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The Political Economy of Application Fees for Indigent Criminal Defense

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THE POLITICAL ECONOMY OF APPLICATION FEES FOR
INDIGENT CRIMINAL DEFENSE

RONALD F. WRIGHT* & WAYNE A. LOGAN**

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INTRODUCTION

State and local governments spend serious money every year to hire lawyers for criminal defendants who cannot otherwise afford their own attorneys. Like all the other big-ticket items in a public budget, this one is revealing. Funding for this politically unpopular yet necessary government service must go through the legislative appropriations process, year in and year out, producing an instructive case study in crime politics.

Legislators who draft the criminal justice portions of the state budget routinely express the hope that the government can control the expense of indigent criminal defense. One method of doing so involves recovering part of the attorneys' fees from the defendants themselves. Some defendants, although they may qualify for appointed counsel under the state's standards for indigency, still have the financial means to pay for part of their defense, or will be in a position to do so in the future, allowing the state to recoup some of its expenses after the case ends.

But these traditional "recoupment" statutes require a great deal of judicial effort to sort the truly indigent from those with more resources, and considerable administrative effort to track defendants over time and collect the monies piecemeal. The disappointing revenues collected under recoupment statutes have led many states, since the early 1990s, to experiment with a different cost-control technique: statutes that instruct courts to assess up-front "application fees," typically in the range of \$25 to \$100.¹ The fees are charged automatically to criminal defendants, who, despite their demonstrated poverty, are expected to "pay as they go," often without regard for the outcome of their case. The fees, imposed on the front end of the criminal prosecution process, do not create the same administrative burdens as the more income-sensitive "recoupment" procedures, yet they enjoy many of the same policy and political benefits. As we explain in Part I, they have now spread to over half the states.

1. See *infra* Part I.A.

These application fee statutes follow a typical route through the legislative process. Part II portrays this process as an internal struggle among defense lawyers, in particular between the leadership and the rank-and-file attorneys who work in organizations that provide legal services to indigent criminal defendants. Instead of the archetypal political debate between prosecution and defense-oriented advocates, this debate plays out within the ranks of defense providers, in the process revealing differences in priorities and professional self-images, and ultimately, varied notions of what best serves the interests of indigent defendants.

Counterintuitively, it is defense organizations themselves that often initiate the idea of application fees, generally during a time of budgetary stress for a defender program. The high-level administrators who deal with budgets and negotiate with legislators tend to favor the fees from an institutional perspective. The application fees not only hold the promise of increasing revenue, but also to secure legislative goodwill by showing a willingness to contain costs and possibly impose a measure of personal responsibility among the client base. From the vantage point of the leadership, operating a program within harsh budgetary and political limits, the choice to endorse application fees is a natural one, and the endorsement of the concept might be more important for their purposes than the actual collection of fees. As for the effects of fees on prospective clients, defense organization leaders tend to downplay—without any direct empirical support—the burden on their impecunious clients.

Resistance to fees inevitably comes from lower in the defense ranks, from attorneys who represent indigents and view matters from an individual client perspective rather than an institutional vantage point. Perceiving themselves to be at the ramparts of the hallowed ideals of *Gideon v. Wainwright*,² they stand for uncompromised principles of government responsibility to the criminally prosecuted poor and rely on supposition and anecdotal evidence to assert that the fees, while comparatively small, will chill many defendants' willingness to request a lawyer.

These objections from the field operators of the defense organizations, however, usually give way to budgetary and political imperatives. The defense establishment, like other bureaucracies,

2. 372 U.S. 335 (1963).

takes its policy direction from the top. Faced with the right combination of budgetary and political woes, a defense organization will bow to necessity (as seen by its leaders) and adopt a policy to collect application fees.

Part III tracks the fate of application fee laws after the formal policy takes effect. This is the juncture where rank-and-file defense actors, quelled in the legislative debates, push back. In individual cases and strategic test cases alike, publicly appointed defense counsel file legal challenges. In ruling on these challenges, courts offer their own reactions to the application fee statutes: in two instances to date, state supreme courts have invalidated the laws on constitutional grounds.³

An equally important judicial reaction, however, occurs at the trial level. Trial judges draft rules and establish courtroom routines that determine the real impact of the application fee statutes. In conjunction with rank-and-file defense attorneys who see the issue more from the vantage point of individual defendants, judges in local courtrooms enjoy the capacity to create broad de facto limits on the reach of the fee statutes. Although the upper-tier defense advocates align themselves with legislators (and prosecutors), the lower-tier defense advocates find their allies among the ranks of trial judges.

The defendant's waiver decision plays a starring role in all these debates and reactions to the application fee laws. Both the legislative debates and the judicial responses to fee laws are based on speculative assertions about the waiver decisions of defendants. Yet in the application fee context, and particularly when it comes to misdemeanors (which make up the vast majority of criminal charges), surprisingly little is known about waiver of counsel, including such basic facts as the number of criminal defendants who waive their legal right to appointed counsel and why they do so.

Powerful reasons exist to believe that an application fee could seriously affect a defendant's waiver decision, starting with anecdotal evidence from attorneys and judges who report increases in waivers after the application fee statutes take effect. Careful studies of the effects of "co-pay" systems in other settings, such as medical insurance, also suggest that the effect on waiver of counsel

3. See *infra* Part III.

could be significant. Nevertheless, in Part IV we assemble data to suggest that application fee laws have only muted effects on waiver decisions. By tracking the level of counsel waiver in recent years in two jurisdictions that passed application fee statutes, we find little or no evidence that the fees increased the number of waivers during the target period.

Perhaps the administrators of indigent defense organizations who support the application fees are correct: defendants do not consider the fees to be large enough to affect their waiver decisions. We believe a better explanation, however, builds on the power of trial actors to neutralize the effects of any new criminal justice policy, at least in the short run. Application fee statutes matter far less in practice than the political debate might indicate because the trial-level actors remain unsympathetic to them and implement them in ways that blunt their effects. Their power to refract the effects of such policies is especially strong in the high-volume world of misdemeanor courts. In this context, as in so many others in criminal justice, having the last word can matter the most.

I. THE SPREAD OF INDIGENT DEFENSE FEE LAWS

The right of indigents to have government-funded counsel dates back to *Gideon v. Wainwright*⁴ (for felonies) and before that to *Powell v. Alabama*⁵ (for capital crimes). In both decisions, the Supreme Court concluded that the Sixth Amendment, although it does not require the government to sponsor defense attorneys in all prosecutions,⁶ compels the states in serious criminal cases to provide attorneys for defendants too poor to pay.⁷ Subsequently, the

4. *Gideon*, 372 U.S. 335.

5. 287 U.S. 45 (1932).

6. See U.S. CONST. amend. VI (providing only that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence,” not that counsel be state funded). Under English common law, criminal defendants had a right to counsel in misdemeanor but not felony cases; only in 1836 were accused felons in England allowed counsel. See *Faretta v. California*, 422 U.S. 806, 821-26 (1975). By the time of the framing of the U.S. Constitution, twelve of the thirteen original states rejected their forebears’ rule and recognized the right to counsel in almost all criminal prosecutions. See *Powell*, 287 U.S. at 64-65. For more on this history, see Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 226-27 (2004).

7. See *Gideon*, 372 U.S. at 341; *Powell*, 287 U.S. at 71. In 1938, the Court held that the Sixth Amendment required counsel in all federal criminal proceedings. *Johnson v. Zerbst*, 304

Court expanded the right to include defendants accused of any criminal offense if conviction could “end up in the actual deprivation of a person’s liberty.”⁸

This affirmative constitutional obligation, unlike others such as the warnings that the police must provide criminal suspects under *Miranda v. Arizona*,⁹ sends powerful annual shock waves through state budgets.¹⁰ As the Supreme Court has expanded the right over time, and states themselves have made appointed counsel more available,¹¹ the fiscal impact of appointed counsel has increased.¹² Currently, 82% of felony defendants in large states utilize publicly funded counsel;¹³ and while the Supreme Court has acknowledged

U.S. 458, 467-68 (1938).

8. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). The right also extends to felony preliminary hearings, see *Coleman v. Alabama*, 399 U.S. 1, 9 (1970), sentencing proceedings, see *Mempa v. Rhay*, 389 U.S. 128, 137 (1967), and appeals of right from convictions, see *Halbert v. Michigan*, 125 S. Ct. 2582, 2586 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963). No right to appointed counsel extends, however, to instances when only a criminal fine is imposed (not prison or jail), see *Scott v. Illinois*, 440 U.S. 367, 368, 373-74 (1979), and to discretionary appeals, see *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

9. 384 U.S. 436 (1966).

10. Of course, the nonfiscal consequences of *Miranda*, as well as numerous other constitutional safeguards the Court has imposed on states, have long been debated. See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 391 (1996) (suggesting that *Miranda* has prevented confessions in approximately one out of every six cases).

11. See B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 418-19 (2000) (noting that fifteen or fewer U.S. jurisdictions provide only the bare minimum of counsel coverage prescribed by the Supreme Court). While courts have seen fit to expand the scope of the right, legislatures have shown a ready willingness to offset such increases by lowering financial eligibility thresholds, thereby shrinking the overall pool of mandated counsel appointments. See, e.g., FLA. STAT. ANN. § 27.52(4)(a)(1) (West 2005) (declaring that a defendant is indigent if his income is “equal to or below 200 percent of the then-current federal poverty guidelines” or if the defendant is receiving specified government assistance for the needy). Because of the wide variations in state standards for indigency, as noted by one commentator, “*Gideon* means something different in Alabama than it does in Florida.” Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 572 (2005).

12. Between 1982 and 1999, for instance, data from twenty-one states showed that state spending on appointed counsel increased more than two and one-half times in terms of inflation-adjusted dollars. See CAROL J. DEFRAnces, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 2 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf>.

13. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

the associated costs,¹⁴ federal money has never arrived to fully fund the federal constitutional mandate.¹⁵ As a result, state and local governments foot the bill mostly by themselves,¹⁶ annually spending millions to fulfill their constitutional obligation to fund indigent defense.¹⁷

In the 1990s, the combination of budgetary shortfalls and constitutional challenges to underfunded indigent defense systems that threatened even larger future expenses¹⁸ forced state legislatures to take action. They pursued various alternate funding mechanisms for indigent criminal defense. In keeping with the privatization strategies increasingly in vogue,¹⁹ many states tried to trim their criminal defense budgets by shifting the costs of such

14. See *James v. Strange*, 407 U.S. 128, 141 (1972) (recognizing that the expansion of the right to counsel has "heightened the burden on public revenues").

15. See DEFRANCES, *supra* note 12, at 1 (noting that over 90% of funding for appointed counsel in each of twenty-one states included in the report originates from nonfederal sources). As Darryl Brown recently observed, while the "Court is rigorous about protecting the formal right to counsel [it] barely regulates the *quality* of counsel." Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1603 (2005) (footnote omitted).

16. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 42 (2004) [hereinafter BROKEN PROMISE], available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (noting that "virtually no federal funds are allocated for defense services in the fifty states").

17. See THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002, at 35 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (reporting that in 2002 state and local expenditures for indigent defense exceeded \$2.8 billion). Notably, counties play a significant part in indigent funding. See BROKEN PROMISE, *supra* note 16, at 8 tbl.1 (noting that in six states counties provide 90% or more of indigent defense funds). For a discussion of the methods of providing appointed counsel such as the use of public defender programs, rosters of private attorneys serving by appointment, and contract attorneys, see *id.* at 2.

18. See Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1791-802 (1999) (book review) (surveying state litigation over the cost of defense counsel systems). For a discussion of the professional ethics implications on counsel because of this underfunding, see Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

19. See generally PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992) (arguing that privatization can benefit the criminal justice system in various ways, such as helping to reduce court dockets and prison overcrowding). For a more general discussion of the increasing tendency of governments to charge for services, see Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373 (2004).

services back to the consumers—indigent criminal defendants. Today, cost recovery mechanisms typically take two primary forms: (1) recoupment, a court order imposed at the conclusion of a case for the defendant to pay an amount reflecting the actual cost of attorney’s fees, and (2) contribution (sometimes referred to as “application fees,” “co-pays,” “user fees,” or “administrative” or “registration” fees), a fixed sum imposed at the time of appointment. This Article focuses on the latter, which we refer to collectively as application fees, the newest variety of cost-recovery mechanisms on the criminal justice landscape.

