February 11, 2019

Dear NYU Legal History Colloquium,

My undergraduate advisor was fond of saying “no dissertation was ever completed except in a rush.” Enclosed is the last, rushed chapter of my recently defended dissertation, now in the process of being revised into a book manuscript. Because it is an early stage draft, I am eager to hear any and all reactions as to what directions to pursue and which claims to nail down by researching additional jurisdictions, court practices, or times.

My book project, *The Lawyers’ Code*, is broadly about the transformation of legal practice in the nineteenth-century United States from the old common law writ system to the modern lawyer-dominated landscape familiar today. The code at the center of the title and of the story is the New York Code of Procedure, enacted in 1848 and more commonly known today as the Field Code after its chief drafter, the Manhattan corporate counsel David Dudley Field.

I have included the Part III introduction that explains how this chapter fits into the overall structure of the argument. Two other items are worth noting: previously in the book I make clear that a *folio* for purposes of calculating a lawyer’s fee was, by the 1840s, no longer a literal page but rather 100 words of text.

Second, the chapter previous to this one focuses on the fusion of law and equity in New York and provides a detailed examination of the “Erie Wars.” Briefly, the robber barons Jay Gould and Jim Fisk retained Field & Shearman (predecessor to Shearman & Sterling) in their bid to leverage the Erie Railroad to take control of the Albany & Susquehanna line, with the apparent intent of plundering both lines. Field & Shearman filed numerous claims for equitable injunctions and receiverships from Judge George Barnard, who was later impeached for receiving bribes from Gould. Judge Darwin Smith of Rochester ultimately ruled all of the Gould injunctions and receiverships as fraudulently obtained. Field had Darwin reversed on a technicality (some of Darwin’s rulings were in the nature of a *quo warranto* proceeding, but no jury was impaneled). This chapter picks up with the scandal of the Erie Wars still hanging in the air.

Many thanks for reading,

Kellen Funk

Kellen Funk
PART III

THE CODE AMERICÁN

We shall have a book of our own laws, a Code American, not insular but continental, as simple as so vast a work can be made, free in its spirit, catholic in its principles! And that work will go with our ships, our travelers, and our armies; it will march with the language, it will move with every emigration, and make itself a home in the farther portion of our own continent.
—David Dudley Field, Address to the Albany Law School (1855)

In 1888, David Dudley Field became the eleventh president of the still nascent American Bar Association. Founded by seventy-five lawyers in Sarasota Springs, the Association was dominated by New Yorkers but remained rudderless in its professional mission. Its founding charter dedicated its members to “the promotion of the administration of justice and a uniformity of legislation throughout the country.” But ten years into its history, the Association’s members—who hailed from solid code states like Missouri, common law states like Michigan, and Anglophile reform states like Massachusetts—disagreed sharply over what legislation actually was and whether national uniformity in legislation was even desirable.¹ Before his presidency, Field saw one of his codification proposals mangled in debate. Field therefore tried a different tack by reviving the strategy used forty years earlier: Field would build a professional consensus around national codification by starting with procedure.

Field’s original measure, co-drafted in 1886 with the theorist of municipal law John F. Dillon (1831–1914), was the seemingly anodyne resolution “that the law itself should, so far as possible, be

reduced to a statute.” In the ensuing debate, Field and Dillon clarified that the resolution was meant only to establish, as a first step, that legislation was preferable to case law as a source of governance. Whatever steps the Association should take towards legislation was an independent question on which the resolution supposedly did not depend. The accompanying report clarified that Association members could read the resolution as a call for codification if they chose, but that “the real question is whether the American people should be governed by legislation or by litigation.” Addressing the national Association, Field pitched the resolution in nationalist terms. “An unwritten or inaccessible law is un-American,” his report read. “The law of the legislature, as distinguished from the law of the courts, is the necessary sequence of the American doctrine, that the functions should be apportioned between three great departments, legislative, executive and judicial.” But even after a century under this purportedly American doctrine, “our practice is inconsistent with our theory.”

Common law lawyers were quick to challenge Field. Henry Budd, a lawyer from the anti-code state of Pennsylvania, offered what was by now a standard objection to codification. Granted that a binding American code could somehow be formulated and enacted, “the code won’t execute itself, [and] must be interpreted.” Without a “body of juris-consults to meet together to discuss problematical questions and decide them,” there would “still be law-making by litigation as before.” Budd was especially disparaging of Field’s belief that codification fit naturally with American political theory. The foundation of American politics, according to Budd, was not legislative supremacy as Field had it, but the federated system of independent states. Recasting arguments made all along the American frontier, Budd argued that codes were inherently a tool of imperial administration, because only an imperialistic regime could enact a single piece of legislation across an entire continent. “But it

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2 Report of the Ninth Annual Meeting of the American Bar Association (1886), 11. Two other signatories to the report were George G. Wright of Iowa and Seymour D. Thompson of Missouri. Ibid., 358. Wright dissented from the report because he thought it too disparaging of civil jury trials. Ibid., 359. On Dillon’s jurisprudence, see Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870 (Cornell 1989), 220–27.

would be a very different thing were that code, drawn by the most skillful lawyer this country can produce, to be put before the legislatures of the thirty-eight states.”

The prominent New York case reporter Austin Abbott (1831–1896) attempted to salvage Field’s resolution with a practical compromise. He moved to amend Field’s resolution to state “that the law, so far as in its substantive principles it is settled, should be reduced to the form of a statute.” The amended resolution made clear that any resulting code would not change the law but only gather settled precedents into one place, much like a treatise, albeit one with legislative force behind it. Abbott defended the proposal not with theories of governance, but as a practical question of “whether it will facilitate the labors of the profession and of the bench.” Case reports, Abbott knew from experience, had continued to multiply from the time lawyers first complained about the bulk of precedents during the Jacksonian era. “We have to range the reports of the whole country, whereas thirty years ago we only looked at the reports of our own state,” Abbott contended, and now “reports are multiplying so that their authority is breaking down by the mere mass of them.” If nothing else, codification could be a labor-saving device, and that was American enough. As modified by Abbott, the resolution passed on a fairly evenly divided vote of 58–41, hardly a clarion call for codification by the only national lawyer’s association.

Returning as president in 1888, Field ignored Abbott’s resolution relating to “substantive” law and instead started down the path of codification from a familiar place: procedure. Field reported that in 1887 he had visited Senator Francis Cockrell of Missouri in Washington to work out a plan for a federal code of procedure. Support for a federal procedure code had stalled in the Senate, but Field believed with the Association’s support it could pass, and he urged a resolution from his 1886 report that the Association go on record advocating for a federal procedure code.

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5 Report of the Ninth Annual Meeting of the American Bar Association, 45–47.
Field understood the resolution to mean more than simply an adjustment of practices in the federal courts. “If a Federal code of procedure is once made,” he reasoned, “the codes of procedure in the various states (for I believe there will be one in every state eventually) will naturally assimilate themselves to the code of Federal procedure.” Federal codification, encouraged by the national Bar Association, was thus a direct path to a national code. The setbacks suffered by the procedure code in Field’s home state, and the resistance to the Field Code along the eastern seaboard, could be reversed by being transcended at the federal level. “Do gentlemen know what has already happened?” Field asked in his presidential address. “Do they know that the code of procedure of New York which was framed and passed in 1848, which abolished the distinction between law and equity, has gone the circuit of the world?” Referring in part to the adaptation of his code in western and southern states and in part to reformed English procedure for which he took credit, Field proclaimed that his “code has been followed in twenty-six states and territories of this Union, and it is followed in almost every colony where there is an English speaking people. It is in Australia, it is in Singapore, it is in Hong Kong, it is in China.”

The litany of Field’s claimed procedural colonies bears a remarkable resemblance to an address Field had delivered more than thirty years earlier to a graduating class of students at Albany Law School. At that time, the future appeared bright for Field’s codification efforts. The completed procedure code was annually introduced in New York’s legislature and was making its way across the West. Field was hopeful more codes would follow: codes of civil, criminal, and constitutional law. Field stressed to the students that codification was the key to measuring New York’s stature against other states and even other nations. “Shall this imperial State be outstripped in the noble race by either of her sisters, or by that queenly island, mother of nations, which having been our parent, is now our rival?” No, he answered. In the race for empire, the Empire State would be the first to “win the well-deserved prize; that we shall have a book of our own laws, a CODE AMERICAN, not insular but

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continental, . . . and that work will go with our ships, our travelers, and our armies; it will march with
the language, it will move with every emigration, and make itself a home in the farther portion of our
own continent, in the vast Australian lands, and in the islands of the southern and western seas.” Like
the Code Napoleon, the Code Americán would be a monument of civilization. Unlike the French code,
it would be “as simple as so vast a work can be made, free in its spirit, catholic in its principles!”

In his address to the American Bar Association, Field essentially proclaimed his Albany
prophecy fulfilled. The Code Americán turned out to be his code, a procedure code. It had crossed the
continent and even, in Field’s telling, the western seas. It had traveled with emigrants to the West, and
with armies to the South. But its dominance remained fragmented by American federalism. Some
states avoided codification, some, like his home state, took half measures which distorted his
intentions. “Now,” he pleaded with the Bar Association, “let us make a code of procedure for the
Union, and that will lead to what we all desire, I think; to an assimilation of the practice in all the
states. I hope the resolution will be adopted without a dissenting voice.” It was.

The previous chapters have shown that although the contingencies of politics shaped the
development of American procedure, and although Field and the codifiers thought they were
revolutionizing the law, Anglo-American legal practice remained fundamentally stable. Fact pleading
did not abolish the artifice of formulary pleading but merely multiplied the forms; oathtaking did not
abolish fiction or desacralize the law but changed the kinds of pious fictions that could be told; fusion
in practice retained a separate jurisprudence for law and equity with separate procedures depending
on the remedy. But even if the structure of legal practice remained largely unchanged from its late
medieval configuration, the code did introduce certain features that then and now have come to
distinguish American practice from the rest of the world’s legal systems.

