Duke Law Journal Online

VOLUME 67 JANUARY 2019

DOES THE AMERICAN RULE PROMOTE ACCESS TO JUSTICE? WAS THAT WHY IT WAS ADOPTED?

JOHN LEUBSDORF†

An intriguing recent article by Peter Karsten and Oliver Bateman,[1] exploring the history of the American Rule under which each party to civil litigation bears the cost of its own lawyer, defends that Rule as promoting access to justice for deserving plaintiffs, as compared to the English Rule under which a prevailing party ordinarily recovers its own attorney fees from its losing opponent. Karsten and Bateman criticize as "inaccurate and misleading"[2] the assertion in my history of the Rule that this justification for it was not advanced before the twentieth century.[3]

This reply takes issue with both of those contentions. First, I will show that, even though the American Rule encourages some claims, it discourages others, and cannot on the whole be defended as opening the courthouse doors to deserving claimants. Second, I will show that the cases on which Professors Karsten and Bateman rely in asserting that the American Rule was introduced to promote access to justice do not support that reading but concern quite different issues. Rather, it was not until the twentieth century that anyone sought to defend the American Rule on any such theory—which is not surprising, given the complex and ambivalent effects of that rule on aspiring plaintiffs.

First, some clarifications. I am not an advocate of the English Rule. I welcome Professors Karsten's and Bateman's criticisms of recent proposals to import that rule to the United States in the hope of dampening perceived unwarranted litigation[4]—though I see the English Rule initiatives as a

† Distinguished Professor of Law and Judge Lacey Scholar, Rutgers Law School. Professor Karsten graciously commented on a draft of this reply. I appreciate his remarks and those of my colleague David Noll.

1. Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules*, 66 DUKE L.J. 729 (2016).

2. *Id.* at 739.

3. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 9, 23, 27–28 (1984).

4. Karsten & Bateman, *supra* note 1, at 748–60.

relatively minor campaign in the broader conservative war against plaintiffs.[5] I agree with much else that Karsten and Bateman say, and in particular that contingent fees, whose history they have traced,[6] do indeed promote access to justice by plaintiffs, and were legitimized for just that reason.

My claim is that the effects of the American Rule (and the English Rule) are complex and sometimes unpredictable, varying with such factors as the costs of litigation to each party, the ability of plaintiffs to pay attorney fee awards, and the procedures and standards for assessing fees. In addition, other rules and practices help shape the impact of each rule, for example, the status of contingent fee arrangements and one-way attorney fee statutes, the availability of legal aid, and the economics of the plaintiffs' bar. The American Rule was not introduced to aid plaintiffs. It arose in the nineteenth century from the efforts of lawyers to charge their clients more than fee recovery rules allowed, and during that century it was not appraised in terms of its impact on meritorious claims.[7]

I. THE AMERICAN RULE'S IMPACT

Both the opponents and many of the supporters of the American Rule often assume that it tends to encourage plaintiffs to sue because, even if they fail, they will not have to pay the defendant's legal expenses. Professors Karsten and Bateman share this assumption, defending the American Rule and contingent fees because they "provide plaintiffs . . . more reliable access to judicial hearings with less expense for poorer plaintiffs and the elimination of the fear of punishing loser pays costs."[8] Their assertions to this effect constitute the "public policy rationales for the American Rule" that the title of their article announces.

Yet for many years, scholars have been showing that this characterization is an oversimplification, both theoretically and in the real world.[9] The rule is symmetrical, at least in form. Although it does protect losing plaintiffs from having to pay defendants' litigation expenses, it also denies them recovery of their own expenses when they prevail. If it

5. *See generally* STEPHEN BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

6. Karsten & Bateman, *supra* note 1, at 733–36; Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingent Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998).

