

FROM BUSINESS ORGANIZATIONS TO JUDICIAL HIERARCHIES: ERROR CORRECTION LESSONS

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Abstract: In this paper I am trying to answer the question of how analysis of business organizations can be useful in evaluating judicial hierarchy when it comes to error correction. I apply business organizational knowledge to analyse judicial hierarchies by evaluating the economics of the correction of legal errors. The method I use is a multidisciplinary analysis drawing upon law, economics, game theory and business studies. The social, political and economic importance of judges dispensing justice correctly is fundamental; it enhances societal order, cohesion, efficiency, and behavioural predictability. I demonstrate that judicial hierarchies have mixed results in determining and correcting errors made by lower-level courts. During my examination, it becomes apparent that while the current degree of knowledge related to judicial hierarchies is limited, business studies can prove beneficial.

I examine the following factors: the organization of modern business hierarchies, the complexities of judicial errors, the tension between individual and societal interests, the judicial process as a quasi-market, market failures and hierarchical solutions, errors as social dilemmas and failures of individual rationality.

Key words: error correction, judicial hierarchy, judiciary, appellate courts, economic entities, organizations, social efficiency, court specialization.

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Introduction

This paper tries to answer the question of how business organizations can be useful for the judicial hierarchy in correcting errors made by lower-level courts. A connection is made between business firms and judicial

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hierarchies. Firms emerge to deal with the high cost of negotiating through markets, because of the existence of market failures. Their hierarchical structures become more complex as they grow in size. Judiciaries can be seen as market-like structures (Posner, 1973), which function in a way that exhibits the same market failures as economic markets. Consequently, market failures can be seen as manifesting when judges make errors in resource allocation. Thus, it can be argued that in judiciaries, similarly to business organizations, hierarchies appear in order to correct those market failures. The parallel that is drawn allows this paper to arrive to the conclusion that the stakes for judicial hierarchies are higher than those in business firms and that they have a fundamental but dangerous balance to strike between individual freedom and social cohesion. Analysis of this problem does not exist in the legal literature. This article uses economics, game theory, and organizational business studies to fill this knowledge gap.

The societal, political and economic importance of judges dispensing justice correctly is fundamental at any level of the judicial hierarchy. Error correction enhances the chances of achieving social order. If senior court judges do not follow consistent definitions of what constitutes a 'legal error', they can render decisions that go against the greater good, resulting in an unstable and directionless human behaviour. Correcting legal errors also increases the efficacy of the legal profession & legislation as a whole. The condition is that errors are clearly defined in terms of what is better for the individuals involved (Shaell, 2009) but avoid problems when individual rational choices lead to socially suboptimal outcomes.

The problem of the current state of affairs in judicial hierarchies exists because law and legal studies struggle to show when judicial errors occur. Speaking from the organizational perspective, lawyers qua lawyers cannot say how error correction can be improved. The reason is they do not deal with properly organizing the judiciary. Nor can management and organizational studies deal with error correction of governmental institutions. Thus the judiciary is caught in a catch-22 situation as it is neither a business organization (because it exhibits important differences), nor it is in the field of law to organize it better. In this article, the two disciplines of business organization and law have been combined to achieve a deeper analysis. Also they have been accompanied by economics and game theory. The goal is to provide better tools to evaluate hierarchical courts' role in error correction.

This article contains the following analysis: inquiry into the foundations of business hierarchies, analogy with judicial hierarchies, the

complexities of error in law, the judicial process as a quasi-market, market failures and hierarchical solutions, the tension between individual and social interests, errors as social dilemmas and failures of individual rationality.

1. Coasian Analysis: The Foundation of the Business Firm

This paper steps on the foundation fashioned by Ronald Coase a Nobel Prize laureate of economics. In his first major essay, "The Nature of the Firm", Coase challenged the status quo of economic theory at the time, which assumed that business firms were simple single units that participated in the market exchange. He explained that if firms were similar to independent, self-employed entrepreneurs who contract with one another, there would not have been that many business organizations that compete on the market. Instead business organizations are prevalent and people often prefer to work under their management structures. Also, firms become organizations with ever growing complexity as they grow in size (Coase, 1937). Their most important feature, which this paper focuses on, is their hierarchical structure. The reason behind this is there are important lessons to be learned from the organizational perspective that can be applied to judicial hierarchies.