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9 David Dudley Field, Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany (1855), 32.
In a recent work, Amalia Kessler argues that a professional legal culture of adversarialism is both an American distinctive and an enduring legacy of the Field Code. The chapters that follow take up Kessler’s invitation to “focus on the historical particularities of the American experience” that account for perceived differences between western legal systems. Chapter 7 surveys the code’s extension of the so-called “American rule,” that each party bears its own litigation costs and pays its own lawyer. Chapter 8 describes code practice as it related to one of the most widely recognized unique feature of American law to this day: the dramatic power of lawyers to act as pretrial fact investigators with the power of discovery. Chapter 9 chronicles the reception of the Field Code at the federal level, through what codifiers called the “American system” of procedural rulemaking.

Kessler’s work chronicles how “adversarialism” became defined as a key component of due process in American legal culture even before the New York code made “process” a domain of law to be codified. On this ground, Kessler argues that the code “simply ratified what lawyers themselves had already accomplished,” and that the code’s “supposedly revolutionary merger of law and equity . . . was in fact little more than a fait accompli.” That may well have been the case for adversarialism, and Kessler shows convincingly that well before the New York codification, oral combat in open court triumphed over written examinations taken in private as the main lawyerly mode for eliciting facts.

But within its 800 pages, the New York code contained so much more than the regulation of witness examinations and the related trappings that are sometimes identified as adversarial. Kessler’s account shows how lawyers seized opportunities where they saw them to define their combative trial practices with the “due process” required by a liberal democratic society. My account concurs that the power of professional lawyers was central to domains in which the Field Code wrought the most

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influence—and created the most distinctly American legal practices. Lawyers disagreed sharply about
the wisdom behind the formulary system and the fusion of law and equity, but abolishing fee
regulations, empowering lawyer-driven discovery, and investing lawyers with rulemaking authority
were far less divisive measures among the bar, and far more successful code reforms.

The features that distinguished American legal practice by the end of the nineteenth century
(and distinguish it to this day) were those aspects of lawyerly power created or augmented by the
Field Code. This study, therefore, is less concerned with the debate about whether “adversarial”
procedures meaningfully distinguish American (or English) legal culture from the “inquisitorial”
modes of European procedure, and instead contributes to the literature on the ways codification
enhanced modern legal institution-building. The comparativist R.C. Van Caenegem argued that a
jurisdiction’s distinctive legal history and legal culture were largely controlled by the institution that
became preeminent during nineteenth-century codification controversies. In France, that institution
was the legislature; in Germany, the professoriate. In England, codification was controlled—and thus
successfully resisted—by the judiciary. Van Caenegem largely excluded the United States as having
no codification controversy to speak of. The following chapters contribute to Van Caenegem’s
paradigm by showing that in America, it was the professional bar who gained in power and
preeminence through the fortunes of codification.

As this study has shown, the United States did have a codification controversy, but one
misinterpreted because of the assumption that classical legal thought believed procedure an
unimportant and therefore uncontroversial supplement to the real law. In fact, the controversial Code
Americán was a lawyers’ code, and a lawyers’ code was a procedure code. The coincidence was not
unimportant, for it was in procedure that the lawyers found their power.

Chapter 7

How Shall the Lawyers Be Paid?

Fees & Costs

A long and labyrinthine paper trail stretching from 1850s California wound its way to the witness stand of a New York courtroom in 1865, where sat the famed explorer and first (failed) Republican presidential candidate John C. Frémont (1813–1890). In odd ways, the litigation was all about Frémont and not about him at all. Before the Democrats had fixed on what seemed to be the inspired choice of General George B. McClellan for their presidential nominee in 1864, a fractured Republican Party had briefly considered unseating Lincoln to replace him with Frémont. That was, partly, what brought Frémont to the center of New York political squabbles as the Civil War was winding down.¹ But in the suit that brought Frémont to the stand, he was only a minor witness, called in primarily to discuss David Dudley Field’s retainer fees.

Field had been an early champion of Frémont in the Republican Party and had eagerly joined Horace Greeley of the New York Tribune and Salmon Chase, Lincoln’s Treasury Secretary, in Frémont’s 1864 gambit. Their bitter opponents in ’64, going back to the Democratic-Whig rivalry, were William Seward and his chief journalist lieutenant Thurlow Weed. After Weed accused George Opdyke, a former mayor of New York City and one of Chase’s major banking allies, of corruptly making “more money . . . than any fifty sharpers, Jew or Gentile, in the City of New York,” Field sued, hoping to use a wide-ranging libel suit to air his and Opdyke’s many grievances against Weed.²

² On Field’s connections to Opdyke and his management of the libel case, see Daun Van Ee, David Dudley Field and the Reconstruction of the Law (Garland 1986), 138–61.
One of the libel claims concerned Weed’s allegation that Opdyke had fleeced an unsuspecting Frémont. However, most of Frémont’s examination concerned not his dealings with Opdyke, but rather the striking revelation elicited by Weed’s counsel that Frémont had paid Field a retainer of $200,000 before his 1856 presidential run, a staggering sum for a single legal representation at the time. As the defense counsel had hoped, Field could not help but take the bait, stretching out the examination on a tertiary point in order to justify his fee, and by implication, his integrity as a lawyer conducting a high stakes litigation (the libel suit sought $50,000 in damages). Field walked Frémont back through a bewildering array of transactions structured to offload a mining interest that had gone bad before the presidential run. Field’s fee, Frémont acknowledged, was paid in stock with a par value of $200,000 but whose market value was uncertain. Frémont had no objection “at all” to it when it was negotiated, and told Field he “richly deserve[d] it” when transferring it at the end of the representation. The two had contracted freely, and privately.

Turning from Frémont to the gallery, Field made a miniature speech taunting his opposing counsel. “My friend [Edwards] Pierrepont [(1817–1892)] need not waste his thoughts” on such a high fee, Field snarled, “for nobody will ever make him such an offer, and he would not earn so much were he to live a hundred years.” As for William M. Evarts (1818–1901), the future architect of the modern federal court system, Field invited him to “sit down with me and compare the fees he has received from the public treasury” for representing New York and the federal government at various times. “I will promise to make no public inquiry into the amount he has received, and we will both cry quits and be even.” Defending himself publicly a few years later after the Albany & Susquehanna litigation, Field deployed the same tactics: insulting his fellow lawyers as unskilled and therefore envious of the high fees he could command, while simultaneously threatening to reveal his opponent’s own dubious compensation schemes.

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3 The Great Libel Case, Opdyke Against Weed: A Full Report of the Speeches of Counsel (1865), 8, 63–64.
4 The Great Libel Case, 148–49.
This chapter traces those professional and ethical arguments through the history of the code’s deregulation of lawyer fees. Fees, however, must be understood in their relation to legal “costs”—by no means a mere synonym in the nineteenth century. Costs were the legal expenses, including fees, chargeable to the loser in a litigation. Before the code, New York strictly regulated the costs that victorious lawyers had to be paid by their adversaries. It was unclear whether the limits on costs were also the limits on fees that lawyers could negotiate with their own clients, but lawyers at the time commonly spoke as if the limits were the same, and they loudly complained that theirs was the only craft burdened by legislative price fixing.

Cost-shifting, including making the loser of a litigation pay the victor’s attorney fees, is typical in western legal systems, so much so that the prevalent practice of the United States in requiring each party to bear its own litigation costs and fees is seen as a distinctive feature of American legality, commonly dubbed “the American rule.”\(^5\) As the Supreme Court explained in its first invocation of the term, “the rule here has long been that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract,” on the premise that “litigation is at best uncertain and one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.”\(^6\)

The leading account on the history of the American rule by John Leubsdorf echoes the Court’s formulation. “In a sense, the American rule has no history,” he writes. “As far back as one can trace, courts in this country have allowed winning litigants to recover their litigation costs from losers only to the extent prescribed by the legislature.”\(^7\) These formulations are highly misleading, however,

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because rarely in American history until the mid-twentieth century has there been an “absence” of a cost-shifting statute. Most U.S. jurisdictions for most of the nineteenth century had a comprehensive cost-shifting statute, and for the majority of those jurisdictions, that statute was (or was superseded by) the Field Code. Although the code deregulated lawyer fees, it preserved the traditional logic and practices of cost-shifting, largely expanding the equitable practice of having lawyers petition the court for costs to shift after each victorious motion or phase of litigation by appending the words “with costs” to their motion or plea.

We can get a sense of how pervasive cost-shifting was, even during the supposed “heyday” of the American rule in the late nineteenth century, from a popular lawyer joke at the time. A lawyer was called on to pray at a community picnic. “Not being experienced in such duty, he rose and attempted the Lord’s prayer, and succeeded very well until he came to the passage ‘Give us this day our daily bread,’ when, from the force of habit, he immediately added, ‘with costs.’” Cost-shifting was, almost until the time the Supreme Court declared it to be a foreign practice, the reflexive vocabulary of the American lawyer.

What lawyers at the time called “the American rule” was not the regulation of cost-shifting, but actually the Field Code’s proclamation that lawyers were entitled to contract for and enforce their fee agreements instead of adhering to the English and civilian traditions of accepting fees as a mere gratuity. In time, the one American rule gave rise to the other, this chapter argues, as Field’s system of unregulated fees put increasing strain on the code’s justification for cost-shifting. Rather than

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8 The earliest instance of the joke I have found is the Bellows Falls Times (Bellows Falls, Vt.), November 13, 1868. The joke circulated widely in 1869, but continued to run around the code states as late as the 1890s. See, for instance, Yorkville Enquirer (Yorkville, S.C.), October 31, 1896. Incidentally, this joke was discovered by my digital history collaborator, Lincoln Mullen, using a similar approach to text analysis as the project in Chapter 3 to trace biblical quotations across nineteenth-century U.S. newspapers. See Lincoln Mullen, America’s Public Bible: Biblical Quotations in U.S. Newspapers, website, code, and datasets (2016): http://americaspublicbible.org.
9 See, e.g., New York Civil Practice Act (1921), §§ 1432 et seq. (detailing the rules for cost shifting, which was required in nearly every kind of action);
deterring meritless or unscrupulous litigation practices through cost-shifting, Field and other elite lawyers turned increasingly to local bar associations to police attorney ethics. And in Field’s case, the local bar association was the one that arose directly in response to his Erie Wars litigation.