7. Leubsdorf, *supra* note 3, at 13–24.

8. Karsten & Bateman, *supra* note 1, at 761.

9. AVERY WIENER KATZ, INDEMNITY OF LEGAL FEES, 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 63 (Boudewijn Bouckert & Gerrit De Geest eds., 1st ed. 2000). This survey cites many previous works on which I have drawn in writing the following paragraphs.

encourages some plaintiffs to sue rather than "lumping it,"[10] it may also encourage some defendants to defend suits rather than paying up. Many questions must be answered before we can appraise the Rule's effects with any hope of accuracy.

A. Compared to What?

Notwithstanding the supporters of the English Rule, the American Rule's major competitor in recent decades has been the proliferation of one-way fee statutes that grant attorney fee recovery routinely to prevailing plaintiffs but rarely to prevailing defendants.[11] Passing more such statutes and extending their principle to some common law litigation[12] is the most obvious way to make it possible for deserving plaintiffs to sue.[13] Beyond that, one can imagine many hybrid rules and combinations of rules—indeed, that is the existing situation in the United States—with varying effects on what claims are brought.

B. Which Claims?

Of course, not all claims are equally deserving of encouragement, and some can be considered noxious.[14] But assuming that it is desirable to nurture a class of claims, the American Rule is not invariably more effective in doing that than the English Rule.

The American Rule, unlike the English Rule, makes it difficult or impossible to assert claims when the cost of litigation exceeds the probable recovery. For example, the cost of bringing a typical medical malpractice suit is likely to be at least $50,000, so suits are not viable unless the damages

---

10. William L.F. Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 L. & SOC'Y REV. 63, 81 (1974).

11. *See, e.g.*, 42 U.S.C. §§ 1988, 2000e-5(k).

12. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010). For more on the origins of one-way fee statutes, see Karsten & Bateman, *supra* note 1, at 749, and Leubsdorf, *supra* note 4, at 25–27, 29–30.

13. John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439 (1986). But sometimes further steps are needed. *See generally* SEAN FARHANG, CONGRESSIONAL MOBILIZATION OF PRIVATE LITIGANTS: EVIDENCE FROM THE CIVIL RIGHTS ACT OF 1991 (2009) (describing why Congress concluded that recovery of damages as well as attorney fees was needed to yield sufficient litigation against employment discrimination).

14. Consider, for example, Strategic Lawsuit Against Public Participation (SLAPP) suits brought to deter the exercise of free speech. *See* CAL. CIV. P. CODE § 425.16 (2015) (detailing state legislative findings of excessive SLAPP suits and prescribing procedural checks to limit their frequency); GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996); Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 647–66 (2017) (surveying fraudulent tort claims).

are well above that amount.[15] The American Rule also provides less encouragement than the English Rule to assert claims almost certain to prevail, because the prospect of recovering damages minus litigation expenses is less enticing than that of recovering damages while having the defendant cover litigation expenses. Because plaintiffs and their lawyers tend to believe that they have very strong cases, the encouragement provided by the English Rule may be greater than more objective appraisals would warrant.[16]

On the other hand, the American Rule is more favorable than the English Rule for claims unlikely to prevail, including innovative claims that society should encourage, because the American Rule does not penalize failure with payment of the defendant's expenses. For example, the first successful asbestos suits followed unsuccessful and costly failures that gradually unearthed the facts; had the plaintiffs and their lawyers been further burdened by responsibility for the defendants' lawyer bills, success might have been beyond reach.[17] Similarly, the American Rule is more favorable to plaintiffs than the English Rule in cases in which the defendant's recoverable expenses are greater than those of the plaintiff, so that having to pay the defendant's expenses would be disproportionately burdensome. Obviously, the extent to which courts limit what unsuccessful plaintiffs must pay to less than the defendant's actual expenses will affect this situation.

C. Which Plaintiffs?

The English Rule encourages suits by plaintiffs who simply cannot pay any fee award entered against them. For those plaintiffs, the English Rule is a one-way rule under which they recover more if they prevail than under the American Rule, without having to pay anything if they lose. On the other hand, the English Rule is discouraging for plaintiffs who can afford to pay a fee award but would find it especially painful to do so, whether because their assets are modest or because they are risk averse.

