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ADDRESS

THE AMERICAN COURTS AS PUBLIC GOODS: WHO SHOULD PAY THE COSTS OF LITIGATION?*

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The question that I am going to discuss with you deserves to be considered carefully, but skeptically. It should be considered carefully because it affects two of society's most important problems: (1) the allocation of scarce public resources, and (2) an overburdened court system. It should be considered skeptically because it calls into question something that is supported by centuries of Anglo-American practice.

The question is this: Should the cost of running our nation's courts be borne by those who use them, or by the taxpayers? Alternatively stated, should the public continue to pay for what is used by only a few of its members?

Fortunately, the issue is not a single, indivisible whole. For some kinds of litigation, the only reason for not changing from public financing to user financing is that the public has been paying the bills for centuries. Change without delay in those easy cases is a good idea not only because it would achieve immediate benefits of significant magnitude, but also because our experience with those cases would provide useful understanding concerning whether the change should be more extensive.

Both the easy cases and also the harder ones can be better evaluated against the background of a brief review of the economic concept concerning "public" or "social" goods. Public goods are generally defined as goods that must be equally available for use by all of the public. A classic example is the common pasture in the center of town, upon which cows belonging to all citizens may freely graze. Another is the lighthouse. There is, however, a difference between the two, and the difference illustrates the most serious

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problem associated with public goods: overuse by free-riders. In the case of the common pasture, there is nothing to prevent some citizens from grazing so many of their cattle that they consume more than their aliquot share of what is owned by the entire community. There is a potential free-rider problem whenever the public goods are consumable, that is, when the cost of their use is proportionate to the extent of their use. This is not a problem with the lighthouse, because the use of the light by one person does not make a lesser quantity available for other users thereby "consuming" the light.

It is part of our American tradition that we treat our courts as public goods. They are publicly funded, and made available "for free" to whomever wants to use them. From the standpoint of the free-rider problem, courts are more like the public pasture than the lighthouse. Their services are consumable. Use by one has an effect on others' use. And since everyone does not use the courts in direct proportion to the taxes he or she pays, public financing makes it not only possible but inevitable that some will pay for what others use.

While no definitive study has been done concerning the cost of this judicial grass being grazed by other people's cows, one thing is beyond dispute: it is not cheap. The most reliable estimates are that if all costs are taken into account, the average cost of operating an American courtroom (including the apportioned salaries of the judge and other court personnel, plus the apportioned cost of the building) is somewhere in the neighborhood of $400-$600 per hour. Does it really make sense to make something that valuable available at public expense to anyone who wants it for as long as he wants it? Clearly we would not provide at public expense a $5,000 a day hotel room for as long as any citizen wanted to use it. It is equally clear that there are differences between a hotel room and a courtroom. But are these differences sufficient to justify the court-cost sudsidy in all cases?

The most obvious difference between a courtroom and a hotel room is that courts, unlike hotels, are governmental institutions. Collectively, they constitute one of the three separate branches of government. We assume that their use benefits a broader segment of society than those who participate as parties to the litigation.

Yet, in the case of the overwhelming majority of litigants, consumption of judicial resources results not from any altruistic or public-spirited effort to advance the common good. And there are certainly other instances in which the public receives a benefit from private activity without providing a subsidy in return. In any event, analysis will be aided by dividing the cases into two groups: (1) those in which there is at least some theoretical possibility that the underlying assumption of public benefit is applicable, and (2) those

in which there is no conceivable rational basis for the way we do things. Accordingly, I will begin by examining the basic case for change from public financing to user financing of our nation's judicial resources, and then consider those circumstances in which the case for change is less strong.

I. THE BASIC CASE FOR CHANGE

The easiest case is one in which the only result from the lawsuit will be a transfer or non-transfer of money from the defendant to the plaintiff, either of whom could easily afford to pay the court costs. The parties to such a dispute have available to them several alternative means for its resolution. One of these alternatives—litigation in a publicly-funded court—effectively appropriates public money for the sole benefit of the parties. The fact that they happen to be involved in a dispute that they have been otherwise unable to resolve is irrelevant to their entitlement to a public subsidy. It may be that judicial decision is the most effective and efficient means of resolving their dispute. But it is a means that differs from others because it necessarily involves an expenditure of public funds. Yet, we leave the decision whether or not public funds will be spent for that purpose entirely in the hands of nonpublic persons. They are the beneficiaries of their own decision and their decision is driven by nonpublic considerations.

The genius of the free enterprise system generally is that it allocates society's goods fairly because it allocates to those who are willing to pay for them. Subsidies distort that process, and thereby deprive society of the benefits of the free market system. The public financing of private litigation is a good example. If the parties to a dispute elect to resolve it by negotiation, arbitration or some other nonlitigation alternative, they bear the costs themselves. But if they choose to litigate, a substantial portion of those costs are provided at public expense. We vest in those parties, therefore, an ex officio authority to appropriate public money for their own benefit.

