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The Difference Between Filing Lawsuits and Selling Widgets: The Lost Understanding that Some Attorneys' Exercise of State Power is Subject to Appropriate Regulation

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The Difference Between Filing Lawsuits and Selling Widgets: The Lost Understanding that Some Attorneys' Exercise of State Power is Subject to Appropriate Regulation

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I. INTRODUCTION

It is often argued that all attorneys practicing in the United States – regardless of the function they perform in the American justice system – are purely private actors working in a free market system.

Senator Orrin Hatch, former Chairman of the Senate Judiciary Committee, for example, in opposing an amendment to legislation that would have limited attorneys' fees, said:

> If we allow ourselves to start dictating what fees have to be paid to certain professions in our society, however tempting, then I think we are starting down a dangerous road. How can conservatives support setting fees in a free market system? . . . We should think twice before we move toward having the Congress of the United States set attorneys' fees. What is it going to be next? Accounting fees? . . . Private doctors' fees? . . . Should we consider capping Jerry Seinfeld's pay because he makes tens of millions of dollars a year . . .?[1]

This article examines whether it is true, as Senator Hatch claims, that all attorneys in every instance should be equated, as a matter of public policy, with other private actors.

This article explores why not all attorneys function in a free market, and consequently their renumberation should not always remain unregulated. Attorneys who file lawsuits can, by simply filing a complaint at their unfettered discretion, immediately subject defendants to the threat of a default judgment and necessitate their spending money and resources toward their defense. That dynamic results in a situation in which a defen-

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1. 144 Cong. Rec. S5099-5100 (daily ed. May 19, 1998) (statement of Sen. Hatch).

dant will be made to pay any amount to the plaintiff in settlement, provided the settlement demanded is less than the defendant's costs of defense and the plaintiff's attorneys' costs for filing the case are minimal (as they universally are).

This article proceeds to discuss a short history of attorney regulation – from Roman times to the present, a story beginning with severe limits on attorneys' influence and ending in a regime of rules that encourage the filing of lawsuits and do little to restrain them – and an examination of how that breakdown of attorney regulation occurred over time. This article concludes with a discussion of Supreme Court precedents indicating that private attorneys who file lawsuits should be considered state actors in most circumstances in which they trigger the authority of the state and, through the state, the threat of a default judgment and the consequent necessary expenditure of defense costs. This article concludes that attorneys who file lawsuits are qualitatively different than other private actors who seek to sell products to willing buyers in a free market system, and hence private attorneys who file lawsuits are more appropriately subject to regulation.

II. ATTORNEYS' POWER TO TRIGGER THE THREAT OF DEFAULT JUDGMENTS ENFORCED BY THE STATE

Looking beyond the "officer of the court" label,[2] it becomes clear that attorneys who file lawsuits have unique powers, as privately paid profes-

2. Historically, there has been at least a rough notion that attorneys are in some sense "officers of the court," and not purely private actors. In the colonies, the first statute defining the criteria for the formal admission of attorneys to practice in Massachusetts was An Act Relating to Attorneys, which required an oath of office that included a statement that "you shall use your self in the Office of an Attorney . . . with all good Fidelity as well as *to the Court* as your Clients." Anton-Hermann Chroust, *The Rise of the Legal Profession in America: The Colonial Experience* vol. 1, 88 (U. of Okla. Press 1965) (citing Acts and Laws, of Her Majesties Province of the Massachusetts-Bar in New-England 165 (1714)) (emphasis added). Since then, the Supreme Court and leading American commentators have emphasized the role of attorneys as officers of the court rather than private actors in a free market. In *Ex Parte Garland*, 71 U.S. 333 (1866), the Supreme Court stated that "[a]ttorneys and counsellors . . . are officers of the court, admitted as such by its order . . . . From its entry the parties become officers of the court, and are responsible to it for professional misconduct . . . ." *Id.* at 378. In the same case, the Court stated that attorneys are not only subject to judicial supervision, but also to legislative enactment. According to the Court, "[t]he attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor . . . . The legislature may undoubtedly prescribe qualifications for the office, to which he must conform . . . ." *Id.* at 379. In *Ex Parte Bradley*, 74 U.S. 364, 374 (1868), the Supreme Court recognized that abusive litigation could warrant sanction by courts, stating "[w]e do not doubt the power of the court to punish attorneys as officers of the same . . . [i]f guilty of . . . stirring up litigation by corrupt devices . . . ." *Id.* at 374. In 1953, Roscoe Pound noted that "[t]he legal profession is a public profession. Lawyers are public servants. They are stewards of all the legal rights and obligations of all the citizens." Roscoe Pound, *The Lawyer from Antiquity to Modern Times* vii (West 1953).

sionals, to trigger the threat of default judgments enforced by the state. Significantly, current law allows attorneys unlimited discretion to choose whom to sue. As one commentator has pointed out:

> The state could require the attorney to submit for ex parte approval a proposed defendants list that includes constitutional rationales for naming each defendant. But the courts and legislatures have delegated these decisions to attorneys. By allowing discretion into procedural rules, the state grants decisional power to attorneys. These grants of discretion substitute the attorney's decisions for those of a judge or other state officer or body.[3]

The Federal Rules of Civil Procedure, for example, place no limits on the ability or authority of a lawyer to file a complaint.[4] Once a complaint is filed, the court clerk sends a summons to the plaintiff or their attorney, who then serves the summons and a copy of the complaint on the defendant.[5] The summons carries with it the threat of a default judgment if the defendant does not respond.

Not only do the rules allow attorneys to sue whomever they choose, they allow them to decide on what grounds to sue, the types of damages to request, and the amount of money to demand. The attorney's unlimited discretion to determine the amount sued for has significant consequences for defendants. University of Chicago law professor Cass Sunstein and Nobel laureate Daniel Kahneman have compiled research from studies involving more than 8,000 jury-eligible citizens in Illinois, Colorado, Texas, Arizona, and Nevada showing that juries give higher awards when personal injury attorneys simply demand higher amounts,[6] and settlement costs can be expected to rise with the threat of higher jury awards.

Attorneys have this power, yet they are allowed to exercise it for their own financial gain. As Judge Richard Posner has explained, "the legal process relies for its administration primarily on private individuals moti-

3. James W. Harper, *Attorneys As State Actors: A State Action Model and Argument for Holding SLAPP-Plaintiffs' Attorneys Liable Under 42 U.S.C. § 1983*, 21 Hastings Const. L.Q. 405, 423-24 (1994).

4. *See* Fed. R. Civ. P. 11 (A civil action is commenced by filing a complaint with the court).

