Public Choice (2008) 135: 35–53
DOI 10.1007/s11127-007-9245-y

Spontaneous order and the common law: Gordon Tullock's critique

Todd J. Zywicki

Received: 10 September 2007 / Accepted: 5 October 2007 / Published online: 13 November 2007

Abstract Gordon Tullock critiques two specific aspects of the common law system: the adversary system of dispute resolution and the common law process of rulemaking, contrasting them with the inquisitorial system and the civil law systems respectively. Tullock's general critique is straightforward: litigation under the common law system is plagued by the same rent-seeking and rent-dissipation dynamics that Tullock famously ascribed to the process of legislative rent-seeking. The article concludes that Tullock's critique of the adversary system appears to be stronger on both theoretical and empirical grounds than his critique of the common law system of rulemaking.

Keywords Tullock · Posner · Law & economics · Economics of judicial procedures · Adversary system · Inquisitorial system · Civil law · Common law · Rent-seeking · Spontaneous order

JEL Classification B31 · D72 · K10 · K12 · K13 · K41

1 Introduction

Much of the research agenda of the modern law and economics movement has been predicated on the belief in the economic "efficiency" of the common law and positive explanations for it. Although there are important differences in the thinking of leading enthusiasts for the common law, they share a fundamental underlying assumption that in the most important respects the common law evolves according to an "invisible hand" process and that individual, self-interested action generally tends toward the creation of an efficient legal regime (Zywicki and Sanders 2008). The standard law and economics model argues that although the common law and its related processes (such as the adversary process of litigation) are shaped by decentralized, non-centrally planned individual actions, the outcome

T.J. Zywicki (✉)
George Mason University School of Law, James Buchanan Center for Political Economy,
Program on Politics, Philosophy, and Economics, 3301 N. Fairfax Dr., Arlington, VA 22201, USA
e-mail: Tzywick2@gmu.edu

of these decentralized actions is superior to what would be the result were the legal process more centrally planned. Even those such as Posner who would vest more authority and discretion in judges to make the law than thinkers such as Hayek, still believe that the common law fundamentally is a socially-beneficent spontaneous order process. Gordon Tullock has dissented from this dominant view.[1]

Tullock doubts that the uncoordinated actions of individual judges, juries, and litigants will be conducive to the generation of an efficient legal system. Rather, he predicts that the decentralized process of the common law system is prone to socially suboptimal outcomes—at least as the common law system operates today. Tullock believes that the common law and adversary process create incentives for individuals to act in zero-sum and negative-sum manners that will tend to the generation of suboptimal social outcomes, relative to other legal systems. Tullock expresses enthusiasm for the civil law and inquisitorial systems of law-making and dispute resolution instead. The common law system tends to the production of a malign, not beneficent spontaneous order, Tullock argues, and although the civil law system has its own problems, he insists that it is superior to the common law.

Tullock's critique of the common law focuses on two points: first, the adversary system as a system for dispute resolution and second the common law as system for making legal rules. The remainder of this article is as follows. Section 2 sets out a conceptual framework for thinking about legal process and legal evolution as spontaneously ordered systems. Section 3 examines Tullock's critique of the adversary system of litigation as a process for resolving individual disputes and the comparison to the inquisitorial system. Section 4 examines Tullock's critique of the common law as a social rule-making system and his comparison to the civil law system. Section 5 concludes.

2 Spontaneous order and the common law

2.1 Beneficent versus malign spontaneous orders

A spontaneous order is an order among persons that emerges from self-motivated individual actions that combine into a larger concatenation of coordinated activity, without any central directing authority. Although produced from the purposive activities of individuals, the overall order itself is not the product of any particular person or persons' contrivance (Barry 1982). It is thus often said, following the Scottish Enlightenment's Adam Ferguson, that a spontaneous order is one that is "the product of human action but not human design." Although the individuals that comprise the order follow individual purposive plans, the overall order itself has no specific direction or "purpose," but rather is a purpose-independent forum through which individuals pursue and coordinate their diverse plans. A spontaneous order can thus be distinguished from a "designed" or "constructed" order, which reflects an effort by an individual or group of individuals to design an institution for a particular purpose.

Examples of spontaneous orders abound: language, money, traditions, "the market." A famous and often-cited example of spontaneous order is the common law (Hayek 1972; see

[1] This article focuses primarily on Tullock's critique of the common law broadly identified, rather than his extensive and important contributions in other areas of law and economics. This focus in not intended to slight Tullock's important contributions to many doctrinal areas of law, such as criminal law and civil procedure, as well as a far-reaching and influential critique of the use of citizen juries to resolve disputes. Instead, the focus is intended to get at the underlying root of Tullock's critique of the common law, what amounts to a critique to the notion that the common law and the adversary process that is associated with the common law can be understood as a beneficent example of spontaneous order.

also Polanyi 1997). Statutory law, such as the Napoleonic Code, is designed by its authors (the members of the legislature) according to a conscious plan to accomplish particular goals. Statutory law is abstract and prospective in nature, an intentional effort to design generally applicable rules that can be applied deductively to particular cases that arise. The classical common law, by contrast, results from many judges resolving particular disputes involving particular individuals in concrete fact situations, from which emerge abstract and generalizable legal concepts as the byproduct.

Spontaneous orders are often socially beneficent, such as the division of labor or a Hayekian division of knowledge. Spontaneous orders may be more flexible and robust than designed orders, especially if the order and the rules that govern it are the product of a decentralized evolutionary process that allows for decentralized testing and improvement at the margins over time (Pritchard and Zywicki 1999). The mere existence of a spontaneous order, however, does not necessarily imply its social optimality. In particular, a spontaneous order may represent an order that is optimal from a local perspective but not a global perspective. Thus, for instance, the system of Roman numerals presumably emerged as spontaneous order; nonetheless, it was less efficient than Arabic numbers in terms of performing complicated mathematical or financial calculations. An arms' race is a spontaneous order, in that the order arises from the uncoordinated activities of the participants into a stable order, yet given the social waste of duplicative arms' expenditures it would be welfare-enhancing if the spontaneous order could be replaced by a designed order that eliminated the arms' race, *ceteris paribus*. Prisoner's dilemma games similarly result in a form of spontaneous order, in the sense that the parties activities are coordinated and predictable but yet suboptimal, and outcomes could theoretically be improved by replacing the uncoordinated actions of the participants with an overarching designed order.

Two types of spontaneous orders are thus conceptually possible—beneficent or malign spontaneous orders. A beneficent spontaneous order is one that tends to produce a globally-optimal social result when compared to alternative realistic ways of organizing that element of society, such as the division of labor.[2] A malign spontaneous order is one in which a stable order emerges, but is suboptimal when compared to an alternative system that can be realistically achieved, such as an equilibrium solution to a prisoner's dilemma game. The test of the value of a spontaneous order, therefore, is whether it conduces to the production of results that are more socially-beneficial than perfectly-constructed arrangements.