Interestingly enough, empirical evidence indicates that, even when the English Rule is in effect, it is rare for plaintiffs to pay for defendants' attorney fees. This is the case in Alaska, which follows the English Rule; not surprisingly, it also turned out that there is little evidence that the minimal

15. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 165–67 (2014).

16. Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 377 (1990).

17. *See generally* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 6–180 (1985) (describing how between 1961 and 1981 lawyers uncovered increasing evidence supporting the liability of asbestos manufacturers).

possibility of having to pay defendants decreases filings.[18] When Florida adopted the English Rule for medical malpractice cases, fee awards against plaintiffs were apparently also rare, the number of suits filed did not decrease, and the Florida Medical Society that had supported the innovation changed its position and supported its 1985 repeal.[19] In both situations, the English Rule turned out to be at least as likely to encourage suits as the American Rule—though it might not work the same way in jurisdictions where defendants and judges are more willing to impose heavy fees on unsuccessful plaintiffs. In any event, since these empirical studies appeared, conservative interest in importing the English Rule seems to have diminished.

D. What Context?

Other legal and social institutions affect the impact of fee recovery rules. In the United States, the prevalence of contingent fees aids plaintiffs with promising claims for substantial damages to proceed, as Professors Karsten and Bateman note,[20] and as those seeking to limit what they consider excessive litigation are well aware.[21] That pro-plaintiff effect is now strengthened by the development of wealthy, entrepreneurial plaintiffs' lawyers, large plaintiffs' law firms, and lawyer networks willing to subsidize innovative claims,[22] and also by one-way fee recovery statutes,[23] by the growth of litigation financing,[24] and for some cases by public interest lawyering. These institutions rest on widely shared beliefs about the right to a day in court, and the social role of the judicial system.[25] It is because of these institutions and beliefs, not the American Rule, that plaintiffs with substantial claims secure access to court. And plaintiffs with small claims often have no access, notwithstanding the American Rule, because of the expense of litigation and the scarcity of public funding. The Legal Services

18. ALAS. R. CIV. P. 82; SUSANNE DI PIETRO, TERESA W. CARNS & PAMELA KELLEY, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES 100–05, 134–35, 138–39 (1995).

19. Snyder & Hughes, *supra* note 16, at 355–56. For further analysis of the complex effects of the Florida legislation, see James. W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995).

20. *See supra* text accompanying note 7.

21. LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (2011).

22. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 210 (2001).

23. *See supra* text accompanying note 11.

24. *See generally* Symposium, *A Brave New World: The Changing Face of Litigation and Law Firm Finance*, 63 DEPAUL L. REV. 193 (2014).

25. GEOFFREY C. HAZARD, JOHN LEUBSDORF & DEBRA LYNN BASSETT, CIVIL PROCEDURE, 602–04 (6th ed. 2011).

Corporation, for example, has struggled almost every year even to preserve its inadequate Congressional appropriation.[26]

E. Which Rule?

Terms like "English Rule" describe families of rules, whose details will affect their impact. Rulemakers must decide for example, on what basis the court will calculate its fee award, how it will treat varying degrees of success, and what exceptions will apply. Case law under fee recovery statutes indicates just how many questions arise,[27]the answers to which may affect the incentives created by the rule.[28]

For example, the recent Texas "loser pays" rule that Karsten and Bateman discuss makes the loser pay when there is a motion to dismiss on the ground that the allegations of the plaintiff's complaint are insufficient in law or incredible in fact.[29] Its focus is thus on pleading. Awards will correlate only loosely with the merits of the plaintiff's claim, as required by the traditional English Rule. A poorly pleaded claim may be sanctioned even though the plaintiff actually has a valid claim on the merits, and a defendant may be sanctioned for moving to dismiss a well pleaded claim whose allegations are credible but wholly false. This rule may impede access to court for some plaintiffs with valid claims, but its effects will be quite different from the traditional English Rule that sanctions the party that loses on the merits.

