The Joy of Attorneys' Fees
Grover Rees III
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The fee-shifting statutes generally provide that courts may award "reasonable" fees. It is difficult to say what is meant by this, since the most obvious index of reasonability, the market value of the services in question, is by definition unavailable for lawsuits that the client would not bring if he had to pay his own attorney's fees. The Supreme Court has settled on a formula by which an attorney receives *at least* the prevailing hourly rate for attorneys of similar skill and experience in his community for however many hours he can justify having spent on the case. To this base figure there may be added a "bonus" or "multiplier" (typically 25 to 50 percent of the base) for such factors as the attorney's "exceptional" skill, results "exceptionally" beneficial to the client, or the "degree of contingency," which is the risk that the attorney took that he would lose the case and receive no fee at all. This last provision leads to an odd result: a case that challenged such a gross violation of civil rights that it was sure to win would get only the standard fee, while a farfetched claim that won only by a fluke would get the maximum multiplier for its extreme degree of contingency.

The ideal attorneys' fee formula would provide no more and no less than would have been needed to get some competent attorney to take a given case. On paper, the "prevailing rate plus" formula looks as if it might approximate this ideal. Even the contingency factor can be justified on the basis that it makes public interest litigation just as remunerative in the long run as regular litigation with paying clients (though another way to look at it is that it charges the taxpayers, or whoever else the defendant happens to be, even for the lawsuits that are held to be unmeritorious). But in practice, the Court's formula provides windfalls to lawyers by omitting several key factors.

The first dubious assumption in the formula is based on a distorted view of the economic structure of the legal profession. Although the courts have abolished the minimum fee schedules once promulgated by bar associations and enforced by the threat of expulsion from the legal profession, there is still in most communities an understanding among lawyers that it is permissible to charge far more than the median hourly rate but impermissible to charge much less. The result of the suppression of price competition is that the lawyers whose services are least in demand find themselves unable to attract as much work as they would like to do. Although some lawyers respond by discounting their services, they are most likely to do so on an informal case-by-case basis.

The relative rarity and undetectability of attorney competition below the going rate, together with the unlikelihood that a judge will declare an attorney who has just won a case to be unusually unskillful, ensures that few attorneys will be awarded much less than the median fee award. Recently the Supreme Court upheld awards of $95, $100, and $105 an hour—amounts the Court acknowledged to be at least as high as the generally prevailing rate—to New York Legal Aid Society lawyers who were one, two, and three years out of law school respectively. Moreover, although the "like skill and experience" language does not prevent the median from operating as a floor, it does ensure that the ceiling is elastic. For instance, a federal district court recently awarded Harvard law professor Laurence Tribe $275 an hour for several hundred hours of work—a fee subsequently knocked down to $175 an hour by an appeals court on the grounds that he had charged a paying client less than this amount.

Litigating for Love, Not Money

An even more important flaw in the "prevailing rate" theory is that it ignores the nonmonetary benefits that attract many lawyers to such work in the first place. The decision whether to allocate five hundred hours of your time to a personal injury case, a securities transaction, twenty-five divorces, or a suit on behalf of your most cherished philosophical principles that may lead to a landmark Supreme Court decision is an easy one every time, if somebody will pay you $50,000 no matter which you choose.

For many lawyers the choice would be almost as easy if the public interest lawsuit paid only one-half or one-fourth as much as the less interesting and influential work. Many talented attorneys make essentially this choice by working as salaried employees of organizations whose goals they support even though they could make more money elsewhere. If a big cut

in attorneys' fees awards were similarly to force self-employed attorneys to choose between material and psychic satisfaction, some would still choose to be full-time public interest lawyers. (To keep things in perspective, even a shockingly large cut in fee awards could still leave them at a figure such as $50 per hour, for what often adds up to several hundred billable hours per case.)

Other lawyers would choose to mix philosophically important litigation with more conventional and lucrative work. Prestigious New York and Washington law firms already choose to do public interest work for social and philosophical reasons. When the law firm wins, it collects from the defendant at rates a bit lower than it usually charges, but far higher than any fee it would actually have charged the plaintiff; when it loses, it spreads the costs among its paying clients. The psychic satisfaction of the attorneys is not without its own palpable economic value to the firm: many firms attract top law school graduates by advertising the number of hours their attorneys spend on public interest litigation.

Paying for goods you would otherwise get for free is not the worst thing in the world; it may well be a prerequisite to generating more goods of the same kind. The problem, however, is that this analysis assumes some sort of rational constraint on how much new litigation will be called forth. Even if something is underproduced by the unaided market, it may still be undesirable to produce too much of it. This may be even more true of litigation than of other good things.

