Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940

Peter Karsten
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"The inhabitants of [England] are lost in the law, such and so many are the references, orders and appeals, that it were better for us to sit down by the loss than to seek for relief . . . . The price of right is too high for a poor man."

—John Warr¹

INTRODUCTION

An intriguing development in nineteenth century American law consisted of the increased availability to wronged Americans of the legal services of skilled attorneys at affordable prices. Nineteenth century America saw the creation and sanctioning of the contingency fee contract, an agreement between plaintiff and lawyer, wherein the latter offered to represent the former free of virtually all charges until a settlement or judgment had been obtained, at which time the lawyer was to receive a percentage of the award, ranging from five percent to fifty percent depending on the type of action, the likelihood of recovery, and the anticipated preparation costs and labor. This distinctly pro-plaintiff innovation has not received the attention it deserves. Others have noted the emergence of these contracts (although some have identified them incorrectly as emerging in the late nineteenth century),² but to date, no one has systematically described or inter-

* Professor of History, University of Pittsburgh. An earlier version of this Article was presented at the Third Annual Clifford Seminar on Tort Law and Social Policy, addressing Contingency Fee Financing of Litigation in America, Chicago, Illinois, April 4-5, 1997.


2. See RANDOLPH E. BERGSTROM, COURTING DANGER 88-91, 113 (1992) (noting the antebellum origin of the change in New York, but arguing that contingency fees were not being used in New York until 1890); KENNETH DeVILLE, MEDICAL MALPRACTICE IN NINETEENTH CENTURY AMERICA 195 (1990) (stating that contingency fee contracts first significantly affected the field of medical malpractice in the 1880s); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 482 (2d ed. 1985) (stating that contingent fees were virtually universal by 1881); KERMIT L. HALL, THE MAGIC MIRROR 215 (1989) (noting the fledgling American Bar Association's concern with ambulance chasers in the late 19th century); KAREN ORREN, BELATED FEUDALISM 63
interpreted their approval by the bench. Why had contingency fee contracts not been tolerated before the nineteenth century? Why were they sanctioned in America in the mid-nineteenth century? This Article attempts to provide answers to these questions. Part I traces the history of contingency fee jurisprudence, first in England, and subsequently in the United States. In discussing the development of contingency fee jurisprudence in the United States, particular attention will be given to democratic politics and religious influences in the nineteenth century, and to the critical role they played in fostering acceptance of contingency fee principles. Part II explores the expanded use of contingency fees in the latter half of the nineteenth century, new questions raised by acceptance of contingency fee agreements, and the organized bar's concerns about contingency fee abuses. Part II will also draw attention to the hypocrisy of some late nineteenth century critics who characterized contingency fees as immoral and exploitive.

I. THE DEVELOPMENT OF CONTINGENCY FEE JURISPRUDENCE

A. The English Rule

Since the Middle Ages in England, those who offered to assist or assume the pleading of the legal claim of a stranger for reward were barred from doing so both by penal statutes and the common law doctrine of champerty. Rich and powerful men had sought to acquire additional wealth and power by aiding those with claims on the property of others, stirring up suits and “oppressing the possessors” in exchange for a portion of that property. Both private individuals and public officials were the targets of such statutes, which eventually included penalties of three years imprisonment and fines for “pleaders and attorneys.” In 1617, Sir Henry Hobart, Chief Justice of Common Pleas, stated, “If an attorney follow a cause to be paid in gross, when it

3. Champerty is defined as: “A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.” BLACK'S LAW DICTIONARY 292 (4th ed. 1968).


5. CHARLES Viner, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 150 (2d ed. London, G.G.H. & Charles Viner 1793); see also 1 SIR WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 84, § 11 (London, Law Booksellers & Publishers 1724) (stating that champertors will be punished at the King's pleasure).
is recovered, that is champerty. Thus, contingency fee agreements were unavailable to "a poor man" when John Warr penned his critique of the law in 1649.

Eighteenth and nineteenth century English high courts held to the same standard, barring all champertous contingency fee contracts. By the early 1840s, at least one of England's leading jurists seemed impatient with a rule that prevented attorneys from assisting those without the means to advance attorney costs and fees in order to seek justice. Lord Abinger, author of the assumption of risk and fellow servant rules, offered this dicta in 1843:

If a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife.

Lord Abinger was hypothesizing a Good Samaritan, not a solicitous solicitor who advanced resources for affidavits and court fees to promising clients. Nonetheless, I think this dicta indicates that he understood that there existed a human rationale for the contingency fee, however inadequate that rationale ultimately might have been to him and his colleagues.

Ten years later, a British inspector of coal mines described a dilemma that could, theoretically, have served as the grounds for the sanctioning of the contingency fee contract in Britain. He noted:

[The survivors of those killed in mine accidents] have no one to plead their cause. However gross may have been the neglect which caused the husband's death, all interests are arrayed against the survivors. The colliers, the [propertied] jury, the means of legal redress . . . and the difficulty of obtaining a solicitor who will undertake the odium and the risk, unite in forming an insuperable bar to the claim due to the widow and the fatherless . . .

In England, the losing party was generally obliged by the court to pay the attorney's fees of the winning party, and since these could be

7. See supra note 1 and accompanying text.
8. Id.
14. Id.
quite substantial (often amounting to a sum greater than what was being recovered in damages in the suit itself), the prospect of paying court costs and both parties' attorneys fees was quite daunting. For example, the coal mine inspectors managed to convince the Secretary of State the next year, in 1854, to pay for the costs of one widow's suit and unsuccessful appeal in the test case of Parkinson v. Caldwell. The Government's costs ran to £187 13s 1d, and one inspector lamented that the statute enabling the widows of workers killed in industrial accidents to sue for their wrongful death was "comparatively inoperative, as regards collieries, owing to the poverty of the suitor." 

B. The American Reception and Subsequent Rejection of the English Rule

If Pennsylvania's experience was at all typical, and if that state's Justice Hugh Henry Brackenridge is to be believed, contingency fee arrangements between clients and attorneys may have been common in late colonial America. In 1813, Justice Brackenridge claimed that "parties not monied" sometimes chose "to stipulate for something out of what was recoverable," with attorneys "taking what are called contingent fees." Justice Brackenridge suspected that the practice may have arisen from "the scarcity of circulating medium" in cash-scarce colonial Pennsylvania. In any event, "at an early period, it was tolerated, and has become common." But Justice Brackenridge believed the "most eminent" members of the bar still viewed the contingency fee contract as "unlawful," and most of the earliest reported antebellum American decisions on the subject held contingency fee arrange-
ments to be champertous and void. For example, South Carolina's high court, anticipating Lord Abinger, was not averse to:

[A Good Samaritan who was to] lay out money in a suit to recover a [tract of land] of which his poor neighbor had been deprived, and without which he must lose it. Human and justice would approve it; but, if he were to do it upon a stipulation, that he shall receive one half of the filed, if it be recovered, he is a champertor.

New York's Chancellor, James Kent, was equally adamant in adhering to the English rule. An attorney, aware of the issues in a suit for recovery of the value of promissory notes for pipes of wine, had purchased from the plaintiffs their right to sue for $351.31. After he had secured a judgment in New York for $5,987, the original suitors sought justice in that state's equity system. Chancellor Kent easily identified this attorney's behavior as having all the elements of champerty: "The object of the rule is, to remove the temptation to imposition and abuse, for clients must apply to attorneys for assistance." In that case, the defendant had come to the plaintiffs as an attorney, but he had hidden from them the grounds for his belief that he might succeed where they had failed. As a result, he had secured the right to litigate for what turned out to be six percent of the property's value; thus providing the attorney with a fee equal to ninety-four percent of the award. This, Kent wrote, was champerty in its most "odi-

22. See, e.g., Holloway v. Lowe, 7 Port. 488, 490-92 (Ala. 1838) (holding that champerty is the unlawful maintenance of a suit); Scobey v. Ross, 13 Ind. 117, 124 (1859) (holding that an agreement by which an attorney is to receive for his services a portion of the claim or thing to be recovered is champertous and void); Rust v. Larue, 14 Ky. (4 Litt.) 411, 418 (1823) (holding that champerty and maintenance are offenses at common law as well as by statute); Livingston v. Cornell, 2 Mart. (O.S.) 281, 284 (La. 1812) (noting that Roman law barred such fees); Thurston v. Percival, 18 Mass. (1 Pick.) 415, 416-17 (1823) (holding that while champertous agreements are void, an attorney might recover in quantum meruit for services rendered prior to executing the champertous agreement); Backus v. Byron, 4 Mich. 535, 553 (1857) (declaring it would shock the sense of professional propriety for an attorney to advertise that he would prosecute lawsuits for a share of the claim); Martin v. Clarke, 8 R.I. 389, 403 (1866) (holding that champerty is against the law); State v. Chitty, 17 S.C.L. (1 Bail.) 375, 400 (1830) (noting that maintenance and champerty are impermissible species of barratry).

