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Civil Judicial Subsidy

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The Civil Judicial Subsidy

BRENDAN S. MAHER*

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“The question we ask today is not whether our government is too big or too small, but whether it works”

—President Barack H. Obama¹

INTRODUCTION

Justice is blind, not free. Litigation is expensive. Yet while significant scholarly attention has been devoted to the private cost of litigation, largely unaddressed is the cost of the civil court system itself—or who should bear it.² Judges and court staff do

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1. President Barack H. Obama, Inaugural Address (Jan. 20, 2009), available at http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address.

2. In 1929, Professor Arthur Goodhart declared that “virtually no mention [of cost shifting] has been made by American writers” and set forth his own seminal thoughts on the subject (although, using English nomenclature, Professor Goodhart called “costs” what we today call attorney’s fees). See Arthur L. Goodhart, *Costs*, 38 *YALE L.J.* 849, 849 (1929). Profound treatment of the *private costs* of litigation, and who should bear them, followed. See,

not work for free, and courthouses do not build and maintain themselves; those costs are almost entirely borne by the taxpayer as a pure judicial subsidy. This Article asks: is that right? Or is there a more desirable way to apportion court usage costs between the state and litigants?

In Part I, I describe our current system as one offering nearly 100% subsidized “court insurance” for all litigants and consider why that is the case. We subsidize court use because there are, in theory, considerable “social positives” (i.e., benefits not internalized by the litigants) associated with public adjudication.³ I construct an evaluative framework with which to assess the wisdom of the status quo and determine whether the theoretical social positives attributable to subsidized court use attach with equal force to *all* court use by *all* players in *all* cases. Were that assumption not true, a differentiated subsidy should be considered, namely, a subsidy that distinguishes between different court users and uses in a way sensitive to the social positives at issue.

In Part II, I examine the social positives held to warrant public adjudication in the first instance. These social positives can be grouped into two conceptually useful categories: “consequentialist” and “consonant” rationales. Roughly, the former is akin to “cost-benefit” analysis; the latter to “fundamental value” analysis—namely, “X” is fundamentally fair, just, or desirable and its absence is fundamentally unfair, unjust, or undesirable. I examine justifications in each category as a necessary prerequisite to examining whether and how a differentiated subsidy could compromise either category of social positives.

In Part III, I investigate the costing and measuring side of the current subsidy. The appropriate consumption and cost unit of the subsidy is time, that is, cost incurred per time unit consumed by the litigants in a given case. A “cost-minute” approach would precisely and transparently reflect the contours and beneficiaries of the subsidy, and it would be the most sensible metric for measuring the cost obligation of nonsubsidized litigants in a differentiated-subsidy world.⁴

In Part IV, I imagine a possible reconstruction of the subsidy resulting from an application of the analytical framework developed herein. Specifically, each litigant would bear responsibility for one half of court usage costs, collectible at the conclusion of the case, with three provisos. First, a significant proportion of litigants would receive an “access” subsidy designed to address risk-aversion and liquidity problems

e.g., Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 31 DUKE L.J. 651 (1982); I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 141 (1998). Yet little attention has been devoted to determining—or even assessing *how* to determine—the ideal public and private split of litigation costs, aside from the occasional proposal to significantly increase filing fees. *See, e.g.*, FIRST REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 63–64 (1925); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 132–37 (1985).

3. I use the term “social positives”—rather than either “positive externalities” or “public goods”—deliberately. *See infra* note 15.

4. Minute-based estimates of time expended, including both costed and noncosted minutes, have been used in a handful of academic and administrative studies of limited scope and have proven to have powerful descriptive value. *See infra* Part III.A.

that might thwart access in a user-pays system. Second, appeals would be subsidized. Third, a retributive tax—where losing litigants outside the first two exemptions pay to the state the winner’s half of court usage costs, in addition to their own—would be implemented. Although more empirical research is needed, plausible assumptions about the current civil litigation system suggest this model could offer considerable savings⁵ compared to the current monolithic subsidy, without—in theory—materially undermining the social positives generated by public adjudication.⁶

I. CONCEPTUALIZING THE SUBSIDY

Few consciously view the nation’s civil court system as a subsidy. Yet it is, and the first step in a disciplined inquiry is to make explicit the baseline rationale for having *any* judicial subsidy—namely, that the subsidized adjudication must somehow serve social interests beyond the interests of the litigants at bar. I then develop an analytical framework with which to assess the merits of the current subsidy, as compared to potential alternatives.

A. Subsidized Insurance and Social Positives

To the dismay of some and approval of others, America lacks national health insurance. But it offers a very different kind of social insurance, one rarely discussed as such: “court insurance.” Whereas doctors are highly trained professionals expert in medicine, judges are highly trained professionals expert in the law, and neither work for free. Excepting the needy and the elderly, private parties must pay for the doctor’s time. Yet, no “legal patient” need pay for the court’s time—or the ancillary costs that go with “seeing a judge,” that is, the cost of courtroom personnel or the cost of operating and maintaining the courthouse. The only requirement is a modest co-pay, namely, the filing fee. The state picks up the rest—no matter the characteristics of the litigant, the nature of the dispute, or the length of the case.⁷

5. Reducing any subsidy obviously increases government revenue, which may be attractive to states constitutionally obligated to balance their budgets; depending on one’s macroeconomic loyalties, however, efforts to balance budgets could have very undesirable economic consequences in the current economy. *See, e.g.*, Paul Krugman, Op-Ed., *Fifty Herbert Hoovers*, N.Y. TIMES, Dec. 29, 2008, at A25 (explaining that because of balanced budget rules many of the fifty states will “slash[] spending in a time of recession, often at the expense both of their most vulnerable constituents and of the nation’s economic future”). Certainly, challenging economic times make budget discussions more searching. *See, e.g.*, Jesse McKinley, *Shortfalls Prompt Look at Unorthodox Taxes*, N.Y. TIMES, Mar. 1, 2009, at A13 (noting that states are now exploring the imposition of previously unconsidered taxes to raise revenue, such as taxes on pornography and marijuana). However, I wish to stress that my evaluative framework and reform speculations are in no way motivated by our economic crisis; the reconceptualization of the subsidy offered here would be urged with equal force in times of plenty.

6. I do not here consider constitutional concerns arising from either the United States Constitution or the constitutions of the individual states. My focus here is to develop a robust theoretical scheme for assessing what an ideal subsidy should look like, absent particular constitutional or political constraints.

7. Other modest fees may attach, such as a jury-impaneling fee. *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-144 (West Supp. 2009) (\$190 fee); MASS. ANN. LAWS ch. 231, § 103

Why is this so? After all, insurance has well-known distortional effects on the conduct of the insured, commonly called moral hazard.⁸ Specifically, insured players are less likely to engage in the optimal level of precaution regarding the indemnified risk (and more likely to engage in overconsumption of the insured service) than are parties who bear the risk and cost themselves.⁹ Insured players whose future premiums are unaffected by their present conduct—either because they are one-time players, because premium adjustment for past conduct is limited by regulation, or because another party has future premium responsibility—are in turn more susceptible to moral hazard than are insured players for whom present conduct can affect the level of future premiums or the availability of future insurance.¹⁰ The current legal system—with the premiums and indemnity fully subsidized by the state, and with no “experience rating”¹¹ adjustment in any case—is highly likely to result in the overconsumption of judicial resources.¹²

Why do we tolerate such apparent “overconsumption”? The answer: because it is actually “overconsumption” only to the extent there are insufficient positive externalities arising from court use. Making something available at less than market price, which is functionally what happens for services covered by subsidized insurance, will result in overuse of that service only to that extent that countervailing positive externalities—benefits not internalized by the users—are absent. When positive

(LexisNexis 2000) (\$50 fee); TEX. GOV'T CODE ANN. § 51.604 (Vernon 2005) (\$30 fee).

8. The writing on moral hazard is vast. Two classic pieces (addressing insurance in the health care context) are Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963), and Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968). See also Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (providing a thorough and fascinating discussion of moral hazard with reference to and analysis of moral hazard writings of Arrow, Pauly, Richard Epstein, and others).

9. See, e.g., Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 299 (2007) (discussing examples of overconsumption of insured services and suboptimal efforts to prevent loss).

10. Other factors, of course, can limit moral hazard (particularly when the risk involves costs not entirely compensable by money, such as serious personal injury or death). See, e.g., Baker, *supra* note 8, at 278–79. For example, “court overuse” is constrained, obviously, by legal fees.

11. Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 414 (1985) (“Experience rating . . . uses the loss experience of the insured during one period to help set the premiums charged in the following period.”).

12. That is, if we assume all players are risk neutral (which they are not) and that there are no externalities associated with court use (which there are), subsidization results in “court overuse” because players will not be bearing the full cost of suit. Put simply, if players litigate when expected gains exceed expected costs, artificially reducing costs with a subsidy will result in some amount of socially undesirable litigation that causes a net decrease in total overall welfare—that is, some amount of “court overuse.” See Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OR. L. REV. 909, 912 (1995) (urging the payment of jury fees because “[t]hose who use a government service should pay its true costs or that service will be overused”); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575, 577–78 (1997) (explaining that excessive litigation may occur because a litigant’s legal costs do not include costs of his adversary or the state).

externalities are involved, there is an inadequate market incentive for individual actors to engage in the socially optimal level of the positive-externality-generating activity (here, court use).¹³ To properly incentivize those actors, a government can effectively lower the “price” of the activity by deploying a subsidy such that an optimal (or closer to optimal) level of the activity occurs.¹⁴

Necessarily, then, the current system is premised on the notion that *some* level of positive externality (in the broadest possible meaning of the term)¹⁵ is generated by litigation. Court use, in short, is presumed to generate some greater social good—some “social positive”—beyond the mere benefit it confers on litigants by resolving their present dispute. What, then, are the “social positives” allegedly gained, and the costs incurred, by subsidizing court use?¹⁶ The framework for answering that question is discussed below.¹⁷

B. An Evaluative Framework

Consider the hypothetical of the imaginary “widget bar.” The widget bar is the ultimate candy bar: sold at cost for only \$2.50, one widget bar satisfies a person’s nutritional needs for the day. But not only that—the widget bar, being green, also magically improves the environment as it is eaten, to the tune of \$2.00 in reduced pollution.¹⁸

13. Consideration of externalities occurs in a broad range of legal fields. *See, e.g.*, Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTEL. PROP. L. 1, 8–10 (2005) (intellectual property law); Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 986–93 (1996) (tort liability rules); Russell S. Jutlah, *Economic Theory and the Environment*, 12 VILL. ENVTL. L.J. 1, 11 (2001) (environmental economics and regulation); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 772–75 (1995) (corporate law).