Coase argued that there were a number of transaction costs to using the market. (Coase, 1937) Complexly structured firms arise when they can arrange to produce what they need internally and manage to bypass the high costs demanded on the free market. These costs he named 'transaction costs' (Coase, 1960). They can arise when the procurement of goods and services through the market are too expensive and their price would rise disproportionately, as compared to their internal acquisition or production. Other costs, such as information, bargaining costs, and controlling enforcement costs can also spur firms to invest internally (in their own structure) to acquire them. For example, to deal with knowledge gaps for credence goods, such as legal services, some larger businesses hire in-house lawyers to make sure their legal interests are protected. As an added benefit, these in-house lawyers can judge the performance and competence of other legal professionals that are occasionally needed by the firm. They can also help negotiate contracts more efficiently because they know the interests of the firm better than an outsider. This suggests that complex firms will be created when they can arrange themselves to produce what they require internally while avoiding rising market costs.

This article expands on that Coasian idea and considers why the price mechanism (the market) is replaced by firms that have hierarchical relationships of subordination. Businesses create their own internal structures that become more strictly hierarchical with the increase of the size and scope of activity of the firm. Small and medium-sized business firms always start with individual or family-held operations (Miller, 1993). The entrepreneur wants her desires to be followed by subordinates as precisely as possible. In countries where the market relations have not been developing continuously since the industrial revolution, for example in Eastern Europe, the situation resembles the one at early industrial firms.

Such firms are organized as dictatorships that are Pareto optimal. The reason is all of the decisions such businesses reach are founder-led choices (Miller, 1993). No changes could therefore have been made without making the manager/founder himself more dissatisfied. With that in mind, the entrepreneur has a single defining purpose – for the business to create profits for themselves. In single objective problems, the Pareto optimal solution is unique. Pareto efficient state of affairs exists if there is no alternative state that would make the founder of the firm better off, or in the very least - worse off. On the businessperson's way to success stand only the errors made by their subordinates. So an 'error' then is understood as any action which makes the founder of the business worse off.

If a group creates a business organization then a Pareto optimal state of affairs exists when none of the founding partners are worse off, and at least one of them is better off as a result of the operation of the firm. However, the objective is the same: creating profits through the firm. Again, an error is a situation in which Pareto optimality is not reached.

2. Defining Error in Law

Error in law is a way more complex phenomenon than the situation in firms. Nevertheless legal scholars assume, more or less automatically, that judicial hierarchy (appellate courts) exists to correct errors of the lower courts. In the simplest example a judge makes an error when they condemn an innocent person to imprisonment. However, a more detailed survey of the existing literature gives less certain answers of what legal error actually is. The literature can be divided in three groups: in the first, legal authors such as Burton Atkins have given a simple definition of error correction as the main function of appellate courts that depend on specific rules. Other

scholars such as Steven Shavell, one of the leading law and economics scholars, have admitted that error correction is not a clearly defined term. He has argued that to avoid errors, the law, the judiciary (and society as a whole) have to have a specific, well-defined aim that can be called “social good” or “welfare”. A third group of authors has spent considerable time on related concepts, such as defining what law is. The writings of the two classical authors of 20th century legal theory Ronald Dworkin and HLA Hart will thus allow us to extract the possible meaning of legal error from the definition of law.

2.1 Basic legal definition of error correction

Legal scholars such as Burton Atkins take for granted the hierarchical role of appeal courts. He has claimed that judicial hierarchy exists for one main purpose: “[a]n appellate court's basic contribution is error correction” (Atkins, 1990). This author has pointed out that an existing legal regime with written laws and other rules that determine what is right or wrong. However, this definition does not have any transcending features that can help determine what an error is, beyond the premise that any deviation from existing rules must then be an error. This positivistic view steps on the extremely controversial idea that existing law is always clear enough to be applied in its current form.