5. *See* Fed. R. Civ. P. 4 (Rule 4 of the Federal Rules of Civil Procedure provides: "Summons (a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended. (b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served . . . .").

6. Cass Sunstein et al., *Punitive Damages: How Juries Decide* 62 (U. of Chi. Press 2002).

vated by economic self-interest rather than on altruists or officials."[7] Consequently, like all other economic actors, attorneys will tend to exploit situations to maximize their utility. One way of doing that, of course, is by exploiting the inherent bargaining advantage the state allows them through rules authorizing attorneys to sue whomever they want for whatever they want, even when a lawsuit has no legal merit.[8]

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7. Richard A. Posner, *Economic Analysis of Law* 565 (5th ed., Aspen Publishers, Inc. 1998).

8. Rule 11of the Federal Rules of Civil Procedure does not require any sanctions at all for the filing of frivolous lawsuits. *See* Fed. R. Civ. P. 11(c) ("the court *may* . . . impose an appropriate sanction . . . .") (emphasis added). Further, Rule 11 currently allows attorneys to avoid sanctions for making frivolous claims and demands by withdrawing them within 21 days after a motion for sanctions has been filed. *See* Fed. R. Civ. P. 11(c)(1)(A) ("A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, *but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected*.") (emphasis added). As Justice Scalia has pointed out, such a rule *encourages* frivolous lawsuits: "[i]n my view, those who file frivolous suits and pleadings should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty." H.R. Rpt. 104-62, at 11-12 (Mar. 1, 1995) (quoting Justice Scalia).

Many states' rules of civil procedure are modeled after Federal Rule 11, and therefore also do not require sanctions for the filing of frivolous lawsuits. *See* Ark. R. Civ. P. 11 (Arkansas), Addition to Reporter's Notes, 1997 Amendment ("The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based [on] Rule 11(c)(1) of the Federal Rules of Civil Procedure, as amended in 1993 . . . New subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served . . . ."); Minn. R. Civ. P. 11.04 (Minnesota), Advisory Committee Comments, 2000 Amendments ("Rule 11 is amended to conform completely to the federal rule . . . . On balance, the Committee believes that the amendment to the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice . . ."); N.D. R. Civ. P. 1 (North Dakota), Explanatory Note ("As will become readily apparent from a reading of the rules, they are the Federal Rules of Civil Procedure adapted, insofar as practicable, to state practice."); N.D. R. Civ. P. 11 (North Dakota), Explanatory Note ("Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Rule 11."); Tenn. R. Civ. P. 11 (Tennessee), Advisory Commission Comment to 1995 Amendment ("Amended Rule 11 tracks the current federal version. Sanctions no longer are mandatory, and non-monetary sanctions are encouraged. The 21-day safe harbor provision allows otherwise sanctionable papers to be withdrawn, thereby escaping sanctions."); Utah R. Civ. P. 11 (Utah), Advisory Committee Note ("The 1997 amendments conform state Rule 11 with Federal Rule 11."); Vt. R. Civ. P. 11 (Vermont), Reporter's Notes to 1996 Amendment ("Rule 11 is amended to conform to the 1993 amendment of Federal Rule 11."). In addition, state courts also often rely on federal court decisions when interpreting their rules. *See e.g. Gray v. Washington*, 612 A.2d 839, 842 (D.C. 1992); *Bryson v. Sullivan*, 412 S.E.2d 327, 332 (N.C. 1992); *Bryant v. Joseph Tree, Inc.*, 829 P.2d 1099, 1104-05 (Wash. 1992) (en banc). Sanctions for frivolous filings are also not mandatory in 38 states and the District of Columbia. *See* Ala. R. Civ. P. 11 (Alabama); Alaska R. Civ. P. 11 (Alaska); Ark. R. Civ. P. 11 (Arkansas); Cal.C.C.P. § 128.5 (California); C.R.C.P. 11 (Colorado); C.G.S.A. § 52-190a (Connecticut); Del. R. Sup. Ct. R. 33 (Delaware); D.C. R. Civ. P. 11 (D.C.); Fla. R. Civ. P. 1.150 (Florida); Hi. R. Civ. P. 11 (Hawaii); Il. C. S. Sup. Ct. R. 137 (Illinois); In. St. Trial Rule 11 (Indiana); La. Civ. Code Ann. Art. 864 (Louisiana); Me. R. Civ. P. 11 (Maine); Md. Rule 1-311 (Maryland); Mass. R. Civ. P. 11 (Massachusetts); Minn. R. Civ. P. 11.03 (Minnesota); Miss. R. Civ. P. 11 (Mississippi); Miss. Code Ann. § 11-

The incentives for personal injury lawyers to file meritless nuisance lawsuits for their settlement value are clear. As leading commentators have described the situation under current law:

> [T]he plaintiff may choose to file a claim at some (presumably small) cost. If the defendant does not then settle with the plaintiff and does not, at a cost, defend himself, the plaintiff will prevail by default judgment . . . . Given the model and the assumption that each party acts in his financial interest and realizes the other will do the same, it is easy to see how nuisance suits can arise. By filing a claim, any plaintiff, and thus the plaintiff with a weak case, places the defendant in a position where he will be held liable for the full judgment demanded unless he defends himself. Hence, the defendant should be willing to pay a positive amount in settlement to the plaintiff with a weak case – despite the defendant's knowledge that were he to defend himself, such a plaintiff would withdraw.[9]

These commentators point out that defendants face a form of extortion because "to defeat a claim, the defendant will have to engage in actions that are frequently more expensive than the plaintiff's cost of making the claim, for the defendant will have to gather evidence supporting his contention that he was not legally responsible for harm done to the plaintiff or that no harm was actually done."[10] The same commentators offer the following illustration:

> Suppose, for instance, that the plaintiff files a claim and demands $180 in settlement. The defendant will then reason as follows. If he settles, his costs will be $180. If he rejects the demand and does not defend himself, he will lose $1000 by default judgment. If he rejects the demand and defends himself, the plaintiff will withdraw, but he will have spent $200 to accomplish this. Hence, the defendant's costs are minimized if he accepts the plaintiff's

55-5 (Mississippi); Mo. S. Ct. R. 55.03 (Missouri); Neb. R. Civ. P. St. § 25-824 (Nebraska); N.H. Sup. Ct. R. 59 (New Hamphsire); N.J.S.A. § 2A:15-59.1 (New Jersey); N.M.R. Dist. Ct. R. Civ. P. 1-011 (New Mexico); N.D. R. Civ. P. 11 (North Dakota); Ohio R. Civ. P. 11 (Ohio); 12 Okl. St. Ann. § 2011 (Oklahoma); Or. R. Civ. P. 17 (Oregon); Pa. R. Civ. P. 1023.1 (Pennsylvania); Pa. R. Civ. P. 1023.4 (Pennsylvania); R.I. R. Civ. P. 11 (Rhode Island); S.C. R. Civ. P. 11 (South Carolina); Tenn. R. Civ. P. 11.03 (Tennessee); Tex. Civ. Prac. & Remedies Code § 10.004 (Texas); Utah R. Civ. P. 11 (Utah); Vt. R. Civ. P. 11 (Vermont); Va. Sup. Ct. R. 1:4 (Virginia); Va. Sup. Ct. R. 4:1 (Virginia); Wash. R.Civ. P. 11 (Washington); W.Va. R. Civ. P. 11 (West Virginia); W.S.A. § 802.05 (Wisconsin); Wyo. R. Civ. P. 11 (Wyoming).