The Irresistible Temptation of Pecuniary Interest: Fees and Costs in 1840s New York

Despite the central importance of lawyer compensation to the structure of legal practice and professionalism, legal historians know surprisingly few details about how lawyers were paid in the nineteenth-century United States, beyond close studies of the legal careers of a few exceptional figures such as John Adams and Daniel Webster.\(^\text{11}\) We can discern some things from contemporary case law—for instance, that the American colonies and states of the Early Republic did not enforce English rules against champerty (essentially, a payment by a lawyer to a client to instigate litigation) and therefore permitted a variety of contingency fee arrangements from early on in their history.\(^\text{12}\) But although cases appear in every jurisdiction of lawyers suing former clients, no doubt the choice to do so was not taken lightly, and lawyers appear to have been especially careful to keep from inviting negative precedents that would affect their fundamental ability to earn a living through the law.

Two dangers confronted a lawyer suing to collect a promised fee. The first was that the action might be disallowed entirely. Summarizing a civil tradition running back to republican Rome, Blackstone’s *Commentaries* had asserted that “a counsel can maintain no action for his fees, which are given . . . not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation.”\(^\text{13}\) In 1790s England, Lord Kenyon (1732–1804) emphasized in a series of opinions the rule that medical and legal professionals practiced for gratuitous honoraria, not

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\(^{13}\) 3 Blackstone’s *Commentaries* 28.
compensation to which they had any colorable right in the law of property or contract.\textsuperscript{14} Although a few states early after the Revolution repudiated the gratuitous fee rule by statute, New York was not one of them, and courts there would not confront the question of a lawyer’s entitlement to compensation until the surprisingly late date of 1840.\textsuperscript{15}

The second danger, particularly in New York, was that courts might recognize an entitlement to fees but then limit those fees to the amounts prescribed by statute. At the time, it was by no means clear whether “fees and costs” meant the same thing in the law. Generally speaking, “costs” were the charges that were shifted by the court from the loser to the winner of a litigation at its conclusion. These charges included both actual costs such as those for paper goods as well as fees paid to clerks and to the adversary’s lawyer. That is, what made a charge a “cost”—even if it was nominally a “fee”—was that a loser at trial could be forced to pay it. Lawyers called these “taxable” charges.\textsuperscript{16} Not all states provided for taxable costs, and most certainly did not provide the depth and detail of regulation that New York gave to the subject. It was clear enough that New York’s many limits on the charges per “folio” of attorney work product were meant to limit taxable costs imposed on an adversary; but were they also limits on what lawyers could receive from their own clients?

That was one popular interpretation in 1830s New York, even as lawyers attempted to find ways to charge beyond what the low limits of the Revised Statutes arguably allowed. Theodore Sedgwick chronicled both views in his explosive tract, \textit{How Shall the Lawyers Be Paid?}, one of the clearer windows into how lawyer compensation actually worked in nineteenth-century New York. Sedgwick wrote that clients typically conflated costs with fees. When clients discovered the amount of costs shifted at the end of trial, “they make this same tariff the rule of compensation between the attorney


\textsuperscript{15} At least, no New York court had confronted the question in a case subsequently reported on the record. See Stevens & Cagger v. Adams, 23 Wend. 57 (New York Supreme Court 1840) (discussed below and collecting cases from other states that had abolished the English rule of gratuitous fees).

and his client.” If attorneys tried to charge more, some clients held “out all the terrors of the law,” by which Sedgwick meant the threat that lawyers would have to litigate for their fees, and possibly lose if the courts ruled their fees a gratuity. Other terrors could have been in store, as the Revised Statutes made it a misdemeanor for public officers to charge more than the fees “provided for by law.”

Nevertheless, Sedgwick acknowledged, lawyers did charge more than the folio fees made taxable by the Revised Statutes. These were called “counsel fees” in a technical attempt to evade the statute should the courts ever decide that prescribed costs were indeed the limits on what “attorneys” could charge their clients. The idea was that a “counsellor” who advised on the law was a different sort of professional and provided a different service from an “attorney” who appeared in court, standing in the place of their client. Just as America had not generally followed the English separation of barristers from solicitors, attorneys and counsellors were often the same person in the same cases, but at least arguably the client was paying two different fees to two different professionals. Unlike the prescribed attorney fees in the Revised Statutes, which were low amounts tagged to the number of folios in a filing (generally 25 cents a folio at common law and 28 cents a folio in chancery), counsel fees could be charged by the task or for a total representation and could range up to hundreds of dollars. In time, counsel fees too were covered by statute. The Revised Statutes provided that counsel fees, including a retaining fee between three and four dollars, could be taxed to the other side. Sedgwick recognized that lawyers opened themselves to claims of extortion if they insisted on counsel fees over and above the statutory rates, “but in point of fact,” he concluded, “no lawyer can or will work, and no client expects that he can or will work, without them.”

Sedgwick’s admission about counsel fees is an interesting one, because it undercut the two most prominent points in his tract: his depiction of lawyers as degraded artisans and his argument

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that fees had to be reformed to give lawyers the proper incentives in their craft practices. Sedgwick complained that “no other workman,” such as the “physician, the sculptor, [or] the tailor . . . is paid according to statute . . . without any reference to the individual qualification of talent, industry or integrity” of his craftsmanship. But of course, thanks to counsel fees, eminent lawyers could expect their compensation to rise with their talent and industry.

Sedgwick was on somewhat firmer ground in claiming that, counsel fees notwithstanding, lawyers had an incentive to “make all our papers prolix, and to create useless labor and expense” by litigating technical points of pleading that, if won, shifted costs their way independently of the ultimate merits of the suit. Counsel fees were flat rates that clients agreed to usually before a representation began; they would be paid regardless. A lawyer could thus increase his compensation by inflating the page count of filings and then winning, if not the case, at least “interlocutory” motions arguing the finer points of pleading and practice. But in Sedgwick’s telling, lawyers faced not a mere incentive but an “inevitable tendency,” an “eternal and irresistible temptation of pecuniary interest.”

Again, Sedgwick might have had a stronger argument if lawyers had to subsist solely on the taxable fees they won. But instead of recognizing how counsel fees could mitigate the incentives to over-file, Sedgwick spoke as if the lawyers’ practice was entirely economically determined by the Revised Statutes. “There is no justice in condemning the conduct of the individual,” he concluded. “It is the system that must be reprobated . . . for the sake of justice.” Perhaps that was because Sedgwick was just such an “individual” who would stand condemned otherwise. As he admitted about pleading an unpaid debt, “Here I can tell the story in two lines, yet if I were to narrate it to a court, I should think it very unprofessional to put it in less than twelve hundred words, or thereabouts” which he claimed he and all other lawyers naturally had to do.

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21 Sedgwick, How Shall the Lawyers Be Paid?, 7, 19.
22 Sedgwick, How Shall the Lawyers Be Paid?, 19. See also ibid., 7 (“There are checks upon this it is true, but they are inoperative compared to the sleepless interest of the pleader or practitioner.”).
Despite his complaint that lawyers were the only craftsmen to have their fees regulated by statute, Sedgwick’s solution was to leave those regulations in place. It was a “rule of inherent justice” that losers in litigation had to pay the winner’s costs, and so public law would have to continue making sure that only the true “expenses of the controversy” shifted, not necessarily the luxurious expenses of employing “counsel of . . . extraordinary ability.” Sedgwick moreover believed that taxable costs might become the sole compensation of counselors—as clients were continually insisting—so long as the rates were raised to sufficiently compensate those who engaged in such “a toilsome, an honorable and an expensive science.” Sedgwick suggested that fees should attach not to the folio of work product but to the amount of money demanded as a remedy (or a monetized equivalent of an equitable remedy), with interlocutory costs abolished and a penalty applied to those who dragged out delays. Doing so would ensure that “time is paid for instead of the services, and time represents with sufficient accuracy the services that are performed” by the lawyer.23

Sedgwick’s brief reform track raised a number of themes that became central to the Field Code reforms. As late as 1840, the relationship between lawyer fees and taxable costs remained uncertain in New York. Although lawyers had found a way to charge fees above the taxable rates in the Revised Statutes, it was uncertain whether such fees would hold up if challenged in court. Lawyers like Sedgwick commonly spoke as if the fee regulations were their only certain source of income, regulations with which no other craft workers had to contend. Sedgwick cast lawyers as virtually powerless to act contrary to financial incentives, an idea that would have a long history in debates about professional ethics, not least in debates about Field’s professional ethics. Finally, by turning from fees based on page counts to an early form of the billable hour, Sedgwick showed how difficult it could be to measure and monetize the value of a lawyer’s services with precision.

From Status to Contract: Stevens & Cagger v. Adams

At almost the same time Sedgwick was penning his tract, a New York court was finally confronting the question of whether lawyer fees were mere gratuities as a matter of state practice. Stevens & Cagger, a prominent firm known for its appellate practice, argued two appeals for a Mr. Adams in the New York Court for the Correction of Errors, New York’s highest court of appeal at the time. Adams explicitly agreed to pay $300 for Samuel Stevens to conduct the oral arguments. Stevens expertly structured the transaction as a counsel fee. Another lawyer acted as “attorney” and filed the actual writ of error (the appellate pleading), while Stevens confined himself to the oral argument as “counsel.” But when it came time to collect, Adams insisted on paying only the taxable cost of an oral argument under the Revised Statutes—a mere $3.75.