Why, for example, should the public subsidize a lawsuit between Greyhound and IBM, or between Litton Industries and AT&T? Surely others are more in need of public welfare benefits. Yet, in each of those suits the public paid the bill for thousands of hours of court time—at several hundred dollars per hour—to determine which of these corporate giants owed the other money.

More is at stake than just money. It is generally conceded that many, if not most, American courts are overloaded. This is bad for several reasons, not all of which are economic. First, there is a relationship between the quality of justice and the promptness with which it can be delivered. Judicial relief years after the event is seldom adequate. The parties' circum-

stances have changed; sometimes the parties themselves are not the same; and the linkage between the judicial judgment and the effects that it is intended to have is usually weakened by time. A second, related negative effect is the cynicism that our citizens develop in the ability of our judicial system to do justice. Finally, in addition to the impact of delays on quality, there can also be a negative correlation between the amount of work that any given judge is called upon to do, and the quality of his or her work product.

So if delay and overload in the courts are serious problems, why do we subsidize them? Delay and overload are caused by too many people using the courts. Inevitably, more people will use the courts—or anything else of value—if they are free.

It might be argued that the use of the courts is not provided at public expense alone, because there are other expenses (principally legal fees) that constitute a barrier to litigation. The argument is correct, but not very relevant. All that it proves is that the subsidy is not complete. But it is still a subsidy; it is substantial in amount; and it therefore contributes to additional use of a court system that is already overused.

There is a commendable effort currently underway to shift the resolution of substantial portions of our nation's disputes away from the courts to other processes, such as arbitration, mediation, or negotiation. It is an effort that has received sustained attention from the leaders of our profession, including the Chief Justice of the United States, and was given a major impetus by the Pound Conference in 1976. Yet, at the same time that we pursue this effort to encourage alternative dispute resolution processes, we effectively pay people to do the very thing that we profess to be trying to find ways to avoid. It makes no more sense than if government were to do something as absurd as requiring health warnings to be printed on cigarette packages and advertising, while at the same time subsidizing the production of tobacco. If we are really serious about encouraging alternative processes for the resolution of disputes—as we should be—wouldn't it make much more sense to subsidize those processes instead of their competitor?

Principally because of excessive litigation costs, some business executives have attempted to resolve their disputes through "mini-trials," presided over by "private judges," prominent lawyers who are willing to serve as "father figures" in disputes between corporations. The principal inducement toward the use of these mini-trials has been the litigation costs to the corporation. This shift from public trials to more streamlined private hearings is the kind of adjustment that an unsubsidized free enterprise system is capable of making, and usually does make, with consequent benefits to society. Under our present system, however, the market does not take all of the costs into ac-

count. If corporations were required to bear not only their legal fees, but also the public money that their decision to litigate appropriates for their benefit, there would be even greater inducement to find more efficient alternatives to litigation.

Within recent years, several courts have imposed fines on lawyers for conduct that reaches so far beyond the vigorous representation of clients that the legal process has been misused and the public injured. The concept is sound, but its logical application reaches beyond attorney fines. More specifically, the fine is not the most appropriate remedy for the wrong that has been committed. Consider the analogy to sanctions for violations of laws prohibiting theft. Robbery, burglary, larceny, and embezzlement are and should be treated as offenses against the public that carry criminal punishments. But any particular theft does not spread its impact equally among all members of the public. Restoring to the theft victim that which has been lost should be a more important remedial objective than sending the thief to jail or requiring him to pay money to the public rather than to his victim.

Similarly, though the attorney fine cases are headed in the right direction, their shortcoming is that the punishment does not fit the crime. The real evil of gross lawyer misconduct is that it consumes other people's money. If the conduct occurs during discovery, the principal victim is the opposing client. (The client of the offending lawyer may also be a victim, but this is an acceptable consequence, since he chose the lawyer.) If it occurs during the trial or appeal, then public money is also consumed, so that a fine, which goes into the public coffers, is appropriate. But the amount of the fine should be measured by the thing consumed: the number of hours of wasted courtroom time multiplied by the hourly cost of operating a courtroom.

The case for reform is perhaps most appealing in the context of suits between corporate giants where only money is at stake. If multi-billion dollar companies need to use the courts for the purpose of deciding how much money one of them owes the other, they are certainly entitled to do so. It does not follow that they are entitled to have the public pay for it. And though the case for reform may be more appealing in the context of the corporate giants, it is certainly not limited to them. As a lawyer in private practice, one of the first steps that I always took in deciding whether to litigate was to multiply the likelihood of success (expressed as a percentage, and representing my best lawyer's judgment) by the amount my client would recover, if successful. Unless that figure was substantially in excess of the estimated costs of litigation (or unless my client had other legitimate objectives whose worth could not be evaluated in dollars and cents) I would recommend against filing a lawsuit.