9. D. Rosenberg & S. Shavell, *A Model in which Suits are Brought for their Nuisance Value*, 5 Intl. Rev. L. & Econ. 3, 3 (June 1985).

10. *Id.* at 10.

> demand for $180; and the same logic shows that he would have accepted any demand up to $200. It follows that the plaintiff will find it profitable to file his nuisance claim; indeed, this will be so whenever the cost of filing is less than the defendant's cost of defense.[11]

Under this dynamic, when an attorney files a case, the defendant is in a lose-lose situation from the beginning: the defendant can either pay the costs of defending the case, or lose the case entirely by doing nothing. All cases, simply by virtue of being filed, have an immediate value for the plaintiff that creates an inherently superior bargaining position for the plaintiff's attorney.[12] Attorneys have the unique power to subject innocent individuals to a situation in which simply paying off frivolous claimants through monetary settlements is often cheaper than litigating the case.[13]

Attorneys know the mere filing of claims immediately subject defendants to significant legal costs of defense, and they will tend to use those costs of defense to their advantage. A legal system that allows attorneys unfettered authority to trigger inherent bargaining advantages, simply by virtue of their filing a complaint, must also limit attorneys' ability to exploit this inherent bargaining advantage for their own personal gain. As leading legal ethics expert Geoffrey Hazard wrote, "[t]he function of lawyer is closely related to the exercise of government power. We wish to control the exercise of government power through constitutions and laws. So also we wish to use constitutions and laws to control the exercise of the quasi-governmental power that is exercised through our profession."[14] The Supreme Court has also noted the institutionally coercive role lawyers are allowed to play in society, stating:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers . .

11. *Id.* at 4.

12. *See Rodulfa v. U.S.*, 295 F.Supp 28 (D.D.C. 1969) ("[A] person who is successful in litigation is a part loser because he has to pay his own expenses and counsel fees . . . ."), *appeal dismissed*, 461 F.2d 1240 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

13. Opponents of reform often claim that contingency fees – agreements by which personal injury attorneys are allowed a percentage cut from any monetary damages awarded to their client – provide a screening mechanism that weeds out frivolous cases. The argument is that personal injury attorneys will not take frivolous cases because doing so would leave them with no monetary recovery. The perverse dynamic outlined above, and the fact that filing fees are usually no more than a hundred dollars and additional defendants can be named in the lawsuit at no extra charge, mean that contingency fee agreements provide no effective screening mechanism at all, since attorneys can take advantage of the legal costs they impose on defendants simply in virtue of their filing a case.

14. Geoffrey C. Hazard, Jr., *Social Responsibility: Journalism, Law, Medicine: The Legal and Ethical Position of the Code of Professional Ethics* vol. 5, 7 (Louis W. Hodges 1979).

> . . [A]s an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.[15]

III. A SHORT HISTORY OF ATTORNEY REGULATION

Today, the inherent bargaining advantage of those filing lawsuits over those defending themselves from lawsuits is virtually unfettered. How did this situation come to be? A short history of attorney regulations helps explain how the current rules governing attorneys have changed over time.

The history of the regulation of attorneys is a story beginning with severe limits on attorneys' influence and ending in a regime of rules that not only fail to restrain, but encourage, the filing of lawsuits. Attorneys' fees were heavily regulated in the American Colonial Era and in the Post-Revolutionary Period. Then, in the mid-nineteenth century, New York's influential Field Code of Civil Procedure rejected any regulation of attorneys' fees but conceded that a "loser-pays" rule was justified by the costs attorneys could impose on innocent victims simply by virtue of filing a lawsuit. In the years that followed, however, fee-shifting provisions materialized in this country in a manner that benefited plaintiffs only, and not defendants. The result has been an abdication of any significant limits on the power of attorneys to file lawsuits, the encouragement of the filing of lawsuits through fee-shifting rules that benefit plaintiffs alone, and – with the rise of the numbers and influence of attorneys in America – the triumph of rules that only create additional demand for attorneys.

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15. *In re Snyder*, 472 U.S. 634, 644 (1985). It should be remembered that, in part because lawyers exercise government power, they can be required, despite the First Amendment, to refer the court to relevant, material legal authority contrary to their clients' legal position whenever there is a danger that the court might be otherwise misled. *See Malautea v. Suzuki Motor Co.*, 987 F.2d 1546 (11th Cir. 1993) ("All attorneys, as officers of the court, owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself."). Lawyers also have responsibilities that require them to perform certain services, as they can be made to represent the indigent when appointed by the court, even without fee when necessary. *See State v. Delaney*, 332 P.2d 71, 80 (Or. 1960).

A. *The Fear that Attorneys Would Abuse Their State Power Permeated the Colonial and Post- Revolutionary Period.*

The understanding that attorneys can exercise state power – and the fear that power would be abused – has ancient roots, as do laws seeking to limit such abuse. In ancient Rome,[16] Tacitus described how the emperor Claudius fixed maximum attorneys' fees at ten thousand sesterces because attorneys were considered to be doing the work of the state.[17] Justinian in his Digests maintained the law limiting attorneys' fees, and further banned contingency fees entirely.[18]

Since then, European law relied significantly on Roman law, and limits on attorneys' fees remained the norm in Europe throughout its history,[19] and later in America, driven largely by attorneys' potential to abuse the litigation system. During the American Colonial period, lawyers were roundly despised. According to one historian, "[i]n every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion . . . . In many Colonies, persons acting as attorneys were forbidden to receive any fee . . . in all, they were subjected to the most rigid restrictions as to fees and procedure."[20] Early American observer Benjamin Austin wrote, "if we look through the different counties throughout the Commonwealth, we shall find that the troubles of the people arise principally from debts enormously swelled by tedious law-suits." [21] The Duc de La Rochefoucauld similarly observed, "[t]he . . . inhabitants of New England. They are said to be very litigious . . . . [T]here are, indeed, few disputes, even of the most trivial nature, among them, that can be terminated elsewhere than before a court of justice."[22] As one historian summarized the situation in early America, "[l]awsuits were often begun or continued for no other purpose than to embarrass an

16. There was no clearly defined role for a legal advocate until the profession began to emerge in ancient Rome, approximately 2000 years ago. *See* William Forsyth, *The History of Lawyers, Ancient and Modern* 13-15, 20-26, 80-92 (1875).