A. Extent and Variety of Application Fees

Currently, laws in twenty-seven U.S. jurisdictions (twenty-five states²⁰ and two counties²¹) authorize or compel judges to impose a fee on indigent criminal defendants who seek appointed counsel. The laws each condition appointment of counsel on payment of a fee,

20. See ARIZ. REV. STAT. ANN. § 11-584(B) (Supp. 2005); ARK. CODE ANN. § 16-87-213(a)(2)(B) (Supp. 2005); CAL. PENAL CODE § 987.5 (West Supp. 2005); COLO. REV. STAT. ANN. § 21-1-103(3) (West 2004); CONN. GEN. STAT. ANN. § 51-298 (West 2005); DEL. CODE ANN. tit. 29, § 4607 (2003); FLA. STAT. ANN. § 27.52(1)(b)-(c) (West Supp. 2005); GA. CODE ANN. § 15-21A-6(b) (2005); IND. CODE ANN. § 35-33-7-6(c) (LexisNexis Supp. 2005); KAN. STAT. ANN. § 22-4529 (2004); KY. REV. STAT. ANN. § 31.211(1) (LexisNexis Supp. 2004); LA. REV. STAT. ANN. § 15:147(a)(1)(d) (2005); MASS. GEN. LAWS ANN. ch. 211D, § 2A (West 2005); MINN. STAT. ANN. § 611.17 (West Supp. 2005), *invalidated in part by State v. Tennin*, 674 N.W.2d 403 (Minn. 2004) (invalidating mandatory fee on Sixth Amendment grounds but condoning imposition of fee on discretionary basis); N.J. STAT. ANN. § 2B:24-17(a) (West Supp. 2005); N.M. STAT. ANN. § 31-15-12(C) (West 2003); N.C. GEN. STAT. § 7A-455.1 (2003), *invalidated in part by State v. Webb*, 591 S.E.2d 505, 511 (N.C. 2004) (concluding the assessment of counsel fees on acquitted defendants under subsection (b) violated the state constitution); N.D. CENT. CODE § 29-07-01.1(1) (Supp. 2005); OHIO REV. CODE ANN. § 120.36(A) (West 2006); OKLA. STAT. ANN. tit. 22, § 1355A (West 2003); OR. REV. STAT. ANN. § 151.487(1) (West 2003); S.C. CODE ANN. § 17-3-30(B) (2003); TENN. CODE ANN. § 40-14-103(b)(1) (2003); VT. STAT. ANN. tit. 13, § 5238 (1998); WIS. STAT. ANN. § 977.075 (West 1998). In addition, Missouri law seemingly authorizes assessment of an application fee. See MO. ANN. STAT. § 600.090.1(1) (West 2003) (stating that a qualified indigent can be required to pay a fee if “he is able to provide a limited cash contribution toward the cost of his representation”). However, the provision is apparently not being used at this time. Telephone Interview with Dan Graylike, Senior Deputy Counsel, Office of Mo. State Pub. Defender (Aug. 28, 2005) (transcript on file with authors).

21. See Office of the Public Defender, King County, Washington, <http://www.metrokc.gov/dchs/opd/FAQ.aspx> (last visited Mar. 25, 2006) (processing fee of \$25); Department of Assigned Legal Counsel, Pierce County, Washington, <http://www.co.pierce.wa.us/pc/abtus/ourorg/dac/legalservices.htm> (last visited Mar. 25, 2006) (application fee of \$25).

in amounts ranging from \$10 in New Mexico to \$480 in Wisconsin,²² with several states tying fee amounts to the degree of the criminal offense charged,²³ and others prescribing a monetary range while permitting the trial judge to assess a defendant's relative ability to pay.²⁴ Depending on statutory specifics, the fee is collected by the court,²⁵ or the public defender or other entity that screens defendants for counsel eligibility.²⁶

Consistent with accepted constitutional limits,²⁷ none of the application fee provisions permit counsel to be denied if a defendant fails to pay the required fee, and laws in all states, except Florida, allow trial judges to waive fees when a defendant is unable to pay.²⁸ States are free, however, to condition appointment of counsel on future payment of the application fee and to inform defendants how collection of that fee will happen. In Delaware, for instance, a defendant who is unable to pay the prescribed \$50 fee must report to the Commissioner of Corrections for directions on how to discharge the amount by means of work.²⁹ In Minnesota, the fee is subject to the Revenue Recapture Act, allowing the state to garnish wages, seize property, file adverse credit bureau reports, and impound vehicles.³⁰ Other coercive collection techniques include

22. See N.M. STAT. ANN. § 31-15-12(C) (West 2003); WIS. ADMIN. CODE PD § 6.01 (2005).

23. See, e.g., IND. CODE ANN. § 35-33-7-6 (LexisNexis Supp. 2005) (\$50 for a misdemeanor and \$100 for a felony).

24. See, e.g., ARK. CODE ANN. § 16-87-213(a)(2)(B)(i)(a) (Supp. 2005) (range from \$10 to \$100); TENN. CODE ANN. § 40-14-103 (2003) (range from \$50 to \$200); see also KY. REV. STAT. ANN. § 31.211(1) (LexisNexis Supp. 2004) (allowing fee to be set "in an amount determined by the court," which can order that payment be made in a lump sum or by installments); OR. REV. STAT. ANN. § 151.487(1) (West 2003) (imposing a fee if the court "finds that the person has financial resources that enable the person to pay in full or in part the administrative costs of determining the eligibility of the person and the costs of the legal and other services to be provided at state expense").

25. See, e.g., IND. CODE ANN. § 35-33-7-6 (LexisNexis Supp. 2005); MINN. STAT. ANN. § 611.17(c) (West Supp. 2005); N.D. CENT. CODE § 29-07-01.1(1) (Supp. 2005).

26. See, e.g., COLO. REV. STAT. § 21-1-103(3) (2004); N.M. STAT. ANN. § 13-15-12(C) (West 2003).

27. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 19-20, 24 (1956) (invalidating state law that conditioned access to trial transcripts on appellant-defendants' ability to pay).

28. See FLA. STAT. ANN. § 27.52(1)(b)-(c) (West Supp. 2005). For a brief time in 2003, Minnesota law also refused to allow for waiver. See MINN. STAT. ANN. § 611.17(c) (West 2003) (repealed 2003). As discussed *infra*, however, the Minnesota Supreme Court deemed this aspect of the law unconstitutional. See *infra* notes 133-43 and accompanying text.

29. DEL. CODE ANN. tit. 29, § 4607(d) (2003).

30. See MINN. STAT. ANN. § 270A.03-04 (West 1998 & Supp. 2006).

both the threatened revocation of probation³¹ and the possibility of sentence enhancement in the event of nonpayment.³² Finally, in most states, the fees are imposed regardless of whether the defendant is convicted of the charged offense.³³

B. The Application Fee Trend

Application fee laws have shown significant gains in popularity over the past decade. According to one study, in 1994 only seven jurisdictions (six states and one county) authorized their collection;³⁴ today's increase to twenty-seven jurisdictions (twenty-five states and two counties) marks an increase of nearly 300% in just over ten years. The proliferation of application fee laws reveals no geographic pattern: states in all regions of the country have adopted laws. The group includes states known for their progressive or liberal positions on social matters (e.g., California and Massachusetts), along with states with a more conservative profile (e.g., Georgia and Kansas). Perhaps just as interesting are states such as Alabama and Texas, places not known for coddling criminal suspects, where the legislatures have refrained so far from adopting application fee laws. What the jurisdictions do share, as noted next, is a predictable political coalition in support of the laws.

31. See THE S. CTR. FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER ...": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM 41-42 (2003), available at <http://www.schr.org/indigentdefense/articles.html>.

32. See TENN. CODE ANN. § 40-14-103(b)(1) (2003) (providing that failure to pay the fee will not result in the state refusing to appoint counsel but any "willful failure to pay such fee may be considered by the court as an enhancement factor when imposing sentence if the defendant is found guilty of criminal conduct").

33. See, e.g., ARK. CODE ANN. § 16-87-213(a)(2)(B) (West Supp. 2005); § 40-14-103 (specifying the administrative fee as "nonrefundable"). But see, e.g., KAN. STAT. ANN. § 22-4529 (2004) ("If the defendant is acquitted or the case is dismissed, any application fee paid pursuant to this section shall be remitted to the defendant."). In a handful of states, defendants are expressly allowed to seek judicial review of a fee order. See, e.g., N.M. STAT. ANN. § 31-15-12(C) (West 2003); OR. REV. STAT. ANN. § 151.487(5) (West 2003).

34. See THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 4 (2002), available at <http://abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf>.

II. POLITICAL ORIGINS OF APPLICATION FEE STATUTES

Application fee statutes move through the legislative process in much the same way from state to state. Advocates of the strategy very often hail from the leadership of organizations that provide criminal defense lawyers to indigent defendants—a group we call the “defense establishment.” Their objectives are to avert immediate budgetary troubles and to establish credibility with legislators and other “repeat players” in the arena of crime politics, such as law enforcement officials. Despite the monetary impact on individual clients, the hope is that a stronger financial position will help the organization in the long run to provide better representation to its ever-growing client base.

Opposition to the idea, however, often comes from within these defense organizations, although usually from further down in the hierarchy, from those who more directly provide services to individual clients. The crucial debates on the merits of application fees, then, happen within the defense organizations themselves rather than in the legislature. Prosecutors and law enforcement organizations might support the laws, but they do not carry the flag into battle. State legislatures tend not to pass these laws over the determined and united opposition of the existing defense organizations.

This Part begins by recounting the political background of the application fee statute in one state—North Carolina—followed by a review of the themes from the North Carolina story that also figure in application fee debates nationwide. We then discuss the implications of this specialized political environment, where debate within defense-oriented organizations largely determines the legislative outcome for a central matter in criminal justice administration.

A. The Defense Establishment and Application Fees

The idea for an application fee statute in North Carolina originated from within the defense establishment. The Commission on Indigent Defense Services (IDS), a statewide body created late in 2000 to establish standards and coordinate budgets for the county-

level public defenders,³⁵ set out to establish credibility with the key legislators in the appropriations process. In 2002, Democratic Governor Mike Easley asked all state agencies, including courts and corrections, to find budget cuts in an effort to shrink a growing deficit.³⁶ As part of the Commission's response to this budgetary challenge, the chief financial officer for IDS first proposed in April 2002 that the Commission ask for changes to the existing recoupment statutes to make them less "confusing."³⁷ The changes, the CFO said, might include a "co-pay" of \$40, modeled on a Florida law that "works well."³⁸ The executive director of IDS spoke in favor of a co-pay proposal, pointing out that "many people" who cannot afford \$5000 to retain an attorney can afford a smaller amount.³⁹ The commission chair thought it was "important for the Commission to come forward with cost-saving ideas if possible."⁴⁰ Given this early endorsement from key leaders, the Commission authorized the staff to develop proposals for a co-payment from indigent clients.⁴¹

From there, the idea quickly gained momentum. At its next two meetings, the Commission discussed a package of legislative proposals that included revisions to the existing recoupment statute, along with a new \$50 application fee to be charged to all defendants who receive publicly funded counsel.⁴² Executive Director Malcolm "Tye" Hunter (the chief appellate defender for the state before taking over as the first director of IDS), noting that the proposal would "pass if IDS pushes for it,"⁴³ made the case in terms of overall program health: "[L]ook at this proposal in [the] context

35. Indigent Defense Services Act of 2000, 2000 N.C. Sess. Laws 144.

36. Associated Press, *N.C. Agencies Leave Jobs Vacant To Meet Budgets*, CHARLOTTE OBSERVER, Apr. 10, 2002, at 3B.

37. Meeting Minutes of Comm'n on Indigent Def. Servs., in Raleigh, N.C. (Apr. 19, 2002), available at http://www.ncids.org/IDS%20Commission/2002%20Meeting%20Minutes/02_April.htm.