So long as there is an unexhausted supply of attorneys who will derive a greater sum of financial and psychic satisfaction by bringing new civil rights suits than by doing anything else, there will be no *internal* control on the amount of litigation generated by the fee-shifting statute. The number and scope of tax-supported suits against the taxpayers will continue to increase until society runs out of money or lawyers. Congress seems to have assumed that *external* controls—such as a relatively inelastic supply of clients wishing to bring suit, or of constitutional and civil rights, or of arguments that judges might accept—would operate as an effective limit. But this was a naive assumption.

The paradigmatic civil rights lawsuit that Congress had in mind when it passed the Civil Rights Attorneys' Fee Award Act was that of a poor person who had suffered a shocking violation of his civil rights, but who had suffered little or no monetary damage and could therefore anticipate no large award out of which to pay the fee. In an important public interest lawsuit, however, the civil right being asserted is often on the cosmic rather than the individual scale, and the person who happens to be named as the plaintiff may have had very little to do with initiating the suit. Indeed, the selection of a nominal plaintiff is frequently just one of a number of tactical decisions to be made by the lawyers handling the suit.

If anybody other than the lawyers themselves is helping to make the decisions, it is most often a civil rights or public interest organization. Such organizations, like some government agencies but unlike most individual and business litigants, are motivated more by ideological and long-term strategic factors than by a desire to make money. Like the government, they often litigate through salaried staff attorneys whose hourly wage is a small fraction of the "prevailing rate," and they benefit from other economies of scale that result from litigating many cases with similar facts and legal issues. In the award of attorneys' fees, however, these litigating groups get treated not like government agencies but like individual attorneys competing on the open market, which means that they are compensated at an hourly rate much higher than their cost per hour.

Under the prevailing-rate-plus formula, the number of hours a litigant bills tends to approach the maximum number a reasonable attorney could justify spending. By aiming for the upper limit of reasonableness, the public interest organization not only maximizes its receipts in the case at hand but also puts pressure on the ceiling for future cases. In effect, it becomes a cost-plus contractor that maximizes

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Civil rights groups churn the profits from successful litigation back into more litigation. Because of the disparity between what it costs them to litigate a suit and what they are awarded when they win, they need to win only a few suits in order to initiate many new ones. And if they can win the same percentage of this year's cases as they did of last year's, their litigation budget will expand geometrically.

The Rights Industry

This system—essentially an entitlement program for lawyers—has enabled individual rights litigation to grow into a big business. But it poses much more than just a budgetary problem. If the only effect of excessive litigation were to refine the legal system, to call forth ever-smaller incremental steps toward some agreed-on goal of perfect justice, it would be at worst another case of spending too much on a good thing. The problem is that every controversial issue has at least two sides. When a court grants an asserted individual right to one party, it is more often than not rejecting an individual right claimed by another party.

A government making laws and a rights group selecting clients are both faced with a bewildering array of competing claimants. They must consider the putative rights of merchants and consumers, of pregnant women and unborn children, of people who want to swim in the nude at the public beach and parents who do not want their children seeing naked people. When they decide between these claims, or attempt to balance them, they are making political choices between philosophies of government. Thus, most "individual rights" litigants are best understood not as defenders of a generic "individualism" against some other philosophy, but as advocates who happen to promote their own political philosophies in terms of a resulting set of individual rights. In the case of most litigant groups dating back to the 1960s or earlier, the choice of rights coincides with the policy preferences of the left; in the case of a small number of more recent groups, it coincides with the preferences of the right.

The public interest law establishment frequently asserts that its choices among rights are based not on ideology but on the U.S. Constitution. This argument, however, is circular; it is another way to say that professional civil libertarians have come to regard almost all of their political opinions as constitutional rights. As most any candid civil rights lawyer will tell you, few of these rights were contained in the written Constitution that was ratified in 1790 or in its amendments. Rather, they are part of the "living constitution" that has been enacted by the federal courts during the last thirty years. The courts, in turn, have defined the contours of the living constitution largely according to suggestions made by the ACLU and its sister organizations. This is a function partly of the predisposition of most federal judges, but perhaps more importantly of what is called litigation pressure.

The Role of Litigation Pressure

Litigation is not an abstract idea. It is a thing. It has attributes very much like mass, volume, density, speed, and acceleration. Other things being roughly equal, if Position A is urged in a thousand lawsuits and Position B in only ten, the courts will eventually adopt Position A.