To illustrate the point, consider the distinction drawn by James Buchanan in comparing the process of "profit-seeking" in the market versus "rent-seeking" in politics (Buchanan 1980). Regardless of the forum, whether private market activity or political activity, individuals will be engaged in the relentless pursuit of economic "rents," i.e., "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use" or "receipt in excess of opportunity cost." As Buchanan observes, "So long as owners of resources prefer more to less, they are likely to be engaged in rent seeking, which is simply another word for profit seeking." In the private market, the individual pursuit of economic rents (profits) by self-interested individuals produces "results beneficial to all members of the community." Notably, Buchanan invokes the conceptual structure of spontaneous order in explaining how this result comes about, "In an idealized model of market order, profit seeking as an activity produces consequences neither predicted nor understood by any single participant, but 'good' when evaluated as a characteristic of the order

[2]It is important to stress that the alternative orders must be *realistic*, in the sense that they are achievable in practice, not just a comparison to an ideal alternative.

itself" (Buchanan 1980, p. 4). The relentless search by *individual* entrepreneurs to earn economic profits results in economic growth and development at the *social* level but only as an unintended by-product of individual self-interested actions. The attainment of short-term economic rents generates entry by competitors that dissipates those profits. Thus, in the institutional structure of the market, the uncoordinated, self-interested actions of individual actors aggregate into a benevolent spontaneous order that benefits all involved. Buchanan refers to the socially beneficent spontaneous order of the market as "profit seeking."

Under different sets of institutional rules, however, the "unintended results of individual efforts at maximizing opportunities may be 'bad' rather than 'good.' " Under these institutional settings, individual efforts to maximize value generate social waste rather than social surplus. For instance, rather than securing economic rents through making a new or better product, one can instead secure a protective tariff or anti-competitive economic regulation. In a competitive political market to secure laws and regulations that benefit oneself and hamper competitors, "entrepreneurs" will expend real resources simply to gain a political advantage, with no beneficial unintended consequences to consumers or society (Tullock 1967). The uncoordinated rent-seeking activity of political "entrepreneurs" results in negative unintended consequences to society, as in equilibrium rent-seekers will dissipate all of the economic rents potentially available from investments in redistributive activity. A spontaneous order of full competition for government favors and dissipation of economic rents results, but the end result of this competition is the net generation of social waste rather than increasing social welfare. Human nature and individual self-interested behavior is identical in both cases; the differing outcomes result from the institutional rules that provide incentives for the individuals and shape the interactions between them.

2.2 Tullock's critique of the common law

This brings us to Gordon Tullock's critique of the common law. The common law, as noted, typically is extolled as an example of a beneficent spontaneous order. There are two distinguishing features of the Anglo-American common law system. First, disputes are resolved through the adversary system, where each party hires his own lawyer to discover facts and present his partisan view of the case, with respect to both the law and the facts. This approach can be distinguished from the inquisitorial system that prevails throughout continental Europe, where most fact-finding activity is conducted centrally by the judge as a purportedly unbiased expert. Second, the substantive rules and principles of the common law emerge inductively out of these individual cases (which are decided by the adversary system), rather than being part of a legislative process that produces a comprehensive set of rules.

Tullock's critique of the common law is straightforward—in contrast to Hayek, Tullock argues that the common law system (at least as it exists today) is a suboptimal spontaneous order. He models the behavior of competing litigants in the adversary system as essentially rent-seeking parties pleading for favors from the judicial decision-maker. There is little reason to believe, he argues, that this clash of self-interested parties under these institutional constraints will be likely to result in socially beneficial results, as opposed to mere rent-dissipation with random results. Similarly, the development of the common law itself is unlikely to lead to efficient results, but instead should reflect the same sorts of rent-seeking pressures as legislative decision-making. As a result, the common law should be no more efficient as a macroeconomic system than the civil law.

3 Tullock's critique of the adversary system[3]

Consider first the economic question of the most effective means for the resolution of discrete disputes between private parties. From an economic perspective, the optimal procedural regime for resolving disputes arises from the interaction of two offsetting cost functions, with the optimal regime being that which minimizes these joint costs. The first cost relates to the accuracy of the outcome of the case in imposing liability—more accurate results are to be preferred to less accurate results *ceteris paribus*. Second, less-expensive systems of dispute resolution are to be preferred to more expensive systems *ceteris paribus*. The costs of inaccuracy can be referred to as *error costs* and the costs of dispute resolution can be referred to as the *administrative costs* of the system. The optimal system of dispute resolution, therefore, is that which minimizes the *joint* error and administrative costs of the system (Posner 1973; Zywicki 2007a). Consider each of these elements.

3.1 Error costs and administrative costs

3.1.1 Error costs and accuracy

First, an efficient dispute-resolution scheme should seek to minimize error costs, *ceteris paribus*. From a social perspective, legal rules provide incentives or "prices" informing citizens on how to behave, and more accurate case decisions send clearer signals to individuals. From an individual perspective, the promise of more accurate case resolutions *ex post* will tend to reduce the costs to parties of contracting *ex ante* by permitting them to rely on third party adjudicators to resolve disputes that arise (such as under a contract), thereby relieving them the costs of alternative mechanisms for accomplishing their goals, such as informal means of reputation, repeat-dealings, self-enforcement (such as bonding, collateral, or the use of hostages), and vertical integration (Zywicki 2006). By reducing the costs of contracting, the promise of more accurate *ex post* resolution of disputes reduces the transaction costs of contracting and thereby increases the gains to trade between the parties.

There are two types of errors that can affect the accuracy of a given dispute-resolution system, false positives and false negatives. A false positive occurs when liability is erroneously imposed by the Court; a false negative occurs when the Court erroneously fails to impose liability, such as where the defendant had a legal duty to undertake some action which had a social benefit, and the court erroneously fails to compel him to do so. It will be assumed for purposes of the analysis here that the costs of false positives and false negatives are symmetrical.[4] Total error cost is the sum of all false positives and false negatives produced by the system.

[3] The discussion in this section is based on Tullock (2005a).

[4] This is likely an accurate assumption for civil litigation. For criminal law enforcement, American society seems to have reached a working (but perhaps unreflected) consensus that the costs of a false positive that results in wrongful imprisonment is greater in magnitude than a false negative (erroneous acquittal), as reflected in the ancient aphorism that "it is better that n guilty men go free than one innocent man be wrongly convicted." The exact "exchange rate" between false positives and negatives has been expressed differently over time by different theorists. See Volokh (1997). If this is the case, and it seems to be a normative question of how heavily to weigh the costs of wrongful convictions versus wrongful acquittals, then it indicates that in the criminal system the costs of false positives and false negatives is not symmetrical. On the other hand, it could be plausibly argued that in some situations the exchange rate runs in the opposite direction. If, for instance, criminal punishment deters multiple crimes against innocent victims, then punishment of some innocent defendants could theoretically reduce the total social cost of criminal activity, so long as the system was still *perceived* as being accurate.