23. See supra note 11 and accompanying text.
25. Arden v. Patterson, 5 Johns. Ch. 44 (N.Y. Ch. 1821).
26. Id. at 46.
27. Id. at 47.
28. Id. at 49.
29. Id. at 46-47.
30. Id.
ous" form, and champertor as blatant as this was as wrongful in New York in 1821 as it had been in England in 1621.

Other reported cases of champertous contracts between lawyers and clients in the 1820s were less obviously offensive contingency fees; cases which involved fees of ten percent, a quarter, a third, or a half of the debt or property being claimed. These cases involved such well-connected and accomplished litigators as Henry Clay, Amos Kendall, Linus Child, and Daniel Webster, each of whom provided their services on a contingency fee basis to such clients as the Western Cherokee, Mississippi slave-market owners, heirs of Philadelphia millionaire Stephen Girard, merchants suing foreign governments, and American diplomats suing the United States for wages and expenses. Increasing numbers of contingency fee agreements were spawned by the many conflicting and overlapping land claims in several of the newly-settled states of Kentucky, Maine, Ohio and Tennessee in the early nineteenth century. Holders in due course of colonial land grants vied with Revolutionary War land scrip holders and squatters bearing occupancy titles, some with registered land warrants, others without. Settlers who had purchased titles from mere squatter-enclosers and had built homes, cleared farms, and paid taxes for years, now found themselves ejected, their improvements treated as mere offsets for rent they had not paid to the true land grantees. These disseized settlers, desperate for legal representation and with no ability to pay up-front fees, had no real choice but to utilize attor-

31. Id. at 48; see also Merritt v. Lambert, 10 Paige Ch. 352 (N.Y. Ch. 1843) (noting that principles from 17th century England were still applicable regarding attorneys fees).
32. See infra notes 33-37.
35. See Contingent Fees, 59 Cent. L.J. 401, 401-02 (1904) (positing arguments in favor of contingency fee agreements, and noting, for support, a contingency fee agreement entered into by Daniel Webster in an action against Mr. Girard's heirs).
38. For a broader discussion of the property disputes which arose in the frontier states of the late 18th and 19th centuries, see generally Patricia Watlington, The Partisan Spirit: Kentucky Politics, 1779-1792, at 16-17 (1978) (noting that a tangle of lawsuits surrounded almost every acre of land); Alan Taylor, Liberty Men and Great Proprietors: The Revolutionary Spirit on the Maine Frontier, 1760-1820, at 21 (1990) (commenting that lawsuits over land were long, complex and expensive); Paul Gates, Tenants of the Log Cabin, reprinted in, Paul Gates, Landlords and Tenants on the Prairie Frontier 16 (1973) (noting that the growing costs of litigation to clear title to land, together with fees, kept litigants in constant turmoil).
39. See supra note 38.
40. See supra note 38.
ney contingency fee arrangements to defend their rights at trial or on appeal.\textsuperscript{41}

Charles Hammond appeared before the Ohio Supreme Court in 1823 on behalf of such a contract.\textsuperscript{42} Hammond noted that, "From the commencement of our jurisprudence, the legal profession [in Ohio has] been in the habit of stipulating for conditional and contingent fees, very frequently . . . to be paid out of the sum recovered, and in proportion to the amount."\textsuperscript{43} A poor individual, "placed in the power of unfeeling and rapacious men, is illegally and oppressively stripped of his property, and turned, with his family, destitute, desolate, and helpless, upon the world."\textsuperscript{44} These feelings of humanity demanded that Ohio's judiciary reject a common law rule created by tyrannical descendants of the Norman conqueror who had subjugated the country and despoiled the Saxons of their land.\textsuperscript{45} Inasmuch as the right of making contracts was "a high personal privilege of the citizen,"\textsuperscript{46} Hammond (who also served during this period as Ohio's Supreme Court Reporter) asked that the court order the upholding of an arbitrator's award of twenty-five percent of the value of recovered property to his attorney-client.\textsuperscript{47}

Hammond's client and his partner, however, had included in their contract with their disseized client the provision that the client not settle the case out of court without informing them and securing their assent.\textsuperscript{48} After all, because they were proposing to spend time, labor, and monies to build their client's case, they probably felt it was only fair that they be a party to any settlement. The Ohio Supreme Court felt otherwise, particularly offended by this stipulation which might have the effect of mitigating the "injunction of sacred writ . . . which invites us to agree with our adversary."\textsuperscript{49} The court felt that this contract would result in maintaining a dispute that litigants might otherwise have been willing to resolve, and this was contrary to good public policy and therefore void.\textsuperscript{50} Judge Jacob Burnet also denied Hammond's claim that contingency fees were commonplace,\textsuperscript{51} but Judge

\begin{itemize}
\item \textsuperscript{41} See supra notes 38-40 and accompanying text.
\item \textsuperscript{42} Key v. Vattier, 1 Ohio 132 (1823).
\item \textsuperscript{43} Id. at 141.
\item \textsuperscript{44} Id. at 136.
\item \textsuperscript{45} Id. at 136, 139.
\item \textsuperscript{46} Id. at 135.
\item \textsuperscript{47} Id. at 132.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 146.
\item \textsuperscript{50} Id. at 147; see also Weakly v. Hall, 13 Ohio 167, 175-76 (1844) (stating that champertous contracts discourage early settlement of claims).
\item \textsuperscript{51} Key, 1 Ohio at 132.
\end{itemize}
Burnet may have been engaging in wishful thinking; the appearance of these suits in more than just a few jurisdictions in antebellum America suggests that Hammond’s description of contingency fees in early Ohio was neither fanciful nor unique.

Benjamin Hardin, an attorney defending his own 1817-vintage contingency fee arrangement before Kentucky’s Supreme Court in 1823, maintained that the “old obsolete doctrine [of champerty should remain] buried under the rubbish of two hundred years.” In Kentucky, it was frequently the practice for the plaintiff to promise contingently part of what was in contest to his attorney. Hardin offered this public policy rationale: “[The client] may not have anything else to give, and without the aid of the matter in the contest, he can never sue for his right, not having otherwise the means to employ counsel, the precise case here.” Hardin’s former client offered clear substantiation of Hardin’s point during the trial when he told the equity judge that he was so poor when he had entered into this agreement that he had really been without any option. The client had to agree to a contingent fee for the purpose of obtaining counsel, as other attorneys with whom he had spoken had required a payment of one hundred dollars. The Chancellor treated this champertous contract as void, but allowed Hardin appropriate compensation on a quantum meruit basis, as did the high court of Massachusetts in similar circumstances. And note that everywhere in the United States, courts did not oblige the losers of suits to pay the legal costs of the winners, as they did in England. As a result, those of modest means need not fear the crushing weight of a railroad corporation’s legal fee.

Justice George Woodward of Pennsylvania’s Supreme Court also attested to the antebellum popularity of contingency fee arrangements by calling them “common,” though criticizing them as being “more frequent . . . than they ought to be.” They had “attracted the animadversion of this court, more than once,” he continued. But whereas his colleagues in Alabama, Indiana, Massachusetts, Michigan, New Hampshire, Ohio, Rhode Island and South Carolina would con-

52. Rust v. LaRue, 14 Ky. (4 Litt.) 411, 424 (1823).
53. Id.
54. Id. at 421.
55. Id. at 412.
56. Id. at 421.
57. Id. at 428.
60. Patten v. Wilson, 34 Pa. 299, 300 (1859).
61. Id.
continue for some time to declare these contracts void, sometimes in very doctrinal fashion, in 1852, Justice Woodward and the Pennsylvania Supreme Court joined Delaware (1840), Louisiana (1834), New York (1824) and Tennessee (1836) in sanctioning such contracts. In the next decade the high courts of the United States, Arkansas, California, Georgia, Illinois, Iowa, Texas, Virginia and Wisconsin held contingency fees to be enforceable. In the years following the Civil War, Connecticut, Michigan, Missouri, New Jersey and Utah followed suit, with New Jersey's Chancellor going so far as to reject the English rule barring any payment to a barrister assigned to aid a pauper (in forma pauperis). In that case, an attorney who had been assigned to aid a poor woman seeking to recover on her husband's insurance policy had asked for fifty percent of whatever he recovered for her, and that state's chief equity judge held this to be a valid agreement.