Year in and year out lawyers for public interest groups bring thousands of lawsuits urging the courts to incorporate certain ideological positions into the Constitution. These cases are selected from among many more thousands of possible cases for their relatively strong fact situations, appealing plaintiffs, and unappealing defendants. Every effort is made to bring pioneering suits in the judicial districts with the most sympathetic judges, and even then a civil rights organization may be willing to lose many cases in order eventually to win one big one.

When a single federal district judge declares the existence of a new constitutional right, law review articles appear proclaiming the landmark status of the case. In the next round of lawsuits the landmark case and the law review articles are cited as authority. More cases are won. By the time the Supreme Court considers the question, the new civil right is practically an established part of the legal landscape. Even if the justices refuse to go along, a

public interest group is unlikely to regard its defeat as final. More lawsuits will be brought (with slightly different fact patterns to distinguish them from the Supreme Court's decision) in order to win more victories in lower courts, more law review articles and newspaper editorials, and an eventual reconsideration by the Court.

It is not unreasonable to ask what the state and local governments are doing while their laws and ordinances are gradually being transformed into violations of the Constitution. There are many answers. Some government lawyers lose because they are simply not as competent as the opposing public interest lawyers. Others concede the fundamental claim advanced by the opposition and try to carve out a narrow exception for their clients, either because they are personally sympathetic to the opposing position or because they are more concerned with winning one case than with the eventual progress of the law.

Even when the government decides to fight, it labors under certain disadvantages. Government lawyers, unlike those who work for civil rights or public interest groups, generally take lawsuits as they find them with the plaintiffs, defendants, facts, and judges already selected. It is much harder for hundreds of governmental entities to coordinate litigation strategy —to attempt to ensure, for instance, that the cases that go to the Supreme Court are strong ones for the government and that they are argued by the best attorneys available—than it is for the organizations that bring the suits.

Moreover, once the courts have decided to regard one side of the case as the "individual rights" side and the other as the "government interests" side, a number of procedural and substantive rules combine to make it difficult for the government to prevail—even when the government's interest is in protecting some people from injury by others. Government lawyers themselves contribute to this situation: even when they draw the court's attention to the individual interests that the challenged law protects, they almost always argue only that the Constitution permits the government to protect these interests if it so chooses, and hardly ever that the Constitution requires such protection.

Finally, once the public interest law establishment wins a single case in the Supreme Court it has usually won for good, since government lawyers will generally advise their clients to comply with the decision rather than relitigate what seems to be a lost cause. So the law moves gracefully in the desired direction, riding the crest of the litigation glacier, with only an occasional lurch the other way.

Silencing the Opposition

The effects of litigation pressure might be very different if it came from many different directions at once. But for quite a while the groups litigating for civil and constitutional rights were not at all evenly distributed along the ideological spectrum; nearly all came from the left. During the last few years, however, it seems to have dawned on conservatives that a single defeat in federal court can cancel out many legislative victories. Dozens of litigating organizations have sprung up to press more conservative viewpoints.

If the trend toward diversification among individual rights litigation groups were to continue, the organizations on the left would have to devote substantial resources to relitigating old cases and defending their fundamental assumptions about which individual rights are to be protected, with a corresponding diminution of the resources available for expansion of the constitutional frontiers. This is where Mrs. Black and Dr. Seguin come in. They will serve as an example for others who might think of asserting in court that laws challenged by the established groups should be upheld as valid protections of individual rights.*

*As another example shows, the public interest law establishment is not at all happy about the prospect of sharing with these upstarts the public interest mantle and the strategic advantages that go with it. A recent article in the *Yale Law Journal* suggests that the Internal Revenue Service should deny tax-exempt status to most business-oriented public interest groups. The author, Oliver Houck, ties his proposal to the charge that the groups have received donations from businesses that benefit from the groups' lawsuits. The irony is that, under Houck's plan, these businesses would still be able to deduct their litigation costs as business expenses. The principal effect of denying tax-exempt status would be to deter contributions from people who do *not* have a palpable financial stake in the outcome. In any case, the article implicitly assumes either that contributors to the other kinds of public interest groups get no substantial benefit financially or otherwise from the lawsuits at issue, or that, even if they do, such self-serving contributions (unlike self-serving business contributions) should not compromise the organizations' public interest status.

Nothing in the Civil Rights Attorneys' Fee Award Act or in any other federal fee-shifting law suggests that such laws should be applied against individuals who intervene to defend their own rights. The law provides that the judge "may" award attorneys' fees to any prevailing party other than the United States. Although the law does not explicitly exclude any alternative—not even the possibility that losing *plaintiffs* might be required to pay attorneys' fees to state and local governments—the courts have construed the statute to deny such awards unless the plaintiff's claim was frivolous. A similar construction on behalf of the intervenors in the Akron case would have been fully consistent with the purposes of the law: to encourage people to assert their rights and to compensate for the advantages governments have over individuals.

