If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute

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> Gideon mandated an in-kind wealth transfer to indigent defendants. No matter what it cost . . . lawyers had to be made available at trial and on appeal. Either the state had to create a legal aid office and employ lawyers itself, or find a way of paying private practitioners to defend the poor.[1]
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> An [indigent] person provided counsel . . . shall be assessed a counsel fee of $150.[2]

I. Introduction

The first case I argued as a law student defender was a success. The judge dismissed the charges against my client, not because I zealously advocated for her, but because the Fifth Amendment gave her and her boyfriend the right to refuse to incriminate themselves on charges stemming from a fight. Any competent lawyer could have dispensed with the case with about twenty minutes of work, including the court appearance. After dismissing the case the judge imposed a statutory fee of $150 for my services on my client. I tried to inform him that she was indigent and could not pay this fine. What I did not say was that I assumed that the very imposition of that fine went directly against the right to counsel enshrined in *Gideon v. Wainwright*.[3] The judge summarily dismissed my protestations and moved on.

A few days later I spoke to the person in charge of my client's welfare benefits. She informed me that my client, after paying her rent, was left with around $50 a month for the rest of her living expenses. According to her calculations, it would take my client approximately a year to

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[1] Lucas A. Powe, Jr., The Warren Court and American Politics 445–46 (2001).

[2] Mass. Gen. Laws ch. 211D, § 2 1/2 (2006).

[3] 372 U.S. 335 (1963).

repay the court for the cost of my assistance; the judge had given her two months.

I was prepared for most of the realities of indigent defense. The random dispensation of justice, the disorganization of the court system, the power wielded by prosecutors, the indifference to the plights of individual defendants displayed by some judges, clerks, probation officers, and even defense counsel. All of these issues were sobering, but not shocking. I already knew that the rights seemingly guaranteed by the Constitution were seldom as robust as their rhetoric implied. When I signed up to work as a student defender, I had expected that these systemic shortcomings would disturb the complacency I had developed over two years of law school. I was prepared for this gap between theory and practice.

One reality I was not prepared for, however, was the fee that Massachusetts courts required indigent defendants to pay to exercise their constitutionally guaranteed right to counsel. When I learned that Massachusetts charges these defendants $150 for their appointed attorneys (or student representatives), my immediate response was, "That's unconstitutional." If I had learned anything in law school, it was that the 1963 Supreme Court decision in *Gideon v. Wainwright*[4] mandated free counsel for defendants who were too poor to hire an attorney. It turns out that I was wrong.

Contrary to my assumptions,[5] *Gideon* does not guarantee an indigent defendant free counsel. Many scholars have written about the Supreme Court's failure to protect the substantive meaning of *Gideon*, concluding that although "[t]he rhetoric of the Sixth Amendment is grand, the reality is grim."[6] In *Strickland v. Washington*,[7] for example, the Court made clear that the right to an attorney, declared necessary by *Gideon*, was essentially nominal: that in order to uphold a conviction based on a challenge to the effectiveness of counsel, a court needed to find that the attorney met only a minimal level of professional responsibility to her client.[8] Lawyers who have passed this minimal threshold include those who slept through their clients' trials, those who appeared in court inebriated, those who spent only a few hours preparing for a capital case, and those who allowed their

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[4] *See id. Gideon* extended the right to counsel to criminal defendants in state felony prosecutions.

[5] At least three Justices of the Supreme Court shared these assumptions. *See infra* Part II.A.4.

[6] Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003).

[7] 466 U.S. 668 (1984).

[8] For a discussion of the erosion of the right to counsel see Amanda Myra Hornung, Note, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 513 (2005) ("The evidentiary difficulties of showing a reasonable probability that counsel errors changed the outcome of the case compounded by the extreme deference that judges show to counsel's performance, make proving [that counsel was ineffective] almost impossible.").

clients to be sentenced to death without putting on any mitigating evidence.[9] This interpretation of the substantive right to counsel sharply limits the "noble ideal" Justice Black put forth in *Gideon*[10] and undermines the notion that America's criminal justice system is a rigorous adversarial process.[11]

Scholars are rightly outraged that the right to counsel means so little. Yet their outrage over the shortcomings of the right to counsel overlooks the fact that states now charge indigent defendants for exercising their constitutionally protected right.[12] The Supreme Court declared these fees constitutionally permissible in 1974 in *Fuller v. Oregon*;[13] today such fees are imposed by every state and the federal government, working practical hardship on thousands of indigent defendants who decide to accept counsel rather than face the state pro se.[14] These fees underscore the "grim reality" of the meaning of the right to counsel, a right that is still touted by lawyers and politicians as evidence that our criminal justice system is the fairest in the world.

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[9] *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (discussing the poor quality of indigent defense); William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543 (2004) (discussing the Supreme Court's failure to ensure that defendants get adequate representation).

[10] *See* Gideon v. Wainright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on . . . fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

[11] *See* Bright, *supra* note 9, at 1836 ("Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.").

[12] When states were first passing reimbursement statutes, there were a few law review articles written that directly questioned the laws' constitutionality. *See, e.g.*, Gerard A. Bos & Eugene B. Livaudais, Note, *Constitutional Law—Recoupment Statutes—Reimbursement of Indigent Defense Costs Upheld*, 49 TUL. L. REV. 699 (1975); Comment, *Charging Costs of Prosecution to the Defendant*, 59 GEO. L.J. 991 (1971); Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 MICH. L. REV. 1404, 1415–16 (1969). Since then, no scholarship has focused on the constitutionality of such statutes, despite their prevalence, save for one article published in *The Champion* in 2004 calling for defense lawyers to make "suggestions on ways that [the Indigent Defense Committee of the NACDL] can work to protect indigent defendants from the overwhelming burdens of cost recovery policies." Lynn O. Rosenstock, *The Price of Being Indigent and Accused*, CHAMPION, Aug. 2004, at 50, *available at* http://www.nacdl.org/public.nsf/PrinterFriendly/A0408p50?openDocument. The few current articles that address reimbursement statutes with more than a passing reference use their existence to support other claims. *See, e.g.*, Wayne R. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of A Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181 (1998).

[13] 417 U.S. 40 (1974). *Fuller* is discussed at length in Part II.B.2, *infra*.

[14] *See* Holly, *supra* note 12, at 218 ("[E]very state and the federal government has enacted a statutory recovery system designed to recoup all or some of the costs associated with the government's constitutional obligation to provide counsel to indigent criminal defendants.").

If the state may charge an indigent defendant for counsel, what is the promise of *Gideon* in practice? Essentially, *Gideon* is the equivalent of a *Miranda* warning; it is the defendant's right to know that a lawyer will be available should she desire one. The state will still provide counsel for defendants who are too poor to hire a full-price lawyer, but the defendants will have to repay the state for the privilege of asserting this constitutional guarantee.

Part II of this Article describes the evolution of the right to counsel, from the colonial-era assurance that the state could not deny a defendant the right to an attorney, to the ideal that all criminal defendants should have meaningful access to a lawyer at the expense of the state, to the present reality, where a defendant who is too poor to hire an attorney can still be charged for representation. Part II.A traces the evolution of the right from its roots in the Constitution through its fulfillment in *Gideon v. Wainwright*, which, I argue, requires states not only to provide counsel to indigent defendants, but to do so at their own expense. Part II.B discusses the rapid devolution from this celebrated guarantee, examining the often-overlooked opinions in *James v. Strange*[15] and *Fuller v. Oregon*, which allowed states to charge indigent defendants for exercising their constitutional right to representation. Part III discusses how these decisions play out in contemporary practice in Massachusetts.[16] Part III.A describes how Massachusetts's reimbursement statute is applied and abused, and Part III.B suggests how lawyers in Massachusetts might challenge its constitutionality. Finally, the Conclusion places the imposition of counsel fees in the larger context of fines and fees that indigent defendants are increasingly forced to bear.

II. A Constitutional Right to Free Counsel?

This Part considers the rise and fall of the right to free counsel for indigent defendants in Supreme Court doctrine. Section A describes the rise of the right to free counsel. It discusses how the right's meaning evolved from the founding fathers' understanding—that the Sixth Amendment merely prevented the state from denying a defendant legal representation, should she be wealthy enough to afford a private attorney—to the interpretation pronounced in *Gideon v. Wainwright*,[17] when the Supreme Court insisted that states make counsel available regardless of a defendant's ability to pay.[18] In particular, Section A examines the Court's efforts to weigh the

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[15] 407 U.S. 128 (1972).

[16] Because I originally conceived this Note as an advocacy tool for the Criminal Justice Institute, a student clinic at Harvard Law School, its focus is the Massachusetts statute. My hope was (and is) that this work might be used as a starting point for a discussion about challenging the Massachusetts statute in particular, as well as similar statutes in other states.

[17] 372 U.S. 335 (1963).

[18] *Id.* at 344 (declaring it an "obvious truth" that "in our adversary system of criminal

injustice of a criminal justice system without guaranteed defense counsel against the burden that providing such counsel would place on state treasuries, and concludes that it was this pecuniary concern, rather than constitutional considerations, that prevented the Court from extending the right to all indigent defendants before the 1960s. What made *Gideon* momentous, then, was not its application of the Sixth Amendment to the states, but rather its implication that the states would have to bear the costs of providing counsel to the defendants that they prosecuted.

