing to pay a price to achieve that pattern. Why they should have such a taste can be explained by biology. Because there is diminishing marginal reproductive return to wealth, when wealth is great enough, it is better to allocate some assets to remote generations than to give them all to one’s children. The fee tail is one vehicle for satisfying that taste.

(b) *Evolution of the Fee Tail and Subsequent Perpetuities*<sup>42</sup>

Through the centuries, judges have had many opportunities to review the validity of transfers attempted by dynastic ancestors. It is not clear which position prevailed in the first dispute involving a grant that included the language “and the heirs of his body,” but it did not take long for judges to hold against the ancestors, freeing the lands from the grip of the dead hand of the past. Early judges accomplished this circumvention of the grantor’s intent by interpreting the grant “to A and the heirs of his body” to allow A to sell a fee simple, disinherit his heir, if he had a living heir. This early interpretation, which frustrated the dynast’s intent, is sometimes known as the “fee simple conditional”<sup>43</sup> or “conditional fee.”<sup>44</sup> The transferee had a fee—complete and alienable ownership—upon satisfaction of the condition that an heir be born alive.

But property holders with dynastic designs did not disappear. In fact, they prevailed upon Parliament to overturn the rule chosen by the courts. The Statute De Donis Conditionalibus of 1285 established that the recipient of a grant limited to him “and the heirs of his body”

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41. See *infra* note 45 and accompanying text.

42. In a sense, the medieval fee tail was a perpetuity, a restriction on the power of free alienation. SIMPSON, *supra* note 35, at 208, 212 n.9.

43. DUKEMINIER & KRIER, *supra* note 22, at 216.

44. SIMPSON, *supra* note 35, at 66.

could not sell the land even after the birth of issue.<sup>45</sup> For six decades after De Donis, it was debatable whether all subsequent descendants would be similarly fettered, but by 1346 it appears settled that they were.<sup>46</sup> This judicial interpretation, which limited the rights of all descendants, shows that judges did not always decide against inalienability. The resulting estate, which honors the grantor's intent to prevent subsequent transfer out of the family and limits descent to a limited class of heirs, is known as the fee tail.

What ensued was predictable. Because fees tail could not be disentailed, as time passed, more and more lands were tied up. As the supply of alienable lands diminished, the value of alienable lands probably rose, and the premium to be gained by freeing land from the entail increased commensurately. For both this reason and so that they could determine the next taker, tenants desired to turn their fees tail into fees simple and resorted to legal maneuvers to "bar the entail." Some of these schemes worked and others failed, but in 1472 the judges in *Taltarum's Case* made it clear that one elaborate scheme, the "collusive common recovery," would bar the entail and eliminate the interest in the issue.<sup>47</sup> After another century, it was established that the collusive common recovery would also bar the remainderman and reversioner.<sup>48</sup> The common recovery survived in one form or another until the nineteenth century.<sup>49</sup> By bringing this suit, the possessor of the entail could convert his estate to a fee simple, freeing the land for transfer and development and thereby increasing its value. For our purposes, it matters little whether judges honored the collusive common recovery because it was technically unassailable or because they did not like the inefficiency of land use that might have become increasingly apparent as time passed.<sup>50</sup> The key point is that the inefficiency created pressures that led to attempts to loosen the shackles, and eventually the judges went along and allowed disentailment.

But dynasts never say die. In response to the common recovery, conveyancers created new devices to prevent alienation. One example can be seen in a case from 1495. "Land was given in tail, remainder in fee, on condition that if the donee or his heirs alienated to the damage of the issue, the donor and his heirs might re-enter. And the opinion of the court was that the condition was good."<sup>51</sup> Such "clauses of perpetuity" developed over the subsequent century, but by the

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45. *Id.* at 82.

46. *See id.* at 83-84.

47. *See id.* at 129-32.

48. *Id.* at 132.

49. *Id.* at 137.

50. *Id.* at 134-35, 208-09.