In a few cases, such as when a business enterprise is found to have discriminated in employment, the civil rights law clearly permits the awarding of attorneys' fees against non-government defendants. But in these cases it is the wrongful acts of the defendants that the plaintiffs claim to have violated their rights in the first place. When people intervene in a lawsuit to defend the constitutionality of a law, their only offense is to argue in court that their own rights are at least as important as those of the plaintiffs. To treat the assertion of rights in court as if it were itself a civil rights violation contravenes some of our most cherished notions—including those that motivated the passage of the civil rights attorneys' fee law.

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In two earlier abortion cases where the facts were similar to those of the Akron case, federal judges had refused to levy attorneys' fees against parents and other individual intervenors. In effect, the courts treated losing intervenors just as they have always treated losing plaintiffs. The earlier courts had also noted that the presence of individual intervenors had given the courts a more accurate picture of the controversy than if only the government had defended the law. But the Akron judge summarily rejected such reasoning. He noted that the intervenors had caused the plaintiffs' attorneys lots of extra work by choosing to intervene as parties, and that if they had just wanted to suggest helpful arguments to the court they could have done so in an amicus curiae brief. There is a certain tension between these arguments, since the only reason the parties' attorneys do not have to spend much time answering arguments in amicus briefs is that such briefs are notorious for not being read by judges. Moreover, all kinds of parties cause opposing parties' attorneys lots of work year in and year out in all kinds of lawsuits, and only in exceptional circumstances are they hit with attorneys' fees as a result. Those exceptions, as we have seen, sometimes provide that both sets of fees must be paid by an unusually guilty or an unusually powerful party. Even assuming that the ACLU and its clients can be analogized to David, it does not make much sense to designate Mrs. Black and Dr. Seguin as Goliath.

The Akron judge's reasoning presents an unpleasant choice to people who believe a challenged law protects their rights. If they stay out of the lawsuits, they risk losing whatever rights the law affords without ever having had a day in court. Even the most competent government lawyers may not adequately represent the interests of those who are protected by a law, because the state's interests are never precisely identical to those of any one group of citizens. The state will be reluctant to advance arguments that might win a case but cause it to lose some other case or that might make state officials look bad in the eyes of some voters. But if the beneficiaries of the law appear in court to make these arguments for themselves, they now risk bankruptcy.

No such unpleasant choices are imposed on those who choose to challenge a law, even when the only difference between challengers and defenders is that the defenders happened to win the political contest that preceded the judicial one. Mrs. Black and Dr. Seguin, even if they had won their court battle, would not have been able to recover their attorneys' fees from the

abortion clinics. The asymmetry stems from the court's assumption that anybody who is defending a state law or a local ordinance against constitutional attack cannot really be on the side of individual rights.

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This is a disturbing assumption not only because it reflects a certain cynicism about democracy but also because it tends to be self-validating. The imposition of severe penalties on people who appear in court to defend their own rights under a law will perpetuate the present artificial situation in which the courts see individual rights on only one side of each case, while designating the other side as a mere governmental interest. The presence of flesh-and-blood people on both sides of civil rights cases makes it more awkward for a court to indulge in this legal fiction. Intervenors like those in the Akron case therefore pose a potentially important threat to the hegemony of the current public interest establishment, since the individual rights/governmental interests dichotomy has been crucial to many of the most important victories its constituent organizations have won over the years.

Bad News for Defenders of Laws

Congress is now considering comprehensive legislation to curb the excesses of the federal attorneys' fee industry. One proposal under consideration would effectively overrule the Akron case by making it clear that fees can be awarded only against litigants who are found to have violated someone's rights. Assuming that the Akron case is not overruled by Congress or by a higher court, however, the public interest law movement can be expected to portray it as a landmark and urge its application in other contexts.

The Akron ruling is technically an interpretation only of the Civil Rights Attorney's Fee Award Act of 1976, but its reasoning is equally applicable to many other federal fee-shifting statutes that provide for "reasonable attorneys' fees." The parties at risk in these cases will be people who intervene to defend state and local government conduct; where the federal government is the principal defendant, on the other hand, the language of the usually applicable statute is more precise and harder to apply against intervenors.