2.2 Shavell on Legal Error

Shavell has admitted that error correction is not a well-defined concept. However, he has given a useful summary of the types of error that can occur. The simplest kind of error concerns the facts of the case at hand. Another type can occur in the determination of the applicable legal rule to the case's evidence and context. Whether the latter type of error is conceptually clear depends on whether the law is well-defined. Shavell remarks that what could clarify the definition of an error, is the availability of clear direction of the law, in general. To have such a direction, the law has to have a specific well-defined aim. In other words, it has to have a definition of what “social good” is (Shavell, 1995). In such a situation, it is relatively easy to say that anything that goes against that social good is a legal error. That means that if the top of the judicial hierarchy has a clear vision of what its values are, it can impose them on the lower courts and direct their decision making.

As opposed to profit maximization in a business firm, it is not always possible to have a clear idea of what achieving “social good” is. There have been some major attempts to do so (Kaplow, Shavell, 2006), however, the topic remains controversial. Economists, for example, can argue that the social good is attained when the legal rules applied bring about social net benefit or promote individual welfare (Kaplow, Shavell, 2006). Another example is the theory of Jeremy Bentham: his idea of social good is “the greatest happiness for the greatest number”. Any rule that goes against that principle can be seen as going against the social good. Since this is a theory that is in favor of the majority in society, the minorities will suffer. Most problematically, the social good can also be a political goal, for example, promoting a specific ideology. If any legal rule goes against that ideology, it is, therefore, an error. In this situation having a clear idea of what social good is, is not prudent as societies with the clearest definition of ‘error’ are usually authoritarian and totalitarian, promoting their ideology at the expense of individual freedom. In a free society, there are usually more definitions of what ‘social good’ is and thus the question of what constitutes ‘legal error’ becomes more complicated.

2.3 The Conflicting Concepts of Law and Error Correction in Legal Theory

To demonstrate the struggle that legal theory faces with what an error in law is, the most influential legal theorists of the twentieth century have to be considered—Ronald Dworkin and HLA Hart. They do not agree on what law is, let alone when the application of that law is an error.

According to Dworkin, the three issues when the law and thus ‘error’ are not clear. The first concerns issues of fact when answering the question: “What actually happened?”. This is supposed to be a straightforward problem that requires judges to go over the facts and evidence and uncover them as they happened.² The second one is issues of political morality³ or fidelity whether a decision or a judge is faithful to the structure

² Uncovering the fact and what actually happened is a complex issue deserving ample attention on its own.

³ Political morality is actually a term that Dworkin prefers over social good. It is suggested that they are the similar. Political morality is what Dworkin aims for in his theory and thus is his version of social good. Dworkin finds that what is good for society comes from morality and not pure law or other external source such as economics. In reality though, his source of social good is also external to law that has strong political aspect and determines what the morality in a given society is.

of things in society. Political morality is a similar concept to “social good” as examined above. However, Dworkin is not inspired by economics but finds a source (external to law) in morality and politics, which are often controversial in their own right.

It can be deduced from Dworkin’s writings that the most serious obstacle he would find standing on the way to defining legal error would be the theoretical disagreement about what counts as ‘law’ (Dworkin, 1986). For example, the disagreement can come from a statute whose legal text may not clearly resolve the question at hand. If the doubt persists and the decision can go either way, then there is a theoretical disagreement. What this implies in the context of legal error is that it will not be clear if the judge has made an error in the first place. The judge would have just positioned themselves on one particular side of the theoretical disagreement.

Hart is another fundamental author who can allow us to see the problem of legal error from the perspective of what he calls “hard cases”. Disagreements about the law and error only occur at the margins, at the penumbra (Hart, 1994). In that context, there is judicial discretion on how to decide the case and it results in an appeal to social aims, purposes, and policies in order for a court to render an authoritative decision (Hart, 1977). For error correction that means that in hard cases it totally depends on a judge in a particular situation to decide what an error is while exercising their judicial discretion. Thus, drawing a general conclusion of how we should define error becomes extremely hard, if not impossible.

The problem of error in law is thus fundamental. It puts into question whether erecting complex judicial hierarchies really corrects errors, or they simply just follow different ideas of what is considered ‘law’ or ‘social good’ is. To seek more precise answers of the role of hierarchical courts in error correction the analysis will continue with economics, organizational studies and game theory.