14. *See generally* JOHN B. TAYLOR, *ECONOMICS* 421–24 (2d ed. 1998) (discussing subsidizing positive externalities and taxing negative externalities).

15. “Externality” is itself a pregnant term; the more narrowly it is defined, the less reason a subsidy is warranted and the more likely a given level of use is “overuse.” For example, under some modes of analysis, “unfairness” would not be considered a negative externality. *See, e.g.*, Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES L. 309, 314 (2008) (rejecting “soft externalities”); *cf.* Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 540 (1998) (noting that the definition of externality is unclear and can vary in breadth). To narrowly define externality unfairly minimizes the range of arguments to be made in favor of the status quo I criticize, and intellectual fairness requires not defining opposing arguments out of the debate. For this Article’s purposes, I use the term “externality” in the most expansive possible sense—namely any arguable societal benefit that falls on nonlitigants or society at large as a result of court use—so as to more thoroughly consider the arguments in favor of the status quo. The term I generally use for the foregoing is a “social positive.” For similar reasons, I do not use the term “public good” (although, of course, “positive externality” and “public good” themselves are distinguishable concepts).

16. *See supra* note 15.

17. *See infra* Parts I.B. & II.

18. Both widgets and pollution are favorite subjects of economists and legal scholars. Pollution makes sense, as it is the paradigmatic real world example of a negative externality (although here I am using an incidental pollution reducer as the generator of a positive

Because the widget bar reduces pollution, it makes sense to subsidize widget bar consumption by all eaters. Of course, because the widget bar is also capable of preventing starvation, subsidizing widget-bar consumption for the needy (i.e., those who would otherwise be unable to afford the widget bar) makes humanitarian sense, even if there were no pollution reduction component to the bar's consumption. Modern democratic societies do not let their citizens starve.¹⁹

Thus, we have different grounds for the widget-bar subsidy. In one case, subsidizing a certain type of consumption *activity* leads to the desirable social outcome of reduced pollution; in the other case, subsidizing a certain type of consuming *player* leads to the socially desirable outcome of no starvation. Through that analytical lens, we see that to the extent we can eliminate the subsidy when neither the targeted activity nor the target player is involved, society would be better off. For example, if the widget bar lost its pollution reduction abilities when used as an ingredient in mass-produced ice cream, ice cream manufacturers purchasing widget bars should not enjoy the subsidy.

The widget-bar subsidy example seems silly, and it is. But it crystallizes the contours of our inquiry into the judicial subsidy in a fertile way. To wit, the judicial subsidy as currently costed and conceived is totally undifferentiated; *all* civil court use by *all* players in *all* manner of cases is fully paid for by the state. That the net social positive for every type of court use is even theoretically equivalent in magnitude or kind seems doubtful. Consider: are the social positives associated with subsidizing a status conference (one type of court activity) the same as subsidizing a Supreme Court decision (another type of court activity)? Are the social positives associated with subsidizing contract disputes between public corporations (one type of litigant) the same as those associated with subsidizing a tort dispute involving a poor, elderly plaintiff (another type of litigant)?²⁰ Perhaps. But perhaps not.

A rational analysis of the subsidy—even to conclude that all parts of all cases by all litigants do in fact warrant subsidization—requires a multistep process. First, one must identify the various social positives attributable to public adjudication generally. Second, one must conceptually disaggregate the subsidy, to determine (i) which types of players and (ii) which types of court activities are, if subsidized, likely to lead to some or all of the social positives previously identified. Activities or players that generate little or no social positives should, in theory, not be subsidized.²¹ The answers

externality). See JOSEPH P. TOMAIN & JAMES E. HICKEY, JR. WITH SHEILA S. HOLLIS, *ENERGY LAW AND POLICY* 36–37 (1989) (noting that pollution is a traditional example of a harmful externality). The fascination with widgets is a mystery whose resolution, as they say, is beyond the scope of this Article.

19. See, e.g., HAROLD L. WILENSKY, *THE WELFARE STATE AND EQUALITY* 15–16 (1975) (explaining that developed countries have safety nets to prevent abject misery); Edward B. Foley, *Interpretation and Philosophy: Dworkin's Constitution*, 14 *CONST. COMMENT.* 151, 171 (1997) (“[N]o constitution worth defending would permit citizens to starve to death . . .”).

20. Cf. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 *STAN. L. REV.* 1275, 1296 (2005) (arguing that the public stake in product liability disputes is likely different than in business-to-business contract disputes).

21. In an admittedly very different setting—analyzing the relationship between morals and police power—Professor Richard Epstein cautioned against the error of “assum[ing] that the simple mention of a negative externality is sufficient to overwhelm . . . very large economic disruptions.” Richard A. Epstein, *Externalities Everywhere?: Morals and the Police Power*, 21 *HARV. J.L. & PUB. POL’Y* 61, 66 (1997) (emphasis in original). Here, I seek to avoid making an

to those two inquiries will drive the development of a feasible reform agenda. And so as to not divorce totally the theoretical analysis from reality (as tempting as that may be), we must also consider a practical question: if the subsidy were to be eliminated for some activities or players, how should the state determine what nonsubsidized players owe? Under the current system, the cost value of the subsidy received by any particular player cannot be accurately calculated. That should change, simply for reasons of transparency, but also because it is a prerequisite to charging a nonsubsidized player an amount corresponding to the public resources consumed.²²

II. JUSTIFYING THE SUBSIDY

That the state provides adjudicative services does not mean those services should be free (consider, for example, public transportation). However, if public judging is superior to private resolution of disputes (insofar as public judging has greater social benefits associated with it), then some level of subsidy for use of the former is warranted. The necessary preliminary inquiry, then, is: what social positives flow from public judging, when compared to private dispute resolution?

In my view, the relevant social positives fall into two categories: (1) “consonant” positives and (2) “consequentialist” positives. The latter encompasses at its core reasoning premised upon reasonably concrete “cost-benefit” type analysis, that is, where the aim is to ascertain the readily measurable desirable (“benefit”) and undesirable (“cost”) consequences of different world models, and compare the two. In contrast, “consonant” positives are those that are essentially nonconsequentialist, namely, arguments that rely upon *a priori* or fundamental perceptions of what is just, fair, or otherwise desirable to conclude that public judging is “consonant” with these first principles.²³ (A bit of explanatory semantics: the asserted social positives of public adjudication are simultaneously rationales for its provision, so I use “positive(s)” and “rationale(s)” interchangeably as context and grammar require.)

A. “Consonant” Positives

I begin with the consonant rationales, because they reflect, in my estimation, the most deep-seated attachment to the structure of the current system of public judging.

error in the other direction, by methodically not assuming that the mere mention of a social positive justifies an undifferentiated subsidy.

22. The cost value of the services consumed is not the only possible way to charge the player. For example, alternatives include a flat fee that represents the average subsidy per case, or a fee based on the amount of money in dispute. But I leave consideration of those possibilities (both their pluses and minuses) for another day. For ease of discussion, I use the cost-recovery model to imagine the appropriate usage fee.

23. Although consonant rationales can often be supported by consequentialist analysis, they acquire adherents not because of the strength of the proof that they are desirable in a cost-benefit sense, but for nonconsequentialist reasons. But certainly, the rationales offered in the literature can blur across my categories here, and the reader should not labor under the impression that I contend the category boundaries are lapidary. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 26 (rev. ed. 1999) (“All ethical doctrines worth our attention take consequences into account in judging rightness.”). Some level of fuzziness is not a problem, because the aim here is not to supply an unimpeachable or flawless categorization, but rather to use the categorization as a heuristic to assess the appeal of proposed changes to the current subsidy.

As mentioned, consonant rationales are nonconsequentialist justifications for public adjudication that rest upon the notion that public adjudication is “consonant” with a core intuition about how things are or should be *a priori*.²⁴ Consonant rationales largely arise from three loci: that public judging is consonant with (1) fundamental presumptions about the basic structure of any fair/just/moral society; (2) the healthy operation of a pluralistic, democratic society such as ours; or (3) humans’ neural wiring. The first two are so familiar as to require only brief recitation.

Perhaps the most popular justification for public judging rests upon core philosophical notions of what autonomous individuals expect from *any* fair society, namely, that the government will make accessible some impartial and reliable mechanism to protect their rights. In one familiar version of the argument, the expectation is Lockean: why would an individual enter into the social contract absent guarantees that he or she would have a forum in which to protect his or her rights and seek redress for violations thereof?²⁵ Another version is Rawlsian: if, beyond a veil of ignorance, one did not know one’s place in society, surely one would choose a society in which access to an impartial tribunal was available to all. Whatever the philosophical mechanism employed (e.g., social contract, veil of ignorance, etc.), the point is the same: that foundational principles require the state to provide all citizens with legal means to protect their rights.

A second consonant justification is that public adjudication is part and parcel of the healthy operation of pluralistic, constitutional democracies, such as those of the West.²⁶ Formal and public expression of the law encourages and promotes civic engagement, leading to a richer public life that benefits all citizens.²⁷ Permitting all citizens to participate in the expression of values that occurs in public legal proceedings enhances the dignity of the individual and strengthens the communal bounds of the body politic.²⁸ As Professor Owen M. Fiss famously put it, public adjudication in a

24. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977) (stating that a principle is a “standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”).

25. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); see also Albert Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1810 (1986) (describing the justification for public adjudication as partially Lockean and explaining that the vindication of rights is “an essential part of the sensed social compact”).

26. See, e.g., Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights, Part II*, 1974 DUKE L.J. 527, 533 n.20 (reasoning that the presence of the Constitution almost certainly implies a recognition of intrinsic rights, including a right to litigate, for “noninstrumentalist” reasons); Morris B. Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247, 250 (1972) (arguing that lack of access to courts is functionally similar to voter disenfranchisement).

27. See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 582 (1997) (noting that public adjudication “is the linchpin of a democratic scheme, reinforcing a multitude of democratic ideals”).

28. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995) (public expression of values constitutes Hegelian “objective spirit” of

constitutional democracy can often explain and identify the “values that define a society and give it its identity and inner coherence.”²⁹

A different type of consonant rationale can be extracted from research in behavioral psychology conducted over the past thirty years. Humans, it seems, are hardwired with a sense of “fairness.” In a famous experiment (called the Ultimatum Game, and repeated many times in different settings), a modest financial pot (e.g., \$10) is to be divided between two subjects.³⁰ One subject is given the right to make an offer on how to divide it up; the other subject is given the right to accept or reject the offer.³¹ Because there is no repeat play, it makes rational sense for the first subject to make a final offer of \$0.01 to the second subject. That would make the first player better off by \$9.99 and the second player better off by \$0.01—which is better for both players than the alternative of the second player rejecting the deal. With no possibility of repeat play, there is nothing to be gained by rejecting this deal and then treating the offeror accordingly in the future. Yet rejection rates increase the further away the offeror gets from a 50/50 split.³² One conclusion (although not a necessary one) is that humans are hardwired to reject treatment perceived as “unfair.”³³ I do not pick sides in the debate;

community); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I*, 1973 DUKE L.J. 1153, 1175 (dignity values); Reuben, *supra* note 27, at 582.

29. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982) (discussing constitutional decisions); *see also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*] (explaining that the courts have a duty not only to resolve disputes, but also to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 968 (1992) (arguing that the Supreme Court’s function in part is to “recall values, commitments, or ideals which people have somehow neglected, and to cause people to honor these values in their actions”).

30. *See generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489–97 (1998) (discussing the ultimatum game and the “fairness” behaviors of test subjects).

31. *Id.* at 1489–90.

32. Joseph Henrich, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, Herbert Gintis, Richard McElreath, Michael Alvard, Abigail Barr, Jean Ensminger, Natalie Smith Henrich, Kim Hill, Francisco Gil-White, Michael Gurven, Frank W. Marlowe, John Q. Patton & David Tracer, “Economic Man” in *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. & BRAIN SCI. 795, 798 (2005) (explaining that, in experiments performed with student populations, the most common offer was 50% and offers below 20% were rejected half the time).

33. In studies of neural activity during the ultimatum game, brain areas believed to be correlated with negative emotional states showed greater activity for unfair (i.e., not 50/50) offers. *See generally* Alan G. Sanfey, James K. Rilling, Jessica A. Aronson, Leigh E. Nystrom & Jonathan D. Cohen, *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755 (2003). *See also* Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 441–42 (2005) (noting that ultimatum game research “suggests that an intrinsic sense of fairness, albeit quantitatively tuned by cultural norms, is part of our evolutionary heritage”); Kent Greenfield & Peter C. Kostant, *An Experimental Test of Fairness Under Agency and Profit-Maximization Constraints (With Notes on Implications for Corporate Governance)*, 71 GEO. WASH. L. REV. 983, 990 (2003) (explaining that ultimatum-game bargaining experiments “have been used as evidence of the

I merely suggest that some may quite credibly conclude that, in some meaningful way, “fairness” is ingrained (and/or readily imprinted via culturalization) in human perceptions. Observers who draw that conclusion may therefore believe that to have a system widely perceived as unfair (e.g., if the courthouse doors were closed to those less fortunate) would result in widespread cognitive discord and be per se undesirable.³⁴

B. “Consequentialist” Positives

Rule making. The most obvious social positive associated with public adjudication is rule making, namely, rule creation, dissemination, and enforcement.³⁵ That is, litigation does not merely resolve the dispute between the parties; it results in state-enforced damage and liability rules that govern future conduct.³⁶ There are three important ways in which public judging—through rule making—can confer benefits on society at large: (1) by creating and enforcing binding rules; (2) by creating widely-knowable and applied rules; and (3) by creating better rules.

First, public adjudication creates and enforces rules that bind other players who are subject (voluntarily or involuntarily) to the power of the state. Purely private adjudications, to the extent that they result in rules at all, lack state-backed binding power on other players (although violating non-state rules can and does have reputational consequences, which can be significant). Accordingly, public rules have a

importance of fairness considerations in legal fields such as contracts, negotiations, property, products liability, corporate bankruptcy, and corporate governance”).

34. This could easily be categorized as a consequentialist rationale, insofar as the primary objective is to avoid the consequence of widespread cognitive discord and unhappiness among societal members. But I have left it in the consonant rationales because the argument orbits around a perceived fundamental quality of human beings.

35. See, e.g., Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 227 (1999) (describing court opinions as public goods); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 662 (1997) (arguing that precedent has public value and thus litigation deserves some level of subsidization); Edward Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916, 933 (1985) (reviewing JAMES S. KAKALIK & ABBY EISENSHTAT ROBYN, RAND INST. FOR CIVIL JUSTICE, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES (1982)) (explaining that society subsidizes civil litigation because of the “immense social value” of case law).

36. See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). Landes and Posner conclude, among other things, that adjudication serves two roles—dispute resolution and rule formation (precedent)—and that private markets are likely to inadequately compensate judges and litigants for the latter. *Id.* at 241–42. Accordingly, “[t]he precedent-creating function of adjudication . . . may invite public intervention in the judicial-services market.” *Id.* at 242. Judge Posner nonetheless later concluded, in 1985, that the federal courts were overloaded, and he proposed several means to decrease federal filings, including increasing jurisdictional requirements and monolithically increasing filing fees (to some unspecified level) for all litigants except indigents, to drive disputants into state court. See POSNER, *supra* note 2, at 130–36. But see Martin D. Beier, Comment, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1175–76 (1990) (criticizing increased filing fees as a method to divert cases into state courts).

greater deterrent effect.³⁷ When faced with state rules governing conduct and loss allocation, rational actors face a steeper price for rule breaking. Such is a net benefit because it prevents some additional quantum of costly injuries and disputes from ever occurring,³⁸ that saves society injury costs suffered by the victim and litigation costs borne by the disputants and the state.

Second, public adjudication, by way of written and openly available decisions, creates widely knowable and routinely applied rules of conduct and loss-allocation.³⁹ Such obviously enhances the deterrent effect of a binding rule in the first instance (by increasing the chance that a given player will know of the binding rule and avoid the harm-causing conduct). Thus, one consequentialist justification for requiring a public record of the decision and its reasoning (e.g., a written opinion) is so that a rule (or a new application of a rule) can effectively propagate throughout society and create the maximum deterrence benefit. Star chambers are not only dangerously unfair to litigants, they also starve adjudication of a critical deterrence function associated with public decisions. Of course, not all public decisions with equal information penetration have the same deterrence value; deterrence benefits are strongest when the adjudications in question concern new liability or damage rules, or are applications of existing rules to factual situations whose treatment was previously unclear. In those cases the mass of affected conduct is larger.

Known and applied rules resulting from public judging have the additional salutary effect of serving as guidance for private actors attempting to cheaply resolve recent, nascent, or potential disputes. By dint of private ordering in the “shadow of the law,” disputes that might otherwise consume significant resources can be resolved more quickly through private remediation in whole or in part.⁴⁰ Public decisions do more than deter wrongful conduct in the first instance; they permit private actors negotiating over already-occurred or yet-to-occur conduct with uncertain liability or damages

37. See, e.g., Alschuler, *supra* note 25, at 1814 (“[R]ules can be efficient only when they are enforced.”); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1114 (“[A] private market will supply an optimal amount of dispute resolution, but not an optimal amount of dispute avoidance.”).

38. Importantly, the deterrent effect on behavior is not entirely caused by fear of explicit sanction; public expression of the law can have positive consequential effects through the influence such expression has on the changing or strengthening of norms. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1382 (1994) (noting that beyond fear of sanctions, the “law may change behavior by influencing estimations of the correctness or feasibility of various sorts of behavior”). See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (arguing that the law influences social norms).

39. Cf. MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* 6 (2003) (taking the position that “legal facts and legal judgments are only meaningful and effective within a network, one that connects legal decisions and statutes” and that also includes a real-world infrastructure).

40. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (explaining that a key aim of divorce law is to guide private ordering); see also McAdams, *supra* note 37, at 1100 (offering a new theory of “adjudicative expression” which holds that in some circumstances “there will be some compliance with adjudication even without the threat of sanctions or legitimacy”).

consequences to mutually allocate responsibility and risk based on the existing public rules.⁴¹

Third, public adjudication can improve rule quality; that is, it can create new rules that result in greater total social benefit (however it is measured) than older (or absent) judicial rules or rules created (or not created) through legislative means.⁴² Rule-making duties and powers are shared between the legislature and the judiciary (although the ideal division of that authority is hotly and endlessly debated⁴³). Thus, intentionally or not, public judging can result in the creation or modification of legal rules that will increase overall social welfare.⁴⁴ This is not limited to constitutional decisions; common law rule formation or statutory interpretation can serve the same function.⁴⁵ There are many reasons why a legislative body may not pass rules with a net positive societal effect—political paralysis, interest group capture, or a conscious decision to leave certain rule-making prerogatives to judges. That in every case but constitutional

41. Cf. Mnookin & Kornhauser, *supra* note 40. Obviously private ordering in the shadow of unclear rules deprives society of the externality associated with litigating to conclusion and getting a clearer rule. But private ordering is presumably more likely the more clear and applicable a given rule is; that is, private ordering is more likely when the externality from adjudicative resolution is likely to be smaller. That is not always the case, however, and several scholars have complained of the public loss associated with private settlement of disputes, most notably Professor Fiss. See Fiss, *Against Settlement*, *supra* note 29, at 1085 (decrying overenthusiastic embrace of settlement and alternate dispute resolution); see also Luban, *supra* note 28, at 2622 (urging caution in embracing settlement as resolution for disputes in part because settlements, like private adjudications, produce no binding precedents); cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426 n.195 (1982) (“[T]o the extent that civil lawsuits enforce public norms, settlement of some claims may be more ‘expensive’ for the public”).

42. This is different than a deterrent effect. The deterrent effect is the net benefit gained from actors more often *following* a desirable rule (compared to less rule compliance); the social change effect is the net benefit gained from *moving* to a more desirable rule from a less desirable rule, assuming both rules were followed.

43. See, e.g., Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (asking why, if “any first year law student knows that judges make law constantly,” Chief Justice John Roberts and other sophisticated players insist on the pretense that judges are mere “umpires” who do not make the law).

44. Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307–10 (1976) (explaining the difference between the private dispute resolution and the public law models of the courts, and discussing reasons why courts are advantaged, in some circumstances, for producing desirable prospective rules). Scholars have recognized that courts may be better positioned than legislatures to account for and weigh the preferences of otherwise disadvantaged individuals and groups. See, e.g., J. Woodford Howard, Jr., *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339, 345–46 (1969) (explaining that courts are attractive forums for politically weaker players).

