Gambling with Ethics and Constitutional Rights: A Look at Issues Involved with Contingent Fee Arrangements in Criminal Defense Practice

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I. INTRODUCTION

The general view is that use of contingency fees in criminal cases is an ethical violation.1 Although most believe this to be true, compelling justification has not been put forth to explain why such an arrangement is per se unethical. Instead, proponents of the general view simply state that such an arrangement is contrary to public policy.2 This is where the idea begins, and also where it ends. Indeed, the concept of contingent fees in criminal defense practice is a short-lived road that is rarely traveled upon. If one should look for persuasive guidance as to why this general view exists without having a vast foundational basis to rest upon, one might find himself on an empty journey without light at the end of the tunnel. With so many issues and interests intertwined, and so many questions left unanswered, one should still ask the basic question: “why?”

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2. See Genins v. Geiger, 240 S.E.2d 745, 747 (Ga. Ct. App. 1977) (stating that a contingency fee arrangement in a criminal case that would be paid upon a favorable disposition to the client is “void as against public policy”); see also Baca v. Padilla, 190 P. 730, 731 (N.M. 1920) (noting that contracts by attorneys for contingent fees are generally upheld by courts, but contracts for a contingent fee by an attorney in a criminal case, dependent upon conviction, is contrary to public policy).
Perhaps the individual who embarked on this journey would not gain any more than what he or she already knows by reading this article. However, from an unbiased standpoint, this article attempts to shed light on the use of a contingent fee arrangement in criminal defense, and offers differing views pertaining to this topic. First, this article will generally describe what a contingent fee is. Second, the role and potential application of the contingent fee in both criminal and civil settings will be discussed. Third, problems associated with such an arrangement in criminal defense practice will be addressed, as will certain positive aspects of such an arrangement. Finally, this article will discuss how lawmakers could address this issue to ensure that contingency arrangements cannot be abused.

II. THE CONTINGENT FEE

A contingent fee depends on the outcome of a future event—an outcome the client seeks when an attorney is initially consulted. Through use of such a plan, an attorney will receive a pre-set percentage of the total award obtained in the client's favor. However, if the attorney is unsuccessful in his pursuit of the client's interest, then the attorney may walk away empty-handed. In essence, the attorney is gambling as he is taking a chance with his income whenever he proceeds with a case.

Since this means that no initial nor regular fee must be paid for services rendered, clients with limits on their pocket books, or those who feel their claim is one which can not achieve victory, may be prompted to proceed with their claim anyway. This can have both

3. See Shanks v. Kilgore, 589 S.W.2d 318, 321 (Mo. Ct. App. 1979) (defining a contingency fee as one "arrived at early in the employment of an attorney, with liability of the client dependent upon the outcome of the anticipated litigation and stated as a percentage of the sum awarded the client").

4. See BLACK'S LAW DICTIONARY 614 (6th ed. 1990) (defining a contingent fee as an "arrangement between attorney and client whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered"); see also DeGraff v. McKesson & Robbins, Inc., 292 N.E.2d 310, 315 (N.Y. 1972), which describes how contingent fees can fall into several categories:

The fee may be a straight percentage of the entire recovery, a percentage of the recovery over some minimum, or may include an increment in addition to a low, fixed retainer or time-based fee. The percentage, where there is a percentage, may be adjusted depending on the range of the recovery, or different percentages may be applied to successive increments of the same recovery. Also, a contingent fee may be a fixed sum if the lawsuit is successful, or a schedule of fixed sums depending on the range of the recovery. In each instance, the relative risks borne by the lawyer and his client would be different, and the amount of the fee that would be reasonable in a successful case would vary.

5. See F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 3 (1964) (stating that if no recovery is obtained for the client, the lawyer is entitled to no fee at all).
positive and negative impacts on the practice of law, an issue that in and of itself primarily pertains to the actual merit of the civil claim, a topic that transcends the scope of discussing the role of contingency fees in criminal cases. Nevertheless, as a consequence, clients with a low likelihood of success on the merits frequently have their claims litigated by attorneys employing a contingency fee plan.7

This may often be the scenario in civil cases, in which a client can choose whether to proceed with a claim. In contrast, criminal cases involve persons who are not litigating simply to further their interests—they are litigating to preserve and protect their interests.8 Criminal defendants have no choice whether to litigate or not, for it is the State that commences proceedings, and failure to comply with authorities may result in steeper criminal sanctions for the defendant.9 Unlike civil cases, in which an attorney can screen out meritless claims by refusing to accept a case, a criminal case is a situation in which the defendant is guaranteed to have an attorney.10

6. Positive aspects may include meritorious claims, initially believed to lack merit, can now be heard, and potentially expensive legal services can now be available to a larger portion of the general population with little or no risk to clients. However, a drawback of this very scenario may develop, as expanding the numbers of potential clients provided with these opportunities may open the door to an increasing number of frivolous lawsuits. In re Sosa, 980 S.W.2d 814 (Tex. Ct. App. 1998) provides an illustration of a claim that was filed by an indigent because the client would not have to pay for costs if the client were to lose. The indigent client did not care whether the claim contained merit or not. Although the court did not address whether the claim was frivolous or not, the court stated that "[i]t is the glory of the contingency system that a client, indigent or otherwise, with a meritorious claim, can be fully equal to the largest defendant." Id. at 818 (Hardberger, J., concurring).

7. See, e.g., Thornber v. City of Fort Walton Beach, 622 So. 2d 570, 571 (Fla. Dist. Ct. App. 1993) (illustrating an example of a claim for attorney fees when a contingency plan was utilized in a prior case that had a very low likelihood of success on the merits).

8. See Albright v. Oliver, 510 U.S. 266, 274 (1994) (noting, in a civil rights action, that an individual has a Fourth Amendment "Liberty Interest" to be free from the prosecution of any alleged criminal acts unless the circumstances indicate probable cause that the defendant committed the act because of "the deprivations of liberty that go hand in hand with criminal prosecutions").

9. See Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976) (distinguishing criminal cases from civil cases by claiming that the stakes are higher in criminal cases because one's liberty or even life is at stake, and a defendant is up against the state, whose "sole interest is to convict").

10. U.S. CONST. amend. VI, applying to defendants in federal criminal trials, and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
III. THE CONTINGENT FEE AND THE CRIMINAL DEFENSE ATTORNEY

It has been pointed out that in a criminal case, it is hard for an attorney to effectively screen out potential clients.11 A majority of criminal defendants are indigent12—those who would ordinarily not have their cases taken by an attorney if in a civil trial.13 This could mean that in criminal cases, those accused who are most likely to favor a contingency fee plan could be those with whom the attorney would least want to be making such a bargain.14 Further, it may be harder for an attorney to conduct such a screening process because a criminal defendant may lack important attributes that help an attorney distinguish an individual with a high likelihood of conviction from

11. See Pamela S. Karlan, Contingent Fees and Criminal Cases, 93 COLUM. L. REV. 595, 613–15 (1993) (distinguishing clients with weak claims from those with strong claims and explaining that an attorney will assume a contingent fee relationship with a client when the expected return is greater or equal to the amount expected to be obtained based on the likelihood of success and the percentage agreed upon).