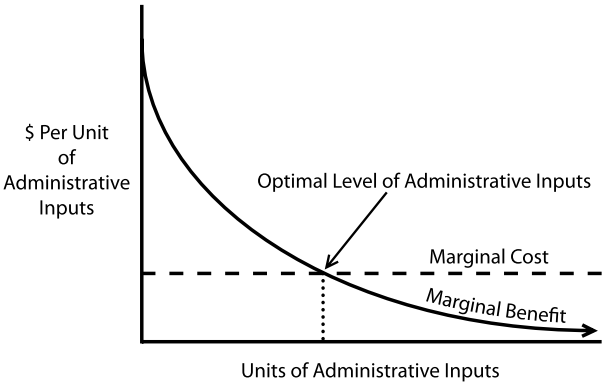

Fig. 1 Optimal level of administrative inputs for dispute resolution

3.1.2 Administrative costs

The costs of investigating and trying cases can be defined as *administrative costs*. In theory, accuracy can be increased at the margin by increasing resource investment in truth-finding. In investigating a murder, for instance, if the police allocated 25 detectives to the case rather than 1, presumably it would increase the likelihood of accurately resolving the case. The constraint, of course, is the opportunity cost of allocating 25 detectives to trying to solve a single crime when from a social perspective it may be more socially-optimal to allocate at least some of their efforts to investigating other cases. Similarly, it would be possible to require an extensive investigation and trial for every speeding ticket, yet these citations are resolved in a summary, and often non-judicial, manner. As a result, the incidence of errors, both false negatives and false positives, is likely to be higher for speeding tickets than for other more serious crimes. Nonetheless, the limited severity of the punishment imposed implies that additional administrative resources dedicated to truth-finding are not justified for speeding tickets.

Given this apparent tradeoff between error and administrative costs, it thus becomes possible to describe a joint cost-minimization model of the litigation system, with the objective being to minimize the joint sum of error and administrative costs. Marginal investments of administrative inputs will generate decreasing marginal returns in terms of improved accuracy as illustrated in Fig. 1, the optimal level of administrative inputs will be that point where further expenditures on administrative costs exceed the improved accuracy.

In this model, the efficient level of resource investment (administrative costs) is determined by the diminishing marginal returns in terms of error costs. It is thus efficient to invest additional resources up to the point at which that investment substantially reduces error costs, but not beyond.

3.2 Tullock's critique of the adversary system

This analytical framework enables us to better understand Tullock's double-barreled attack on the adversary system as a device for dispute resolution. Tullock argues that when compared to the inquisitorial model of dispute-resolution, the adversary system is both *less accurate* and *more expensive* than the inquisitorial model. In other words, the adversary system is inferior under both measures of dispute resolution and thus inferior overall. Consider each of his arguments in turn.

Tullock argues that error costs will be higher under the adversary system than under an inquisitorial system. Indeed, Tullock's critique is even more fundamental. He suggests that in the adversary system there is no fundamental tradeoff between error costs and administrative costs. This is because in the adversary system only the deserving party in the case is investing resources for the "truth" to come out. The adversary system "places little or no value on searching for the truth. It is a combat system in which winning is the sole objective" (Tullock 2005b). The investments of the undeserving party are made simply to obscure the truth from the finder of fact. He thus concludes, as an a priori matter that the inquisitorial system is inherently more accurate than the adversary system. His critique goes to fundamental heart of the adversary system, yet is so exceedingly straightforward and simple that it can be stated in one basic paragraph:

> In the adversary proceedings, a great deal of the resources are put in by someone who is attempting to mislead. Assume, for example, that in the average American court case, 45 percent of the total resources are invested by each side and 10 percent by the government in providing the actual decision-making apparatus. This would mean that 55 percent of the resources used in the court are aimed at achieving the correct result, and 45 percent at reaching an incorrect result. Under the inquisitorial system, assume that 90 percent of the resources are put up by the government which hires a competent board of judges (who then carry on an essentially independent investigation) and only 5 percent by each of the parties. Under these circumstances, 95 percent of the resources are contributed by people who are tempting to reach the correct conclusion, and only 5 percent by the saboteur. Normally we would anticipate a higher degree of accuracy with the second type than with the first[5] (Tullock 2005c).

It follows from Tullock's argument that increasing marginal expenditures on administrative costs in the context of the adversary system is not likely to increase the accuracy of the system, but instead will decrease accuracy (Tullock 2005b). Tullock specifically analogizes litigation under the adversary system to interest groups engaging in rent-seeking activity to secure favorable legislation, with the same negative social consequences. These costs include not only the direct costs to the parties, but all other costs of litigation, from the maintenance of the court systems (including courthouse buildings and judicial and other public salaries), the misallocated human capital investments of litigation lawyers who rather than engaging in efforts to redistribute wealth through litigation could otherwise be engaging in socially productive activities (such as writing contracts or even "selling vacuums"), and finally the opportunity costs of all of the largely involuntary participants in the system, such as witnesses, jurors, and the parties themselves.

Tullock charges that litigation under the adversary system is fundamentally a random process with little claim to producing reliably accurate outcomes. The results in any given case will be the result of the investments of the parties in lawyers, expert witnesses, and other litigation expenses, rather than the intrinsic truth of the matter. Moreover, knowing this, the parties will invest in litigation as if it were an arms-race, with each party being willing to invest to try to gain a relative advantage over their rival. Each dollar invested in litigation expenses simultaneously increases that party's chance of winning and reduces the

[5] Elsewhere he similarly posits, "I should explain that I believe that European courts are less prone to error than American courts, but this is more a matter of feeling that their procedure is more likely to reach the truth than a decision based on actual statistical knowledge." He adds, "I think [European courts] are more likely to be correct than American courts, but this is not an estimate based on real data." A similar discussion of the matter appears elsewhere in his work. See Tullock (2004).

chance of the other (Tullock 2005d). Thus, as with an arms-race, the cost incurred by each party is incurred primarily to impose costs on the other party, and these investments simply cancel each other out. He says, "[T]he benefit to my case and the injury to the other case are identical. In other words, there is an externality falling on my opponent of exactly the same size as the benefit I receive"[6] (Tullock 2005c, p. 354).

The process is thus essentially a rent-seeking process with an unpredictable outcome—parties invest in litigation, but doing so does not increase the accuracy of the system, because the investments should offset each other on a one to one basis. Thus, there is no benefit to the parties themselves from the investments, but nonetheless, these resources are squandered from a social perspective. "As in rent-seeking," Tullock writes, "the party which wins makes a net profit from the activity, but from the social standpoint this is more than offset by a cost inflicted on other people. This is the similarity between the legal process and lobbying" (Tullock 2005d, p. 187). Tullock predicts that in equilibrium all surplus should be dissipated by the parties in the course of litigation. To the extent that there is some prospect of genuine social product, such as compensation to an injured party, Tullock charges that this "social product itself tends to be lost in a sea of social waste" (Tullock 2005b, p. 423).

Tullock explicitly rejects the notion that the common law is a beneficent spontaneous order, and argues instead that it is a malign spontaneous order because decentralized self-interested behavior by litigants depresses overall social welfare. The spontaneous order produced by the adversary system, therefore, is a spontaneous order in the same way that the "tragedy of the commons" is a spontaneous order—individual self-interest results in an order of sorts, but it is an order that is suboptimal from a social perspective. Or the way in which legislative rent-seeking is a spontaneous order, but similarly an order that is suboptimal from a social perspective given the undefined property rights that generates the rent-seeking scramble. Tullock's conclusion is worth considering in full:

> In his zeal to liken the common law system to a private market, Posner oversteps the mark. The common law system is not a private marketplace. It is a socialistic bureaucracy in which attorneys essentially lobby government officials—judges and juries—much in the same way that special interest groups lobby the legislature. The greater the rents at stake in an action, the more lavish will be the outlay of resources on attorney-lobbyists and on expert witness-lobbyists whose prime goal is to tilt the judgment of the judge-jury regulators in favor of their client. In some cases, attorneys will engage in judge-shopping to secure a compliant judge and in jury manipulation to secure a compliant jury. The distinction between the common law courthouse and the legislature is far less than Posner is willing to admit (Tullock 2005b, p. 450).