The case was so perfectly structured to favor the lawyers, one wonders if it was not manufactured for that purpose. For one, the fact that there was an express agreement removed the thorny problem of how courts should value a lawyer’s service if lawyers could indeed collect more than the taxable amount. The stark disparity—almost literally a hundredfold—between the agreed amount and the actual payment surely could not have endeared Adams as a defendant before the court. Perhaps most importantly, the fact that the case concerned appellate argument helped the lawyers get past what New York’s highest court noted were “the plain words of a statute.” The Revised Statutes prescribed fees for “services . . . done or performed in the several courts of law and equity in this state, by the officers thereof.” Although the Revised Statutes did not expressly define officers to include lawyers, Adams’s defense counsel pointed out that so many other statutes and cases had declared lawyers to be officers of the court that it had basically become a truism. The problem, then, was Title 4, Section 5 of the Revised Statutes’ fee regulations: “No judge, justice, sheriff, or other

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24 On the firm’s prominence, see George Rogers Howell, History of the County of Albany, N.Y., From 1609 to 1886 (1886), 1:146–47.
25 Stevens & Cagger v. Adams, 23 Wend. 57 (New York Supreme Court 1840), 59.
26 Stevens & Cagger v. Adams, 26 Wend. 451 (N.Y. Court for the Correction of Errors 1841), 461 (Senator Gulian C. Verplanck, concurring); Adams, 23 Wend. at 57–58.
officer whatsoever, . . . shall take or receive any other or greater fee or reward” than those declared in the preceding regulations. If lawyers were public officers of the courts, than they were included in the “other officer” category, and prohibited from charging more than the prescribed fee.

Both the trial court and the Court for the Correction of Errors recoiled from that plain reading, however. The trial court ruled that taking the Revised Statutes literally would “run into an absurdity” that revealed the legislature could have intended only that the fee regulations limited costs taxed between the parties, not fees paid by clients to their counsel. One clue was that the Revised Statutes limited the taxable costs in an appeal (but not necessarily in trial litigation) “only to one counsel on each side, who shall have been actually employed and rendered the service charged.” But many appellate lawyers worked in two-lawyer teams as Stevens & Cagger did. Clearly, the court reasoned, the statute was designed to keep such firms from taxing double costs, not from keeping one advocate from being compensated entirely. Second, the court noted that the Revised Statutes not only prohibited officers from collecting higher than their prescribed fees, it actually criminalized the act, deeming it a misdemeanor. Given the prevalence of counsel fees, the court was sure the statute was not intended to criminalize the vast majority of the practicing bar.

Finally, the court reasoned that Section 5, directed as it was explicitly to sheriffs and “other” officers, “applies only to such officers as are compellable on the requisition of parties to render the services appertaining to their offices, but has not application to counsel.” The logic of that decision accords with recent work by Nicholas Parrillo on the nineteenth-century shift from a fee- and bounty-based regulatory culture to one of salaried judges and bureaucrats. Parrillo finds one key stage of that development in changing notions about whom public officers served, and how they should serve. By mid-century, he argues, most states were moving away from fee system that encouraged public

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27 Revised Statutes of the State of New York, 2:650 § 5.
29 Revised Statutes of the State of New York, 2:518 § 7; Adams, 23 Wend. at 61–62.
officers to treat their clientele as a “customer class” and render extraordinary services for bonus fees and profits. Instead, officers were increasingly expected to expend their best efforts serving all of the public at once. Fee caps became a way not just to limit an officer’s total compensation from ballooning to unseemly proportions, but also to destroy any incentive for officers to cultivate a clientele and provide extraordinary services for extraordinary pay.\textsuperscript{31}

The restrictiveness of New York’s Revised Statutes seems to map onto these newly developed views about public service quite well, but as the Adams court recognized, the prescription of lawyer fees fit uneasily into this emerging world of public servants. The problem was that in the craft logic of practice, some lawyers would naturally exhibit, as Sedgwick argued, more “talent, industry or integrity” than others, and would see their services in higher demand. Were the eminent leaders of the bar to be paid the same as neophytes? Could a lawyer who won a high-stakes case with technical sophistication and skill really receive no monetary reward for the effort? Here the Adams court noted that the Revised Statutes were stricter than previous New York fee statutes, in that the Revised Statutes prohibited “tak[ing]” or “receiv[ing]” a higher fee. Earlier laws had required that lawyers not “exact, demand, or ask” any greater fee. Under a strict reading of the Revised Statutes, even the English and European idea of fees as gratuities was out of bounds. Ultimately that reading was too implausible for the court. The principle was too deeply ingrained that lawyers of disparate skill ought to have their superior craftsmanship specially remunerated.\textsuperscript{32}

Once past the difficulty of taking the statute literally, neither the trial court nor the court of appeal had much trouble deciding against the civilian rule of fees as gratuities and in favor of enforcing lawyers’ contractual rights to their compensation. “The reward of the Roman advocates was

\textsuperscript{31} Parrillo, \textit{Against the Profit Motive}, 93–101.
influence with the people, from which grew political distinction and power,” Stevens argued. But “with us, the reverse is the case . . . . The relation between the counselor and his client is created by contract, and like all other contracts may be enforced in a court of law.”33 Chancellor Reuben Walworth made the chain of reasoning even more explicit in the decision of the high court. “The [Roman] distinctions of patron and client . . . ceased in this state when slavery was abolished,” he declared in the Court for the Correction of Errors. But in the American Republic, no “business or profession . . . is so much more honorable than the business of other members of the community.”34 Professional honoraria belonged to a world of status, where lower classes served the higher as slaves. But a republic of free and equal men, on Walworth’s reasoning, was a world of contract.35 Walworth affirmed that Stevens & Cagger could collect on their contract; no jurist on the court (comprising the entire state senate at the time) dissented.

The Adams case resolved that New York lawyers had the right to sue for their contractual fees, even when those fees vastly exceeded the prescribed rates of the Revised Statutes, which were now defined away as taxable costs. The decision received an unsurprising amount of acclaim among the bar, but it left open the question of how to value a lawyer’s services in the absence of the kind of express agreement Stevens had with Adams. The case that would decide that question was litigated on the very eve of the Field Code, in the spring of 1848, just before the code took effect in July. The case was something of the reverse of Adams. James T. Brady was the lead lawyer for the City of New York, called the “corporation counsel.”36 By 1848 (on track with Parrillo’s timeline), the corporation counsel was a salaried position, at $2,000, but Brady prosecuted a number of successful suits for the

33 Adams, 23 Wend. at 57.
34 Adams, 26 Went. at 452.
city in chancery that resulted in $8,511 of costs recovered to the city as victor. Brady brought an action essentially to add the taxed costs to his personal compensation, more than quadrupling his salary. Since his contract with the city did not mention taxable costs and did not explicitly limit his compensation to his salary, there was no express agreement as there had been in *Adams.*\(^{37}\) Whereas Stevens had sought to escape the low statutory rates of common law appeals, Brady was seeking to reap a windfall from the high statutory rates of chancery.

The New York City judge and case reporter Lewis Sandford ruled that Brady was entitled to the costs. He interpreted Brady’s salary to be his “counsel fee” only, so Sandford laid down the rule that lawyers who actually engaged in litigation as attorneys (or solicitors in chancery) were presumed to be owed *at least* the taxed costs that resulted. Although lawyers had been reluctant to have their services valued only at the prescribed rates, in this particular case full of chancery litigation, the rule happened to net Brady a windfall.\(^{38}\) A brief assembly report on fees in 1845 made clear that “custom and the decisions of the courts” had established that “the counsel is entitled to all, over the amount allowed by the fee bill, that competent witnesses may swear his services are worth.” Competent witnesses were “lawyers, of course, just as a farmer, mechanic, or laborer, would in all cases be the best judge of the time, labor and value of any piece of work.” In sum, the value of a lawyer’s services was a matter to be proved case by case in court—by the defendant if it was argued the value was less than the taxable costs, by the plaintiff if it was argued to be more. Responding to a petition to “equalize” lawyer fees by requiring all practitioners to collect no more than the prescribed rates, the assembly committee refused to create “any legislation compelling the profession of law to submit to restrictions not placed upon any other class of society,” and to leave lawyers to “the great principles

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37 Brady v. The City of New York, 1 Sand. 568 (N.Y. Superior Court 1848).
38 Sandford was not terribly distressed at the windfall, which he blamed on the city’s litigiousness and poorly drafted contracts. Brady, 1 Sand. at 592 (“If it is said that our conclusion awards to the plaintiff an enormous compensation for his services while corporation counsel, it must be answered that if such be the result, it is to be attributed to the immense extent of the litigation in which the city has been involved, and to the defective legislation of the corporate authorities on the subject.”).
of supply and demand, and of the free moral and intellectual capacity of man, to regulate and control his ordinary business operations.”

Thus, by the time of the Field Code, New York lawyers had won an unequivocal right to their compensation; but unless they secured an express agreement from their clients or put on proof at trial, their services were presumed to be valued at the amount prescribed by the Revised Statutes as taxable costs, a presumption clients and legislators were trying to make a hard and fast rule as late as 1845. Lawyers were still public officers of the court, but new conceptual separations of public office from private gain had not attached to them as it had to sheriffs and other servants of judicial process. And despite both the law on the books and the law in practice declaring their freedom from the prescribed rates of the Revised Statutes, lawyers continued to present themselves as the only craft profession in the Republic that had its rates set by legislation.

A Private Agent for Private Purposes: The Deregulation of Lawyer Compensation

Of all the reforms undertaken by the 1848 code, fee reform received some of the lengthiest and certainly the most passionate commentary in the commissioner’s report. The report completely effaced the steady work of the courts in the 1840s to secure lawyers’ contractual rights to their compensation. Instead, one could easily come away from reading the First Report with the impression that the Field Code was the first time in world history lawyers gained rights to their fees and freedom from legislative regulation. If the code was not so revolutionary in effect, it was at least unabashed in articulating the logic of its rules: “We cannot perceive the right of the state, to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill or labor. . . . It is not [government’s] province, to make bargains for the people or to regulate prices.”