38. *Id.*

39. *See id.*

40. *Id.*

41. *Id.*

42. Meeting Minutes of Comm'n on Indigent Def. Servs., in Durham, N.C. (May 10, 2002) [hereinafter IDS Minutes, May 2002], available at http://www.ncids.org/IDS%20Commission/2002%20Meeting%20Minutes/02_may.htm; Meeting Minutes of Comm'n on Indigent Def. Servs., in Asheboro, N.C. (June 21, 2002) [hereinafter IDS Minutes, June 2002], available at http://www.ncids.org/IDS%20Commission/2002%20Meeting%20Minutes/02_june.htm.

43. IDS Minutes, May 2002, *supra* note 42.

of the fund's bad financial shape and the Commission's earlier decision to ask the Legislature for more money.⁴⁴ Hunter estimated that the fee could generate over a million dollars a year, and argued that it would have a limited impact on defendants because judges would not deny counsel for nonpayment of the fee and because "many clients can afford to pay \$50."⁴⁵

Initially, some of the commissioners were reluctant to endorse the application fee, questioning "whether indigent defendants would be able to come up with that sum," particularly those in "groups with high unemployment rates."⁴⁶ For such clients, "a \$50 fee could mean no groceries," and the commissioners feared the fee "might pressure defendants into waiving attorneys."⁴⁷ These reservations mostly came from commissioners who were either trial judges or practicing defense attorneys.⁴⁸ When these commissioners asked if the experiences of other states could tell them anything about likely waiver rates, staff members responded that other states did not gather information about waivers and it would be "difficult to quantify."⁴⁹

Ultimately, however, all but one of the commissioners were convinced that the application fee was worth pursuing.⁵⁰ Because the proposed statute explicitly stated that "[i]nability [or] failure ... to pay the appointment fee shall not be grounds for denying appointment of counsel,"⁵¹ the language seemed to protect destitute

44. IDS Minutes, June 2002, *supra* note 42. The "context" Hunter spoke of was "to improve representation." See IDS Minutes, May 2002, *supra* note 42. Hunter explained "any fees collected would be a source of income for the fund in the present fiscal year, which would benefit the clients as a whole." IDS Minutes, May 2002, *supra* note 42.

45. IDS Minutes, May 2002, *supra* note 42.

46. *Id.*

47. IDS Minutes, June 2002, *supra* note 42.

48. The minutes reflect objections from Boshamer (public defender), Hufstader (public defender), Morgan (superior court judge), Tally (capital defense attorney), and Hurley (capital defense attorney). See IDS Minutes, May 2002, *supra* note 42; IDS Minutes, June 2002, *supra* note 42. Some commissioners were also concerned that the fee would apply to defendants who are acquitted or whose cases are dismissed. See *id.* Executive Director Hunter responded by noting "acquitted defendants do not get refunds from retained attorneys" and "\$50 is a good investment even for a person who is acquitted." IDS Minutes, May 2002, *supra* note 42.

49. IDS Minutes, June 2002, *supra* note 42.

50. *Id.* Only Henry Boshamer, the commissioner appointed by the county-level public defenders, voted against the fee proposal. *Id.*

51. N.C. GEN. STAT. § 7A-455.1(d) (2003).

defendants. Indeed, the commissioners, led by the representative of the state bar association, turned aside an amendment that would have instructed judges to inform defendants that nonpayment of the fee would not prevent them from receiving an attorney, because “no defendants [would] pay the fee if the judge [told] them they [did] not have to pay it,” meaning that the fee “[would] not raise any revenue.”⁵² They left unchanged the current practice, which allows judges to tell defendants that an appointed attorney is not free, because the defendant might have to pay for the services later after a recoupment hearing.⁵³ The commissioners decided to “see how it works” and to consider rules later if necessary to reduce the number of waivers,⁵⁴ yet they created no method for studying the impact of the new fee on the choices of prospective clients.

Once the IDS Commission settled on its proposal, the North Carolina legislature passed the application fee statute without fanfare, burying it in a larger budget bill.⁵⁵ Observers identified the IDS Commission as the source of the bill.⁵⁶

Soon after its passage, however, the public began to hear from the lower levels of the defense establishment. The chief public defenders and private defense attorneys in various counties criticized the new law,⁵⁷ and attorneys in many counties filed constitutional challenges at their first opportunity. Many critics emphasized that the fee would deter defendants from requesting appointed counsel to which

52. IDS Minutes, June 2002, *supra* note 42. Commissioner Joe Cheshire, who was appointed to the Commission by the North Carolina Bar Association, also opined that “most criminal defendants have done something wrong,” so he was “not concerned about requiring them to pay some small amount of money for a good attorney.” *Id.*

53. *Id.*

54. *Id.*

55. See Current Operations, Capitol Improvements, and Finance Act of 2002, 2002 N.C. Sess. Laws 126.

56. See Paul Garber, *Court To Decide If Fee for Indigents Is Legal*, WINSTON-SALEM J. (N.C.), Apr. 3, 2003, at B1 (stating that IDS “pushed for the fees last year to help make up for budget shortfalls”).

57. See Mike Fuchs, *Public Defender Challenges Fee: A Guilford County Judge Will Decide Whether a New Fee Poor Defendants Pay Is Unconstitutional*, GREENSBORO NEWS & REC. (N.C.), Mar. 12, 2003, at B13 (quoting Guilford County Public Defender Wally Harrelson as stating that the fee statute “establishes a very dangerous precedent of imposing fines or costs or fees upon indigent defendants when the state runs short of money”); John Stevenson, *Durham Senior Judge Rules \$50 Application Fee Unconstitutional*, HERALD-SUN (Durham, N.C.), Mar. 4, 2003, at C1.

they were constitutionally entitled.⁵⁸ As Forsyth County Public Defender Pete Clary put it, “What defendants are being told and what they’re hearing when they get arrested is they can’t get a court-appointed attorney unless they have \$50.”⁵⁹ These frontline actors also dismissed the programmatic concerns of the IDS Commission (“I’m not in the money-raising business, I’m in the business of helping clients”) and found it “ironic that the people who were set up to protect the rights of indigents are the very people who asked for this [law] to be imposed.”⁶⁰

In the end, this criticism from the ranks did not derail the law. A few months after passage of the original application fee statute, the IDS Commission debated whether it should ask for a repeal of the application fee, for “public relations” reasons.⁶¹ The Commission decided, however, that it had already “weathered the storm” and would not seek repeal of the fee.⁶² Indeed, Executive Director Hunter declared that he did not understand the fuss over the fee among public defenders because the appointment of counsel was not strictly conditioned on payment of the required fee.⁶³

B. Debate Themes

The political debate over application fees in North Carolina featured several themes that also appeared during similar debates elsewhere in the country. First, the organizational priorities of the debaters were predictable, and what the debaters said depended largely on where they stood in the organizational structure. Second, fee proposals appeared during times of special budgetary stress for indigent criminal defense programs. For example, in Minnesota, the

58. See Fuchs, *supra* note 57 (quoting Public Defender Wally Harrelson as suggesting that the fee could have a “chilling effect” by discouraging some defendants from getting court-appointed lawyers).

59. See Paul Garber, *Court Fee Is Under Fire*, WINSTON-SALEM J. (N.C.), Mar. 13, 2003, at B1.

60. *Id.* (quoting public defenders Pete Clary and Wally Harrelson).

61. See Meeting Minutes of Comm’n on Indigent Def. Servs., in Raleigh, N.C. (May 8, 2003) [hereinafter IDS Minutes, May 2003], available at http://www.ncids.org/IDS%20Commission/2003%20Meeting%20%20Minutes/05_03.htm.

62. *Id.*

63. Editorial, *Court Fees*, WINSTON-SALEM J. (N.C.), Mar. 16, 2003, at A18; Garber, *supra* note 59.

legislature enacted an application fee law during a round of budget cuts designed to cut appropriations for the public defender service by 15%.⁶⁴ A similar scenario played out in numerous other states.⁶⁵

In this context of weak and variable funding, the priorities for the leadership of defense groups followed naturally: as political actors, they saw application fees in terms of their short- and long-term budgetary effects. In some states, as in Ohio, the leaders of the defense organizations themselves advanced the application fee proposal, burnishing their reputation for fiscal responsibility.⁶⁶ While the leaders were typically not enthused about the application fees, they needed to respond to demands from governors and legislatures to cut the costs of their programs. They endorsed application fees as the best available option in difficult financial times. As John Stuart, the state public defender in Minnesota, stated, "It would be much better if the work of the court system could be paid by general revenues. But this year that money was not there, so this system was put in place to keep from cutting the [budget of] public defenders by \$10 million."⁶⁷ Similarly, in

64. Margaret Zack & Pam Louwagie, *Public-Defender Fees Thrown Out*, STAR-TRIB. (Minneapolis, Minn.), Sept. 4, 2003, at 1B; see also Brief of Amici Legislators at 4-5, *State v. Tennin*, 674 N.W.2d 403 (Minn. 2003) (No. A03-1281); James L. Baillie, *Our Public Defender System: A Funding Crisis*, BENCH & B. MINN., Feb. 2004, at 5, 5.

65. See, e.g., Laura A. Bischoff, *Taft Budget Plan Raises Fees*, DAYTON DAILY NEWS (Ohio), Feb. 13, 2005, at B1 (discussing application fee legislation as part of a package of user fees in Ohio intended to generate \$56 million in total fees for the state); Rachel Tobin Ramos, *Fletcher Rallies Judges Against Bill To Fund PDs*, FULTON COUNTY DAILY REP. (Ga.), Mar. 19, 2004 (reporting that the Georgia lawmakers used a court administration bill as a vehicle for enacting application fees for appointed counsel "because of the difficulty of funding a new program in lean budget years"); cf. Editorial, *Not Too Much of a Burden*, GREENVILLE NEWS (S.C.), Sept. 18, 2003, at 10A (noting that Greenville County responded to the "unfunded mandate" of the Supreme Court's decision in *Alabama v. Shelton* by imposing an application fee).

66. In Ohio, the statewide public defender's office proposed an application fee in response to the governor's call for agencies to find new sources of funding. See Mark Niquette, *Critics Blast Proposed Lawyer Fee for the Poor*, COLUMBUS DISPATCH (Ohio), Feb. 15, 2005, at B1 (quoting a spokesperson for the Ohio Public Defender's Office as saying that the proposed application fee is "something in good budget times we would not have supported"); see also IDS Minutes, May 2003, *supra* note 61 ("[T]he [application] fee has been an important part of showing the Legislature that we are trying to raise money and be fiscally responsible.").

67. Margaret Zack, *Hennepin County Public Defenders Contest New Law*, STAR TRIB. (Minneapolis, Minn.), July 3, 2003, at 1B; see also Bill Rankin, *Legislature 2004: Indigent Defense Funding Proposed*, ATLANTA J.-CONST., Mar. 11, 2004, at D5 (quoting the director of the Georgia Public Defender Standards Council as favoring a funding package based partly

Colorado, the Office of the State Public Defender backed a fee as a means to reduce its misdemeanor caseload and thereby provide additional resources for its felony-level representations.⁶⁸

Just as the budgetary perspective drove the choices of defense establishment leaders, the needs of individual clients dominated the views of application fee critics, who predictably came from the lower tiers of the defense organizational infrastructure.⁶⁹ To critics, budgetary and broader political considerations were someone else's concern; a matter of deep constitutional principle was at stake, and public defenders should never take the first step to compromise this principle. As noted by one public defender, there is "something outrageous about charging poor people for the exercise of their Sixth Amendment right. We wouldn't charge fees for welfare benefits."⁷⁰

Similarly, critics of application fees highlighted the likely waiver consequences of fees, positing that a fee, even a small one, would chill the likelihood that poor defendants would request counsel.⁷¹

on a \$50 application fee: "As a result of all the effort that went into this issue, we feel they've come up with a reasonable solution of how to fund the statewide system.")