He adds:

> [T]he invisible hand of the market does not have its counterpart in the disinterest of the judge. Rather, its counterpart is the visible boot of the politically active judge and

[6] He notes that the problem is exacerbated under the so-called "American Rule" for legal fees and expenses where each party pays his own attorney, as compared the English "loser pays" rule. In the American system, the ability of each party to externalize costs on the other party raises the total expenses of litigation. In addition to direct costs, litigants can impose indirect costs on each other as well. For instance, a plaintiff can depose as witnesses senior officials of a defendant corporation, detaining them for hours under questioning (not counting preparation for the deposition itself), yet need not pay for the opportunity cost of the deponents' time. Nor are the parties likely to care about the burden that they impose on those who are not their clients, such as third-party witnesses, or the total social cost of their case, such as the cost to taxpayers from use of the court system and undercompensated quasi-conscripted jurors. Those costs are all externalized by both parties to the litigation.

> the bony knees and elbows of the semi-blindfolded, intellectually lame jury. Competition between the parties does not convey information efficiently to the courtroom, because laws of evidence are designed deliberately to obfuscate the process. In consequence, the American legal system at best is extremely capricious, and at worst is a random lottery. It would be much more cost effective, in such circumstance, to decide outcomes by flipping a coin or by rolling a die rather than by indulging in the high-cost farce of the typical jury trial[7] (Tullock 2005b, p. 451).

Tullock thus expressly rejects the notion that the adversary system aggregates decentralized individual actions into a benevolent spontaneous order. Rather, it is more analogous to a rent-seeking or arms'-race scenario, where many of the expenses made by one side have the effect of simply imposing costs on the other side of the dispute. Tullock posits that the end result should be the dissipation of the entire social product of the litigation in attorneys' fees and other direct and indirect costs. Moreover, because these heightened costs simply cancel out each other, they do nothing to improve the accuracy of the outcome.

3.3 The inquisitorial system compared

Tullock argues that the inquisitorial system will be both a more accurate and less expensive means of dispute resolution than the adversary system. In the inquisitorial system, the overwhelming majority of work is performed by the judge, rather than the parties. Tullock argues that this will have a salutary effect on both accuracy and administrative costs. The overwhelming number of resources in the inquisitorial system are directed toward pursuing the truth of the matter, rather than its concealment. Unlike the litigants in the adversary system, the judge has no reason to pursue facts or theories that are misleading or conceal the truth, or to try to divert the fact-finder's attention toward irrelevant or misleading facts. As a result, Tullock argues that as an a priori matter the judge in an inquisitorial system will almost certainly converge on the truth more easily, predictably, and at lower cost than the fact-finder under the adversary system.[8]

The judge-centered inquisitorial system has an incentive to prevent the excessive spending and rent-dissipation associated with the adversary system. Under the adversary system, the parties have the incentive and opportunity to externalize many of their costs on each other, as well as on the public at large. In the inquisitorial system, by contrast, the judge internalizes those costs, and thus has an incentive to incur additional administrative costs only so long as the value of increased expenditures increase the expected accuracy of the final result.[9] Overall, Tullock concludes that the social costs under an inquisitorial system are likely to be both much lower and more likely to be set at a socially-efficient level than under the adversary system.

[7] See also Parisi (2002) (criticizing analogy between market competition and common law).

[8] Tullock also argues that accuracy is likely to be higher in inquisitorial systems because of the absence of rules of evidence that exclude potentially relevant and probative facts from the fact-finder in Anglo-Saxon countries. The justification for excluding evidence thought to be irrelevant, misleading, or unfairly prejudicial is justified as necessary to prevent jurors from being confused or distracted. Tullock notes, for instance, that hearsay evidence is generally excluded in the Anglo-Saxon countries, but is admissible (although discounted in importance) in the inquisitorial system. Although these rules are designed primarily to constrain juries from misusing the evidence, Tullock observes that for some reason they are also applied when the judge sits as a finder of fact. Thus, to the extent that these restrictions unduly interfere with fact-finding under the adversary system they seem counterproductive.

[9] For instance, the judge has an incentive to call only those witnesses who are relevant to the case and to keep them and question them only so long as necessary to improve the accuracy of the judge's decision.

Given the obvious superiority (to him) of the inquisitorial system, Tullock professes puzzlement that the adversary system has persevered in the Anglo-American world: "The line of reasoning is so simple that I always find it difficult to understand why the Anglo-Saxon court system has persisted" (Tullock 2005c, p. 300). He offers two explanations for the persistence of the adversary system. First, is the "inertia of established custom" and path dependency. The adversary system, Tullock argues, is a blind residuum of the ancient trial by battle, with the parties' lawyers filling the roles previously performed by champions in battle.[10] Second, is the "immensely powerful interest group favoring the preservation of the present situation in Anglo-Saxon courts," namely lawyers. Tullock observes that the number of lawyers per capita in Anglo-Saxon countries is much higher than in countries that rely on the inquisitorial systems. A change from the adversary to the inquisitorial system would reduce the demand for lawyers, thereby reducing lawyers' incomes as well. Moreover, given the substantial investments in industry-specific capital by lawyers, this reduction in the demand for lawyers and this dramatic reduction in their roles would eliminate much of the value of their accumulated human capital. As a result, lawyers would be likely to oppose any reform that would result in such dire financial consequences. By contrast, any public benefit from legal reform would be dispersed widely among consumers. Thus, for standard Olsonian reasons, it is doubtful that any reform is likely to come about. Tullock concludes that the perpetuation of the adversary system is explained by these two factors—path-dependency and interest group pressures—not its efficacy.

3.4 Adversary v. inquisitorial systems compared: A second look

Is it true that the Tullock has demonstrated that it can be established as a matter of a priori reasoning that the adversary system is both inferior and more expensive that the inquisitorial system? And that the persistence of the adversary system reflects nothing more than path-dependency and interest group pressures by lawyers?

It certainly seems evident that litigation expenditures are higher in adversary systems. It is also evident that there are more lawyers in economies with adversary-based legal systems, and probably a greater number of lawsuits as well, suggesting that higher levels of social costs are allocated to dispute resolution in those countries. Thus, there seems to be little doubt that the overall administrative costs of dispute resolution are higher in those countries with the adversary system. On this count, at least, Tullock's reasoning seems sound.

If the administrative costs of the adversary system are higher than the inquisitorial system, then the only economic defense for the persistence of the adversary system is whether its use results in lower error costs (i.e., greater accuracy) relative to the inquisitorial system. Tullock argues that cannot be the case, and even if the adversary system produces greater accuracy for some reason, the difference is unlikely to be so large as to justify the much-higher administrative costs. But is this so?