3. Economic analysis of error correction

Judge Richard Posner is perhaps the most prolific and influential author of the Law and Economics movement. His definition of “error costs” includes “the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it.” (Posner, 1973). In other words, Posner has put in place an economic framework that highlights the allocative role of the courts. Posner has argued that courts serve as

quasi-markets that allocate resources between the parties, when the transaction costs are too high and real markets cannot fulfil that on their own. Thus for Posner, the main definition of error by the courts is an incorrect allocation of resources between the parties. Posner has also left the door open for other social functions courts may be assigned. That can make the definition of error quite broad and essentially include many of the types of error discussed above.

Posner's idea needs to be précised. This paper maintains that the courts have to have an allocative function that mimics markets but as it will be shown their main challenge of hierarchical courts from the economic perspective, is to deal with market failures and social dilemmas. Thus, here in order to examine the usefulness of court hierarchies in error correction, the legal process in courts is likened to a market in the following way: buyers and sellers do not trade in goods but in ideas about what should happen in society. At least one side will contend that a legal error has been committed. In this quasi market the participants try to promote their interests, and signal about problems in society to the authorities (judges). In other words, this is a market in which ideas about what is right and what is a 'legal error' compete. The price is determined not by bargaining (unless there is out of court settlement of the dispute where bargaining actually occurs) but by the judge who determines the price or in other words, defines who gets what.

There are two types of costs that legal errors impose. One is cost on the individuals. In that case a person can lose their rights. For example, that can be property or contract rights that the law ought to have protected. The other type of error concerns errors that impose social costs. That can happen when individual rationality leads to a societal loss. For example, in the game of tragedy of the commons, individual rationality allows the privately owned animals to overgraze the common land that becomes unusable afterwards and everyone loses the common pasture as an additional resource for their cattle raising business.

The question that Posner leaves unanswered is then: how do we deal with the common situation when individual interests do not align with social efficiency. The frequency of that problem is potentially the main reason for the existence of hierarchy (Miller, 1992).

The individual and social costs errors impose are the very reason we want to correct them. The view accepted here is that this happens when future desirable behavior is not achieved by the imposed rules. If judges do not correct these errors as they continue to be influenced by previous

decisions (especially in common law systems), it is reasonable to predict that errors will continue to impose a high cost on individuals and society. Thus, it is important for the system to correct wrong (inefficient) decisions.

4. Judicial Hierarchy from Business Organizational and Game Theory Perspectives

Firms emerge to deal with high cost of negotiating through markets because of the existence of market failures. Their hierarchical structures become ever more complex as they grow in size. Judicialries can be seen as market-like structures, which function in a way that exhibits the same market failures as real markets.

Thus the following questions should be answered: why should there be a court hierarchy?; Is it for the same reasons as firm hiererarchies are developed?; What lessons can be drawn from an analysis of business firms to be applied to judicial hierarchies?. So far we have seen that 'error' from the legal perspective poses more questions that gives answers. The economic perspective gives us some guidance that courts should mimic markets in resource allocation and impose costs on socially undesirable behavior, but it does not answer the question why court hierarchy is needed. There is a presumption that they are simply better at allocating resources and deterring undesirable behavior. However, that does not provide us with an answer to: when is judicial hierarchy necessary and how hierarchies work, in general. The organization of the business firms can provide the answers to that.

Ronald Coase in his seminal works proposes that the failure of market actors to contract efficiently may be attributed to the relatively high costs of negotiating, monitoring, and enforcing contracts (Coase, 1960). Thus using contracts to coordinate human behavior is not always possible because people cannot bargain each time when there are contradictions in the way things are organized to achieve a mutually agreeable result. The costs are prohibitive.

The answer to this problem Coase recognised, in practice, often results in the creation of a hierarchy. That means hierarchy is created instead of bargaining because of what Coase coined as 'transaction costs'. Whenever conditions are present that make such contracts costly, markets may fail to achieve the efficient equilibria they could achieve in the absence of transaction costs. In the case of the judiciary that means courts cannot

negotiate every single action they take by gathering all the judges to discuss and negotiate all their judicial and organizational decisions. Thus, judges cannot all meet each other every time when one of them has to decide whether some other judge has made an error in law.