68. See THE SPANGENBERG GROUP, *supra* note 34, at 5-6.

69. See Steve Karnowski, *Public Defenders Now Coming with a Cost*, ASSOCIATED PRESS, Nov. 14, 2003, available at <http://www.lexisone.com/news/ap/ap111403a.html> ("While many public defenders [in Minnesota] condemn the new fees, the state's chief public defender supports them.")

70. Lynn O. Rosenstock, *Indigent Defense: The Price of Being Indigent and Accused*, CHAMPION, Aug. 2004, at 50, 50 (quoting Kathryn Kase, staff attorney for the Texas Defender Service); see also Robert E. Pierre, *Right to an Attorney Comes at a Price; Minnesota Law Requiring Fees for Public Defenders Is Challenged*, WASH. POST, Oct. 20, 2003, at A1 (according to Professor Norman Lefstein, shifting the costs of defense to defendants "without regard to the consequences [is] inconsistent with the fundamental right to counsel"); Bill Rankin, *Indigent Defense Is Back on Rails*, ATLANTA J. -CONST., May 2, 2004, at D1 ("This is a fundamental constitutional obligation that the state has. The cost of paying for it should be shared by everyone." (quoting Georgia defense attorney Stephen Bright's criticism of application fees)); cf. Schilb v. Kuebel, 404 U.S. 357, 378 (1971) (Douglas, J., dissenting) (arguing that state-funded defense counsel is an "unavoidable consequence[] of a system of government which is required to proceed against its citizens in a public trial").

71. See Pierre, *supra* note 70 ("The danger is that people will not avail themselves of the right to counsel to avoid the charge." (quoting Norman Lefstein, Dean Emeritus, Indiana University School of Law)); Zack, *supra* note 67 (quoting Jim Kamin, a public defender in Minnesota, as opposing an application fee because "individuals who can't afford it may not seek a public defender and try to represent themselves"); see also Peter Erlinder, *Muting Gideon's Trumpet: Pricing the "Right to Counsel" in Minnesota Courts*, BENCH & B. MINN., Dec. 2003, at 16 (asserting that application fees "may do more to solve the courts' and public defenders' funding problems by coercing 'waivers' of *Gideon* and *Miranda* than by generating 'income' from desperate indigents who pay the fees").

Critics failed to present any hard data on the waiver question, but invoked vivid reminders about the reality of poverty, along with anecdotes suggesting that a small fee could have effects on the waiver decisions of a large group of defendants.⁷² As one public defender in Minnesota described the effects, a fee ranging between \$50 and \$200 (depending on the charged offense) “is literally taking the food out of the mouths of [defendants’] children.”⁷³ Finally, critics took pains to point out that while the application fees taken alone are fairly small, they assume “greater magnitude” when combined with the litany of other fees that defendants must pay, such as probation services fees and victim assistance fund fees.⁷⁴

After field-level critics shifted the focus of the debate away from the system’s financial viability and onto client effects, fee supporters typically offered several replies that related to individual clients. They stressed that fees were not very large when compared to other expenses involved in every criminal defense⁷⁵ and noted that judges could waive fees for truly destitute individuals.⁷⁶ Or, if there was no

72. See Amy Mayron, *Law on Legal Aid Fee Voided*, PIONEER PRESS (St. Paul, Minn.), Sept. 3, 2003, at 1B (“They’re trying to balance the budget on the back of our clients You’re hitting the people who absolutely have the least ability to absorb that hit. I think it’s atrocious The last thing they need is something [negative] on their credit rating.” (quoting Geoffrey Isaacman, Hennepin County assistant public defender)); Steven H. Pollak, *\$50 for a Free Lawyer? It’s Been Hard To Collect*, FULTON COUNTY DAILY REP. (Ga.), June 30, 2005, at 1 (reporting that a Georgia public defender stated that “in Fulton [County,] many clients don’t have the money for the fee—especially those who are already in jail”).

73. Zack & Louwagie, *supra* note 64; see also Brett Barrouquere, *Senators Back Fee for Anyone Seeking Public Defender*, ADVOCATE (Baton Rouge, La.), May 6, 2003, at 6A (reporting that a state senator opposed Louisiana’s application fee bill partly because \$40 can make it possible for some people to eat meals they otherwise would not eat); Pam Louwagie & Margaret Zack, *Court Rejects Fees for Defense; Poor Defendants Don’t Have To Pay for Lawyers*, STAR-TRIB. (Minneapolis, Minn.), Feb. 13, 2004, at 1A [hereinafter Louwagie & Zack, *Court Rejects Fees*] (stating that although the state public defender office supported application fees, “some other public defenders argued that the law might have meant the difference between defense and dinners for some clients”).

74. See Rosenstock, *supra* note 70, at 51.

75. See Barrouquere, *supra* note 73 (“Many people can afford the fee, but not the cost of an attorney for the duration of their criminal cases.” (paraphrasing a Louisiana state senator)); Louwagie & Zack, *Court Rejects Fees*, *supra* note 73 (quoting Minnesota State Representative Steve Strachan as exclaiming that the \$200 maximum application fee is “not even an hour’s worth of time for most attorneys”); Pierre, *supra* note 70 (“These are modest amounts We’re trying to get some balance here. Too many judges [under the prior law permitting waiver] just waived the fee as a general rule.” (quoting Minnesota State Representative Eric Lipman)).

76. See Niquette, *supra* note 66 (reporting that a spokesperson for the Ohio Public

explicit judicial waiver authority, the statute provided that payment of the fee was not a precondition to obtaining an attorney.⁷⁷ Others downplayed the practical significance of fees by pointing to the inevitable obstacles that would prevent the state from fully collecting the monies.⁷⁸ As the director of the Louisiana Indigent Defense Assistance Board pointed out, the collection of application fees often falls to local public defender offices, and the “law does not spell out repercussions” for offices that fail to collect the fee.⁷⁹ Finally, supporters of fees even speculated that the small investment by a client could improve the attorney-client relationship, because the payment would give the client a stake in the representation and an enhanced expectation that the public defender is a “real” lawyer.⁸⁰

Supporters of fees, like their critical counterparts, however, offered no empirical support and no relevant program data to support these hypotheses about expected client behavior. Rather, drawing upon economic reasoning about the likely incentives that clients face, they assumed rational action by clients in the face of predictable options.

The rejoinder of critics to this series of claims about clients amounted to a weary sigh—the response of veterans to the idealistic claims of theorists who lack practical wisdom. Although the statutes did state the principle that payment of the application fee was not

Defender’s Office noted that “judges would have the ability to waive the [proposed application fee] if they determine someone can’t afford to pay it”).

77. See Zack, *supra* note 67 (reporting Minnesota State Public Defender John Stuart’s belief that “nobody will be denied an attorney” for nonpayment of the fee; in the event of nonpayment, the state will provide a defense and collect the fee another way, such as from a tax refund).

78. See Karnowski, *supra* note 69 (stating that the “main tool” for collecting unpaid fees through tax refunds and lottery winnings is “fairly weak”); Mayron, *supra* note 72 (reporting that fee supporters argued that the collection of unpaid fees is handled by civil action and “collection is a low priority for state revenue workers”); Pollak, *supra* note 72 (quoting the chair of the Georgia Public Defender Standards Council as saying that it is “very unlikely” that Georgia would attempt to collect unpaid application fees because “the collection efforts would exceed the \$50”).

79. Meghan Gordon, *Fee Has Provided \$44,000 to Public Defender*, TIMES-PICAYUNE (New Orleans), July 20, 2004, at B1 (noting a comment by the director of the Louisiana Indigent Defense Assistance Board that not every district has opted to collect the application fee).

80. THE SPANGENBERG GROUP, *supra* note 34, at 4; see also Pollak, *supra* note 72 (“I think even poor people should be given the dignity of making contributions for their defense, if they can.” (quoting B. Michael Mears, director of the Georgia Public Defender Standards Council)).

a precondition for receiving an attorney, critics asserted that this subtlety was lost on most poor clients. Indigent clients do not calculate the practical odds that the state will invoke its civil enforcement options; they only hear the message that a lawyer is not free.⁸¹ Even though defendants are told that they can avoid the fee if they plead *guilty*, they are not always informed that they can nevertheless still receive counsel even if they plead *not guilty* and cannot pay.⁸² This failure to inform indigents that they will still get counsel even if they cannot pay a fee leads to a “system of perfunctory waiver[].”⁸³

This fissure within the defense community, repeated in state after state, takes place without much practically relevant advice from professional organizations. The recommendations from professional groups either remain largely agnostic or assume that application fees are permissible only as an *alternative* to recoupment. The *Criminal Justice Standards* of the American Bar Association (ABA) stake out a position against recoupment: it “should not be required, except on the ground of fraud in obtaining the determination of eligibility.”⁸⁴ The ABA policy with respect to application fees or “contribution,” on the other hand, is more positive. According to the ABA Standards, although the imposition of a fee potentially conflicts with the Sixth Amendment,⁸⁵ an appropriately limited fee, imposed after proper notice, might be acceptable.⁸⁶ This tempered

81. The North Carolina defense establishment explicitly rejected an effort to instruct judges to clear up this potential misunderstanding among defendants. See *supra* text accompanying notes 51-53.

82. Rosenstock, *supra* note 70, at 51.

83. *Id.* (quoting Jim Neuhard, director of the Michigan State Appellate Defender Office, an active participant in the national debate); see also Garber, *supra* note 59 (“The unfortunate effect of this is that some people are scared to ask for a court-appointed lawyer because they’re under the impression that they have to have this money up front.” (quoting Pete Clary, Forsyth County Public Defender)).

84. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-7.2(a) (3d ed. 1992). In support, the ABA notes “compelling policy reasons,” including the chilling effect on a defendant’s exercise of the right to counsel and the interference with the defendant’s rehabilitation that a long-term financial obligation might impose. See *id.* cmt. at 93.

85. See *id.* cmt. at 91 (noting “the apparent conflict in these standards between the obligation of advice of the right to appointed counsel at state expense and the potential obligation of the defendant to contribute”).

86. See *id.* Standard 5-7.2(b)-(c).

view is justified, the ABA reasons, because contribution is an improvement over traditional recoupment practices. Contribution amounts to far less than repaying the total cost of representation, and does not impose “long-term financial debts” on the defendant.⁸⁷ Presuming that application fees are normally not charged “unless there is a realistic prospect that the defendants can make reasonably prompt payments,”⁸⁸ contribution is less likely than recoupment “to chill the exercise by defendants of their right to counsel.”⁸⁹ Similarly, the National Legal Aid and Defender Association’s (NLADA) *Guidelines for Legal Defense Systems* supports imposing a “limited cash contribution,” so long as some assurance exists that the fee will not impose a financial hardship on the defendant.⁹⁰

On their face, these recommendations give conditional approval to application fees. Yet, given the political reality of the application

87. *See id.* cmt. at 93.

88. *Id.* Potential clients “required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make a contribution. Contribution should not be imposed unless satisfactory procedural safeguards are provided.” *Id.* Standard 5-7.2(b)-(c).

89. *Id.* cmt. at 93.

In August 2004, the ABA House of Delegates adopted guidelines in an effort to elaborate on the “procedural safeguards” urged but not specified in the 1992 Standards. *See* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, RECOMMENDATION NO. 110: ABA GUIDELINES ON CONTRIBUTION FEES FOR COSTS OF COUNSEL IN CRIMINAL CASES 1 (Aug. 9, 2004) [hereinafter ABA, CONTRIBUTION FEES RECOMMENDATION], available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf>. The ABA noted that the guidelines were not intended to “modify” Standard 5-7.2, but emphasized that additional guidance is “urgently needed at this time.” *Id.* at 6. The ABA also evinced considerably greater concern about fees in principle, cautioning that

[t]he use of application fees carries an unacceptable risk of chilling the exercise of the right to counsel. To a defendant of limited means, a fixed fee as high as \$200 may represent a substantial financial burden. Because the fee is usually assessed before any representation is provided, indigent defendants may choose to waive their right to counsel as soon as they learn of the fee to avoid the obligation of payment.

