

Law and Economics  
Session 19  
Legal Process 2

Elliott Ash

Columbia University  
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# Outline of the Rest of the Class

- Today: Legal Process 2
- Tomorrow: Constitutional Law
- Next Week:
  - Monday: Presentations
  - Tuesday: Presentations (Assignment 5 Due)
  - Wednesday: Review
  - Thursday: Exam
- Paper due by evening of Saturday, July 5

- In 2009 federal courts, there were 260,000 civil cases filed, compared to 75,000 criminal cases.
- There's no comparable data on state courts, but we know it is much much more:
  - In just Illinois, there were 750,000 civil filings in 2008 (about one case per 17 people)
- How are cases resolved?
  - Only 2% resolved by trial (1.2% by jury, 0.6% by judge)
  - 53% dismissed
  - 19% transferred
  - 13% resolved through pre-trial motions
  - 8% resolved by default judgment
- About 16% of federal court cases are appealed, compared to less than 1% of state court cases.

# Historical Trends in Litigation

- The number of civil and criminal cases tripled between 1981 and 1992, but has fallen steadily since then
- Contracts were the most numerous type of case historically, but were replaced by torts in the mid 1990s

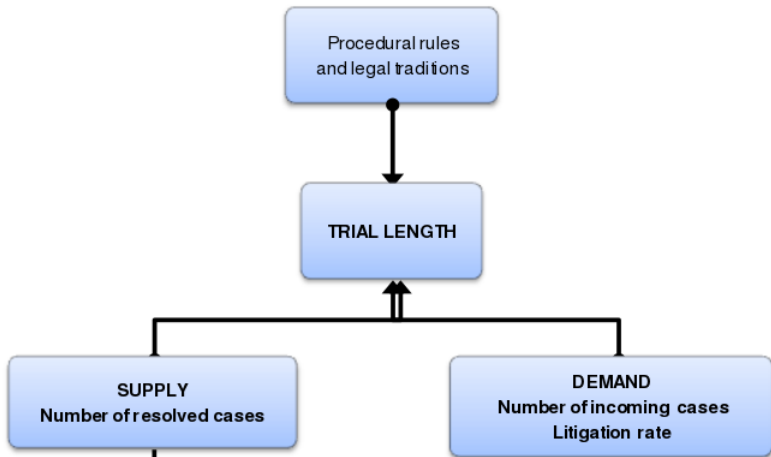
# Does the US have too many lawyers?

- The United States has 1.2 million lawyers, about 1 for every 260 people.
  - Germany: 1 for every 622 people
  - United Kingdom: 1 for every 496 people
  - Japan: 1 for every 5800 people
- Difficult to determine the optimal number of lawyers, though – the United States is a complex society with a complex legal framework.
- There actually may be too few lawyers, since state bar associations actively restrict attorney labor supply.

- Filings fees for civil actions in Chicago, Illinois:
  - \$114 for damages less than \$250
  - \$244 for damages less than \$15,000
- Discovery:
  - Takes up about one-fourth of the average litigation lawyer's time.
- Trial:
  - A typical trial lasts 9 days, while a typical settlement negotiation would last 9 hours.

- Add up the time for each person:
  - 2 lawyers times \$1000 per day = \$2000
  - 1 judge times \$1000 per day
  - 12 jurors times \$200 per day = \$2400
  - 5 other workers, times \$200 per day = \$1000
- Equals \$6400
- Times nine days = \$57600
- Compare to settlement negotiations:
  - 1 day, times 2 lawyers, equals \$2000