12. See BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE at 1 (Feb. 1996), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/id.txt (last visited Mar. 5, 2004) (noting that “three-fourths of the inmates in State prisons and about half of those in Federal prisons received publicly-provided legal counsel for the offense for which they were serving time” and “in 1992 about 80% of defendants charged with felonies in the Nation’s seventy-five largest counties relied on a public defender or on assigned counsel for legal representation”). It should be noted that criminal defense attorneys engaged in providing representation as assigned counsel to indigent defendants face financial troubles as a direct result of their representation, due to low in and out of court hourly fees paid by the state for indigent representation. See People v. Thompson, No. 3717-00, 2003 WL 145536, at *1 (N.Y. Sup. Ct. Jan. 9, 2003); see also People v. Branch, No. 2037/2000, 2001 WL 881109 (N.Y. Sup. Ct. Apr. 12, 2001).

The profound inadequacy of compensation has markedly reduced the number of attorneys choosing to accept assignments to represent indigent defendants. And among those now unwilling to do so are many experienced and highly-skilled defense attorneys. In many instances, the smaller pool of available and competent lawyers has resulted in delays in moving cases to trial or disposition, and has given rise to the risk that the legal assistance provided to indigent defendants will be less than effective . . . . For those defendants who are innocent, this means longer waits to be free of unfounded criminal accusations, and raises the specter of wrongful conviction. For those defendants who are guilty, it means welcome delays, with an increased likelihood that witnesses will become lost and memories will fade.

See Branch, 2001 WL 881109 (citation omitted). Attempts by attorneys to work around already determined fees for criminal defense representation or to become privately retained by individuals an attorney has been appointed to represent may lead to sanctions and suspension. See, e.g., In re Singer, 752 N.Y.S.2d 655, 656 (App. Div. 2002), (per curium).

13. See, e.g., James R. Neuhard, The Right to Counsel: Shouldering the Burden, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 169, 173–75 (1998) (noting that although there is a duty to fulfill pro-bono work, the reality is that a vast majority of attorneys will not handle cases involving indigent clients).

14. See Karlan, supra note 11, at 596 (describing this scenario as the “problem of adverse selection,” based on the incentive criminal defendants with high probabilities of convictions will have to retain a lawyer who charges a contingent fee).
another with a lower likelihood.\textsuperscript{15} In fact, because of the general type of clientele that the average criminal defense attorney attracts, it may be acknowledged that a good criminal defense attorney makes sure that the client makes payment prior to the entry of a plea. This line of thinking illustrates the possibility that any fee arrangement in the criminal context may ultimately turn out to be a contingent one. As such, intentionally representing a criminal client under a contingency fee arrangement may not be too far of a stretch from what occurs in criminal defense practice every day.

So why would a criminal defense attorney want to take part in such a fee plan? Such a plan is enticing to a civil lawyer because he or she will get a hefty percentage of the pie if successful. Most civil trials are those in which a person’s interest in property is at stake against an adversary,\textsuperscript{16} whereas in a criminal trial, it is a person’s liberty that is at stake against the government’s interest in prosecuting the defendant.\textsuperscript{17} As such, the amount of personal monetary gain that can result from a civil trial is not comparable to the gain that can result from a criminal trial. Because of the discrepancy between criminal and civil cases concerning the prospect of obtaining substantial financial gain, the criminal defense attorney will not receive as great a payoff as a civil attorney.

Notwithstanding this reality in criminal cases, there are usually two issues associated with a criminal defense contingency fee plan. One is that it may be a Constitutional violation.\textsuperscript{18} The other is that it

\textsuperscript{15} Id.

\textsuperscript{16} See Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure § 1.1 (2d ed. 1993) (noting the function of the adversary system in the American judicial system).

\textsuperscript{17} See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.3(a) (2d ed. 1986) (describing the societal interest in preventing crimes and imposing punishment on wrongdoers who commit crimes).

\textsuperscript{18} The point of this article is to illustrate the ethical aspect of the use of contingency fees in criminal cases, but not to provide an in-depth look at why such a plan may constitute a Due Process violation. Any relation between a contingency fee plan in a criminal case and the Due Process clause stems from the view that such a fee arrangement can turn both counsel and client into joint venturers, with the attorney obtaining a direct stake in not only the case, but also the client’s future. See Karlan, supra note 11, at 605 n.46. The relationship that the criminal defendant forms with the attorney in this situation may create a conflict of interest that can impede the attorney’s ability and duty to provide effective counsel, as proscribed by the Sixth Amendment. However, court decisions indicate that the relationship formed between counsel and client based upon a contingent pay plan does not conclusively render the service counsel provided any less competent than it would have been had no relationship been present, nor does it give rise to a conflict of interest grave enough to rise to the level of what is considered as ineffective assistance of counsel. See Caplin & Drysdale v. United States, 491 U.S. 617, 633 (1989) (stating that a contingent fee in a criminal case is not to be viewed as “ineffective assistance \textit{per se}” and is not an infringement of a defendant’s Sixth Amendment rights).
may be an ethical violation. Nevertheless, the most common justification for declaring such a fee plan as improper in criminal cases is that it is contrary to public policy. This premise rests upon the fact that there is no object of property produced from the litigation that can serve as a basis from which to formulate the amount due to an attorney. To obtain or produce property is the primary goal of the civil plaintiff, and the lawyer is retained to achieve this goal. In a criminal proceeding in which the defendant may face a prison sentence, the primary goal of the defendant is to obtain freedom. But, regardless of whether the proceeding is civil or criminal, the attorney vigilantly pursues the client's goals and, if victorious, both civil and criminal parties have reached their intended goals with the help of their lawyers. Notwithstanding, even if the goals of the client are successfully reached, the book on the potential problems associated with contingent fee arrangements is not closed.