F. What else?

The comparative tendency of the American or English Rule to encourage plaintiffs to sue is only one factor bearing on the desirability of one or the other rule. How will one or the other rule affect the total cost of litigation? How will the choice of rule affect the likelihood of settlement? What about the *amount* of settlements, surely of much importance to plaintiffs and defendants alike? Much thought has been devoted to these and other questions.[30]

Indeed, perhaps the strongest argument against the English Rule concerns not its impact on what claims are brought, but its encouragement

---

26. EARL JOHNSON, JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 2–3 (2014).

27. ARTHUR D. WOLF & MARY FRANCES DERFNER, COURT AWARDED ATTORNEY FEES (2016).

28. *E.g.*, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (surveying how one Supreme Court ruling affected public interest litigation).

29. TEX. R. CIV. P. 91a7; *see also* Karsten & Bateman, *supra* note 1, at 751–54 (discussing the Texas rule).

30. *See* sources cited *supra* notes 9, 16, 18.

of expensive and lengthy court battles over just what fees should be awarded. As Professors Karsten and Bateman note, this has long been recognized.[31] Under systems like Germany's, which regulates fees by formula and sets them at relatively low levels, such battles are unlikely.[32] Not so in the United States, or for that matter in England.[33] No one would want courts to award a successful party whatever fee the opponent's lawyer chose to charge. Fee awards must therefore be limited to what is "reasonable," and off we go.

In fairness to Professors Karsten and Bateman, I note that the issues I have outlined do not fall within the scope of their article, which is devoted to legal history. Nineteenth century judges and lawyers did not analyze the American Rule in the way I have been doing, and neither do Professors Karsten and Bateman. That the American Rule promotes access to the courts is a proposition they assume rather than discuss—as is also true of some of the conservatives whose efforts to repeal that rule they describe. But that proposition pervades both their historical analysis and their conclusion that the American Rule, as supplemented by contingent fees, provides U.S. plaintiffs with "more reliable access to judicial hearings with less expense for poorer plaintiffs and the elimination of the fear of punishing loser pays costs" than what is available elsewhere.[34] Those who wish to improve such access, and those who wish to understand the American Rule and its origins, cannot afford to rest on these unanalyzed assumptions about its effects.

II. THE AMERICAN RULE'S HISTORY

Whether people in the nineteenth century justified the American Rule as promoting access to justice for plaintiffs, as Karsten and Bateman assert, is important as a matter of history. For example, it casts some light on the extent to which lawmakers sought to protect underdogs rather than entrepreneurs.[35] More broadly, differing positions on this issue may reflect differing perspectives on the rationality of legal evolution.

---

31. Karsten & Bateman, *supra* note 1, at 747–48 (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)). For one of many reiterations of the point, see CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642, 1653 (2016).

32. PETER L. MURRAY & ROLF H. STÜRNER, GERMAN CIVIL JUSTICE 341–54 (2004).

33. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT 27–38 (2009); Adrian Zuckerman, *New Rules for Costs Capping Orders: Feeding the Costs Litigation Frenzy?*, 28 CIV. J.Q. 289, 289–92 (2009).

34. Karsten & Bateman, *supra* note 1, at 761.

35. *Compare* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997) (underdogs), *with* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (entrepreneurs). Needless to say, these capsule summaries oversimplify.

As is often the case when lawyers debate the history of legal rules, current policy is also at stake here. If, as Karsten and Bateman contend, the American Rule has been grounded in fostering access to court from its inception, that would add to the rule's present credibility and make it harder to jettison it. But if, as I claim to have shown, the Rule arose from a mixture of other concerns in a world whose contexts and concerns differeds from ours, we should be more ready to consider reforms such as the extension of one-way fee recovery.