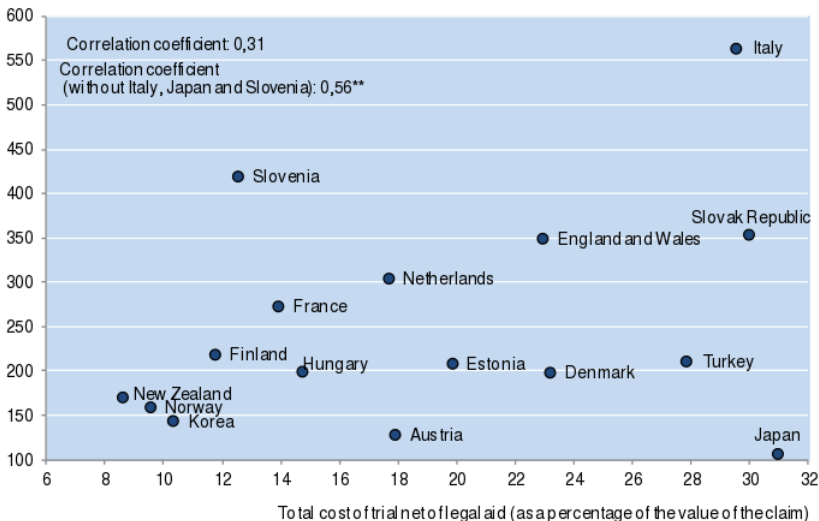
# Determinants of Trial Length





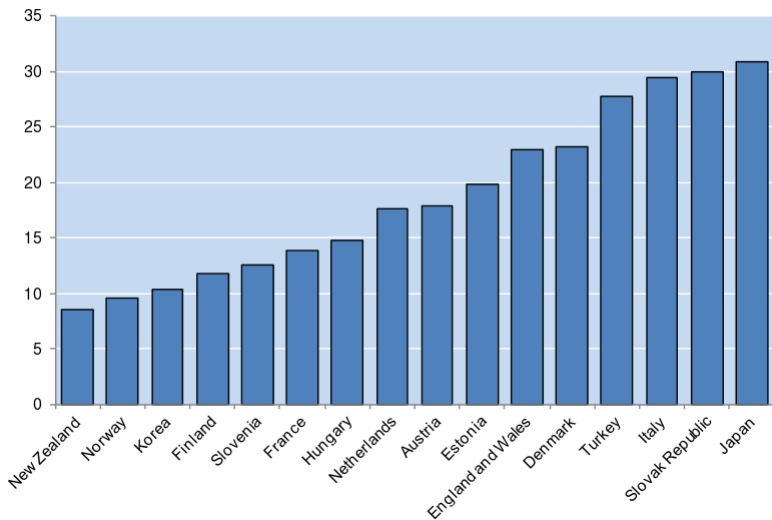
# Cross-country variation in trial length and trial costs

Trial length in days, first instance



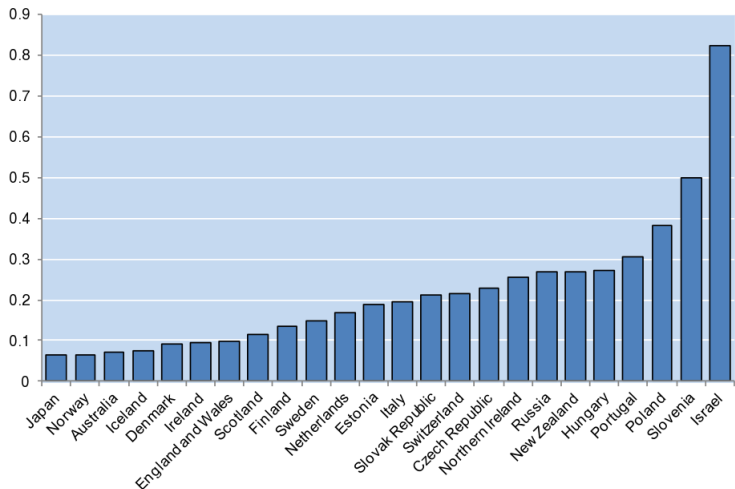
# Cross-Country Variation in Trial Costs

Trial cost net of legal aid as a percentage of the value of the claim



# Cross-Country Variation in Court System Costs

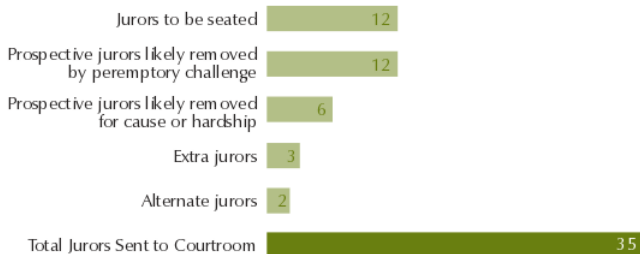
Figure 4. Budget allocated to courts as a percentage of GDP



- How much are jurors paid?
  - In New York, \$40 a day
  - In Illinois, \$17 a day
  - In California, \$15 a day
- Minimum wage is \$58 a day.

## How Many Jurors Should Be Sent to a Courtroom?

Example of a routine, nonviolent felony trial in a jurisdiction that requires a 12-person jury and provides each side with 6 peremptory challenges:



Source: Center for Jury Studies

# How much should we pay jurors?

- People with high opportunity cost of time will avoid jury duty, which will bias the sample away from the average – paying them more would result in a less biased sample.
- And paying jurors more might have an incentive effect, making them deliberate longer and reach better decisions.
- A pilot study of jury pay in Washington found that increasing the pay from \$10 a day to \$60 a day had no observable short-term effects.

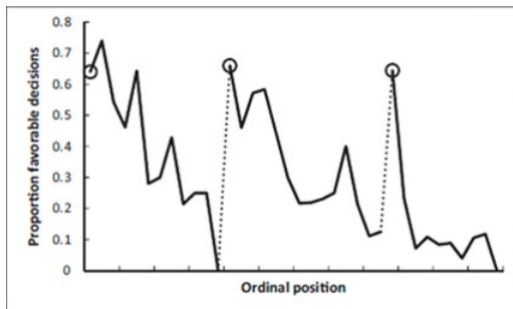
- Public defenders are court-appointed attorneys for criminal defendants who cannot afford a private attorney.
- Hoffman et al (2005) found that:
  - Public defenders achieve poorer outcomes than private-sector attorneys (in terms of criminal sentences received)
  - This is partly because they are less able, but also due to a selection effect where defendants with poor cases (and expect to lose) are more likely to choose a public defender.
- Abrams and Yoon (2007) looked at random assignment of public defenders in Las Vegas felony court. The draw mattered:
  - Drawing a veteran public defender decreased your prison sentence by 17% relative to an inexperienced one.
  - Drawing an hispanic public defender decreased your prison sentence by 26% relative to a black or white one.