Section B describes how the states managed to skirt *Gideon*'s determination that the importance of representation outweighed the states' financial considerations. In the decade following *Gideon* the Court belied its own rhetoric by upholding a state's right to charge indigent defendants for state-provided counsel in two cases.[19] These two decisions made clear how reluctant the Court was to burden state treasuries with the cost of indigent defense and how little it would do to protect the right it had extended in *Gideon*. They also set the stage for the current conception of the right to counsel, where almost every state requires some form of repayment from those deemed poor enough to merit state-appointed representation.[20]

A. The Rise of the Right to Free Counsel

1. The Right for Those Who Can Afford It

To an originalist or a strict textualist, the claim that the right to counsel even *extends* to those who cannot afford an attorney is incorrect. *Gideon* was not preordained by the Sixth Amendment, which merely forbids states from denying defendants the right to be represented by counsel. The American colonists inherited from the British a system that saw no need for such a right, given "the weakness of the government vis à vis its enemies."[21] However, once the colonists ceased relying solely on private complainants and began to use public prosecutors to enforce their laws,[22] they quickly saw that a professional public prosecutor "knew the law, the jury system, and

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justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

[19] In James v. Strange, 407 U.S. 128 (1972), and Fuller v. Oregon, 417 U.S. 40 (1974), the Court reweighed the cost of its Sixth Amendment jurisprudence and retreated from its mandate of free counsel, giving states the right to recoup funds from those designated too poor to hire an attorney in the first place. As discussed in Part III.A, *infra*, in order to receive this designation in Massachusetts a defendant must earn less than 125% of the federal poverty level (approximately $9800 a year for an individual) to be awarded free counsel. *See infra* note 102.

[20] *See* Holly, *supra* note 12.

[21] ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE: A CRITICAL PERSPECTIVE 3 (1992); *see also* Faretta v. California, 422 U.S. 806, 827 (1975) ("The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers.").

[22] *See* Metzger, *supra* note 6, at 1638 ("[The] Colonists rejected the English 'private party' prosecutions and adopted a strong public prosecutor system.").

the judge more intimately than could any individual defendant."[23] This realization, coupled with the colonists' fear of a powerful, centralized government, led "[t]welve of the thirteen American colonies [to insist on the right to counsel] because they believed that [forcing defendants to represent themselves] was an outrageous perversion of humane treatment and that it led to inaccurate convictions."[24] Some states, including Massachusetts, enshrined the right in their constitutions, while others enacted right-to-counsel legislation.[25] By the time the United States Constitution was drafted, the right to counsel was so dominant an idea that some scholars have suggested that the very inclusion of a Bill of Rights stemmed from the American public's insistence upon "the maintenance of a fair balance in criminal trials, and to that end the protection of the rights of the accused."[26]

This insistence upon the rights of the accused, however, was not absolute. The right to counsel written into the Sixth Amendment was merely a right to obtain and be represented by counsel. It was not a right to have counsel appointed and certainly not a right to counsel at the expense of the state.[27]

2. The Right for Capital Defendants

For two hundred years the states determined for themselves whether a defendant who could not afford counsel was nonetheless entitled to representation. Many chose to provide counsel to defendants charged with capital crimes. It was this practice that allowed the Supreme Court to open the door to the modern understanding of the right to appointed counsel in the 1932 case *Powell v. Alabama*.[28]

Powell was not a case in which the defendants were denied counsel altogether.[29] Nor was it a case addressing the Sixth Amendment, which did not yet apply to the states; rather it involved the Due Process Clause of the Fourteenth Amendment. The "Scottsboro boys," as the defendants became known, were nine African American men accused of raping two white women. They were tried in a mob-surrounded Alabama courthouse and were represented by a lawyer who had been appointed on the morning of

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[23] *Id.*

[24] Sundeep Kothari, *And Justice For All: The Role Equal Protection and Due Process Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2162 (1998).

[25] Metzger, *supra* note 6, at 1689.

[26] Garcia, *supra* note 21, at 4.

[27] *Id.* ("[T]he Sixth Amendment did not embrace the right to appointed counsel. Rather, what the amendment connoted at the time of its enactment was that 'the right to counsel meant the right to retain counsel of one's own choice and at one's own expense.'") (quoting WILLIAM M. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 21 (1955)).

[28] Powell v. Alabama, 287 U.S. 45 (1932).

[29] Garcia, *supra* note 21, at 5.

trial.[30] The egregious circumstances of the case—the mob atmosphere, the defendants' likely innocence, and, significantly, the inadequacy of counsel—so outraged the Court that it put aside its long history of abstention from interference with state criminal procedure[31] to hold that, at least in capital cases, the Due Process Clause of the Fourteenth Amendment requires that a defendant be given competent counsel at the expense of the state.[32]

Though *Powell* is rightly heralded as a momentous case, the holding itself was not particularly revolutionary. By the time *Powell* reached the Supreme Court, almost all states had interpreted their own constitutions to require the appointment of counsel for capital cases.[33] What *Powell* did was provide a language of *necessity* to describe the right to counsel. The Court made clear that the Constitution did not simply guarantee that a defendant be allowed representation. The Justices recognized that counsel in a criminal trial is fundamental to the very notion of due process: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[34]

While the *Powell* Court did not say that the Fourteenth Amendment mandated the free provision of counsel in capital cases, it almost certainly presumed it. There was little question that the Scottsboro boys, unemployed African Americans in the Jim Crow South, were too poor to pay for their attorneys. In choosing to rest its reversal of conviction on the grounds that adequate counsel was a necessity even for indigent defendants, the Court implicitly held that all capital defendants must be given a lawyer, regardless of their ability to pay for one.

3. Weighing the Cost of the Right

Eight years later, in *Betts v. Brady*,[35] the Supreme Court had the chance to extend the right to provision of counsel to all defendants facing prison terms. In 1942, however, the Court was not ready to burden the states (or the State) with the cost of protecting the rights of non-capital criminal defendants.

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[30] MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 99 (2004).

[31] Ironically, it is to the Jim Crow South that we may owe any constitutional protection for criminal defendants in state courts. The Court saw "impoverished, illiterate, black defendants, probably or certainly innocent of the charges made against them . . . railroaded to the death penalty in egregiously unfair trials," and could no longer ignore basic rights for individual defendants. *Id.* at 117.

[32] *Powell*, 287 U.S. 45.

[33] KLARMAN, *supra* note 30, at 124.

[34] *Powell*, 287 U.S. at 68–69.

[35] 316 U.S. 455 (1942).

The facts of *Betts* are quite similar to those of *Gideon*.[36] Betts was indicted on robbery charges in the state of Maryland. Unable to afford a lawyer, he asked the court to appoint one for him, but "[t]he judge advised him that this would not be done, as it was not the practice in Carroll County to appoint counsel for indigent defendants, save in prosecutions for murder and rape."[37] The Supreme Court granted certiorari to determine, among other things, whether the Sixth Amendment should apply to state defendants. In holding that the Sixth Amendment was "not aimed to compel the State to provide counsel for a defendant,"[38] and that it need only be applied in special circumstances, the Court reasoned that "that which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."[39]

The Court's finding that Maryland's refusal to provide counsel to Betts did not deny him "fundamental fairness" contrasts with its contrary finding four years earlier in a Sixth Amendment case that had arisen in federal court. In *Johnson v. Zerbst*,[40] the Court declared the right to counsel a necessity in all federal criminal trials. Holding that the right to counsel was "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty,"[41] the Court addressed both the practical and historical grounds on which its decision stood. It explained that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel,"[42] and proclaimed that "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[43]

The rhetoric of the two opinions appears contradictory. In *Johnson*, the Court declared the right to counsel a necessity in all federal criminal trials; in *Betts*, the Court declared this same right unessential in criminal trials in state court. To make *Johnson* and *Betts* coherent on a literal level, the Court would have had to believe either that Betts was a far more skilled advocate than Johnson—an unlikely belief, given that Johnson was a lawyer—or that refusing to provide defense counsel only undercut "fundamental fairness" at the federal level. But the Court did not attempt to reconcile the two cases; rather, it rested its holding in *Betts* on its respect for

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[36] For a discussion of the facts of *Gideon* see *infra* Part II.A.4.
[37] *Betts*, 316 U.S. at 457.
[38] *Id.* at 466.
[39] *Id.* at 462.
[40] 304 U.S. 458 (1938).
[41] *Id.* at 467.
[42] *Id*. at 462–63.
[43] *Id.* at 462 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

federalism, focusing on its reluctance to tread on the states' criminal law territory.[44]

It is likely that the *Betts* Court was also animated by another concern: the burden that incorporating the Sixth Amendment against the states would place on state coffers. As one scholar notes, the "Sixth Amendment right to counsel . . . is the only criminal procedure constitutional guarantee that costs money in the purest sense."[45] While absent from its official holding, the issue of the financial costs inherent in extending the right to counsel colors the Court's opinion. For instance, in defending its refusal to intrude on states' rights, the Court trivialized another costly right, the right to a jury trial. It explained that "the usual practice [in Maryland trial courts] is for the defendant to waive a trial by jury . . . . Such trials, as Judge Bond [the trial judge in Betts' case] remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved."[46] The logic of this quote is clear: if the Supreme Court were to give indigent defendants the right to a lawyer, those defendants would start insisting on other constitutional rights, such as the right to a jury trial, and *that* would be expensive.

The Court ended its opinion by noting the danger of an opposite holding: the likelihood that "[c]harges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it."[47] This hyperbolic slippery slope argument reveals the Court's awareness of the potential monetary burden that requiring counsel for all criminal defendants would impose on the states and its unwillingness to give its imprimatur to such a broad mandate.

