

# IS ADJUDICATION A PUBLIC GOOD? “OVERCROWDED COURTS” AND THE PRIVATE SECTOR ALTERNATIVE OF ARBITRATION

*Stephen J. Ware\**

## I. INTRODUCTION

Courts are underfunded, dockets are crowded, and litigation is slow. These observations lead many lawyers and judges to call for increased court funding. While I would like to see a significantly higher percentage of government spending go to courts, I do not believe that is likely to happen. So I suggest we think about “underfunded” courts differently.

Courts provide a service—binding adjudication—to disputing parties. This service is heavily subsidized by tax dollars, as only a portion of courts’ costs are covered by fees paid by litigants. This public subsidy, basic economics suggests, causes demand for this service to exceed supply so disputing parties queue up to receive the subsidy. A court’s time and other resources are allocated among parties according to their willingness to wait. In contrast, other goods and services are, in a market economy, allocated according to willingness to pay. If parties had to pay more to use the court system, fewer would use it, and thus those who did would not have to wait so long.

In short, the related phenomena of “underfunded” courts, crowded dockets and justice delayed are caused by the public subsidy for litigants. Focus on this subsidy for parties in litigation enables a contrast with the absence of a subsidy for parties in the private sector alternative to litigation, arbitration, which (like litigation) also provides disputing parties with binding adjudication. While the public-sector court system provides binding adjudication virtually free of charge to the disputing parties, the private sector arbitration system generally charges them something like market rates for it.

---

\* Professor of Law, University of Kansas. J.D. University of Chicago, 1990; B.A. University of Pennsylvania, 1987. For helpful comments, I thank Chris Drahozal, Mark Weidemaier, and participants in a symposium at the University of Maryland. For excellent research assistance, I thank Caroline Bader, Michael Keenan and Jeff Pyle.

Which disputing parties deserve subsidized adjudication and which should have to pay market rate for it? Our society's failure to confront this important question allows all disputing parties to pursue the subsidy for themselves. The result is that parties who do not deserve the subsidy—parties who should be paying market rates for adjudication—are consuming public resources that would be better spent on parties who do deserve the subsidy.

One way to end the public subsidy for cases that do not deserve it is for courts to charge the parties to such a case a fee high enough to reimburse the court for its costs of adjudicating the case. Several thoughtful commentators have proposed such “user fees.” This Article assesses those proposals and suggests that user fees would make litigation look more like arbitration. It concludes by considering the possibility that the public-sector court system and private arbitration organizations could compete in the market for unsubsidized adjudication and in the market for subsidized adjudication. In short, this Article places discussions of overcrowded courts and court user fees in the context of a society—our society—with a strong private sector alternative to our courts.

## II. “OVERCROWDED COURTS” AND THE PRIVATE SECTOR ALTERNATIVE OF ARBITRATION

### A. “Overcrowded Courts”

The economic downturn of the last few years required many families and businesses to reduce their spending. The same is true of state court systems.<sup>1</sup> State court funding cuts in recent years have prompted protests decrying the harms caused by underfunded courts.<sup>2</sup> In the words of American Bar Association (“ABA”) Pres-

---

<sup>1</sup> “The court funding crisis is yet another byproduct of the Great Recession that hit the United States in late 2007.” James Podgers, *Your ABA*, A.B.A. J., Aug. 2012, at 58. “According to the National Center for State Courts, forty-seven states have experienced funding reductions since 2010, and most states already allocate less than two percent of their budgets for the courts.” *Id.* See also NATIONAL CENTER FOR STATE COURTS, *State Budget Cuts Threaten Public’s Access to Courts*, (Nov. 29, 2011), <http://www.ncsc.org/Newsroom/Backgrounder/2011/Court-Budget-cuts.aspx>.

<sup>2</sup> On January 18, a group called the Open Courts Coalition held a rally on Grand Avenue in Los Angeles to support funding for California’s judiciary. “Yes, you read that right—a rally for our courts that brought together members of the legal profession, the business community and labor leaders. It was a defining moment, and one we hope will be repeated in the coming months as we stand up and speak out for full funding for our judiciary.” See Wm. T. (Bill) Robinson III, *No Courts, No Justice, No Freedom*, A.B.A. J., Apr. 2012, at 9.

ident Bill Robinson, “[s]tate court underfunding is a threat to our system of justice and all we believe in as Americans and as an association. It is harming clients, slowing our nation’s economic recovery and undermining our liberty.”<sup>3</sup>

If the reality is anywhere near this dire—“a threat to our system of justice and all we believe in as Americans”—then we truly have a crisis on our hands. Still worse, it appears to be a long-running crisis. Cries of alarm about underfunded courts, crowded dockets and justice delayed, which we all know is justice denied,<sup>4</sup> have been sounded by lawyers and courts for over a half a century.

In 2012, the ABA President warned that “court underfunding is a threat to our system of justice.”<sup>5</sup> Similarly, the previous decade was also a “time of scarce judicial resources and crowded dockets”<sup>6</sup> so the ABA in 2004 “formed a Commission on State Court Funding . . . to point out that underfunded courts lack adequate resources to meet caseload demands.”<sup>7</sup> Similarly, hanging over the 1990’s was a “looming crisis in the nation” due in part to “dangerously crowded dockets” and “overburdened judges.”<sup>8</sup> In 1993, an

<sup>3</sup> *Id.*

<sup>4</sup> Or, in the lingo of economics, “courts with congested dockets exact social costs at two interrelated levels: (1) they impose a direct cost to litigants by decreasing the time value of litigation; and (2) they impose an indirect cost to litigants by undermining the deterrence effect and other social benefits of civil liability.” Bruce L. Hay, et al., *Litigating BP’s Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1931–32 (2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (“We recognize the importance of the district court having the ability to control its own docket, particularly in this time of scarce judicial resources and crowded dockets.”); *accord* E.E.O.C. v. *Hibbing Taconite Co.*, 266 F.R.D. 260, 265 (D. Minn. 2009) (“As a vehicle designed to streamline the flow of litigation through our crowded dockets, we do not take case management orders lightly, and will enforce them.”); *Report of the Section of Litigation, Ethical Guidelines for Settlement Negotiations*, 127 A.B.A. No. 2 Ann. Rep. 439, 439 (2002) (“Courts and court rules encourage settlement of disputes as a means of dealing with burgeoning case loads, increasingly crowded dockets, and scarcity of judicial resources.”).

<sup>7</sup> Dennis W. Archer, *Tackling Tough Issues*, A.B.A. J., Feb. 2004, at 8.