17. *See* Pound, *supra* n. 2, at 53 (describing understanding in ancient Rome that lawyers did "the work of the state").

18. The law stated "*Ille piraticus mos est*," meaning contingency fees were considered "the moral of a pirate." Forsyth, *supra* n. 16, at 3; Suetonius, *Nero* 17, Liba. 1, § 12.

19. In medieval times, an "undue eagerness" for attorneys' fees was not only deemed uncouth, but provided grounds for disbarment. *See* Forsyth, *supra* n. 16, at 365 ("Among the capitularies of Charlemagne there are regulations concerning the conduct of advocates or 'clamorers' (clamatores), as they are there called; as, for instance, that if they were discovered to be influenced by an undue eagerness for money in the causes they undertook, they were to be banished from the society of honorable persons, and to be, in fact, disbarred (Cap. vii, tit. 114).").

20. Charles Warren, *A History of the American Bar* 4 (William S. Hein & Co., Inc. 1913).

21. Benjamin Austin, *Observations on the Pernicious Practice of the Law* 4 (1786).

22. La Rochefoucauld, *Travels through the United States of America* 536 (St. Paul's Church Yard 1799).

enemy by making him incur legal costs."[23] And as John Adams observed of the notoriously litigious town of Braintree, Massachusetts, "[t]hese dirty and ridiculous litigations have been multiplied, in this town, till the very earth groans and the stones cry out. The town has become infamous for them throughout the country."[24] Popular journalist William Duane of Philadelphia, wrote a pamphlet arguing that abusive litigation practices by lawyers "demand the more serious interference of the legislature, and the jealousy of the people" because lawyers "so manage justice as to engross the general property to themselves, through the medium of litigation . . . ."[25]

Attorneys were so despised in early America that they often inspired violence. As one historian wrote:

> During Shay's Rebellion, in 1786 people actually demanded that all inferior courts and all lawyers be entirely eliminated . . . . In Vermont and New Hampshire vociferous demands were made to suppress the legal profession completely, or at least to reduce the number of lawyers and, incidentally, to cut down substantially the usual legal fees. In Vermont, where the general populace was particularly vehement in its actions and denouncements, courthouses were set afire . . . . As early as 1786 the town of Braintree, Massachusetts, passed a resolve "to crush . . . that order of Gentlemen denominated Lawyers . . . whose . . . conduct appears . . . to tend rather to the destruction than the preservation of this Commonwealth."[26]

Fear that the legal profession would abuse its power to generate lawsuits was also reflected in limits on attorneys' fees. In 1711, maximum attorneys' fees in Pennsylvania were set at twelve shillings.[27] The same year in Connecticut attorneys' fees were set at four shillings in the County Court, and at eight shillings in the Superior Court.[28] Later, in 1784, Connecticut by statute limited attorneys' fees according to a "Table of Fees."[29] In 1792, Georgia regulated attorneys' fees as follows: for "each cause com-

23. Chroust, *supra* n. 2, at 82.

24. John Quincy Adams, *Works of John Adams* vol. 2, 90 (1850).

25. William Duane, *Sampson Against the Philistines* 22 (1805).

26. Anton-Hermann Chroust, *The Rise of the Legal Profession in America: The Revolution and the Post-Revolutionary Era* vol. 2, 26-27 (U. of Okla. Press 1965) (citing Laws and Resolves of Mass., c. 23, § 2, (1785); John Adams, *The Adams Papers: Diary and Autobiography of John Adams* vol. 1, 342 (1902); John Quincy Adams, *Three Episodes of Massachusetts History* 897 (1893)).

27. An Act for Regulating and Establishing Fees, 2 Statutes at Large of Pennsylvania, c. 169, § 1, 331, 344-45 (1896).

28. Chroust, *supra* n. 2, at 119 (citing An Act for the Better Regulating Proceedings and Pleas at the Bar, Acts and Laws of His Majesties' English Colony of Connecticut in New England 61 (1750)).

29. Acts and Laws of the State of Connecticut in America 10-11 (1784).

menced and tried in the superior or inferior courts," eighteen shillings and eight pence.[30] In 1714, Massachusetts fixed attorneys' fees at twelve shillings "at the superiour court of judicature . . . and at the inferiour court, ten shillings, and no more."[31] In 1719, Rhode Island attorneys' fees were fixed at a maximum of twelve shillings.[32] In 1766 these fees were reduced to a maximum of five shillings.[33] By 1748, the New Jersey Legislature passed a statute establishing an elaborate schedule of lawyer's fees.[34] In 1778, in Virginia, attorneys' fees were fixed by statute in the General Court and the High Court of Chancery depending on the nature of the action.[35] In 1795, in Pennsylvania, attorneys' fees in the Court of Common Pleas were set for filing a lawsuit and entering an appearance as follows: "if the suit is ended before or during the sitting of the first court," at $1.67; for every suit "ended after the first court and before judgment," $3.34; and for "every suit prosecuted to judgment," $4.00.[36] In 1801, New York enacted the comprehensive Act Regulating the Fees of Several Officers and Ministers of Justice within the State, which included limits on attorneys' fees.[37] In 1810, in Maryland, a statute was enacted providing "no attorney of any of the county courts shall be authorized to charge more . . . than the sum of three dollars and thirty-three cents and one third of a cent in any one suit."[38]

Some states provided particular fee limits directed at those filing actions or appeals. New Hampshire, in 1791, passed the Act Regulating Fees which provided that in the Court of Common Pleas, attorneys' fees for filing the plaintiff's writ of declaration were 8 shillings; for the petitioner's complaint or petition to the Court of General Sessions of the Peace, 8 shillings; for every complaint entered in the Superior Court, 8 shillings; and for drawing a writ "triable" before a justice of the peace, 3 shillings.[39] Attorney's fees were set by statute in Rhode Island in 1798 and again in 1822

30. A Digest of the Laws of the State of Georgia 476 (1800).

31. Acts and Laws, of Her Majesties Province of the Massachusetts-Bar in New-England 185 (1714).

32. Charter Granted by His Majesty King Charles the Second to the Colony of Rhode Island and Providence-Plantations in America 21 (1719).