Chief Justice Isaac Parker of the Massachusetts high court allowed that the contingency fee was "useful and convenient, where one has a just demand which he is unable from poverty to enforce." He and his colleagues, however, regarded themselves as bound by the old English champerty statutes and by common law precedent and principles until the state legislature were to change the law. How is it that


63. See Backus, 4 Mich. at 538 (stating that champerty is malum in se, an offense of high grade, tending to strife, oppression and injustice); Butler, 62 N.H. at 352 (stating that contracts for a share of the judgment are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void); Martin, 8 R.I. at 400-03 (holding not only that champerty is an offense at common law, but also that it is malum in se, thus voiding any contract which it enters).

64. Bayard v. McLane, 3 Del. (1 Harr.) 129, 219-20 (1840); Flower v. O'Connor, 7 La. 198, 207 (1834); Thallhimer v. Brinkerhoff, 3 Cow. 632, 648 (N.Y. 1824); Strohecker v. Hoffman, 19 Pa. 223, 227 (1852); Moore v. Trustees of Campbell Academy, 17 Tenn. (9 Yer.) 115, 118 (1836).

65. Wyllie v. Coxe, 56 U.S. 415, 420 (1853); Lytle v. State, 17 Ark. 608, 678 (1857); Baldwin v. Bennett, 4 Cal. 392, 393-94 (1854); Nesbit v. Cautrell, 29 Ga. 255, 256-57 (1859); Smith v. Young, 62 Ill. 210, 211-12 (1871); Allison v. Chicago & N.W.R. Co., 42 Iowa 274, 280 (1875); McDonald v. Chicago & N.W.R. Co., 29 Iowa 170, 174-75 (1870); Hill v. Cunningham, 25 Tex. 26, 32 (1860); Major's Ex' v. Gibson, 1 Pat. & H. 48, 82 (1855); Ryan v. Martin, 16 Wis. 59, 67 (1862).


67. Schomp, 40 N.J.L. at 198.

68. Id. at 207.


70. Id. Perhaps Parker and his peers on other champerty-embracing courts convinced themselves, as had Lord Campbell of Queen's Bench, that, "no pauper having a real just cause of
a practice that courts had for centuries regarded as a “temptation to imposition and abuse,” a tendency “to promote useless and unjust litigation” and to “greatly multiply” the number of lawsuits—in short, a contract contrary to good public policy—could by the 1850s, increasingly come to be deemed acceptable?

One answer lies in the people’s assemblies. In 1839, the legislature of Virginia narrowed the scope of champerty and maintenance substantially and indicated that attorneys were “free to contract” such fee arrangements with their clients as the parties chose. One year later, Theodore Sedgwick argued that as American attorneys were free from the English practice that limited barristers to honoraria payments from clients or solicitors—who subsequently recovered this from their clients or the losing opposite party as part of the court-ordered bill of costs—then consequently, American attorneys ought to be free to contract with clients as they wished, like other professionals, artisans and tradesmen. David Dudley Field’s report to the New York legislature on procedural reform called for freedom of contract for attorneys, and New York’s resulting Code of Procedure in 1848 banned all rules “regulating the costs or fees of attorneys.” Other states adopting the Field Code correspondingly sanctioned contingency fee contracts by a statutory route as well.

Thus, the contingency fee arrangement, so useful to poor plaintiffs, was authorized early on by statute in some states. But in many other non-code or pre-code states it first entered through the portals of the state’s supreme court. By the 1820s, champerty’s venerable lineage may still have held doctrinal courts like that of Massachusetts in tow, but others were more impressed by utilitarian arguments than by mere precedent. One such rationale was advanced in the mid-1850s

71. Arden v. Patterson, 5 Johns. 44, 49 (N.Y. 1821).
73. Holloway v. Lowe, 9 Port. 488, 491 (Ala. 1838).
75. Honoraria are defined as: “An honorary or free gift; a gratuitous payment, as distinguished from hire or compensation for service; a lawyer’s or counsellor’s fee. A voluntary donation, in consideration of services which admit of no compensation in money; in particular, to advocates at law, deemed to practice for honor or influence, and not for fees.” BLACK’S LAW DICTIONARY 869 (4th ed. 1968).
78. See generally Leubsdorf supra note 15 (discussing the influence of the Field Code, and other factors in the development of the American approach to recovery of attorney fees).
by both Justice Lucas Thompson of the Virginia Special Court of Appeals\(^8^0\) and Justice Onias Skinner of the Illinois Supreme Court.\(^8^1\) They reasoned that contingency fee contracts "constituted a better guaranty for fidelity, energy and proper zeal from one's attorney than the fee certain."\(^8^2\) Thus, an attorney who was to receive payment only if he was successful would work harder to achieve that goal. And he would not waste the time and resources of the state's judicial system, his client, or his opponent with a case that was without merit. Judge Edwin Countryman of New York took the same view, describing the contingency fee arrangement between attorney and client as an "advantageous bargain . . . [for both parties] as they are equally dependent on each other for service and support generally."\(^8^3\)

The other, far more commonly expressed rationale, however, concerned the welfare of the plaintiff. The plea that Benjamin Hardin had offered before Kentucky's Supreme Court in 1823, to bury champerty "under the rubbish of two hundred years"\(^8^4\) in order to help a poor man to "sue for his right,"\(^8^5\) finally found a sympathetic audience in the 1830s and 1840s. Thus, in 1836, Tennessee's Justice William Reece sanctioned a champertous agreement between a destitute woman and her attorney regarding her inheritance rights with the observation that it was "no quixotism . . . [to] redress the wrongs of the indigent and the injured . . . [but rather] a grave and highly honorable duty of the profession."\(^8^6\) When a champertous attorney's attorney asked the Delaware high court in 1840, "How is the poor man to assert his rights?" he was pleased to hear Justice Samuel Harrington answer, "[T]he poor suitor may not have the present means of payment, and this policy [of voiding contingent fee contracts] may deprive him of counsel . . . . His rights are nothing unless he can have the means of enforcing them."\(^8^7\)

Justice Christopher Scott offered the same rationale for sanctioning contingency fees in Arkansas in 1857.\(^8^8\) Citing Lord Abinger's dicta

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82. Major's Ex', 1 Pat. & H. at 82.
84. Rust v. LaRue, 14 Ky. (4 Litt.) 411, 424 (1823).
85. Id. at 421.
86. Moore v. Trustee of Campbell, 17 Tenn (9 Yer.) 115, 116, 118 (1836).
87. Bayard v. McLane, 3 Del. (1 Harr.) 139, 207, 219-20 (1840). The two men were not speaking hypothetically in this manner: the client in this contingency fee arrangement was suing the Philadelphia millionaire merchant, Stephen Girard!
on the subject,\textsuperscript{89} he added his own comments: "[T]he door of justice is not shut to the poor, who may be oppressed"\textsuperscript{90} and those of Justice Scott, "[R]ights are nothing without the means of enforcing them."\textsuperscript{91} Similar sentiments were expressed by Justice Lucas Thompson in 1855:

[Such contracts] are in fact based on [the client's] ability to pay. Abrogate the right to so contract, and ... you virtually close the doors of justice upon the party aggrieved in the cases. The genius of this practical and utilitarian age [renders old rules] as inapposite and inappropriate, in reference to the affairs of mankind in this age, as would be the code of chivalry promulgated by the Knight of La Mancha to the common every-day concerns of life.\textsuperscript{92}

New Hampshire's Chief Justice Samuel Bell agreed in 1862:

It is not uncommon that attorneys commence actions for poor people, and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in cases where, without such aid, he would be unable to enforce a just claim.\textsuperscript{93}

And hear Missouri's Judge Robert Bakewell in 1876:

Many a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of his suit .... If [such agreements] are immoral or illegal, there are perhaps few attorneys in active practice amongst us who have not been habitual violators of the laws.\textsuperscript{94}

Appellate jurists in Iowa,\textsuperscript{95} New Jersey,\textsuperscript{96} Texas,\textsuperscript{97} Utah,\textsuperscript{98} and in at least one federal court\textsuperscript{99} also permitted contingency fees in these same years. Poor litigants could now afford skilled legal services and were not as intimidated by the prospect of court costs such as fees for jurors, witnesses, documents, and filing fees.