4. The Right Trumps the Cost

In 1963, *Gideon v. Wainwright* famously and unanimously overturned *Betts* and incorporated the right to counsel against the states.[48] Like thousands of other criminal defendants, Clarence Gideon was a poor drifter who had been in and out of prison; he was charged in Florida "with [break-

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[44] *See Betts,* 316 U.S. at 471 ("[I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.").

[45] Stacey L. Reed, *A Look Back at* Gideon v. Wainwright *After Forty Years: An Examination of the Illusory Sixth Amendment Right to Assistance of Counsel*, 52 DRAKE L. REV. 47, 48 (2003).

[46] *Betts*, 316 U.S. at 472.

[47] *Id.* at 473 (quoting trial court).

[48] 372 U.S. 335 (1963). *Gideon* is the subject of a well-known book, ANTHONY LEWIS, GIDEON'S TRUMPET (Random House 1989) (1964) (subsequently turned into a feature film), and countless articles and commentaries.

ing and entering] a poolroom with intent to commit a misdemeanor."[49] When he came before the court, Gideon requested that he be provided a lawyer free of charge, since he knew from experience that he would not fare well advocating for himself. The trial court denied his request.[50] Gideon defended himself in front of a jury; he was convicted and sentenced to five years in prison. After the Supreme Court of Florida denied his appeal, Gideon appealed his case to the United States Supreme Court. In this appeal Gideon was represented by future Supreme Court Justice Abe Fortas.[51]

The Court held that the Constitution did indeed guarantee Gideon the right to a lawyer.[52] It incorporated the right to counsel against the states for all criminal defendants accused of a felony. Citing *Powell* and *Johnson*, among other cases, the Court overturned *Betts*, stating that there was "ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."[53] The Court maintained that it was not making any fundamental alterations to constitutional precedent, and suggested instead that the *Betts* Court had made "an abrupt break with its own well-considered precedents"[54] in holding that representation for poor defendants was not a "fundamental right" worthy of incorporation.[55] As made clear by the Court, *Gideon* was not a revolutionary constitutional decision. It simply expanded the right to counsel in a way consistent with its treatment of other fundamental rights and corrected the deviation of *Betts*.[56]

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[49] *Gideon*, 372 U.S. at 336.

[50] The trial judge told Gideon that "the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense," to which Gideon replied "The United States Supreme Court says I am entitled to be represented by Counsel." *Id.* at 337.

[51] *See* LEWIS, *supra* note 48, at 48–52.

[52] *Gideon*, 372 U.S. 335.

[53] *Id.* at 341. One reason the Court may have been willing to stand up for the rights of indigent defendants in *Gideon* may have been a change in society's attitudes towards the poor. As Klarman notes, "it seems likely that the entire criminal procedure revolution was intertwined with changing popular attitudes toward poverty. Surely it is no accident that the Warren Court revolutionized the former at the same time that the Johnson administration declared war on the latter." Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 64 (1996); *see also* POWE, *supra* note 1, at 446 ("Astute commentators during the 1960s readily drew the connection between the Court's criminal procedure revolution and the Johnson administration's 'War on Poverty' . . . .").

[54] *Gideon*, 372 U.S. at 344. *But see id.* at 349 (Harlan, J. concurring) ("I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded.").

[55] Betts v. Brady, 316 U.S. 455, 471 (1942).

[56] This reading of *Gideon* is consistent with most scholarship on the topic. My argument diverges in its suggestion that *Betts* was informed more by the practical costs of extending the right to counsel than by the Court's concerns about federalism. *See, e.g.*, LEWIS, *supra* note 52, at 220 ("When *Betts v. Brady* was decided in 1942, the majority of the Court thought it was expressing a meaningful [constitutional] principle.").

That *Gideon* meant free counsel was clear at the time of the decision. This is apparent from the text of the opinion, which states that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[57] That the Court did not specify that "provided for him" meant at the expense of the state reflects only that it was too obvious to mention. Those who could afford to pay for an attorney were already guaranteed the right to have one; the Justices believed that they were dealing only with those "too poor to hire a lawyer."

The favorable public reaction to *Gideon* supports this reading.[58] The press proclaimed it America's guarantee of equal treatment for the poor. The *Washington Post* described *Gideon* as a landmark case for "the cause of justice for all indigent defendants" and declared that "[i]t is intolerable in a nation which proclaims equal justice under law as one of its ideals that anyone should be handicapped in defending himself simply because he happens to be poor."[59] This sweeping language would be out of place had the decision meant only that an indigent defendant was being given a loan from the government that would soon have to be repaid.

That *Gideon* required free counsel was presumed by at least three contemporary Supreme Court justices. In *United States v. Desist*,[60] a case addressing the retroactivity of criminal procedure decisions, Justice Harlan wrote in dissent that "*Gideon* had already established the proposition that the State must provide *free* counsel to indigents at the criminal trial."[61] Then in *Argersinger v. Hamlin*,[62] the case that extended the right to counsel to defendants in misdemeanor trials, Justice Powell wrote a concurring opinion, in which he was joined by Justice Rehnquist, to express his fear that "the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses. No one can foresee the consequences of such a drastic enlargement of the constitutional right to free counsel."[63] If Justice Powell had thought that *Gideon* allowed the states to charge indigent defendants for the exercise of their constitutional right, he would have had much less to fear.[64] Finally, Chief Justice Burger noted in a concurring opinion in *Argersinger* that "[w]ere [he] able to confine [his] focus solely to the burden that the States will have to bear in providing counsel,"[65] he would be inclined to vote against extending the counsel right.

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[57] *Gideon*, 372 U.S. at 344.

[58] *See* Reed, *supra* note 45, at 52 ("The decision was . . . popular with the public.").

[59] POWE, *supra* note 1, at 381 (quoting WASH. POST, Aug. 11, 1963, at E4).

[60] 394 U.S. 244 (1969).

[61] *Id.* at 268 (Harlan, J., dissenting) (emphasis added) (citation omitted).

[62] 407 U.S. 25 (1972).

[63] *Id.* at 52 (Powell, J., concurring).

[64] The majority also addressed the issue, noting that it did not "share Mr. Justice Powell's doubt that the Nation's legal resources are sufficient to implement the rule we announce today." *Id.* at 37 (majority opinion).

[65] *Id.* at 41 (Burger, C.J., concurring).

However, he and the *Argersinger* majority felt that the accused's constitutional rights outweighed the practical concerns of the state.

B. The Retreat from the Right: James *and* Fuller

Though *Gideon* may not have been revolutionary constitutional interpretation, its impact on state court practices was enormous. Since most criminal defendants are poor, the decision "mandated an in-kind wealth transfer to indigent defendants."[66] Faced with this drain on their treasuries, states began searching nearly immediately for ways to lessen *Gideon*'s financial impact.[67] Though they could not violate outright the Supreme Court's Sixth Amendment dictate by denying counsel to poor defendants, they were able to experiment with ways to reduce the cost of providing counsel.[68] In *Gideon*'s aftermath, a number of states passed statutes aimed at complying with the Supreme Court's ruling that included provisions requiring indigent defendants to reimburse the state for the cost of their attorneys. These provisions were immediately challenged as contrary to *Gideon's* mandate.[69]

1. Weighing the Cost of the Right, Again

On the very same day that the Justices heard arguments in *Argersinger*, they issued an opinion invalidating a Kansas provision requiring defendants to reimburse the state for the cost of their court-appointed counsel. In *James v. Strange*, the Court reviewed the Kansas Aid to Indigent Defendants Act, which both mandated the appointment of counsel for indigent defendants and instituted civil proceedings whereby the state could "recover [from the defendant] counsel and other legal defense fees expended for the benefit of indigent defendants."[70] In *James*, the defendant was charged with first-degree robbery under Kansas state law. He "professed indigency" and was appointed counsel under the aforementioned statute.[71] After counsel represented James at his guilty plea,[72] he received $500

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[66] POWE, *supra* note 1, at 445.

[67] One response to this increased cost could have been to prosecute and imprison defendants more selectively, thereby saving money on both trials and prisons. However, the trend since the 1970s has been exactly the opposite. Imprisonment rates steadily increased through the mid-1980s and then exploded in the late 1980s and early 1990s. *See Development in Law–Alternatives to Incarceration*, 111 HARV. L. REV. 1875, 1877–78 (1998) ("Between 1985 and 1996, the incarcerated population grew by 121%, outstripping the 84% growth rate of the entire correctional system, and continuing a trend toward increased incarceration that began in the early 1970s.") (footnote omitted).

[68] As discussed in Part I, *supra*, one way states have gotten around *Gideon* is by refusing to set standards for the quality of representation given to indigent defendants by their court appointed attorneys.

[69] *See, e.g.*, James v. Strange, 407 U.S. 128 (1972).

[70] *Id.* at 128.

[71] *Id.* at 129.