33. Acts and Laws of His Majesty's Colony of Rhode-Island and Providence-Plantations in America 98 (1767).

34. The Acts of the General Assembly of the Province of New-Jersey 167 (Allinson ed. 1776).

35. Chroust, *supra* n. 26, at 261-62 (citing 9 Statutes at Large of Virginia 529 (Hening ed. 1823)).

36. 15 Statutes at Large of Pennsylvania, c. 1863, § 1, 360 (1911).

37. 5 Laws of the State of New York Passed at the Session of the Legislature Held in the Year 1801, c. 190, 553-71 (1871).

38. Laws of Maryland of 1810, c. 126, § 2; 1 The General Public Statutory Law of Maryland 601 (1840).

39. Chroust, *supra* n. 26, at 244 (citing The Laws of the State of New-Hampshire 118-20 (1792)). These fee tables were redrawn according to the new American currency in 1796. *See* Chroust, *supra* n. 26, at 244 (citing Constitution and Laws of the State of New-Hampshire 116 (1805)).

at the following rates: for filing a writ of declaration, one dollar; for entry of every action in the Supreme Court, three dollars; and for the filing of every petition in the Supreme Court, two dollars.[40] New Jersey in 1799 passed legislation that limited attorneys' fees for every declaration, plea, or pleading to $0.70.[41] Delaware had its own unique method for reducing litigiousness. In 1793, Delaware passed the Act for Regulating and Establishing Fees providing that for all pleadings in an action subsequent to a declaration, the fee would be one cent for every written line, twelve words to a line.[42]

B. *The Relaxation of Attorney Regulation Was Ushered in by the Field Code in the Mid-Nineteenth Century, and the Abandonment of Attorney Regulation Occurred through One-Way Fee Shifting Statutes in the Twentieth Century.*

Statutory limits on attorneys' fees prevailed until the mid-nineteenth century. Then, in 1848, the Field Code[43] of Civil Procedure that governed practice in New York struck down all provisions "establishing or regulating the costs or fees of attorneys" and provided that "hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties."[44]

The report recommending the Field Code embraced the notion that attorneys are purely private actors. The report stated "[i]f it be said, that the attorney is an officer, admitted to the courts, and therefore, in a position different from the others, we answer, that he is not a public officer, chosen to perform public duties. He is admitted to practice in the courts, for private purposes, and on behalf of private persons. He is, in every respect, a private agent . . . ."[45] However, the report promptly conceded that attorneys, even if considered private actors, could abuse the state power they were allowed to exercise when it stated "[w]e propose to . . . place the law

40. Chroust, *supra* n. 26, at 241 (citing The Public Laws of the State of Rhode Island 222-23 (1798); The Public Laws of the State of Rhode Island 171-72 (1822)).

41. Chroust, *supra* n. 26, at 255 (citing Laws of the State of New-Jersey 481-94 (1821)).

42. Chroust, *supra* n. 26, at 256 (citing 2 Laws of the State of Delaware 1116, c. 27 (1797)).

43. The code is named after legal reformer David Dudley Field.

44. Laws of the State of New York § 258 (1848). The Court of Appeals of New York considered these changes for the worse, stating in one opinion that "Section 303 of the Code . . . abrogates all rules and provisions of law which might restrain an attorney in agreeing with his client for the measure or mode of his compensation, and it leaves such compensation to the agreement of the parties, express or implied. What was before not only illegal but disreputable is now lawful, if not respectable." *Rooney v. Second Ave. R.R. Co.*, 18 N.Y. 368, 373 (N.Y. 1858). At approximately the same time, Virginia ended its regime of attorneys' fees regulation. *See* John B. Minor, *Institutes of Common and Statute Law* vol. 4, 200-04, 213-14 (3d ed. 1893).

45. First Report of the Commissioners on Practice and Pleading, Code of Procedure 205 (1848).

on its proper footing, of indemnity to the party, whom an unjust adversary has forced into litigation . . . . The losing party, ought however, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary, unjustly, and should indemnify him for it."[46] The report's support for a "loser-pays" provision demonstrates that the legal system continued to be understood as prone to abuse by those triggering state power against the innocent victims of lawsuits. The Field Code supported both unregulated attorneys' fees and a loser-pays rule that would apply to both plaintiffs and defendants.

The Field Code was widely influential. By 1870, at least twenty-four states had adopted some version of it.[47] Not only did the Field Code usher in a regime in which all attorneys' fees were left largely unregulated, it also spurred a trend in the law toward loser-pays provisions. However, while a trend toward a loser-pays rule developed in certain parts of the law, it was a trend that acted solely to the plaintiff's benefit, contrary to the recommendation of the Field Code's authors.

Three federal statutes – voting rights legislation in 1870, the Interstate Commerce Act of 1887, and the Sherman Act of 1890 – allowed successful plaintiffs, but not successful defendants, to recover their legal expenses.[48] Various state laws followed suit.[49] The one-way attorneys' fees shifting statutes were in the fashion of the Progressive Era, namely tools to encourage attorneys to file lawsuits on behalf of poorer plaintiffs against certain large corporations.[50] Such state statutes allowing the award of attorneys'

46. *Id.* at 206. Rules requiring losing plaintiffs to pay the fees of the defendant's attorney had existed in America since its early days. In 1792, for example, Georgia regulated attorneys' fees and provided that "[w]here the defendant prevails, [he was] to receive the fee in lieu of the plaintiff's attorney." A Digest of the Laws of the State of Georgia 476 (1800).

47. *See* C. Hepburn, *The Historical Development of Code Pleading in America and England* 84-117 (W.H. Anderson & Co. 1897).

48. Act of May 31, 1870, 16 Stat. 140, §§ 2-3, repealed by Act of February 8, 1894, 28 Stat. 36; Act of February 4, 1887, 24 Stat. 379, § 8; Sherman Antitrust Act, 26 Stat. 210, § 7 (1890).

49. *See* Act of May 2, 1873, 1873 Ill. Pub. Laws 135, 138 and 1874 Minn. Gen. Laws, c. 26, § 15 (requiring railroads to pay legal fees when found liable for charging unlawful rates); 1874 Kan. Sess. Laws, c. 94; 1875 Minn. Laws, c. 98, § 5 (requiring railroads to pay legal fees when found liable for harming livestock); 1866 Pa. Laws, c. 106 (corporations liable for fees when bondholders made to sue to collect interest on bonds previously held valid); 11 A.L.R. 884 (1921) (collecting statutes providing for attorneys' fees in suits against insurance companies).