Id. at 4.

90. NAT’L STUDY COMM. ON DEF. SERVS., SUMMARY OF RECOMMENDATIONS: GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES Guideline 1.7 (1976), available at http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems. The guidelines also advise that the public defender office itself should assess the fee. *Id.* Guideline 1.7(a). The defender “should determine the amount to be contributed,” which “should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.” *Id.* The fee should not exceed (1) 10% of the total maximum that would be payable for the representation under the assigned counsel fee schedule or (2) a “sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.” *Id.* Guideline 1.7(b).

fees enacted around the country—the fees typically supplement the income from traditional recoupment, rather than create an alternative to recoupment⁹¹—neither the ABA Standards nor the NLADA Guidelines endorse the current crop of application fees. Nor, given the political atmosphere, does it appear likely that legislatures will accept the procedural protections and substantive limits that the professional organizations list as preconditions.⁹²

Standards of professional ethics also offer little concrete guidance for public defenders who must operate with application fees after the passage of the laws. Because the application fee statutes can require that public defenders themselves collect the fees, the fees raise ethical concerns. Defenders face the temptation of using the fee to control a burdensome caseload⁹³ by stressing the costs of representation to defendants already sitting on the fence, especially among misdemeanor defendants known for making hasty and improvident waivers.⁹⁴ Public defenders can also create distrust among their clients by raising the issue of fees and collections at the start of the attorney-client relationship.⁹⁵ Moreover, in an insidious sense, with fees in place and legislative appropriations built around the projected revenues from those fees, defense counsel have an incentive not to advocate for reduced fees or waivers because any victory for a client will reduce the public defense budget.⁹⁶

91. Wisconsin represents an exception to this trend. See John B. Arango, *Defense Services for the Poor: Nebraska Reforms Indigent Defense System*, CRIM. JUST., Fall 1995, at 38, 39 (noting that the Wisconsin legislature adopted an application fee instead of the governor's proposal to collect \$11 million from recoupments following conviction).

92. See, e.g., ABA, CONTRIBUTION FEES RECOMMENDATION, *supra* note 89, at 7-10 (urging, inter alia, that defendants be permitted to be heard and to present information, including witnesses, on whether a fee can be afforded, backed by a right of judicial review of the initial determination).

93. See Scott J. Silverman, *Imposing and Recouping Attorneys' Fees from Publicly Represented Criminal Defendants*, FLA. B.J., May 1996, at 18.

94. See BROKEN PROMISE, *supra* note 16, at 39; Robert C. Boruchowitz, *The Right to Counsel: Every Accused Person's Right*, WASH. STATE B. NEWS, Jan. 2004, at 22, 24-25, available at <http://www.wsba.org/media/publications/barnews/2004/jan-04-boruchowitz.htm>.

95. See Pollak, *supra* note 72 (quoting noted Georgia defense attorney Stephen Bright as saying that a fee "puts the public defenders themselves in a difficult position to start out the relationship with a client by trying to collect a fee").

96. See Rosenstock, *supra* note 70, at 51 (noting the view expressed by Michigan public defender Jim Neuhard).

While the factions of the defense establishment argue among themselves about the desirability of application fees, prosecutors and their professional organizations remain quietly on the sidelines of the dispute. They typically support the idea of fees because the projected fee amounts take some pressure off the general tax revenues devoted to law enforcement and courts,⁹⁷ as a result possibly lessening annual public defense appropriations and strengthening their own budgetary negotiating positions. When prompted by legislators or journalists, prosecutors publicly express their support for the fees.⁹⁸ They also publicly fret that if defense lawyers are not available, because of budgetary shortfalls, they must extend unduly lenient plea deals to defendants, based on the need to avoid jail time (and thus the trigger of the constitutional right to counsel).⁹⁹ At the same time, it is possible that prosecutors favor fees because more defendants would waive counsel and plead guilty without difficult plea negotiations.

As for the attitude of judges toward the application fees, they divide in much the same way as the different levels of the defense establishment. While some judges express support for the fees, based on the idea that any new revenue source for the court system is welcome, judges at the trial level, especially in misdemeanor court, express more concern about the effect of the fees on indigent defendants.¹⁰⁰ Like the field-level defense attorneys, trial-level

97. See, e.g., Garber, *supra* note 56 (noting that North Carolina Attorney General Roy Cooper and “many other state officials and district attorneys” support application fees because they are “necessary to help pay for the cash-strapped court system”); Paul Garber, *N.C. Justices Are Asked To Rule on Indigent Court Fee in 4 Cases*, WINSTON-SALEM J. (N.C.), Mar. 25, 2003, at B1 [hereinafter Garber, *N.C. Justices Asked To Rule*] (quoting Forsyth County district attorney, who supported the application fee, as saying that “[t]his could be close to \$1 million (a year) that would not have to come out of the taxpayers’ pockets”). *But see* Editorial, *Charging the Indigent Only Courts Insensitivity*, GREENSBORO NEWS & REC. (N.C.), Mar. 10, 2003, at A6 (noting that prosecutors in one North Carolina county declined to appeal a constitutional ruling against the fee statute and “confessed the fee made them uncomfortable”).

98. Garber, *supra* note 56; Garber, *N.C. Justices Asked To Rule*, *supra* note 97; see also Barbara L. Jones, *High Court Hears Testimony on Defenders’ Relief Request*, MINN. LAWYER, Oct. 20, 2003 (describing prosecutors’ efforts to lobby the legislature for public defender funding and to advocate “greater efficiencies” in providing defense counsel services, such as “more carefully scrutinizing applications for public defender representation”).

99. See, e.g., John Gibeaut, *The Good Fight Gets Harder*, ABA J., Feb. 2004, 41, 45.

100. See *infra* Part III.

judges speak with concern about defendants who might waive their access to an attorney because of a fee.¹⁰¹

C. Political Theory and Internal Defense-Side Politics

According to most theoretical accounts of the legislative process, when it comes to matters of criminal justice, a simple model offers the most predictive power: prosecutors and law enforcement always get what they want from the legislature.¹⁰² For instance, when the legislature considers whether to expand the reach of substantive criminal law, prosecutors lobby in favor of a new weapon in their arsenal. Legislators tend to ally themselves with the prosecutors because that is their surest path to re-election.¹⁰³ Voters and political donors generally picture themselves as potential victims of crime, and approve of expanded powers and budgets for those who fight crime. As for those who might picture themselves as criminal suspects or defendants, they overwhelmingly come from marginalized social groups lacking money for campaign contributions and meaningful political influence on election outcomes.¹⁰⁴ As Robert Kennedy famously put it: "The poor man charged with crime has no lobby."¹⁰⁵

According to this model of crime politics, the key variable to understand is what the prosecutor and law enforcement agencies want. With that fact in hand, one can pretty confidently predict what the legislature will do.

101. See *infra* Part III.

102. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-31 (2001).

103. See *id.* at 529-30.

104. See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2168-69 (1996) ("Legislators need not fear that enacting most criminal measures will dry up campaign coffers. Throughout history, criminal offenders have been from the poorest strata of society.... Nor will legislators necessarily lose votes if they are insensitive to the needs of convicted felons. Felons often cannot vote"); see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (employing public choice theory to analyze the criminal law field and concluding that legislatures undervalue the rights of the accused).

105. ANTHONY LEWIS, *GIDEON'S TRUMPET* 211 (1964) (quoting then U.S. attorney general Robert F. Kennedy).

The prosecutor-centered theory of crime legislation, however, does not explain all criminal justice debates equally well. Some more complex settings exist when a pro-prosecution, anti-defendant outcome in crime politics is not assured. For instance, when state legislatures consider how to set criminal penalties, the high costs of prison beds sometimes lead them to deny prosecutors the longer-authorized sentences that they seek.¹⁰⁶ Alternatively, when legislatures structure the criminal court system, they sometimes respond to the wishes of judges and the organized bar, who are groups that might contradict the requests of prosecutors and incidentally benefit criminal defendants.¹⁰⁷

The legislative debates about application fees present another environment that does not fit well within a prosecutor-centered theory of crime legislation. These debates do not pit prosecutorial advocates against defense advocates, leading legislators to side with the prosecutors. Instead, as discussed above, the key to understanding these legislative debates is to follow the debate among the attorneys on the defense side. When the leaders of the defense establishment initiate or endorse an application fee statute, legislators become even more predisposed to vote for the proposed legislation, which they can already fairly characterize as “tough on crime.”¹⁰⁸

Similar political coalitions are likely to produce or affect other monetary obligations targeting indigent defendants, such as recoupment of fees and definitions of indigency. These coalitions have made possible the recent broader private subsidization movement, aptly referred to as “pay-as-you-go” criminal justice.¹⁰⁹

106. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 806-07 (2005).

107. See Wright, *supra* note 6, at 265-67 (describing legislatures requiring various forms of resource parity between public defenders and prosecutors).

108. See, e.g., Barrouquere, *supra* note 73 (describing a Louisiana state senator's endorsement of an application fee bill because both prosecutors and defense attorneys supported it).

109. See, e.g., Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1 (noting proliferating state and local efforts to require inmates to pay for their room and board); cf. Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J.) (noting that government has no incentive to restrain amounts of criminal fines because “fines are a source of revenue”).

Collecting such fees from defendants remains politically popular despite the disappointing monetary results that typically accrue.¹¹⁰

This setting emphasizes the common ground between the leaders of prosecution and defense organizations, who view issues from a similar systemic perspective.¹¹¹ The leaders of both types of organizations are, at bottom, political animals who establish long-term relationships with key legislators, and are willing to trade short-term losses for long-term gains. Despite the naturally occurring conflicts between defense and prosecution leadership groups,¹¹² they share a core common interest in the viability of the criminal courts.¹¹³ They also share common problems in managing their employees, the rank-and-file attorneys who staff their respective offices.¹¹⁴

110. See THE SPANGENBERG GROUP, *supra* note 34, at 29 (reporting a 6% to 20% rate for application fee collection); Amy Sherman, *Defendants Squeezed for Drug Tests, Probation Costs Fees Are Part of Trend To Help Pay for Criminal Defense*, PIONEER PRESS (St. Paul, Minn.), Dec. 27, 2003, at B1 (noting that Minnesota secured only \$93,000 during the first three months of its nonwaivable application fee, a pace far short of the hoped-for \$5 million per year); cf. Amy Sherman, *Inmates' Jail Fee Yields Little Green: 'Pay-to-Stay' Program Was To Offset Counties' Costs*, PIONEER PRESS (St. Paul, Minn.), Sept. 14, 2003, at C1 (noting that Minnesota counties collected from inmates far less than the projected cost of the inmates' room and board).

111. See Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEG. ETH. 199, 199-200 (1999) ("In the last two decades, chief defenders have been locked into a narrow managerial role Wedged between competing obligations to clients and funding authorities, chief defenders have narrowly defined their function as controlling the office's operations to stay within budget guidelines.").

112. Evidence of this conflict manifested itself in California, where over the course of its seven-year existence the state public defender office doubled the appellate reversal rate, only to have its budget cut in half and eventually disappear. See Charles M. Sevilla, *Gideon and the Short Happy Life of California's Public Defender Office*, CHAMPION, Jan.-Feb. 2003, at 44, 44.

113. See BROKEN PROMISE, *supra* note 16, at 13 (quoting the statement of former U.S. Attorney General Janet Reno to this effect); see also, e.g., *Foster v. Carson*, 347 F.3d 742, 744 (9th Cir. 2003) (declaring moot an action jointly filed by public defenders and the county district attorney's office challenging indigent defense cutbacks, which would curtail counsel appointments for four months and create major backlogs in the prosecutor's office). As Kim Taylor-Thompson points out, in the early years of public defense, during the first decades of the 1900s, defender offices were "team players" dedicated to reducing "conflicts with the prosecution" and increasing system efficiency, not providing zealous assistance to their clients. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2423-25 (1996).