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40 First Report of the Commissioners on Practice and Pleadings (New York 1848), 204–05.
Accordingly, the code welcomed lawyers to a world of free contract. Section 258 abolished “all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil action,” as well as “all existing [court-created] rules and provisions of law, restricting or controlling the right of a party to agree with an attorney . . . for his compensation.” It declared that “hereafter the measure of such compensation shall be left to the agreement, express of implied, of the parties.” 41

The report agreed with Sedgwick that the unreformed system “encourages the multiplication of processes, and . . . is not proportioned to the real labor performed.” The commissioners’ main objection was to the Revised Statute’s many pages of tabulated folio fees. “The real labor bestowed upon a lawsuit, is proportioned, not so much to the number or length of proceedings in the courts, as to the difficulty of the questions of law or fact,” the report explained. “One case requires little thought; and almost takes care of itself; another requires a vast amount of study, careful preparation, and great learning. These cannot be measured by any table of fees.” 42 As Sedgwick had argued, it was chiefly the lawyer’s time that was his product, not his paper filings.

But the commissioners did not follow Sedgwick’s recommendation to abolish interlocutory appeals or costs or to penalize parties who delayed a suit by raising objections to form and practice. Instead, they believed the code had already eliminated those tactics precisely because it was a code. The commissioners expected that under their system, technical objections would be few and readily resolved because of the comprehensive clarity of their code; and by holding parties to plead just the facts, verified by oath, they expected judges could cut to the essence of a claim without getting held up by form or “sham defenses.” 43 Fee reform was to fit hand-in-glove with fact pleading. By eliminating fees based on the folio of work product, any incentive to inflate pleadings with fictions

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41 1848 New York Laws 544 § 258.
42 First Report (New York 1848), 205–06.
43 First Report (New York 1848), 70–73; See also Final Report of the Commissioners on Practice and Pleadings, in Documents of the Assembly of the State of New York, 73d sess., No. 16 (1850), 2:274–75; Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky (1850), ii.
and redundancies for the sake of compensation would be removed, and lawyers could make the best use of their valuable time by quickly and succinctly stating only the necessary and relevant facts.

As in the tracts and reports from earlier in the 1840s, the commissioners’ report emphasized the equality of the legal profession with other crafts and professions, despite the fact that lawyers already had the freedom to charge what their clients were willing to pay. The state “may prescribe the salary of the clergyman, or the fee of the physician, with as much reason as the compensation of the attorney,” they wrote—which was to say, without reason at all. They reiterated the republican dictum that equality under contract was “the only just rule.”

The Adams court had had to wrestle with the question of whether lawyers were public officers for purposes of the Revised Statutes’ fee regulations; having abolished the Revised Statutes, the practice commission went further and declared lawyers to be members a fully privatized profession. After comparing lawyers to physicians and clergy, the report anticipated the objection “that the attorney is an officer, admitted by the courts, and therefore, in a position different from the others.” But it answered simply “that he is not a public officer, chosen to perform public duties.” The lawyer, in this account, was “a private agent” admitted to the court “for private purposes, and on behalf of private persons.”

The 1848 report’s account of the lawyer as a purely private actor, engaged in the “freedom of industry” alike with any other citizen, stood in tension with the 1850 Final Report of the code regulating admission to the bar. By extending the domain of “procedure” over attorney admissions, the commissioners faced an awkward choice. Compromises with and between the anti-lawyers had left the 1846 constitution unclear. It provided that “any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state,” but it placed the clause in the same

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44 *First Report* (New York 1848), 205–06.
45 *First Report* (New York 1848), 205.
section that regulated the judiciary’s appointment powers, implicitly leaving it to the courts decide who would be admitted to the bar.46 The Whig legislature, continuing its cooperation with the anti-lawyers, had passed a bill permitting anyone to appear as “a special attorney” on behalf of any litigant, but the courts struck the provision down as unconstitutional.47 The commissioners stated that they did not want to insert themselves into the constitutional debate and were “not expressing an opinion of our own” in codifying the rule that only the courts could admit persons to the bar.48

Nevertheless, the Final Report gave an extensive policy justification for maintaining the prerogative of courts to control access to the bar. Because “the profession of a lawyer is essential to society,” the report argued, “its character and honor are public interests.” To show why, the commissioners sketched a straight line from the bar to the political health of a republic. Because “the judicial department is recruited from the legal profession,” the “character of the judges” necessarily reflected “the character of the lawyers. Made at the bar; their moral characters there take their complexion. To degrade the bar therefore leads directly and inevitably to the degradation of the bench.” Therefore, “anywhere a corrupt legal profession is to be found it is found in the midst of a corrupt and corrupting people.”49 So despite the First Report’s declaration of “the right of the citizen to engage, at will, in any honest calling” and to “receive such reward as he can agree for it,” the Final Report came down on the side of regulated admission to the bar.

In defending this choice, the commissioners took special exception to an idea recently propounded by the leading English legal reformer Lord Henry Brougham, who had declared that “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty.” Brougham explicitly privileged the lawyer’s private duty to his client.

above his public duties to the state, arguing that “in performing this duty [a lawyer] must not regard
the alarm, the torments, the destruction which he may bring upon others . . . though it should be his
unhappy fate to involve his country in confusion.”

Such a view, the New York commissioners wrote, “betrays not only an unsound heart, but an unsound understanding.” A lawyer’s duty “as a moral being requires him to advise justice,” the report explained, and “his position as a legal adviser does
not exempt him from the moral duties which bind other men.” A lawyer, that is, was in some sense a
public officer, making public scrutiny and regulation of his profession necessary.

It may be tempting to suppose that different commissioners wrote different notes, one
pressing for the full privatization of the legal profession, the other advocating separately for public
mindedness and its consequent public regulation. An editor of Field’s collected writings claimed
Field’s authorship only of the paean to professional duties, but his other published writings
advocated both for the view of lawyers as private contractors and of lawyers as public actors whose
moral duties were to restrain their zeal for their clients’ causes. To hold these views together, Field
departed from Sedgwick on the determinative power of compensation. Sedgwick had written of
economic incentives as “irresistible” to the lawyer. He therefore advocated their continued public
regulation so long as the incentives were realigned away from technicality and over-filing. Although
Field shared many of Sedgwick’s concerns, he did not share the language of incentives. Field regretted
that the Revised Statutes compensated the most meaningless parts of the lawyer’s craft, but that is
how he spoke of it: as inadequate compensation rather than as a powerful incentive. Field proposed

50 The Trial at Large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; in the House of Lords, on Charges of
Adulterous Intercourse (1821), 2:3.
51 Final Report (New York 1850), 207-08.
52 See A. P. Sprague, ed., Speeches, Arguments, and Miscellaneous Papers of David Dudley Field (1884), 1:296-302. Given the
public criticism of Field’s fees at the time his writings were being collected (see below), one should not make too much
of the exclusion of the privatization passages from Field’s collected works.
53 A Letter from D. D. Field, Esq. of New York, on Law Reform, to Representatives John O’Sullivan in Documents of the
Assembly of the State of New York, 65th Sess., No. 81 (1842), 5:55-60 (hereafter “Field, Letter to Representative John
O’Sullivan”); David Dudley Field, Legal Reform: An Address to the Graduating Class of the Law School of the University of
Albany (1855), 9.
that lawyers could make any amount of compensation for which they contracted, but doing so need not impugn their professional integrity. A paid advocate could, he surmised, “in civil cases present defenses recognized and provided by law, although he may himself disapprove of the principle and policy of the law. But here the advocate should stop.” The “law and all its machinery” were means towards the end of justice, and no lawyer “in his zeal for the means” could forget the ends.\footnote{Final Report (New York 1850), 207-08.}

**Public Judgment and Private Professionalism: The Debate Over Field’s Attorney Ethics**

Critics then and now revisited Field’s words in the wake of the Erie Wars. Field’s advocacy for Gould seemed to take the precisely the outline Brougham had cast, using every means for the private advantage of the client while “involv[ing] his country in confusion.” Field’s Final Report had declared that “to assent to the bad scheme of an unjust client, is to become equally guilty with him, and the two are as much conspirators to effect a wrong, as if they had originally concocted a plan of iniquity with the view of sharing in the plunder.” What then of Judge Darwin Smith’s equitable findings that Gould and his “associates” had engaged in a pervasive conspiracy to fraudulently wrest control of the Albany & Susquehanna for private gain? After Darwin’s decision but before Field’s successful appeal, the *New York Times* rebuked Field without naming him. Gould should have found a lawyer at the “Tombs bar,” meaning the disreputable low-class lawyers who hung around the Manhattan jail. Instead, he opened his pocketbook to “a leading jurist and law-reformer of the State . . . and, instead of being shown the door, found no difficulty in employing him in his worst cases.” The paper went on to describe Jim Fisk’s visit to Henry Ward Beecher’s Sunday school to pluck Field’s partner Thomas G. Shearman from the pew.\footnote{New York Times, December 5, 1870.}

Field ignored the *Times*, a longtime political antagonist of his. But when Samuel Bowles, editor of the *Springfield Republican* reprinted and commented on some of the New York material, Field lashed
out. “What gives you, sitting in private and writing anonymously, authority to render ‘judgment’ upon me?” Field wrote to Bowles at the end of 1870. Field then invoked the two central ideals of his code: public facts and private practitioners. “I am not disputing your right, as a collector of news, to publish any facts concerning anybody,” Field wrote, “but you certainly have no greater right to publish your opinions respecting the character or conduct of a private person, than you would have to publish them to his face in a private company.”56 Bowles countered that although a lawyer might be responsible to private clients, he also “takes a responsibility to the public, on which it may arraign, dispute and judge him.”57 An exchange of twenty letters followed between Field, Bowles, and Field’s son Dudley, now a junior partner in Field’s firm.58