Even if the Akron precedent is not applied to any fee-shifting statutes other than the civil rights law, however, it may apply to many private litigants who would not otherwise be forced to pay for their opponents' attorneys. A recent Supreme Court decision has expanded the term "civil rights" beyond its traditional context to mean *any* right secured by the Constitution *or by any federal statute.* Thus the law could be applied to businesses or civic associations who might wish to defend local zoning laws against attack on constitutional or federal statutory grounds, or to hunters and fishermen who support state interpretations of the federal fish and wildlife laws less draconian than those sought by environmentalist groups, or to private schools or teachers who intervene to defend their interest in any of the numerous laws that apply to them, or to anyone who benefits from a state program funded in part by the federal government.

It is even conceivable that the Akron case could come back to haunt the ACLU itself. Some laws, after all, do protect rights that are important to liberals, and conservative lawsuits could place the beneficiaries of such laws in exactly the spot in which the ACLU managed to place Mrs. Black and Dr. Seguin. It is much more likely, however, that attorney fee awards against individual intervenors would prevent right-of-center litigation groups from emerging as serious competitors to the established organizations on the left. In the first place, conservatives have generally been more successful than the left-of-center public interest organizations have been in securing legislative protection for the rights they believe to be important, so that they have more laws to defend and fewer to attack. The left, on the other hand, has done far better in court. Even if new judicial appointments and litigation pressure from conservative groups should eventually reverse the leftward drift of federal judicial decisions, such a

reversal would necessarily be gradual, and it would start from sets of precedents that define individual rights more or less according to the specifications of the ACLU.

In the first few years of any effort to get the courts to accord constitutional status to the rights they regard as important, conservatives could expect to lose far more cases than they would win. But their only alternative is to confine themselves to defending the power of legislatures to protect these rights, which is what got Dr. Seguin and Mrs. Black into so much trouble in the Akron case. This is quite a discouragement; if during the early history of the ACLU its clients had been routinely exposed to liability for many thousands of dollars in attorneys' fees, it would have had fewer clients.

Finally, the public interest establishment is in a better position than the newcomers to absorb any losses they might incur. The litigation budget of the ACLU alone is many times larger than the combined budgets of all the conservative groups that litigate on "social" issues. The established groups get institutional support not only from blue-chip law firms and large foundations but even, ironically, from various levels of government. In the Akron case, for instance, the ACLU lawyer was also the director of the "litigation clinic" at a state university law school. His services were donated (with out-of-pocket expenses being advanced by the abortion clinics) with the stipulation that the law school and the ACLU would share equally in any attorneys' fee award.

THE FINANCIAL ADVANTAGES that the public interest establishment enjoys over its adversaries, like the fact that it starts out with more of its positions having been designated by the federal courts as the "true" individual rights positions, is attributable in no small part to the fact that it has been on the job longer. In individual rights litigation as in any other market, barriers to entry help the established enterprises. If the costs of setting up business can be made steep enough, competition can be eliminated and monopoly power established. The Akron case—in which a law designed to encourage people to assert their rights in court has been transformed into a bludgeon against the assertion of rights that are not currently fashionable—suggests that the incumbent monopolists are in a predatory mood. ■

Curse of the Mummy's Tomb
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ple, allow the store a generous markup on the merchandise; or it may advertise the item heavily, spurring consumer curiosity and high turnover. Note that manufacturers can win even in cases where a supermarket is a local monopolist; the Soviet Union is known for its rigid retailing monopoly, but finds it advisable to sell Pepsi-Cola anyway.

Rival airlines have a number of ways to bid for prominence in a CRS system. They can create demand from the ground up by advertising aggressively to consumers, or give travel agents higher commissions so as to encourage them to take a moment to call up the extra screens. More drastically, they can launch their own CRS systems, or even market their tickets outside the world of travel agents, as People Express has done. These options were not much explored in the CAB proceedings. The board's statement mentioned, but only to dismiss as an anomaly, People Express's success in selling directly to consumers. They asserted that travel agents would find it hard to switch from one CRS system to another, and they examined only the chance that a new entrant would have of displacing United's SABRE or American's APOLLO—even though carving out a smaller market niche might be a more effective strategy for entry.

The most obvious way for a carrier to bid for better screen position, of course, is to offer a higher fee to the system operator. Thus, the point of the campaign against bias was to demand that the government secure for rival airlines, for free, an increase in listing prominence that they were quite capable of bidding for. One reason for their attitude may be that the fees charged to competing carriers and agents have in many cases been going up, as both the costs of operating the systems and their value to users has risen. Deregulation has intensified the use of CRS systems by making possible rapid fare and schedule changes, entry by new airlines, tighter seat assignment scheduling (because of higher load factors), and more connecting flights (because of the shift toward a "hub-and-spoke" system).

The CAB devoted most of its attention to the question of whether bias is unfair to businesses, and never much looked into the ques-