114. See Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891, 915-17 (noting parallel employer-related challenges in respective offices).

In regard to application fees and other devices that shift costs to criminal defendants, however, it is apparent that the political economy of defense and prosecution leadership diverge. While prosecutors have no divided loyalties, the defense leadership must balance the need for stable funding and system viability with the real-life experience of poverty-stricken clients. The danger is that the defense leadership, either because they lack ground-level experience in criminal defense or because they have developed habits of agreement with prosecutors on questions such as system funding, will not place enough weight on the impact on clients. These habits of agreement get reinforced by the sources of information (such as systemwide cost data and court processing statistics) and the circle of contacts (leadership groups in the judiciary, the prosecutorial organizations, and legislative committees) that become routine for the defense establishment.

Under such circumstances, the defense leadership can become preternaturally inclined to take political positions that do not align with the interests of clients. When defense leaders barter in the name of achieving budgetary relief,¹¹⁵ they can fail to consider the impact of application fees on those *potential* clients who decide not to request a lawyer, because they never enter the system, never get counted in the statistics, and ultimately never become a visible reality to the lawyers working in the office.¹¹⁶

A thought experiment might suggest the optimal position for the defense leadership to take in legislative debates about application fees. If the design of the system were put to a majority vote of all criminal defendants, both those who ultimately request lawyers and those who do not, would the defendants as a group vote to accept application fees? Would they choose a more well-funded system available only to those willing or able to pay versus a less well-funded system that is more accessible to the entire group?¹¹⁷

115. See Taylor-Thompson, *supra* note 111, at 203 ("To the virtual exclusion of all other tasks, [chief defenders] have devoted their energies and creative talents to securing adequate budgets for their offices.")

116. Cf. BROKEN PROMISE, *supra* note 16, at 26 (noting that in 2002, in Riverside County, California, over 12,700 persons plead guilty without ever speaking with counsel, resulting from a law removing public defenders from municipal court arraignments).

117. One scholar has proposed allocating indigent defense funding based on default rules. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from*

The answer to these questions could educate the defense leadership on whether to trade an advantage for some defendants in exchange for a disadvantage for others. Unfortunately, defense leaders have no reliable way to answer this question, because they do not routinely talk to clients, and even if they do, they have no information about those defendants who waive counsel and never become their clients.

III. JUDICIAL RESPONSES

Thus far, we have canvassed the political dynamic driving the enactment of application fee laws within states. This account, however, leaves out a key institution: the judiciary. Judges, along with prosecutors and defense lawyers, on a daily basis operate the buttons and levers of the criminal justice machinery in U.S. courthouses. Yet, judges also are asked to redesign those buttons and levers from time to time, both when implementing new laws and when addressing challenges to their constitutionality. With application fees for defendants who request a state-paid defense attorney, judges have made important choices both as operators and as re-designers of the criminal justice apparatus.

Insulated (in theory, at least) from the broader fiscal and public relations ramifications of the laws, judges have erected practical obstacles to the collection of application fees in the everyday routines of the courtroom. Trial judges have the capacity to grant waivers based on a minimal showing or even to issue blanket orders waiving the fee for entire categories of defendants.¹¹⁸ When the fee statute empowers the court clerk to collect the fee, the judges who supervise the work of the judicial bureaucracy might do little or nothing to promote vigorous collection. If the statute entrusts the public defender offices with announcing and collecting the fee, judges might signal that they will tolerate unenthusiastic collections by the public defenders.¹¹⁹

Institutional Design, 104 COLUM. L. REV. 801 (2004).

118. See, e.g., Pollak, *supra* note 72 (noting that a state court judge in Houston County, Georgia, issued an order waiving the application fee in all criminal cases).

119. See *supra* note 79 and accompanying text.

Judges have also shaped the impact of application fee statutes through their rulings on legal challenges to the laws. In Minnesota and North Carolina, the only two states in which appellate courts have passed judgment on application fee provisions,¹²⁰ first trial judges and then appellate judges played an active role in the fate of application fee statutes.

In North Carolina, trial courts in Durham, Forsyth, Orange, and Guilford counties enjoined implementation of the state's \$50 "appointment fee," concluding that its imposition on convicted and acquitted defendants alike violated state and federal constitutional law.¹²¹ In response, the state attorney general asked the North Carolina Supreme Court to enter a statewide ruling to clarify the applicability of the fee in the state's remaining ninety-six counties.¹²² In a highly unusual move, the supreme court agreed to allow the State an appeal from a trial court ruling and ordered that court personnel should continue to apply the fee in all counties pending a final ruling from the court itself.¹²³

In February 2004, in a unanimous decision, the court invalidated the fee in *State v. Webb*.¹²⁴ Basing its decision on North Carolina law, the *Webb* court agreed with the lower court's conclusions that the fee violated a provision of the state constitution imposing

120. This paucity of challenges, it bears mention, is striking given the number of fee provisions in existence, and the enormous amount of litigation in recent years generated by other criminal-justice-related fees. See, e.g., *State v. Beltran*, 825 P.2d 27, 29 (Ariz. Ct. App. 1992) (invalidating on ex post facto grounds a conviction "surcharge"). In an unpublished order, the Massachusetts Supreme Judicial Court held in 1992 that a "counsel fee," then in the amount of \$40 and since raised to \$150, was constitutionally permissible because it did not condition the availability of counsel on a defendant's ability to pay the fee. See *Cameron v. Justice of the Taunton Dist. Court*, No. 92-203, slip op. (Supreme Judicial Court for Suffolk County, June 5, 1992); cf. *Hanson v. Passer*, 13 F.3d 275, 280 (8th Cir. 1994) (holding that a "court cannot ... withhold the constitutionally-mandated appointment until a sum of money is paid").

121. *State v. Draper*, No. 02 CR 104461 (Guilford County Dist. Ct. 2003); *State v. Kelly*, No. 02 CR 952 (Orange County Super. Ct. 2003); *State v. McNeil*, No. 02 CR 19580 (Durham County Dist. Ct. 2003); *State v. Rubio*, No. 03 CR 51971 (Forsyth County Dist. Ct. 2003); *State v. Webb*, No. 00 CRS 60884 (Durham County Super. Ct. 2003); see also Paul Garber, *Lawyers Lobby Justices for Ruling on Court Fees: \$50 Indigent Fee Collected Unevenly in State*, WINSTON-SALEM J. (N.C.), Sept. 12, 2003, at B1.

122. Petition for an Extraordinary Writ and Motion Under Rule 2, *State v. Kelly*, No. 156PA03 (N.C. Mar. 24, 2003); see also Garber, *supra* note 121.

123. See Garber, *supra* note 56.

124. 591 S.E.2d 505 (N.C. 2004).

financial liability only on those “convicted” of crimes and limited such liability to “costs.”¹²⁵ The State argued that the fee, which was imposed regardless of the outcome in a defendant’s case, was part attorney’s fee and part administrative cost, thus taking it outside the ambit of the constitutional prohibition.¹²⁶ The court disagreed, concluding that the fee constituted a cost by another name; it was imposed to “support that part of the criminal justice system that enables the State constitutionally to prosecute indigent defendants who qualify for court-appointed counsel.”¹²⁷ The fee was designed to reimburse the state for “expenses associated with keeping its system that provides for court-appointed counsel operational,”¹²⁸ and, as such, violated the state constitutional prohibition against compelling acquitted defendants to pay “costs.”¹²⁹

On the other hand, the court concluded that the law could be imposed on convicted defendants, as to whom the constitutional prohibition regarding payment of costs did not apply.¹³⁰ Moreover, the court concluded that the law, when applied only to convicted defendants, did not have an unconstitutional chilling effect on a defendant’s Sixth Amendment right to counsel because the fee served the valid purpose of defraying prosecution expenses and was not intended to punish those who sought court-appointed counsel.¹³¹ Furthermore, according to the court, a defendant’s knowledge that he someday might be required to repay the expense of legal services chilled the defendant’s choice to rely on counsel no more

125. *See id.* at 509 (quoting and discussing N.C. CONST. art. I, § 23, which provides that “[i]n all criminal prosecutions, every person charged with [a] crime has the right ... not [to] be compelled to ... pay costs, jail fees, or necessary witness fees of the defense, unless found guilty” (alteration in original) (ellipsis in original)).

126. *Id.*

127. *Id.*

128. *Id.* at 509-10.

129. The court elaborated that the relevant provision, contained in article I, section 23 of the state constitution, did “not insulate acquitted defendants from bearing the burden of paying for their own counsel, but it does shield an acquitted defendant from having to pay for a system designed to reimburse the state for expenses necessarily ‘incurred in the conduct of the prosecution.’” *Id.* at 509 (quoting *State v. Wallin*, 89 N.C. 578, 580 (1883)).

130. *Id.* at 512. The court upheld use of application fees with regard to convicted defendants pursuant to a severability provision in the fee law. *Id.*

131. *Id.* at 513 (citing *Fuller v. Oregon*, 417 U.S. 40, 53 (1974)).

than recoupment or other constitutionally acceptable established practices.¹³²

A similar chain of judicial events sealed the fate of Minnesota's recently amended application fee law. The new law provoked an immediate constitutional challenge for two reasons: first, unlike the prior fee law, the new statute contained no waiver provision permitting courts to exempt defendants from paying based on undue financial hardship, and second, the new law increased the prior application fee (referred to as a "co-payment") from \$28 to a range of \$50 to \$200, depending on the level of the charged offense.¹³³ The judiciary in Hennepin County, which contains Minneapolis, brokered an arrangement with the county public defender, who decided to challenge the constitutionality of the law as a "strategic litigation project," undertaken by local defenders despite the state public defender's highly visible support for the law.¹³⁴ Under the arrangement, Hennepin County—in the interest of avoiding having the courts clogged with repeated challenges—agreed to suspend imposition of the fee until a designated county judge could hear a test case.¹³⁵ On September 2, 2003, two months after the non-waivable application fee statute took effect, the judge invalidated it on Sixth Amendment grounds and enjoined its application.¹³⁶ Because the court was "well aware of the financial impact [its] ruling may have on the public defender budget," it certified the matter to the Minnesota Court of Appeals.¹³⁷

132. *Id.*

133. Compare MINN. STAT. ANN. § 611.17(c) (West Supp. 2005), with MINN. STAT. ANN. § 611.17(c) (West 2003). According to the applicable guidelines, the fee is based on "the level of the offense at the time the public defender is appointed. Subsequent dismissals or amendments do not impact the assessed fee." FOURTH JUDICIAL DIST., STATE OF MINN., PUBLIC DEFENDER ELIGIBILITY GUIDELINES-CRIMINAL DIV. (effective Sept. 2, 2003) (on file with authors). In *State v. Cunningham*, 663 N.W.2d 7 (Minn. Ct. App. 2003), the Minnesota Court of Appeals rejected arguments that the prior waivable \$28 application fee violated the right to counsel and the equal protection rights of poor and minority defendants. *Id.* at 9.

134. E-mail from Leonardo Castro, Hennepin County Chief Public Defender, to Wayne Logan, Professor of Law, William Mitchell College of Law (Aug. 4, 2005) (on file with authors).

135. *Id.*

136. *State v. Tennin*, No. 03061357, at 6 (Hennepin County Dist. Ct. Sept. 3, 2003) (Findings of Fact, Order and Certification) (on file with authors). The court was at pains to note the "administrative problems" that the county would face "if it chose to collect the co-payment in thousands of cases and was then required to refund those payments." *Id.* at 8.

137. *Id.* at 7-8.