According to Garry Miller, the explanation of hierarchy rests with the causes of market failure. Autonomous self-interested individuals can converge on inefficient outcomes (Miller, 1992). By analogy, we can then assume that information asymmetry, the monopoly of power and negative externalities will prevent a court system without hierarchy from functioning properly, in the same way they hinder firms. Because of these three market failures, hierarchical control may serve to improve, rather than impede, efficiency (Miller, 1992). Consequently, hierarchies form when people see that a goal or purpose is not achieved, creating a structure to oversee the fulfillment of the desired task.

In a firm the goal is profit maximization, whereas in institutions, such as the judiciary, the tasks might be more complex. Knowledge is transferable from business firms to the judiciary because in both cases the reason for not achieving the initial purpose or goal of the organization is the existence of a market failure. That view supplements the economic scheme developed in this article that likened courts to markets. Wherever there are markets, there are also market failures that have to be dealt with.

The first market failure that impedes optimal social coordination and provokes the creation of a hierarchy is information asymmetry. In its presence, there is a failure to achieve what would otherwise be a socially optimal result. The reason is that one side lacks the important information that is available to the other side (Miller, 1992). The classical business example of information asymmetry comes from Akerlof (1970), who described the market for used cars, where car dealers have all the information of the quality of the car, whereas the buyer does not know whether they are buying a good or a bad car. In the case of the judiciary, that we likened to buyers and sellers of ideas of what is right or what is an error, when the courts are faced with asymmetric information, inefficiency can be the outcome. Courts then can be viewed as an institution that establishes a hierarchical superiority over the parties and decides for them. The goal is to compensate for information failures to which the parties to the court proceedings are subjected to. Courts try to collect the information of who has erred in society and put a price on their conduct in order to reduce or stop socially undesirable behaviour. But the question of why not create a single-level court, which is the hierarchical control over the parties to the

dispute, remains. A second-tier court could be able to add something valuable to the resolution of the asymmetric information problem.

Externalities constitute a second potential reason for market failure that provokes the creation of hierarchy. These externalities are arguably the main issue that courts have to deal with. Efficient markets require that the transactions in the marketplace have no impact on third parties. However it is often the case that the market exchange affects third parties, who are, by definition, not consenting (Tirole, 2017). The most common business example is, a coal plant that produces electricity but also emits greenhouse gases that generate acid rain. There is no market mechanism for protecting those third parties who passively suffer from the pollution harm. Lawsuits and negotiations are the two ways to deal with externalities. Thus, when there is a judicial decision, out-of-court settlement or a case that does not deal with externalities there is social suboptimal situation taking place. A court that sees the big social picture has to take action and eliminate the undesirable behavior (the negative externality). That is especially the case when it is socially costly to reach a satisfactory negotiation or contract that solves the issue for any one member of a given society.

According to the fundamental theorem of welfare economics, the existence of market failures leads to the requirement of a mechanism to correct inefficiencies they cause. Hierarchy is one of the mechanisms for correction. When any one market failure exists, individual self-interest leads to inefficient Nash equilibria.⁴ That can be called a social dilemma or social trap, which means that individual and social optimality do not coincide. In other words, individual interests lead to a socially suboptimal situation. (Miller, 1992). Each of the occasions for market failure can be used to support a different explanation and rationale for the existence of courts as hierarchical superior over the parties of the dispute.

4.1 Judicial Hierarchies as Resolution of Individual vs. Social Dilemmas

Another major reason for the existence of judiciary as hierarchal control over individual parties to court proceedings, is the existence of social dilemmas in which individual and social interests are in conflict. This

⁴ Nash equilibrium is a set of strategy choices of a number of players that occurs when each player has chosen a strategy and she cannot increase her own expected payoff by changing the strategy while the other players keep theirs unchanged.

is the key to understanding superior hierarchical courts in their role as a decision-maker that stands above the first-instance courts. The reason for existence is then—the interests of individual users of the judicial system (the parties to a dispute) can be in conflict with the social interests. In most cases, first instance courts just look at the dispute as a zero-sum game between individuals. One has to win something and the other has to lose something. Individual and their relation to social interests are not dealt with by lower-tier courts.

