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Adjudication as a Private Good: A Comment

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ADJUDICATION AS A PRIVATE GOOD: A COMMENT

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THE principal paper[1] appears to present two quite distinct ideas. The first part of the paper inquires whether "adjudication" is or might be a "private" good. The second part of the paper appears to inquire whether cases involving certain types of rules (i.e., those that are more "inefficient") are more likely than other cases to be pursued on appeal, by reason of the incentives open to the parties.

It is difficult to understand why these topics should be considered together. As the content of the first part of the paper shows, the issue it addresses requires a comprehensive view of procedures for settlement of disputes over legal rights, hence a form of legal anthropology in its broadest sense. The second part of the paper deals with a question that presupposes a highly formalized system of adjudication, including a differentiation between trial and appellate functions and between "legal" and "factual" issues. In any event, I have deep doubts that the thesis in either part of the paper is sound.

As to the first part of the paper, no definition is supplied of "adjudication" or of "private." Questioning the definition is not a "semantic game" but an inquiry about the intelligibility of the thesis. "Adjudication" is sometimes used, even in law, to refer to procedures for dispute resolution that are not like "adjudication" defined in a more rigorous way. That being so, the authors should explain what definition they have in mind. I believe a useful definition is: A procedure for determining a dispute involving a claim of legal or customary right in which a third party is invested with authority to make a decision that is recognized as binding, except that under some systems of adjudication the parties have a right to reach a different disposition by contract after an adjudication. This definition entails the existence of a third party, and hence differentiates the procedure from negotiation; it involves a third party with power to make a binding determination, and hence differentiates the procedure from mediation; it presupposes that the claims are to

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[1] William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235 (1979).

rights, and hence excludes disputes over other matters such as allocation of resources at the disposal of a multi-person decision maker.

Most important, in specifying that the third party has authority to make a *binding* determination, the definition implies some sort of compulsion upon the parties beyond that which they can exert on each other. (The latter is "bargaining power" or "coercion," or the like.) The question then becomes, what is the source of the compulsion and who would bother to exert it? This is simply another form of the question, raised but not faced by the authors, of how a party to a dispute can be induced to submit to adjudication when he foresees that he will lose. The answer in either case is that third parties will act to compel him to submit, because they have an interest in seeing that the dispute is resolved on some other basis than that the stronger party shall always prevail. If there is no such third-party involvement, I submit that the decision procedure is not "adjudication" as that term is ordinarily understood. If the authors have in mind a special usage, they should state it.

The question, then, is whether the third-party interest is "private." Again, a definition is required, one that differentiates "private" from whatever it does not denote. If "private" is defined in opposition to "state," then the paper says that there may be adjudication under the compulsion of nonstate authority. This is hardly a historical or analytic breakthrough.

I had thought the authors used "private" in opposition to "public," because the title of the paper refers to "private *good*" and thus implied the dichotomy in economics between private goods and public goods. If so, then some particularization of this definition to the problem of adjudication is required in order to make the thesis intelligible. Do the authors mean that both the immediate disputants and the third-party adjudicator realize immediate benefits from resolution of the dispute that are not shared by the community as a whole? Do all three realize the same kind of benefits? Could the disputants equally well realize those benefits by contract, and if not why not? I had thought that such questions were the essence of analysis of "private" and "public" goods, as indeed the authors' reference to the lighthouse problem seems to acknowledge.

As for the second part of the paper, I confess being unable to follow the algebraic exposition and relied on reading the narrative summary at its beginning. The thesis is difficult to follow. The key paragraph appears to be the one commencing "We, in contrast, assume . . ."[2] In this paragraph, it is said that if the applicable rule is efficient "the likely outcome" will be to impose liability on the cheaper cost avoider. It is hard to see why such a result is merely "likely" unless reference is being made to some aspect of the adjudicative process other than the rule being applied. If we exclude such mishaps as misinterpretation of the rule, then application of an efficient rule

[2] *Id.* at 261.

will *certainly* result in imposing liability on the cheaper cost avoider—by definition. But this will not "reduce future costs of the activity," as the authors say, for no change has been introduced.

It is then said that if an efficient rule is operative, litigation will be avoided "because its expected yield is negative," meaning apparently that the result will be to increase costs. But, again, if the existing rule is inefficient, its continued enforcement perpetuates but does not worsen the inefficiency. In either case, it is difficult to see why the character of the rule would affect the appeal rate, so long as the parties were free to settle their dispute after trial and before the case is submitted to the appellate court. If the rule being applied is "efficient," then it would seem that each party has an incentive to get it changed in his favor. If the rule is "inefficient," the beneficiary of the rule has an incentive to protect it from being changed and the other party has the reverse incentive. In any case, the value of effectuating change or non-change in the rule (as the case may be) can be stated as a component of the price of settlement. Hence, other things being equal, the character of the rule as efficient or not will affect the price of settling the case after trial, but not the nature of the cases reaching the appellate court for decision.