50. As state legislatures and Congress allowed the contingency fee and one-way fee-shifting statutes to replace regulations limiting attorneys' fees, many prominent legal scholars foresaw a rise in lawsuits filed for their nuisance value. Judge Cooley feared a rise in frivolous negligence lawsuits against corporations. *See* E. Countryman, *The Ethics of Compensation for Professional Services* 24 (W. C. Little & Co. 1882) (quoting Judge Cooley as having written that many negligence actions "are often taken as mere ventures – as one might invest in a lottery ticket, or in the exploration of an unknown land for possible mineral wealth."). Judge Cooley also opposed the contingency fee, writing "[t]he lawyer's legitimate fee is payable irrespective of the result, and any contingent interest in the event of the litigation is necessarily corrupting." Otto C. Sommerich, *The History and Development of Attorneys' Fees*, 6 The Record of the Association of the Bar of the City of New York 363, 369 (1951).

fees and costs to prevailing plaintiffs covered claims against carriers for freight,[51] and claims against life and fire insurance companies on insurance policies.[52]

At first, legislation that made corporations alone pay the costs of litigation regarding successful claims against them for the payment of labor rendered, overcharges, or the injury of livestock, was struck down by the Supreme Court as a violation of the Equal Protection Clause.[53] However, when such legislation was amended to make "any person or corporation" liable for successful plaintiff's costs of litigation for the same class of claims, it was sustained as a "police regulation designed to promote the prompt payment of small claims."[54]

Moorefield Storey also wrote that "[u]nder existing law it costs little to start a groundless suit, in order to frighten an adversary or take a speculative chance of getting a settlement." Moorefield Storey, *The Reform of Legal Procedure* 35 (Yale U. Press 1911).

51. *See Mo., K. & T. Ry. Co. v. Cade*, 233 U.S. 642 (1914); *A. Coast Line Ry. Co. v. Coachman*, 52 So. 377 (Fla. 1910); *Mo. K. & T. Ry. Co. v. Simson*, 68 Pac. 653 (Kan. 1902); *Smith v. Chicago*, St. P. M. & O. Ry. Co., 157 N.W. 622 (Neb. 1916).

52. *See Fidelity Mutual Life Ins. Co. v. Mettler*, 185 U.S. 308 (1902); *Ark. Ins. Co. v. McManus*, 110 S.W. 797 (Ark. 1908); *Tillis v. Liverpool L. & G. Ins. Co.*, 35 So. 171 (Fla. 1903); *Harp v. Fireman's Fund Ins. Co.*, 61 S.E. 704 (Ga. 1908); *British Am. Assur. Co. v. Bradford*, 55 Pac. 335 (Kan. 1898); *Keller v. Home Life Ins. Co.*, 95 S.W. 903 (Mo. 1906); *Johnson v. St. P. F. & M. Ins. Co.*, 178 N.W. 926 (Neb. 1920); *Union C.L. Ins. Co. v. Chowning*, 26 S.W. 982 (Tex. 1894).

53. *See Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897) (holding the challenged statute "is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations . . . . If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees . . . . They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.").

54. *Mo., K., & T. Ry. Co. v. Cade*, 233 U.S. 642, 649 (1914).

By the 1960's, nearly all major civil rights[55] and environmental statutes[56] included one-way fee-shifting provisions. Other statutes brought whole areas of litigation under the one-way fee-shifting rule.[57] By the 1980's, the Supreme Court went even further by reading one-way fee-shifting statutes broadly[58] and encouraging enforcement under such statutes in a way that tended to grant fees to prevailing plaintiffs while denying them to prevailing defendants.[59]

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55. *See, e.g.* Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b) (2005) ("In any action [for discrimination in public accommodations] the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee as part of the costs . . . ."); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2005) ("In any action [for denial of equal employment opportunities] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g)(2)(B) (2005) ("On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court – (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of the claim under section 703(m) . . . ."); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2005) ("In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the revised statutes, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . ."); Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a(b) (2005) ("In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs."); 42 U.S.C. § 1997c(d) (2005) ("In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs . . . .").

56. *See e.g.* Clean Air Act, 42 U.S.C. § 7607(f) (2005) (allowing the court to award costs including reasonable attorney's fees); Clean Water Act, 33 U.S.C § 1365(d) (2005) ("The court, in issuing a final order in any action [for violation of the Clean Water Act], may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.").

57. *See* Civil Rights Attorney's Fee Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976); Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980).

58. *See e.g. Maine v. Thiboutot*, 448 U.S. 1 (1980); *Bradley v. Sch. Bd.*, 416 U.S. 696 (1974).

59. *See e.g. Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978). In *Christianburg*, the Supreme Court held that, even though the statute on its face provided "no indication whatever of the circumstances under which either a plaintiff or defendant should be entitled to attorney's fees," an award of attorneys' fees may be made to a successful defendant, rather than a successful plaintiff, in a Title VII action *only* if the court found that the *plaintiff's* action was "frivolous, unreasonable, or without foundation." *Id.* at 418, 421. This was because "Congress wanted to clear the way for suits to be brought under [Title VII]" in a manner that did not unduly stifle plaintiff's incentives to bring such claims. *See id.* at 412, 420 ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII."). The Court elaborated in *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), that for a defendant to benefit from cost-shifting, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees."

The result today is that, while one-way fee shifting rules govern in fields of litigation in which the plaintiff tends to sue for injunctive rather than monetary relief,[60] the field of personal injury in tort for money damages is left unregulated by either limits on attorneys' fees or a "loser-pays" rule.[61] An explanation as to why may lie in the fact that, over the years, the number of attorneys has risen dramatically, and with it the power of those pressing for a regime expanding the demand for lawyers and opposing any proposals for rules that might tend to reduce that demand.[62] "The number of lawyers in the United States per thousand population nearly tripled between 1970 and 1998, largely in response to the widening role of government and a boom in litigation."[63] As one commentator noted in 1981, "[t]he most significant response [of attorneys] to the erosion of supply control . . . has been a redirection of professional energies toward strategies of demand creation."[64] As the number of lawyers rose, so did the need to create additional demand for lawyers, and one-way, pro-plaintiff fee-shifting statutes and a system of unregulated attorneys' fees did just that.[65]

60. *See* O. Fiss, *The Civil Rights Injunction* 4 (1978).

