Boston College Law Review

Volume 40
Issue 4 *Number 4*

Article 3

7-1-1999

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A NOTE ON TREND-SPOTTING IN THE CASE LAW

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Professor Robert Hillman tells us that he "will not try to resolve . . . whether we should be enthusiastic or lament the recent judicial trend to apply rules that favor written contracts."[1] This is a refreshingly non-dogmatic approach in a field where scholars are continually asserting reasons to celebrate or lament some new judicial trend. Moreover, Professor Hillman, again admirably in my view, is not even sure such a trend exists. If there is a trend in favor of written contracts, however, he believes that it has resulted because (1) "judicial decisions applying private law reflect changes in public opinion,"[2] and (2) public opinion has grown "more distrustful of big government, more wary of nondemocratic institutions such as the judiciary, and more respectful of market exchange."[3]

I like this style of argument. Professor Hillman has framed the more controversial part of his thesis in a careful, conditional manner, and stops along the way at several points to identify the empirical issues. The argument's level of generality gives me little reason to fear that Professor Hillman is trying to enlist me in a private, quixotic effort to change the law to suit his normative vision. In short, I was initially receptive to Professor Hillman's argument because it respects my autonomy, giving me room to go my own way on the normative issues—such as whether one should celebrate or lament the trend in favor of written contracts.

Still, I disagree with Professor Hillman's thesis, even at this level of generality. I think it buys too heavily into an unproven and probably mistaken conception of legal change that is orthodox in the legal academy and common in public opinion. We should admit that the orthodox view of legal change is unsupported by evidence, and recognize that it probably has a harmful effect on legal scholarship and the legal profession generally.

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[1] Robert A. Hillman, *The New Conservatism in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. qqq, qqq (1999).

[2] *Id.* at qqq.

[3] *Id.* at qqq.

I. The Orthodox View of Legal Change

The orthodox view, as I see it, is made up of two parts. The first is an assumption that legal change occurs through the conscious effort or action of judges. It is important, according to this view, to know judges' predispositions, to get inside their heads, in order to predict the direction of legal change. A strong version of this theory holds that judges act as representatives of their economic class, so that judges who are members of the economic elite will tend to hand down decisions that favor the elite; for example, they will decide cases in a way that favors the owners of capital over laborers. Perhaps the best-known illustration of this theory is the claim—advanced by Horwitz[4] and others[5]—that the negligence rule was fashioned during the nineteenth century by judges who wanted to subsidize emerging industry. A weaker version of this theory, consistent with Professor Hillman's argument, holds that changes in public opinion play a role in deciding cases because judges absorb public opinion. Judges, therefore, cannot avoid deciding cases in ways that reflect dominant opinions.

The second part of the orthodox view is an assumption that, in the absence of judicial action moving the law in a particular direction, the law changes or develops in a neutral fashion. Accordingly, in the absence of judicial effort, we should not observe significant trends that favor one economic or social class over another. Indeed, we really should not observe doctrinal trends of any sort. If, in difficult cases (which are the only cases that are likely to spend a lot of time in court) judges have no reason to prefer one set of rules (e.g., rules favoring a written contract) over another, we should not expect to see outcomes that favor a particular set of rules. According to this view, the negligence rule never would have materialized if nineteenth century judges had been uninterested in using the law to aid owners of capital.

Lawyers are not accustomed to speaking explicitly in statistical terms. I think it helps clarify the argument, however, to introduce some statistical reasoning in this description of the orthodox position. Think of the law as an object moving along a path. The object can stay along a straight course or move over time to the right or to the left. If the object follows a "random walk," then it is equally likely to move one

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[4] Morton Horwitz, The Transformation of American Law 1780–1860, 85–99 (1977).

[5] While the subsidization thesis has become connected with Horwitz's book, the argument was suggested earlier by Charles Gregory in his article *Trespass, to Negligence, to Absolute Liability*, 37 Va. L. Rev. 359 (1951). For the most impressive historical refutation of the subsidization thesis, see Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717 (1981).

step to the right as it is to move one step to the left.[6] Over time, the average or expected position of an object moving according to a random walk remains the same. Because it is equally likely to move to either side, we should expect a sample of one hundred steps to include fifty steps to the right and fifty steps to the left, leaving the object at its initial position. The random walk is often illustrated with the description of a drunk walking through a park.

The orthodox view assumes that the law follows a neutral, random-walk evolutionary path so long as judges do not actively attempt to move the law in a particular direction. Accordingly, a trend under this view will emerge randomly, if at all, and eventually will be overcome by a trend in the opposite direction. Although this view does not rule out the possibility of a substantial trend in the case law in a particular direction, it does indicate that substantial trends will be observed quite infrequently—as infrequently, for example, as we would expect to observe twenty heads in a row in a game of tossing coins.

II. ALTERNATIVE EVOLUTIONARY MODEL

In contrast to this orthodox view, I want to offer an alternative, evolutionary model that relies entirely on the trial selection process to explain trends in the case law. Neutral, random-walk evolution is captured adequately by the trial-selection model of Priest and Klein.[7] According to Priest and Klein, the disputes that are litigated all the way to judgment are those in which the law is most uncertain, where the outcome is very much like a coin toss. If the law is relatively clear, the parties are likely to settle, because the divergence between the plaintiff's and the defendant's expectations of the trial outcome will be negligible. Because trials are as uncertain as coin tosses, under the Priest-Klein model, the percentage of trials won by plaintiffs will be roughly fifty percent. As a result, we should expect to see random-walk evolution in the case law; that is, we should observe few significant trends in judicial decisions.