[72] James pled guilty to a "reduced charge of pocket picking." *Id.*

from the state for his services. The state then notified James that, pursuant to the statute, he had sixty days to reimburse the state for his appointed counsel before a judgment for that amount was docketed against him.[73]

James challenged the law's constitutionality on several grounds, and the United States District Court for the District of Kansas held that the statute was an unconstitutional violation of his right to counsel.[74] Relying on *United States v. Jackson*,[75] in which the Supreme Court struck down the Federal Kidnapping Act because the act conditioned the imposition of the death penalty on the defendant's assertion of his right to a jury trial and thereby chilled the exercise of that right, the district court held that requiring payment by indigent defendants would unnecessarily "chill" their use of their constitutionally guaranteed right to counsel.[76] In a strongly worded opinion, the district court held:

> Beyond question, the Kansas statute deters indigents from exercising their right to the assistance of counsel. The statute most assuredly puts the accused in the position of deciding whether he can afford to consult even with court appointed counsel. In practical effect, this statutory condition on an indigent accused's acceptance of court appointed counsel returns the indigent accused to the lawyerless position he occupied prior to the decision in *Gideon v. Wainwright*. For if an accused has not the means to hire an attorney in the first instance, he will not be in a position to accept court appointed counsel when it merely means that he has at most ninety days grace in paying the cost of legal services rendered on his behalf.[77]

The district court was not alone in condemning state reimbursement statutes on Sixth Amendment grounds. The two state supreme courts to consider the issue before *James* had also held that reimbursement statutes violated the right to counsel. In 1969 the California Supreme Court reasoned that, while the state's "concern for financial burdens imposed upon the counties for [the cost of appointed counsel] is commendable we believe that [the statutory fee] is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation."[78] That same year, the New Hampshire Supreme Court advised its legislature that such a statute would be unconstitutional

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[73] *See id.*

[74] Strange v. James, 323 F.Supp. 1230, 1234 (D. Kan. 1971).

[75] 390 U.S. 570 (1968).

[76] *Id.* at 1232–33. A discussion of the doctrine of the unnecessary "chilling" of constitutional rights appears in Part V *infra*.

[77] *Id.* at 1232.

[78] *In re* Allen, 455 P.2d 143, 144 (Cal. 1969).

under its state constitution's right to counsel.[79] Additionally, the American Bar Association's 1968 "Standards Relating to Providing Defender Services," produced by a committee chaired by future Chief Justice Warren Burger, noted that reimbursement for counsel "should not be required" because "the practice raises serious constitutional questions," including whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation.[80]

The Kansas district court restated *Gideon*'s "noble ideal" that "the right to counsel is absolute and should not be fettered by the poverty of the accused."[81] It held that the reimbursement statute rendered that decision "hollow verbiage"[82] by requiring payment from those defendants already deemed indigent and thus "by definition unable to stand the very expense in question,"[83] and added that "[t]o this court it is beyond question that the indigent's right to counsel as explicated in *Gideon* and the larger assurance of a fair trial implicit therein will not long endure unless the state provides counsel in a manner designed to assure that the indigent accused will in fact have counsel to represent him."[84]

Given the Justices' holding in *Argersinger*, one would assume that the Supreme Court would have at the very least affirmed the lower court's holding, if not expanded on *Gideon*'s precise requirements. Instead, the Supreme Court took the case in order to narrow the grounds on which the lower court had decided the constitutional issue. The Court noted that, because the statute was enacted to provide counsel to indigent defendants, it was "certainly no denial of the right to counsel in the strictest sense."[85]

The Court left open the question of whether the statute "impermissibly [deterred] the exercise of this right" because it found the statute was unconstitutional on Equal Protection grounds. The Court's narrow holding was that the statute at issue treated indigent defendants differently from other "civil judgment debtors" because they were denied the "exemptions afforded other judgment debtors," such as restrictions on the amount of earnings from which payment could be garnished.[86] However, the Court tacitly approved recoupment statutes more generally. It noted at the outset that "the Kansas statute is but one of many state recoupment laws appli-

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[79] Opinion of the Justices, 256 A.2d 500, 500 (N.H. 1969).

[80] American Bar Ass'n Project on Standards for Criminal Justice, Providing Defense Services 58–59 (Approved Draft 1968).

[81] *Strange*, 323 F.Supp. at 1233.

[82] *Id*. at 1234.

[83] *Id.*

[84] *Id.* The district court's statement seems prescient in light of later cases such as *Ross* and *Strickland*, which allowed states to curtail greatly when defendants may have counsel, and what the quality of their counsel must be.

[85] *James*, 407 U.S. at 134.

[86] *Id.* at 135.

cable to counsel fees," and refused to make "any broadside pronouncement on their general validity."[87]

Reading *James* in hindsight, it is clear that the Court was backtracking on its promise to ensure free counsel. Toward the end of his opinion invalidating the Kansas statute for denying equal protection to indigent defendants, Justice Powell somewhat tangentially noted that "the state interests represented by recoupment laws may prove important ones. . . . Many States . . . face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution."[88] This thinly veiled reference to *Argersinger*'s extension of the counsel requirement to misdemeanors suggests that the majority of the Court saw recoupment statutes as a way to alleviate the pressure it had put on state treasuries by expanding constitutional safeguards. Of course, this reasoning seems entirely beside the point if one sees *Gideon* as mandating counsel. Many constitutional requirements "burden" the states; it is not the Court's job to lessen the burden that the Constitution itself imposes. By invalidating the Kansas statute on grounds other than the Sixth Amendment, the Court signaled an initial retreat from the protection it had promised poor defendants in *Gideon* and *Argersinger*.

2. The Cost Trumps the Right

Two years later, in *Fuller v. Oregon*, the Court completed its retreat when it upheld an Oregon reimbursement statute.[89] The defendant, after pleading guilty to sodomy in the third degree, was sentenced to five years' probation on the condition that he repay the state for the fees incurred by his state-appointed counsel and the investigator hired by his attorney. This repayment stipulation was expressly authorized by an Oregon statute that laid out the provisions for appointing counsel to indigents in criminal cases. The statute provided that any defendant convicted of a crime might be required to pay costs and that these costs could be imposed as a condition of probation. It made clear that costs were only to be imposed on those indigent defendants who "[are] or will be able to pay them," and that the court assessing the fees was ordered to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."[90] The statute also allowed a defendant ordered to pay these costs to "petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof," and explained that "[i]f it appears to the satisfaction of the court that the pay-

[87] *Id.* at 132–33.
[88] *Id.* at 141.
[89] 417 U.S. 40, 57 (1974) (affirming the lower court's validation of the statute).
[90] *Id.* at 45 (citing OR. REV. STAT. § 161.665 (1973)).

ment of the amount due will impose manifest hardship on the defendant . . . the court may remit all or part of the amount due in costs."[91]

Finding the Oregon statute constitutional, the Court made much of the notion that the Oregon statute was "never mandatory." It also listed the conditions that had to be met in order for an indigent defendant to be charged counsel fees:

> First, a requirement of repayment may be imposed only upon a *convicted* defendant; those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal face no possibility of being required to pay. Second a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them'. . . . Third, a convicted person under an obligation to repay may [petition the court to remit the costs]. . . . Finally, no convicted person may be held in contempt for failure to pay [if his non-payment is not intentional].[92]

In emphasizing these conditions in its decision, the Court encouraged lower courts to place heavy emphasis on these safeguards in reviewing similar recoupment statutes. As a result, state statutes now largely include these same conditions. Whether intentional or not, then, this dictum in *Fuller* essentially ensured that challenges to recoupment statutes would no longer reach the Court.

The Court quickly disposed of the petitioner's claim that the statute violated the Equal Protection Clause "because of various classifications explicitly or implicitly drawn by the legislative provisions."[93] First, it made clear that the Oregon statute was "wholly free of the kind of discrimination that was held in *James v. Strange* to violate the equal protection clause."[94] Then the Court considered a new equal protection challenge, namely that the statute only assessed costs on those defendants found guilty. The Court had previously invalidated a statute that required prisoners to repay the state for the cost of trial transcripts for use in an appeal but did not require the same from those who were found guilty but not imprisoned. The Court found that defendants who were imprisoned should not be treated differently than those defendants who were sentenced to probation or fined.[95] Fuller's attorney suggested that the distinction between convicted defendants and those found not guilty was similarly harmful, but the Court found this distinction "wholly noninvidious."[96] In fact, the

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[91] *Id.*
[92] *Id.* at 45–46.
[93] *Id.* at 46.
[94] *Id.* at 48.
[95] Rinaldi v. Yeager, 384 U.S. 305, 305 (1966).
[96] *Fuller*, 417 U.S. at 49.

opinion went on to make clear how different these two classes were, saying that a "defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours."[97] The Court saw Oregon's distinction as "an effort to achieve elemental fairness" for defendants who were not found guilty.[98]

The Court also resolved the question it had left open in *James*: whether requiring indigent defendants to pay for counsel violated their Sixth Amendment right by deterring them from accessing counsel. In determining it did not, the Court stated that the Oregon statute provides free counsel for a defendant "when he needs it," and repeated its earlier insistence that only those found able to pay are required to do so. The Court did not discuss whether indigent defendants might be deterred from obtaining counsel by the knowledge that they might have to reimburse the state; rather, it stated that the Oregon statute "in no way affects [a defendant's] eligibility to obtain counsel."[99] It then distinguished the deterrent effect of a recoupment statute from that of statutes that "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." Again the Court emphasized that the Oregon statute "is tailored to impose an obligation only upon those with a foreseeable ability to meet it . . . ."[100]