45. But constitutional rule making is the most obvious example. See, e.g., Fiss, *Against Settlement*, *supra* note 29, at 1089 (describing *Brown v. Board of Education*, 347 U.S. 483 (1954), as a decision where “judicial power is used to eradicate the caste structure”).

ones the legislature reserves the power to change judicially formed rules does not mean judicial rule making cannot result in interim or permanent net positives for society.⁴⁶

Preferable dispute resolution mechanism. Apart from rule making, a distinct consequentialist justification for public adjudication is that it avoids the diffuse but significant social negatives associated with forcing players into “self-help.” Put differently, providing relief to the injured (via damages) or the to-be-injured (via injunctive relief) through a public, impartial process that is subject to fixed evidentiary rules and intended to be “fair” to both parties is a superior means of redressing harms than the alternatives, which have significant social costs.⁴⁷

Accessible public judging reduces the likelihood that an aggrieved party will engage in undesirable efforts to self-remediate, such as injuring the claimed defendant through physical violence, engaging in theft, practicing economic vigilantism (e.g., offsetting the claimed debt against obligations otherwise not in dispute), or initiating a reputational attack. Self-help can have considerable collateral damage and is in any event likely only by coincidence to constitute the socially optimal level of deterrence or result in the proper level of compensation (if any) for the victim.⁴⁸

Parties lacking the capacity or desire to engage in self-help (who resign themselves to “lumping”⁴⁹ the injury), may develop antisocial attitudes that contribute to a general sense of noncooperativeness and refusal to abide by societal norms and the law.⁵⁰ Society is lubricated by trust and internalized norms of conduct; actors do not expect that they need monitor other players 100% of the time and thus do not do so.⁵¹ Part of this is because all players expect that public adjudication will be available to resolve disputes and redress injury. If public adjudication is unavailable, the benefits society at

46. See Luban, *supra* note 28, at 2636. “[E]nunciation of a legal rule by a court generates a provisional resting point—provisional, because political forces can repeal a statute or undo a legal rule, but a resting point nonetheless.” *Id.* Of course, judicial rule making can result in undesirable rules as well. See *infra* Part II.C.

47. See *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). “The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.” *Id.*

48. See *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070–71 (1985) (Stevens, J., concurring). “The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help.” *Id.*

49. Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14 (1983) (defining “lumping it” as resigned acceptance of the injured party that no worthwhile remedy can be pursued).

50. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (legal compliance more likely when players perceive legal system as fair). See also Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 714–17 (2000) (describing role of internalized norms and morals on behavior).

51. As the second Justice Harlan memorably put it: “[W]ith the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.” *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

large experiences from having players who generally follow the rules will be lessened.⁵²

C. Counterarguments

Of course, as should be obvious, counterarguments to both types of rationales abound. One can disagree about whether fundamental notions of fairness, deliberative democracy, and humans' hardwiring are correct, or that they are relevant at all.⁵³ As for consequentialist rationales, one can believe that rules derived from particular cases may have uncertain application at large and thus have the wrong deterrent effect; that the court system may be so costly that it is an inferior dispute resolution system compared to informal reputational policing or private resolution; and/or that the social change effected by litigation is often undesirable.⁵⁴ If these criticisms were on balance correct, there would be reason not to subsidize court use at all or even to abolish in large part the civil justice system.⁵⁵ But I do not subscribe to that view. I believe that, even accepting that the listed positives have some degree of merit, a monolithic subsidy may nonetheless be unnecessary.⁵⁶ Prior to the consideration of reform,

52. Moreover, widespread perception that significant portions of society lack or have grossly unequal access to a crucial good or service increases the likelihood of massive political change, whether it be accomplished peacefully or, in less stable systems, through insurrection. For example, several scholars trace the introduction of social health insurance in Germany to Otto van Bismarck's fear that, absent such measures, the German government would face revolution. *See, e.g.,* José Brunner, *Trauma in Court: Medico-Legal Dialectics in the Late Nineteenth-Century German Discourse on Nervous Injuries*, 4 THEORETICAL INQUIRIES L. 697, 707 (2003) (attributing Bismarck's extensive social insurance policies to a desire "to stem the rise of socialism by means of laws intended to curb the frustration and dissatisfaction of workers"). If a critical good or service is functionally available only to those inside the castle walls or rich enough to bribe their way in, the risk that those walls will be knocked down increases. *See also* Luban, *supra* note 28, at 2627 ("Lawmaking is in one sense the antithesis of revolutionary politics . . .").

53. *See generally* Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001) (arguing that "fairness" concerns should be afforded no evaluative importance in constructing legal policy); Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63 (1999). For one of the many responses to Kaplow and Shavell, see Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 1993 (2002) (reviewing LOUIS KAPLOW & STEVEN SHAPELL, *FAIRNESS VERSUS WELFARE* (2002)) (arguing that "notions of justice and fairness have a legitimate and probably inevitable place in the making of legal policy").

54. *See, e.g.,* Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982) (arguing that undesirable common law rules will result from strategic play by aggressive litigants).

55. *See, e.g.,* John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 199 (claiming that "a truly free society requires liberating the law from state control to allow for the development of a market for law"); *cf.* Keith N. Hylton, *Fee Shifting and Incentives To Comply with the Law*, 46 VAND. L. REV. 1069, 1076 (1993) (suggesting that some arguments in favor of subsidization rest upon uncertain foundations).

56. *See infra* Part IV.

however, one must examine the state of the current subsidy and explore measurement metrics that, moving forward, will increase the subsidy's transparency and make intelligible the possibility of a differentiated subsidy.

III. COSTING AND MEASURING THE SUBSIDY

Surprisingly, the subsidy is, in even the grossest terms, poorly measured. An obvious obstacle to convenient measurement is the federalist nature of the American justice system; no aggregate number reflecting the total expenditures for all the nation's distinct judicial systems is readily available.⁵⁷ Each sovereign categorizes its expenditures differently (for example, some do not include capital expenditures in the judicial budget),⁵⁸ and, in any event, adding up court-related expenditures from each overstates the subsidy to the extent civil justice expenditures (compared to criminal) are not separately itemized.⁵⁹ A fair estimate is that the subsidy runs, in cost terms (rather than the benefit conferred), in the tens of billions of dollars annually.

Yet total expenditure numbers are of very limited use for evaluative and reform purposes. As explored below, the subsidy is not time-tracked or cost-unitized in a way that renders it transparent or readily susceptible to disaggregation along lines that would be useful in evaluating the level of social positive flowing from the subsidization of certain court activities or litigants.⁶⁰ Moreover, to the extent the subsidy should be abolished for some players in some cases,⁶¹ accurate measurement of the subsidy would be necessary to determine what they owe.

57. The federal government's expenditure is the largest, and California's is the largest of the states. In 2008, the federal judiciary received an appropriation of \$6.2 billion. JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2008). California's proposed judicial budget for 2009 was approximately \$4.0 billion. *Welcome to California's Governor's Budget for 2009–2010*, <http://2009-10.archives.ebudget.ca.gov/StateAgencyBudgets/0010/agency.html>. The federal court system deals only with a small number of the overall claims filed. For example, in 2002 there were 97,887,356 actions filed in state courts and 1,835,412 actions filed in federal district courts. James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 296 (2006).

58. See, e.g., ADMIN. OFFICE OF THE PA. COURTS, *Court Finances—Fiscal Year 2006–2007*, in ANNUAL REPORT 2007 at 93, 95 tbl.4.1 (capital expenditures not included), available at <http://www.aopc.org/NR/rdonlyres/C28B66E2-694F-4CA0-8ADB-67436322A7E5/0/26finance06.pdf>.

59. Most activity in the nation's court system is civil. See, e.g., STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, 2004 JUDICIAL BUSINESS: ANNUAL REPORT OF THE DIRECTOR, LEONIDAS RALPH MECHAM 11 (2004) (286,053 pending civil cases and 65,619 criminal cases in 2004, with similar ratios in earlier years).

60. In discussing the civil justice system generally, scholars have bemoaned the lack of granular data regarding its usage. See, e.g., Hadfield, *supra* note 20, at 1281 (suggesting we know more about “on-base averages of baseball players in the nineteenth century than we do about our civil justice system”); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 38 (discussing disaggregative shortcomings in current system).

61. See *infra* Part IV.

A. Cost-Minute Accounting

The judicial subsidy is not currently unitized in a way that reveals useful information about where the subsidy is going. For example, federal and state courts track the number of cases pending, so calculating the average subsidy per case can be readily performed: simply determine the aggregate court expenditure for a year and divide by the number of cases in the courts that year. The average subsidy per litigant could similarly be computed. Yet both numbers would be of severely limited value as evaluative metrics. The judicial subsidy is not paid out on a per-average-case or per-average-litigant basis; what is subsidized for each case and each litigant is court time actually consumed.⁶² The relevant unit of consumption and cost is time.⁶³

Court personnel's time can be monetized straightforwardly: for each case, the time a court employee (including a judge) spends on the case is measurable via time tracking, which can be monetized by multiplying minutes expended by the staffer's compensation rate. For example, if the judge's annual compensation is X, and the judge has Y work minutes (or whatever temporal unit) in a year, then one can arrive at an X/Y dollars-per-minute cost-value of the judge's time, and the value of the "judge subsidy" for a given case.⁶⁴ Similar calculations can be performed with the time of other court personnel. The result would be useful labor-compartmentalized cost-minute measurements of the subsidy—for district judge use, magistrate judge use, staff attorney use, law clerk use, etc.⁶⁵ Nor is cost-minute accounting's applicability limited

62. In other words, litigants effectively receive a transfer payment worth the cost value of the court's time.

63. For case-weighting purposes, the Federal Judicial Center undertook a study to determine the average time, in (noncosted) minutes, that federal district court judges spend on particular cases (and specified events within the case). See PATRICIA LOMBARD & CAROL KRAFKA, 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY (2005), available at <http://www.fjc.gov/public/home.nsf/pages/665> [hereinafter FEDERAL CASE-WEIGHTING STUDY]. Of the previous ten federal weighting studies done, the 2003–2004 study was the first to estimate minutes per court event. *Id.* at 9.

64. Average cost-minute estimates were used in two private studies of the costs of the civil justice systems of the federal government and of California, Washington, and Florida in the 1980s. See JAMES S. KAKALIK & ABBY EISENSHTAT ROBYN, RAND INST. FOR CIVIL JUSTICE, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES (1982) [hereinafter RAND TORT STUDY]; JAMES S. KAKALIK & R.L. ROSS, RAND INST. FOR CIVIL JUSTICE, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES (1983) [hereinafter RAND CIVIL STUDY]. Minutes consumed were estimated based on surveys and interviews, and costing was done per "judge package," that is, including the judge and all his or her support staff. RAND CIVIL STUDY, *supra* at vi–ix; RAND TORT STUDY, *supra* at viii–xii. No distinction was made between judges, magistrates, staff attorneys, or law clerks; the judge's cost minute included those other costs. RAND CIVIL STUDY, *supra* at ix–xi; RAND TORT STUDY, *supra* at xii. Assuming the judge is the most highly compensated employee, this calculation overstates the subsidy given in "judge-light" cases where most of the work was done by nonjudge personnel, and understates the subsidy in "judge-heavy" cases where most of the work was done by the judge. Nonetheless, the studies confirm the descriptive usefulness of the cost-minute metric.