I think that approach is sound. I suspect that it is followed, in one way or another, by most conscientious lawyers. It necessarily does not take into account the costs that are borne by government, amounting to thousands of dollars a day. Indeed, I can recall from my private practice experience several instances when the dollar differences over which the parties were disputing in a case that went to trial was probably less than the number of courtroom hours consumed by that trial multiplied by five or six hundred dollars. Those were costs that I never took into account. I would have if they had been potential costs to my client.

For these reasons, I conclude that, at least in some cases, the costs of courtroom services should be borne by those who use them. The harder question is whether there should be any exceptions. Should the result be any different, for example, where either indigent parties or noneconomic issues are involved. Each of these possible exceptions turns on separate considerations, and I will treat each separately.

II. An Exception for the Indigent?

The difference between free access to the courts by the poor and the nonpoor may be more than a difference in degree. For a person or company of means, utilization of the courts involves simply an economic decision driven by net-worth-maximizing motives. That is, the decision will be controlled by an assessment whether the litigant's net-worth will be greater or less if he goes to litigation. For the poor, by contrast, the cost of litigation would constitute an absolute barrier so that the indigent, unlike his or her wealthy neighbor, could not make the same rational judgment whether to litigate. And the barrier will of course be higher if it includes the cost of running the court.

That argument deserves further consideration, but it may not prove sufficient to carry the day. For many people—including many who would not qualify under any traditional standard for measuring indigency—bearing the total cost of a decision to go ahead with litigation would probably preclude such a decision. It is not readily apparent, however, that what follows is that society should respond by always picking up the tab. For obvious reasons, the case for the public funding of courtroom costs for poor people is stronger than for people of means. But is the issue really any different than the broader questions of how public welfare dollars should be distributed and how many of those dollars there should be? One of the strong competitors for public funds both at the national and local levels is care for the poor. The proper focus on the present issue may be this: Out of all the possible candidates for the expenditure of public money to help the poor, how do

court costs compare with the others? Starting from the premise that there is a finite limit to the total amount of money to be expended for the benefit of the poor, is it better to make access to courts easier than to make additional money available for food, shelter, job training, or day care?

Perhaps we will ultimately conclude that it is unfair to make those comparisons; that legal services are sufficiently different that they should be in a class by themselves. But that conclusion, if it is to be reached, should be a conscious and deliberate one. The power to spend is one of the most potent of all governmental prerogatives. The key to its proper exercise, I believe, is that any spending decision should be the result of a considered governmental choice, and not simple governmental inertia. It may well be that after careful consideration, our nation's policymakers would conclude that there are good reasons why the free use of our nation's courts by persons of limited means is not comparable to other forms of subsidy, and should, therefore, be governed by an all inclusive rule. But if that is to be the conclusion, it should come after the debate rather than before it.

Let me give you an example of the kinds of considerations that ought to enter into such a debate. The example focuses on the differences between the way our society pays for two kinds of professional services, legal and medical. Doctors do their work in their offices and in hospitals. Medical care costs consist of three basic components: doctors' fees, the costs of operating doctors' offices, and the costs of operating hospitals. Lawyers do their work in their offices and in court, and the costs for legal care also break down into three components: legal fees, the costs of operating law offices, and the costs of operating courtrooms. Thus, these two professions have three comparable cost components. Yet of the six cost elements, only one is borne by the public. Is there any good reason for a distinction that runs in either direction? That is, can any argument be advanced for publicly financing the cost of the courts (one of the constituent elements of legal care) that is not equally applicable to the other two elements of the total litigating cost? And is there any good reason why we should provide a free place for lawyers to work but not doctors?

It can be pointed out, of course, that we do in fact subsidize parts of medical care, including some hospital services. Through the Legal Services Corporation we also subsidize for the poor elements of legal services other than court costs. Each of these examples strengthens my central proposition that subsidization of court costs should represent a conscious policy judgment. The decisions to fund Medicare, Medicaid, and legal services programs did not come about because these costs had been borne by the public for hundreds of years. They represent deliberate choices by the policymaking bod-

ies of government, following ample opportunity for consideration of all aspects of the problem. If it is worthwhile to ask under what circumstances the public should be paying for the cost of lawyers or the cost of the places where doctors work, is it not equally worthwhile to ask the same questions concerning the cost of the places where lawyers work?

III. An Exception for Public Interest Cases?

I turn now to a second possible exception. It would be an exception for noneconomic cases—cases seeking to vindicate a public value, or at least a value that cannot be expressed in terms of money.