51. *Id.* at 210 (quoting Y.B. 10 Hen. 7, fol. 11, Mich., pl. 28 (1495)).

early 1600s courts once again held in favor of alienability.<sup>52</sup> Another attempt, the perpetual freehold—which was a transfer to *A* for life, then to his son for life, then to his son’s son for life, and so on in perpetuity—was curtailed in the 1585 case of *Lovelace v. Lovelace*.<sup>53</sup>

During the sixteenth and seventeenth centuries, the landed and powerful continued their attempts to restrict the alienation of their lands by descendants. They were aided, in particular, by the Statute of Uses in 1536. That statute executed “uses,” beneficial interests recognized in equity, making them into legal interests. Because it was possible to create many sorts of interests in equity that did not previously exist at law, the Statute of Uses made it possible for donors to create new legal interests. For some time, there seemed to be no limit on the kinds of successive interests that might be created by employing the Statute of Uses. Dictum in *Chudleigh’s Case*<sup>54</sup> appeared to signal a judicial intent to step on the brakes, subjecting the new interests created by the Statute of Uses to the same limitations on legal interests.<sup>55</sup> But subsequent cases “whittled” *Chudleigh’s Case* down to the rule of *Purefoy v. Rogers*,<sup>56</sup> which was not up to the task of curbing many dynastic designs.<sup>57</sup> In 1620, the court in *Pells v. Brown*<sup>58</sup> decisively rejected the rule suggested in *Chudleigh’s Case*, holding instead that executory interests were not subject to the old common law rules and that they could not be destroyed by a common recovery attempted by the first taker.<sup>59</sup> The fact that the dictum in *Chudleigh’s Case* was not followed by subsequent courts is further evidence that the judges were not always inclined to constrain those who wished to tie up their lands in inalienable estates.

Similar evidence suggesting a lack of concern among sixteenth century judges for the problems of inalienability appears in the mixed decisions in cases involving long-term leaseholds. Although some cases had rejected executory limitations of long-term leaseholds, in *Manning’s Case*<sup>60</sup> and *Lampet’s Case*<sup>61</sup> the courts held that a long-term leasehold could be devised to one person for life, with a gift over to another person after the death of the devisee for life.<sup>62</sup> Because the executory devise was indestructible, there was nothing the life tenant could do to gain the power of alienation over even the

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52. *See id.* at 211.

53. *Id.* at 215.

54. 1 Co. Rep. 113b (1595).

55. SIMPSON, *supra* note 35, at 218.

56. 2 Wms. Saunders 380 (1671).

57. SIMPSON, *supra* note 35, at 218-19.

58. Cro. Jac. 590 (1620).

59. SIMPSON, *supra* note 35, at 222.

60. 8 Co. Rep. 94b (1609).

61. 10 Co. Rep. 46b (1612).

62. SIMPSON, *supra* note 35, at 221.

leasehold interest, much less the fee.<sup>63</sup> During the next half-century, however, the courts found ways to constrain the dynastic designs that employed leaseholds as a vehicle.<sup>64</sup> In *Childe v. Bailie*,<sup>65</sup> for example, the court held that a term of years could not be divided up into a fee tail followed by an executory devise.<sup>66</sup> As another example, life estates within the leasehold could not be given to persons who were not *in esse*.<sup>67</sup>

The law governing executory limitations of freeholds following fees simple was not so clear, however, because fewer cases pressing the limits had made it to court.<sup>68</sup> In addition, the law that applied to interests created in trust was quite unsettled.<sup>69</sup> In *The Duke of Norfolk's Case*<sup>70</sup> in 1681, Lord Nottingham announced a new approach for testing transfers designed to restrict future alienation.<sup>71</sup> He approved future interests that were certain to vest, or not, within the lives of living persons.<sup>72</sup> His approach is embodied in the "Rule Against Perpetuities," which prevents a grantor from creating interests that might vest too far in the future.<sup>73</sup> Although it appears that Lord Nottingham's original concerns were more religious than economic,<sup>74</sup> the Rule has functioned for more than three centuries as a key component in the set of rules preventing inefficient restraints on alienation.<sup>75</sup>

To sum up the history, dynasts tried to restrict alienation, but the courts resisted. Dynasts then persuaded Parliament to force courts to honor their intent, establishing the fee tail. Owners of entailed lands could see that their interests could be sold or donated or more fruit-

63. *See id.* at 221.

64. *Id.* at 223.

65. Palmer 48, 333, W. Jones 15, Cro. Jac. 459 (1618-23).

66. SIMPSON, *supra* note 35, at 223.

67. *Id.* at 225.

68. *See id.* at 224.

69. *Id.* at 225.

70. 3 Chan. Cas. 1, 2 Swanston 454 (1681).

71. SIMPSON, *supra* note 35, at 225.

72. *Id.* at 225-26.