Thus, examining individual choice which can be socially costly is paramount. The problem is insufficiency of individual rationality (Miller, 1992). Individuals often choose outcomes that do not coincide with the social interest. That negative outcome can be corrected through appeal (hierarchical) courts whose task should be to resolve private issues that result in social suboptimal results, in contrast to first-instance courts, which decide on the dispute between the parties only. So the *raison d'être* of judicial hierarchy must be specialization. Hierarchical courts can only do this job if they are specialized in identifying market failures that go beyond the dispute between the parties whose individual interests might be socially inefficient.⁵

4.2 Game Theory as a Tool of Identifying Social Dilemmas

These inefficient social outcomes resulting from individual rationality can be elucidated by game theory. There are several games that can provide an effective way of thinking about the interaction between individual self-interest and group efficacy (Miller, 1992). The first one is the prisoner's dilemma game, where group interests do not match individual interests.

Prisoners' Dilemma is a game in which each individual has a dominant strategy not to cooperate. The game consists of two players, A and B, who have to make a choice of whether to confess or not to their crime.⁶ They both can get a positive (socially optimal) outcome only if each

⁵ The big question is whether individuals are better off when they follow social efficiency or simply their individual freedom is infringed upon. This is beyond the scope of this article because this is an issue that deserves special and detailed attention. The question of under what conditions cooperation is better for individual wellbeing will be considered elsewhere.

⁶ The usual description of the game is as follows: The prosecutor has created a situation in which individual self-interested behavior works against the criminals. The prosecutor knows that they are guilty of a major crime, but is unable to convict either unless one of them confesses. He orders their arrest, and separately offers

individual chooses the individually-irrational option. Only then both individuals can be better off. Failing to confess is definitely worse for A and B, no matter which choice the other makes. But if both select their individually worst option, both will be better off than if each selects their best individual choices. Regarding just the individual preferences of A and B they lead to a Pareto suboptimal result. In other words, the Nash equilibrium⁷ reached in the game is Pareto suboptimal for A and B.

The same dilemma occurs in any game in which the Nash equilibrium is inefficient. Efficiency here is understood to be Pareto optimality where at least one individual is better off and nobody is worse off.

Besides prisoner's dilemma, "The tragedy of the commons" game also clearly shows how in a land owned in common to which each participant has the possibility to send his animals to pasture and the result is overgrazing and destruction of the common pasture. Thus, until nobody can send their cattle to graze anymore, people will overuse the land. Individual self-interest to overgraze in the short-term translates into inefficient outcome for the whole community in the long run.

The "Battle of the sexes" game also shows how a couple cannot coordinate their behaviour and fulfil an order of choices even though both people involved have a compromise choice that they would prefer over of the inefficient Nash equilibrium. The game reaches an undesirable result when individual self-interest is followed.

All these games, in which individuals do not have dominant strategies, are examples of "social dilemmas" or "social traps" (Miller, 1992). Such traps occur when the participants in a game choose to pursue their individual interests, not acting upon a cooperative option that might be more efficient, especially longer term. From a political macro perspective, a social dilemma is a choice between two core values— individual autonomy vs.

each the following deal: If you confess and your accomplice fails to confess, then you go free. If you fail to confess but your accomplice confesses, then you will be convicted and sentenced to the maximum term in jail. If you both confess, then you will both be convicted, but the maximum sentence will not be imposed. If neither confesses, both will be framed on a tax evasion charge for which a conviction is certain. Both players cannot consult their own self-interest and get a desirable for them outcome. Only if the two players find some way to coordinate their choices they can act together in the interest of both.

⁷ Nash equilibrium is the stable outcome reached when both players make a satisfactory choice and each one is convinced that he has made the correct choice, after the other's choice is revealed. Neither player could make himself better off by each changing his mind. In game theory such is called (Tirole 1988: 206). (Miller 1992: 22)

social efficiency (Miller, 1992). This is a delicate choice between a pivotal pillar for our society and social choice that ultimately might protect the existence of our society.