On its face, the argument is strong that there should be such an exception. The American court is not just another governmental service, like a fire department, a park service, or a record keeping agency. Courts are the ultimate authority on constitutional rights, but article III of the Constitution provides that the power of the federal courts to decide constitutional issues (or any other issues) is limited to the decision of actual "cases or controversies." Similar limitations apply to most state courts. To the extent we make access to the courts more expensive, therefore, we inhibit the development of constitutional law. The same observation applies to nonconstitutional decisions. Judicial interpretation of statutes that are important to large numbers of people can be rendered only in the context of resolving cases or controversies. Yet someone has to take the initiative and bear the expense of going ahead with that kind of litigation. Even without paying court costs, plaintiffs often bear an expense—legal fees—for the benefit of the entire public. It is they who are subsidizing the public, rather than vice versa. It would have been an egregious error, for example, to increase the cost of litigating such cases as *Brown v. Board of Education*.

These arguments are probably correct, and are probably sufficient to carry the day. But once again, as with the indigency exception, I think they should be exposed to the searchlight of skeptical examination. For while nonmonetary suits frequently yield nonmonetary values to persons other than the plaintiff and defendant, they are values that are not shared by all who finance the litigation through their taxes. Any lawsuit is inimical to the interests of one or more taxpayers. In the case of "public interest" lawsuits, the number of beneficiaries is frequently large, but so is the number whose interests the litigation impairs. As strong as the public interest is in vindicating a clean environment or strong civil rights laws, for example, it is not always easy to ascertain which side in a particular lawsuit best achieves those objectives, or whether the cost at which they are achieved makes the suit a net contribution or detriment to the public interest. Would it be bet-

ter, therefore, to leave the cost of vindicating "public" values to those segments of society who share a common view as to what those values are and how best to pursue them? This would mean that the cost of public interest litigation—including the cost of running the courts—should be borne (as the legal fee component is currently borne) by organizations whose members believe in the organizational objectives.

It could be argued that this is drawing the line too finely in attempting to save taxpayers from financing causes with which they disagree. Perhaps, this is no different from whether an individual should be permitted to withhold tax payments that he or she is otherwise obligated to pay, the amount withheld being proportionate to the amount of the federal budget spent on MX Missiles, aid to Nicaraguan rebels, legal services funding, or any other expenditure with which the taxpayer disagrees. On the other hand, maybe the public financing of litigation is different. This is one of those instances where it really is feasible to separate the users from the nonusers by imposing the cost of the service at the point of use.

Another potential problem is that even assuming the economic/noneconomic distinction proves a sensible one, in theory it will not always be easy as a practical matter to draw the distinction. A suit seeking damages for breach of contract, or for collision between two ships, would seem clearly to fall on one side of the line, and a school desegregration action on the other. But what about the highly publicized dispute between the producers of video equipment and tapes, and the holders of copyrights to movies and television productions? On the one hand, it was a dispute over money, big money. But did it involve more than just money? And were there public impacts from the litigation beyond those of the parties? And what about private antitrust or securities actions? They are economic lawsuits, but not all seek a money judgment. And whether they do or not, they are brought to enforce public interests based on public laws. Does the difficulty of drawing any meaningful distinction between economic and noneconomic cases counsel against the whole idea of changing to user-based financing of court costs?

I think not. First, if the distinction cannot be drawn, the conclusion may be that users should pay regardless of the substance of their claim. Second, while it is undoubtedly true that in a capitalistic society, most activity undertaken for private gain yields some public benefit, it is an incidental benefit whose magnitude is usually speculative. If it has any applicability at all in the present context it should carry us no further than the proposition that we should consider a general rule requiring users rather than the public to bear the costs of operating the courts, but with exceptions in those individual cases where the successful party can persuade the judge that the public

benefitted sufficiently from that particular lawsuit to warrant the subsidy. That is essentially the approach that we now follow in some cases by awarding attorneys fees to litigants who oppose the government and lose, but perform a public service by advancing the law in the opinion of the court.

IV. CONCLUSION

I will end where I began. These are hard problems, but they deserve to be considered seriously. The fact that the waters are uncharted, and some of them may be choppy, does not counsel that the voyage should not be attempted. We should start with some points on which everyone ought to agree—suits whose only issues involve how much money one well-financed party owes another—and see what our experience with those cases teaches us. Maybe our experience will show that the dichotomy between money suits and others makes no sense, and society is best served by requiring that all users of court facilities pay for what they take. Or maybe it will show that the difficulties in distinguishing between the two are sufficient enough—combined with other problems of user-based cost assessment—that the whole idea should be scrapped. Or that the basic principle is sound, but that the real problems are quite different from those that have been anticipated. What is not acceptable, I submit, is the facile assumption that the problem is not worth consideration. Most of the important issues with which our society deals involve hard choices and require positive effort. This one is no different.