IV. POTENTIAL PROBLEMS WITH CONTINGENCY FEE PLANS BEING UTILIZED BY CRIMINAL DEFENSE ATTORNEYS

There are certain problems that may arise as a result of the use of a contingency fee plan. For instance, the actions a lawyer undertakes to meet the needs of their criminal defendant clients and to earn their contingent fees may lead to ethical violations. Because the lawyer's paycheck is dependent on the outcome of the case, there is a greater incentive to win, thus prompting an attorney to take part in corrupt practices that can improve the chances of success. Of course, such incentive exists regardless of whether the forum is civil or criminal,

19. See id. at 633 n.10 (noting that contingency fees in criminal cases are generally unethical).
20. See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 (1979) (stating that public policy properly condemns contingent fee arrangements in criminal cases, largely on the grounds that legal services in criminal cases do not produce a res with which to pay the fee); but see N.Y. County. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 714 (1996) (recognizing that contingent fees are allowed in certain civil cases that do not produce a res, such as civil rights cases, which have a substantial public interest comparable to criminal adjudication).
21. This may not always be the case. In certain circumstances, the acquittal of a defendant may result in the defendant receiving an interest in property, such as in the form of a life insurance policy. See, e.g., United States v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972).
22. See JOHN WESLEY HALL, JR., PROF'L RESPONSIBILITY FOR THE CRIMINAL LAWYER § 7:7 (2d ed. 1996) (noting that "the stakes are higher and there is a weightier interest in seeking justice in the outcome").
23. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-373 (1993) (stating that contingent fee arrangements in criminal cases are prohibited "because such arrangements may present the risk of giving the lawyer an interest that is in conflict either with the client's interests or with important public interests").
24. See Karlan, supra note 11, at 610.
25. See id.
but this piece strives to only address the role of the contingent fee in criminal practice. Although such a potentially corruptive situation may seem relevant only on the television drama, "The Practice," in which the lead star is regularly faced with a conflict between criminal defense and legal ethics, it should be apparent that such a situation could take place in real life.

Consider this hypothetical: A defense attorney proffers evidence tending to benefit the defendant. This evidence is not actually known to the lawyer to be false, but does not seem believable to the reasonable person. The defense attorney might not be so eager to present such incredible evidence if he knew that he would be paid regardless of the outcome in the case. The attorney's motive to present such evidence is much stronger when the facts indicate that the defendant will most likely be convicted. Using incredible evidence in this type of situation would prejudice the plaintiff in the civil trial, but would have a much more devastating effect in a criminal trial because there are more persons harmed by such an act: the People of the state represented by the prosecutor.

Although unethical techniques may be used by attorneys in civil cases,26 a civil case differs from a criminal case in several important respects. In a civil case, the community in its entirety does not have as great an interest in the case as compared to a criminal case where the government has filed criminal charges against a defendant who has committed a serious harm to society.27 The community's interest is greater in the criminal context because the same defendant, or another, might commit the crime again in the same locality if preventive steps are not taken.28 The public's interest in a civil case cannot be as great because typically it is solely the wronged individual initiating the suit.

26. See Walter Olsen, Sue City: The Case Against the Contingency Fee, 53 POLICY REV. 46, 47 (1991) (stating that "[l]awyers as a profession face unusual temptations to engage in unethical conduct").

27. See Lee Goldman, Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials, 31 SANTA CLARA L. REV. 147, 185 (1990) (distinguishing a civil trial from a criminal trial, because "[t]he public does not want to favor one civil litigant over another").

28. This theory was reinforced in United States v. Salerno, 481 U.S. 739, 750 (1987), in which the Supreme Court upheld the constitutionality of the Bail Reform Act of 1984. In this case, the petitioner challenged his detention before trial. The Court, expressing the interest that a government has in protecting the public, stated, [w]hile the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

Id.
In a criminal case, the community as a whole can benefit from the punishment of the defendant.\textsuperscript{29} Such unethical practices do not only include attempts to use unethical techniques in front of a judge or jury. Unethical practices can also occur in other contexts. For example, a client's liberty interest may suffer if an attorney chooses to obtain or to plead to a lesser charge, even though there is a good chance that the defendant could have been acquitted.\textsuperscript{30} Stated otherwise, there could be a greater incentive for the criminal lawyer to take a plea even when he knows that he could prevail at trial.\textsuperscript{31} The reality is that most criminal cases plea out, but a contingent fee arrangement could “encourage” guilty pleas in inappropriate situations. The concern is that the attorney may place his or her financial interest in the case before the interest of the client. After all, a result is guaranteed when arising out of a negotiated bargain between defendant, attorney, judge and prosecutor. Otherwise, an attorney would take a chance with a jury, and risk not being paid if he or she is unsuccessful. Alternatively, an attorney may place his or her client's future on the line by foregoing the opportunity to seek a lesser charge in order to obtain a greater fee, even when there is a slim chance that the defendant will prevail at trial.\textsuperscript{32} These scenarios are bound to lead to constitutional violations that can harm the accused, as the right to acquire zealous representation can be vitiated when an attorney agrees to or overlooks a plea arrangement without conducting a diligent investigation of the client's realistic alternatives or the actual merits of the case.\textsuperscript{33}

Courts approach criminal cases in which a contingency fee plan has been utilized in different ways. The presence of a conflict of

\textsuperscript{29} See Goldman, supra note 27, at 185.  
\textsuperscript{30} See Peter Lushing, The Fall and Rise of the Criminal Contingent Fee, 82 J. CRIM. L. & CRIMINOLOGY 498, 517 (1991) (noting that this circumstance is a conflict of interest since an attorney can earn a bigger fee through an acquittal). 
\textsuperscript{31} This scenario may not only be an ethical violation, but may also be a constitutional violation, since the defense attorney is most likely not performing his function by serving as effective advocate, and is not furthering his client's interest, or “putting the constitution to the test.” Nevertheless, the constitutional remedy of granting a new trial for this type of behavior does not seem to be an effective measure to deter the misuse of and improper conduct associated with contingency fees in the criminal justice system. See id. at 521.  
\textsuperscript{32} See Schoonover v. Kansas, 543 P.2d 881 (Kan. 1975) (illustrating a situation in which a criminal defendant entered into a contingency fee arrangement with her attorney and upon conviction, appealed on the grounds that counsel was ineffective because the attorney had not sought a plea bargain that may have been beneficial to the client's interests when the attorney had the opportunity to do so).  
\textsuperscript{33} See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1(a) (3d ed. 1993) (stating that one duty of a defense attorney is to fully investigate a case even if a plea agreement is contemplated).
interest was the key issue in New Hampshire v. Labonville, 34 in which a
criminal defendant contested the legal representation she received at
her trial. The defendant in the case was convicted of conspiracy to
murder her husband and retained the services of an attorney she had
used in previous civil matters also related to the death of her
husband. 35 The contingency fee agreement worked like this: if the
defendant was acquitted the defense attorney would receive eighty-
five dollars per hour for out of court time, and one hundred dollars per
hour for in court time. 36 In addition, if acquitted, the defendant would
receive $153,000 from the life insurance policies of her late husband. 37
If convicted, however, the attorney would only bill the state twenty
dollars per hour for out of court time, and thirty dollars per hour for in
court time. 38 Because the defendant was convicted in the case, the
attorney received $1,500 from the state for his services, and $900 for
his expenses. 39

The defendant contended that because of this pay arrangement,
the representation she received was ineffective. 40 Although the court
did not look favorably upon the rate plan that the attorney had
utilized, it did not automatically view utilization of a contingency fee
as constituting ineffective assistance of counsel. 41 Instead, the court
analyzed whether there had been a constitutional violation and did not