61. Although common law allows courts to award attorneys' fees to a party when their opponent has acted in "bad faith," a fee award under the bad faith exception requires subjective bad faith, and "some proof of malice entirely apart from inferences arising from the possible frivolous character of a particular claim" is necessary. *Copeland v. Martinez*, 603 F.2d 981, 991 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) *compare with Hall v. Cole*, 412 U.S. 1, 5 (1973) (awarding attorneys' fees where the opponent acted in bad faith). Further, Federal Rule of Civil Procedure 68, entitled "Offer of Judgment," does not help defendants. Federal Rule 68 currently provides that any party defending a claim may make a settlement offer to the plaintiff. If the plaintiff rejects the offer and does not receive a more favorable judgment at trial, he must pay the defendant's court costs and fees incurred after the date of the offer. *See* Fed. R. Civ. P. 68 ("At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . ."). The underlying principle of Rule 68 is that if the plaintiff rejects an offer that turns out to be more favorable than what they receive in a final judgment, they should be made to pay something to compensate the defendant for the defense expenses incurred in what turns out to be an unnecessary trial. However, the Supreme Court, in *Delta Air Lines v. August*, held that a *defendant* cannot invoke Rule 68 cost shifting if it prevails on liability because as currently written Rule 68 only allows costs to be recovered when a judgment is "finally obtained *by the offeree*," and the offeree, of course, would be the plaintiff. *See* 450 U.S. 346, 351-52 (1981) ("[T]he plain language of Rule 68 confines its effect to . . . [cases] in which the plaintiff has obtained a judgment" which is for less than the offer of judgment and "it is clear that [Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff.").

62. The more lawsuits that are filed, of course, the more work there is for attorneys representing defendants as well.

63. Theodore Caplow, Louis Hicks & Ben J. Wattenberg, *The First Measured Century: An Illustrated Guide to Trends in America, 1900-2000* 30 (AEI Press 2001).

64. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 657 (1981).

65. In England, there was a similar reservation of litigation costs, including some or all attorneys' fees, to successful plaintiffs but not successful defendants very early in English legal history. However, that situation in England was eventually corrected. The first statute that awarded plaintiffs their costs, which governed in England until 1875, was the Statute of Gloucester, *see* 6 Edw. I, c. 1 (1278),

IV. THE TREND OF RECENT SUPREME COURT DECISIONS POINTS TO AN UNDERSTANDING THAT ATTORNEYS FILING LAWSUITS EXERCISE STATE POWER, AND CUTS AGAINST CURRENT POLICIES UNDER WHICH SUCH ATTORNEYS ARE SUBJECT TO LITTLE OR NO REGULATION

While the policy status quo subjects attorneys who file lawsuits to little or no regulation, recent Supreme Court precedents point to an understanding that attorneys who file lawsuits exercise state power and are the appropriate subjects of regulations limiting the power of the state. The key question the Supreme Court has asked in inquiries regarding whether actions constitute "state action" is whether there is a "sufficiently close nexus" between the state and the challenged conduct of the nominally private party such that the conduct can fairly be attributed to the state.[66] That is a fact-specific inquiry, as the Supreme Court has noted: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[67]

State action exists as a result of a private party's "mak[ing] use of state procedures with the overt, significant assistance of state officials."[68] An early description of the state action doctrine appeared in 1880 in *Ex parte Virginia*.[69] There, the Court declared:

> [T]he prohibitions of the Fourteenth Amendment are addressed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities . . . . The constitutional provision, therefore, must mean that no agency of the State, or of the of-

enacted in 1278, which provided that in certain cases "the Demandant may recover against the Tenant the Costs of his Writ purchased, together with [specified] damages." *Id.* The law awarding costs to successful defendants evolved more slowly. In 1531, defendants were allowed costs in certain actions such as trespass, contract, and covenant, *see* 23 Hen. VIII, c. 15 (1531), and in 1606 a statute was enacted that provided a defendant could recover costs in all cases in which the plaintiff could have them if the plaintiff recovered. *See* 4 Jac. I, c. 3 (1606). In 1875, the First Schedule to the Supreme Court of Judicature Act granted the courts discretion to award litigation costs to either party, providing that, with certain exceptions, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." 38 & 39 Vict., c. 77 (1875). Since the fee-shifting rule in England operates to the benefit of both successful plaintiffs and defendants, there is a much lower demand for attorneys there compared to the United States. Today, the United States, compared to England, has a much larger number of lawyers per capita, and at the same time American attorneys charge higher fees and earn higher incomes than their English counterparts. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953, 984 (2000).

66. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

67. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

68. *Tulsa Collection Services v. Pope*, 485 U.S. 478, 486 (1988).

69. 100 U.S. 339 (1880).

> ficers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.[70]

In *Home Telephone & Telegraph Company v. City of Los Angeles*,[71] the Supreme Court extended the state action doctrine, holding that actions not authorized by the state remain state action if taken under the appearance of state authority: "[w]here an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Fourteenth Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant . . . ."[72]

More recently, in *Tulsa Professional Collection Services, Inc. v. Pope*,[73] the Supreme Court held that when private parties make use of state procedures with overt, significant assistance of state officials, state action may be found.[74] In that case, a state statute provided that claims on an estate had to be made within a certain period of time after the court appointed the executor or executrix of the estate, at which time notice had to be given to potential creditors.[75] The Court held that the notice procedures constituted state action, even though it was a private party initiating the state procedure.[76] As the Court stated, "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."[77] A private attorneys' filing of complaints triggering the threat of default judgments unless defendants expend money to defend themselves should also be considered state action under this analysis.[78]

Shortly after the Court decided *Pope*, it decided *West v. Atkins*,[79] in which it further extended the state action doctrine to cover private professionals contracted out to provide services to the state.[80] In that case, the Court held that a private physician who contracted with a state prison to attend to an inmate's medical needs was a state actor.[81] The Court held that:

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70. *Id.* at 346-47.
71. 227 U.S. 278 (1913).
72. *Id.* at 287.
73. 485 U.S. at 478.
74. *Id.* at 486.
75. *Id.* at 481.
76. *Id.* at 488.
77. *Id.* at 486.
78. *See also Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 340 (1969) (holding that the triggering of a state garnishment statute was state action, and pointing to the monetary harm caused the garnishee, including "often . . . the loss of a job" and a "great drain on family income").
79. 487 U.S. 42 (1988).
80. *Id.* at 57.
81. *Id.* at 44, 57.

> Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.[82]

Therefore, even when the state "privatizes" medical care for inmates, the medical practitioners contracting with the state appropriately can be considered state actors. Consequently, even if attorneys filing lawsuits are considered "private" operators in the civil justice system – as they surely are, operating as they do to save the state the resources that would otherwise be necessary to enforce civil tort claims[83] – they can be considered to be exercising state power.