The lengthy correspondence never strayed far from the opening point: what did it mean for Bowles, or any member of the public, to “judge” Field’s actions as a lawyer? From where did that authority arise, and what standards applied in such a judgment? Conversely, what gave Field the power to dodge public inquiry into his practices, and how could a lawyer really hold himself aloof from a fraudulent conspiracy joined by his chief clients? Field kept his attention focused on the latter question. Suppose his clients were bad men, what then? Should only “saints . . . have a monopoly of lawsuits”? Here Field picked up the old Whig language of “the independence of the bar.” If Gould was wicked, so much more did he need skilled counsel to protect what rights he legitimately had in a democratic society. “I speak for [my clients] in the courts of the country, stand between them and popular clamor, just as I would stand between them and power, if they were menaced by power of any kind, monarchical or republican,” Field concluded.59 On this account, the lawyer checked arbitrary power—of both king and mob—by adhering to professional standards that the public, as

57 Field & Bowles, The Lawyer and His Client, 15.
59 Field & Bowles, The Lawyer and His Client, 6.
outsiders, could not judge. “The lawyer is responsible, not for his clients, not for their causes, but for
the manner in which he conducts their causes,” Field wrote in one of his final letters to Bowles. “Here
I admit the fullest responsibility,” he closed, but that was not a responsibility to Bowles, who could
not possibly judge the manner in which a lawyer practiced his technical craft.\(^{60}\)

In a final editorial, Bowles recognized that Field was attempting to make the lawyer’s moral
code coterminous with expert legal practice. So long as the lawyer’s techniques were within the letter
of the law, Field was immune to public scrutiny. That argument might be sound, Bowles argued, if
the law were an exact science, in accord with divine law in every way. “But if human imperfection is
to be recognized in law and lawyers, — if we admit the moral element into their work, — if there is such
a thing as a private conscience, and a public conscience as well, — [Field’s principles] are all wrong.”\(^{61}\)
Nevertheless, Bowles conceded the ground to Field’s technical argument. Disclaiming any knowledge
of New York law or legal practice, Bowles admitted that so far as he knew, “You have sinned against
no statute; I will not undertake to say, even, that you have violated any prescript of the code
professional.”\(^{62}\) That was all Field needed to triumph on his opening question. Whoever may have
swayed public sympathies, Field was adamant that a knowledge of craft was necessary to understand
what Field had done, much less to judge it. Bowles, by admitting his ignorance of craft, had divested
himself of jurisdiction to judge.

Recognizing Field’s maneuver, the New York City lawyer Francis Barlow (1834–1896), known
among the bar as General Barlow for his decorated Civil War service, took up Field’s offer to condemn
him for his manipulation and abuse of technical procedures. In a series of long letter-articles to the
Tribune, Barlow recounted the Albany & Susquehanna raid day by day, highlighting the unusual and
dubious procedures Field and Shearman had deployed, such as the service of summons by telegraph;

\(^{60}\) Field & Bowles, The Lawyer and His Client, 8–9.
\(^{61}\) Springfield Republican (Springfield, Ill.), January 30, 1871.
\(^{62}\) Field & Bowles, The Lawyer and His Client, 10.
the last-minute arrest of Ramsey; and the many ex parte orders obtained from Judge George Barnard, including one obtained by rushing Barnard back to New York at midnight from his mother’s home in Poughkeepsie. Barlow especially sought to demonstrate Field’s orchestration of Ramsey’s arrest, noting that Gould had paid Field $10,000 to be onsite in Albany the day of the shareholder’s meeting.

Called upon to justify himself with the actual facts and technicalities of his representation, Field drowned Barlow’s essays with his counter-response. Field not only responded at length, he commissioned another lawyer, George Ticknor Curtis, to write a volume-length account of the A&S litigation that highlighted the nefarious tactics of the Ramsey side and sympathetically explained and exonerated Field’s conduct. Though Curtis presented his account as that of a neutral observer, Field’s brother Cyrus reimbursed him $3,500 for his efforts. Field gathered other letters from colleagues attesting to his integrity and professionalism. Critics responded that the letters were no doubt “worth what was paid for them.” Field specifically denied receiving any special fee for appearing in Albany at the disputed election, which he explained as a matter of pure happenstance. In response, Barlow produced the receipt from the Erie Railroad’s accounts.

But just as Bowles had done, Barlow made a tactical blunder at the close his correspondence with Field. Barlow first appealed to the reading public to see “whether Mr. Field has made a fair, candid and responsive answer to the charges which I have brought against him.” Then perhaps concerned that the morality of Field’s practices was being buried under piles of facts and technical

63 Francis C. Barlow, Facts for Mr. David Dudley Field (1871).
64 Barlow, Facts for Mr. David Dudley Field, 12. See also Chapter 6.
65 George Ticknor Curtis, An Inquiry into the Albany & Susquehanna Railroad Litigations of 1869 and Mr. David Dudley Field’s Connection Therewith (1871).
66 Curtis reported only that he was “requested by an intimate friend of Mr. David Dudley Field, to examine the proceedings.” Curtis, An Inquiry into the Albany & Susquehanna Railroad Litigations, 2. Thomas Shearman recorded Cyrus as the source of the payment in his memoirs, noting that the firm eventually reimbursed Cyrus. Shearman noted that Jeremiah S. Black “wrote one or two telling articles in our favor,” leaving it unclear whether Black too was commissioned to write in Field’s defense. Memoirs of Thomas G. Shearman, 1:188, Papers of Thomas G. Shearman, Shearman & Sterling Law Library, 575 Lexington Ave., New York, N.Y.
68 Barlow, Facts for Mr. David Dudley Field, 41–42.
69 Barlow, Facts for Mr. David Dudley Field, 54–55.
arguments, Barlow closed with the promise to “take care that his conduct is investigated before a body of men who cannot be deceived by small tricks and petty evasions.” Field leaped at the offer, interpreting it as a pledge to take the matter before the nascent Association of the Bar of the City of New York. “After all, the professional tribunal is the true one” that should judge him, Field wrote. It had been founded “for the mutual advantage of its members, and as well to protect them from unfounded attacks as to maintain the purity and dignity of the profession.” Whether or not Field was winning on the merits, he was certainly winning on procedure. Once again he shifted jurisdiction, this time from the court of public opinion to a private bar association.

That association had been founded in early 1870, during the midst of the Field-Bowles correspondence. Its leaders were a mix of municipal reformers as well as lawyers who had directly participated in the A&S litigation on one side or the other. Although they founded the association in direct response to the public outcry over Field’s lawyering, the latest history notes that “it seems incredible, but the first three histories of the Association . . . never mention Field by name.” Bar associations were nothing new by the late nineteenth-century, but many early bar associations had gone defunct around mid-century. The New York City association became the first of many modern bar associations and, like New York’s code, it provided a model the others could emulate.

The founding documents and speeches of the Association of the Bar of the City of New York were shot through with appeals to public interest and public service, both implicit and explicit rebukes of Field’s privatized ideal of the lawyer. The call to organize the association, circulating in the papers in December 1869, advertised that the association would “sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public.”

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70 Barlow, Facts for Mr. David Dudley Field, 68.
71 Barlow, Facts for Mr. David Dudley Field, 68–69.
74 Papers of the Association of the Bar of the City of New York, 42 W. 44th St., New York, NY.
Refusing to be cowed by his colleagues and former associates, Field made sure to be one of the earliest subscribers to the call and an avid attender of the organizational meetings. At the first meeting, George Templeton Strong counted two hundred lawyers. “The decent part of the profession was well represented . . . , and among them was the virtuous D. D. Field,” he wryly commented. With Field in the room, his opponent from the Opdyke litigation William M. Evarts used the opening discussion to ensure all understood that Field’s censurable activities made the association necessary:

> Why, Mr. Chairman, you and I can remember perfectly well (and we are not very old men), when, for a lawyer to come out from the chambers of a Judge with an ex parte writ that he could not defend before the public, before the profession and before the Court, would have occasioned the same sentiment toward him as if he came out with a stolen pocket-book.

It was clear enough to Evarts that Field could not defend his injunctions to the public. Now he would have to defend them to the profession.

More implicit barbs came from Samuel Tilden, then in the midst of his multi-pronged political and legal offensives against Boss Tweed. Tilden expressly opposed the public-mindedness of the bar to private fee-seeking. In the midst of breaking up municipal “rings” of all sorts, Tilden declared that he did “not desire to see the Bar combined, except for two objects. The one is to elevate itself . . . ; the other object is for the common and public good.” But “if the Bar is to become merely a method of making money, making it in the most convenient way possible, but making it at all hazards, then the Bar is degraded.” Tilden closed by linking his concern for public mindedness over fees in a peculiar fusion with New York imperialism. If New York was to remain “the commercial and monetary capital of this continent” it had to “establish an elevated character for its Bar, and a reputation throughout the whole country for its purity in the administration of justice.” Tilden then reiterated that the commercial wealth of the state depended on its bar not pursuing its fees at all costs. To gain the world for New York, its lawyers had to keep their souls.

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Field maneuvered as expertly in the bar association as he had in the courts. Within the first year of the organization, he gave the “committee on amendment of the law” its first assignment by referring to them proposed code amendments that restricted the equitable appointment of receivers. The association crafted the amendments into a bill and sent it to the legislature, where no action was taken. Field not only got to retain his title as the great law reformer, he scored the implicit point that his actions had been legally sanctioned at the time and, given the legislature’s indifference, legal and moral still. Field was also active in amending the association’s by-laws to establish and regulate a grievance committee to hear members’ professional complaints about one another. Crucially, the by-laws provided that any proceedings would remain private until the committee ordered publication.

Sometime after Barlow pledged to have Field investigated by the profession, the grievance committee instituted proceedings on Field’s litigation practices but never issued a report. By September 1872, some of the members had organized a special committee to investigate lawyers implicated by the recent state impeachment proceedings against Judge Barnard. Field, of course, was one such lawyer, given all the ex parte orders granted by Barnard in the A&S litigation. But as with the grievance committee, the special committee delayed reporting, continually asking for more time.