34. 492 A.2d 1376 (N.H. 1985).
35. Id. at 1377–78.
36. Id. at 1378.
37. Id. In reference to an arrangement such as this, it should be noted that a court or
ethical committee might examine ways to justify payment of a criminal defense attorney on a
contingency basis without labeling the arrangement a contingent one. For instance, the
Committee on Professional and Judicial Ethics for the Association of the Bar of the City of New
York was faced with the following scenario: An attorney was hired to represent a client in a civil
claim using a "standard contingency fee arrangement." Subsequent to the agreement, the client
was arrested and indicted on criminal charges. The client utilized the same attorney's services
under the same arrangement for representation on the criminal matter. The Committee on
Professional and Judicial Ethics did not find that the representation relating to the criminal
matter was an ethical violation, and did not view the arrangement as a contingent fee plan in a
criminal action. Instead, the Committee found that the criminal defense fee was "not contingent
upon the successful accomplishment of any event in that action. Rather, it would be contingent
upon the client's successful recovery of a verdict in the civil negligence action. Moreover, the
potential recovery in the negligence action provides a fund from which the fixed fee in the
criminal action can be paid." Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial
38. Labonville, 492 A.2d at 1378.
39. Id.
40. Id.
41. Id. at 1379. Although the appellant claimed violations of both the New Hampshire
Constitution and the Federal Constitution, the court only based its decision on the state
constitution. However, the standard for determining whether a contingent fee agreement is a
constitutional violation is the same as used in the federal system.
utilize any relevant ethical standards in reaching its conclusion. In doing so, the court held that "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance" in order to prevail on an ineffective assistance of counsel claim.\textsuperscript{42}

Because of the vast discrepancy in hourly fees in this case, there appeared to be a real incentive for the attorney to resort to corrupt practices in order to obtain the most desirable fee. Additionally, a reasonable person could view the circumstances, which revolved around the attainment of insurance proceeds, as inherently suspicious. But the court held that the attorney's performance did not adversely affect the defendant, and that no conflict of interest existed.\textsuperscript{43}

The \textit{Labonville} case appears to stand for the proposition that there may be a place in the criminal justice system for contingent fee arrangements. If the court were to come out and state that the contingent fee lacks a role in the criminal justice system, this premise would lack merit. However, the \textit{Labonville} court did not construct its opinion to relay a clear message on this issue. Notwithstanding the court's message that such a plan may pose an ethical issue, the court did not regard the arrangement as an automatic ground for complaining about one's counsel. In doing so, it has placed the burden on the defendant to establish that the contingency fee plan actually had an "adverse effect" on the outcome. With all practicalities considered, it seems as if this is a substantial burden for the defendant to overcome in most instances because the attorney can always negate prejudice by claiming that the defendant would have been convicted anyway. Perhaps the amount of deference that has been granted to the attorney unfairly detracts from a defendant's potential remedy against their attorney in a subsequent case. It also, perhaps, demonstrates the principle that lawyers will strive to protect their own collective interests before those of others. This advantage can be harmful to a criminal defendant who, after conviction, seeks a remedy against their attorney. In practice, an obstacle that the defendant now faces—possible presumption that the assistance rendered by counsel was effective—can in effect preclude the defendant from obtaining the degree of justice that he or she may deserve.

But there is another aspect to such a contingency fee arrangement in this situation that should not be overlooked. In \textit{Labonville}, the attorney was to be paid a certain amount pending acquittal, but he was also to be paid (albeit at a much lower rate) by the state even if he lost

\textsuperscript{42} \textit{Id.} (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

\textsuperscript{43} \textit{Id.} at 1380.
the case. Given this reality, it seems as if the lawyer was the one without the contingency, since he was in a no-lose situation. Under this analysis, the client is the one with their future up in the air, but the lawyer gets paid either way. Of course, an incentive for the attorney to win and obtain a bigger fee still exists, but this incentive is not as great since he will not walk away empty handed for his services, and he will be paid for his out of pocket expenses. Yet, in a subsequent case to establish that the attorney did not properly do his job, it is the client who must overcome the burden. This makes it seem as if the client is the one being punished when it is the attorney who has arguably committed an ethical violation. Thus, an attorney who participates in such a plan may have little to fear from the exploitation of others.

Another case recognized that a contingency fee plan used in this context may create a conflict of interest. In People v. Winkler, the New York Court of Appeals applied a similar standard to place the burden on the accused, and the court rejected the notion that such a plan automatically constituted per se ineffective assistance of counsel. The court first viewed the arrangement as "unquestionably unethical," yet failed to articulate precisely why such a fee arrangement should be considered this way, besides resting on grounds of public policy.

In Winkler, the defendant was accused of murdering his father, and the lawyer he retained agreed to represent him for a set fee, plus an additional $25,000, contingent on the defendant being found not guilty (either on the merits, by reason of insanity, or through "some other legal reason"). This contingent $25,000 was to be taken from the inheritance the defendant was to receive from his father's estate. The attorney in this case also represented the settlement of the victim's estate. Notwithstanding the court's examination of the conflict of interest present, and its recognition that there may be an incentive to employ corrupt tactics in order to obtain a greater fee, the

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45. Id.
46. Id. at 486-87.
47. Id. at 486.
48. Id. It should be noted that the arrangement originally called for a $15,000 fee. However, it was Winkler himself who crossed out $15,000 and wrote in $25,000 prior to agreeing to the arrangement.
49. Id. at 486.
court held that it was the defendant who had the burden of proving that the contingent fee arrangement was the root of ineffective assistance of counsel, and remanded the case for a fact-finding hearing consistent with its opinion.\textsuperscript{50} Winkler then took his shot in federal court, and petitioned for \textit{per se} reversal. The Second Circuit noted with authority that “[w]ithout doubt, trial counsel’s acceptance of the contingency fee agreement for representing a criminal defendant is highly unethical and deserves the strongest condemnation.”\textsuperscript{51} In addition, the Second Circuit found that the fee arrangement between Winkler and his attorney gave rise to an actual conflict of interest.\textsuperscript{52} However, the Second Circuit, like the New York Court of Appeals, found that \textit{per se} reversal for such a conflict of interest was not appropriate.\textsuperscript{53} The Winkler Court noted that \textit{per se} reversal should be limited to two specific circumstances—practice by an unlicensed attorney and practice by an attorney in which the attorney himself engages in the defendant’s crimes.\textsuperscript{54} As the use of a contingency fee plan fit neither of these two scenarios, the Second Circuit declined to reverse Winkler’s conviction.\textsuperscript{55}

\textit{Labonville} and \textit{Winkler} provide examples of how courts will continuously frown upon the use of contingency fees in criminal cases, but will be reluctant to promulgate rules to deter it.\textsuperscript{56} These cases also demonstrate that although a court will declare such a practice to be unethical, other grounds, such as constitutional or statutory provisions, will be used to justify a court’s decision.\textsuperscript{57} Despite the substantial social policy interest in the way criminal cases are administered, this interest, by itself, is not enough for a court to automatically view a contingent fee arrangement as impermissible.