In his dissent, Justice Marshall argued that the statute violated equal protection because indigent defendants required to repay the state might be imprisoned for nonpayment, whereas a defendant who had hired private counsel could never be imprisoned on those grounds. Because he found the statute to violate equal protection, Marshall did not reach the Sixth Amendment argument. However, in a footnote, he made clear that he would be open to a Sixth Amendment challenge were it brought by "a defendant who, unlike petitioner, had refused appointed counsel and contended that his refusal was not a knowing and voluntary waiver of his Sixth Amendment rights because it was based upon his fear of bearing the burden of a debt for appointed counsel . . . ."[101]

It is possible to argue that *Fuller* stands only for the proposition that a convicted defendant found in a separate hearing to be no longer indigent can be forced to repay the state. Concurring, Justice Douglas highlighted these features of the Oregon statute in his determination that the statute is constitutionally valid.[102] Read this way, the statute would essen-

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[97] *Id.* at 49–50.
[98] *Id.* at 50.
[99] *Id.* at 53.
[100] *Id.* at 54 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).
[101] *Id.* at 61 n.2 (Marshall, J., dissenting).
[102] *Id.* at 55 (Douglas, J., concurring in the judgment) ("[The Oregon statute] forbids

tially be a barrier to a nonindigent defendant claiming to be indigent and receiving free counsel, a concern emphasized by the Court.[103]

In reality, *Fuller* has a much broader impact. As is clear from the challenges to reimbursement statutes since *Fuller*,[104] the decision has been read expansively to allow the state to require reimbursement from defendants who meet the definition of indigency, who are never given hearings to determine the status of their resources, and who are compelled to repay the state at great hardship to them. However, the Supreme Court left open a number of bases on which to challenge such practices. The following Part will discuss the details of Massachusetts's reimbursement statute and illustrate how such challenges might be deployed to question the validity of that state's reimbursement scheme.

III. Tackling the Massachusetts Reimbursement Statute

This Part examines how the Supreme Court's decision in *Fuller* has manifested itself in Massachusetts and discusses possible avenues through which to challenge the state's reimbursement statute. Section A discusses the intricacies of the Massachusetts statute; Section B suggests ways to challenge the statute, focusing on exploiting the weaknesses of the statute's wording and drawing upon challenges brought in other states.

A. The Massachusetts Reimbursement Statute

It is clear from the many challenges that have been brought in other courts since *Fuller* that each state has its own method for administering the right to counsel, its own method for determining indigency,[105] and its own method of forcing defendants found to be indigent to repay the state for counsel. Thus states are left to set the bar for indigency, and in many cases they have set this bar at an incredibly low income level. Addition-

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the court to impose such a requirement at the time of sentencing unless the defendant at that time 'is or will be able to' pay those costs and requires the court to consider the 'nature of the burden that payment of costs will impose' on the defendant.") (quoting Or. Rev. Stat. § 161.655 (1974)).

[103] *See* James v. Strange, 407 U.S. 128, 141 (1972) ("Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency.").

[104] *See infra* Part IV.B.

[105] Neither the Supreme Court nor Congress has ever set standards for what constitutes indigency in state courts. *See* Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 Ind. L.J. 571, 579 (2005) ("In the absence of any direction from the Supreme Court of the United States, the determination of indigency has been left in the hands of the states."). Thus states are left to set the bar for indigency and in many cases have set this bar incredibly low. In this category, Massachusetts is one of the more reasonable states, setting the indigency level at 125% of the federal poverty level. Mass. S.J.C.R. 3:10(1)(f)(2). In contrast some states, such as Wisconsin, "set the financial eligibility threshold so high that individuals eligible for Medicaid coverage or food stamps would not be appointed counsel." Gershowitz, *supra*, at 590.

ally many states, including Massachusetts, have statutes that catch defendants who cannot afford to pay for counsel in their reimbursement net.

The Massachusetts reimbursement "statute" is actually a collection of statutes and judicially created rules. The statute, which ostensibly addresses the functioning of the Massachusetts public defender (Committee for Public Counsel Services ("CPCS")), also addresses how much to charge a defendant should she be declared indigent. Chapter 211D, Section 2 1/2 of the Massachusetts General Laws mandates that "a person claiming indigency . . . must execute a waiver authorizing the court's chief probation officer . . . to obtain the person's [financial information]."[106] It falls to the probation officer to determine if the defendant meets the "definition of indigency under section 2."[107] However, the "definition of indigency" is actually found in the procedural rules promulgated by the Supreme Judicial Court. Rule 3:10 defines an indigent person as one who receives certain types of public assistance; a person whose annual income, after taxes, is "one hundred twenty-five percent or less of the then current poverty threshold"; a person who is in a number of illness-related institutions; and a person in prison without funds."[108] Another category of defendants is labeled "indigent but able to contribute."[109] It is up to the judge, based on the probation officer's report, to determine if a defendant falls into either of these categories.[110] Furthermore, the probation department is mandated under Section 2 1/2 to "complete a re-assessment of the defendant's finan-

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[106] MASS. GEN. LAWS ch. 211D, § 2 1/2 (2006).
[107] *Id.*
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> *Indigent*—A party who is: (i) receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, or Supplemental Security Income (SSI); (ii) receiving an annual income, after taxes, one hundred twenty-five percent or less of the then current poverty threshold referred to in G.L. c. 261, § 27A(b); (iii) residing in a tuberculosis treatment center or a public or private mental health, mental retardation or long term care facility, including the Bridgewater State Hospital and the Treatment Center, or the subject of a proceeding in which admission or commitment to such a center or facility is sought, or who is the subject of a proceeding in which a substituted judgment determination concerning treatment is sought, provided, however, that where the judge has reason to believe that the party is not indigent, a determination of indigency shall be made in accordance with Section 4 and other applicable provisions of this rule. The provisions of paragraph (b) of Section 1 of this rule notwithstanding, for purposes of such determination "available funds" shall not include the liquid assets or disposable net monthly income of any member of the party's family; (iv) serving a sentence in a correctional institution and has no available funds; or (v) held in custody in jail and has no available funds.

MASS. S.J.C.R. 3:10 (1)(f) (2006).
[109] MASS. S.J.C.R. 3:10 (1)(g).
[110] MASS. S.J.C.R. 3:10 (4).

cial circumstances" every sixty days that she is represented.[111] The judge, at the next court appearance, has the right to revoke the defendant's counsel upon a finding that she no longer meets the definition of indigency.[112]

Rule 3:10, however, instructs the judge to appoint counsel before a determination of what level of indigency a defendant qualifies for. Judges are instructed to tell any defendant appearing without a lawyer that "the law requires that counsel be available in the proceeding, at public expense if necessary and if [ ]the court finds that the party wants counsel and cannot afford counsel, the Committee for Public Counsel Services will provide counsel at no cost or at a reduced cost."[113] This is the only information that a defendant in Massachusetts receives from the trial judge before she is assigned an attorney.

As noted above, a judge does not decide which category a defendant falls under until after counsel has been assigned. Thus, a defendant must accept the state's "deal" with no knowledge of what that deal is. After counsel is assigned the judge decides, with no hearing, whether a defendant is "indigent" or "indigent but able to contribute." This determination is subject to review "at any stage of a court," and a defendant has a right to request a hearing as to the determination of her status.[114] However, there is no requirement that a defendant be informed of this right when she is assigned counsel.[115] While in most circumstances a defendant could rely on her lawyer to assert her right to due process, in this instance it is unlikely that most defense lawyers will do so because relieving the defendant of this financial burden is directly adverse to the interests of a defense attorney. Even CPCS, which, of the attorneys representing indigent defendants in Massachusetts, is most likely to be concerned for a client's financial well-being, has published a report asking that the statutory fee be raised in order to better compensate attorneys for their work.[116]

The determination that a defendant is indigent rather than indigent but able to contribute does not mean that her counsel is free of charge. Rule 3:10 mandates that a defendant determined to be indigent "may not be ordered, required, or solicited to make any payment toward the cost of counsel, *except for an order entered pursuant to G.L. c. 211D § 2A*."[117] Both Sections 2A and 2 1/2 include a reference to the statutory fee that is to be

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[111] MASS. GEN. LAWS ch. 211D, § 2 1/2 (2006).

[112] "If, upon receipt of [the probation officer's] report, a judge finds that the defendant no longer meets the definition of indigency, he shall revoke the appointment of counsel . . . ." *Id.*

[113] MASS. S.J.C.R. 3:10 (2).

[114] MASS. S.J.C.R. 3:10 (7)(a).

[115] *See* MASS. S.J.C.R. 3:10 (7)(b) ("A party has the right to reconsideration in a formal hearing of the findings and conclusion as to the party's entitlement to assigned counsel.").

[116] *See* REPORT OF THE COMMISSION TO STUDY THE PROVISION OF COUNSEL TO INDIGENT PERSONS IN MASSACHUSETTS (2006) (suggesting that investigations into indigency be more stringent, that rates of repayment be raised, and that no counsel be provided for minor misdemeanors).

[117] MASS. S.J.C.R. 3:10 (10)(c)(1).

assessed for "all defendants assigned counsel" by the court. Section 2A specifically refers to a person charged with a misdemeanor, whereas section 2 1/2 refers to any defendant claiming indigency. Both sections note that the defendant should be charged a $150 fee for assigned counsel. Section 2 1/2 says that a judge may waive this fee "*only* upon a determination that the defendant is unable to pay,"[118] whereas Section 2A says simply that the fee "may be waived at the discretion of the court."[119] It is unclear whether this difference in language is intentional; in either case, a defendant assigned counsel will be charged the fee unless the judge, in her discretion, waives it. Furthermore, if upon the probation department's mandatory sixty-day review, a defendant who had the fee waived is determined to now be able to pay, the court is instructed to "invalidate the waiver and re-impose the $150 counsel fee."[120] The trial court may "authorize a defendant to perform community service in lieu of payment of the counsel fee."[121] The statute does not set boundaries for when community service should be imposed instead of the fee, nor for when the court should impose community service rather than waive the fee for a defendant whom it determines unable to pay.