<sup>8</sup> *Report of the King County Bar Association*, 123 A.B.A. No. 1 ANN. REP. 389, 390 (1998) (“There is a looming crisis in the nation because of the extraordinary number of vacant federal judicial positions and the problems associated with delayed judicial appointment, dangerously crowded dockets, suspended civil case dockets, burgeoning criminal caseloads, overburdened judges, and courts which are chronically understaffed.”) *See also* Patrick E. Longan, *Congress, The Courts, and The Long Range Plan*, 46 AM. U. L. REV. 625, 661 (1997) (“Congress systematically has underfunded the courts.”); J.D. Page & Doug Sigel, *Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rule of Civil Procedure 174(b)*, 9 REV. LITIG. 49, 75 (1990) (“In this age of crowded dockets, soaring legal costs, and declining public confidence in the legal system, courts should use bifurcation in all cases in which appropriate grounds for bifurcated trial exist.”); Debra Cassens Moss, *Planning Ahead*, A.B.A. J., June 1993, at 20 (“The

ABA committee issued a report providing an “Overview of the Crisis in America’s System of Justice.”<sup>9</sup>

Going back further in time reveals more of the same. In the 1980’s, one ABA president wrote a column entitled “the underfunded commitment to justice,”<sup>10</sup> and a few years later a different ABA president said “[w]e must attack the underfunding of the justice system.”<sup>11</sup> In the 1970’s, an ABA report said problems like “[o]vercrowded dockets” and “generally inadequate resources” had “reached crisis proportions.”<sup>12</sup> While this “crisis” in the 1970’s was “alarming,”<sup>13</sup> in the 1960’s it was “staggering.”<sup>14</sup> A 1969 commentator said “[t]he increased workload which has engulfed the courts had already stretched our judicial system to its limits by the mid-twentieth century.”<sup>15</sup> This assessment of the mid-twentieth

---

problems considered most serious by judges include delays in filling judicial vacancies, the impact of the criminal docket on the civil docket of district courts, and the volume of criminal cases. To deal with crowded dockets, judges apparently favor controlling caseloads over increasing judgeships.”).

<sup>9</sup> *Saving Our System: A National Overview of the Crisis in America’s System of Justice*. Prepared on behalf of the American Bar Association, Special Committee on Funding the Justice System (Aug.1993) (emphasis added).

<sup>10</sup> Morris Harre, *The Underfunded Commitment to Justice*, 69 A.B.A. J. 528, 528 (1983).

<sup>11</sup> Rhonda McMillion, *Lobbying For Justice*, A.B.A. J., Aug. 1988, at 133 (ABA President Robert MacCrate said “[n]othing has a more deleterious effect on the quality of justice in America than this severe underfunding of our justice system.”) See also *MacCrate Outlines His Goals*, A.B.A. J., Oct. 1987, at 20 (“We must attack the underfunding of the justice system”). See also Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7 (1983) (“federal courts today labor under staggering workloads. They have too much business. Some of it must be trimmed if the quality of federal justice is to remain high.”).

<sup>12</sup> *Report No. 4 of the Judicial Administration Division*, 98 A.B.A. Ann. Rep. 857, 857 (1973).

The magnitude and complexity of the many problems facing the judicial system of the United States today have reached crisis proportions. That this statement is not mere hyperbole is evident from even a cursory examination of the conditions of our courts. At every level of the judiciary, difficulties of a truly alarming nature are commonplace. Overcrowded dockets, insufficient personnel, antiquated procedures and generally inadequate resources are the rule, while speedy, fair and smooth resolution of conflict is the exception in far too many cases.

*Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Comment, *The Judicial Panel on Multidistrict Litigation: Embryonic Guidelines for the Consolidation of Pretrial Proceedings*, 38 FORDHAM L. REV. 786, 786 (1970) [hereinafter *Judicial Panel on Multidistrict Litigation*]

Although the problem of lagging justice is thousands of years old, its dimensions have recently reached staggering proportions. Our modern society has created demands on our judicial establishment which amount to a “law explosion.” The increased workload, which has engulfed the courts, had already stretched our judicial system to its limits by the mid-twentieth century.

*Id.* (internal citations omitted).

<sup>15</sup> *Id.*

century is confirmed by a 1952 report stating that “[t]he problem of the crowded docket is one which in recent years has grown more and more disturbing.”<sup>16</sup> Some suggest this problem goes back, not just these sixty years, but for hundreds, or even thousands, of years.<sup>17</sup> In short, the “crisis” of “underfunded” courts, crowded dockets and justice delayed may always be with us.<sup>18</sup>

What are we to make of this perpetual crisis? First, that it confirms the predictions one would make based on some simple economics:

Courts receive some of their revenue from fees paid by litigants, but most comes from the taxpayer. In short, litigation, and es-

<sup>16</sup> Comm. on Practice and Procedure of the Junior Bar Section, *The Perennial Problem of the Crowded Docket*, 26 CONN. B.J. 327, 327 (1952).

The problem of the crowded docket is one that in recent years has grown more and more disturbing, not only to the professional jurist but more significantly, to the general public. It is axiomatic that any proper system of justice demands not only that impeccably fair decisions be rendered in our courts but that the litigant secure his hearing as speedily as is reasonably possible. Public confidence in the integrity of our legal system seems to diminish in proportion to the amount of time it takes for a case to be concluded.

*Id.* See also *Howes Leather Co. v. La Buy*, 226 F.2d 703, 709 (7th Cir. 1955) (“In this day of crowded dockets and voluminous calendars, the position now advanced by respondent, if adopted, would make reference to a master the rule rather than the exception in every case of a complicated nature which is filed in the district court.”); David F. Maxwell, *The President’s Page*, 42 A.B.A. J. 899, 899 (1956).

One of the primary aims of the organized Bar always has been to improve the administration of justice. Today the challenge in that field is greater than ever before. By reason of congested court calendars in many judicial districts the courts have been subjected to sharp criticism editorially, in the press and in other forums of public opinion, because, as so often has been said, justice delayed is justice denied. *Id.*; Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1045 (Nov. 1958) (“The federal judiciary does not stand alone in its problems . . . some of our state courts report trial delays up to five and six years.”).

<sup>17</sup> *Judicial Panel on Multidistrict Litigation*, *supra* note 14, at 786:

As a result of multiplying caseloads and expanding backlogs, American courts are currently struggling with congested calendars and delayed litigation. However, the problem of court congestion and delay is not of recent origin. As early as 600 years before the dawn of the Christian era, the prophet Habacuc stated: “[T]he law is torn in pieces, and judgment cometh not to the end . . . . The problem was also recognized in the thirteenth century when the drafters of the Magna Carta pledged that: “To no one will we sell, to no one will we deny, or delay right or justice.” Nevertheless, two centuries later “[d]evices for delaying, hindering, and obstructing altogether the work of the fifteenth century Court of Common Pleas were many.” Congestion and delay in the 16th century German courts caused Goethe to lose his taste for the law and turn to the profession of letters. At the beginning of the 17th century, Shakespeare’s Hamlet, in his soliloquy, catalogued life’s “troubles” and listed among them “the law’s delay.” (citations omitted).

*Id.*

<sup>18</sup> The current ABA president says “the crisis of underfunding for the courts [is] an issue that will take years to address.” Podgers, *supra* note 1, at 58.

pecially trials, are subsidized by government. As with other subsidized goods and services, demand exceeds supply. Litigants must wait for a trial, sometimes for years. Trial time is allocated according to willingness to wait. In contrast, other goods and services are, in a market economy, allocated according to willingness to pay. If parties had to pay more to use the court system, fewer parties would use it so those who did would not have to wait as long.<sup>19</sup>

In short, the perpetual “crisis” of “underfunded” courts, crowded dockets and justice delayed is caused by the public subsidy for litigants. Focus on this subsidy for parties in litigation enables a contrast with the absence of a subsidy for parties in the private sector alternative to litigation, arbitration.