65. Some have praised the role of the modern law clerk, see, e.g., *Making the Case for Law Clerks: An Interview with Judge Alex Kozinski*, 3 LONG TERM VIEW 55 (1995), while others

to personnel. Cost-minutes (including amortized capital expenditures) associated with courthouse use can be similarly determined.

Cost-minute tracking is a powerful practical and theoretical tool that permits measurement of the cost of the subsidy in a transparent and easily disaggregable way. Cost-minute tracking would quickly reveal the cost-minutes consumed per individual case and could fairly easily show the cost-minutes consumed per case event. In addition, because the subject matter of cases filed in the federal system and in most state systems is already reliably recorded, cost-minute accounting could be used to determine the subject matter cost-minutes that a particular court (or circuit, division, or department) devotes to different types of cases (e.g., antitrust versus asbestos cases).

Indeed, were cost-minutes tracked for events within each case (conferences, non-dispositive motions, dispositive motions, trials, etc.), information about the actual public cost of different components of the dispute resolution process would be readily obtainable.⁶⁶ For example, the *2003–2004 Federal Case-Weighting Study* (the first federal weighting study to formally estimate time per case event) supplied estimates of the average time consumed by pretrial events, such as dispositive motion resolution, and included in its estimates judicial time spent outside of the courtroom (reading briefs, doing legal research, drafting opinions) in particular types of cases.⁶⁷ Such granularity in measurement is a far better indicator of where subsidy dollars are going than is merely recording and collecting the number of case filings of a particular subject-matter type.⁶⁸

B. The Desirability of Measurement

Robust cost-minute measurement is not currently done on an ongoing basis.⁶⁹ Only a handful of academic or administrative studies have been done on the topic, and those

have expressed worry, *see, e.g.*, Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Law Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007). The debate would no doubt benefit from having a robust and actual measurement of law clerk activity.

66. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 107 n.3 (1994) (noting that the RAND CIVIL STUDY, *supra* note 64, which estimated cost per case event, showed that notwithstanding the infrequency of trials, roughly half of the aggregated court expenditure was for trials).

67. *See* FEDERAL CASE-WEIGHTING STUDY, *supra* note 63, at 13–14.

68. *See id.* at 60–62. There were far fewer antitrust cases (751) than asbestos cases (13,402), yet because antitrust cases required more judge time than asbestos cases (1520 to 54 average minutes), antitrust cases—and thus antitrust litigants—absorbed a larger percentage of the federal judicial subsidy. *Id.* One side benefit to policy makers in keeping ongoing track of cost minutes per case per subject matter is that it will give rule makers a sense of the adjudicative costs or savings associated with modifying the underlying law in a given subject area. For example, tort reform saves less (in judicial subsidy terms) when it bars suits which, on average, consume only modest amounts of judicial resources.

69. *See* David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 120 n.83 (1983) (“Assessing what a case costs the public is notoriously difficult.”). Cost-minute tracking would make it considerably easier. For a very rough guess at today’s average court costs, we can take the RAND cost estimates and simply adjust them for inflation. For example, the RAND estimate for the average expenditure per federal tort case was \$1740 in 1982. RAND TORT STUDY, *supra* note 64, at xxi. In 2009 dollars that would be \$3807.14. Bureau of Labor Statistics, Consumer

(although thoughtfully done) were significantly limited in scope.⁷⁰ Whatever the reasons as to why the judicial subsidy has not been measured with precision in the past, none are sufficiently persuasive to justify inadequate measurement of the subsidy moving forward.⁷¹

When the assumption is that the subsidy should be monolithic, there is little incentive to measure cost-minutes, other than for reasons of transparency. That is, if the subsidy is unfailingly paid out, why incur the trouble of calculating it for each litigant? The only rationale in that case would be transparency. But to the extent the subsidy is not monolithic and some court use should not be subsidized, measurement makes operative sense, because it constitutes the “bill” for the non-subsidized litigant. As for subsidized activities and litigants, it is desirable to track cost-minutes to

Price Index Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (the “Inflation Calculator” was used to generate all estimates of 2009 dollar values in this footnote). For “contracts and other civil complaints,” the average cost was \$1890. RAND CIVIL STUDY, *supra* note 64, at xvii. In 2009 dollars that would be \$4135.34. Average costs were lower in state courts. *Id.*

Combining the RAND cost-minute numbers and the *Federal Case-Weighting Study* average minutes per case of a given subject matter is another very rough method of guessing at today’s court costs. In 1982, RAND’s calculation of a cost minute for a federal district court judge (including all support staff) was \$9.41. RAND CIVIL STUDY, *supra* note 64, at x; RAND TORT STUDY, *supra* note 64, at xiv. Again assuming (likely wrongly) for the sake of argument that the only difference as to 2009’s cost minute is inflation, then value of a “judge plus staff” cost minute today would be \$20.59. The average judge minutes (not inclusive of other personnel’s time) per case in various subject areas was set forth in the *Federal Case-Weighting Study*. *Supra* note 63, at 60–62.

So, although the cost and time numbers need to be adjusted accordingly (to reflect proper weighing of nonjudge time), using the unadjusted numbers, one can arrive at rough, ballpark numbers for the average cost per federal case of a given type, namely, \$20.59 times estimated minutes per case of a given subject matter. Using that formula, the average cost numbers look higher than simply inflation adjusting the RAND numbers. For the average federal civil case terminated in 2002 (the data set of the weighting study), the cost would be approximately \$9300 (\$20.59 times all judge minutes divided by cases terminated). Regarding particular subject matter: the average approximate cost of an insurance contract dispute is \$12,700; a personal injury dispute, \$8200; an ERISA dispute, \$7600; and an asbestos dispute, \$1100 (according to my own calculations). Average numbers are of course misleading because trials are by far the most time consuming (and thus costly) event. *See* FEDERAL CASE-WEIGHTING STUDY, *supra* note 63, at app. Q (breaking down average estimated time per case event in different subject areas). But trials only happen in a small percentage of cases. *See, e.g.*, RAND CIVIL STUDY, *supra* note 64, at xiii (finding that trials occur very infrequently); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256–60 (2005) (concluding that trials are rare).

70. *See supra* Part III.A.

71. A concern that time tracking is an unacceptable practical burden (as opposed to an invasion into judicial deliberations) seems overblown. Technological advances make the recording and collection of such data far less onerous than in days past; after all, private lawyers do it all the time. Nobody *likes* to time track. But doing so here is a public service, and to the extent it assists in recouping some of the judicial subsidy, the additional effort pays for itself. That is, for those who fear time spent recording time will be time not spent adjudicating, recaptured subsidies can be used to hire additional judges, increasing the overall judge minutes available.

determine whether a particular category of activity or litigant is worth the cost of the subsidy.

An objection that could have force even in a partial-subsidy world might be that precise measurement—where court staff keeps track of time on a per-event, per-case basis—might constitute an undue invasion of the privacy of judicial deliberation. Put differently, if judges are concerned that the amount of time they spend on a particular case, or a particular element of a case, is discoverable, then fear of criticism—that a judge spent too much or too little time on a particular thing—may undermine judicial competence and result in judging to avoid criticism, rather than judging to reach the right result. Because judicial decisions are public, however, one would not expect that criticism related to time expended would materially outweigh criticism of the result, and the latter will occur in any event. Judges are well aware their substantive rulings will be watched and criticized; an additional amount of time-based criticism seems unlikely to negatively affect judicial conduct.

Lack of transparent, robust measurement has no doubt been in part attributable to reflexive internalization of the consonant rationales.⁷² Put another way, there is likely a deep-seated, intuitive conviction among Americans that to charge user fees of any type for court access is “unjust.”⁷³ Under that view, measurement serves little apparent purpose.

While this may explain the past lack of measurement, it does not constitute an argument against accurate measurement moving forward. First, accurate cost measurement is not an argument against the current subsidy; as mentioned, simply for transparency reasons, it would be desirable to track with precision how a public resource is being utilized.⁷⁴ But more importantly, while attitudes may well be settled regarding the fundamental opposition to some types of user fees (i.e., fees for indigents), I doubt, if pressed, that all observers would be inimically opposed to the possibility of *certain* court usage fees. It is understandable to resist accurate costing (given the effort it requires) when the apparent choice is binary—either the status quo monolithic subsidy or a pure user-pays alternative—particularly when the second option is considered to be per se unacceptable. Yet the choice is not binary; there is an enormous amount of cognitive space between a complete subsidy and no subsidy. Accurate costing permits us to knowledgeably explore the middle ground of a differentiated subsidy.

Of course, costing is only half the story; the other half is disaggregation by relevant variable, that is, to select variables that are correlative with the existence or level of social positives and imagine possible adjustments to the subsidy. To that I turn my attention next.

72. See *supra* Part II.A.

73. See Brunet, *supra* note 35, at 930–31 (noting that some oppose measurement on the ground that “‘justice’ should not be quantified or measured”).

74. Transparency in government action and expenditure, happily, is a concern of both the current President and Congress. See Memorandum on Transparency and Open Government from Barack Obama, President of the United States, to the Heads of Executive Departments and Agencies (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/transparencyandopengovernment/; Damian Paletta & Michael R. Crittenden, *TARP Oversight Panel Urges Transparency, Accountability*, WALL ST. J., Jan. 10, 2009, <http://online.wsj.com/article/SB123151863031268319.html>.

IV. REIMAGINING THE JUDICIAL SUBSIDY

Given the severe undermeasurement of the subsidy as it is currently constituted, “shovel-ready” proposals of reform are premature. At a minimum, more accurate measurement and additional empirical research must occur.⁷⁵ Nonetheless, consideration of potential reform and an analytical roadmap thereto can aid in the development of a reform and research agenda.