- Prosecutors coordinate investigations, trials and plea bargains for criminal defendants.
- In most countries, prosecutors are career bureaucrats, isolated from the outcomes of their decisions in the same way that judges are.
- In the United States, prosecutors are often elected political positions, which mean they have high-powered incentives to impress voters.

- For some areas of law, trials are administered by magistrates rather than judges:
  - Magistrates (administrative law judges) are employees of the executive branch and have weaker tenure.
- For example:
  - Tax cases
  - Environmental cases
  - Labor union disputes
  - Immigration violations
- These types of trials have weaker procedural protections for defendants, which is justified by the fact that magistrates normally can't put you in jail.
  - Immigration detention being the exception.



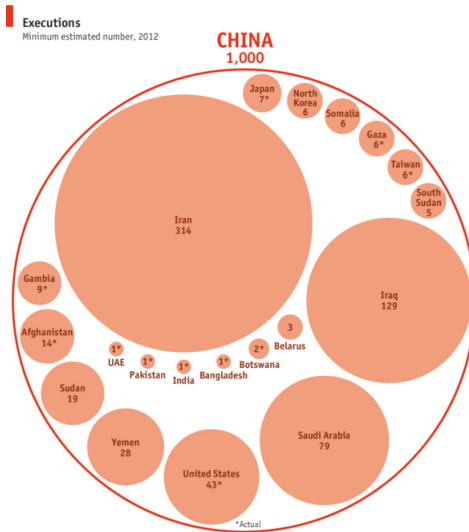
# The Deadweight Loss of Hungry Judges



- Data from 1,112 parole board hearings in Israeli prisons
- Proportion favorable decisions by time of the day.
- The trend breaks? A morning snack and a lunch break.
- These rulings were made by eight Jewish-Israeli judges with an average of 22 years of experience.
- When asked, the judges didn't know they were doing it.

- Your textbook advocates for employing prisoners in the private sector.
- History:
  - After the Civil War, prison labor was introduced in Southern states to extend slavery
  - Freed slaves were arrested on weak charges and “hired out” for cotton picking, working in mines, and building railroads.
  - For example, in Georgia 1870-1910, 88% of hired-out convicts were Black. In Alabama, 93% of hired-out miners were Black.
- More recently, 37 states have legalized contracting of cheap prison labor by private companies:
  - In Colorado public prisons, for example, the wage is \$2/hour.
  - Companies also get tax breaks for hiring prison labor.
  - Weaker labor protections, worker’s safety, etc.

# Death Penalty Across the World



# Do legal rules evolve toward efficiency?

- In common law systems, judges are policymakers, applying legal rules and adapting them to new circumstances.
- Remember the Legal Origins Lecture:
  - Common law systems have had better socioeconomic outcomes than civil law systems.

# The “Wise Judge” Hypothesis

- Posner thinks that judges have the knowledge, motivation, and incentives to consciously guide the law toward economic efficiency.
  - Perhaps not incidentally, he is himself a judge.
  - Statutes (legislation), in contrast, are aimed at redistribution toward special interests.
  - Legislators are allowed to favor the particular individuals/lobbyists involved, while judges are explicitly forbidden from doing so.
- Hayek (1973) also thought that decentralized decision-making by judges would do better than centralized decision-making by legislators.

- Goodman and Rubin argue that common law will tend to efficiency with or without wise judges:
  - Inefficient rules are more likely to be litigated, and therefore there are more chances for them to be overturned.
    - Even if judges are deciding randomly.
  - This is an “evolutionary” argument in the Darwinian sense – the law converges on efficient rules by survival of the fittest.
- Other nuances:
  - Forward-looking parties with an interest in establishing a favorable precedent will invest more in litigation.

# Counter-arguments in favor of legislation

- Maybe judges are just as political in their rulemaking as legislators.
- “Susceptibility to interest group politics” may be in fact be a good thing:
  - Maybe legislative interest groups will focus more time to overcome inefficient rules.
- That is, similar evolutionary process for the legislation toward efficiency.

- In favor of case law:
  - Common law establishment of property rights
  - Statutes interfering with freedom of contract (minimum wage and rent control)
- In favor of legislation:
  - Establishment of property rights was aided by legislation (eg. 1787 Massachusetts statute)
  - Common law doctrine also interfered with freedom of contracting (e.g. “unconscionability” doctrine)



- The best way have is the Legal Origins research.
- But all common-law jurisdictions now have massive legislative edifices.

# Perhaps both tend toward efficiency

- The evolutionary process works for both.
- Caveat: The evolutionary process favors the more “organized” groups.
  - But in the long term, the organization costs decline through better communication/ organization technologies
    - Class actions
    - Internet