### B. *Arbitration*

While arbitration and litigation are not identical, they do offer disputing parties the same basic service—legally binding adjudication.<sup>20</sup> Arbitration provides such adjudication to a wide variety of

---

<sup>19</sup> STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* § 3.44 (2d ed. 2007); see also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 262 (1998) (“We are accustomed to paying for . . . courts and court personnel by tax receipts. This ‘public good’ arrangement encourages overuse by some until court backlogs and overcrowding create queues that substitute for prices or fees to clear the market.”); Elizabeth G. Thornburg, Book Review, 85 *TUL. L. REV.* 247, 259 (2010) (reviewing HAZEL GENN, —*SAVING CIVIL JUSTICE: JUDGING CIVIL JUSTICE* (2010)):

Although the English system does provide fee reductions for the impecunious and subsidizes some family and small claim matters, about eighty percent of the cost of the civil side of the court system is paid for through user fees. Filing fees alone can exceed £1000, and then each step in the process—such as assigning the case to a track, filing motions, holding hearings, and receiving orders—also requires the payment of a fee. Compared to that, filing fees in most U.S. courts are modest, and the cost of running the courts comes from state and local government budgets.

*Id.*

<sup>20</sup> Arbitration is adjudication in a private (non-government) forum, while litigation is adjudication in a government forum, a court. WARE, *supra* note 19, at 19. See also Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 *NEV. L.J.* 427, 427 (2007) (“Arbitration law is implicitly founded on a procedural model involving binding adjudication of disputes by a private tribunal pursuant to an agreement.”) For a definition of *adjudication*, see *infra* note 29.

While arbitration’s ability to provide legally-binding adjudication makes it a fairly close substitute for litigation, most other processes of dispute resolution, such as mediation, do not provide legally-binding adjudication and thus are not close substitutes for litigation. WARE, *supra* note 19, at 8–11. “Non-binding arbitration has less in common with arbitration than it does with mediation and other processes in aid of negotiation.” WARE, *supra* note 19, at § 2.2. Non-binding arbitration is not discussed in this Article.

parties with a wide variety of disputes and has done so for many years.<sup>21</sup> Arbitration in the United States is well equipped with fine arbitrators,<sup>22</sup> well established administering organizations (like the American Arbitration Association, the JAMS and many trade associations),<sup>23</sup> and a well-developed legal structure under the Federal Arbitration Act<sup>24</sup> and case law, which ensures that arbitrators' decisions are generally confirmed and enforced (rather than vacated) by courts.<sup>25</sup>

The core principle of arbitration law is that disputes do not go to arbitration unless the parties have contracted to send them there.<sup>26</sup> Contracting for arbitration can occur before or after a dispute arises. Sometimes parties with an existing dispute agree to send that dispute to arbitration. More common are pre-dispute arbitration agreements. These are contracts containing a clause providing that, if a dispute arises, the parties will resolve that dispute in arbitration, rather than litigation. Arbitration clauses appear in a wide variety of contracts.<sup>27</sup>

A downside of arbitration for the disputing parties is that they have to pay for it.<sup>28</sup> While "litigation receives a sizable govern-

---

<sup>21</sup> Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 934 (1999) (noting "once confined to the specialized provinces of international commercial transactions and labor-management relations, arbitration clauses now appear in many day-to-day consumer transactions"); Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH U. L. Q. 1053, 1059 (2000).

Contracts in a huge variety of contexts contain clauses requiring the parties to submit disputes to general arbitration. Examples of such contracts include: a retail installment contract between an auto dealer and a consumer, a home termite protection plan, a construction contract between a university and a contractor, a homeowners insurance policy, and a consumer loan agreement.

*Id.*

<sup>22</sup> Stuart Widman, *Courts or Arbitrators—Who Decides Arbitrability Issues*, CBA REC., Jan. 2006, at 34 (referring to "the high quality of arbitrators on the AAA and JAMS panels").

<sup>23</sup> Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 436–37 (2006) (noting that "arbitration . . . is conducted under the auspices of different umbrella organizations" and that besides the several national arbitration organizations, "quite a few industries that maintain their own arbitration boards").

<sup>24</sup> 9 U.S.C. §§ 1–16 (2006).

<sup>25</sup> 9 U.S.C. § 10 (2002).

<sup>26</sup> 9 U.S.C. § 2.

<sup>27</sup> "These arbitration clauses typically are written broadly to cover any dispute the parties' transaction might produce, but also can be written more narrowly to cover just some potential disputes." WARE, *supra* note 19, at § 2.3(a).

<sup>28</sup> An early leader of the ADR Movement put it as follows:

[A]lthough I believe, on the basis of my own arbitration experience, that that process is, by and large, as effective as and cheaper than litigation, lawyers tend not to make extensive use of it (outside of special areas such as labor and commercial

ment subsidy[.] arbitration does not.”<sup>29</sup> The fees litigants pay to courts do not cover the full cost of the judge, jury, court clerk, other administrative personnel, and the courthouse itself. By contrast, “parties to arbitration must pay the arbitrator’s fee, as well as the administrative costs of the arbitration organization, and any cost of the hearing room.”<sup>30</sup>

---

law), in part because it is always cheaper for the clients to have society rather than the litigants pay the judges.

Frank E. A. Sander, *Varieties of Dispute Processing*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 79 (1976), at 125–26. See also Thomas J. Stipanowich, *Publisher’s View on ‘The Costs of Arbitration’*, ALTERNATIVES TO HIGH COST LITIG., May 2003, at 103 (“The court system, of course, is almost entirely paid for by taxpayers; whether or not we ever use that public resource, we are subsidizing its use by others, including private individuals, government entities or corporations. The costs of alternative private adjudication must also be borne by someone”).

<sup>29</sup> Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP RESOL. 433, 447 (2010). See also *Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers*, 682 F.3d 620, 622 (7th Cir. 2012) *denying rehearing en banc* from 676 F.3d 566 (7th Cir. 2012) (Posner J. concurring) (“adjudication is subsidized by the government and arbitration is not. The public subsidy of the courts places arbitrators at a cost disadvantage.”) Judge Posner, like several others, uses the term “adjudication” to refer to litigation but not arbitration, while I use the term “adjudication” to refer to any process in which a third party hears evidence and argument and then decides the result of the dispute. WARE, *supra* note 19, at §§ 1.5(a), 4.2 (defining litigation as adjudication in a governmental forum and arbitration as adjudication in a non-governmental forum). I believe this latter usage better captures the similarities and differences litigation and arbitration have with each other and with other processes of dispute resolution. See also ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 21 (4th ed. 2006) (“‘Adjudication’ refers to the process by which final, authoritative decisions are rendered by a neutral third party who enters the controversy without previous knowledge of the dispute.”); 1 IAN R. MACNEIL, RICHARD SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* § 2.6.1 n.1 (1994) (describing arbitration as a “form of adjudication.”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected [disputing] party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”); Sander, *supra* note 28, at 116 (“Of course quite a variety of procedures fit under the label of adjudication. Aside from the familiar judicial model, there is arbitration, and the administrative process.”)

<sup>30</sup> Drahozal & Ware, *supra* note 29, at 447–48 (internal quotations omitted); Hay, et al., *supra* note 4, at 1924.