\begin{itemize}
\item \textsuperscript{89} Id. at 678.
\item \textsuperscript{90} Id. at 677.
\item \textsuperscript{91} Id. at 678.
\item \textsuperscript{92} Major's Ex' v. Gibson, 1 Pat. & H. 48, 83 (Va. 1855).
\item \textsuperscript{93} Christie v. Sawyer, 44 N.H. 298, 303 (1862) (quoting and paraphrasing Shapley v. Bellows, 4 N.H. 347, 355 (1808)).
\item \textsuperscript{94} Duke v. Harper, 2 Mo. App. 1, 10-11 (1876).
\item \textsuperscript{95} Wright v. Meek, 3 Greene 472, 483-84 (Iowa 1852) (declaring the doctrine of champerty and maintenance to be invalid in Iowa).
\item \textsuperscript{96} Hassell v. Van Houten, 39 N.J. Eq. 105, 109-10 (1884) (affirming that the law of champerty and maintenance did not exist in New Jersey).
\item \textsuperscript{97} Bentnick v. Franklin & Galveston City Co., 38 Tex. 458, 473 (1873) (holding that the law prohibiting champerty was not the law of Texas).
\item \textsuperscript{98} Croco v. Oregon Short-Line Ry. Co., 54 P. 985, 987 (Utah 1898) (holding that contingency fee arrangements are authorized by Utah statutes governing legal fees).
\item \textsuperscript{99} Ex parte Plitt, 19 F. Cas. 875, 883 (E.D. Pa. 1853) (No. 11,228) (deciding not on contingency fees in general, but holding that where counsel represents a party under order of the court, a mutually-agreed upon contingency fee will be enforced).
\end{itemize}
We know something of the socio-economic backgrounds of tort plaintiffs in nineteenth century American courts: about twelve percent were professionals, proprietors, or their spouses; approximately another twenty-five percent were low-white collar workers or farmers or their spouses; about fifteen percent were skilled manual workers; about twenty percent semi-skilled; and about ten percent were unskilled workers or domestics. Hence, while some tort plaintiffs were capable of paying for legal representation, others clearly would not have been able to do so were it not for the judicial sanctioning of contingency fee contracts. This innovation opened the doors of justice in most jurisdictions to many indigent or working-class plaintiffs in the same mid-nineteenth century years that civil juries were beginning to award large damages to accident victims of corporations. During this same period, jurists introduced a substantial number of other pro-plaintiff innovations, the sum of which I call a “Jurisprudence of the Heart.” These innovations included the invocation of fundamental law on behalf of manumitted, fugitive, and sojourner slaves; the rejection of the ancient lights doctrine; the balancing of equities and the rejection of the industrial zone defense in pollution nuisance cases; and creation of the prudent investor rule. Furthermore, jurists allowed quantum meruit recovery in breaches of labor contracts; favored third party gift-beneficiaries to contracts over third party creditor-beneficiaries to contracts; allowed the creation of charitable trusts by bequest in the absence of enabling statutes; created the superior servant, competent servant, sub-contractor, and different department exceptions to the fellow-servant rule; allowed the safe tool, safe place, complaint-of-hazard, and no-warning-of-hazard exceptions to the assumption of risk rule; and created the attractive nuisance rule. Finally, during this period, courts ceased to impute parental contributory negligence to children; freed those in-

102. Id. at 147-56.
103. Id. at 137-42.
104. Id. at 131-32.
105. Id. at 157-89.
106. Id. at 63-64, 74, 76.
107. Id. at 132-34.
108. Id. at 120-26.
109. Id. at 111-13.
110. Id. at 208-13.
111. Id. at 236-51.
jured in the act of saving others from contributory negligence;112 left the question of plaintiffs' contributory negligence as a fact question for the jury;113 refused to allow common carriers to contract out of liability;114 rejected sovereign immunity for injuries caused by negligent road and bridge authorities;115 permitted damage awards for mental shock where no touching of the injured plaintiff had occurred;116 and sanctioned contingency fee contracts.117 Note how many of these innovations concerned personal injury suits.

It is easier to describe a phenomenon or set of apparently related phenomena than it is to ascribe causes which explain them. In Heart versus Head, I have offered three potential explanations for the propensity of jurists to create humane, pro-plaintiff innovations.118 The first is largely technical and nonideological in character: the simplification of the writ system, and the merging of law and equity in the procedural reforms of the 1840s, 1850s and 1860s, made it seem easier for some jurists to reach for equitable remedies to problems embedded in common law rules. This may have been a necessary, if not sufficient, reason that contingency fee contracts were seen as tolerable in a Code state like New York.

A second, more potent explanation lies in the political history of the United States, beginning with the Age of Jackson and including the next several decades: democracy, distrust of corporations, and the election of jurists by the mid-nineteenth century account for much of this "Jurisprudence of the Heart." Furthermore, these historical phenomena may also explain why this jurisprudence has a somewhat regional character—much stronger on the Great Plains, for example, than in Massachusetts, where jurists were still appointed, or in late nineteenth century Pennsylvania, where corporations were politically powerful. Some state courts behaved in decidedly doctrinal ways throughout the nineteenth century; others were more willing to innovate. Furthermore, we know that, even when jurists were appointed by governors, the perspective of candidates could be weighed in a political balance scale that sometimes tipped against corporate interests. For example, Wisconsin's Granger-elected Governor William R. Taylor sought a chief justice in 1874 "who is instinctively in sympathy with the people as against aggregated capital and oppressive monopo-
lies." Jurists chosen because their values were consistent with those of the anti-railroad Granger movement, or the humanitarian reform impulse were expected to protect producers from capitalists, fugitives from slave catchers, children from careless drivers, and the ordinary people from the rich and powerful.

Some jurists elected to the high courts of the other states may have been inspired to draw new equitable rules from their hearts rather than following their common law heads because they faced reelection and sought a popular mandate. But all had been chosen as candidates for the bench by their parties in the first place, and may have been selected because, in addition to their experience and skills, they seemed predisposed to behave with imagination and compassion towards fugitive slaves, farm debtors, temperance activists, and perhaps, poor parties seeking justice, while acting with rectitude and a concern for the public’s welfare towards factory owners and railroad barons. With regard to contingency fee contracts, some of the first sanctioning may have been done by jurists who had themselves made use of the arrangement before their elevation to the bench.

A third explanation for these pro-plaintiff developments involves the intensely religious nature of nineteenth century American culture: as Europeans and Canadians continued to emigrate to the newly-created United States and families grew, the population rose from 4 million in 1790 to 40 million in 1870. With the acquisition of the Louisiana Territory, Florida, Texas, Oregon Territory, California and the Southwest, the land mass of the nation more than doubled in the first half of the nineteenth century. Outputs of grain, livestock, coal, iron, glassware, lumber, and clothing rose at varying rates greater than that of the population’s increase. Gross farm output rose ten-fold between 1800 and 1880. Pig iron shipments rose by some fifteen-fold between 1810 and 1860. Railways, canals, and steamboats served the new nation. The economy was growing. But

119. ROBERT S. HUNT, LAW AND LOCOMOTIVES 109 (Madison, n.p. 1859). Governor Taylor chose as his Chief Justice, Edward G. Ryan. He was not disappointed.
120. See generally TONY A. FREYER, PRODUCERS VERSUS CAPITALISTS: CONSTITUTIONAL CONFLICT IN ANTEBELLUM AMERICA (Kermit Hall & David O’Brien eds., 1994) (discussing the propensity of mid-Atlantic jurists, legislators and voters to view creditors and corporate “capitalists” with distrust and to place them at a comparative disadvantage to local “producer” farmers and artisans).
121. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 7 (1961).
122. Id. at 236.
123. Id. at 7, 284, 312, 357, 366.
124. Id. at 284.
125. Id. at 366.
there was another development unfolding in these years that is too often ignored—a religious development. Between 1780 and 1860 the number of religious congregations in the United States rose from some 2,500 to over 52,000, a twenty-one-fold increase, nearly three times greater than the rate of population increase in the same period.\textsuperscript{126} Churches, especially evangelical churches, were being built by Christian communities everywhere and church attendance was rising. By the mid-1850s, at least forty percent of the total population were evangelical churchgoers.\textsuperscript{127}

Moreover, this was not pro forma church attendance. A generation of fresh scholarship has demonstrated that antebellum Americans, as individuals as well as congregations, were "awash in a sea of faith."\textsuperscript{128} Americans were increasingly concerned with the welfare of their souls, increasingly in search of God's grace.\textsuperscript{129} Many, especially members of evangelical churches, were also concerned with the welfare of the souls of others. Slavery was sinful and drinking led to intemperate behavior and disrupted family life. Concern for the spirit was often joined with concern for the body. Cruelty towards children, wives, sailors, prisoners, animals, as well as slaves, was inhumane. Christianity had a role to play, Reverend Elias Magoon argued in 1849, as the "fortifier of the weak, the deliverer of the oppressed."\textsuperscript{130} It must

\textsuperscript{126.} Jon Butler, \textit{Awash in a Sea of Faith: Christianizing the American People} 270 (1990).