73. *See* Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 707 n.4, 711-12 (1990). Simpson argues that the "rule 'against' perpetuities" is misnamed because it permits them, within limits. SIMPSON, *supra* note 35, at 232, 284.

74. *See* SIMPSON, *supra* note 35, at 226.

75. It should not be imagined, however, that these rules were sufficient to establish complete alienability of land. By the "strict settlement," a series of parents could prevent the next generations from selling the land. This process could be argued to be less harmful than the fee tail or other perpetuities—each generation was allowed some choice in the devolution—but like the fee tail it curtailed transfer and development. It was not until the English Settled Land Act of 1882 that these problems created by the strict settlement were minimized by allowing the life tenant nearly complete control over the land. *See id.* at 285. This reform was, of course, statutory, showing that the common law had not to that date found a way to eliminate all avenues to inalienability.

fully developed if they could bar the entail. So they hired lawyers to free their lands from the dead hand of the past. The lawyers brought these cases to court, and eventually the courts allowed disentailing conveyances. Dynasts attempted many new ways of tying up land, but the courts eventually shut most of those down too.

*(c) Differential Selection Can Lead to Efficiency*

Perhaps the legal treatment of the fee tail and other perpetuities serves as a good example of differential selection. It appears the law has drifted toward the more efficient rule of alienability, despite dynasts' repeated attempts to pull it away. The fact that courts did not always hold for alienability indicates that the drift toward efficiency is not readily attributable to such an inclination in the judges themselves. Likewise, the mixed results in specific cases suggest that increased resources on the side of presumed efficiency were not always able to bend the courts in their direction. It appears more likely that the pressures of suboptimal land use brought the resulting inefficient arrangements back to the courts for judicial invalidation. Private individuals have persisted in trying to find new ways to achieve their dynastic goals, but in doing so they have generated the cases needed for their own undoing.

It does not matter to this process whether judges are biased toward justice in their decisions. Nor does it matter that judges wished to prevent interests that "fight against god," as Lord Nottingham desired to do.<sup>76</sup> As long as the social or religious goal adopted by the judges is uncorrelated to efficiency, the feedback mechanism exemplified here can work. This theory does not rely on courts reaching efficient decisions more often than inefficient decisions. The decisions of the court can be entirely unconcerned with economics and still contribute to a random walk toward efficient rules.<sup>77</sup>

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76. *Id.* at 226 (quoting *The Duke of Norfolk's Case*, 2 Swanston 454, 460 (1681)).

77. This theory should not be taken to deny that there are plenty of reasons that the law might not lean toward efficiency. For example, if one side of a legal question is represented by repeat players in the litigation process, the law may tilt in that direction, even if that is not the efficient direction. If the persons on one side of an issue are dispersed, they may have a hard time asserting their collective interest and the law may lean away from them, even though they are on the side of efficiency. If the interests on the efficient side are few but extremely weighty, they might not have an opportunity to influence the law in a system that relies heavily on the frequency of litigation. If the judges are inclined to do justice, whether distributional, retributive, or otherwise, that inclination can overcome the pull to efficiency in any particular case.

Although these possibilities exemplify how inefficient rules may survive, they do not establish that the law cannot drift toward efficiency through the mechanism suggested above. If all of these forces are not negatively correlated with efficiency, then efficiency can pull the law subtly, in the background, when other forces are not too strong.

### 3. *A Counterexample—Diving Board Liability*

Compare the fee tail story from Property to a hypothetical story from Torts regarding the liability of hosts for diving board accidents. Suppose that a court holds a hotel liable for punitive damages for accidents stemming from use of the diving board at its swimming pool.<sup>78</sup> And suppose that hotels in the jurisdiction respond by eliminating their diving boards. If liability for punitive damages is the efficient decision, we do not have a problem; the diving boards are not worth keeping. But if punitive liability is inefficiently high, we can see that the common law feedback process might not work to correct the decision. If all hotels remove the boards, no cases will arise. Without any cases, it will be hard for the common law to change to the efficient rule.<sup>79</sup>