Although litigation in the court system obviously is not free to the parties, the public still bears a substantial amount of the costs of adjudication. Foremost among these costs is the time that public officers devote to adjudication—time that the parties do not pay for and that the officials could have spent on other cases if the parties had opted for a private alternative. Yet if they resort to private alternatives, such as arbitration, . . . the parties must pay . . . for arbitrators to resolve [any disputes].

*Id.*

In short, government subsidizes the “adjudicator costs” of litigation,<sup>31</sup> but not of arbitration.<sup>32</sup> The public-sector court system

---

<sup>31</sup> Following a prior article, I use the term “adjudicator costs” to describe the costs of paying for the adjudicator (arbitrator, judge, jury) and support for the adjudicator (e.g., employees of the court system or arbitration organization, and the courthouse or hearing room). Drahozal & Ware, *supra* note 29, at 447–48. Adjudicator costs should be distinguished from other “process costs” such as “the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal.” Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 258 (2006). Arbitration’s process costs may be so much lower than litigation’s as to more than make up for arbitration’s higher adjudicator costs. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompi, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 329 (1996) (“If the arbitration process is significantly faster and cheaper to undertake than litigation, the comparative savings in disputing costs should far exceed the higher, unsubsidized, user fees charged by private arbitration organizations.”); *Id.* (“counsel fees and similar costs of pressing the case generally dwarf user fees.”).

The evidence indicates that arbitration tends to have lower process costs than litigation. See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 850 (2010) (“arbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited”); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the AAA*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003).

research shows that middle- and lower-income employees and employees who arbitrated pursuant to promulgated agreements had no real, practical right to trial. This study indicates that AAA employment arbitration offers affordable, substantial, measurable due process to employees arbitrating pursuant to mandatory arbitration agreements and to middle- and lower-income employees.

*Id.*; David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1589 (2005) (studying employment dispute resolution program adopted by anonymous business and reporting that “since instituting its DRP system, ADR Employer 1 has cut its outside counsel fees in half”); William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40, 44 (lawyers who represent employer-defendants estimated their clients’ cost of lawyers’ fees, expenses, and court costs averaged \$96,000 in litigation and only \$20,000 in arbitration); G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 521 n.24 (1989) (“average cost of defending customer-broker disputes in court was \$20,000 per case as compared with \$8,000 per case in arbitration.”); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Alternate Dispute Resolution: Employers’ Experiences with ADR in the Workplace* 19 (1997) (during the first three years after Brown and Root adopted an employee ADR program, it “reported that the overall cost of dealing with workplace disputes (including the annual cost of the ADR program itself) was less than half of what the company had been accustomed to spending on legal fees for employment-related litigation.”); see also Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008) (“Survey evidence and business experience provides some evidence that the total costs of arbitration are lower than in litigation, but the evidence is too limited to draw definitive conclusions.”).

<sup>32</sup> One would expect this to cause “justice delayed” for litigants in congested court systems while arbitration systems remain relatively uncongested. Unsurprisingly, empirical studies tend to suggest that arbitration generally moves cases to resolution more quickly than litigation. See DAVID B. LIPSKY & RONALD L. SEEGER, *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* 17, 26 (1998) (over 65% of companies gave “saves time” as reason they use arbitration); David S. Steuer, *A Litiga-*

provides legally binding adjudication virtually free of charge to the disputing parties, while the private sector arbitration system generally charges them market rates for it.

### C. *Who Deserves Subsidized Adjudication?*

Which disputing parties deserve subsidized adjudication and which should have to pay market rates for it? Our society's failure to confront this important question allows all disputing parties to pursue the subsidy for themselves. The result is that parties who do not deserve the subsidy—parties who should be paying market rates for adjudication—are consuming public resources that would be better spent on parties who do deserve the subsidy.

This problem can be reduced by confronting the question of which disputing parties deserve subsidized adjudication and which should have to pay market rates. An alternative to yet another bar association study on “underfunded” courts is to accept that, although many other lawyers and I would like to see a much higher percentage of government spending go to courts, that is not likely to happen.<sup>33</sup> So attention can shift to taking whatever is spent on courts and focusing it on the disputing parties who deserve a subsidy rather than on those who should be paying market rates.

---

*tor's Perspective on the Drafting of Commercial Contracts*, in DRAFTING CORPORATE AGREEMENTS, *supra* note 31, at 459, 467 (“Arbitration normally proceeds faster than litigation . . . .”); Eric Alan Stone & Jacqueline P. Rubin, *Drafting Corporate Agreements: A Litigator's Perspective*, in DRAFTING CORPORATE AGREEMENTS 483, 498 (2010) (arbitration “is, generally speaking, faster”); Drahozal & Zyontz, *supra* note 31, at 845 (“The average time from filing to final award for the consumer arbitrations studied was 6.9 months.”); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 51 (time to final hearing was about three times faster in arbitration than in court); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32 (consumer claims against businesses average 4.35 months in arbitration and 19.4 months in litigation. For business-initiated claims, the figures are 5.60 and 15 months, respectively); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not be an All or Nothing Proposition*, 87 IND. L.J. 289, 294 (2012) (“Professor Colvin's work confirmed the speed advantage of arbitration. He found that the mean time to resolve a case that proceeded to hearing and award was approximately one year; in contrast, litigation takes at least twice as long.”); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1572–73 (2005) (reviewing empirical data and noting “few dispute the assertion that arbitration is faster than litigation”).

<sup>33</sup> See, e.g., Stempel, *supra* note 31, at 383–84 (“The modern multi-door courthouse I paint as a judicial Nirvana assumes a commitment of resources that may be highly unrealistic. . . . Unfortunately, legislators and the public appear unwilling to make this commitment of personnel, technology, and money to the courts.”).

Which current recipients of subsidized adjudication should instead be paying market rates for it? For a paradigmatic case, imagine two large corporations (Seller and Buyer) who hire expensive lawyers to draft and negotiate their customized contract in which Seller agrees to manufacture and deliver to Buyer a one-of-a-kind machine in exchange for twenty million dollars. After Buyer pays, a dispute arises because Buyer says the machine Seller delivered does not conform to the contract's specifications, while Seller says the machine does conform to the specifications. All that is at issue in this dispute is whether or not this one-of-a-kind machine conforms to this one-of-a-kind contract. That is all an adjudicator is going to decide—an issue that would likely take the form of Buyer's breach of express warranty claim (under Uniform Commercial Code § 2-313) against Seller.

It is difficult to justify using the public courts' limited resources to subsidize adjudication of this dispute because:

- (1) the parties can afford to pay adjudicator costs on their own, without any subsidy,
- (2) the parties had a pre-dispute contract and thus an opportunity to include a good pre-dispute arbitration clause in that contract,
- (3) the parties and their lawyers were sophisticated enough to include a good pre-dispute arbitration clause in their contract, and
- (4) an adjudicator's decision in this case is unlikely to produce any significant "public good," (in either the economic or non-economic sense of that term) because all the adjudicator is likely to decide is whether a one-of-a-kind machine conforms to the parties' one-of-a-kind contract.

The last of these four points merits some explanation of "public good" in both the economic and non-economic sense of the term.

