The objectives of private and public judges

A comment

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Professor Cooter deals with the issue of explaining the behavior of judges, an issue of some interest to those of us who claim that economics can be used to explain the result of the common-law process. While there are some answers to this question in the literature (e.g., Rubin, 1977; Priest, 1977; and Goodman, 1978) which are based on the behavior of litigants rather than of judges, Professor Cooter has elsewhere rejected these answers (Cooter and Kornhauser, 1980) and is thus left with a puzzle. In this paper, he adapts his theory of bargaining breakdowns to the selection of judges and provides an answer to the question. The answer which he provides is in two parts; first, judges want to maximize their case load; second, they will accomplish this by providing efficient decisions in disputes which come before them. The answer is ingenious, and is indeed the sort of answer which we should seek. However, I do not think that this particular solution is completely correct, and it is not very different from those solutions which he rejects. I will discuss each part in turn.

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1. The motives of judges

Professor Cooter begins his discussion with the assumption of a revenue-maximizing judge. Such a judge would want to maximize his case load. He assumes that parties would bargain over the selection of a judge, with each party having a veto power. (If they cannot agree, a judge is randomly assigned.) He also argues that each party will tend to think that he is in the right, or else the case would have been settled. Given this, each party would want a judge who was perceived as fair, that is, as deciding cases "on the merits." Moreover, the parties would want a judge who provided efficient decisions (decisions on the Pareto frontier), for this would create the maximum surplus to be distributed between them. (Essentially the same conditions follow from either model of negotiation breakdown – the optimism model or the strategic model.) This description of the behavior of a private, profit-maximizing judge seems unobjectionable.

Problems arise, however, when the theory is extended to encompass a judge within the court system who is not paid on a case-by-case basis. Efforts to model or explain the behavior of such judges are notoriously unsuccessful. (See, for example, Higgins and Rubin, 1980.) Professor Cooter assumes that such judges "...seek prestige among those who know them best, namely the lawyers and litigants..." (p. 131). They achieve this goal by attempting to maximize the demand for their services, just as private judges do.

This hypothesis about the goal of judges is plausible and may be correct. However, it is clearly speculative. Other, equally plausible hypotheses can be suggested. For example, judges may want to promote efficiency, as originally suggested by Posner (1977). They may value leisure highly and want to minimize their case load. Any number of other hypotheses are possible, and Professor Cooter's guess does not seem compelling. Thus, the model based on this hypothesis seems only one small step removed from arguments such as Posner's which simply posit a desire for efficiency on the part of judges. Without a more compelling reason for accepting this hypothesis, or empirical testing of the hypothesis, I do not think that it can bear the weight put upon it.