The conclusion of my own article was that the American Rule arose without being consciously steered by policy-makers. In colonial times, legislatures placed identical limits on what lawyers could charge their clients and what those clients could recover from an opposing party.[36] During the early nineteenth century, as Karsten and Bateman also explain lawyers succeeded in validating contracts with their clients for fees larger than what clients could recover from an opponent, leading to the effort to legitimate contingent fees for plaintiffs who could not afford market rates.[37] This discrepancy between client fees and recoverable fees—which is the essence of the American Rule—was ratified in New York's widely imitated Field Code of 1848, and in the federal costs statute of 1853.[38] Courts proceeded to recognize the American Rule as a matter of established legislative policy without seeking further justifications in public policy, but also recognized exceptions where contracts or legislation provided for fee awards and under the "common fund" doctrine.[39] Only in the twentieth century did commentators seek to explain the American Rule's impact on litigation—and then they disagreed about whether the Rule fosters or discourages claims, and whether in either case that is a good or a bad thing.[40]

Professors Karsten and Bateman disagree in one significant way with this somewhat skeptical narrative: they claim to have "identified the nineteenth-century American state and federal judiciary's public policy justifications for the contingency-fee contract and for the American Rule,"[41] those justifications being that attorney fees are not proximately caused by the opposing party, and that "jurists spoke as well of the need to ensure a

36. *See* Leubsdorf, *supra* note 4, at 10–13 (summarizing the colonies' various efforts to regulate attorneys fees by statute).

37. *See id.* at 13–17; Karsten & Bateman, *supra* note 1, at 730–36.

38. Leubsdorf, *supra* note 4, at 17–22. For the Field Code, see 1848 N.Y. Laws 258, 262–63. The federal statute is Act of Feb. 26, 1853, 10 Stat. 161.

39. *See* Leubsdorf, *supra* note 4, at 23–27 ("Courts were content to refer generally to the legislative policy without specifying any reasons for it."). For the common fund doctrine, see Trustees v. Greenough, 105 U.S. 527, 529 (1881).

40. Leubsdorf, *supra* note 4, at 27–29.

41. Karsten & Bateman, *supra* note 1, at 761.

measure of access for those whose grievances entitled them to a judicial hearing without those persons fearing potentially heavy financial penalties."[42]

I continue to maintain that nineteenth-century judges did not assert a public policy rationale of access to justice (and, for that matter, a proximate cause rationale) to justify the American Rule, although I agree that they did invoke that rationale to justify contingent fees. To demonstrate this, I consider the thirteen nineteenth-century opinions and the piece of legislative history on which Professors Karsten and Bateman rely.[43] I do not discuss a fourteenth case they quote at some length because it was decided in 1932;[44] I agree that some judges had asserted the access to justice rationale by then, and in fact I cited the same case among others to support that proposition.[45]

Seven of the thirteen cases could scarcely evidence a desire to assist plaintiffs because they *refuse* to award plaintiffs attorney fees as part of their damages.[46] Indeed, one of them warns that plaintiff fee recovery would make a claim "a standing dish,"[47] another expresses sympathy for defendants forced to pay plaintiffs' fees,[48] and a third asserts that allowing successful plaintiffs to recover fees when successful defendants cannot "would give the former an unfair advantage in the contest."[49] Their concern is to protect defendants, not to assist plaintiffs.

Some of these seven cases mention policy concerns other than plaintiffs' access to court, but the crucial fact here is that these concern the law of damages, not the American Rule. As explained in my article:

> [C]uriously enough, courts were quite active in stating or inventing reasons for the rule that attorney fees could not be recovered as damages. Some of these reasons-that the objective value of attorney services is hard to determine, and that the extent of a party's legal expenses reflects his own decisions about how to litigate, for which the other party should not be

42. *Id.* at 748.

43. *See id.* at 739–45 (summarizing a series of nineteenth century cases to reject the purported absence of justification).

44. *See id.* at 745–47 (discussing Ackerman v. Kaufman, 41 Ariz. 110, 111–118 (1932)).

45. Leubsdorf, *supra* note 4, at 27 & n.133. Karsten & Batmen's assertion that I "incorrectly referred to" the 1964 and 1967 decisions "as the sources of the public policy rationale for the American Rule" overlooks this reference. Karsten & Bateman, *supra* note 1, at 747.