An indigent defendant ordered to pay the fee under this statute is not free until she has reimbursed the state. The case against her remains open until she has paid the statutory fee, regardless of whether she has served her sentence or completed her probation. The statute orders the probation office to notify "the departments of transitional assistance, medical assistance and revenue and the registry of motor vehicles the amount of any legal counsel fee owed by the defendant."[122] These departments are authorized to take the amount owed by the defendant from their tax refunds or benefit payments and to put a lien on any motor vehicle owned by the defendant.[123] No notification is due to a defendant nor is any hearing required to determine whether or not the money deducted from their benefits is necessary for their basic living expenses.

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[118] MASS. GEN. LAWS ch. 211D, § 2 1/2 (2006).
[119] *Id.* at § 2A.
[120] *Id.* at § 2 1/2.
[121] *Id.*
[122] *Id.*
[123]

> The department of revenue shall intercept the fee from tax refunds due to persons who have not paid it. The departments of transitional assistance and medical assistance shall deduct the fee in weekly or monthly increments from the benefit payments of persons who have not paid it. The registrar of motor vehicles shall place a lien in the amount of any portion of the legal counsel fee owed by the defendant upon the title of any motor vehicle owned in whole or in part by him. The lien shall be released only upon notification from the clerk of the court that the fee has been collected or worked off in community service.

Id.

The statutes addressing appointed counsel make no distinction between those defendants who plead or are found guilty and those whose cases are dismissed or who are acquitted. However, Chapter 278, Section 14 says that "no prisoner or person under recognizance, acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees or for any charge for subsistence while he was in custody."[124] It is not clear that this statute refers to attorneys' fees. The fact that there is no mention of the remittal for acquitted or discharged defendants in Chapter 211(D) suggests that acquitted defendants also must pay for their counsel. Further, Chapter 261, Section 27A, which deals with court costs, specifically excludes attorneys' fees from its definition of "fees and costs."[125] While this chapter ostensibly applies only to "civil actions," Rule 3:10 refers to it for a definition of indigence,[126] and in several places Section 27 refers to criminal as well as civil actions. Thus it is entirely unclear whether those who are acquitted are free from reimbursement or whether their cases, like the cases of those who plead or are found guilty, also remain open until the fee is paid.[127]

The question of whether or not acquitted defendants must pay counsel fees is not clarified by the practice of judges. Based on many different accounts, judges in the Roxbury District Court have vastly different ways of interpreting the statute.[128] Some judges routinely impose the counsel fee on defendants whose cases are dismissed, while others remit the fee, citing Chapter 278. Some judges routinely conduct hearings to determine whether or not an indigent defendant has the resources to pay the fee, while others impose the fee even upon the protestation of defense counsel that their client is not able to pay it. One judge has a practice of doubling the counsel fee for defendants who are late repaying the state. In my limited experience, no judge makes clear to a defendant at her arraignment that she may have to pay the fee, and no defendant has taken advantage of her right to a hearing on the judge's determination of her financial status.

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[124] MASS. GEN. LAWS ch. 273, § 14.

[125] *Id.* at ch. 261, § 27A.

[126] MASS. S.J.C.R. 3:10 (1)(f) (2006) (referring to MASS. GEN. LAWS ch. 261, § 27A(b)).

[127] Though this Note assumes that the Massachusetts reimbursement statute applies only to those who are convicted or plead guilty, it is not clear that the statute would be constitutionally infirm even if it applied to defendants whose cases are dismissed or who are found not guilty. *See, e.g.*, State v. Kelleher, 452 N.E.2d 143, 145 (Ill. App. Ct. 1983) (holding that requiring fee reimbursement from an acquitted defendant "tends to put indigents and nonindigents who are acquitted, on the same basis and is consistent with due process."); Donovan v. Commonwealth, 60 S.W.3d 581, 584 (Ky. Ct. App. 2001) (upholding a Kentucky recoupment statute that assessed fees "without regard to guilt or innocence."). *But see* State v. Robinson, 109 P.3d 185, 191–92 (Kan. Ct. App. 2005) (highlighting the fact that "[the] statute . . . applies to only *convicted* defendants" and is therefore in line with the Court's holding in *Fuller*) (emphasis added).

[128] The following information was gathered from both direct experience and conversations with supervisors and students at the Criminal Justice Institute, the criminal law clinical program at Harvard Law School.

This lack of uniformity reflects the vague nature of the statute and its inconsistent implementation. It is clear that the statute falls short of the narrowly tailored and systematically implemented statute that the Supreme Court approved in *Fuller*. The Massachusetts courts have never issued a ruling on either the statute or the way judges interpret it.[129]

B. Challenging the Massachusetts Statute

1. The "Chill" Doctrine

The broadest challenge to the statute would be to assert that the threat of repayment chilled a defendant from exercising her right to counsel. The "chill" doctrine was established when the Supreme Court invalidated the Federal Kidnapping Act in *United States v. Jackson*, because it chilled a defendant's assertion of the right to a jury trial.[130] The Court stated that it may invalidate a statute deterring the exercise of constitutional rights regardless of the purpose of that statute: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[131] Relying on this statement, the two state supreme courts to have considered the issue of recoupment statutes have both held that, regardless of the statutes' purpose, they had the unnecessary effect of chilling the exercise of the right to counsel.[132]

In *Fuller*, the Court stated that these lower-court holdings were "wide of the constitutional mark." In the case of indigent defendants, it called the chill argument "fundamentally different" from the issue at stake in *Jackson*, because the statute in *Fuller* was "narrowly tailored" to ensure that those who would actually be deterred by the hurdle of repayment would never have to pay.[133] While the claim was summarily dismissed by the Court, Justice Douglas emphasized the narrowness of the statute:

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[129] No opinions on LexisNexis refer to the constitutionality of the statute or the way it is administered. In Lavallee v. Justices in the Hampden Super. Ct., 812 N.E.2d 895 (Mass. 2004), the Massachusetts Supreme Judicial Court discussed the compensation scheme in Section 211, but did not address the fees assessed to indigent defendants.

[130] 390 U.S. 570 (1968).

[131] *Id.* at 582.

[132] *See In re* Allen, 455 P.2d 143 (Cal. 1969) (California Supreme Court striking down reimbursement statute); Opinion of the Justices, 256 A.2d 500 (N.H. 1969) (advising the legislature that a reimbursement statute would violate the Sixth Amendment). *But see* State v. Foust, 185 S.E.2d 718 (N.C. Ct. App. 1972) (upholding North Carolina's statute and rejecting the "chill" argument). The Massachusetts Court has only addressed the "chill" doctrine in the context of the right to travel. *See* Opinion of the Justices, 257 N.E.2d 94 (Mass. 1970) (holding a two-year waiting period for those on welfare to migrate into the state as an invalid chill on the right to travel). It is likely that any Massachusetts court would rely heavily on the United States Supreme Court's pronouncements in *Fuller* in deciding whether or not the "chill" doctrine was applicable to a right-to-counsel challenge.

[133] Fuller v. Oregon, 417 U.S. 40, 54 (1974).

> The narrow *construction* of the Oregon recoupment statute in this case disposes of petitioner's claim that the statute "chills" the exercise of the right to counsel. Repayment cannot be required until a defendant is able to pay the costs, and probation cannot be revoked for nonpayment unless there is a specific finding that payment would not work hardship on a defendant or his family.[134]

A Sixth Amendment challenge, then, is not moot unless the statute at issue contains the same protections as the Oregon statute challenged in *Fuller.*

This challenge has already been brought in several states, however, and the results are not promising. All but one state court to have heard challenges to reimbursement statutes have rejected Sixth Amendment arguments.[135] Between 1974, when *Fuller* was decided, and 2005 appellate courts in Alaska, Florida, California, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nevada, North Carolina, North Dakota, Ohio, South Dakota, and West Virginia have entertained and dismissed challenges to their reimbursement statutes.[136] Each of these courts has relied on *Fuller* in shutting down the argument that the state statute chills the exercise of the right to counsel. While the holdings from other state courts are discouraging, they do not make a broad challenge to the Massachusetts statute impossible. Given how narrowly the Oregon statute was interpreted by the Court in *Fuller*, it is arguable that most defendants who are ordered to reimburse the state under the Massachusetts statute fall outside the bounds of what that case held acceptable.

From a procedural perspective, this kind of challenge would be strongest in a situation where a defendant had actually waived counsel based on her inability to pay the fee. As Justice Marshall noted, the challenge would be more germane if it were brought by one who could show that she had not exercised her constitutional right because of the hardship resulting from the statutory fee.[137] The challenges that have failed in other states have all been brought by defendants who were provided counsel at trial, making it

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[134] *Id*. at 56 (Douglas, J., concurring in the judgment).

[135] State v. Hess, 541 P.2d 1222, 1224 (Wash. 1975) ("Underlying the *Fuller* decision is a concern that indigent defendants might be discouraged from utilizing court-appointed counsel where repayment for such services could later be required without regard to the defendant's particular circumstances . . . . That concern remains.").