The Minnesota Supreme Court granted accelerated review of the matter three weeks later,¹³⁸ and affirmed the trial court's decision,¹³⁹ invalidating one of the nation's two mandatory, non-waivable fee provisions.¹⁴⁰ In a unanimous decision, the court in *State v. Tennin* conceded the government's right in principle to impose a fee, but like the trial court, faulted the lack of any judicial waiver power in the statute.¹⁴¹ In the absence of such a waiver condition, the law differed from the Oregon recoupment law previously upheld by the U.S. Supreme Court in *Fuller v. Oregon*.¹⁴² Because the law imposed a fee without permitting an independent judicial determination of a defendant's ability to pay, the *Tennin* court concluded that the law deprived defendants of their right to counsel in violation of the Minnesota and U.S. Constitutions.¹⁴³

In sum, courts at both the trial and appellate levels play an indisputably critical part in the evolution and existence of fee laws. In a broad institutional sense, judicial rulings that enlarge the right to counsel create fiscal pressures that play a central role in the origin of application fee legislative proposals.¹⁴⁴ Later, when the laws are implemented, courts first figure squarely in their operation, and, later, their legal fate.¹⁴⁵

Like the critics and supporters of application fees within defense organizations, the judges based their positions on application fees on their hunches and observations about waiver of counsel by indigent defendants. The discussion now turns to the available statistical evidence about when such waivers occur.

138. *State v. Tennin*, No. A03-1281, 2003 Minn. LEXIS 639, at *1 (Minn. Sept. 24, 2003).

139. *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004).

140. The other provision, as noted above, is contained in Florida law, *see supra* note 28 and accompanying text, and has yet to be challenged judicially.

141. *Tennin*, 674 N.W.2d at 408-09.

142. 417 U.S. 40 (1974). The Oregon law contained the equivalent of two waiver provisions; one waiver opportunity arose at imposition, turning on a defendant's inability to reimburse, and another after trial, should the defendant become unable to pay. *See id.* at 46.

143. *Tennin*, 674 N.W.2d at 410-11.

144. *See supra* notes 4-17 and accompanying text.

145. It is worthwhile to note that the institutional resistance to application fees surveyed above is not unique to this particular reform effort. As noted in a recent ABA report, courts often impose legal and procedural obstacles to the implementation of indigent defense reform efforts. *See BROKEN PROMISE*, *supra* note 16, at 29 (providing examples of such obstacles).

IV. FEES AND WAIVER RATES

Compelling reasons exist to believe that an application fee could seriously affect a defendant's waiver decision, starting with anecdotal evidence from attorneys and judges who report increases in waivers after application fee statutes have taken effect. The field actors themselves often assert during legislative debates that the fees will induce and increase waivers. After the statutes take effect, the trial actors believe that their predictions are coming true, as more defendants appear to waive defense counsel.

For example, in North Carolina, a district court judge in Durham County contended, three months after the fee statute took effect, that he had noticed a decline in the number of people applying for court-appointed lawyers.¹⁴⁶ Other misdemeanor court judges in the state made similar comments,¹⁴⁷ echoing anecdotal reports from defense attorneys from around the country.¹⁴⁸

Based on the operation of similar fees in settings other than criminal justice, such expectations of waiver appear well justified. For instance, when health insurance became dominated by co-payments after the advent of managed care, serious effort went into studying the behavior of consumers faced with increased co-payments.¹⁴⁹ Instead of relying on aggregate statistics about the total number of insurance policyholders, researchers utilized surveys and other techniques to examine the choices of individual consumers.¹⁵⁰ This empirical work shows that such up-front costs can discourage many patients from seeking medical care.¹⁵¹ In light of these data, practicing physicians (like their peer frontline actors in criminal defense who resisted application fees) have criticized

146. See Fuchs, *supra* note 57 (stating that a Durham County District Court Judge "said he noticed a decline in the number of people applying for court-appointed lawyers"); Associated Press, *Indigents' Fee Upset Again*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 13, 2003, at B9 (same).

147. See Editorial, *supra* note 97 (noting that, although the amended statute had only been in effect for less than four months, judges already "noticed the number of people applying for court-appointed lawyers declining").

148. See *supra* notes 71-74 and accompanying text.

149. See, e.g., Emmett B. Keeler, *Effects of Cost Sharing on Use of Medical Services and Health*, 8 J. MED. PRAC. MGMT. 317, 317-18 (1992).

150. See *id.*

151. See *id.* at 318-19.

recent efforts to increase medical insurance co-payments among the poor, despite positions to the contrary adopted by some in the medical leadership.¹⁵²

The application fee debate, however, has lacked any analogous empirical evidence. This dearth of consumer-level data is part of a larger knowledge gap about the waiver of counsel more generally.¹⁵³ One commonly hears that waiver rates are quite low, but these estimates are limited to felony cases. For instance, in the federal system and in large urban counties in the state systems, the felony waiver rate is reported at less than one percent.¹⁵⁴ Instances of waiver are thus treated as anomalies, perhaps a result of mental impairment among defendants or a breakdown in relations between defendants and appointed counsel.¹⁵⁵

But waiver is a closer question for misdemeanor defendants, who face sanctions less severe than their felony counterparts, and hence intuitively are more inclined to face the prosecutorial might of the state on their own. This unpredictable waiver decision carries serious consequences, both for the criminal justice system and for the individuals involved. For the system, the financial stakes are high because even though misdemeanor cases are less expensive to

152. See Robert Pear, *Doctors Argue Against Higher Co-Payments for Medicaid*, N.Y. TIMES, Aug. 18, 2005, at A21 (discussing controversy surrounding the issue of whether the Medicaid Commission should increase co-payments for the poor); see also Jonathan Klick & Thomas Stratmann, *How Sensitive Are Seniors to the Price of Prescription Drugs?* (Fla. State Univ. Coll. of Law, Law & Econ. Working Paper No. 05-17), available at http://papers.ssrn.com/paper.taf?abstract_id=766844 (finding that elderly Medicare beneficiaries are sensitive to prescription drug price changes and not just insurance status).

153. See, e.g., Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 815 (2000) (stating that U.S. criminal defendants proceed pro se "in an estimated fifty trials a year," a vast underestimate); see also BROKEN PROMISE, *supra* note 16, at 28 (calling the lack of reliable data on indigent defense "a significant barrier to identifying, evaluating, and addressing structural deficiencies").

154. See HARLOW, *supra* note 13, at 1 (stating that in the seventy-five largest counties in the United States in 1996, 0.4% of felony defendants in terminated cases waived available defense counsel, and in the federal system, 0.3% of felons waived counsel).

155. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 702-09 (2d ed. 2003); see also Erica Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant* 32 (unpublished manuscript, on file with authors) (finding that the overwhelming majority of pro se federal felony defendants do not manifest signs of mental illness and that many opt to represent themselves because of dissatisfaction with the perceived nature and quality of their court-appointed counsel).

prosecute than felonies, misdemeanor defendants significantly outnumber felony defendants.¹⁵⁶ A small shift in the percentage of misdemeanor defendants who request appointed counsel could overwhelm the system. For this reason alone, criminal justice officials responsible for assembling a budget each year have every reason to study closely the waiver choices of misdemeanor defendants.

The waiver decision also has major consequences for individual defendants charged with misdemeanors. Sentencing law and practice make a criminal record especially important in setting the sentence for any future offense,¹⁵⁷ influencing outcomes even when no defense counsel worked on the case.¹⁵⁸ Furthermore, the manifold future consequences of a misdemeanor conviction often escape the notice of a defendant who has no attorney,¹⁵⁹ an informational deficit that goes unremedied by waiver procedural norms.¹⁶⁰

156. While national data on charging practices are not comprehensive, covering only parts of the country, they make clear that charged misdemeanors vastly outnumber felonies. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 353 tbl.4.6 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2003), available at <http://www.albany.edu/sourcebook/pdf/t46.pdf> (reflecting, based on proportional national estimates, that in 2002 there were 2.3 million felony charges and over 9 million misdemeanor charges).

157. See Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1618-20 (2005) (discussing the critical role historically played by prior convictions in sentence enhancements).

158. This is categorically so in the event a valid waiver is secured. See *Burgett v. Texas*, 389 U.S. 109, 114 (1967) (stating that the prosecution of an indigent for a felony is permissible when a valid waiver of the right to counsel is secured). It is also so when an indigent is not provided counsel to defend against a charge for which the right to counsel does not attach. See, e.g., *Nichols v. United States*, 511 U.S. 738, 740-42 (1994) (holding that a prior conviction, for which counsel was not provided because no jail time was imposed, can be used to enhance a subsequent sentence).

159. Such deferred consequences are especially significant with regard to immigration. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941-46 (2000) (noting a variety of minor offense convictions that can result in deportation for resident aliens).

160. See BROKEN PROMISE, *supra* note 16, at 23-24 (noting the widespread practice of failing to inform state misdemeanor defendants of their right to counsel). Consistent with this recognition, waiver of counsel procedures for misdemeanors can be significantly less onerous than for more serious charges. In Minnesota, for instance, individuals charged with felonies and gross misdemeanors must be fully advised of numerous matters before waiver is deemed valid, including facts "essential to a broad understanding of the consequences of the waiver of the right to counsel." MINN. R. CRIM. P. 5.02 subdiv. 1(4) (2005). With misdemeanors, on the other hand, trial courts can find waiver if merely satisfied "that it is voluntary and has been

Despite these consequences, precious little data exist on waivers of counsel in misdemeanor cases. Without a national repository of comparable statistics,¹⁶¹ we are left with the strategy of sampling court data from state systems. The state court data informing our study suggest that waiver levels for misdemeanors are significantly higher than for felonies. The waiver rates are also intriguingly fluid: the percentage of defendants waiving counsel looks different from state to state, and different from one year to the next.

From January 2000 to October 2005, the waiver rate in North Carolina for those convicted of a felony was 3.3%, while the waiver rate for those *charged* with a felony was 7.3%.¹⁶² Waivers of counsel happened in 39.8% of all misdemeanor convictions during the same period.¹⁶³ The trend for the most serious misdemeanors moved up slightly, from 34.2% in 2000 to 35.9% in 2004.¹⁶⁴ In Minnesota, the waiver rate for serious felony defendants from 2000 to 2005 was 3.8%; for other felonies, 8.8%,¹⁶⁵ and for gross misdemeanors,

made with the full knowledge and understanding of the defendant's rights." *Id.* subdiv. 1 (3); cf. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 762 (1989) (noting the "tension between the breadth of the constitutional rights that protect [criminal] defendants and the ease with which those rights may be waived").

161. The Bureau of Justice Statistics, part of the U.S. Department of Justice, has gathered statistics on the processing of felony defendants in seventy-five large urban counties. See HARLOW, *supra* note 13. With respect to misdemeanors, the Bureau provides data based on survey samples only from local jails, reporting that 28% (in 1996) and 17% (in 1989) of jailed defendants had "no counsel," making it unclear whether waiver is specifically at play. *Id.* at 6 tbl.13.

For a proposal to give the federal government a leading role in securing criminal justice data from different jurisdictions, see Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 STAN. L. REV. 361 (2005).

162. All the North Carolina waiver rates discussed in this Part are based on case-level data maintained by the North Carolina Administrative Office of the Courts. The database records in each case an "attorney type" indicating retained counsel, public defender, appointed counsel, waiver, or the field is left blank. We exclude the blank cases from our calculations.

163. The misdemeanor waiver rate in North Carolina closely parallels estimates for misdemeanors in the federal system. See HARLOW, *supra* note 13, at 1 (reporting a federal misdemeanor waiver rate of 38.4%).

164. See *infra* tbl.2. The most serious misdemeanors in the North Carolina Criminal Code, Class 1 misdemeanors, all carry the possibility of a jail term. N.C. GEN. STAT. § 15A-1340.23 (2003).

165. The Minnesota data include only convicted defendants, while the North Carolina data include all defendants charged, whether they were ultimately convicted, acquitted, or had their charges dismissed.

