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Optimal Design of Private Litigation

Louis Kaplow*

Abstract

This article translates and extends Becker (1968) from public law enforcement to private litigation by examining optimal legal system design in a model with private suits, signals of case strength, court error, and two types of primary behavior: harmful acts that may be deterred and benign acts that may be chilled. The instruments examined are filing fees or subsidies that may be imposed on either party, damage awards and payments by unsuccessful plaintiffs (each of which may be decoupled), and the stringency of the evidence threshold (burden of proof). With no constraints, results arbitrarily close to the first best can be implemented. Prior analyses of optimal damage awards, decoupling, and fee shifting are shown to involve special cases. More important, previous results change qualitatively when implicit assumptions are relaxed. For example, introducing a filing fee can make it optimal to minimize what losing plaintiffs pay winning defendants and to reduce the evidence threshold as much as possible — even though the direct effect of these adjustments is to chill desirable behavior, a key feature absent in prior work.

JEL Classes: D82, H23, K13, K41, K42

Keywords: litigation, law enforcement, courts, fee shifting, decoupling, filing fees, burden of proof

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