46. Here are the cases in chronological order, which is also the order in which Karsten and Bateman present them: Stewart v. Sowles, 3 La. Ann. 464 (1848); Good v. Mylin, 8 Pa. 51 (1848); Day v. Woodworth, 54 U.S. 363 (1851); Hicks v. Foster, 13 Barb. 663 (N.Y. App. Div. 1853); St. Peter's Church v. Beach, 26 Conn. 355 (1857); Kelly v. Rogers, 21 Minn. 146 (1874); Spencer v. Murphy, 41 P. 841 (Colo. App. 1895).

47. *Good*, 8 Pa. at 52.

48. *Day*, 54 U.S. at 372 (1851).

49. *Kelly*, 21 Minn. at 152.

> liable–seem equally applicable to the American rule. Indeed, these reasons embody the same principles of individualism and freedom of contract that underlie the Field Code. Perhaps the vociferous defense of the denial of attorney fees as damages can be traced to two other factors. Since damage rules were judge-made, some judicial justification for them was required. And to allow fees as damages would have benefited prevailing plaintiffs but not prevailing defendants-a prospect judges and scholars regarded with disapproval.[50]

Courts' willingness to give reasons other than access to justice for excluding attorney fees from damages plainly does not equate to asserting access to justice as the ground for the American Rule.

A statement in one of these seven damages cases that might seem to support the access to justice policy as a basis for the American Rule does not, on examination, do so. In *St. Peter's Church* v. *Beach*,[51] the court said that:

> honest men are sometimes obliged to resort to courts to get their differences settled; and where, though the form of the declaration may indicate a legal wrong, there is really no culpability whatever imputable to either party, smart money [punitive damages] can not be allowed. The parties in these cases should be encouraged to appeal to the court on equal terms. The defendant should not be punished by being compelled to pay not only his own counsel but such as the plaintiff may please to select to advocate his claims against the defendant . . . . Besides, a different rule is entirely unequal, for the defendant, if he prevails, can never recover any more than a statute bill of costs.[52]

This passage is concerned with equality between the parties, which would be violated if prevailing plaintiffs could recover their attorney fees as part of their damages but prevailing defendants (who do not receive damages) could not.[53] Its further point is that defending a lawsuit is ordinarily not a wrong for which defendants should be punished, not that plaintiffs should be encouraged to sue.

All but one of the remaining six cases, as well as the excerpt from legislative history, likewise dealt with rules other than the American Rule. In two cases, the court refused to allow plaintiffs to use an indemnity theory to recover fees they incurred in previous litigation with a third party. Both

---

50. Leubsdorf, *supra* note 4, at 23 (footnotes omitted).

51. St. Peter's Church v. Beach, 26 Conn. 355 (1857).

52. *Id.* at 366–67.

53. That rationale reappears in *Burruss v. Hines*, 94 Va. 413, 420–21 (1897), which Karsten and Bateman quote in a footnote. Karsten & Bateman, *supra* note 1, at 743 n.99.

express fears that fee recovery would encourage excessively vigorous litigation.[54] One case, and the excerpt from legislative history, criticize recovery of exorbitant fees,[55] which is not the same as advocating *no* fee recovery as provided by the American Rule, and is not in these instances based on any stated concerns about access to court. Two other cases deny attorney fee damages to defendants in previous cases who then sued the original plaintiffs. In one of these, a suit on an injunction bond, the court mentioned the exorbitant fee problem as a reason to refuse recovery.[56] In the other, a suit for false arrest, the court did rely on the policy of not deterring plaintiffs by mulcting them in punitive damages, observing that "[i]t is desirable that courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights"[57]—but this was a traditional concern in wrongful litigation suits, whether or not attorney fee damages were sought.[58] Indeed, in the same year the same court invoked that danger to block a suit by a defendant on an injunction bond.[59] The American Rule was not in question.