Logically, resistance to eliminating the subsidy rests upon some combination of the consonant and consequential rationales, namely that (1) it is fundamentally “wrong” to charge for court usage costs because it conflicts with fundamental notions about fairness, human nature, or the ideal operation of a democratic society,⁷⁶ and/or (2) it is consequentially undesirable because court usage fees will prevent some suits from being litigated that, had they been pursued, would have generated a net increase in overall social welfare.⁷⁷

Surely, consonant and consequentialist objections persuasively demonstrate the undesirability of the polar opposite of the status quo, namely, the monolithic user-fee model, where every player in every case must pay court usage fees.⁷⁸ (Indeed, because of the consonant rationales alone, one can comfortably predict that no pure user-pays model will ever get serious consideration.) However, both consonant and consequentialist concerns have less force in a user-fee model that is differentiated, such as one that is responsive to the nature of the players, the nature of the court action being subsidized, and the respective “fault” of the parties for court costs.⁷⁹ Put another way, the different subsidy rationales almost certainly attach with significant force only to certain types of activities and certain types of players. With a bit of conceptual disaggregation—by asking, does subsidizing court activity with characteristic X, or litigant with characteristic Y, result in significant social positives, or alternatively, does

75. Ideally, policy makers will pay attention. But that is not always so. As Professors Clermont and Eisenberg noted with classic resigned understatement: “There is a demand-side problem as well as a supply-side problem with empirical studies: almost nobody in power pays attention to the few studies that do exist.” Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 135 (2002) (discussing data in connection with discovery reform).

76. See *supra* Part II.A.

77. See *supra* Part II.B. Certainly, administrative concerns about a differentiated subsidy (concerns that may also trigger or aggravate consonant or consequentialist worries) are ultimately relevant. But my limited aim here is to focus on addressing theoretical concerns, which, in my view, analytically precede (but certainly do not moot) administrative concerns.

78. *But cf.* Rex E. Lee, Address, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267 (1985) (urging consideration of a pure user-pays model, with skepticism toward even an exception for the indigent). Consonant rationales likewise operate with great force against proposals to simply increase filing fees significantly (a straightforward and undifferentiated reduction of the subsidy), which would by definition threaten access for the disadvantaged.

79. Indeed, regarding the question of which actors should bear attorneys’ fees—specifically, whether losers should subsidize or “indemnify” some or all of the winners’ fees—it was long ago noted that perhaps in “certain classes of cases” the loser should bear costs. See Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 27 (1969). Conceptual differentiation could similarly be applied to the judicial subsidy.

not subsidizing activity X or player Y deprive us of social positives?—one can begin to construct a differentiated subsidy that fairly separates court use that should be subsidized from court use that should not.

Filtering the consonant and consequentialist rationales through the evaluative heuristic developed herein, I propose considering the following differentiated subsidy. Imagine that first, upon case termination, each litigant would be obligated to pay one-half of the court usage costs.⁸⁰ Second, to ensure court access, a generous “access” subsidy would be extended to a significant percentage of litigants.⁸¹ Third, to encourage the consequentialist positive of rule making and the consonant positive of value expression, cost minutes related to appellate court use would be fully subsidized.⁸² Fourth, a retributive “loser-pays” tax—where a losing litigant must pay the court usage costs of both litigants, except when either of the two foregoing exemptions apply to the loser—would be levied.⁸³ Under this model, a material portion of the current subsidy might be recaptured, without significantly frustrating the social positives that result from public adjudication.

A. A Generous Access Subsidy

Satisfying consonant and consequentialist concerns. The deep intuitive appeal of the consonant rationales, the richness with which they have been historically expressed, and the firmness with which they are attached to the modern America perception of itself cannot be understated. But I believe current thinking confuses depth with breadth. Without marginalizing the power of the consonant rationales, in practical terms it seems the primary consonant fear of subsidy elimination is that such would result in a denial of court *access* to disadvantaged members of society. That, clearly, is an unacceptable negative. But to functionally deny a poor person court access because he or she cannot pay court usage costs is a very different matter than to require one who *can* truly afford court costs to bear them. In the latter case, court access becomes a matter of choice, and a player’s *real* choice to pay or to not pay costs does not offend our fundamental presumptions about how the world should be.

From the consequentialist perspective, an access subsidy similarly achieves the social positive of avoiding destructive self-help—which is perhaps the central negative consequence of a denial of courthouse access. Financially disadvantaged players are those who are most likely to engage in violent self-help, or to develop attitudes inconsistent with the social norms largely responsible for the peaceful and reasonably orderly interactions of daily life.⁸⁴ A closed courthouse door for the disadvantaged may

80. In cases involving more than two parties, usage costs would be prorated per side. For ease of discussion, I assume two litigants per case. In the event of settlement, each party would owe half of the court usage costs, subject to the exemptions discussed here; for example, a wholly subsidized “access” litigant would not owe any court usage costs in the case of settlement.

81. See *infra* Part IV.A.

82. See *infra* Part IV.B.

83. See *infra* Part IV.C. The retributive tax does not apply if a case settles.

84. Wealthier players are more likely to be able to pursue peaceful means of remediation; for example, even absent a legal remedy, a manufacturer may lawfully threaten to withhold future business from a supplier unless a dispute is resolved favorably. Wealthier players also

lead to either undesirable forms of self-help or alienation. Asking those who can afford to pay usage costs to do so is far less likely to have such an effect.

The case of court filing fees is illustrative. Filing fees are a near universal requirement, with frequent exception for indigents.⁸⁵ We accept filing fees, and the indigent exception, because the imposition of filing fees upon those who *can* afford them does not undermine the consonant social positives of justice, democracy, and innate fairness, or the consequentialist positive of avoiding self-help, because access is not threatened.⁸⁶ So too should it be with court usage costs. By subsidizing needy players, we would ensure access—preserving the consonant and consequentialist social positives—but still reduce the overall cost of the subsidy, as some players will require no access assistance.

Constructing the subsidy. The first step in thinking about the size and form of an access subsidy for certain players is to identify the problems an access subsidy is expected to remedy. Access denials arise in a user-pays model for two primary reasons: (1) risk aversion and (2) illiquidity.⁸⁷ Using the expected-value model of litigation, both can be stated succinctly.

Risk-averse players are those who are *not* indifferent to the uncertainty around an expected value. In the litigation context, risk-averse players are those who will not pursue litigation with a positive expected return, that is, litigation that *should* be pursued, because they cannot tolerate the loss outcome.⁸⁸ Imagine the following possibilities for a piece of litigation: (1) a 50% chance of netting \$10 (win \$25, pay contingent lawyer \$10, pay court \$5) or (2) a 50% chance of losing \$5 (win \$0, pay contingent lawyer \$0, pay court \$5), for an expected value of \$2.50. If the “litigation bet” were actually with numbers of that size, few people would be risk averse; they would litigate. But if the numbers were 1000 times larger (expected return of \$2500,

have more to lose from self-help efforts that violate legal or liability rules. *See supra* Part II.B.

85. *See generally* Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 413 (1985) (discussing federal indigent exemption); John MacArthur Maguire, *Poverty and Civil Litigation*, 36 *HARV. L. REV.* 361 (1923) (discussing historical and contemporary treatment of indigent litigants in England and America).

86. I am using justice, democracy, and innate fairness as shorthand for the three species of consonant positive described in Part II.A. Observers who believe filing fees do result, in practice, in denial of access to disadvantaged litigants often couch their arguments in terms of asserted violations of what this Article has called consequentialist or consonant positives.

87. *Cf.* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 *VAND. L. REV.* 729, 765 (2006) (noting risk-aversion and liquidity issues as barriers to arbitration access). Even though risk-aversion and liquidity concerns are slightly different in the arbitration setting—because arbitration fees need to be paid up front—the concerns still apply in a user-pays court costs model.

88. In contrast, risk neutrality is when a player values outcomes based on expected value alone. To a risk-neutral player, an uncertain outcome that will pay him \$100 50% of the time and nothing the other 50% of the time (expected value = \$50) is equivalent to simply receiving a certain sum of \$50. *See* John W. Pratt, *Risk Aversion in the Small and in the Large*, 32 *ECONOMETRICA* 122 (1964); *see also* KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 90 (1971) (“A risk averter is defined as one who, starting from a position of certainty, is unwilling to take a bet which is actuarially fair . . .”). For risk-neutral players, litigation decisions are based on the expected value of the case; that is, the expected gain minus the expected costs of litigation (now including expected court costs).

but possible loss of \$5000), many people simply would not risk taking the \$5000 loss. Risk-averse players can easily be effectively denied court access in a user-pays system.⁸⁹

Illiquidity is a different problem (although often risk-averse players also face liquidity problems). For example, assume a litigant is seeking an expected *nonmonetary* gain from suit that impartial assessors agree “exceeds” his expected costs, for example, custody of a child. Whereas the risk-averse litigant feared a loss outcome, an illiquid litigant has a problem even if he or she *wins*, as children cannot be used to satisfy court costs (whereas monetary awards can).⁹⁰ Certainly it would undermine both the consonant and consequentialist rationales if access were denied under such circumstances.

Thus, an ideal subsidy should address risk-aversion and liquidity concerns, and to ensure access, the subsidy should err on the side of overinclusiveness. After all, even if it covered 50% of all litigants, it would be less than the current expenditure. Unfortunately, no robust breakdown of court use by income or wealth of the litigants is available, nor are comprehensive and reliable particularized estimates of current court costs available.⁹¹ Accordingly, it is impossible to determine exactly how large a generous access subsidy need be.

Nonetheless, a sensible framework might be one that exempts⁹² zero to modest income players (a significant portion of individuals, small private businesses, and nonprofits) entirely and caps the responsibility for higher-income litigants at some small percentage of income, for example, 1–2% of a litigant’s reported federal income above the exempt level.⁹³ For organizations (as opposed to individuals) above a certain size, no cap would be necessary. Larger organizations—particularly public corporations and insurance companies, two frequent litigants—have significant assets, easy access to capital markets, and fair access to liability insurance policies⁹⁴ that make it extremely unlikely that bearing half of court costs⁹⁵ would amount to a functional denial of court access.⁹⁶

89. A common explanation of why people are risk averse is the diminishing marginal utility of money; that is, the first dollar is worth more than the millionth dollar, because the first dollar buys things like food (necessities), whereas the millionth dollar buys diamonds (luxuries). *See, e.g.*, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 186 (1987).

90. Note that even a risk-neutral player would not proceed with otherwise desirable litigation in a user-pays court costs system if the player had a liquidity problem regarding satisfying those costs in the case of a win.

91. Very rough approximations of cost can be calculated by updating for inflation the estimates from the RAND studies. *See supra* note 64.

92. However, I still imagine a modest filing fee that only the indigent are exempt from, which would be the same as the current filing fee model.

93. If the case settles, the subsidized litigant’s half share of the total costs would be based on usage costs to date. Income information would be filed under seal with the court, and not disclosed to one’s adversary, to prevent strategic play.