[136] State v. Albert, 899 P.2d 103 (Alaska 1995); People v. Amor, 523 P.2d 1173 (Cal. 1974); Bull v. State, 548 So.2d 1103 (Fla. 1989); People v. Love, 687 N.E.2d 32 (Ill. 1997); State v. Haines, 360 N.W.2d 791 (Iowa 1985); State v. Robinson, 109 P.3d 185 (Kan. Ct. App. 2005); State v. Donovan, 60 S.W.3d 581 (Ky. Ct. App. 2001); State v. Cunningham, 663 N.W.2d 7 (Minn. Ct. App. 2003); Taylor v. State, 903 P.2d 805 (Nev. 1995); State v. Webb, 591 S.E.2d 505 (N.C. 2004); State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982); State v. Young, 2005 Ohio 5766 (Ohio Ct. App. 2005); Eagle v. State, 280 N.W.2d 659 (S.D. 1979); Armstead v. Dale, 294 S.E.2d 122 (W. Va. 1982).

[137] *See supra* text accompanying note 101.

hard to argue that their right to counsel was actually chilled.[138] This is not to say that many state courts would not uphold the constitutionality of the statute anyway, but it would logically be harder for a court to tell a defendant claiming to have refused counsel because of the fee that it did not deter her from exercising her constitutional right.[139]

In order for a waiver of counsel to be valid under United States and Massachusetts law, it has to be "voluntary and intelligent."[140] A person waiving the right to counsel because she does not think that she can pay the statutory fee is arguably not waiving the right intelligently. The Massachusetts Supreme Judicial Court has recognized a strong presumption against waivers, stating that "when the question of waiver is raised, 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . [they] 'do not presume acquiescence in the loss of fundamental rights.'"[141] In order to waive counsel in Massachusetts, a defendant must sign a form specifically stating that she knows of her rights and has made a voluntary choice to proceed pro se.[142] In many instances, this signed form may overcome the presumption that a defendant did not make a voluntary and intelligent choice.

There is a serious argument, however, that a waiver based on a defendant's belief that she cannot afford the statutory fee cannot be knowing and valid.[143] This argument was not made to the Supreme Court in *Fuller* and still remains viable. In *Hanson v. Passer*,[144] the United States Court of Appeals for the Eighth Circuit overturned a conviction where a defendant had proceeded pro se because he claimed he could not afford to hire a lawyer, even though his net worth was above that of Kansas's indigency threshold. The court rejected the state's argument that the defendant had waived his right to counsel, noting that he "persistently asserted that he was entitled to counsel and protested at having to proceed pro se."[145] The

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[138] *See supra* note 136.

[139] In a dissenting opinion, a justice of the Alaska Supreme Court addressed the result of the requirement that a defendant forgo counsel before challenging a reimbursement statute because of its "chilling effect." The court held that the defendant's challenge was "not ripe, since Albert has not proved a chilling effect." Yet, as the dissent pointed out, the defendant could not offer proof that others were chilled because "[t]here are no statistics to illuminate this issue; the court system has failed to keep them. Given this failure, it is at once unfair to fault Albert for his inability to prove Rule 39's chilling effect and anomalous to expect that anyone will ever be able to offer such proof." The "paradoxical" result of this deficiency was that the Court was able to "skirt the . . . chilling effect of these provisions." *Albert*, 899 P.2d at 130–31 (3-2 decision) (Bryner, J., dissenting).

[140] Commonwealth v. Cavanaugh, 353 N.E.2d 732, 739 (Mass. 1976).

[141] *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[142] *See id.*

[143] *See* Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 MICH. L. REV. 1404, 1415–16 (1969) ("Generally, a valid waiver of the right to counsel . . . must involve an intelligent and competent decision . . . . Accordingly, an indigent defendant's unwillingness to undertake the obligation of repayment may so color his decision to waive his rights that the waiver could not be considered valid.").

[144] 13 F.3d 275 (8th Cir. 1994).

[145] *Id.* at 280.

court did note that, had the state appointed counsel and later determined how much the defendant would have to reimburse the state, it would have "passed constitutional muster."[146] However, the defendant in this case was not determined to be indigent, as a defendant challenging the Massachusetts statute would be.

The key to a successful Sixth Amendment deterrence claim would be to show that the $150 reimbursement fee actually deterred a defendant from accepting counsel. In order to broaden the scope of the challenge, it would be necessary to show that, for the average indigent defendant, a $150 fee is, in the language of the Supreme Court's opinion in *Fuller*, a "manifest hardship." Information regarding the income and expenses of an average indigent defendant would be very important to this type of challenge, and there would be a number of ways to present the information.

It might be difficult for a judge to appreciate that $150 could deter anyone from using a lawyer when the disadvantages to proceeding without one are so well-documented. Rather than simply citing the actual poverty of most indigent defendants, a more convincing strategy might be to emphasize their "relative deprivation."[147] In "Relatively Deprived," John Cassidy argues for the use of relative rather than absolute poverty thresholds.[148] He notes that "while money matters to people, their relative ranking matters more."[149] This insight could be very helpful in a challenge to this kind of reimbursement statute. For instance, trial judges in Massachusetts make $112,777 a year.[150] A person who meets the federal poverty threshold level makes $9,800 a year.[151] To qualify as indigent in Massachusetts, a defendant must make less than 125% of this amount, i.e., less than $12,250. Most indigent defendants make less than 10% of what a trial judge in Massachusetts makes. Put in those terms, a court might less readily assume that a defendant could make this kind of payment. Additionally, as Adam M. Gershowitz notes, "a criminal defendant earning 126% of the federal poverty guidelines [and reasonably spending half of his discretionary income on other expenses before getting into legal trouble] would have only $1,168 remaining at the end of the year."[152] A Massachusetts trial judge, on the other hand, after taking care of the bare necessities and spending half of her discretionary income, would have approximately $45,000. One hundred and fifty dollars represents almost 10% of an indigent defendant's

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[146] *Id.*

[147] John Cassidy, *Relatively Deprived*, NEW YORKER, Apr. 3, 2006, at 45.

[148] *See id.* at 44 ("Rather than trying to come up with a subsistence-based poverty measure . . . we should accept that there is no definitive way to decide who is impoverished and who isn't.").

[149] *Id.*

[150] Scott Helman & Lisa Wangsness, *Healey Raps Pay Raises for Judges*, BOSTON GLOBE, Apr. 19, 2006, § 3 at B1 (noting that the legislature has come to an agreement to raise judges' salaries to $130,000 a year).

[151] Annual Update of the HHS Poverty Guidelines, 71 Fed. Reg. 3848 (2006).

[152] *See* Gershowitz, *supra* note 105, at 587.

discretionary funds. Someone on a judge's salary asked to pay 10% of his discretionary funds (or $4,500) might well be deterred by such a sum, particularly if she had been through the system already (as many criminal defendants have) and knew the amount of time and energy a court-appointed attorney was likely to devote to her case.

This argument would be stronger if the defendant had been charged with a minor crime. For instance, a judge asked to pay $4,500 to defend a charge of murder might well be willing to do so, but what about defending against a charge of driving with a suspended license? Trespass? Possession of a Class D substance? A defendant facing a misdemeanor or minor felony might be deterred from accepting counsel if it meant spending 10% of her discretionary income to do so.

A counterargument in Massachusetts might be that a defendant must know that she will have to repay the state for representation in order to be chilled from requesting counsel. The statute seems explicitly to instruct a judge to assign counsel before she determines a defendant's indigency. There is no mandate that a judge alert a defendant that she will be charged for counsel before she accepts.[153] This argument can be turned around, however, and used by those who have accepted counsel. If a defendant has accepted counsel without knowing that she will have to reimburse the state, it seems clearly to violate her right to due process to then order her to pay. Given that the statement read to the defendant at her arraignment clearly says that counsel will be provided at the cost of the state if needed, a defendant who is able to claim indigency might well assume that she was poor enough to receive this constitutional benefit free of charge.

The fact that there is little or no inquiry into whether or not an individual defendant is able to pay the fee might well be considered constitutionally infirm and serve as another basis for challenging the reimbursement system. The Massachusetts system requires only a cursory review of a defendant's financial resources by a judge. In overturning an order to pay counsel fees, the Pennsylvania Superior Court made clear that, without assurance that "only those able to repay will ever be required to, there is a real danger that some may choose to forgo their right to appointed counsel."[154] The court went on to hold that the judge's order for reimbursement violated the Sixth Amendment because "[a]ction by the state which unnecessarily chills the exercise of a constitutional right is invalid."[155]

Despite the widespread refusal to condemn statutes on Sixth Amendment grounds, a number of opinions condition the constitutionality of a stat-

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[153] Most state statutes require that a defendant be informed of any attorney fee that automatically attaches, but at least one state has held that a judge's failure to advise a defendant of the fee did not constitute reversible error. *See* Eagle v. State, 280 N.W.2d 659, 661 (S.D. 1979) ("We agree with appellant that an accused should be [advised of the fee], but we do not agree that failure to do so constitutes constitutional error.").

[154] Commonwealth v. Opara, 362 A.2d 305, 313 (Pa. Super. Ct. 1976).