\textsuperscript{130.} Merle Curti, \textit{The Growth of American Thought} 308 (2d ed. 1951) (quoting Elias L. Magoon, \textit{Republican Christianity} 312-13 (Boston, Gould Kendall & Lincoln 1849)).
“work for the millions rather than for aristocratic cliques.”

Benevolent societies sprang up targeting one after the other of these customs, habits, and norms.

Many found politics and legislation the most effective means of changing the rules as evangelical Christianity found expression in the Republican Party. Whereas less than thirty percent of eligible voters participated in the political process in the election of 1824, over eighty percent of those eligible voted in 1840, and that level of activity persisted for decades thereafter. For those unable to vote, there remained the petition to legislators as the political statement in aid of temperance, children or slaves.

We now know that American political parties from the 1820s through the 1890s were primarily reflections of the moral issues and perceptions of the day, with divisions largely along religious lines, not those of class. In the words of a convert to this perspective: "[C]lass-consciousness and economic radicalism were shallow and ephemeral characteristics of the electorate . . . [T]he mass of American voters . . . were prompted . . . primarily by ethno-cultural values, mostly religious and sectarian in their roots." In 1856, one of Pennsylvania Governor William Bigler’s correspondents argued that "moral questions have much more to do with elections now than formerly . . . [T]he development of principles draw after them the religious and moral feelings of the people." As another put it in the same year, "[O]ur Protestant laws and constitution need Protestant officers to enforce and execute them."

It was this political world that elevated jurists to supreme courts. Some state jurists were elected, others selected by governors or legislatures in the early nineteenth century; but by the 1840s and 1850s, most judges were elected. By 1860, jurists in just ten of thirty-four states were appointed. But whether selected or elected, they were more or less chosen in a political process. Consequently, it would be

131. Id.
133. Geoffrey Blodgett, A New Look at the Gilded Age, in Victorian America 95, 99 (Daniel W. Howe ed., 1976); see generally Paul Kleppner, Cross of Culture (1970) (discussing the effect of class, culture and religion on politics in the second half of the 19th century); Paul Kleppner, The Third Electoral System, 1853-1892 (1979) (discussing the reshaping of the electoral system in the second half of the 19th century).
135. Carwardine, supra note 127, at 261.
very surprising if they did not reflect some of those moral and religious perspectives to be found in that political process.

In short, I believe that the selection of jurists by a political process resting on an increasingly broad-based franchise, coupled with the pervasive influence of evangelical thought, substantially explain the propensity of nineteenth century jurists to sanction contingency fee contracts.

II. EXPANDED USE AND FURTHER SCRUTINY OF CONTINGENCY FEE CONTRACTS, 1870-1930

A. Increasing Use of Contingency Fee Agreements Involving a Variety of Legal Claims

Even before some of their high courts had sanctioned contingency fees, the American public was putting them to increasing numbers of use: minority stockholders and dissident stock subscribers suing corporations,138 importers and customs brokers suing the federal government,139 depositors suing banks,140 creditors suing insolvent railroads and manufacturing firms,141 merchants and traders reporting depredations and losses at the hands of either Indian tribes or others before federal Claims Commissions,142 passengers and crews suing steamship companies,143 urban park commissioners seeking to clear title to park land,144 county commissioners and state auditors suing for title to land from those without proper title,145 subordinate government entities suing higher ones over tax revenues,146 towns and counties suing to halt the issuance or transfer of railroad bonds, as well as bondholders suing counties and municipalities to collect on these bonds.147 All sought the aid of attorneys on contingency fee contracts. Many of these contracts involved sums that would, by modern standards, have numbered in the hundreds of thousands of dollars, and involved some

139. Irwin v. Curie, 64 N.E. 161, 161 (N.Y. 1902).
143. Northwestern S.S. Co. v. Cochran, 191 F. 146, 149-50 (9th Cir. 1911).
145. Corbin v. Mulligan, 64 Ky. 297, 303 (1866).
147. Millard v. County of Richland, 13 Ill. App. 527, 531 (1883); County of Richland v. Millard, 9 Ill. App. 396, 398-99 (1881); Larned v. Dubuque, 53 N.W. 105, 106 (Iowa 1892); Kellerher v. Henderson, 101 S.W. 1083, 1083 (Mo. 1907).
of the more respected members of the American bar. In 1875, Supreme Court Chief Justice Morrison Waite called one of these arrangements a "legitimate and honorable professional assistance."148 In 1887, New York Court of Appeals Justice Rufus Peckham noted that some of the most reputable and eminent members of the New York bar had testified as to the reasonableness of a contingency fee contract for one-third of the value of an estate in dispute, and found that their opinions were unanimous in proclaiming the contract a fair one.149 Moreover, when challenged in court, virtually all of these contracts were indeed deemed to be valid and binding.150

Jurists made a number of exceptions and qualifications, to be sure. Contingency fee contracts were never sanctioned during these years when their purposes were deemed to be contrary to good public policy, as when they were made for a percentage of the alimony granted in a proceeding for marital separation;151 to secure the terms of a divorce;152 to assist the defense or prosecution in a criminal case;153 to secure a discharge for one who had been drafted during the Civil War;154 or to lobby legislators or cabinet officials for a client’s purely private interests.155 But this left open to contingency fee arrangements a vast domain of litigation, including: debt, tax or promissory

149. In re Mary Hynes, 105 N.Y. 560, 563 (1887).
150. Contingency fee contracts were upheld in the following cases: Taylor v. Bemiss, 110 U.S. 42, 46 (1881); Wright, 91 U.S. at 254; Northwestern S.S. Co. v. Cochran, 191 F. 146, 152 (1887); Phillips v. South Park Comms., 10 N.E. 230, 233 (Ill. 1887); Millard, 13 Ill. App. at 534-35; Larned, 53 N.W. at 110; Wheeler v. Harrison, 50 A. 523, 526 (Md. 1901); Semmes v. Western Union Tel. Co., 20 A. 127, 128 (Md. 1890); Davis, 41 N.E. at 293; Irwin v. Currie, 64 N.E. 161, 161 (N.Y. 1902); In re Mary Hynes, 105 N.Y. at 565.
152. McConnell v. McConnell, 136 S.W. 934, 934 (Ark. 1911); Barngrover v. Pettigrew, 104 N.W. 904, 904 (Iowa 1905); Jordan v. Westerman, 28 N.W. 826, 830 (Mich. 1886); Coleman v. Sisson, 230 P. 582, 585 (Mont. 1924); Lynde v. Lynde, 52 A. 694, 703 (N.J. 1900); Van Vleck v. Van Vleck, 47 N.Y.S. 470, 472 (1897); see also Recent Decisions, 21 VA. L. REV. 443, 446 (1935) (explaining that contingency fee arrangements in divorce cases are void as against public policy).
153. Baca v. Padilla, 190 P. 730, 731 (N.M. 1920) (holding that the prosecutor is supposed to be a disinterested person); see also Price v. Caperton, 62 Ky. 207, 209 (1864) (stating in dicta that a contingent fee arrangement would be unlawful).
155. Houlton v. Dunn, 61 N.W. 898, 901 (Minn. 1895) (voiding a contingency agreement in which the attorney was lobbying on behalf of the client); Richardson v. Scotts Bluff County, 81 N.W. 309, 312 (Neb. 1899) (holding that a contract for drafting a bill and lobbying its passage is contrary to public policy); Spalding v. Ewing, 149 Pa. 375, 380 (1892) (holding that contingency fee contracts which interfere with the making or enforcement of laws are against public policy and therefore void). But see Bergen v. Frisbie, 57 P. 784, 785 (Cal. 1899) (holding that a contingency fee simply to secure clear patents to land for an owner is not contrary to good public policy); Stroemer v. Van Orsdel, 103 N.W. 1053, 1055-56 (Neb. 1905) (allowing a contingency fee contract to obtain Indian reservation land at a reduced price, and criticizing the rule in Richardson).
note collection; land title or inheritance; and increasingly, personal injury litigation.

