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THE HISTORY OF CONTINGENCY AND THE CONTINGENCY OF HISTORY

*Stephan Landsman**

INTRODUCTION

Peter Karsten has given us something of a revolutionary view of the history of the contingency fee. As he notes early in his article, most legal historians have located the birth of the contingency arrangement in the waning decades of the nineteenth century.¹ This dating suggests that contingency is tied to the values and disputes of that era, a time when the tort system was developing its modern character,² when labor and capital were locked in conflict,³ and when an aggressive group of first and second generation Americans was struggling to make their way in a legal profession that was intensely hostile to their intrusion.⁴ Each of these late nineteenth century events has offered modern commentators a vantage from which to criticize contingency. If contingency fees are an offshoot of modern tort law, then they may be challenged as one of the attributes of that system in need of an overhaul as we revamp and reform the way we go about compensating victims for their injuries. If contingency is the product of disputes between labor and capital, it may be denigrated as a partisan mechanism that is no longer needed in a fairer and more prosperous society. If contingency is the result of the hustling and scraping of newly minted lawyers, it may be condemned as unprofessional and in the worst traditions of the bar.

Moving the date of the rise of the contingency fee back at least a half century (and probably more) undercuts much of the challenge from history. The earlier dating suggests that contingency strategies

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1. See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 231 (1998).

2. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973).

3. See generally PAUL AVRICH, *THE HAYMARKET TRAGEDY* (1984) (discussing the riot between labor supporters and police that occurred in Chicago in 1886).

4. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (discussing the development of the legal profession).

were with us as the American legal system was taking on its identity, are woven into the very fabric of our system and reflect some of our most basic values, not later excrescences. It suggests that our concern, from the earliest times, in such cases as those involving title disputes, tax questions, inheritance and patent claims, has been to guarantee that both rich *and* poor will have access to the courts and will be assured an opportunity to avail themselves of the assistance of counsel.

De-coupling contingency from the late nineteenth century places a sharper focus on the question of access. It identifies contingency strategies as a particularly American response to that problem, a response relying on private initiative and market forces rather than government largess. It bespeaks faith in a robustly individualistic adversarial system where each side is given an opportunity to make its strongest case and, in essence, "put its money where its mouth is."

I. THE ENGLISH BACKGROUND

As with so many attributes of our system of adjudication, the contingency fee story begins in England. There, from the thirteenth century on, we find specific statutory enactments against such offenses as champerty, or the financing of litigation by taking a share in the recovery.⁵ By the seventeenth century, three alleged plagues upon the legal system—champerty, barratry and maintenance—were being regularly excoriated.⁶ What are we to make of England's stern response to a sharing of risk and reward between counsel and client?

The frequency and vehemence of the English denunciation of champerty and its cousins suggests that risk sharing did take place and that, the royal judges' criticisms notwithstanding, it played a significant role in English legal activity, especially that conducted by solicitors (the practitioners who had direct contact with clients). Solicitors seldom occupied lofty positions on the high court bench or in Parliament. Those places were reserved for barristers whose fees were tendered in advance and who seldom had contact with clients or responsibility for the initiation of litigation.⁷ It is not surprising that the highly placed might frown upon the practices of those less well off or less powerful than themselves.

5. See Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 639 & n.62 (1964) (citing a statute of Westminster I of 1275).

6. See Karsten, *supra* note 1, at 232-33.

7. For a historical description of the arrangement of legal work in England, see generally RAYMOND COCKS, *FOUNDATIONS OF THE MODERN BAR* (1983).

It was frequently alleged in England that contingency arrangements were a danger because they might encourage feudal lords and magnates to abuse the system in furtherance of the pursuit of power and property.⁸ There is at least a bit of evidence that the wealthy did engage in or encourage litigation designed to undermine neighbors. For example, the 1742 murder prosecution of the nobly born James Annesley was organized and supported by a highly placed aristocrat.⁹ Such cases were, however, rare. I believe there were other, more powerful, motives for English efforts against contingency agreements. By far the most important of these was a growing antipathy among the upper classes to litigation, especially if mounted by plaintiffs of modest means. The theme of curtailing access to court echoes through English legal history. It is perhaps most prominent in England's adoption of a "loser pays" rule whereby the defeated litigant is required to pay not only the judgment (if there is one) but the attorney fees of his victorious opponent as well as his own fees.¹⁰ Such an arrangement substantially increases the risks associated with litigation and inhibits access except for the wealthy or extremely courageous. Something of the same attitude toward access is visible in the coal mine cases Peter Karsten cites, where clear statutory violations and sympathetic claims by widows and orphans are thwarted by contingency fee barriers.¹¹