#### D. *When Is Adjudication a Public Good?*

##### 1. The Economic Sense of "Public Good"

In economics, a good is a public good "when the marginal cost of supplying it to an additional consumer is close to zero. A radio broadcast is a prototypical public good. Although the program is costly to produce, once a signal is broadcast, it costs nothing for

each additional viewer to tune in to a program.”<sup>34</sup> Some argue that an adjudicator’s decision is a public good insofar as it produces a precedent because it “costs nothing” for other consumers of adjudication (potential disputing parties) to benefit from using that precedent “in deciding how to behave.”<sup>35</sup> In other words, precedents that clarify legal rules benefit others in society, besides the parties whose adjudication produced the precedent, simply because clarifying legal rules reduces uncertainty about the legal consequences of different sorts of behavior. Over thirty years ago, in a now “classic” article,<sup>36</sup> William Landes and Richard Posner concluded that leaving adjudication solely to the private sector (arbitration) would under-produce precedent.

[P]rivate judges [arbitrators] may have little incentive to produce precedents. They will strive for a fair result between the parties in order to preserve a reputation for impartiality, but why should they make any effort to explain the result in a way that would provide guidance for future parties? To do so would confer an external, an uncompensated, benefit not only on future parties but also on competing judges.<sup>37</sup>

Accordingly, Landes and Posner concluded, “[t]he precedent-creating function of adjudication . . . may invite public intervention in the judicial-services market.”<sup>38</sup> In other words, an argument for government subsidies to adjudication is that in the absence of such subsidies too few precedents will be produced.<sup>39</sup>

---

<sup>34</sup> DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 313 (1994).

<sup>35</sup> Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1114 (2005). David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995) (“precedents and legal rules are public goods. Although the original litigants of the cases ‘purchase’ the rules, future litigants use these rules without paying.”).

<sup>36</sup> W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1099 n.32 (2012).

<sup>37</sup> William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979).

<sup>38</sup> *Id.* at 242.

<sup>39</sup> Hay, et al., *supra* note 4, at 1944–45.

[A]rbitration . . . is unlikely to provide a full replacement for court-made precedent. Even if arbitrators were as qualified as judges to make precedent, it is doubtful that the parties would be willing pay the price for comparable services. And that price would be quite steep, far higher than the cost of simply deciding the legal questions for the sole benefit of the present parties. To begin with, arbitrators would labor longer and more intensively to decide legal questions for the benefit of parties other than those financing the proceedings; indeed they do this for the benefit of an entire industry. In addition, to enhance the quality and coherence of the rulings, arbitration would have to develop an appellate or functionally equivalent review process, and the parties would have to pay its overhead. In addition, there is also a supply-side

Of course, this argument prompts concerns and counter-arguments. First, can the optimal amount of the public subsidy to adjudication be determined? Even if it can be determined in theory, will the political system implement that amount of subsidy, and no more, in practice? Too large a subsidy can overproduce a public good,<sup>40</sup> and that includes the public good of law and precedent.<sup>41</sup>

Second, precedents created by adjudication are not the only way to clarify law; legislatures and regulatory agencies can clarify law by amending statutes and regulations to resolve previously open issues. Perhaps publicly-subsidized adjudication clarifies law less efficiently than unsubsidized adjudication combined with increased clarification by legislatures and regulatory agencies.<sup>42</sup>

Third, “even if widespread use of arbitration erodes the supply of judicial precedent, this loss may be partially or entirely offset by the value of having competing producers of law.”<sup>43</sup> That is, perhaps arbitrators tend to make better decisions than courts so arbitrator precedents—some arbitrators do cite each other’s precedents<sup>44</sup>—tend to be better than court precedents and the higher quality of arbitrator precedents more than makes up for the higher quantity of court precedents. In short, compared to court precedents, arbitrator precedents might develop into “a superior stock of legal capital.”<sup>45</sup>

---

problem. In the absence of proprietary control over the work product, arbitration-made precedent becomes a public good. As such, competitive free riding among arbitrators will inhibit their investing optimally to make high-grade precedent.

*Id.*

<sup>40</sup> See, e.g., Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 402, n.108 (1984).

<sup>41</sup> Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 208 (2006) (“How much law is enough law? Is publicly made law superior to privately made law? To what extent can legislatures and regulatory agencies satisfactorily fill in for ‘lost’ judicial decisions?”).

<sup>42</sup> See *Id.*

<sup>43</sup> Weidemaier, *supra* note 36, at 1145 n.33.

<sup>44</sup> *Id.* at 1100 (“some studies of international arbitration report that arbitrators often cite other arbitration awards.”); *id.* at 1126 (“over half of the labor awards cited no precedent at all . . . over three-fourths (76.2%) of the remaining awards cited at least one arbitration award and over one-third (35.6%) cited only arbitration awards as precedent.”).

<sup>45</sup> Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209, 243–47 (2000) (“In certain settings, parties may develop an institutional common law through repeated dealings. An arbitral forum may have an advantage in developing and interpreting that institutional common law.”) (citing the law merchant and labor arbitration). See also Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

As the Widget Dealers Association arbitrators build a supply of precedents, they can be contractually required to follow precedents in future cases. So the privately-created law consists of not only unwritten norms and/or written rules, but also deci-

Within economics, one can question whether the benefits precedents confer on non-parties justify the public subsidy for adjudication. Nevertheless, the premise that these external benefits do justify the subsidy remains standard in the law-and-economics literature.<sup>46</sup> Even those who accept this premise recognize that some precedents confer little value on non-parties.<sup>47</sup> This lack of a significant external benefit is likely true of the paradigmatic *Buyer v. Seller* case hypothesized above because all the adjudicator will decide is whether a one-of-a-kind machine conforms to the parties' one-of-a-kind contract. The precedent will likely provide little guidance to other (potential) disputing parties about the legal consequences of their behavior. The law of express warranties is inevitably very fact-specific and this case's high degree of uniqueness makes it especially unlikely to significantly clarify the law governing other cases.<sup>48</sup> In sum, under the economic understanding of the "public good" created by adjudicators' decisions, litigating

---

sional law. In short, arbitration can produce a sophisticated, comprehensive legal system.

Even better, it can produce many such systems. The law—unwritten norms, written rules and decisional law—of the Widget Dealers Association may differ from the law of the Gadget Dealers Association. Both may differ from the laws of the Sierra Club, the Alabama Baptist Convention, the American Association of Retired People, the Rotary Club, or the Saab Owners Association. Thus emerges privatized law in the fullest sense. There is diversity because what is best for some is not best for others. But there is also a process of experimentation in which lawmakers learn from each other and copy laws which seem better. There may even be open competition among different lawmakers to earn money by producing better laws. A market for law develops. This privatized system produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining or mail delivery.

*Id.* at 746–47.

<sup>46</sup> See, e.g., Hay, et al., *supra* note 4, at 1944–46. For a contrary view, see BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 272–74, 277–86 (1990). For a recent study “offer[ing] insight into whether arbitration is capable of generating the public goods associated with precedent,” see Weidemaier, *supra* note 36, at 1110.

<sup>47</sup> Hay, et al., *supra* note 4, at 1921 (proposing that courts charge parties to “almost all commercial-contract cases” a user fee to remove the public subsidy for litigation of such cases); *id.* at 1944 (“A good case can be made for retaining the subsidy for cases that present substantial questions of law and thereby provide the opportunity for courts to make precedent.”); *id.* at 1925 (“Taking account of the public good of judicial precedent making, the proposed user fee would be subject to an offset for costs attributable to the adjudication of substantial legal questions.”).