If obtaining a fee contingent upon achieving a specific result in a criminal case is unanimously deemed improper,\textsuperscript{58} it appears unexplainable why courts do not take steps to remedy this wrong

\textsuperscript{50} \textit{Id.} at 487-88.
\textsuperscript{51} \textit{Winkler v. Keane}, 7 F.3d 304, 308 (2d Cir. 1993).
\textsuperscript{52} \textit{Id.} at 307-08.
\textsuperscript{53} \textit{Id.} at 308.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 310.
\textsuperscript{56} In all respect, it should be noted that these two cases involved defendants who retained attorneys that they had also employed in other actions—civil actions concerning the proceeds from insurance policies taken out on the victim’s lives. Perhaps the results would be different if the attorneys and clients had no previous relation before the criminal trial arose. But it should also be noted that one who retains an attorney by way of a contingent fee plan with money to be paid out of an insurance policy pending acquittal seems controversial in and of itself.
\textsuperscript{57} \textit{See also} Fogarty v. State, 513 S.E.2d 493, 498 (Ga. 1999) (Sears, J., concurring).
\textsuperscript{58} \textit{See Winkler}, 523 N.E.2d at 485.
when it is discovered.\textsuperscript{59} Perhaps ostensible judicial inaction appears as courts prefer to ensure that certain thresholds are satisfied before vast amounts of criminal cases become reversed on appeal and new trials must be ordered.\textsuperscript{60} Although there is a plausible need to maintain standards within the criminal justice system, there is no excuse for a deficiency in articulating the reasons why contingency fees are not appropriate in criminal cases.

V. POTENTIAL BENEFITS OF USING A CONTINGENT FEE PLAN IN CRIMINAL DEFENSE PRACTICE

There appears to be no reason to distinguish a lawyer who predominantly practices criminal law from another who practices civil law.\textsuperscript{61} Both are equally qualified and should possess the same skills needed to practice law.\textsuperscript{62} However, it seems as if the criminal lawyer

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\textsuperscript{59} See, e.g., Winkler v. Keane, 7 F.3d 304, 308–10 (2d Cir. 1993) (finding that there had been no ineffective assistance of counsel rendered by the defense attorney in the New York Winkler cases, supra, and rejecting a per se reversal rule whenever a criminal defense attorney enters into a contingent fee agreement with a defendant); but see Illinois v. Meyers, 263 N.E.2d 81, 82–83 (Ill. 1970) (reversing a defendant’s conviction when the defendant pled guilty as part of a deal with the state. The attorney did not seek the initial recommendation that the state offered, which was half the sentence he was to receive. The court primarily focused on the conflict of interest the defense attorney had, and reversed the conviction because the attorney did not understand his duties to the client due to this conflict.).

\textsuperscript{60} Perhaps appellate courts are reluctant to automatically overturn convictions and allow criminal defendants to go free merely because a contingency pay plan was used. A contingent pay plan may lead to a conflict of interest for defense counsel, but this does not mean that ineffective assistance was rendered. The Supreme Court has set forth a standard to measure ineffective assistance in Strickland v. Washington, 466 U.S. 668 (1984), as well as a standard by which to measure whether any conflict of interest should lead to reversal in Cuyler v. Sullivan, 446 U.S. 335 (1980). Under Strickland, a defendant must show that their defense attorney’s performance fell below “an objective standard of reasonableness” and that this inadequate representation prejudiced the defendant. Strickland, 466 U.S. at 687–88, 691–93. The Strickland Court stated that a “presumption of prejudice” is proper when a defendant can show that he or she has (actively or constructively) been denied the assistance of legal representation. Id. at 692. In comparison, a defendant attempting to show a conflict of interest by his or her attorney must demonstrate that there has been an actual conflict. Cuyler, 446 U.S. at 350. Thus, Strickland allows for a constructive showing of prejudice while Cuyler requires an actual showing, and the presumption Strickland allows provides a criminal defendant with an easier burden to meet in showing that their case has been prejudiced. Since there is a lower applicable standard for ineffective assistance claims, there may be a tendency for defendants on appeal to convert their conflict of interest claims into ineffective assistance claims. The courts may recognize this, and as such, be reluctant to reverse all general claims of attorney prejudice made by convicted criminal defendants.

\textsuperscript{61} See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4.3 (1986) (remarking that the criminal justice system “is probably no more susceptible to corruption by defense lawyers made overzealous by contingent fees than is the civil system,” which is comprised of predominantly the same lawyers).

\textsuperscript{62} Id.
may be held back from having the same monetary possibilities as his or her similarly situated colleagues practicing civil law because those practicing criminal law have chosen an aspect of the profession in which they have an avid interest. No evidence, statistical or otherwise, tends to show that use of a contingency fee in a criminal case has any actual effect on representation. Thus, there seems to be little reason why a criminal lawyer should not have the same pecuniary opportunities as his or her personal injury or antitrust counterparts.

The positive opportunities a contingent fee plan may provide for may not only be for attorneys but perhaps for defendants as well. There exists a distinguishable variety of potential criminal defendants. For instance, as one author has pointed out, sophisticated white-collar defendants who can shop around for counsel are quite differently situated from naive arrestees who must select an attorney while incarcerated. Although the Sixth Amendment guarantees criminal defendants the right to legal representation, the Supreme Court has stated that a criminal defendant has no Sixth Amendment right to freely employ the counsel of their choice. Also, the Court has stated that a defendant cannot insist on retaining the services of an attorney they cannot afford. With this reasoning, it would seem that without contingency fee plans, only affluent defendants would be able to freely retain their own private counsel. However, with a contingency fee plan, those with limited financial means would have an opportunity to retain the counsel whom they believe is the most competent to handle their case. This opportunity may not have been possible without the use of a contingent fee plan. Nevertheless, regardless of whether a contingent fee plan is used, defendants viewed by attorneys as having a high risk of conviction still have a safety net to fall back on—the constitutional right to have a publicly appointed attorney.

63. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-373 (1993) (noting that contingent fees may be appropriate in defense cases, as long as the client gives their consent to the plan, and such plan is reasonable).
64. See Karlan, supra note 11, at 608.
65. Id.
67. See Caplin & Drysdale, 491 U.S. at 624 (1989) (involving a defendant who claimed that a criminal forfeiture statute served as a contingency fee plan because the property acquired through the crimes he was charged with had to be forfeited pending conviction and what were excluded from the assets taken were attorney fees he was to pay the firm he had retained).
68. See id.
69. Id. at 651 (Blackmun, J., dissenting).
70. Gideon, 372 U.S. at 343–45.
Not only could such a plan have positive aspects for an indigent client, but it could also aid the profession as a whole. Since an attorney may not receive as great of an amount of compensation from criminal defense work as he or she would from the average civil case, even the best intentioned attorneys may have little choice other than to decline representing criminal defendants in many cases.\textsuperscript{71} Over time, this means that talented attorneys will not practice criminal law, which could "devastate the criminal defense bar."\textsuperscript{72} In fact, use of contingency fee plans can open new doors to attorneys who possess interests in criminal law and trial litigation, as well as to those who seek more court experience than they may find in civil practice. Attorneys who would employ such a pay plan would be less reluctant to take on criminal cases, thus providing more opportunities for talented attorneys, which the world of criminal law could benefit from. Providing talented attorneys with adequate and innovative financial incentives to take on criminal cases could alleviate potential problems stemming from a lack of resources in the current system.