The extent to which the contingency fee contract had become legitimized in the eyes of most jurists is best illustrated by the fate of an Act of Congress in 1915.156 That Act limited the contingency fees of attorneys representing Southerners claiming damages for depredations or uncompensated takings by federal forces that they or their ancestors had incurred during the Civil War to twenty percent of the award.157 When attorneys who had contracted for larger percentages sued, objecting to this provision, Arkansas' high court turned the challenge away,158 but those of Kentucky, Mississippi, Tennessee, and the United States159 all declared the Act to be unconstitutional on the grounds that Congress was "without power to dictate" the terms of such contingency fee arrangements.160 These cases are clear evidence of the propensity of jurists by this time to treat these arrangements as part of the legal landscape and as the bread and butter of a large segment of the profession, to be defended when contravened by either the client or the defendant. In fact, most appellate cases of the final two decades of the nineteenth century and the first four decades of the twentieth century (the outer limit to this analysis) which addressed contingency fee issues, focused on attorney collection rights rather than the more theoretical sanctity of such contracts.

B. Re-Examination of Contingency Fee Doctrine: Fee Collection and Ambulance Chasers

Four separate issues continued to plague practitioners who had failed to use the right magic words in several jurisdictions: whether the attorney had a proper claim to a portion of the client's chose in action; whether the contract was enforceable if the client settled with the other party without his attorney's knowledge; how attorneys were to finance the costs of the suit; and whether the client was to pay anything if the suit was unsuccessful.

As late as the turn of the century, attorneys were still finding jurists unwilling to tolerate agreements that purported to vest legal title in attorneys to carry on their clients' suits against debtors, former partners, or others, especially when the chose in action was a personal

157. Id.
158. Id.
160. Black, 194 S.W. at 813.
injury or a piece of land, the original English source of the champerty rule.\textsuperscript{161} But these same jurists often were willing to hold that a contingency fee contract for a fee rather than for a share was not champertous, while others allowed contingency contracts for shares if the share were paid out to the attorney in cash rather than a portion of the land at stake after the case was successfully resolved.\textsuperscript{162} Still others treated the contingency fee contract as a lien or equitable assignment of an interest in any settlement or judgment if such language appeared in the contract, notice of it had been served on the other party,\textsuperscript{163} and if this lien was held to be superior to any subsequent judgment against the client.\textsuperscript{164} In fact, the Supreme Court in 1884 allowed an attorney's lien against all of the creditors benefitting from his successful attach-

\textsuperscript{161} Peck v. Heurick, 167 U.S. 624, 632 (1897) (holding that the transfer of a deed by a client to an attorney as contingent payment for services was champertous and therefore void); Coughlin v. N.Y. Cent. & Hudson R.R., 71 N.Y. 443, 449-50 (1877) (holding that tort claim may not be purchased by an attorney); Brown v. Ginn, 64 N.E. 123, 128 (Ohio 1902) (holding that a contingent fee agreement which deprives the client of the right to control his own case is invalid as against public policy); Dahms v. Sears, 11 P. 891, 896 (Or. 1886) (holding that an attorney cannot purchase a claim).

\textsuperscript{162} See generally Blaisdell v. Ahern, 144 Mass. 393 (1887) (distinguishing between a champertous contract in which the attorney receives a portion of the fruits of the litigation, and a lawful contract in which the attorney's receipt of fees is merely contingent on the outcome of the case); Benedict v. Stuart, 23 Barb. 420 (N.Y. App. Div. 1856) (holding that a contract which provides for the attorney to receive a share of the amount recovered is not illegal).

\textsuperscript{163} Larned v. Dubuque, 53 N.W. 105 (Iowa 1892) (describing attorney's contingency fee agreement as a lien); Weeks v. Wayne Circuit Judges, 41 N.W. 269, 269 (Mich. 1889) (holding that courts cannot vacate judgments and dismiss suits without first securing the rights of attorneys under contingency agreements when their clients settle without the attorney's knowledge or consent); Griggs v. Chicago R.I. & P. Ry., 177 N.W. 185, 186 (Neb. 1920) (holding that a contract operated as an equitable assignment of the judgment); In re Salant, 143 N.Y.S. 870, 871 (N.Y. App. Div. 1913) (defining attorney's interest in the judgment as a lien); High Point Casket Co. v. Wheeler, 109 S.E. 378 (N.C. 1921) (holding that plaintiff can assign one-third of recovery from defendant to intervening attorneys on the plaintiff's behalf); Annotation, Terms of Attorney's Contingent-Fee Contract as Creating an Equitable Lien in His Favor, 143 A.L.R. 204 (1943) (describing attorney's contract for contingent fee as amounting to an equitable assignment of interest in cause of action, or proceeds of settlement thereof); Annotation, Attorney's Contract for Contingent Fee as Amounting to an Equitable Assignment in Cause of Action, or Proceeds of Settlement Thereof, 124 A.L.R. 1508 (1940) (surveying the various state approaches as to whether contingent fee arrangements operate as an equitable assignment of an interest in the cause of action). Often these decisions rested on attorney's lien statutes. See generally Crosby & Fordyce v. Hatch, 135 N.W. 1079, 1081 (Iowa 1912) (entitling attorneys to a lien for the amount due to them from a contingency fee client who settled without attorney's knowledge or consent); Holloway v. Dickinson, 163 N.W. 791, 792 (Minn. 1917) (holding that attorney has a right to intervene in order to enforce his contingency fee lien when parties settle without compensating the attorney); Fischer-Hansen v. Brooklyn Heights R.R., 66 N.E. 395, 397 (N.Y. 1892) (holding that attorney's lien on his client's claims extends and attaches to the proceeds of the settlement).

\textsuperscript{164} See Williams v. Ingersoll, 89 N.Y. 508, 523 (1882) (holding that where an attorney represents the client in several cases, the lien is limited to the case for which he has recovered on behalf of his client); Annotation, Agreement for Contingent Fees as an Assignment in Judgment, 2 A.L.R. 454 (1919) (surveying the various state approaches to the status of attorneys' interest in
ment of railroad company property, whether they had been his original clients or not, in a fashion akin to the modern class action suit.165

Jurists differed as well when it came to deciding how much an attorney on contingency fee was to be compensated when the client settled secretly with the other party. Courts decisively and consistently held contingency fee contracts that prohibited clients to settle to be void as contrary to public policy: the client was to remain in control, and the settling of disputes was to be encouraged—though a few courts, however, tolerated stipulations in these contracts that clients consult with their attorneys before settling.166 Where the purpose of the suit had been to secure clear title to something for a particular sum, with the attorney receiving nothing if unsuccessful, a settlement by the client entitled the attorney to a quantum meruit.167 That, however, was a somewhat atypical sort of contingency arrangement. In the more common situation, jurists were divided over the way to calculate the attorney's compensation for a percentage of the settlement or judgment. In Colorado, Iowa, Kentucky and New York, the compromising party was ordered to pay an additional sum equal to the attorney's percentage of the client's settlement amount. In contrast, in Illinois, Minnesota and Missouri, the other party's settlement payment to the client was treated as the client's portion of the contingency arrangement, not the basis from which the attorney's share should be calculated.168 The attorney ended up being paid correspondingly twice as much as he was in the first group of jurisdictions. Indeed, in the event that the case had been argued successfully to judgment, when the client thereupon settled or sold his interest in the judgment without his attorney's knowledge, the attorney was generally awarded his percentage of the actual judgment, rather than a percentage of the subsequent (and smaller) settlement.169