<sup>48</sup> See generally Hay et al., *supra* note 4 (drawing a similar conclusion about contribution cases). See Hay, et al., *supra* note 4, at 1946 (“Most contribution litigation involves largely factual disputes over whether and how much contribution payment is due. Resolving these factual disputes has little (if any) precedential value. Indeed, these are factual disputes that would be well-suited for arbitration.”).

(rather than arbitrating) the paradigmatic Buyer v. Seller case is unlikely to significantly further any public good.<sup>49</sup>

## 2. A Non-Economic Sense of “Public Good”

Some understandings of the “public good” created by adjudicators’ decisions differ from the economic definition just discussed. For example, an oft-cited article by Owen Fiss argued that the job of courts “is not to maximize the ends of private parties, nor simply to secure the peace, but 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.”<sup>50</sup> Arbitration does not do this as well as courts, several scholars argue.<sup>51</sup> Even if that is true, however, it may not matter regarding—or even apply to—the paradigm case between Buyer and Seller.

The “Fiss view” that the job of courts is to “give force to the values embodied in authoritative texts such as the Constitution and statutes” may be a widespread view of cases involving claims based on the Constitution or a statute of great public interest such as the Civil Rights Act of 1964.<sup>52</sup> But I do not believe it is a widespread view of warranty cases between large corporations, even if such

---

<sup>49</sup> On the other hand, perhaps we cannot know whether a case is creating a precedent of importance until it is oft-cited (or not) by later cases. For this point, I thank Mark Weidemaier, who raises an interesting thought: perhaps courts could charge user fees (discussed below) to all parties who can afford to pay them but then send royalties to parties every time their case is later cited.

<sup>50</sup> Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984). See also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *OHIO ST. J. ON DISP. RESOL.* 241, 295 (1996) (“The power to control the law and justice cannot be permitted to seep out of the hands of the people through privatization.”).

<sup>51</sup> Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 *HARV. NEGOT. L. REV.* 11, 42 (2005) (“If the endowment of public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the FAA tends to fall short of the mark in many important respects. . . . arbitration provides little accountability, as arbitration awards are generally not subject to the substantive review that is available for decisions in public adjudication.”); *id.* at 43 (“Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of similar parties in different cases, at least in the sense of the application of substantive rules. Quite to the contrary, arbitration provides a highly individualized form of justice”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *STAN. L. REV.* 1631, 1661–65 (2005).

<sup>52</sup> 42 U.S.C. § 2000e–2000e–16 (2006); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 *WASH. & LEE L. REV.* 395, 399 (1999) (employment discrimination statutes are intended to “achieve the public goal of eliminating discrimination in the workplace.”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *STAN. L. REV.* 1631, 1664–65 (2005) (“we care more when federal statutory claims such as employment discrim-

cases implicate a statute such as the Uniform Commercial Code § 2-313. The values embodied in that statute (Article 2 of the UCC) are basically the values of party autonomy,<sup>53</sup> including freedom of contract,<sup>54</sup> so an adjudicator “enforcing” the UCC in this case will likely be just enforcing privately-created law, the terms of the contract between Buyer and Seller.<sup>55</sup> In sum, under common non-economic understandings of the “public good” created by adjudicators’ decisions, litigating (rather than arbitrating) the paradigmatic Buyer v. Seller case is unlikely to significantly further any public good.

To recap, Buyer and Seller in the above paradigm case do not deserve publicly-subsidized adjudication because they (1) can afford to pay adjudicator costs on their own, (2) they and their lawyers had the opportunity and (3) sophistication to include a good

---

ination are taken away from the public eye than when a dispute over the quality of soybeans shipped from Missouri to Nevada is handled privately.”).

<sup>53</sup> See, e.g., *Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 751 (5th Cir. 1981) (referring to “the Code’s devotion to the principle of party autonomy”).

<sup>54</sup> *Michigan Nat. Bank v. Michigan Livestock Exch.*, 432 Mich. 277, 285 (1989) (quoting 2 *White & Summers, Uniform Commercial Code* (3d ed), § 21-2, p 135) (in Article 2, “freedom of contract is the rule rather than the exception”); *Hayward v. Postma*, 31 Mich. App. 720, 723 (1971) (“The general approach of Article 2 of the code is that freedom of contract prevails”); *Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297, 304 (Tex. App. 2009) (“the UCC recognizes freedom of contract and specifies that parties may vary “the effect” of UCC provisions by agreement, except as proscribed by the Code.”); Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 *TEX. INT’L L.J.* 223, 266 (2006) (“Current Article 2 and contract law in general is premised on the notion of freedom of contract and party autonomy. As such, Current Article 2 has very few limitations on the freedom of contract in the bargaining process for sale of goods transactions beyond requirements of good faith and restrictions on unconscionable contracts.”); Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and “Merchant/consumers” Through Default Provisions*, 30 *J. MARSHALL L. REV.* 39, 44 (1996) (“Freedom of contract is a guiding principle of the U.C.C.”).

<sup>55</sup> Hay et al., *supra* note 4, at 1955 (“In commercial-contract cases, most of the legal questions relate to ‘default rules’”); compare Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 780 (2002) referring to:

[T]he undisputed fact that for a large part of the twentieth century an increasing volume of commercial disputes was voluntarily diverted by the parties from public courtrooms into private chambers of arbitration, thereby relieving the strain on overburdened courts without visibly damaging either the commercial life of the country or the American legal system,

*with id.* at 786:

If all contract disputes which the parties could not settle between themselves had to be submitted to arbitration for resolution, rather than to a court of law, the common law of contract would cease to be a living organism. It would become merely an historical relic, a legal King Tut in its elaborately detailed Restatement (Second) sarcophagus, a ruler to be exhumed and displayed—even admired, perhaps—but not obeyed.

pre-dispute arbitration clause in their contract, and (4) an adjudicator's decision in their case is unlikely to produce any significant "public good." These four factors, I suggest, counsel for ending the subsidy to adjudication of the paradigm case. Buyer and Seller should be paying market rates for their adjudication, rather than consuming some of the limited public resources that could otherwise go to subsidizing more deserving litigants.

### III. USER FEES TO END THE UNDESERVED SUBSIDY

#### A. *User Fees*

One way to end the public subsidy for cases that do not deserve it is for courts to charge the parties to such a case a fee high enough to reimburse the court for its costs of adjudicating the case. Imposing such "user fees" on litigants like Buyer and Seller might lead those parties to avoid newly-expensive litigation and choose instead to arbitrate, which would allow the court to devote more of its resources to other (more deserving) cases.<sup>56</sup> On the other hand, if Buyer and Seller chose to pay the now-high court fees then the money the court received from these fees could be devoted to other (more deserving) cases. Either way, the subsidy now provided for cases that do not deserve it would be re-directed to cases that do deserve it.

Proposals to raise court fees on some parties date back at least to the 1980's. Then Solicitor General of the United States, Rex Lee, concluded "that, at least in some cases, the costs of courtroom services should be borne by those who use them."<sup>57</sup> Lee asked:

Why, for example, should the public subsidize a lawsuit between Greyhound and IBM, or between Litton Industries and AT&T? Surely others are more in need of public welfare benefits. Yet, in each of those suits the public paid the bill for thousands of hours of court time—at several hundred dollars per hour—to determine which of these corporate giants owed the other money.<sup>58</sup>

---

<sup>56</sup> Buyer and Seller might make this choice through either a pre- or post-dispute agreement to arbitrate.