VI. PRACTICAL PROBLEMS AND ISSUES CONCERNING CONTINGENT FEE PLANS IN CRIMINAL CASES

Although there are undoubtedly positive factors linked to a contingency fee plan, certain numerical concerns arise. Basically, the question comes down to this: "how can we measure the contingency?"\textsuperscript{73} Counsel has a duty to provide their client with a way to assess how the fee should be handled; what type of fee is preferable; and what is reasonable under the circumstances.\textsuperscript{74} In fact, a lawyer must clearly indicate the exact percentage of the contingency fee

\textsuperscript{71} See Caplin & Drysdale, 491 U.S. at 646–647 (Blackmun, J., dissenting) (quoting United States v. Bassett, 632 F. Supp. 1308, 1316 (Md. 1986) and United States v. Rogers, 602 F. Supp. 1332, 1349 (Colo. 1983), and remarking that notwithstanding the legal profession's pro bono commitment, this scenario is bound to happen. Caplin & Drysdale also point out that the criminal justice system does have room for, and may even benefit from an influx of risk-taking attorneys, who utilize legal strategies which may be quite effective, yet not condoned by the world of the traditional publicly appointed criminal defense attorneys (i.e., the public defenders). This is especially true when "specialized defense counsel" are needed for highly technical and complex cases, in which there is the possibility that those attorneys who are publicly appointed may not have an adequate opportunity or the resources to deal with the special circumstances accompanying a complex trial).

\textsuperscript{72} Id. at 647.

\textsuperscript{73} See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-373 (1993) (noting that one problem with a contingency fee plan in a criminal case is the difficulty of defining a successful outcome).

\textsuperscript{74} See MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (1983) (stating that "the basis or rate of the fee shall be communicated to the client").
charged once the lawyer and client agree to such a plan.\footnote{75}{DeGraff, 292 N.E.2d at 311 (stating, "[w]hen a lawyer informs a prospective client, at the time he is retained, that his fee will be on a contingent basis, he should clearly indicate the percentage of recovery to be received").} At first, one might suggest that the market price of the legal services rendered is an effective measuring tool.\footnote{76}{See Stephen D. Annand & Roberta F. Green, Legislative and Judicial Controls of Contingency Fees in Tort Cases, 99 W. VA L. REV. 81, 83 (1996) (stating that the prevailing view is that it is the market force that controls the amount of the contingency fee charged by a defense counsel).} The question of how much an acquittal is worth may be economical,\footnote{77}{See Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DEPAUL L. REV. 267, 271 (1998) (describing what an "effective hourly rate" (EHR) is. An "EHR" is the fee received by the lawyer divided by the amount of time the lawyer had to expend to obtain that fee. "This measure captures the various elements of the contingencies facing the lawyer. The numerator, the fee received, is a function of both the amount of damages and whether the lawyer obtains any recovery for the client. The denominator is the amount of time the case actually took.").} with attorneys charging fees according to how intensely their clients need or want their legal services.\footnote{78}{See MACKINNON, supra note 5, at 52 (describing the role of the contingency fee in criminal cases and how highly the criminal defendant values the services of defense counsel before the trial, when the criminal defendant has their greatest interest in the case).} An acquittal in a murder case is different from one in a petit larceny case,\footnote{79}{An examination of the elements needed for each of these crimes is not conclusive of the differences. Also what must be considered is the moral condemnation and stigmatization that is associated with a crime such as murder. See, e.g., Leon Pearl, A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley, 11 HOFSTRA L. REV. 273, 286 n.85 (1982).} and as such, one who has killed another is more likely to desire an acquittal than one who has stolen an item of little value. Thus, the category of the crime should also be examined when measuring the value of the services.

When determining an appropriate amount to charge, an attorney must also heavily weigh other pertinent factors. A lawyer should be prompted to charge a higher percentage to an individual who has a lower risk of evading conviction than a person who has a better chance of getting off.\footnote{80}{See W. Crews Lott, Balancing Burdens of Proof and Relevant Conduct: At What Point is Due Process Violated, 45 BAYLOR L. REV. 877, 888–89 (1993) (discussing the liberty interests a defendant has through the different stages of the criminal justice process, and how important it is at trial and sentencing).} For example, a criminal defendant may be highly interested in maintaining his or her liberty interests.\footnote{81}{See Richard W. Painter, Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?, 71 CHI.-KENT L. REV. 625, 669 (1995) (recognizing that lawyers who}
indigent client is an individual who desperately seeks legal help as the
government diligently investigates their background, and anything
else related to the criminal incident.\textsuperscript{83} At this point, a lawyer has the
opportunity to charge their client a fee that is excessive, which is by
itself an ethical violation.\textsuperscript{84} An experienced defense attorney can take
advantage of the steep disparity in knowledge possessed by counsel
and client and rip off the unsophisticated criminal defendant who has
no idea of what an appropriate contingent fee should be in a criminal
case.\textsuperscript{85}

A. Setting the proper amount for the contingency fee plan.

In a civil case, the contingency amount is set at a specific
percentage of the winnings.\textsuperscript{86} Hence, what the lawyer will receive as
compensation is an ascertainable amount.\textsuperscript{87} In a criminal case, because
no res is produced,\textsuperscript{88} there is no way to establish a specific
ascertainable amount. A criminal defendant may be in the same
financial position post-outcome as they were prior to the
commencement of prosecution, regardless of the disposition.\textsuperscript{89} For
instance, an attorney cannot charge a thirty-percent fee for an