Finally, Field professed to have had enough, and during a December meeting of the association, he gave one of the most remarkable speeches of his career. “I mean to meet this now and here,” he declared, demanding that the association print the original records from the grievance committee, “every word [of which] was taken in shorthand and remains of record.” Once again, Field’s main complaint was that his private practices were being submitted to public judgment. Despite the duly conducted secret investigation of the grievance committee, “these raiders have chosen to make their charges publicly before the whole body in a way to have them reported and

78 Martin, Causes and Conflicts, 56–57.
79 Martin, Causes and Conflicts, 58; Charter and Constitution of the Association of the Bar of the City of New York (1873), 16.
80 Martin, Causes and Conflicts, 57–60, 91–92.
published to the world without giving the member assailed an opportunity to defend himself.” Field reminded his colleagues their professional duties were “judicial in their character.” Judgment on Field’s career was pending, but the “raiders” were seeking to stir up “public opinion” to influence it.81

Field then unleashed his scorn on those he considered to be the chief “raiders,” Barlow above all. Field claimed that the grievance committee would not publish its records because Field had revealed “evidence of disreputable practices by most of [his opponents] and a clue to further evidence.” He then named some of them. Barlow he charged with public embezzlement while attorney general. Joshua Van Cott he claimed had forged a bond with his dead brother’s signature, and down the list Field went. But more terrible in Field’s eyes than the lawyers’ corruption was their practical incompetence. Field went on at length detailing Barlow’s blunders in a particular suit before the Marine Court. He concluded that all his opponents “have so little knowledge or experience of difficult lawsuits that they do not know whether an order is right or wrong.” Given their lack of technical sophistication, how could they possibly judge Field’s actions? “I might as well talk to a child as to [Barlow] about a course of action in a difficult case,” Field sneered. “Would you have me justify my action to such a man—so incompetent, so ignorant?”82

If the Chicago journalist could not judge Field’s professional conduct, nor could the New York Attorney General, nor could the gathered bar of New York City, who could? Field landed on the only practical answer left available: the courts. Litigations from the A&S and Erie suits were still playing out. Let them run their course, Field reasoned. “Must we have two suits of practitioners—one for the courts and another for this association?” In time, judges would pronounce on the litigation tactics of the lawyers, as Judge Smith had done in the A&S suit. And in time those opinions would be reviewed. (Smith had been reversed on Field’s technical jury argument by the time of the grievance proceedings

81 New York Herald, December 11, 1872.
82 New York Herald, December 11, 1872.
before the association.) Implicitly, Field was once again arguing what he had urged from the first with Bowles: whatever was found legal by the courts was moral as a matter of practice.

The association undertook no further proceedings on Field, and he was never censured. The next decade Field was elevated to the presidency of the national American Bar Association. The “public conscience” Samuel Bowles had argued for had been transfigured into a professional conscience of the organized bar. But in reality, the professional conscience was little different from the private conscience that had exonerated Field all along. The historian of the city bar association notes that all records from the grievance proceedings and from the special committee have gone missing from the archives.83 Perhaps Field did indeed introduce evidence about his unscrupulous colleagues. A project to privatize the bar that began with the deregulation of fees ended in the utterly private proceedings of a bar association founded with express purposes of public interest. Whatever the association’s professional judgment of Field, it remains private to this day.

From Unjust Actors to Unfortunate Victims: The Course of Cost-Shifting Under Code Practice

While Field expected the abolition of fee limitations to work a revolution in the bar, his views on taxable costs were quite traditional. The code made it “a general rule” that “the losing party, ought . . . to pay for the expense of the litigation.” The reason was the conventional one. “He has caused a loss to his adversary unjustly, and should indemnify him for it.” As with many departments of practice under the original code, the paradigm given was of a debt collection. “The debtor who refuses to pay, ought to make the creditor whole,” the report reasoned, not just for the unpaid debt, but for the legal hassles of trying to collect it.84 Both the reasoning and the example were featured in Theodore Sedgwick’s tract a decade earlier, which declared, “It is intolerable that a person should without the payment of a just demand, drive the plaintiff to bring suit, . . . keep him at bay for years, and at last

83 Martin, Causes and Conflicts, 91, 100 n.5.
when he is finally compelled to discharge the demand, be released on mere payment” of the debt. Justice demand that the defendant, and by extension any losing litigant, make good “the onerous expenses which his folly or injustice has occasioned.”

On this ground, the code disagreed with the critics of the loser-pays rule both in spirit and in prescription. By the 1840s, a host of lawyers and laymen alike had criticized cost-shifting rules and especially the theory that cost-shifting corrected the “injustice” of a litigant filing or defending a suit ultimately adjudged to be without merit. In practice, critics charged, suits were concluded on technical points of procedure so often that characterizing one litigant as virtuous and the other as unjust was a mistake. “If a promissory note was mis-recited by a word, a non-suit was the result,” complained Field’s co-commissioner Arphaxad Loomis. Could it really be said the loser of the suit was an unjust actor, inflicting a needless harm on his adversary? No, critics answered. Losing a suit was more a misfortune than an act of malice. Like the rain falling on the just and unjust, one account observed, lawyers “take fees from both plaintiff and defendant in collecting debts” without any real regard for fault. Taxable costs were more a measure of “skill in law jugglery,” than the justice of the cause. For these reasons, a number of states abandoned or severely scaled back English cost-shifting rules, most prominently Massachusetts and Pennsylvania. And some, like Iowa, declined to import the code’s cost-shifting provisions.

Nevertheless, New York commissioners insisted on cost-shifting. The leading account on cost-shifting in America generally credits the Field Code for launching states towards the “American rule”

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86 Arphaxad Loomis, Historic Sketch of the New York System of Law Reform in Practice and Pleadings (1879), 6.
87 John W. Pitts, Eleven Numbers Against Lawyer Legislation and Fees at the Bar (1843), 29, 53. See also Hiram P. Hastings, An Essay on Constitutional Reform (1846), 26; Michael Hoffman, “Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts” (Mar. 21, 1846), in Thomas Prentice Kettle, ed., Constitutional Reform in a Series of Articles Contributed to the Democratic Review (1846), 68.
88 Sedgwick, who agreed with Field’s traditional views of cost-shifting, said of Massachusetts and Pennsylvania that they left righteous suitors “to pay for having had the pleasure of a law suit.” Sedgwick, How Shall the Lawyers Be Paid?, 10.
89 Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa (Iowa 1859), 381, note to § 845.
where each party bore its own litigation costs, including attorney’s fees, but it calls the code itself a “paradox” and “incoheren[t]” for permitting free contract between clients and their attorneys but then imposing nominal charges on litigants who had no contract to compensate the other side’s attorney.\textsuperscript{90} Yet jurists at the time recognized that “free contract” could coexist with quantum meruit—a remedy to compensate work performed on the fiction that there had been an implied contract. For all the code’s abolition of fiction, it made sure that “implied contracts” remained cognizable between attorneys and those they served.\textsuperscript{91} Field adopted the conventional logic that the winner deserved—had earned—compensation from the loser because his code was supposed to make it so. By requiring courts to reach the merits of a claim, and by severely restricting the grounds on which a case could be dismissed, Field believed that losing a claim on “technical” points was no longer likely. By eliminating “fiction and evasion” in pleading, Field argued the code system would finally bring about the world the treatises had for so long described in theory, where to proceed on a losing claim was tantamount to acting in bad faith.\textsuperscript{92}

Keeping a system of cost-shifting required commissioners to face again the question of how to value a lawyer’s services. They agreed that clients’ freedom to contract with their lawyers did not include the freedom to stick their opponents with the total bill, but they did not proceed to offer a valuation. Instead, the one task they left to the legislature in reporting the code was to fill in the blanks for the costs that would follow each phase of litigation, offering only the lame advice that any amount selected would be too little to compensate for the lawyer’s time in some cases, and too much in others.\textsuperscript{93} The 1848 legislature decided seven dollars would be awarded for litigation that terminated before trial, twenty dollars after trial, and fifty dollars after appeal.\textsuperscript{94} The commissioners reasoned that

\textsuperscript{90} Leubsdorf, “Towards a History of the American Rule on Attorney Fee Recovery,” 17–21.
\textsuperscript{91} 1848 New York Laws 544 § 258.
\textsuperscript{93} First Report (New York 1848), 207.
\textsuperscript{94} 1848 New York Laws 545 § 262.
their phase system approximated the costs “generally upon the difficulty of the case, and the amount at risk.”\textsuperscript{95} It also served to encourage litigation to settle rather than continue, unlike the system that rewarded the multiplication of filings.\textsuperscript{96}

The other major question was how to shift costs. Judicial discretion over awarding costs had been about the only distinction between the Revised Statutes’ provisions for costs at common law, where shifting happened automatically at the end of a litigation, and in equity, where lawyers had to petition for costs and courts had discretion to grant or deny the petition.\textsuperscript{97} Once again, the commissioners punted. Costs shifted automatically in cases involving claims for money damages or the recovery of real property; costs shifted in all other cases at the discretion of the court. Cost-shifting thus became yet another ground on which the commissioners inadvertently preserved the traditional distinction between law and equity.\textsuperscript{98}

The Field Code did not spawn the “American rule” in 1848, but over time, the commissioners’ attempt to preserve cost-shifting did indeed fall victim to their abolition of regulated lawyer fees, in three ways. First, the Field Code made clear that taxable costs were untethered from the value of a lawyer’s services. In the theory propounded by the code reports, taxable costs were based on penalizing an unjust actor for prolonging litigation, not on an approximation of the value of services rendered. Before the code, Judge Sandford had articulated a legal standard that made the taxable costs the presumed value of the attorney’s fee on an implied contract until the parties proved otherwise.\textsuperscript{99} After the code, the presumption disappeared, and lawyers had to prove their implied contracts by deposing their brethren to testify about the market rates of their services.\textsuperscript{100}