The fundamental assumption of Tullock's conclusion is his assumption that litigation can be best understood as a zero sum rent-seeking enterprise with one side seeking to reveal "the truth" and the other to obscure it. Thus, centralizing investigation in the hands of a judge will minimize the social waste and dissipation associated with competition between the lawyers for both sides. At best, therefore, there is no improvement in accuracy as a result of these competing investments. Indeed, he goes so far as to argue that beyond some point

[10] The trial by battle, of course, is a classic rent-seeking interaction, as there is no social surplus generated by resolving disputes in that manner, and each parties' efforts are designed simply to gain a comparative advantage by injuring the other party.

greater investments in lawyers will be likely to lead to *less* accuracy. The argument for the superiority of the adversary system, however, rests on the idea that "the truth" is not merely out there to be recognized, but must be discovered.

First, experimental evidence indicates that the adversary system may be superior to the inquisitorial system in mitigating any decisionmaker biases[11] (Thibaut et al. 1972; Block et al. 2000). Thus, where a decisionmaker is based, the adversary system may improve accuracy of outcomes.

Second, private parties in an adversary system will have a greater incentive to investigate and produce information in a case then would a judge in an inquisitorial system.[12] In the inquisitorial system, judges essentially have a monopoly on evidence production. Judges in an inquisitorial system internalize the administrative costs of searching for greater accuracy, but can externalize error costs on parties and society unless the judge suffers some independent private cost from inaccuracy, such as reversal and some sanction derived therefrom.[13] Moreover, an inquisitorial judge's budget for evidence gathering is set exogenously and somewhat arbitrarily by the taxpayers, in terms of money, time, and support staff available for investigation. This divergence between private and social costs may lead judges in an inquisitorial system to exert suboptimal levels of effort.

The adversary method of litigation, by contrast, is essentially a competitive model of evidence production. The budget for evidence gathering is endogenous to the case and is established by the parties. Thus, if both parties are wealthy, ample resources will be available for evidence gathering and production of arguments on each side of the case. But if one or both sides lack resources, then it seems probable that the adversary system will produce results inferior to the inquisitorial system. In the adversary system, lawyers for the parties have strong incentives to pursue and uncover all evidence relevant to their respective cases. Over the long run, trial lawyers' compensation is based largely on the basis of their success at trial, thus they have strong incentives to develop evidence favorable to their client and to find flaws in their opponent's case. The lawyers thus internalize the costs of their errors (and triumphs) through the impact on their market reputations.

Contrary to Tullock's assumption, therefore, the relative accuracy of the two systems cannot be resolved as an a priori matter. Instead, their relative accuracy depends critically on the type of information in question, e.g., how difficult it is to uncover, the degree of asymmetry between the parties in the amount of relevant information that they hold, and the degree to which one party has some sense of the information possessed by the other party (Block et al. 2000; Block and Parker 2004). Experimental research suggests that lawyers in an adversarial system may work harder and will produce more information than judges in an inquisitorial system. Inquisitorial judges will tend to stop searching for evidence once they believe that they have all of the information that they need to decide the case. The adversary system is particularly effective at uncovering difficult to discover or private information, relative to the inquisitorial system (see Lind et al. 1973). Except in the situation of difficult to

[11] Moreover, although Tullock ridicules juries for being amateurs at fact-finding in litigation, their inexperience may also allow them to bring a "fresh" and relatively unbiased perspective to a case. On the other hand, jurors may also bring their own distorting biases to the case. For instance, there is widespread concern that jurors may exhibit a hostility to "deep pocket" corporations or to out-of-state parties relative to local parties.

[12] The standard law and economics model comparing the two systems is described in Posner (2003, §22.2, pp. 613–615).

[13] The personal cost of reversal, however, appear to be small and do not seem to interfere with a particular judge's likelihood of promotion. See Higgins and Rubin (1980). Of course, internal motivations of wanting to properly do justice or avoiding the possible embarrassment of being reversed matter as well.

discover facts, however, there seems to be no systematic tendency for the adversary system to produce "more" information than the inquisitorial system. As a corollary, given a weak or lopsided case, lawyers in an adversary system are likely to work harder than judges in an inquisitorial system.

These findings, however, are not necessarily incompatible with Tullock's argument. Uncovering "more facts" may be irrelevant if those facts would not change the results in the case—i.e., if the key facts would be discovered under either scheme, and the new facts would simply be inframarginal, of if those facts simply confirm earlier-discovered evidence (Froeb and Kobayashi 2001). If the additional facts do not change the outcome, then the marginal cost of increased administrative costs expended on the investigation will exceed the marginal benefit returned. In most cases, moreover, the most important evidence or most important legal arguments probably will emerge early on in the investigation, regardless of whether a judge or lawyer is conducting the investigation; thus it is likely that subsequent investments will tend to result in diminishing marginal returns to search. Moreover, in any given case it cannot be known for certain ex ante whether further investigation will return a net benefit. Thus, any analysis of social welfare should be at the level of creating a rule for determining when further investigation is permissible. As a result, it is not obvious that the collection of "more" information will necessarily result in the collection of the "optimal" amount of information. Similarly, if lawyers with a "weak" case expended greater resources or work harder, then this too may be social waste if the case was weak because of its lack of merits and if the evidence simply makes the case less weak but still nonetheless a clear loser.[14]

Contrary to Tullock's assumption, the increased administrative costs of the adversary system are not necessarily purely rent-seeking expenditures, but may contribute to increased accuracy in some cases by discovering useful evidence that would not be produced in an inquisitorial system and which may be relevant at the margin to the accurate resolution of the case. On the other hand, Tullock is surely correct that many of the increased costs of the adversary system are little more than rent-seeking costs imposed by one party on the other to try to obstruct discovery of evidence or to distract or mislead the fact-finder.

But given that administrative costs probably are higher under the adversary system, the burden of proof should rest on proponents of the adversary system to prove that those increased administrative costs are justified by reduced error costs.

4 Common law versus civil law

Tullock also critiques the common law as a system of legal rule-making when compared to the civil law. At its most simplistic, the common law is a system of judge-made law where legal principles are articulated as a by-product of deciding concrete factual disputes between private litigants. Abstract legal principles thus emerge inductively out of the process of judges deciding many cases that pose similar repeated legal questions (e.g., "Was the driver negligent?") under different fact situations. Common law also is fundamentally retrospective in nature, as the legal principle is articulated and applied to the interaction that

[14] This tendency toward excessive expenditures may be ameliorated by certain rules of the adversary system that seek to minimize rent-seeking behavior. For example, private litigants in the adversary system may be prone to overinvestment in collecting personally embarrassing information on their adversary solely to improperly prejudice the fact-finder rather than to increase accuracy in the case. And even if this information might make a small contribution to increased accuracy at the margin, the administrative costs of acquiring this information will likely exceed the tiny reduction in error costs brought about by its acquisition (Posner 2003, §22.6–22.7, pp. 624–626; Parker and Kobayashi 2000).

has already occurred and which the judge must now resolve. Civil law, by contrast, is law enacted by a legislature. It is generally prospective and abstract in nature, in that it attempts to anticipate and resolve general categories of cases before they arise. Systems of procedure and rule-making pose distinct questions and could be disentangled as a conceptual matter, but in practice and historical development the adversary system is generally associated with common law rule-making whereas the inquisitorial system is generally linked to civil law rule-making.