<sup>57</sup> Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 *CATH. U. L. REV.* 267, 272 (1985); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 131–39 (1985) (suggesting higher user fees for federal court).

<sup>58</sup> Lee, *supra* note 57, at 269.

More recently, a thoughtful article by Brendan Maher concluded that “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 [party’s] real choice to pay or to not pay costs does not offend our fundamental presumptions about how the world should be.”<sup>59</sup>

Just last year, a careful analysis by Bruce Hay, Christopher Rendall-Jackson and David Rosenberg got specific about which parties to which cases should be charged litigation user fees and thus denied the public subsidy given to other litigants.<sup>60</sup> Hay, et al., “conclude that the user fee should be applied to commercial-contract cases generally”<sup>61</sup> and explain as follows:

The main reason to apply the user fee in commercial-contract cases and not in other types of civil actions is that, in the former, contracting parties possess the practical means as well as the strong motivation to minimize total costs of the project through optimal contract terms governing price, performance, and resolution of potential disputes. These contracts consequently minimize total social costs (except for the overconsumption of judicial resources). In other types of civil cases, parties lacking access to judicially enforced civil liability would not be similarly situated to minimize the sum of social costs from accident risk and use of courts.<sup>62</sup>

In contrast to commercial-contract cases, Hay, et al., say, are “cases that merit greater priority in gaining access to public judicial resources. Generally, these are cases in which the claimants lacked pre-dispute contractual means to control risk and provide for non-judicial alternatives, and hence the principal social benefits of deterrence and compensation depend on court-enforced civil liability.”<sup>63</sup> In sum, the grounds on which Hay, et al., distinguish commercial-contract cases from other cases are similar, but not identical, to the grounds I used above to distinguish the paradigm *Buyer v. Seller* case from other cases.<sup>64</sup>

---

<sup>59</sup> Brendan S. Maher, *The Civil Judicial Subsidy*, 85 *IND. L.J.* 1527, 1547 (2010). “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)? Perhaps. But perhaps not.” *Id.* at 1532.

<sup>60</sup> Hay, et al., *supra* note 4, at 1919.

<sup>61</sup> *Id.* at 1948.

<sup>62</sup> *Id.* at 1954.

<sup>63</sup> *Id.* at 1921.

<sup>64</sup> See discussion *supra* Part III.C. listing my criteria as:

1) the parties can afford to pay adjudicator costs on their own, without any subsidy,

Hay, et al., point out that imposing a user fee to parties to commercial-contract cases “should lower the average delay” faced by other litigants.<sup>65</sup> In other words, imposing a user fee on parties to some set of cases would reduce the perpetual “crisis” of “underfunded” courts, crowded dockets and justice delayed.<sup>66</sup>

### B. *Practical Challenges Implementing User Fees*

While employing user fees as a way to end the public subsidy for cases that do not deserve it has the simplicity of an elegant theory, translating it into practice would face a knowledge problem:<sup>67</sup> how much should the user fee be?<sup>68</sup>

- 
- 2) the parties had a pre-dispute contract and thus an opportunity to include a good pre-dispute arbitration clause in that contract,
  - 3) the parties and their lawyers were sophisticated enough to include a good pre-dispute arbitration clause in their contract, and
  - 4) an adjudicator’s decision in this case is unlikely to produce any significant “public good.”

Similarly, Hay, et al., would impose their user fee only on “commercial” cases, which I take as a rough proxy for parties with some sophistication and ability to pay. In addition, they would impose their user fee only on parties with the “pre-dispute contractual means to . . . provide for nonjudicial alternatives,” Hay, et al., *supra* note 4, at 1921, that is, arbitration. They advocate a waiver of the user fee for cases likely to involve an important precedent, that is, public good. *Id.* at 1940 (“The proposal’s waiver provision, which preserves the ability of courts to adjudicate substantial questions of law, meets concerns about loss of precedent-making benefits.”).

<sup>65</sup> *Id.* at 1954 (“By eliminating the excessive incentive of contracting parties to litigate commercial-contract cases in court, the user fee should lower the average delay cost and thereby increase the average deterrence effect across other types of civil cases.”).

<sup>66</sup> As Hay et al., say, “in motivating the contracting parties to arbitrate more commercial-contract cases, the user fee will open up space on dockets to enable speedier access to courts for the other types of civil cases. Reducing delay costs for such cases may well increase the rate and volume of their litigation. Consequently, court congestion is likely to remain constant notwithstanding the application of the user fee. Solving the problem of court congestion will take more than a user fee.” *Id.* at 1956.

<sup>67</sup> See generally BARNETT, *supra* note 19, at 29–62 (for a discussion of knowledge problems); see also *id.* at 54–57 (discussing the underappreciated role of prices in solving knowledge problems).

<sup>68</sup> Hay, et al., *supra* note 4, at 1941–42 recognize the difficulty of accurately setting the user fee:

One major design problem, however, does not appear amenable to a precise solution. This problem concerns the practicality of courts setting the optimal user fee. To completely remove the public subsidy for adjudication . . . , the fee should effectively tax the parties for the total social cost of adjudication. That cost has two components. First, there is the judicial overhead: the fixed and marginal costs incurred in establishing and funding the operation of courts to adjudicate [the relevant] cases. This expenditure of judicial resources is both substantial and reasonably calculable. We surmise that courts could readily compute and levy the tax without practical difficulty in any given case.

Each case—even each commercial-contract case—is different. Different cases consume different amounts of the court system’s resources. Figuring out how much of the court’s resources a case consumed would be difficult, even after the case is complete. While Hay, et al., say the user fee should not be assessed and taxed until the end of the case,<sup>69</sup> this would be a change from current practice of charging court fees at the start of the case. More importantly, calculating the user fee at the end of the case would deprive parties of the information they need to decide if pursuing litigation is worth the user fee. If you do not know the price of a service until after you have consumed it, how can you make a sensible decision about whether to purchase that service? Some parties will, perhaps quite reasonably, expect that their case will consume few court resources and therefore trigger a low fee but, to the surprise of all, see that their case turns out to consume a huge amount of court resources and therefore triggers a huge fee. Even leaving aside the injustice of this rude surprise to a party, another problem with not assessing fees until the end of the case is that the parties may not be able to pay them. The court system would then be in the role of creditor trying to collect from an insolvent debtor. It is much easier to insist on payment before providing the service, although I suppose the court system could require parties to post bonds to insure payment of the fee if the party is not able to do so.

Alternatively, if the user fee was (like current court fees) imposed when a case is filed, the court would not need to be collecting debts for services rendered and the parties could take the user fee into account when deciding whether to file a case. But a court employee tasked with tailoring a user fee to a particular case before the case is even filed would have an impossible job. She could not possibly know enough about how the case is likely to proceed to accurately predict the amount of court resources it will consume.