Thus, the fundamental problem of social dilemmas is that individual choice can have a high cost when it reaches inefficient Nash equilibrium. When we speak about business organizations, such choices may not entail group costs that are higher than the bankruptcy of the firm. However, in the legal field the cost can be extreme. If the courts do not deal with such social inefficiencies our societies may cease to exist. The current climate change crisis is a good example and is a large scale tragedy of the Commons' game. The short-term individual benefit for some can lead to extinction of all. Does the use of hierarchical force in this case lead to suppression of individual rights? Should individuals accept the socially "right" thing to avoid group inefficiency? The role of judicial hierarchies then should be authorized to make others do what they would not otherwise find it in their interest to do might be absolutely necessary. However, it also depends on the scale of the social inefficiency and its infringement on individual freedom.

This type of hierarchical control has to be the prerogative of the higher-level courts that normally correct the decisions of the lower courts, solely concerned with resolving a dispute between the parties. The situations in which social interests give way to individual self-interest are bound to occur. In other words, there has to be specialization of courts that deals with social efficiency vs. suboptimal individual choices. It is suggested that hierarchical courts should concentrate on the social efficiency of judicial decisions. That is something that has to be considered as one of the main distinctions between lower courts and higher courts— shifting the focus on different type of interests.

This choice between individual and social interest is at best an uncomfortable one. It is quite dangerous to have a judicial task that can infringe upon individual freedom. The cost of not completing this task, however, is social inefficiency. Judges must possess exceptional ability and be specifically trained to deal with such fundamentally important choices. They have to be precise when assuming such a balancing act in resolving social dilemmas. It is argued that judges are not educated in/qualified to identify and make such choices. That lack of clear specialization and training for judges on social dilemmas lowers the utility of judicial hierarchies and makes them less efficient.

Conclusion

The essence of judicial error is then more complicated than an error in a business firm. The firm pursues and maximizes profits. In contrast, the judiciary should chase a complex dichotomy of high-stakes choice between social efficiency and individual rationality. The justification of complex judicial hierarchy is correcting errors when social efficiency does not coincide with individual rationality. Otherwise, the complex hierarchical systems that exist today work for the simple criminal case in which an innocent person goes to jail for a crime they did not commit. Error of this type does not justify the complexity of existing judicial hierarchies, for example, for civil cases.

It is suggested that it is easier for appeal courts to deal with social dilemmas rather than with political morality or applying an abstract idea of 'social good'. The reason is social traps are easier to identify in practice because they only require uncovering inefficient Nash equilibria. Market failures are also easier to identify than allocation of resources when the latter task goes beyond simply determining the price of the activity (awarding damages). The reason is the lack of clarity over the definition of what social good makes the courts distributive function more complex than a simple price determination.

From an economic perspective the judicial task is to allocate resources in a way that mimics a perfectly competitive market. Thus, an error would be a miscalculation or other misallocation of resources. Richard Posner's definition of error as fulfilling a resource allocation role and "other social functions" leaves a theoretical chasm leaving unanswered: 1) What happens beyond the simple case of determining the price of undesirable activity (awarding simple damages) when the courts play a distributive role based on a specific idea of social good. 2) What are the other social functions that judges have to fulfill besides allocation of resources?

Game theory and business organizational studies widen our understanding of hierarchical court's role in correction of errors because they can lead us to the conclusion that appellate courts have to specialize in resolving market imperfections and social dilemmas. That is an expansion on the economic idea that the role of courts is to mimic markets that is more easily applied in practice.

The practical problem of looking at the appellate courts' role in the context of this article is that appeal-level judges do not "specialize" in allocation of resources, market imperfections or social dilemmas. They are

simply not trained to perform those functions. This makes their role cost ineffective. As a result, the judicial hierarchy produces outcomes that are only based on judges' intuitive performance of these tasks. In other words, appellate judiciaries can only work well if they are specialized and trained better. Otherwise, their role is limited to correcting mistakes and imposing the political opinion of a few elite judges on the law.

Judges trying to protect individual freedom and at the same time attempting to achieve social efficiency is a task full of snags. The idea that appellate judges must resolve social dilemmas on top of their resource allocation task is only a small step forward of how we think about appeal courts.

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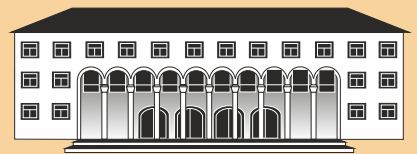
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