[155] *Id.* at 314.

ute on a stringent requirement that a defendant be found able to pay by a trial court before the fee is imposed. Several courts have held that the Sixth Amendment requires that a hearing be held to determine if a defendant is able to pay the reimbursement fee before she is ordered to do so. A number of these courts have read statutes that sweep far more broadly than the Oregon statute in *Fuller* to apply only on the narrow terms under which that statute was upheld. In *Cunningham*, the Minnesota Supreme Court noted that a statute requiring a $28 co-payment by any defendant assigned counsel "raises serious constitutional concerns" because it lacked "statutory limitations."[156] The court avoided invalidating the statute by construing a provision giving judges discretion to waive the fee as requiring that they waive it "when . . . the co-payment would cause a defendant to suffer manifest hardship." The Court read the statute this way "even though this may not have been the intent of the legislature."[157] The South Dakota Supreme Court similarly held "that the condition of repayment can only be enforced in circumstances where the probatee has funds available for such repayment, to avoid any unconstitutional 'chilling effect' upon his right to counsel."[158]

Those state court opinions that have upheld reimbursement statutes that do not require individual hearings before assessing attorney fees on a defendant have occasioned bitter dissents. These dissents focus particularly on the court's duty to ensure that a defendant is not threatened with a fee that she cannot afford.[159] In 1995, the Alaska Supreme Court upheld Alaska's reimbursement statute, which imposed a fixed fee without the safeguard of a hearing to determine a defendant's ability to pay. In response, Justice Bryner wrote a long dissent. Challenging the notion that indigent defendants in Alaska were treated no worse than their nonindigent counterparts, he opined, "In no other area of Alaska law . . . is a private or public debtor virtually stripped of the right to a trial—or even the right to a hearing—and subjected to . . . the automatic entry of a final civil judgment . . . . This treatment is unique to indigent defendants . . . , and it is uniquely harsh."[160] To this judge, at least, the potential burdens imposed by accepting counsel might well chill an indigent defendant from accepting the state's offer.

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[156] State v. Cunningham, 663 N.W.2d 7, 10 (Minn. Ct. App. 2003).

[157] *Id*.

[158] *Eagle,* 280 N.W.2d at 661.

[159] *See* State v. Robinson, 109 P.3d 185, 194 (Kan. Ct. App. 2005) (Greene, J., dissenting) ("*[A] court should not order a convicted person to pay . . . unless he is able to pay* . . . considering his financial resources and the nature of the burden that payment will impose. . . . The Majority's interpretation . . . renders meaningless the . . . requirement that financial burden be considered when the fees are initially assessed. This interpretation is not only inconsistent with the statutory intention, it violates the United States Constitution.") (emphasis in original).

[160] State v. Albert, 899 P.2d 103, 124 (Alaska 1995) (Bryner, J., dissenting).

2. Due Process

Several state courts have found that the Due Process Clause of the Fourteenth Amendment requires a hearing on the record into a defendant's actual ability to pay before a fee is assessed. In *People v. Love*, the Supreme Court of Illinois stated that "due process requires a hearing into a defendant's ability to pay reimbursement as a precondition to ordering such reimbursement."[161] In fact, the legislature had incorporated a hearing requirement into its statute in order to prevent the courts from invalidating it.[162] Likewise, the much embattled Kansas statute found unconstitutional in *James* was upheld only after it was written to "[take] into account the defendant's financial resources and [afford] a judicial determination of a defendant's ability to pay," among other safeguards.[163]

The Massachusetts statute does not require a hearing into the defendant's ability to pay. In fact, it only requires a cursory review of the probation officer's findings regarding the defendant's financial resources before a judge imposes the fee. The potential chilling effect of the standard entry of an order to pay combined with the statute's lack of procedural safeguards leaves Massachusetts well behind most states in terms of the due process it extends to indigent defendants.

The Massachusetts statute contains one loophole in its community service provision. Arguably, a defendant who cannot afford to pay the statutory fee can do community service instead. It might be averred that this provision mitigates the chilling effect that the need to pay would otherwise have on an indigent defendant by providing them an alternative to paying a fee. Under the current statute, however, judges have absolute discretion to decide whether to impose the fee, impose community service, or waive the requirement altogether. A judge who is sensitive to a defendant's financial situation might seriously consider community service as an alternative to a fee, but there are judges who routinely enforce the fee without concern for a client's ability to pay it. Without genuine sensitivity to a defendant's ability to pay, the chilling effects of the statute remain.

Furthermore, there are a number of arguments to be made against imposing community service on a client who is too poor to pay the statutory fee.[164] Defendants might well be chilled from accepting counsel if they

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[161] People v. Love, 687 N.E.2d 32, 36 (Ill. 1997). *But see Albert*, 899 P.2d at 109 ("[We] conclude that James [sic] and Fuller [sic] do not require a prior determination of ability to pay . . . .").

[162] *See Love*, 687 N.E.2d at 36 (noting that the legislature's most recent statute was "clearly intended to correct the due process violation identified in *Cook* by requiring that, prior to ordering reimbursement, the trial court conduct a hearing which considers the defendant's financial ability to pay the reimbursement.").

[163] State v. Robinson, 109 P.3d at 192.

[164] My first inclination was to make a Thirteenth Amendment argument that the community service provision was "involuntary servitude." U.S. CONST. amend. XIII, § 1. However, since the right to counsel can be waived, such an argument would not be particularly

are aware that they must work for the state in order to earn this representation, particularly if they are charged with only minor crimes. Second, although the Supreme Court has specifically upheld the imposition of fines for indigent defense, it has never considered the imposition of community service.[165] A similar provision was successfully challenged in Iowa, where the state supreme court held that judges cannot offer community service as an alternative to paying a fee without first determining whether the defendant is able to pay the fee.[166]

Whether or not the community service provision saves the statute from being invalidated, it does not save it from being applied unfairly by judges with absolute discretion. Any challenge to the statute should insist that no judge be able to enforce the fine without a hearing on the record showing that the defendant is able to pay. One tactic is to urge disciplinary action against judges who impose the fine on acquitted defendants, or those who double or add to the fine for nonpayment or other punitive reasons. This strategy has the advantage of focusing attention on the vagueness of statutory standards. In response, judges will either read specific standards into the statute and be disciplined for acting outside this mandated scope, or will find the statute too vague, prompting them to insist that the legislature clarify the statute to include procedural safeguards for the defendant.

Gathering information about the way judges administer the statute is critical. If judges in Roxbury interpret the fee assessments so differently from one another, it is likely that judges in other districts also diverge in the amount of process and consideration they give to defendants when deciding whether to impose the fee, impose community service, or waive the statute altogether. Information on the number of defendants who are able to pay the fee is also critical. For instance, if it were shown that the majority of defendants were unable to pay the fee, the legislature might reconsider its imposition. As the Supreme Court noted in *James*, "only $17,000 has been recovered under the statute in its almost two years of operation, and . . . this amount is negligible compared to the total expended."[167] The Court refused to consider the negligible return because "[w]hether the returns under the statute justify the expense, time, and efforts of state officials is for

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apt.

[165] Much of the Court's ruling in *Fuller* rested on the notion that the "primary purpose sought to be achieved through recoupment statutes [was the] replenishment of public treasuries." Holly, *supra* note 12, at 219. The link between community service and replenishing the public treasuries, though theoretically plausible, is far more attenuated than that between direct reimbursement and such replenishment. It is not clear that the same alleged purpose would have convinced the Court in *Fuller* to uphold a community service requirement.

[166] People v. Haines, 360 N.W.2d 791, 797 (Iowa 1985) ("[T]he [Iowa] statute . . . require[s] the court to determine whether defendant is reasonably able to pay and to sentence accordingly. In failing to exercise its discretion, the court has sentenced defendant in the alternative. A sentence in the alternative is defective because of uncertainty.").

[167] James v. Strange, 407 U.S. 128, 134 (1972).

the ongoing supervision of the legislative branch."[168] The legislature might be willing to consider the adverse effects that a statute of this kind has on indigent defendants if it can be shown that it contributes only a negligible amount to the coffers of the state.[169]

IV. Conclusion

As recent public attention has shown, recoupment statutes are just the tip of the iceberg where burdens imposed on the poor by the criminal justice system are concerned. The *New York Times* recently published an article documenting the enormous costs that defendants must pay—costs that continue to punish defendants long after they have served their sentences.[170] A woman in Washington who spent nine months in jail for a drug conviction was released owing $1900. A man from Louisiana who spent forty-four years in prison was released only to find that he owed the state $127,000 in court costs.[171] The fees are characterized as a way to "offset some of the enormous costs of operating the criminal justice system."[172] These "enormous costs" stem in large part from the state's need to provide indigent defendants with counsel. The article paraphrases a Georgia judge as saying that "his state's many fees, known there as add-ons, were a backdoor way to make poor people pay for the free lawyers guaranteed to them by the United States Supreme Court's decision in *Gideon v. Wainwright* in 1963."[173] It is hard to imagine that, when the Supreme Court decided *Fuller*, it foresaw indigent defendants owing thousands of dollars to the state, not as part of a punishment, but for the operating costs of defending themselves.

Even if challenging Massachusetts's reimbursement statute proves legally ineffective, doing so would at least highlight the chasm between the promise of fairness and equality that proposes to legitimize the criminal justice system, and the grim reality that undermines that promise.

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[168] *Id.*

[169] This assertion takes an optimistic view of the way the legislature would respond to arguments on behalf of criminal defendants; in fact, it might not give those arguments much weight.

[170] Adam Liptak, *Debt to Society is Least of Costs for Ex-Convicts*, N.Y. Times, Feb. 23, 2006 at A1.

[171] *Id.*

[172] *Id.*

[173] *Id.*