This knowledge problem might be ignored by just imposing a flat user fee on, for example, all commercial-contracts cases. Par-

---

The second component involves the social cost resulting from delayed adjudication. Calculating this element of social cost poses daunting practical problems. *Id.* at 1941–42. I agree that “daunting practical problems” bedevil their second component but doubt that “the fixed and marginal costs incurred in establishing and funding the operation of courts to adjudicate [the relevant] cases” are “reasonably calculable.” I believe Maher also recognizes, but underestimates, the difficulty of calculating these costs. Maher, *supra* note 57, at 1541–44.

<sup>69</sup> “To account for the incurred social costs, the fee would be assessed and taxed at the close of the contribution case.” Hay, et al., *supra* note 4, at 1941.

ties to some cases would overpay while others would underpay but all of these errors might be tolerated as improvement over the status quo. In making improvements, we should let not the perfect be the enemy of the good.

Alternatively, the knowledge problem might be tackled by breaking the user fee into several user fees over the stages of litigation. For example, imposing one fee at the time of case filing, another fee if a discovery dispute requires the court's attention, another fee if a dispositive motion requires the court's attention, a fee for each day of trial and so on.<sup>70</sup> This sort of sequential-fee approach, common in arbitration,<sup>71</sup> would enable courts to more accurately adjust the user fee to the amount of the court's resources consumed by a particular user, and thus more closely approximate the optimal price.

#### IV. CONCLUSION

In short, user fees would make litigation look more like arbitration,<sup>72</sup> and level the playing field for competition between litigation and arbitration. The class of cases subject to the user fee would be the market for unsubsidized adjudication. In this market,

---

<sup>70</sup> Thornburg, *supra* note 19, at 259 (English court “[f]iling fees alone can exceed £1000, and then each step in the process—such as assigning the case to a track, filing motions, holding hearings, and receiving orders—also requires the payment of a fee.”).

<sup>71</sup> See AAA Commercial Arb. Rules & Mediation Procedures: Admin. Fee Schedules at 37 (2009) (charging an initial filing fee and final fee based upon the size of the claim, as well as fees for anything that would be an additional service additional services: “The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties’ agreement or stipulation.”); JAMS Comprehensive Arb. Rules & Procedures: Case Mgmt Fees at 4 (2007) (JAMS charges \$400 per party per day for the first three days of a hearing and 10% of professional fees if the time taken exceeds 30 hours. The JAMS neutral additionally charges her own rates); ICC Rules of Arbitration App. III Art. 2 (2012) (“In setting the arbitrator’s fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Art. 37(2) of the Rules), at a figure higher or lower than those limits.”); see also U.S. Arb. Assoc. Arb. Fee Sched., <http://www.usadr.com/fee> (last visited Oct. 14, 2012) (charging a \$500 per party initial filing fee for controversies totaling over \$75,000; \$125 per party per hour for pre-hearing conferences and scheduled hearings; \$30 per party per quarter hour for document review of motions, briefs and exhibits; costs plus 10% for the use of facilities; \$125 assessed to a party filing a counter-claim; and \$30 per party per quarter hour for award writing).

<sup>72</sup> Another step to make courts more like arbitration is “business courts.” See e.g., Christopher R. Drahozal, *Business Courts and The Future of Arbitration*, 10 *CARDOZO J. CONFLICT RESOL.* 491 (2009).

the public-sector court system would compete, without the benefit of a subsidy, against private arbitration organizations. Conversely, private arbitration organizations could compete against the courts in the subsidized adjudication market. This could be accomplished by giving “adjudication stamps” to all disputing parties. The stamps would be good at a variety of courts and arbitration organizations, much as food stamps are good at a variety of grocery stores,<sup>73</sup> or much as publicly-subsidized student loans are good at a variety of private colleges and universities.

Both these proposals—user fees and adjudication stamps—could be narrow or broad. For example, user fees could be narrowly confined to cases very similar to the paradigm Buyer v. Seller case, that is, cases in which:

- (1) the parties can afford to pay adjudicator costs on their own, without any subsidy,
- (2) the parties had a pre-dispute contract and thus an opportunity to include a good pre-dispute arbitration clause in that contract,
- (3) the parties and their lawyers were sophisticated enough to include a good pre-dispute arbitration clause in their contract, and
- (4) an adjudicator’s decision in this case is unlikely to produce any significant “public good,” in either the economic or non-economic sense of that term.

Such a narrow user fee would apply to few cases and thus provide few additional resources for other (more deserving) cases. The same might be said of Hay, et al.’s proposal to apply the user fee to commercial-contract cases generally because nearly all such cases might well satisfy the first three criteria just listed and only commercial contract cases that also satisfy the fourth criterion (absence of “public good”) would pay the user fee Hay, et al. propose because they advocate a waiver of the user fee for cases likely to involve an important precedent, that is, produce a public good.<sup>74</sup>

---

<sup>73</sup> Foods stamps, now known as SNAP (“Supplemental Nutrition Assistance Program”) may be used at authorized retailers. See, e.g., Supplemental Nutrition Assistance Program, available at <http://www.fns.usda.gov/snap/snap.htm> (last visited Oct. 14, 2012) (“You will continue to receive benefits as before and access them with the same electronic card at your local authorized retailers and farmers markets.”); SNAP Retailer Locator, available at <http://www.snapretailerlocator.com/> (last visited Oct. 14, 2012) (providing a recipient the locations of the nearest participating retailers).

<sup>74</sup> Hay, et al., *supra* note 4, at 1921 (proposing that courts charge parties to “almost all commercial-contract cases” a user fee to remove the public subsidy for litigation of such cases); *id.* at 1944 (“A good case can be made for retaining the subsidy for cases that present substantial questions of law and thereby provide the opportunity for courts to make precedent.”); *id.* at 1925

In contrast, relaxing or eliminating the public goods criterion would enable the user fee to apply to a broader set of cases—all cases among wealthy, sophisticated parties with a pre-dispute contract. This would raise adjudication costs to those parties and thus free up greater resources for cases that do not satisfy the first three criteria, that is, cases among parties who are poor, unsophisticated or lacking a pre-dispute contract (“strangers”). So a desire to make litigation more accessible for parties who are poor, unsophisticated or strangers is in tension with a desire to subsidize adjudication of cases likely to create a public good, even if the parties are rich, sophisticated and bound by a pre-dispute contract. In the absence of higher funding for the court system, each dollar used to subsidize the production of public goods in contract cases between rich, sophisticated parties, is one less dollar available to provide a “day in court” to the poor, the unsophisticated, and the parties to cases between strangers. As a result, different views about the importance of the “public goods” provided by litigation may lead to different views on the appropriate breadth of a user fee.

Similarly, different views about the importance of the “public goods” provided by litigation may lead to different views on the desirability of subsidizing arbitration to the same extent that we subsidize courts as by giving “adjudication stamps” to all disputing parties. This is not likely to appeal to those who believe that arbitration is less suited than litigation to producing “public goods.” In contrast, subsidizing arbitration to the same extent that we subsidize courts will likely appeal more to those who place little value on the “public goods” provided by litigation and who, instead, believe that the dispute belongs to the disputing parties so their choice about whether to litigate or arbitrate it should not be biased by a public subsidy encouraging litigation over arbitration.

---

(“Taking account of the public good of judicial precedent making, the proposed user fee would be subject to an offset for costs attributable to the adjudication of substantial legal questions.”).