165. Central R.R. v. Pettus, 113 U.S. 116, 128 (1884) (upholding the contingency fee contract in principle, but reducing amount of the contingency fee from 10% to 5%).
167. Southworth v. Rosendahl, 158 N.W. 717, 719 (Minn. 1916) (acknowledging the possibility of a quantum meruit award on remand to the lower court). The contingency fee could also be deemed excessive. See Gruskay v. Simenanskas, 140 A. 724, 727 (Conn. 1928).
169. But see Desaman v. Butler Bros., 136 N.W. 747, 750 (Minn. 1912) (affirming the right of the client to settle without the attorney's consent and that attorney's contingent fee should be derived from the amount of the settlement); Stephens v. Metro. St. Ry., 138 S.W. 904 (Mo. Ct. App. 1911) (holding that the attorney could only recover one third of the settlement amount); see generally Annotation, Amount or Basis of Recovery by Attorney Who Takes Case on Contin-
From the beginning, those unwilling to sanction contingency fees insisted that an attorney's promise to pay all of the costs associated with the suit marked such a contract as champertous and void, and contrary to good public policy in that it would stir up litigation that would otherwise never have been pursued.170 But, increasingly, both attorneys and jurists found ways around this problem. So long as the costs were merely advanced or loaned by the attorney to the client, or were deducted from the attorney's share, jurists in Illinois, Kansas, Michigan, Utah, Wisconsin, and elsewhere were satisfied.171 As Utah's Justice James Miner put it:

A contrary rule would embarrass the profession in its legitimate practice, and render attorneys a constant mark for dishonest clients. This is so because it is seldom that for some cause attorneys are not required to advance fees with which to commence suit, and to pay officers and witnesses and other necessary expenses, when their clients may not be accessible, or when they may have a meritorious cause, but are so impecunious as to be unable to meet at the time the necessary expenses.172

In Massachusetts, one of the more Westminster-bound jurisdictions, contingency fee arrangements were only tolerated if they did not contain the stipulation that the attorney was to receive nothing if unsuccessful.173 So long as that language was absent from the agreement, it was held to be lawful, despite the fact that most parties to such agreements clearly understood that the client was not expected to pay if the suit failed.174 Legal fictions like this and those noted in the preceding paragraphs progressively weakened champerty's hold on the Massachusetts Supreme Judicial Court.

170. See Moreland v. Devenney, 83 P. 1097 (Kan. 1905); Atchison, Topeka & Santa Fe R.R. v. Johnson, 29 Kan. 218 (1883); Low v. Hutchison, 37 Me. 196 (1853).
172. Potter, 61 P. at 1003; see also Johnson v. Great Northern Ry., 151 N.W. 125, 127 (Minn. 1915) (holding that advancing money to a client for living expenses during litigation is not against public policy).
174. Id.
While sanctioned in increasing numbers of jurisdictions, contingency fee arrangements continued to be criticized in the fin de siècle by railroad attorneys,175 physicians facing malpractice suits,176 treatise writers,177 law journal editors,178 and jurists who argued that champerty was the rule, with principled contingency contracts the exception. The examples below illustrate this point.

Irving Browne, editor of the Albany Law Journal launched an attack on the contingency fee contract in several issues of the journal in 1881.179 In the process, he solicited and reported the views of Justice Joseph Bradley of the United States Supreme Court (thoroughly critical),180 federal circuit court Judge John Forest Dillon (more equivocal),181 and Michigan's Chief Justice Thomas McIntyre Cooley (thoroughly critical),182 as part of an ongoing debate with New York Supreme Court Judge Edwin Countryman, a defender of the contingency fee agreement.183 Chief Justice Cooley's critique of the contingency fee as a "lottery ticket," a "mere venture" that damaged the bar's reputation with the public and fueled "antagonism" between "aggregated capital" and the "community in general,"184 was tempered by the observations of Judge Dillon, who reminded everyone that "most professional charges" were "sub modo contingent, that is, a lawyer charges more for the same skill and labor where they lead to a successful result than when they do not."185

Three years later, Cooley's critique saw new light in the posthumously published Essay on Professional Ethics of the late Penn-
sylvania Supreme Court’s Chief Justice, George Sharswood. In this series of lectures, delivered while he was professor of law at the University of Pennsylvania in the 1850s, and reprinted throughout the late nineteenth and early twentieth centuries, Sharswood insisted that the attorney who made use of the contingency fee would “cease to consider himself subject to the ordinary rules of professional conduct . . . be tempted to make success, at all hazards and by all means, the sole end of his exertions . . . [and become] blind to the merits of the case” because he would have acquired “a deep personal interest” in the outcome. The contingency fee contract had also created “an undue encouragement to litigation, [since those clients] who would not think of entering on a lawsuit if they knew that they must compensate their lawyer whether they win or lose . . . [would now be willing] to try their chances.” As Cooley would write in 1881, so Sharswood told his students in the 1850s that the contingency fee “makes the law more of a lottery than it is.” Sharswood urged the bar to require a retainer fee in order to discourage speculative litigation.

Sharswood’s views were echoed by Presiding Justice Waterman of Cook County’s Circuit Court in 1895, by George Warvelle’s Essays in Legal Ethics in 1902 and by Julius H. Cohen in 1916. Judge Waterman, dissenting in North Chicago St. R.R. v. Ackley, worried that “the army of small employers, farmers, grocers, and others, the multitude of individuals who must engage and become liable for the negligence of servants, . . . [would, like their corporate counterparts] find in each case, great and small . . . that all right of honest, fair and just settlement with an injured party has been contracted away to professionals.” Justice Waterman concluded that this was “not to my thinking in accordance with . . . sound public policy.” As late as 1920, Warvelle reported contemporary views of contingency fees which included, as Sharswood had predicted, that the contingency fee turned a professional man into a “sordid huckster.”

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187. Id. at 160.
188. Id. at 161.
189. See supra note 182 and accompanying text.
190. Sharswood, supra note 186, at 161.
191. Id. at 164.
193. GEORGE WARVELLE, ESSAYS IN LEGAL ETHICS (2nd ed. 1920).
196. Id.
197. WARVELLE, supra note 193 at 91.
“lower[ed] professional character,” and that its effect was “to block the calendars with speculative and experimental suits,” and with “groundless and vexatious litigation.” Of course “vexatious and unfounded suits have been brought by men who could and did pay substantial attorney’s fees for that purpose,” as Max Radin later pointed out, and few contingency fee attorneys could afford to press groundless or experimental suits for long or very often. But Warvelle was right in one regard: those who could not provide substantial attorney’s fees up front were now able to attract the attention of attorneys who felt they had winnable cases. Julius Cohen worried in 1916 that the contingency fee arrangement created the situation in debt collection cases where, in order to secure a quick fee, attorneys might throw the debtor into bankruptcy, whereas the client’s interests would be better served by leaving things in status quo for the time being. Of course, to the extent that this was characteristic of such collection measures (the truth of which is not known by the author), this would indeed have been an undesirable consequence.

In 1919, in the course of a conference of American Bar Association delegates debating measures that might be taken against the contingency fee contract and the foibles of its proponents and users, Moorfield Story, one of the nation’s more distinguished attorneys, advanced a somewhat different criticism: under the contingency fee arrangement the client was “helpless as a rule,” and could therefore be deceived into agreeing to assign a larger percentage of the anticipated judgment to the attorney than was warranted. In fact, by the time Story offered this criticism, Alexander Robbins, editor of the Central Law Journal, had already offered partial responses to it:

Where claims are uncertain, or where the parties plaintiff are in poor circumstances, the request is nearly always made by the client that the advocate undertake the case on a contingency fee. Coming from the client at no solicitation from the advocate, it can hardly [be] said that any advantage has been taken of the client’s necessities.

Controversy over the use of contingency fee agreements intensified in the late nineteenth and early twentieth centuries when partnerships

198. Id.
199. Id. at 88.
200. Id.
202. See COHEN supra note 194.
of personal injury specialists operating on contingency fees emerged in America's cities, often employing ward healers, ambulance drivers, police, telephone operators, and hospital staff (known as lead men), as well as their own salaried solicitors (also known as touters, runners, cappers, and chasers) to identify and recruit the business of accident victims. Paid a small fee and a small fraction of whatever was recovered in settlement or judgment, the solicitors were expected to secure the victim's power of attorney for their employers. The expense of securing the business was estimated by the Committee of Censors of Philadelphia's Law Association to be some fifteen percent of the total recovered from defendants. Real accident investigators, on straight salaries, then assembled the facts, interviewed witnesses, and recommended a course of action, which was to abandon the case as unprofitable or unwinnable in about one out of every four instances.