Tullock prefers civil law to common law—at least as the common law system exists today—for similar reasons to his preference for the inquisitorial system over the adversary system. Again his analysis is comparative rather than absolute—his preference for the civil law arises not from his enthusiasm for legislative rule-making but rather because of his distinct lack of enthusiasm for the common law. Given Tullock's seminal contribution of the concept of legislative rent-seeking, it may at first seem anomalous that he would prefer legislative rule-making over the common law. On closer inspection, however, Tullock's preference for the civil law rests on the same logic that underpins his preference for the inquisitorial versus adversary system. Tullock's critique of the common law is not as thoroughly developed as his critique of the adversary system; nonetheless, the logic of his argument is manifest.

4.1 Tullock's critique of the common law

Tullock's critique of the common law as a rule-making system is most systematically laid out in his monograph *The Case Against the Common Law* (Tullock 2005b). Tullock argues that although the common law was once a superior form of law making, that advantage has been eroded over time due to special interest pressures on the common law legal system. Tullock begins his discussion of the common law by introducing the "ideal of the common law," as it came to flourishing during the eighteenth century. He identifies several fundamental structural characteristics of the common law of this period, such as the rule of law, judicial adherence to precedent, and the writ system, that provided the foundation for the efficiency of the common law. Tullock also adopts the conventional view in agreeing that during the classical period of the common law, the law tended toward the generation of economically efficient rules, which he attributes to three factors: the utilitarian ideological worldview of nineteenth century judges, the absence of effective tools for judges to engage in widespread wealth redistribution, and the evolutionary model of common law first described by Rubin and Priest (Rubin 1977; Priest 1977).

Tullock argues that during the twentieth century, however, both the structural characteristics and the tendency of the common law to promote economically efficient rules broke down, a widely-shared opinion.[15] As a corollary to Tullock's characterization of the adversary process as rent-seeking, Tullock views the production of the common law as a rent-seeking process as well (Tullock 2005b, pp. 411–412). "The U.S. common law system is appropriately analyzed," he writes, "as part of the more general political marketplace, from the perspective of the interest group approach to politics." In the interest group approach, politicians are modeled as "providing a brokering function in the political market for wealth transfers" of matching demand for wealth transfers with supply. Following Mancur Olson, Tullock contends that relatively small, homogeneous special interest groups will be more effective at demanding wealth transfers and larger, more heterogeneous groups will be the suppliers of the wealth to be transferred (Olson 1971).

[15] This feature of Tullock's argument is discussed in greater detail in Zywicki (2007b).

4.2 Why Tullock prefers Napoleon

Faced with these trends, Tullock contends, "So diseased has the U.S. common law system become that even root-and-branch internal reform no longer is feasible. If individual autonomy and the rule of law are to be re-established, Wellington must now cede victory to Napoleon, and the common law must give way to the civil code" (Tullock 2005b, p. 448). A close reading of Tullock's reasoning, however, reveals that although he has forcefully indicted the common law he has not demonstrated the superiority of the civil law. In fact, it appears that he has conflated two distinctive concepts: the question of the superiority of the adversary system versus the inquisitorial system as a system of dispute resolution on one hand and the distinct question of the relative superiority of the civil law versus common law rule-making processes on the other. Although Tullock describes the task of *The Case Against the Common Law* as comparing the civil law versus the common law his primary concern there actually is with a comparison of the adversary system versus the inquisitorial system.

Tullock's criticisms of the evolution of the common law in recent decades seem sound and are consistent with the analysis of many other commentators. Yet, his foundational concept of rent-seeking was originated in his analysis of the legislative process, and his criticisms of the legislative process remain much more forceful than his critique of the common law (Tullock 1967). Although judge-made law has become increasingly prone to rent-seeking pressures, judges still seem less able than legislators in redistributing resources to well-organized special interests and imposing inefficient rules on society. The social cost of laws such as minimum wage, rent control, protective tariffs, earmarks, occupational licensing, farm subsidies, and similar laws and regulations, dwarf in the aggregate the wealth redistribution brought about by courts, and the flexibility and power of legislatures to redistribute wealth through taxation and mandatory legal is much more vast than for courts.

Perhaps a more plausible model is that neither courts nor legislatures are completely immune to rent-seeking pressures, but rather that they are susceptible to *different* rent-seeking pressures (Pritchard and Zywicki 1999). Legislatures will tend to be more responsive to well-organized economic interests that can convert their demand for legislation into campaign contributions and other products that assist in reelection. Courts, by contrast, may be more responsive to interest groups that share the judges' upper-class, educated, elitist world view, such as interest groups organized around social issues and redistributionist policies.[16] Beyond a certain point of resource investment, increased monetary investments in litigation (especially appellate litigation where legal rules are established) generate rapidly decreasing marginal returns—there are only so many briefs to be written or depositions to be taken. By contrast, legislators have an essentially unlimited appetite for money, suggesting that the marginal value of investment in lobbying legislatures will fall much more slowly.

Thus, as much as Tullock bemoans the evolution of the common law in recent decades, he has not demonstrated that a categorical substitution of increased legislative rule-making

[16] Id. This was not always the case. As Robert Bork notes, the bar and the Supreme Court during the *Lochner* era were drawn from the commercial class and were much more responsive to economic concerns, personal biases that may help to account for their receptivity to the arguments of commercial interests during that period. Lawyers and judges today, by contrast, often are drawn from the academy or the government, reflecting those biases. Moreover, in the past, lawyers entered the bar primarily through an apprenticeship with a practicing lawyer solving real-life legal dilemmas. Today, however, law schools are fully a part of the academy, and law professors and lawyers are best understood as members of the intellectual class, rather than the commercial class. These factors have tended to make today's lawyers more responsive to elite, intellectual-class concerns than during the classical common law period. See Bork (1990).

in the civil law fashion in place of common law rule-making be an improvement. Instead, Tullock's actual agenda appears to be reform of the common law process, by replacing the adversary system with the inquisitorial system, for the reasons described earlier. If it is indeed lawyers who are driving the expansion of liability in an inefficient manner, Tullock suggests that the obvious response is to reduce the influence of lawyers in the legal system and to reduce the gains that they can capture from the legal system. The inquisitorial system, Tullock argues, does exactly that, by reducing the role of lawyers in the litigation process and enlarging that of judges. And although judges may have incentives to shirk, at least they do not have the distorting incentives of lawyers to expand liability as a means of increasing their own wealth, which is more detrimental to overall social welfare. Indeed, if anything, judges will have an incentive *not* to expand liability in order to prevent an expansion of their caseload, which would require them to work harder.

There is an internal inconsistency in Tullock's argument, however. Adopting the inquisitorial system would reduce the influence of lawyers and might thereby reduce their incentives and ability to lobby for liability-expanding rules. But at the same time, by increasing the power of judges, this seemingly would increase their discretion to impose their ideological worldviews on society and the economy. If it is true that the problems of the common law system have arisen because of the *combination* of rent-seeking lawyers and "socialist"-minded judges, as Tullock (2005b) argues, merely transferring some power from former to the latter would be unlikely to fundamentally alter the underlying trends. Moreover, increasing the power of judges would also tend to simply push back the political battles one step, placing greater importance on the political and ideological battles involving judicial appointments (Zywicki 2000). This would not necessarily reduce the influence of lawyers, but simply change the location where they exert this influence.