Just one of the thirteen cases described by Karsten and Bateman does indeed decide that attorney fees should not be awarded as costs, but it evinces no concern for encouraging plaintiffs.[60] On the contrary, the court was concerned about the burden on *defendants*: under a fee recovery rule, the more doubtful the case, and hence the more the plaintiff's lawyer could

54. *See* Reggio v. Braggiotti, 61 Mass. 166, 170 (1851) (reasoning that fees "vary so much with the character and distinction of the counsel" that it would be "dangerous to permit [a litigant] to impose such a charge upon an opponent"); Wynn v. Brooke, 5 Rawle 106, 109 (Pa. 1835) (explaining that recovery would allow surety to "indulge an appetite for litigation at the expense of his principal"). Current law is more receptive to fee recovery in these situations. *See* Leubsdorf, *supra* note 12, at 464–66.

55. *See* Bullock v. Taylor, 39 Mich. 137 (1878) (refusing to let plaintiff enforce contractual fee recovery clause); Appendix to CONG. GLOBE, 32d Cong., 2d Sess. 207 (statement of Sen. Bradbury) (1853) (discussing pending fee legislation).

56. Oelrichs v. Spain, 82 U.S. 211, 231 (1872). Most courts did grant attorney fee damages in this situation. 2 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 64–69 (1888).

57. Osborn v. Moore, 12 La. Ann. 714, 714 (1857).

58. *See, e.g.*, Adams v. Lisher, 3 Blackf. 241 (Ind. 1833); Howard v. Thompson, 21 Wend. 319 (N.Y.S.Ct. 1839); Spengler v. Davy, 56 Va. 381 (1859); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 180–81, 187–89 (1879).

59. Jamison & McIntosh v. Duncan, 12 La. Ann. 785, 787 (1857). The court explained:

> Parties are too prone to exaggerate their own damages; and there is nothing which more frequently requires the careful attention of the courts, than the restraining within reasonable bounds the infliction of pecuniary penalties in civil suits . . . . And this attention is the more required, when . . . a party is sued for damages for having attempted to pursue what he supposed, in good faith, to be his legal rights, according to the forms of law."

Id.; *see also* Grant v. Deuel, 3 Rob. 17, 20 (La. 1842) ("[I]f proof of want of probable cause were not required on the part of a plaintiff, every prosecutor would be exposed to an action, in every case of acquittal.").

60. Swartzell v. Rogers, 3 Kan. 380 (1866).

charge, the more the defendant would have to pay.[61] Fee recovery, the court said,

> involves the unreasonable and unjust proposition that the liability of the defendants for the counsel fees of the plaintiff shall be larger in consequence of the doubtfulness of the plaintiff's right of recovery, or in other words the more doubtful the plaintiff's right of recovery the greater shall be the defendant's liability to plaintiff's counsel for costs. Such is not the policy of the law . . . .[62]

As in many of these cases, the court's emphasis was on fairness more than consequences,[63] and certainly not on promoting plaintiffs' access to justice. The court also relied on the "spirit" of the statutes establishing the American Rule in actions at law, extending that spirit to the equity proceeding before it. Here, as in some other of the thirteen cases,[64] the American Rule was recognized as a general principle, but that principle rested on deference to the legislature rather than any underlying policy.

In general, the thirteen precedents on which Professors Karsten and Bateman rely do not focus on the American Rule, do not rely on a policy of opening the courthouse doors to deserving plaintiffs, and indeed express far more concern about burdening defendants. Surely, if plaintiffs' access to justice were the point, we would find at least one decision in which the court, even though denying a plaintiff recovery of attorney fees, explained that equality of denial was really in the best interests of plaintiffs.

One might ask why, during the same period in which judges mentioned access to justice as a reason to legitimate contingent fees, they did not refer to that goal while discussing the American Rule. One answer might be that the judges exemplified the saying that "if you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind."[65] Another might be that, when thinking about the American Rule, judges sought policy in the acts of the legislature.[66] More basically, judges might have realized that it is far from

---

61. *Id.* at 383.