Guido Calabresi and Douglas Melamed famously divided judicial decisions into those enforcing entitlements with property rules, liability rules, and inalienability.<sup>80</sup> When an entitlement is inalienable, it cannot be transferred.<sup>81</sup> When an entitlement is protected by a property rule, it can be removed from the holder only by paying the price demanded by the seller.<sup>82</sup> When an entitlement is protected by a liability rule, it can be taken by anyone willing to pay the price set by a court.<sup>83</sup> As the fee tail and diving board examples suggest, there may be an important connection between the type of enforcement and the feedback loop in the common law process. If an initial entitlement of rights is inefficient, inalienability prevents those rights from moving. They can be reallocated only by changing the law. When an entitlement is protected with a property rule, high transaction costs can make market reallocation difficult.<sup>84</sup> In such situations, it may be less costly to seek a change in the law. Both property rules and inalienability can create incentives to change the law. When initial entitlements are enforced with liability rules, however, those who want the rights can, by the payment of damages, reallocate the

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78. The damages need not be punitive; any systematic damages greater than actual damages will do.

79. Although the differential litigation mechanism cannot usually lead to rules with efficient incentives, there are two ways that the law might evolve toward rules that create efficient incentives. First, it is possible that the persons who suffer the bad incentives will recognize that it is in their interest to overcome the free rider problems and convince the government to change the rules. Second, it is of course possible for lawmakers (whether judges or legislators) to recognize that certain rules have good or bad incentives. Acting on that recognition, they can tailor the law to achieve efficient ones.

80. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

81. *Id.* at 1092.

82. *Id.*

83. *See id.*

84. *See id.* at 1106.

rights to themselves; it is not necessary to change the law.<sup>85</sup> Thus it is possible that suits to change the law will arise less often when liability rules are employed than when rights are protected with inalienability or property rules. This connection merits further examination.

In any event, there are some inefficient decisions that will live short precedential lives because they create opportunities for their own reversal. Other inefficient decisions will last longer because they create incentives for parties to keep themselves out of the situations that would give rise to a case offering an opportunity for reversal. The feedback loop that is built into the common law decisionmaking process has the potential for correcting some errors, but there are errors it cannot reach. In general, decisions that leave parties in inefficient situations will generate opportunities for reversal, whereas decisions that create inefficient incentives may cause parties to avoid the situations that would give rise to cases that could overturn the inefficient rule. Inefficient rules of property law are likely to create opportunities for litigation. Moreover, inefficiencies in allocation of specific realty are likely to grow, rather than diminish, over time. Inefficient tort rules are more likely to drive parties away from the behaviors that would lead to liability, thus reducing the opportunities for litigation of the entitlement. Thus, we should expect this common law process to have a more beneficial influence on property rules than tort rules.<sup>86</sup> If strong, stable property rules are a key to productivity, this point suggests an alternative theory for explaining why the common law generates more wealth than the civil law.<sup>87</sup> Perhaps the process itself deserves as much credit as the insulation and prestige of judges.

#### 4. *The Tail of the Fee Tail Tale*

One might think that the tale of the fee tail is over, but a new chapter is being written today. Once again, as in 1285, legislative action is loosening the constraints imposed by judges. The Rule Against Perpetuities, the most recent judicial limitation on dynastic designs, is under attack. Legislation has been passed in a number of states exempting assets held in trust from the operation of the Rule.<sup>88</sup> Why? Part of the answer lies in the rise of the perpetual trusts and the competition across jurisdictions for trust dollars. This is a rent-seeking story—a race to the bottom. South Dakota started the com-

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85. It is not even necessary to go to court when the defendant is willing to pay the price the parties anticipate the court will set.

86. Stake, *supra* note 6, at 1447, 1477-92.

87. See Mahoney, *supra* note 6.

88. Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2101 (2003).

petition by abolishing the Rule for its trusts.<sup>89</sup> Abolition of the Rule gave local banks an advantage in attracting the assets of those wanting to set up dynasties.<sup>90</sup> Conversely, banks in other states faced a potential loss of business and a flow of capital out of the state.<sup>91</sup> Other states have subsequently followed suit.<sup>92</sup> As of 2002, there were fourteen states that had sufficiently limited or abolished the Rule Against Perpetuities to allow dynasts to create perpetual trusts.<sup>93</sup> Thus, modern statutes make it possible to achieve much of what the barons wanted to do so many centuries ago.

Although the fee tail is not really needed today in many states because dynasty trusts can be created, perhaps some state will see the possibility of gaining the upper hand in the competition for trust dollars by recreating the fee tail. Once one jurisdiction adopts it for personalty, it could prove popular and spread to other jurisdictions fighting for financial accounts. Such a recreation of the fee tail for personalty could operate to the benefit of those early-adopting jurisdictions, while reducing the net wealth of society.