Note that the waiver rates for felonies reported from both Minnesota and North Carolina are several times higher than the rates of 0.4% reported for felonies in the federal system and

20.8%.¹⁶⁶ As in North Carolina, the trend for the most serious misdemeanor cases in Minnesota moved slightly up during this period, from 20.1% to 24.8%.¹⁶⁷

The arrival of the new application fee statutes in these two states did not profoundly shift the waiver rates as reflected in these aggregate court statistics. The misdemeanor waiver rate for counsel in Minnesota did not spike up during the period (July 2003 through January 2004) when the application fee statute was officially in effect. Although the waiver rate did increase, as Table 1 reflects, this was part of a small longer-term increase in the waiver rate, extending both before and after the brief era of the application fee statute.¹⁶⁸

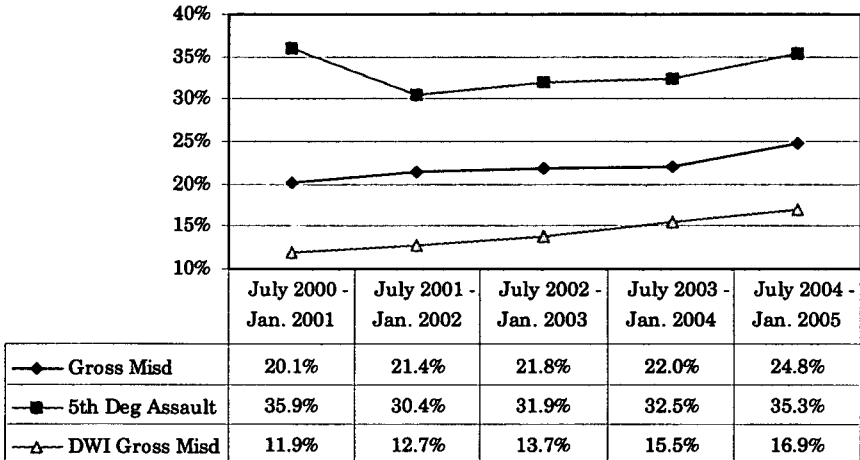
in the seventy-five largest counties in the United States. See HARLOW, *supra* note 13, at 1. The variation may reflect differences between urban jurisdictions and statewide averages for state criminal courts, distinctive practices in North Carolina and Minnesota, or differences in reporting techniques.

166. The waiver rates for Minnesota are calculated based on monthly county-level data provided to the authors by the Minnesota Administrative Office of the Courts.

167. See *infra* tbl.1.

168. The calculations for the Minnesota table exclude cases from Hennepin County (Minneapolis), which never fully implemented the application fee statute. Although Table 1 relies on statewide data (excluding Hennepin County) for July 2003 through January 2004, we also calculated waiver rates for the two-month period, July through August, before Hennepin County formally enjoined application of the law (by judicial ruling on September 3, 2003). The results were almost identical to those reflected in July through January period contained in Table 1.

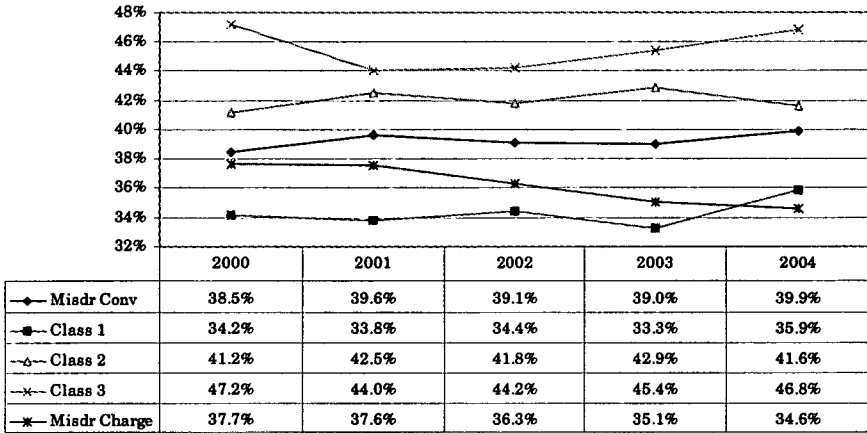
Table 1
Minnesota Waiver of Counsel, Misdemeanor Convictions



Similarly, in North Carolina the waiver rate showed no sign of increasing in response to the new application implemented between December 2002 and January 2004.¹⁶⁹ In fact, the rates for 2003, when the fee law was in full effect, moved down for the most serious (Class 1) misdemeanor cases, as well as for cases originally charged as misdemeanors rather than felonies.

169. To account for the full period of the statute's operation, the North Carolina table includes December 2002 and January 2004 in the 2003 calculation.

Table 2
North Carolina Waiver of Counsel, Misdemeanor
Charges and Convictions



We are left, then, with conflicting evidence: the observations of the trial court actors, together with the carefully documented behavior of consumers who encounter co-payments in other settings, suggest that application fees should prompt higher levels of waiver of defense counsel, especially in misdemeanor cases. On the other hand, the court statistics from the two states studied do not reveal an increase in the percentage of waiver cases during the periods when the courts implemented the new application fee statutes.

What is the best way to reconcile the conflicting evidence about the impact of the fee statutes on a defendant’s decision to waive counsel? A simple answer is possible. Perhaps the administrators of indigent defense organizations who supported the application fees were correct about the incentives for defendants: as they posited, indigent defendants did not consider the fees to be large enough to affect their waiver decisions.

In light of the anecdotal courtroom evidence and the known behavior of consumers in the health insurance context, however, it seems unlikely that fees in this context would not matter to defendants. We believe that a better explanation starts with the power of trial actors to blunt the effects of any new criminal justice

policy, at least in the short run. In many criminal justice settings, it appears that field-level actors can effectively slow down or redirect changes that start at the top. For instance, sentencing commissions know that support (“buy-in”) from trial judges and prosecutors is necessary—at least initially—if new sentencing rules are to have any real effects on the pattern of sentences imposed.¹⁷⁰ Similarly, in the law enforcement realm, new policies (e.g., mandatory arrest for domestic abusers) often experience a lag in implementation, revealing a need for systematic training and persuasion to ensure compliance by police.¹⁷¹

The same dynamic might give trial judges and defense attorneys in the field a short-term veto power over the application fees. Trial judges might prove quite generous in granting waivers,¹⁷² or otherwise effectively limit the reach of the application fee to defendants who would have waived counsel anyway, keeping in equilibrium the overall number of defendants who waive.

Putting aside the available formal power of the judiciary to waive fees, judges have supervisory authority over court personnel who collect the fees and can move slowly to establish procedures for collection.¹⁷³ Judges in some jurisdictions hold the responsibility for describing the fees to defendants, and could change the emphasis of their descriptions in ways that might convince defendants to minimize the practical importance of the fees. The same holds true for defense attorneys: in jurisdictions where they collect the fees and describe the fee options to potential clients, they hold the power to downplay fees.¹⁷⁴ Even without the formal legal authority to waive fees, in short, both trial judges and defense lawyers have some de facto power over whether the defendant takes the potential cost seriously.

170. See DALE G. PARENT, *RESTRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES* 156-75 (Daniel J. Freed ed., 1989) (describing the importance placed on judicial support of sentencing guidelines by the chair of the Minnesota Sentencing Commission); MICHAEL TONRY, *SENTENCING MATTERS* 167-69 (1996).

171. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *HOUS. L. REV.* 237, 279 (2005).

172. See *supra* note 118 and accompanying text.

173. See *supra* text accompanying notes 118-19.

174. See *supra* text accompanying notes 78-79.

Although some of these dampening effects could remain in place for the long-term, they are especially effective in the short-term. Because first trial and later appellate courts struck down the application fee statutes in North Carolina and Minnesota, and the constitutional status of the statutes remained doubtful for most of the time they remained in effect, resistance among trial court actors may have been especially significant.

Whether the systemwide counsel waiver statistics show that application fees are too small to affect defendant choices about waiver, or suggest instead that trial actors were able to blunt any short-term effects from the application fees, the statistics also teach a more profound lesson: the court data are not well suited to answer the important questions about waiver. The people who matter most here—the defendants—cannot be heard through aggregate statistics about case processing.

Although court processing statistics contain the best information currently collected and made available to the public about waiver of counsel, they fall short of informing us what we need to know about this question. Court statistics give more detailed accounts of felony defendants, even though misdemeanor defendants make the waiver decisions with the largest volume effects on the criminal justice budget. The reported statistics concentrate on the crime of conviction rather than the crime charged at the time of the waiver decision, thus losing much information about the connection between plea bargaining and waiver of counsel.

The numbers also miss important differences among counties and among different courtrooms in the same county. If judges and defense attorneys in one locality downplay the application fees or discourage their collection, statewide averages muffle those differences. The same is true for variations in the coverage of the right to counsel. Because the sentence to be imposed after a criminal conviction triggers a right to counsel at the start of the case, trial judges must predict which crimes are likely to result in jail terms, thus requiring an offer of appointed defense counsel. Although different judges might answer this question differently and change the waiver rate accordingly, court system data do not capture this variation.

In the end, court personnel collect and categorize their data for purposes other than understanding the choices of criminal defendants. The information we need should track the waiver decisions of individual defendants, including the reasons they offer at the time for their choices.¹⁷⁵ Survey techniques could also estimate the likely behavior of defendants faced with various hypothetical fee arrangements. Given the amount of money the public invests in indigent criminal defense, and the serious effect that waiver rates can have on the cost and effectiveness of that expensive system, the least we can do is gather data that are suited to the question.

CONCLUSION

Even though publicly funded indigent defense is considered an "unavoidable consequence" of our adversarial system,¹⁷⁶ and despite the constitutional sensitivity of granting criminal justice benefits based on the capacity of indigents to pay,¹⁷⁷ states in recent years have turned to indigent criminal defendants themselves to help cover the ever-increasing costs of their defense. With application fees, state legislators found a way to defray the costs of indigent defense and situate themselves within the broader politically popular "pay-as-you-go" movement sweeping the nation.

The political economy of application fees, however, has greater nuance than kindred reform efforts. In response to intense political pressure to control the costs of criminal defense organizations, the leaders of these organizations themselves very often propose the use of fees. The leadership strategically aligns itself with prosecutorial and other typically antidefense interests in legislative debates. While ultimately successful in political terms, the strategy creates a rift within the indigent defense infrastructure, prompting rank-

175. To this end, an effort was made to examine a random sample of case files of individuals who waived counsel in several Minnesota counties. Unfortunately, the approximately three dozen files examined contained no information whatsoever on the reasons for waiver. For a preliminary effort in this vein, focusing on federal court records and shedding some light on the question, see Hashimoto, *supra* note 155.

176. *Schilb v. Kuebel*, 404 U.S. 357, 378 (1971) (Douglas, J., dissenting).

177. *See, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (invalidating state law that conditioned access to trial transcripts on appellant-defendants' ability to pay); *see also Bearden v. Georgia*, 461 U.S. 660, 664 (1983) ("This Court has long been sensitive to the treatment of indigents in our criminal justice system.").

and-file public defenders to challenge the laws on legal and constitutional grounds in the name of their individual indigent clients.

Perhaps the arguments play out this way inevitably. Given their institutional starting points, the leadership will surely endorse techniques that save program resources, especially if much of the cost falls on those potential clients who never enter the program. Similarly, the appointed lawyers and public defenders at the trial level are wont to defend reflexively the principle of individual access to justice. For both sides, what individual clients actually believe or do about the fees may be beside the point, for it has no effect on their argument of principle.

This Article has undertaken the first steps toward understanding defendant decisions to waive counsel. Statewide court data from Minnesota and North Carolina fail to reveal any impact on waiver rates when those states enacted application fee statutes. This statewide pattern might show that defendants place a higher value on defense counsel than the amount of the application fee, or it could reflect the efforts of trial judges and defense lawyers to spare the defendants from such choices. We are more inclined to believe the latter, because it fits with the often-observed power of trial actors to dampen the effects of criminal justice policy changes imposed from the top, especially in the short-run.

More importantly, our preliminary survey of aggregate court statistics points to a need for different measurement techniques: the gathering of case-level information that captures local courtroom variety and the reasoning of individual defendants. We have until now failed to grasp the huge impact of counsel waiver for the quality and cost of criminal justice. Listening in the right places will help us hear the answers from criminal defendants themselves.