94. Under my suggested framework, liability insurance policies would almost certainly begin to cover court costs.

95. Or all of the costs in the case of a loss. *See infra* Part IV.C.

96. Indeed, corporate organizations and insurance companies are very often defendants, and corporations above a certain size are presumptively risk neutral, at least with respect to a risk the size of court costs. *See, e.g.*, Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of*

Theoretically, such a regime could prevent access denial, by addressing risk-aversion and liquidity concerns, while recapturing a significant portion of the current subsidy. Two observations on subsidy recapture are worth noting. First, in a large percentage of cases, a defendant is being sued *because* it has resources sufficient to satisfy judgment or settle.⁹⁷ The defendant is thus unlikely to qualify for the access subsidy discussed above. Organizations—mostly business entities—are involved in a significant number of cases as both defendants and plaintiffs.⁹⁸ Such players presumably consume a considerable portion of the judicial subsidy that is susceptible to recoupment. Second, the vast majority of cases settle before trial, and trials are the most time-consuming (and thus, in terms of the judicial subsidy, costliest) event of a lawsuit.⁹⁹ Cases that settle early will likely involve modest court costs that are at least in part affordable by a significant number of those litigants who are not 100% exempt from costs.¹⁰⁰

B. A Rule-Making and Value-Expression Subsidy

A crucial consequentialist justification for subsidizing public judging is rule making, and the consonant analog might be fairly described as value expression.¹⁰¹ The prosubsidy argument rests in part upon the view that, upon the charging of court usage fees, fewer suits will be brought, and less rule making and value expression will occur.¹⁰² That concern, although not illogical, should be of modest practical impact, assuming a generous access subsidy.¹⁰³ That is, without denying the considerable positives attributable to public judging, subsidy elimination—with an exception for

Litigation, 70 S. CAL. L. REV. 113, 130 n.66 (1996) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 572 (4th ed. 1992)) (explaining risk neutrality of corporations and insurers).

97. Most civil suits are for damages, and many are filed because the defendant is expected by a contingent-fee plaintiff's lawyer to be able to pay a settlement or judgment. Plaintiffs' lawyers' filing guesses should be fairly accurate signals about defendants' ability to pay, or the plaintiffs' bar would not be in business.

98. Indeed, as Professor Hadfield has shown, organizations (which are mostly business entities) are involved in a significant number of federal cases as defendants (and also as plaintiffs). See Hadfield, *supra* note 20, at 1298 (noting that organizations are defendants in more than 80% of all nonprisoner, nonstudent loan, nonforeclosure federal litigation, and plaintiffs in more than 30%).

99. See FEDERAL CASE-WEIGHTING STUDY, *supra* note 63, at app. Y, tbl.4 (identifying the percentage likelihood of trials in cases of varying subject matter); Galanter, *supra* note 69, at 1256–60 (finding that trials are rare); RAND CIVIL STUDY, *supra* note 64, at xiii (finding that trials are the most costly element of litigation in terms of public resources consumed, but occur rarely).

100. Both RAND studies noted that in general the public expenditure in a given case was small because most cases settle. RAND CIVIL STUDY, *supra* note 64, at xiii–xv; RAND TORT STUDY, *supra* note 64, at xi–xiii.

101. The appeal of adjudication as a dispute resolution mechanism over self-help was the other consequentialist justification. See *supra* Part II.B. But a generous access subsidy likely addresses the vast majority of players who might succumb to the temptation to engage in costly self-help. See *supra* Part IV.A.

102. See *supra* Part II.

103. See *supra* Part IV.A.

appeals—seems unlikely to result in materially less rule making and value expression than that which arises from the current subsidy.

Eliminating the monolithic subsidy raises the price of going to court (for all players not wholly covered by the access subsidy). If the price of *any* item is raised, there are three logical possibilities. First, a player might choose a less costly substitute. Second, a player might forego the item entirely. Third, the player might still consume the item—because even at the increased price, the item is still a desirable purchase. The more there are of the last type of player, the less effect a price increase will have on the quantity of the item demanded (here court use).

With the above in mind, consider that there are in essence two categories of legal dispute: (1) one for which a party has an ex ante contract for binding alternative dispute resolution (ADR) with a potential adversary, and (2) one for which the party does not. For category (1) players, an increase in the “court price” should have no material effect on filings. Those players have *already* chosen a less costly substitute for litigation: ADR.

It is category (2) where an increase in the court price could have a significant effect. A party is in category (2) because it (i) lacks the bargaining power (or legal ability) to get a potential adversary to agree to binding ADR; because (ii) the dispute was not expected to occur at all or with a particular adversary (many torts); or because (iii) the party *could* have ex ante contracted with the adversary but believed the courts would be more attractive than ADR. Let us consider the three possibilities in reverse order.

The reason a player is in category (2)(iii) is because the player *prefers* the court to ADR. Of course, even *with* the present subsidy, courts are considerably more expensive (because of higher legal fees and increased discovery costs) than ADR.¹⁰⁴ Almost certainly, category (2)(iii) players chose to be in court because they can obtain something from the court not obtainable in ADR that is worth the increased legal bill. If the “court price” increases, category (2)(iii) players will only stop filing lawsuits to the extent that the expected court usage fee for a potential dispute outweighs whatever non-ADR-obtainable goal was previously thought to be worth the considerable cost increase associated with litigation; category (2)(iii) players with that calculus will end up in category (1) and thus file no suit. However, because court usage costs are a small component of overall litigation costs, the extra cost associated with a user fee is unlikely to move litigants who otherwise would have been in category (2)(iii) to category (1).¹⁰⁵

Players in categories (2)(ii) and (2)(i) are in a different position. They had no choice to do ADR; such players must go to court to obtain relief. What effect will an increase in the “court price” have? Will it cause significant numbers of these litigants to forego suit? Or will most players litigate notwithstanding the increased court price? From a

104. See, e.g., Robert B. Moberly & Judith Kilpatrick, *Introduction: The Arkansas Law Review Symposium on Alternative Dispute Resolution*, 54 ARK. L. REV. 161, 167–68 (2001) (noting that legal fees and discovery costs are lower in alternative dispute resolution).

105. See JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION xi fig.S.1 (1986) [hereinafter RAND COMPENSATION STUDY] (finding that in tort cases, defendants’ average legal fees and expenses were nine times court expenditures and plaintiffs’ average legal fees and expenses were twelve times court expenditures); see also RAND CIVIL STUDY, *supra* note 64, at vii (finding that “private expenditures far exceed government expenditures for the average case”).

litigant's perspective, seeking relief makes sense if the expected value of its claim exceeds the cost of litigating the claim.¹⁰⁶ Eliminating the current subsidy means the cost of litigating the claim increases by half of the expected court usage fee (because each litigant only bears half of the court costs). For players who are risk neutral and liquid with respect to the additional expected court cost obligation (either because of their own financial status or because of the access subsidy), the only claims that will not be brought—compared to the status quo—are those claims whose expected value no longer exceeds the litigation cost. Given a generous access subsidy, and assuming court usage costs are as small a fraction of overall legal costs as they appear to be,¹⁰⁷ it seems unlikely a usage fee would drive very many claims from the courthouse (or constitute tipping pressure to settle).

The foregoing strongly suggests that, given the realities of litigation, the number of suits lost as a result of the abolition of the current subsidy (assuming a generous access subsidy) should be small.¹⁰⁸ Smaller still is the effect that those lost suits would have had on rule making and value expression; only a small percentage of the suits not brought would have, in any event, resulted in an opinion that actually affected the future behavior of others.¹⁰⁹

I suspect the calculus changes for appeals.¹¹⁰ That is, while I cautiously believe no significant loss of rule making or value expression will occur for eliminating the subsidy (other than the access subsidy) at the trial level, the risk to social positives is higher at the appellate level. First, for appeals, court use costs are likely a more significant portion of the incremental litigation costs associated with pursuing an appeal. At the trial level, because of discovery and evidentiary disputes, the private-

106. See Drahozal, *supra* note 87, at 760 (“Under the expected value model of litigation, a prospective claimant decides whether to file suit in court by comparing the costs and benefits of litigation.”). Regarding settlement, as opposed to filings: settlement behavior is difficult to model and predict with certainty. Increased costs may make settlement slightly more likely, but, because of the access subsidy, the small relative proportion of court costs, and bargaining issues, it is difficult to expect the increase will be significant.

107. See *supra* note 105.

108. Put another way, for many, the consumer surplus associated with court use will still be positive; consumer surplus can be thought of as simply the difference between price paid and what a consumer would be willing to pay. See, e.g., Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 659 (1982) (defining consumer surplus).

109. See H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 431 (1986) (“The study of law focuses upon reported cases, which represent about two or three percent of all suits which are instituted.”). Trial courts have far less rule-making and value-expressive power than appellate courts; the rule-making and value-expression social positives associated with the lost increment (i.e., lost because there is no subsidy beyond an access subsidy) of trial court decisions seems minimal, and tolerable.

110. Obviously suits not pursued at the trial level because of the elimination of the monolithic subsidy will also result in fewer appeals. However, I expect the number of these “lost decisions” to be small, as explained in the preceding text, and only a small percentage of those lost decisions would have ever been appealed. When I consider the calculus for appeals, what I mean to say is that I am considering the effect the absence of the appeal subsidy would have on the *incremental* decision to appeal from suits that would be brought in an access-subsidy-only world.

litigation-cost-to-court-use-cost multiple is likely higher than the private-cost-to-public-cost multiple at the appellate level (which is confined to legal disputes). Accordingly, more players might decline to pursue appeals, given the higher marginal cost associated with a user fee obligation. More importantly, however, appellate courts obviously have greater rule-making power than lower courts; foregone appeals therefore have a greater cost in lost rules. And value expression, of course, has heightened force at the appellate level; indeed, that recognition, in part, drove Chief Justice Earl Warren to seek unanimity in *Brown v. Board of Education*.¹¹¹ Thus, public monies saved by subsidy elimination appear outweighed, at the appellate level, by lost social positives. Accordingly, an appeal subsidy to litigants—equal to the value of the appellate court’s cost minutes, *excluding* the cost minutes of the lower court—makes sense in cases where the appellate court issues a written opinion.¹¹²

Yet, here too, additional empirical data is crucial. If the reality is that trial court usage costs are—contrary to the current assumption—in fact a sizeable fraction of the litigation costs and expected value of many claims litigated by otherwise nonsubsidized players, than the number of suits unfiled as a result of the removal of the current subsidy could be significant. In that case, rule making and value expression could materially suffer and extension of a subsidy to a *portion* of trial court activities may be warranted.¹¹³

111. Edward N. Beiser, Book Review, 89 HARV. L. REV. 1945, 1947–52 (1976) (reviewing RICHARD KLUGER, *SIMPLE JUSTICE* (1975)) (discussing Chief Justice Warren’s efforts behind the scenes to secure a unanimous opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

112. Cases settled before issuance of an opinion would not receive the subsidy; in that case, little or no social positives would have resulted from the aborted appeal. One note regarding those cases that do result in an opinion: opinions can, of course, be published or unpublished. The Federal Rules of Appellate Procedure, recently amended, now prohibit court rules that bar the citation of unpublished appellate opinions. FED. R. APP. P. 32.1(a). State rules on the subject vary. See Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 258–85 (2001) (collecting various rules). There is a profound debate in the literature regarding unpublished decisions, their constitutionality, and the proper limits on their use. See, e.g., Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 788–91 (2003) (expressing concern over nonprecedential opinions); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1504–14 (2004) (arguing that unpublished opinions further disadvantage marginalized groups). However, for this Article’s purposes, if an opinion is written, then given the comprehensiveness of today’s electronic databases, the opinion likely aids, at the very least, in private ordering. I accordingly assume it makes sense to attribute *some* material level of social positive to an “unpublished” (but readily discoverable) appellate opinion—even if a published opinion generates a higher level of social positive or would have been more desirable. I may be mistaken; perhaps voluminous unpublished opinions undermine rather than aid the consequentialist social positives arising from rule making, by serving as a form of judicial noise. I leave that to the consideration of the reader.