Whether the fee tail is recreated in its traditional form or merely in the form of dynasty trusts matters little. The question is whether the common law courts will come to the rescue, once again, to save assets from inalienability. Perhaps they will.<sup>94</sup> But perhaps there is no need for them to come to the rescue. Two of the problems stemming from inalienability evaporate when wealth is held in trust. We do not have to worry about another family being unable to buy the trust res because the trustee can sell it to them. We do not have to worry about lack of development because the trustee can mortgage the land for capital to invest in the land. The issue as to whether the enjoyment of control can be limited to one generation is still a con-

89. *Id.*

90. *Id.*

91. *See id.* at 2103.

92. Another reason for the abolition of the Rule Against Perpetuities is that it is so difficult to master that lawyers fear malpractice liability. When the privity requirement prevented would-be devisees from suing the scrivener, lawyers had little to worry about. *See id.* at 2100-01. But as the privity requirement has fallen, the fear of malpractice has risen, and with it the incentive to abolish the Rule. *See id.* at 2101. For an argument that violations of the Rule should not lead to malpractice liability, see Stake, *supra* note 73, at 773-75.

93. DUKEMINIER & KRIER, *supra* note 22, at 334.

94. Is there a better solution than invalidation? Some might say that we should not abolish the fee tail, but rather tax it to internalize the social costs. This will help, but it will not solve the problem. If there are social costs to the fee tail (exceeding its benefits), adding a tax will reduce the frequency of the fee tail, but the losses will remain in those cases where the fee tail is created. *O* is already willing to pay a tax, in the form of lawyer fees and reduced value, to create the fee tail. Increasing that tax will reduce the frequency, but it is still possible for the losses from diminishing marginal reproductive utility to be larger than the tax. In such cases the fee tail will be created, and the asset held in fee tail will generate less wealth than if it were held in fee simple.

cern, but the answer to that question, as a matter of efficiency, remains unclear.

This last point shows one more beneficial attribute of the behavior of the common law. If courts strike down inefficient arrangements, the dynasts have to keep trying different ways to reach their goals. Eventually, through trial and error and perhaps increasing levels of complexity, they may hit on an approach that generates fewer problems for society, one that is not so inefficient. It remains to be seen whether these modern variations will generate cases and, if so, whether the courts will find ways of ignoring the original intent. But the common law process does provide at least some hope that, if welfare losses are large, a new means of disregarding intent, a modern analogue to the ancient collusive common recovery, will be recognized by the courts.

## V. CONCLUSION

The common law competes with other legal systems—on efficiency as well as other criteria—and the outcome of that tournament is far from decided. In addition to external forces, there are a number of internal means by which the common law may generate efficient rules. Judges can actively seek efficiency, or favor it without knowing they are doing so. Even without judicial help, the common law process itself may have the capacity to generate efficient rules. Because the efficient decision generates greater wealth, litigants on the side of efficiency may spend more to promote their position. Because of asymmetries in stakes, cases may be settled more often when rules are efficient. In addition, some sorts of inefficient rules may sow the seeds of their own undoing by creating obvious wastefulness that can be prevented only by changing the law.

The fee tail and other attempts to create property that cannot be alienated outside the family provide examples of legal rules that create opportunities for their own reversal. Time and again, creative donors imposed restraints on alienation. Time and again, those suffering the inefficiencies of those restraints sought judicial relief, and sometimes, but only sometimes, they got it. The inefficient rule led to inefficient land use, which led to litigation, which led to reversals of the rule. Thus, some inefficient decisions fall quickly because they create opportunities for their own reversal. Other inefficient decisions, such as excessive diving board liability, last longer because people avoid the situations that would give rise to additional cases. The common law decisionmaking process contains a feedback loop that can correct some errors, but cannot reach others.

In general, decisions that leave parties in inefficient situations, such as decisions in cases involving property law, create opportuni-

ties for reversal. Decisions that create inefficient incentives, such as decisions in cases involving tort law, cause parties to avoid the situations that would become lawsuits. We should expect this common law process to have a more efficient influence on property rules than tort rules.<sup>95</sup> Because efficient property rules are important to a healthy economy, the common law process may have an internal advantage that gives it a big leg up in its external competition with other legal systems.

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95. Stake, *supra* note 6, at 1477-92.