4.3 Precedent

Tullock also observes a change in the nature of judicial precedent over time, but on this point it is difficult to understand what he is saying. Tullock endorses the views of Italian Roman law scholar Bruno Leoni, who noted that under the Roman law, a judgment did not become a "true precedent" until it had been reached independently in separate cases by several judges, in large part because the absence of a "supreme court" meant that decisions had to be independently ratified by several courts based on their reason and persuasive authority, rather than being imposed by authority[17] (Tullock 2005b, p. 444). Tullock observes that during the formative period of the English common law (until 1800), a similar view of precedent prevailed, as the "English common law itself had evolved out of a competing court system and was composed of judgments that had survived repeated scrutiny. Appeals to the House of Lords, though theoretically possible, were rare events. This implied that the common law evolved only very slowly and that changes had to survive a sequence of independent judgments before becoming established as precedent and subject to *stare decisis*." (Tullock 2005b, pp. 444–445).

In contrast to this more flexible view of precedent as based on ratification of the reasoning of opinions, elsewhere Tullock seems to urge a stricter form of *stare decisis* similar to the more modern view. Tullock, like traditional law and economics scholars, justifies *stare decisis* as being economically efficient because it increases the stability of legal rules,

[17] Leoni (1991) was an important early contributor to the analysis of the implications of public choice theory for law. See his lectures on "Law and Politics" appended to the Third Revised edition of *Freedom and the Law*.

thus making it easier for private parties to plan their transactions (Tullock 2005b, pp. 402). Greater predictability will also tend to reduce the amount of litigation by reducing the zone of uncertainty of legal obligations that will need to be resolved by a judge. Moreover, precedent will tend to reduce the administrative costs of courts in deciding cases as judges needn't reconsider legal rules once settled. This implies a stricter form of precedent than the classical view.

Tullock does not resolve this question of the optimal strength of precedent in his work, but it may be possible to resolve the question using Tullockian principles (Zywicki 2003, pp. 1565–1581). The standard law and economics justification for *stare decisis* focuses on the efficiency-enhancing value of strong precedent (i.e., *stare decisis*) in creating stability and preserving expectations. But this analysis is incomplete, because it ignores the incentives that strong precedent creates for private parties to invest in rent-seeking litigation.

We can model the common law process of rule-generation through litigation in the same manner in which we model the legislative process of rule-generation. In both rule-making institutions, the value of the stream of rents transferred to an interest group will be a function of two variables: the value of the rent to be transferred in each period times the number of periods over which the wealth transfers are expected to occur (the expected duration of the law). Thus, the present value of the wealth transfer to an interest group can be increased either by increasing the sum to be transferred in each period or by increasing the expected duration of the law and thus the expected number of periods over which the wealth transfers will occur. Moreover, the same Olsonian dynamics that drive the rent-seeking process with respect to legislation are likely to apply to litigation as well, as discrete, well-organized interest groups are likely to be able to organize better to try to manipulate the path of precedent better than more dispersed heterogeneous groups (Olson 1971).

Thus, although strict adherence to *stare decisis* will increase the stability of efficient precedents, it also will increase the stability of *inefficient* precedents that are the product of rent-seeking activity. Moreover, although stronger adherence to precedent will increase the costs to interest groups in capturing favorable precedents, it also will increase the value of the "prize" once captured, by increasing the expected lifespan of a precedent once created. To the extent that the dynamics of rule-creation through litigation approximate that of the legislative process by tending to favor well-organized discrete groups there will be stronger incentives on the judiciary to produce and maintain inefficient precedents that benefit small groups, rather than efficient precedents that benefit society generally. Thus, interest groups that "lobby" for rule-making through the common law process may prefer a regime where rule acquisition is more costly ex ante if it increases the stability of the rule (and hence the rents to be transferred over the lifespan of the rule) ex post, especially if those interest groups have a comparative advantage in lobbying for this rule-creation and preservation relative to other interest groups. Because there are social benefits and costs to both strict and more relaxed precedential regimes, again it is not possible to establish the single efficient rule as an a priori matter.

Thus, although strict *stare decisis* may seem efficient when examined in isolation, it may not be once the incentives it creates for rent-seeking are considered. Instead, the efficient rule may be a weaker form of precedent, perhaps one in which a legal rule becomes established as precedent only gradually and only after repeated agreement and approval by several independent judges considering the issue, as during the formative age of the common law. By reducing the ability to redistribute wealth through litigation, this may reduce the incentives to try to alter the path of legal precedent ex ante.

4.4 Macroeconomic effects of common law and civil law

Tullock's preference for civil law over common law is also susceptible to empirical evaluation. If Tullock is correct that the civil law is a better and more efficient system of rule generation than the common law, then countries that have adopted the civil law system should be wealthier than those that have adopted the common law system. Based on this criterion, Tullock's expressed preference for Napoleon is difficult to justify. Empirical studies have generally concluded that countries with common law legal systems are wealthier than those predicated on civil law systems (Mahoney 2001). The underlying causal explanation for this observed relationship remains open. Several possible mechanisms have been postulated. First, a "political" theory that points to a general preference for private ordering in the common law versus the civil law. Second, an "adaptability" theory that points to the flexibility of the common law system to respond to societal and economic changes more rapidly and sensibly than the civil law (Beck et al. 2002). A third theory argues that the rights of financial investors tend to be stronger in common law countries, leading to greater levels of investment and economic growth (Levine 1998, Laporta et al. 1997, 1998). Others have explained the relationship by pointing to differences in norms and social trust among countries, which may hold some correlation with the development of the common law system (Coffee 2001). Notwithstanding continuing efforts to isolate the mechanisms that explain the relative efficiency of the common law relative to the civil law, the overall consensus appears to clearly favor the macroeconomic efficiency of the common law system, in contrast to Tullock's preference for the civil law.

Tullock's response may be that the common law system of the *past* was indeed more efficient than the civil law, but the common law of the *present* is converging inevitably toward the civil law and adopting the civil law's tendencies toward rigidity, interest group pressures, and redistributive ideology, and that common law societies whose legal systems have degenerated to this point would do better to simply adopt the civil law system. This response, however, is necessarily somewhat speculative and less persuasive in the face of contrary empirical evidence that indicates that the common law is superior on this score. Tullock's preference for the civil law relative to the common law is difficult to understand. Thus, even if the common law's superiority over the civil law is not as overwhelming as it once was, even the degenerate modern common law system seems preferable to the civil law as a system of rule-making.

5 Conclusion

For purposes of analysis, this article has treated the common law and civil law systems as stylized "pure" forms in order to examine Gordon Tullock's critique of the common law. Subsequent research has confirmed some of his theories, others have questioned his conclusions, and still others remain open to further investigation. In particular, his preference for the inquisitorial over the adversary system seems to rest on stronger theoretical and empirical ground than his preference for civil law over common law as contrasting systems for producing legal rules.

There remains one larger question that this article has not attempted to address—what if the systems themselves are spontaneous orders subject to their own internal evolutionary processes, such that they will tend to improvement over time? In particular, Francesco Parisi (2002) notes that over time the "pure" distinction between the common law and civil law systems has eroded, as each system has come to borrow attributes from the other. Through its

system of evidentiary rules, for instance, the common law has some element of inquisitorial-style centralized control by the judge over the evidence that is introduced into the trial, and the judge has the power to decide cases on summary judgment and other devices that prohibit the parties from putting their cases before the finder of fact. In turn, Parisi reports that in civil law systems judges have come to permit the litigants greater control over many procedural choices. Similarly, civil law judges have always provided some deference to precedent, rather than a fully statutory scheme.