This soliciting could thus be said to have cost both the client and the defendant money and, just as importantly to the organized bench and bar of Philadelphia, Milwaukee, Boston and elsewhere, it was scandalous. A Milwaukee Circuit Court inquisition in 1927 criticized "the struggling swarm of chasers and adjusters, vieing and competing with one another in the relentless race for selfish advantage . . . overreach[ing] and impos[ing] upon the helpless." The authors of the Philadelphia Law Association's Committee of Censors report, while generally offering objective descriptions of the process, could not restrain themselves at one point from comparing the activities of these runners and chasers, with their "unerring rapidity and insatiable ra-

205. *The Solicitation of Accident Cases*, 63 AM. L. REV. 135, 140 (1929) (discussing the direct solicitation of personal injury cases, as reported by the Committee of Censors to the Law Association of Philadelphia).
206. *Id.* at 135-40.
207. *Id.* at 150.
208. *Id.* at 149; see generally Kenneth DeVille, *New York City Ambulance Chasing in the 1920's*, 59 THE HISTORIAN 290 (1997) (exploring class and social distinctions between the conservative corporate defense lawyers and the predominantly immigrant class of lawyers who tormented them by representing the poor, often by way of ambulance chasing arrangements); Paul A. Holmes, *The Ambulance Chasing Panacea: Being a Discussion of the Milwaukee Circuit Court's Investigation of Legal Abuses*, 12 MARQ. L. REV. 193 (1928) [hereinafter Holmes, *Ambulance Chasing*] (proposing that the enacted statutes will facilitate courts across the country as they attempt to curb such legal abuses); Paul A. Holmes, *The Circuit Court Inquisition into Legal Abuses*, 11 MARQ. L. REV. 183 (1927) [hereinafter Holmes, *Inquisition*] (quoting Judge Gehrz's declaration that the solicitors are targeting the poor and gullible with the objective of making as much money as possible); *Ambulance Chasing*, 20 THE GREEN BAG 145 (1908) (conveying comments by the president of the Philadelphia Rapid Transit Company regarding the dramatic increase in litigation costs caused by ambulance chasing attorneys).
209. See *supra* note 208 and accompanying text.
Milwaukee's Presiding Circuit Court Judge Charles Aarons similarly insisted that while these solicitors might "pose as friends of the poor and unfortunate," they were more accurately described as the advance men in "a business to get as much money as possible."213

The contractual arrangements between personal injury lawyers and their solicitor/chasers were approved by jurists in Illinois (1895), Kentucky (1915), and New York (1902), but were held to be barratrous and void in Michigan (1933), Minnesota (1899 and 1909) and New York (1906). One attorney, who had purchased retainers for damage claims against a telephone company for poles installed on private property, was disbarred when he added to this barratrous behavior explicit offers to help the telephone company settle claims against his clients for a reasonable sum.216 By 1930, Massachusetts, New Jersey, New York and a number of other state legislatures had been persuaded to declare the acceptance of fees paid by an attorney for the recruiting of clients in this fashion to be a misdemeanor.217

"Ambulance chasing," as the phenomenon was being called by the 1890s, had been prompted by the sanctioning of contingency fee contracts. Something similar might well have developed whether the contingency fee had been made lawful or not, as the steady increase in both population density and vehicles, the latter moving at faster and faster clips, generated more accident victims on America's streets and highways. And in any event, the rapacious behavior of these solicitors was no more reprehensible than that of the adjustors employed by streetcar, trolley, railroad and factory corporations in these same years. These adjusters also descended on victims, seeking cheap releases, sometimes quite fraudulently, and their sharp practices deprived victims of at least as much cash as the solicitors cost them.219

211. The Solicitation of Accident Cases, supra note 205, at 143.
212. Holmes, Inquisition, supra note 208, at 185.
213. Id.
215. Hightower v. Detroit Edison Co., 242 N.W. 97, 99 (Mich. 1933); Holland v. Sheehan, 122 N.W. 1, 2 (Minn. 1909); Gammons v. Johnson, 78 N.W. 1035, 1037 (Minn. 1899); In re Clark, 184 N.Y. 222, 233 (1906).
216. In re Clark, 184 N.Y. at 234.
217. Id.
218. Bergstrom, supra note 2, at 31-57.
219. See Chreste, 180 S.W. at 50 (describing defendant railroad adjuster's low settlement with plaintiff, without plaintiff's attorney's knowledge); Desman v. Butler Bros., 136 N.W. 747, 749 (Minn. 1912) (holding that defendant company conducted collusive, fraudulent and unfair settlement with plaintiff without knowledge of plaintiff's attorney or defendant's counsel of record); Stephens v. Metro. St. Ry., 138 S.W. 904, 906 (Mo. 1911) (describing defendant railway agents'
III. Conclusion

Contingency fee contracts were sanctioned by mid-nineteenth century American jurists, some of whom were impressed by their potential for efficiency, more of whom decided that they were necessary from a humane perspective, as the only way poor men or women would gain their day in court. Common enough for decades before they gained the sanction of common law, these arrangements grew steadily more common as creditors, heirs, property claimants, accident victims, and indeed, government itself turned to those attorneys prepared to represent their interests under such terms. By the twentieth century, the arrangement was lawful in those jurisdictions that had originally balked so long as it contained no promise for the attorney to pay all court costs and made no explicit note that the client was under no obligation to pay if the suit failed—measures that might arguably be styled legal fictions. Equitable assignments and attorney's liens provided solutions to the problem of what was to be done in the event that the client settled secretly with the other party. And by the late 1920s, the contract between attorneys and the solicitors or ambulance

misrepresentation and use of intoxicating liquor to unduly influence plaintiff in accepting settlement lower than judgment); Carl Gersuny, Work Hazards and Industrial Conflict 48-49 (1981) (discussing the use of contributory negligence, assumption of risk, and the fellow servant rule as tools to eliminate or reduce settlements); Walter Licht, Working for the Railroad 205-11 (1983) (discussing settlement terms and employer's resistance to disability insurance). In Pennsylvania alone these agents of corporate defendants were found to have behaved fraudulently in obtaining releases in numerous cases. See Palkovitz v. American Sheet & Tin Plate Co., 266 Pa. 176, 181, 182 (1920) (holding that release of defendant company's liability could not overcome immigrant plaintiff's claim since defendant company failed to properly explain the meaning of the form); Hogarth v. Grundy, 256 Pa. 451, 461 (1917) (holding release of liability void after defendant's adjuster fraudulently obtained signature from severely injured plaintiff less than one month after the accident); Vanormer v. Osborn Mach., 255 Pa. 47, 51 (1916) (describing evidence presented at trial that defendant's adjuster obtained release of liability from plaintiff by providing a falsely positive medical prognosis); Lindeman v. Pittsburgh Ry., 251 Pa. 489, 492-93 (1916) (declaring that release obtained by defendant's agent from mentally unfit plaintiff on the day following the accident was void); Gordon v. Great A & P Tea Co., 243 Pa. 330, 335 (1914) (affirming that defendant's agent fraudulently obtained release signature from epileptic and mentally unsound plaintiff by presenting settlement money as a gift); McCaw v. Union Traction, 205 Pa. 271, 276, 279 (1904) (finding that fraudulent manner in which defendant's agent obtained release from unconscious plaintiff was void); Clayton v. Consolidated Traction, 204 Pa. 536, 542 (1903) (holding that defendant's agent fraudulently obtained plaintiff's release of liability by misrepresenting and concealing the contents of the release); Gibson v. West N.Y. & Pa. R.R., 164 Pa. 142, 147 (1894) (discussing evidence that defendant's agent obtained plaintiff's release liability while plaintiff was still hospitalized and allegedly under influence of anesthesia); see also Ralston v. Philadelphia Rapid Transit Co., 267 Pa. 257, 270-75 (1920) (discussing a series of cases in which agents used fraudulent means to obtain releases from unsophisticated claimants); A.A. Golden, The Tweedledee & Tweedledum Analysis of Ambulance Chasing, 22 Law. & Banker 5 (1929) (comparing the ethics of ambulance chasers with those of the corporate defense bar and finding the latter entirely wanting).
chasers they employed to track down accident victims was made unlawful as contrary to good public policy. Less was done to police the adjusters deployed by streetcar, railway and auto insurance companies to settle with accident victims and to secure releases from liability.

Later in the century, once class action suits were sanctioned, once tort defendants faced a second round of judicial assaults upon old but harsh common law defenses, and once no-fault legislation had reduced work required of the plaintiff's counsel, the contingency fee arrangement came under new scrutiny and was subjected to additional criticism. But that is another story.

220. For one of the more recent such critiques, see generally Lester Brickman et al., Re-Thinking Contingency Fees (1994) (proposing a test to prevent lawyer abuse of contingency fee agreements).