The line of cases involving prejudgment attachment, garnishment, and peremptory challenges[84] makes it increasingly clear that attorneys filing lawsuits exercise state power. Regarding prejudgment attachment and garnishment, in *Lugar v. Edmondson Oil Company, Inc.*,[85] a prejudgment attachment procedure required only that someone allege, in an *ex parte* petition, a belief that someone else was disposing of or might dispose of their property in order to defeat his creditors.[86] Acting on such a petition, a clerk of the state court would then issue a writ of attachment, which was then executed by the County Sheriff.[87] In the case the Court considered, "thirty-four days after the [attachment] a state trial judge ordered the attachment dismissed because [the petitioner] had failed to establish the statutory grounds for attachment alleged in the petition."[88] The Supreme Court noted that it "has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the State act jointly with a creditor in securing

82. *Id.* at 55.

83. *See* Posner, *supra* n.7, at 566 (noting that under the American civil justice system, "[t]he state is thereby enabled to dispense with a police force to protect people's common law rights, public attorneys to enforce them, and other bureaucratic personnel to operate the system . . . . The number of public employees involved in the protection of private rights of action is remarkably small considering the amount of activity regulated by the laws creating those rights . . . .").

84. A challenge is "[a] party's request that a judge disqualify a potential juror or an entire jury panel." A peremptory challenge is "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." Black's Law Dictionary (8th ed., West 2004).

85. 457 U.S. 922 (1982).

86. *Id.* at 924.

87. *Id.*

88. *Id.*

the property in dispute."[89] Such joint action occurs "when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute."[90]

Just like the prejudgment attachment proceeding at issue in *Lugar*, an attorney filing a complaint acts in an *ex parte* manner with unlimited discretion, subject to no prior approval by a court or anyone else. Indeed, the significance of *Lugar* to the status of private attorneys exercising state power and demanding relief was not lost on Chief Justice Burger, who pointed out in his dissent in the case that "[t]his case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant."[91] Under this understanding, a private party that commences a lawsuit, even if the lawsuit is short lived, can still cause significant injury to a defendant by exercising state power and triggering the threat of a default judgment – and the consequent necessary expenditure of defense costs – to pressure settlements.

Further, the Supreme Court, in *Wyatt v. Cole*,[92] held that qualified immunity is not available to private defendants charged with liability under 42 U.S.C. § 1983 for invoking state replevin, garnishment, or attachment statutes.[93] In doing so, the Court stated:

> Respondents do not contend that private parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution or abuse of process were entitled to absolute immunity. And with good reason; although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who, like respondents, *set the wheels of government in motion by instigating a legal action*.[94]

A procedure in which private actors can trigger a state-enforced attachment of property is directly analogous to a procedure in which private actors can file a civil lawsuit with the consequent threat of a state-enforced default judgment: filing a civil lawsuit "sets the wheels of government in motion" by immediately threatening a defendant with a default judgment enforced by the state.

89. *Id.* at 932-33.
90. *Id.* at 942.
91. *Id.* at 943 (Burger, C.J., dissenting).
92. 504 U.S. 158 (1992).
93. *Id.* at 168-69.
94. *Id.* at 164-65 (1992) (citation omitted) (emphasis added).

Regarding peremptory challenges, in *Edmonson v. Leesville Concrete Company, Inc.*,[95] the Supreme Court addressed whether it constituted state action for a private defense attorney to strike all black persons from a jury in a civil case.[96] The Court stated:

> We begin our discussion within the framework for state-action analysis set forth in Lugar . . . . We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor. There can be no question that the first part of the Lugar inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law.[97]

The Court continued that "peremptory challenges have no utility outside the jury system, a system which the government alone administers . . . . Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose."[98] The same of course is true of filing a civil complaint, which would have no utility outside a system in which a court's enforcement of a default judgment makes filing a lawsuit worthwhile.[99]

The Court continued in *Edmonson* that "[i]n determining [private defense attorneys'] state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential govern-

95. 500 U.S. 614 (1991).

96. *Id.* at 616.

97. *Id.* at 620.

98. *Id.* at 623-24 (quotations and citations omitted). Neither federal nor state law allows an attorney to order a prospective juror to leave the jury box. If, where a judge, in response to the exercise by a private attorney of a race-based peremptory challenge, directs a black juror to leave, and the judge's order is state action, then surely there is also state action where a judge, in response to the filing of a complaint, directs a defendant to answer for a default judgment, since neither federal nor state law allows an attorney to order an answer to a default judgment.

99. The Supreme Court has made distinctions in state actor status based on whether an attorney is in an adversarial position in relation to the government. *See id.* at 626-27 ("We find respondent's reliance on *Polk County v. Dodson*, 454 U.S. 312, . . . (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature . . . . In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant."). That is, an attorney initiating a civil lawsuit against a private party is not in a position adverse to the government, so such an attorney can be a state actor.

mental body [a jury], having no attributes of a private actor."[100] In the same way, the threat of a default judgment and the consequent enforcement of a default judgment is a traditional function of government.[101] The Court also stated in *Edmonson* that "[t]he fact that the government delegates some portion of this power [jury selection] to private litigants does not change the governmental character of the power exercised . . . . [W]hen private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance."[102] So, too, as in *West*, when the state "privatizes" part of a governmental function, actors in such a privatized system can be considered to be exercising state power.[103]

V. CONCLUSION

Not all attorneys function in a free market. Attorneys who file lawsuits, in particular, can by simply filing a complaint at their unfettered discretion, immediately subject defendants to the threat of a default judgment and necessitate their spending money and resources toward their defense. That dynamic results in a form of extortion according to which a defendant will be made to pay any amount to the plaintiff in settlement provided the settlement demanded is less than the costs of defense and the attorneys' costs for filing the case are minimal, as they universally are. While historically severe restrictions were placed on attorneys' influence, to limit the potential for abusive lawsuits, a series of developments have led to a situation in which, today, we live under a regime of rules that encourages the filing of lawsuits and does little to restrain them, even as recent Supreme Court precedents have sustained the notion that attorneys are not purely private actors.

This article does not argue that any particular regulation of attorneys is appropriate. It does, however, argue that attorneys who file lawsuits and thereby trigger the authority of the state and, through the state, the threat of a default judgment, are qualitatively different from other private actors. Consequently, attorneys who file lawsuits are more appropriately subject to regulation than are other private actors who simply seek to sell products to

100. 500 U.S. at 624.

101. *See id.* at 625 ("[I]n all jurisdictions a true verdict will be incorporated in a judgment enforceable by the court. These are traditional functions of government, not of a select, private group beyond the reach of the Constitution.").

102. *Id.* at 626, 628.

103. 487 U.S. at 42.

willing buyers in a free market system. That understanding prevailed through much of American history, and it should again today.