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\item \textsuperscript{83} See Anne Bowen Poulin, \textit{Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong}, 34 \textit{AM. CRIM. L. REV.} 1071, 1113–15 (1997) (highlighting several incidents of criminal behavior and the actions the government undertook in
an effort to fully investigate the defendants to obtain convictions in each case).
\item \textsuperscript{84} See \textit{MODEL CODE OF PROF'L RESPONSIBILITY} DR 2-106(A) (1979) (stating that “[a]
lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee”).
\item \textsuperscript{85} See Herbert M. Kritzer, \textit{Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship}, 23 \textit{LAW & SOC. INQUIRY} 795, 811–12 (1998) (stating, in relation to the usual civil case, “the lawyer has the kinds of experience and knowledge necessary to [evaluate whether the case is promising after
assessing information, valuing the case, and estimating likely costs and outcomes if the case goes
to trial], while only the very occasional client can begin to make the necessary judgments”); see
also Karlan, supra note 11, at 627 (noting the disparity in the level of knowledge defense counsel
has over her client).
\item \textsuperscript{86} See \textit{LESTER BRICKMAN, MICHAEL HOROWITZ, AND JEFFREY O'CONNELL, RETHINKING CONTINGENCY FEES} 13 (1994) (describing the premium charged when the
attorney's fee is contingent upon winning, and illustrating several examples of what percentage a
contingency fee may be, and whether it may be from the total amount of what the client recovers,
or from the amount that is left after all expenditures are paid off).
\item \textsuperscript{87} Id.
\item \textsuperscript{88} See People v. Winkler, 515 N.Y.S.2d 488, 492 (App. Div. 1987). See supra note 44 for
Winkler's procedural history; see also Landsman v. Moss, 579 N.Y.S.2d 450, 452 (App. Div.
\item \textsuperscript{89} \textit{MACKINNON}, supra note 5, at 52 (stating that “after conviction (even for a lesser
offense than charged) or acquittal, the client will no longer be as interested in the legal services
nor will he be in a better position to pay a fee”).
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acquittal, since there is no way to measure the worth of thirty-percent of an acquittal. Nor is there any way to measure what a percentage is of a lesser sentence or a conviction of a lesser charge. Of course, one could always play actuary and examine life expectancy and future income possibilities, as well as factor into account the potential stigmatization of becoming "an accused," to come up with a monetary figure. However, the bottom line remains that in criminal cases there is no precise formula that can be used to determine an actual monetary amount.

Additionally, the question arises as to the purpose of the contingency. The ordinary criminal defendant seeking legal assistance wishes to be acquitted of all criminal charges. Practically speaking, instead of obtaining an acquittal, this accused individual may be convicted, but with a lesser sentence of a lesser charge. The criminal defense attorney who represents such a client and is able to persuade the judge or jury that the defendant should be entitled to a lesser punishment, or is able to broker a favorable plea, is one who has been successful when all of the facts tend to demonstrate their client's guilt. However, seeing as this may not have been the result for which the client retained the attorney's services, the client may not view it as a success, and not wish to pay the fee.

If a client has agreed to pay a set amount, are they entitled to a rebate if a worse outcome occurs than was originally anticipated?

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90. See Lushing, supra note 30, at 525.
92. See Ronald D. Rotunda, Legal Ethics: Innovative Legal Billing, Alternatives to Billable Hours and Ethical Hurdles, 2 J. INST. STUD. LEG. ETH. 221, 230 (1999) (stating, in relation to when a contingency fee should be paid by a client, "[t]he term 'outcome' need not necessarily mean 'a complete judicial victory' or 'a complete judicial loss'.")
93. See, e.g., Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983) (illustrating a scenario in which a client refused to pay a fifteen percent contingency fee plan after the attorney had substantially performed his share of services, when the case was near victory through arbitration, and the client had made special demands on the attorney that could not be achieved).
94. In 1999, the Supreme Court of Georgia found that a partial rebate for a criminal defense fee was valid. The defense attorney agreed to refund $15,000 of his $25,000 up front fee if the charges against the defendant were dropped, and hence, there would be no trial. Although this instance does not concern a contingency fee arrangement in a criminal context, it provides an insight that rebates may be permissible in criminal cases, thus leaving the door open to rebates of contingency fees charged by the criminal defense counsel. See June D. Bell, Justice Ok Fee-Rebate Deal in Criminal Case, FULTON COUNTY DAILY REPORT, Mar. 26, 1999, LEXIS, News Library, FULTON File. This query is also analogous to one pondered before the Florida Bar Association:

May an attorney contract with his client, in a criminal case, that the fee will be a certain amount, to be paid in advance, providing, however, that in the event of a guilty verdict, or, in the event of sentence being imposed whereby the defendant
This is just another point that the attorney should disclose to the client if initiating such a fee plan. To prevent potential problems, an attorney should set clear standards for their criminal defendant client that detail exactly what must be paid if a particular result occurs.\(^5\) In civil trials, this seems easy, as the client knows whether they have won or lost when the result indicates that they have acquired new property or have lost property to their adversary. The criminal process is different because there are various nuances that can lead to the defendant evading punishment.\(^6\) Consequently, there are many factors that must be evaluated before an attorney can make an educated judgment as to what fee amount is appropriate.

**B. The propriety of contingent fee plans in different criminal contexts.**

The amount of the fee is not the only issue that must be appropriate. What also must be appropriate is the situation in which a contingency fee plan may be applied.\(^7\) Although a contingent fee plan generally may be negatively regarded for all types of criminal cases, there may be particular criminal matters whereby representation should clearly not be based upon such a plan. The two cases discussed earlier dealt with individuals who were to receive the proceeds of the life insurance policies of the victims they were accused of murdering.\(^8\) If the defendants were acquitted and it turned out that the defendants did in fact murder the victims in an effort to attain these funds, the attorney's paycheck would be the direct result of such criminal acts. This is fully contrary to the principle that it is not proper for an attorney to be paid from improperly acquired money.\(^9\)

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\(^5\) See, e.g., Model Rules of Prof'l Conduct R. 1.5(c) (1983) (stating "[a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined . . . .'').

\(^6\) See, e.g., Winkler, 523 N.E.2d 485, 486 (N.Y. 1988) (describing the actual contract the attorney drafted with the defendant, which stated: "It is understood and agreed, subject to the approval of [the defendant], that in the event [the defendant] is acquitted or found not guilty by reason of insanity, or some other legal reason . . . shall pay, as additional legal fees, the sum of . . . .'').

\(^7\) See, e.g., Mackinnon, supra note 5, at 35–53 (describing the legal contexts in which a contingency fee plan is proper).

\(^8\) See Labomville, 492 A.2d 1376, and Winkler, 523 N.E.2d 485.

The same seems true for cases involving a defendant accused of fraud, in which there exists the possibility that if the attorney is successful, his or her fee will come from property the client has obtained through his or her wrongdoing.

Besides cases involving monetary disputes, perhaps defendants charged with serious and egregious crimes contrary to core principles of society should not be afforded the right to employ counsel with a contingency fee arrangement. There is a much more tenable argument to be made that certain types of crimes should not bear any association to contingency fee arrangements due to social policy, rather than claiming that social policy stands for the proposition that contingency fee plans have no place in all criminal matters. There is a difference between white-collar crimes and crimes involving serious moral turpitude. The punishments are different, as well as how each one is regarded by society. Furthermore, there is a greater social interest in protecting the public from murderers and rapists than there is in punishing an individual who has committed a sole act of misrepresentation or marijuana possession. There is also a difference between crimes in which conviction leads to time in prison, as compared to charges and convictions not involving incarceration. With the safety of society more at stake in the former categories than in the latter ones, there may be more justification for reasons resting on a basic policy rationale.