113. Much trial court activity is not directly concerned with rule making, only with resolution of the dispute at bar. Analytically, it makes sense to only subsidize court activities reasonably proximate to a published ruling (e.g., court time spent reading briefs, hearing argument, doing research, drafting opinions). Court time spent at status conferences or on the resolution of preliminary disputes (for which no written opinion is published) is less generative of social positives than is court time spent producing decisions written for consideration by

C. A Retributive Tax

What of winning or losing? Should that affect the parties' usage fee obligations? It is useful to recall the different rules of cost shifting with respect to attorneys' fees.¹¹⁴ Under the American Rule, both sides pay their own counsel fees, regardless of who prevails.¹¹⁵ Under the English Rule, the loser pays the winner's attorneys' fees.¹¹⁶ The core attraction of the English Rule is that it forces actors in the wrong (i.e., liable defendants or nonmeritorious plaintiffs) to internalize the costs of their conduct.¹¹⁷ An asserted weakness of the English Rule is that, in such a regime, financially weak players may have a meritorious claim with a positive expected value but be afraid to pursue it because they would be financially devastated if the other side prevailed.¹¹⁸ In contrast, the theoretical attraction of the American Rule is that it does not deter risk-averse litigants from pursuing or defending suit. The criticism of the American Rule is that by not forcing bad actors to pay all costs generated by their conduct, theoretically their undesirable behavior is underdeterred, that is, nonmeritorious suits and defenses are encouraged.¹¹⁹

future actors. *See supra* Part II.B. Private or near-private trial court decisions, that is, decisions not put in writing or not readily discoverable to the legal community (such as many discovery rulings), confer a *de minimis* societal benefit, if any. Informal, unwritten decision making that moves a case along, that is, case management activity, primarily benefits the litigants, who wish to resolve disputes expeditiously to avoid costs and/or to obtain relief. To the extent that case management benefits the public, it does so because it prevents disputes from "clogging" the system, that is, consuming judicial resources. But were such case management activities not subsidized, litigants consuming them would pay an equivalent amount of the time value lost into the public fisc.

114. To be clear, however, I am not proposing a shifting of attorneys' fees. In addition, shifting of counsel fees is different than a retributive tax on usage costs, because in the latter case the loser pays the state, not his opponent. Nonetheless, consideration of two different fee-shifting rules on counsel fees will prove helpful.

115. *See generally* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 55-65 (1982) (discussing American and English rules). Critics of the American Rule complain that winning a lawsuit but not being able to recover fees can make winners losers, by dint of large legal bills. As the old saw goes, the only parties that win litigating are the lawyers. *See, e.g.*, Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915, 1919 (1994) (arguing that under the American Rule, "[o]nly the lawyers . . . come out ahead").

116. *See generally* Goodhart, *supra* note 2, at 856-68 (discussing the English Rule in English courts). Variations on the English Rule are widely applied throughout Europe. *See generally* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984). Nonetheless, the term of art remains the "English Rule."

117. *See, e.g.*, Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1161-63 (1996) (arguing that a loser-pays model deters "long-shot case[s]" with high payoffs and "imposition-based case[s], whose settlement value arises from [the] threat of cost infliction").

118. Shavell, *supra* note 115, at 61-62; *see also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 539 (3d ed. 1986) (English Rule discourages litigation by risk-averse plaintiffs).

119. Interestingly, there is no broad consensus of the *actual* effects of the different rules. *See* Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1948 (2002) (noting "surprisingly little

Regarding court usage fees, a “loser-sometimes-pays” rule is conceptually attractive.¹²⁰ The “sometimes” refers to the exemption applicable to “access” and “appeal” subsidized litigants. A loss should not force an otherwise-subsidized loser to pay an amount that exceeds his subsidized cost obligation.¹²¹ Were that a possible outcome, it would either undermine access (by deterring litigation by financially disadvantaged litigants) or decrease the rule making and value expression associated with appellate litigation (by deterring appeals). But there is some percentage of situations that fall in neither category, that is, cases involving nonsubsidized losers. A loser-sometimes-pays rule would require a nonsubsidized loser to pay to the state a tax equal to the winner’s half of costs (regardless of the winner’s subsidized status), with the winner absolved of any usage fee obligation to the state.¹²²

A party who has violated a rule or brought a baseless suit should not be able to impose upon the victimized opponent half the costs of resolving the dispute. Nor is there compelling reason why, in the case of a nonsubsidized loser, the taxpayer should have to bear the share of costs that were, in essence, forced upon the winner by the loser. If one accepts that judgments or verdicts are usually right, namely, that they correctly identify whether violations have or have not occurred, then for fairness reasons a retributive tax has appeal. The nonsubsidized loser “caused” the public to expend resources adjudicating a claim or defense that lacked merit (and otherwise advanced no social positive).¹²³

Objections to the English Rule on attorneys’ fee shifting have less force regarding a retributive tax on usage fees. Because court usage costs are generally a fraction of attorneys’ fees,¹²⁴ the group of players materially risk averse to bearing usage costs in the event of a losing outcome will be a fraction of the group of litigants intimidated by a loser-pays attorneys’ fees rule. Second, because of the access subsidy, most players whose litigation decisions would be undesirably chilled by the fear of having to pay

agreement” among those who have studied different fee-shifting regimes).

120. No shifting would occur in the event of settlement, although the parties would be free to agree to bear different proportions of the court usage costs.

121. In many cases, a player’s “subsidized usage cost obligation” would be zero (for totally exempt players); thus no retributive tax would be imposed on wholly subsidized players. For a partially subsidized (“capped”) player, *see supra* Part IV.A, the tax would increase his owed cost (including the retributive tax) to no more than what his capped obligation *would* have been had the case been resolved that same day without any retributive tax. The winner’s cost obligation to the state, in both cases, would be waived. *See also infra* note 122. Since appellate cost minutes are entirely subsidized for all players, they would not be included in any retributive tax.

122. For example, if total court usage costs were \$100, each litigant would have a gross cost obligation of \$50. Even if the winner was totally or partially subsidized, a nonsubsidized loser would still have to pay a retributive tax of \$50 to the state, on top of the \$50 the loser owed for his own costs. A loser who was himself protected by a cost obligation “cap” of \$75, *see supra* Part IV.A, would only have to pay \$25 of the retributive tax (in addition to his own \$50 in costs); a loser who was totally covered by an access subsidy would pay no retributive tax. *See also supra* note 121.

123. Under old English law, there was a similar moral justification for taxing the loser: “It was believed that a person who resorted to the courts and lost his claim was morally at fault, and at common law the unsuccessful party was fined, the revenue going to the king.” Note, *Distribution of Legal Expense Among Litigants*, 49 *YALE L.J.* 699, 700 (1940).

124. RAND COMPENSATION STUDY, *supra* note 105, at xi.

court costs will be shielded from an unbearable cost obligation. One of the reasons the English Rule is workable elsewhere is because “litigation insurance” and other financial assistance is available to needy litigants; here the access subsidy achieves the same result (and it lacks the coverage problems associated with private insurance).¹²⁵ Of course, while the negatives associated with the English Rule on fee shifting are reduced when court costs are the obligation being shifted, so are its asserted positives. Access-subsidized litigants will face little or no deterrent effect; court usage costs, as a fraction of overall litigation costs, will likely have only a minor affect on litigation behaviors of nonsubsidized litigants; and most cases settle, so often that no retributive tax would be triggered. One needs to be careful to not overstate the effect of the tax, in terms of deterring undesirable behavior. But the fairness appeal, and the modest public money saved, weigh in favor of consideration of the tax.

CONCLUSION

For many, the free provision of public adjudication for all litigants is such an intuitively correct idea that a searching analysis of the rationales for it, or a discussion of potential reforms, is a waste of time. This apparently dominant view is a mistake. A considered discussion of the subsidy as constituted (as opposed to a broad discussion of the general merits of public adjudication) has not occurred systematically or within any recognizable evaluative framework. That failure is a significant one, in my view, because it deprives us of the theoretical tools with which to consider the merit (or peril) of refashioning the contours of a subsidy central to modern American society.

I anticipate that many will challenge the wisdom of the particular refashioning of the subsidy that this Article contemplates. Some may propose differentiation along different lines, for example: subsidizing court use regarding disputes of certain subject matter; subsidizing court use by “one-shot” players; subsidizing only cases tried to verdict, and so on.¹²⁶ Others may focus on administrative, practical, or political obstacles that will become more apparent as more accurate measurement of and additional empirical research and/or theoretical refinement concerning the current subsidy occurs. Still others may criticize the conceptual moorings of the evaluative framework herein advanced. But those criticisms—whatever their ultimate merit—are all part of a larger discussion long overdue.

125. See, e.g., Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54, 55–56 (discussing advantages and disadvantages of English system).

126. For example, Professor Marc Galanter famously argued over thirty years ago that “repeat player” litigants bear considerable advantages against “one shot” litigants. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974). Although I have not explored the merits here, I can envision an argument that certain “repeat players” should not be entitled to an appellate subsidy, because they already have a heightened interest to undertake appeals.