Thus it may be that each system itself is a spontaneous order at the system level with an internal dynamic process that permits evolution to adapt to changing circumstances and borrowing from other systems.[18] Thus, in providing a full analysis of the common law and civil law from a spontaneous order perspective, future research may fruitfully examine this mechanism for evolution at the system level as well.

Acknowledgements I would like to thank the George Mason Law School Law & Economics Center for financial support. This article was written initially for a conference honoring Gordon Tullock hosted by the Atlas Research Foundation's Program for the Study of Spontaneous Orders. Thank you Lloyd Cohen, Francesco Parisi, and Vosh Wright for comments on an earlier draft of this article and to Ed O'Shea for research assistance.

References

Barry, N. (1982). The tradition of spontaneous order. *Literature of Liberty*, *5*, 7–58. Retrieved August 13, 2007, from http://www.econlib.org/library/Essays/LtrLbrty/bryTSO.html.

Beck, T., Demirguc-Kunt, A., & Levine, R. (2002). *Law and finance: Why does legal origin matter*? World Bank Policy Research Working Paper, 2904.

Block, M. K., Parker, J. S., Vyborna, O., & Dusek, L. (2000). An experimental comparison of adversarial versus inquisitorial procedural regimes. *American Law and Economics Review*, *2*, 170–194.

Block, M. K., & Parker, J. S. (2004). Decision making in the absence of successful fact finding: Theory and experimental evidence on adversarial versus inquisitorial systems of adjudication. *International Review of Law & Economics*, *24*, 89–105.

Bork, R. A. (1990). *The tempting of America: The political seduction of the law*. New York: Free Press.

Buchanan, J. M. (1980). Rent seeking and profit seeking. In J. M. Buchanan, R. D. Tollison, & G. Tullock (Eds.), *Toward a theory of the rent-seeking society* (pp. 3–15). College Station: Texas A&M Press.

Coffee, J. C. (2001). Do norms matter? A cross-country evaluation. *University of Pennsylvania Law Review*, *149*, 2151–2177.

Froeb, L., & Kobayashi, B. H. (2001). Evidence production in adversarial v. inquisitorial regimes. *Economics Letters*, *70*, 267–272.

Hayek, F. A. (1972). *Law, legislation, and liberty: Vol. 1. Rules & Order*. Chicago: University of Chicago Press.

Higgins, R. S., & Rubin, P. S. (1980). Judicial discretion. *Journal of Legal Studies*, *9*, 129–138.

Laporta, R., Lopez-de-Salines, F., Shleifer, A., & Vishny, R. W. (1997). Legal determinants of external finance. *Journal of Finance*, *52*, 1131–1150.

Laporta, R., Lopez-de-Salines, F., Shleifer, A., & Vishny, R. W. (1998). Law and finance. *Journal of Political Economy*, *106*, 1113–1155.

Leoni, B. (1991). *Freedom and the law* (3rd edn.). Indianapolis: Liberty Fund.

Levine, R. (1998). The legal environment, banks, and long-run economic growth. *Journal of Money, Credit, and Banking*, *30*, 596–613.

Lind, E. A., Thibaut, J., & Walker, L. (1973). Discovery and presentation of evidence in adversary and non-adversary proceedings. *Michigan Law Review*, *71*, 1129–1144.

Mahoney, P. (2001). The common law and economic growth: Hayek might be right. *Journal of Legal Studies*, *30*, 503–525.

[18] Notably, in the era of competing courts in medieval Europe, borrowing innovative procedural and substantive rules from other courts was quite common. See Zywicki (2003).

Olson, M. (1971). *The logic of collective action: Public goods and the theory of groups*. Cambridge: Harvard University Press.
Parisi, F. (2002). Rent-seeking through litigation: Adversarial and inquisitorial systems compared. *International Review of Law & Economics*, *22*, 193–216.
Parker, J. S., & Kobayashi, B. H. (2000). Evidence. In B. Bouckaert & G. DeGeest (Eds.), *The encyclopedia of law and economics* (Vol. 5, pp. 290–306). Cheltenham: Edward Elgar.
Polanyi, M. (1997). Two kinds of order. In D. Boaz (Ed.), *The libertarian reader* (pp. 225–232). New York: Free Press.
Posner, R. A. (1973). An economic approach to legal procedure and judicial administration. *Journal of Legal Studies*, *2*, 399–458.
Posner, R. A. (2003). *The economic analysis of law* (6th edn.). New York: Aspen.
Priest, G. L. (1977). The common law process and the selection of efficient rules. *Journal of Legal Studies*, *6*, 65–82.
Pritchard, A. C., & Zywicki, T. J. (1999). Finding the constitution: An economic analysis of tradition's role in constitutional interpretation. *North Carolina Law Review*, *77*, 409–522.
Rubin, P. H. (1977). Why is the common law efficient? *Journal of Legal Studies*, *6*, 51–63.
Thibaut, J., Walker, L., & Lind, E. A. (1972). Adversary presentation and bias in legal decisionmaking. *Harvard Law Review*, *86*, 386–402.
Tullock, G. (1967). The welfare costs of tariffs, monopolies, and theft. *Western Economic Journal*, *5*, 224–232.
Tullock, G. (2004). On the efficient organization of trials. In C. K. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 1, pp. 465–483). Indianapolis: Liberty Fund.
Tullock, G. (2005a). Optimal procedure. In C. K. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 9, pp. 274–290). Indianapolis: Liberty Fund.
Tullock, G. (2005b). The case against the common law. In C. K. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 9, pp. 399–455). Indianapolis: Liberty Fund.
Tullock, G. (2005c) Technology: the anglo-saxons versus the rest of the world. In C. K. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 9, pp. 291–308). Indianapolis: Liberty Fund.
Tullock, G. (2005d). Rent-seeking and the law. In C. K. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 5, pp. 184–195). Indianapolis: Liberty Fund.
Volokh, A. (1997). n guilty men. *University of Pennsylvania Law Review*, *146*, 173–216.
Zywicki, T. J. (2000). *Public choice and tort reform*. George Mason University School of Law Working Paper 2000-36. Retrieved August 13, 2007, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244658.
Zywicki, T. J. (2003). The rise and fall of efficiency in the common law: a supply-side analysis. *Northwestern Law Review*, *97*, 1551–1634.
Zywicki, T. J. (2006) *Toward a theory of contract governance*. George Mason University School of Law Working Paper, August 2006.
Zywicki, T. J. (2007a). Institutional review boards as academic bureaucracies: an economic and experiential analysis. *Northwestern University Law Review*, *101*, 861–896.
Zywicki, T. J. (2007b, forthcoming). Gordon Tullock's critique of the common law. *Supreme Court Economic Review*. Retrieved August 13, 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964781.
Zywicki, T. J., & Sanders, A. B. (2008, forthcoming). Hayek, Posner, and the economic analysis of law. *Iowa L. Rev.* Retrieved August 13, 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=957177.