100. Rather than simply quoting professional rules of ethical conduct, as did occur in United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985), before the court made any determination as to whether the arrangement between counsel and client was a contingent fee, it may be better if a more objective view to such a fee plan is taken. More bite for the case against contingent fees in criminal cases would be present if courts could articulate reasons why a contingency fee plan should not be employed in certain cases. The Ianniello court simply stated (in a footnote), "[c]ontingent fees for defense attorneys in a criminal action are void as against public policy. "In criminal cases, the rule is stricter because of the danger of corrupting justice." Ianniello, 644 F. Supp. at 457.

101. Annotation, What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 USCS §§ 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime, 23 A.L.R. Fed. 480 (1975) (distinguishing crimes of moral turpitude from other crimes in that crimes involving moral turpitude are those that involve a serious delinquency that is measured by community standards, which grievously offend the moral code of mankind).

102. Id.

103. See, e.g., People v. Graham, 396 N.Y.S.2d 966, 974 (Sullivan County Ct. 1977) (finding the interest of the State of New York to be significant where the defendant is charged with murder, and other serious offenses).
VII. POTENTIAL SOLUTIONS

Ethical problems concerning the use of contingency fees in criminal cases can be alleviated by different techniques. The best solution for all of these problems seems to be to enact regulations. Whether a contingent fee may be applicable in a particular case and how great it may be can be addressed and controlled by statutes. Originally, contingent fees in civil cases were not thought of as legitimate, but today these views have changed, with one reason being that clients are protected from abuse through the safeguards of statutes. The implementation of uniform criminal defense practice standards that attorneys can abide by in order to set rates is important, 

104. See Lester Brickman, Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement, 53 WASH. & LEE L. REV. 1339, 1349 (1996) (advocating methods to deal with contingency fee abuses by attorneys, including (1) setting limits on the amount of fees an attorney may charge; (2) using the judiciary to scrutinize the charging of fees on a sui generis basis; and (3) requiring an attorney to clearly provide all information to the client so the client can make an educated decision as to whether or not a contingent fee arrangement is appropriate in the given situation).

105. See Lushing, supra note 30, at 534 (stating that if things get out of hand, maximum contingent fee rates or some other set of guidelines could be created and enforced to regulate, just like what is presently done in civil cases); see, e.g., Federal Tort Claims Act, 28 U.S.C. § 2678 (2000) (restricting fees in such cases to twenty-five percent of the total judgment, and twenty percent of a settlement); City of Burlington v. Dague, 505 U.S. 557, 567 (1992) (holding that the enhancement of a contingency fee for services pertaining to the Solid Waste Disposal Act and the Clean Water Act is not permitted).

106. See, e.g., Baca v. Padilla, 190 P.730, 731 (N.M. 1920) (stating “[c]ontracts for contingent fees by attorneys at law were not tolerated at all at common law”); Longmire v. Hall, 541 P.2d 276, 278 (Okla. Ct. App. 1975) (stating, in an action to recover attorney fees from a divorce action, that “contracts for contingent fees paid attorneys were not tolerated at all at common law”); Mazureau & Hennen v. Morgan, 25 La. Ann. 281, 281 (La. 1873) (finding that a contingent contract between an attorney and a client is unlawful and quoting an 1908 Louisiana Statute, which states, “that any bargain or agreement with a plaintiff or defendant on the event of any suit to receive any portion of the land or any other property that may be in dispute or sued for, as the compensation for the services of any attorney or counselor-at-law, shall be null and void to all intents and purposes”); Roller v. Murray, 72 S.E. 665, 667–68 (Va. 1911) (finding a contingency fee contract between a lawyer and a client as “champertous” and against public policy).

107. See, e.g., N.Y. ATTORNEYS AND COUNSELLORS LAW § 474-a (2) (McKinney 2003) (providing a statutory example of where contingent fee arrangements are limited by the legislature). The statute reads, Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action shall not exceed the amount of compensation provided for in the following schedule: 30 percent of the first $250,000 of the sum recovered; 25 percent of the next $250,000 of the sum recovered; 20 percent of the next $500,000 of the sum recovered; 15 percent of the next $250,000 of the sum recovered; 10 percent of any amount over $1,250,000 of the sum recovered. Id.; see also Yolango v. Popp, 644 N.E.2d 1318, 1322 (N.Y. App. Div. 1994) (discussing the § 474-a(2) fee schedule).
otherwise attorneys will have the opportunity to charge a specified percentage, and tell their clients that it is the amount that must be paid if successful.\textsuperscript{108}

Additionally, courts and certain administrative bodies do have the power to discipline attorneys for abuses of a criminal defense contingency plan.\textsuperscript{109} Courts also have the inherent power to oversee the collection of attorney fees and the collection of fee agreements.\textsuperscript{110} The interest of justice requires courts to award attorney fees that are reasonable under the circumstances.\textsuperscript{111}

\textbf{VIII. CONCLUSION}

As one can see, the general contemporary view should not be conclusive on the issue of the ethical validity of the contingent fee in criminal defense. There are many concerns associated with the use of such contingency plans in the world of criminal justice, but these concerns are no worse than those associated with other branches of undeveloped law. The general view that it is unethical remains, yet there is a shortage of reason and enforcement to prohibit attorneys and clients from taking part in such a plan. Because such fee arrangements are not inherently unethical, and views pertaining to similar matters have changed with the times, it is foreseeable that there may be a contingent of contingent fee arrangements in the criminal justice world to come.

\textsuperscript{108} See Lushing, supra note 30, at 534.
\textsuperscript{109} See, e.g., \textit{In re Fasig}, 444 N.E.2d 849 (Ind. 1983); \textit{In re Steere}, 536 P.2d 54 (Kan. 1975) (reprimanding attorneys for entering into contingency fee arrangements in criminal cases).
\textsuperscript{110} See Lack v. Wal-Mart Stores, Inc., 56 F. Supp. 2d 674 (1999) (employing a twelve factor test that a court can use to determine whether the actual fee the attorney charged should be awarded. The twelve factors are (1) the amount of time and labor which is required; (2) the novelty, uniqueness, and difficulty of the legal questions presented; (3) the skill needed to perform adequate legal representation; (4) the amount of work that the attorney has foregone as a result of taking the case; (5) the typical fee for such services; (6) whether the fee is fixed or contingent; (7) whether there had been any time limitations that were imposed on the attorney by the client or the circumstances; (8) the amount involved in the litigation and the resulting judgment; (9) the experience, reputation, and ability of the attorneys; (10) whether the case is desirable for the attorney to take; (11) the context of the relationship that the attorney has with the client; and (12) the usual award that is achieved in similar cases.), rev'd on other grounds, 240 F.3d 255 (4th Cir. 2001).
\textsuperscript{111} See Belzer v. Bollea, 571 N.Y.S.2d 365, 366 (Sup. Ct. 1990) (stating, "the whole point and purpose of the rules fixing contingent fees in personal injury actions is to prevent attorneys from exacting unconscionable fees even though there appears to be agreement by the client." in an action in which the attorney settled a claim for the client before the case went to trial, and then requested a substantially increased contingent percentage than was agreed to because of the hardship that the case caused).