\textsuperscript{95} \textit{First Report} (New York 1848), 205–07.
\textsuperscript{96} Field, Letter to Representative John O’Sullivan, 56 (“[T]he indemnity ought to be so adjusted, as to furnish no temptation to litigation.”).
\textsuperscript{97} \textit{Revised Statutes of the State of New York}, ch. 10, tit. 1, §§ 2 (“[T]he costs of all suits and proceedings in equity . . . shall be paid by such party as the court shall direct.”), 3 (specifying cost-shifting for “any action or proceeding at law”).
\textsuperscript{98} See 1848 N.Y. Laws 544–45 §§ 259–61.
\textsuperscript{99} Brady v. The City of New York, 1 Sand. at 568.
\textsuperscript{100} See Benjamin Vaughan Abbott and Austin Abbott, \textit{Digest of New York Statutes and Reports} (1884), 387–89.
Second, as the Supreme Court noted in its 1967 articulation of the American rule, “it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit.”\textsuperscript{101} That is, the pre-code view persisted that a loser of a litigation was, as one Wisconsin assemblyman put it, an “unfortunate victim.” The 1852 Wisconsin legislature was considering New York’s code. An assembly committee advised against the code’s cost-shifting provisions, or having any cost-shifting at all. It argued that, given the imperfections of human justice, most losing litigants were more likely to be “a defeated though honest party” rather than user of “chicane and trickery.” It likened fee bills to the indiscriminate destruction of a natural disaster, and it encouraged tribunals “to be lenient in general, even towards the unsuccessful party; for such is the [courts’] imperfection, that could a change of venue be taken to the court of Heaven, who knows how many of their decisions would be reversed.”\textsuperscript{102}

Even the Field commentary from 1850 recognized that not all losing litigants were knowingly inflicting an injustice on their opponents. In the same commentary disputing Lord Brougham’s ideal of the zealous advocate, Field wrote that, even in a codified system, “the law, moreover, is not so clear and precise, but that it may be mistaken or perverted. A strong mind at the bar, and a weak one on the bench, lead often to erroneous judgments. . . . Before ordinary tribunals, more depends on the advocate than is generally imagined.”\textsuperscript{103} Field’s rebuke of Brougham not only undercut his reasons for cost-shifting, it also showed why the old view of a losing litigant as misfortunate rather than malicious could not but be amplified under Field’s fee system. If so much depended not on merit but on counsel, and if magnates like Gould and the corporations they controlled could pay exorbitant rates for the “best” counsel, what was the point of penalizing losers? Of course the haves were going

\textsuperscript{101} Fleischmann Distilling Corp, 386 U.S. at 718.
\textsuperscript{103} Final Report (New York 1850), 207–08.
Such was the logic that underlay much of the uproar when Field agreed to represent William “Boss” Tweed after his corruption prosecutions. Few articulated any legal objection to Field’s argument—Tweed had been sentenced to eleven years in prison under a statute that provided for a maximum penalty of only one year. What both lawyers and laymen alike found galling was that Tweed, freshly convicted of embezzling $6 million from the City, could nevertheless pay high rates to a lawyer who would inevitably find some technical defect with the prosecution. By deregulating compensation, the Field Code only fueled the objection that litigation came down to who could afford the best lawyer, undercutting a reason to shift those costs from the loser.

Finally, the Field Code gave further momentum to the other reason stated in the Supreme Court’s articulation of the American rule: “that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.” As Peter Karsten has shown, contingency fees were widely used in early American practice, but lawyers employing that fee structure often ran a risk of seeing their fees ultimately disapproved by courts wishing to hold them to English champerty rules. By abolishing all former statutes and court rules regulating attorneys’ fees, the Field Code and its imitators unequivocally sanctioned the contingency fee and other alternative fee arrangements that permitted lawyers to bring claims on behalf of those who could not pay up front. Courts thereafter might set aside contingency fees that were “unconscionable” in their rate or manner of negotiation, but the principle itself had to be allowed under the new statute. “Many a poor man with a just claim would find himself unable to

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106 Fleischmann Distilling Corp., 386 U.S. at 717.
107 Karsten, “Enabling the Poor to Have Their Day in Court,” 234–42.
prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of his suit,” a judge explained in the code state of Missouri.¹⁰⁸

By the 1920s, academic commentators cited the prevalence of suits by poor litigants under contingency fees and other arrangements as a further reason that cost-shifting might be inappropriate in the general run of cases. Here, the “misfortune” of losing a litigation coincided with the larger misfortune of poverty and all its constraints on pursuing rights claims in the courts.¹⁰⁹ The gradual elimination of cost-shifting also ensured that lawyers could offer their services pro bono without running the risk of a disastrous cost award should they prove unsuccessful. Thus, an attorney like Louis Brandeis, in the heyday of his litigations as “the People’s Lawyer,” could explain his pro bono representations as a “luxury cost” of time rather than money. “Some men buy diamonds and rare works of art, others delight in automobiles and yachts,” Brandeis famously pronounced. “My luxury is to invest my surplus effort . . . to the pleasure of taking up a problem and solving, or helping to solve, it for the people without receiving any compensation.”¹¹⁰ That, too, was a fee arrangement made possible by the code.

Conclusion

This chapter has sketched some of the complicated ways the Field Code brought on the reign of the so-called American rule of costs and fees. In the nineteenth-century, lawyers used the term “American rule” to signify the code’s signal departure from past English and American practice by both entitling lawyers to their compensation and by making that compensation publicly unrestricted. The American rule was, originally, the rule of free contract for a lawyer’s fees. But by maintaining a system of shifting costs to the victor of a litigation, the code endorsed the exact opposite of what the American rule would become in the twentieth century. In time, the code’s regime of free contract for

¹¹⁰ Quoted in Melvin Urofsky, A Mind of One Piece: Brandeis and American Reform (Scribner’s 1971), 36.
fees ate away at its purposes for cost-shifting. Those who lost to the highest compensated corporate counsel were seen as unfortunate rather than unjust, and the increasing access of the poor to court through contingency fees mitigated against imposing the risk of loss on the already destitute.

By eliminating the restrictions placed on lawyers’ fees, the code made possible both David Dudley Field’s adventures in corporate lawyering as well as Louis Brandeis’s public service for no fee at all. Of course, we should not mistake the one as equally weighted as the other—a historical wash. Robert W. Gordon has frequently argued that the lionization of figures like Brandeis is one of the American legal profession’s central problems. By celebrating the occasional public-minded attorney, lawyers and legal historians implicitly normalize the far higher percentage of the profession that confined itself to private gain. By acknowledging that the Field Code made both paths possible, we should not lose sight of which path its own author ultimately chose.

That choice touched off one of the most significant battles among American lawyers over their professional duties and ethics. Field continually shifted ground on who could judge his professional character, first denying that power to the public press, then to individual colleagues, then to the organized profession. Field defeated the move to censure him and denied that his compensation debased his professionalism. Ultimately he succeeded in keeping his practices private, enclosed within a bar association unwilling to publicize its proceedings against him.

Field’s argument that the procedural judgment of the courts set the sufficient boundaries on professional ethics became something of a de facto rule. Field’s partner Thomas Shearman invoked it shortly after proceedings wound down in the bar association. When a new slate of directors finally ousted Gould from the presidency of the Erie Railroad, the new head counsel Samuel L. M. Barlow

(no relation to Francis) dismissed Shearman. Sherman’s “only subsisting obligation” was that he “not act against the Company, in matters in which [he had] special knowledge.” As Gould’s personal counsel, Shearman protested that he would go on representing Gould against his former client the Erie Railroad. He assured Barlow that he had “consulted some professional friends, entirely disinterested, all of whom agree with my view of duties,” but he also offered to submit the question to a presiding appellate or trial court judge “and to abide by the decision of either Judge.”

Barlow wrote back with a tone both bemused and irate by turns. “I, too, have consulted disinterested professional friends, who agree with me that your views, as to your rights and duties, . . . are subversive of all the peculiar obligations by which custom and law control counsel similarly situated”—that is, elite corporate counsel who knew company secrets. Barlow refused to submit to any judge “a hypothetical case, which might not, probably would not, contain the facts necessary for their proper determination.” Instead, he appealed to Shearman’s fee, reminding him that he and Field had collectively taken “out of the funds of the company over $300,000, and apart from any strict rule of professional etiquette, this fact alone would in the judgment of the company be a sufficient reason why you should take no part” in further litigation.

“The amount of fees received by me cannot possibly affect the questions under consideration,” Shearman shot back, arguing that in all the time he spent on the railroad’s affairs, he had never “received more than a fair and just compensation.” Barlow having turned down the offer of submitting a “hypothetical” case, Shearman followed Field’s rule and threatened to meet him in a real one. Shearman did indeed continue as Gould’s chief counsel in subsequent litigation against Erie, a further episode in Gould’s career as colorful as any other. Because Gould ultimately settled with

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112 Samuel L. M. Barlow, Correspondence with Thomas G. Shearman (1872), on file with the St. Louis Mercantile Library at the University of Missouri-St. Louis.
113 Correspondence with Thomas G. Shearman, 3, 6–7.
114 Correspondence with Thomas G. Shearman, 6–8.
115 Correspondence with Thomas G. Shearman, 7, 10–11.
116 In short, Gould had embezzled some $12 million from the Erie Railroad. To pay it back, he colluded with the new president of the railroad to announce their amicable settlement but then publicly broke off relations several times, each
the Erie, in-court appearances were few, and Barlow had no chance to lodge an objection to Shearman’s representation. (Shearman tried to provoke Barlow into seeking an *ex parte* injunction, but Barlow seems not to have taken the bait.) Now considered a textbook violation of professional canons, Shearman’s representation against his former client was essentially sanctioned by silence—silence of the court procedurally, and silence of the bar professionally. Deregulation in its many forms had become an American rule.

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117 Correspondence with Thomas G. Shearman, 10–11.