II. COLONIAL AND POST-REVOLUTIONARY AMERICA

American attitudes towards litigation were quite different from those exhibited by the English. Alexis de Tocqueville observed that in early nineteenth century America virtually every serious question eventually became a legal case.¹² Such a tradition bespeaks both receptivity to litigation and facilitation of access—a far cry from the attitudes manifested in the mother country. Americans also rejected English reticence about the right to counsel. In the criminal sphere, from before the time of the drafting of the Constitution, Americans insisted that those accused of a felony had a right to counsel. The Sixth Amendment specifically preserves this right from abridgement and, as the Supreme Court observed in *Powell v. Alabama*, virtually every state among the original thirteen embraced the idea that those

8. See Painter, *supra* note 5, at 639 n.63.

9. See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 545 (1990) (citation omitted).

10. See John Leubsdorf, *Toward a History of the American Rule of Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 12 (1984).

11. See Karsten, *supra* note 1, at 233.

12. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1835).

accused of a serious crime have a right to the assistance of a lawyer.¹³ By contrast, in this period the English refused to recognize any such right. It was not until 1836 that a right to counsel in felony proceedings was accepted in England.¹⁴

The American acceptance of ideas about easy access and the value of counsel were signaled on the civil side by the resounding rejection of the "loser pays" principle. Burdens on access were thus cast aside in favor of allowing litigants a day in court. Americans embraced not only the idea that citizens should have free access to their courts but that lawyers are an important resource to which citizens should have recourse. The high value placed on counsel was remarked by De Tocqueville in the 1830s.¹⁵ Moreover, those who triumphed in the courtroom, from Adams and Hamilton to Webster and Lincoln, were widely celebrated and revered.

III. INSIGHTS FROM THE EARLY AMERICAN CONTINGENCY CASES

The early history of the contingency fee provides a number of important insights. It is interesting to observe that 175 years ago judicial critics were using virtually the same rhetoric about contingency fees as critics use today. For many in both groups the key risk alleged to arise because of contingency is a flood of litigation. This rhetoric has had a hollow ring since the beginning of the Republic. Unmanageable "floods" of lawsuits have, upon investigation, usually proven to be a chimera.¹⁶ Moreover, the fact that there are more legitimate claims is no calamity but an indication of a societal need that deserves to be met. The real issue is not the quantity of litigation but our view about access. Do we want a system open to all comers or one whose doors are closed to the vast majority? We may legitimately choose social repose over litigiousness but this decision should be made candidly after a debate focused on the real issues.

The old cases provide some very useful insights about the real problems of contingency, including unconscionably large fees and an excessive shifting of control (especially over questions like settlement) from litigant to counsel. These are difficulties that have dogged the system from its beginnings and deserve our careful consideration. In a

13. See *Powell v. Alabama*, 287 U.S. 45, 61-65 (1932) (stating that 12 out of 13 original colonies rejected the English common law and recognized the right to counsel).

14. *Id.* at 60.

15. 1 DE TOCQUEVILLE, *supra* note 12, at 272-80.

16. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69-71 (1983).

contingency fee system, methods must be developed to discourage lawyer over-reaching while preserving the widest opportunity for access.

Peter Karsten's history tells us that contingency fees are as American as apple pie. They have been embraced, if not lovingly, at least knowingly, as a means of assuring citizens a day in court. The arguments against contingency, though vigorously expressed, seem to me, to fly in the face of our history. They posit an unrealistic communitarian ideal that is not consistent with our past behavior or adversarial court structure. The result of rejecting our past would be less power for the weak and less restraint on the powerful. The American people, in their wisdom have, apparently, recognized this and been reluctant to tamper with the system we have.¹⁷

17. For example, California Proposition 202 which would have limited contingency fees was rejected by voters. See B. Drummond Ayers, Jr., *Cougars and Lawyers Come Out Ahead in Propositions on California Ballot*, N.Y. TIMES, Mar. 28, 1996, at A11.