62. *Id.*

63. Karsten and Bateman's reading of this remark as meaning that "courts should not incentivize attorneys to take dubious cases" in my opinion adds a new thought to the original. Karsten & Bateman, *supra* note 1, at 743.

64. Day v. Woodworth, 54 U.S. 363, 371–72 (1851); Spencer v. Murphy, 41 Pac. 841, 841–42 (Colo. App. 1895); Bullock v. Taylor, 39 Mich. 137, 140–41 (1878); Kelly v. Rogers, 21 Minn. 146, 152–53 (1874).

65. Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (purporting to quote an unpublished manuscript of Thomas Reed Powell).

66. *See* case cited *supra* note 61.

obvious when and to what extent the American Rules does promote access to the court system.

Professors Karsten and Bateman have simply not made their case. They have shown that nineteenth-century judges thought about the burdens of litigation and sometimes sought to reduce or at least equalize them, and that they occasionally mentioned access to courts by plaintiffs and defendants even when not discussing contingent fees. On my part, I did not mean to portray nineteenth-century judicial treatment of all attorney fee issues as some kind of policy desert. But when it comes to discussions of the American Rule—as opposed to contingent fees, liability for wrongful litigation, and other issues—I still fail to find evidence that judges or commentators rooted it in public policy, and in particular that they based it on "the need to ensure a measure of access for those whose grievances entitled them to a judicial hearing without those persons fearing potentially heavy financial penalties."[67] Instead, what is striking is that courts that mention access to justice in other situations failed to mention it in this one.

CONCLUSION

It is not surprising that nineteenth-century courts did not describe the American Rule as promoting access to justice for those aggrieved, because it is far from clear that it actually does so. When early twentieth-century commentators began to assess the rule, they disagreed about whether compared to the English Rule it encouraged or discouraged litigation, and further disagreed about whether encouraging litigation is good or bad.[68] As explained in the first part of this essay, further study has only emphasized the complex impacts of the Rule. So it is not surprising that recent European attempts to promote access to court have introduced contingent fees rather than the American Rule,[69] while in the United States they have supplemented contingent fees with hundreds of one-way attorney fee statutes.[70]

My own view is that the one clear advantage of the American Rule over the English Rule, aside from our being used to it, is that it avoids court disputes over attorney fee awards. When it comes to encouraging desirable litigation, it is contingent fees (now supplemented by litigation financing),

67. Karsten & Bateman, *supra* note 1, at 748.

68. Leubsdorf, *supra* note 4, at 28 (citing authorities); *see also* MOORFIELD STOREY, THE REFORM OF LEGAL PROCEDURE 35–36 (1912) ("Under existing law it costs little to start a groundless suit . . . . [While at the same time] the suitor who seeks only what is justly due him is mulcted severely by the cost of recovering what is his own . . . .").

69. NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE 33–56 (Mark Tuil & Louis Visscher eds., 2010).

70. *See* sources cited *supra* note 11.

one-way fee shifting statutes, and other institutions that do the heavy work. One-way fee statutes offer the further advantage that they can be aimed at the sorts of litigation needing encouragement—and after all, litigation cannot be regarded as so delightful that it should always and in all circumstances be promoted. Whether we have too much litigation of the wrong is debatable,[71] but my own view is that where we most fall short is in the obstacle that heavy litigation costs place in the way of smaller claims. That is the problem we should address, and the American Rule cannot solve it.

71. For critiques of the "litigation out of control" theory, see, for example, DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE (2016); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017); Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28. 62–89 (2011) (concluding "the evidence shows "no negative economic effects from more pro-plaintiff tort law"); Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189, 190–191 (2003) (defending "adversarial legalism" in the United States as generally beneficial); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 721–725 (1998) (critiquing commonly popular complaints among about the civil justice system); Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. ONLINE 1177, 1177–1182 (2015) (assessing trends in the volume of federal civil litigation since 1986 and finding the federal civil caseload to be relatively stable).