Note that I have said nothing about the predispositions of judges. If such predispositions are observable, the neutral evolution implied by Priest and Klein should be observed nonetheless. Why? If everyone

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[6] For an explanation of the random-walk process, see 1 RICHARD P. FEYNMAN ET AL., THE FEYNMAN LECTURES ON PHYSICS 6–7 (1963).

[7] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6–12 (1984). For further discussion of the connection between the Priest-Klein model and "random-walk" case law evolution, see Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI-KENT L. REV. 427, 436–40 (1995) (symposium on fee shifting).

knows that judges are favoring a certain type of litigant—say they want to subsidize a particular industry—the cases that are likely to be decided in accordance with this well-known bias will settle early. Only those cases in which the judicial predisposition is unclear will be litigated all the way to judgment and possibly appealed. Judicial attitudes or predispositions are, therefore, irrelevant under this view.

I want to rely on this model and build on it. It happens to be inadequate in my view, because there are many areas of litigation in which plaintiff win rates fall substantially below the fifty percent level predicted by Priest and Klein. In view of this shortcoming, I want to modify the Priest-Klein model.

Several years ago, I offered a modification that, in my opinion, sufficiently explains the patterns of non-neutral evolution actually observed.[8] Under the "asymmetric information" model, the litigant who has less information about the legal standard is likely to lose more frequently in court. Thus, if the plaintiff tends to have less information about the relevant legal standard than does the defendant, the average plaintiff win rate will be less than fifty percent. For example, if the typical malpractice plaintiff has less information about the relevant legal standard than does the defendant—which is plausible since application of the negligent care standard requires facts that are exclusively in the hands of the defendant physician—then plaintiff win rates should fall well below fifty percent in malpractice litigation. Empirical data confirm this prediction.[9]

This is a good point to set out clearly the alternative to the orthodox model of legal change. As explained above, if litigants are equally informed as to the relevant legal standard, the law will follow a neutral, random-walk evolutionary path. This implies that we should observe significant doctrinal trends favoring one particular class of litigant over another quite infrequently. On the other hand, if litigants are unequally informed as to the relevant legal standard, the law will not follow a neutral, random-walk path. In particular, the law will follow a biased path that seemingly favors the better informed party.[10] The

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[8] *See* Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993).

[9] *See id.* at 200–03. Priest and Klein, I should note, offer an alternative explanation of non-neutral evolution. They argue that if one of the parties has much more at stake than the other, the party who has more at stake will tend to win more often. However, I have argued that the evidence is generally inconsistent with this argument. *See id.* at 203.

[10] The better informed party is one who has the most accurate prediction of the likely outcome of a trial. Greater accuracy may result from better information regarding the relevant legal standard or from better information regarding the important facts of the dispute.

law will continue to follow this biased path until rough informational equality is attained, at which point the random-walk path should be observed.

It is important to note that nothing in this alternative theory relies on the predispositions or attitudes of judges, as long as these attitudes are known by all litigants. In other words, judicial attitudes are irrelevant in the evolutionary model.

III. Some Implications

Except for exceptional cases—such as those decided by the Supreme Court—the evidence from routine litigation does not support the orthodox view. Plaintiff win rates in malpractice and products liability litigation are well below fifty percent,[11] and the appeals generated by these cases often produce case law that favors defendants. Although some authors have suggested that recent pro-defendant products liability case law reflects a new judicial attitude,[12] I find this explanation unpersuasive, particularly in the medical malpractice arena. In my view, the plaintiff win rate statistics and case law trends are too stable to reflect changes in judicial attitudes. They are also too common to reflect judicial attitudes, because it is unlikely that these attitudes are the same in all jurisdictions across the country. Finally, the notion that judges have deliberately set out to provide special protective legal rules for physicians and product manufacturers strikes me as implausible on its face. Judges, as a group, have no identifiable reason to run interference for these two particular interest groups through the case law.

In addition to its lack of supporting evidence, the orthodox position encourages a negative view of the courts and the legal profession, and probably has a harmful effect on legal scholarship. This is a bit of a paradox, because the popular view of law, as something shaped by the hands of thoughtful judges, is in part a by-product of efforts in the popular press to humanize institutions. Thus corporations are described as extensions of some aggressive chief executive officer. Given this approach, it only makes sense to treat the law as the product of aggressive judicial activism, as if judges operate without constraints. The negative implication of this view, however, is that the law is in-

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[11] *See id.* at 200–03.

[12] *See* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479 (1990).

finitely manipulable, because it is entirely dependent on the personalities and attitudes of judges.

Legal scholars, buying into this orthodox view, write articles in which they identify a certain trend in the case law, such as the development of the negligence rule in the nineteenth century, and argue that it reflects an effort by judges to subsidize a particular interest group. Scholars are discouraged from trying to understand the complex process that generates case law trends because the greater payoff awaits those who present simple explanations based on judicial attitudes.

I would not make these complaints against Professor Hillman, because he is too careful to fall prey to these criticisms. Still, I think the better approach is to steer clear of the orthodox position. We must take case law trends seriously, but we need a deeper understanding of them than we have now.