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Privatizing Criminal Procedure

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As the staggering costs of the criminal justice system continue to rise, many states have begun to look for non-traditional ways to pay for criminal prosecutions and to shift these costs onto criminal defendants. Many states now impose a surcharge on defendants who exercise their constitutional rights to counsel, confrontation, and trial by jury. As these "user fees" proliferate, they have the potential to fundamentally change the nature of criminal prosecutions and the way we think of constitutional rights. The shift from government funding of criminal litigation to user funding constitutes a privatization of criminal procedure. This intrusion of market ideology into the world of fundamental constitutional rights has at least two broad problems: it exacerbates structural unfairness in a system that already disadvantages poor people, and it degrades how we conceive of those rights. This Article proposes solutions to ameliorate the harshest effects of these rights-based user fees but also argues for the importance of resisting the trend of the privatization of constitutional trial rights.

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I. Introduction

Although overall incarceration has decreased slightly since the high-water mark of 2008-2009,[2] the United States still processes a staggering number of people through its various criminal justice systems.[3] The overall size of the criminal justice apparatus shows no sign of decreasing in any significant way, and counties, states, and the federal government struggle to find the funding to support this massive project. User fees are the latest effort to provide funding for courts, prosecutors, prisons, and other costly features of the modern American criminal justice system.

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[2] *See* U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prison Statistics (June 30, 2010), https://www.bjs.gov/content/pub/pdf/p08.pdf (finding that federal and state correctional authorities had jurisdiction over 1.6 million people at the end of 2008).

[3] *See* Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE, Mar. 14, 2017 (detailing the American criminal justice system and the number of people held within each facility or program).

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As states continue to deal with ever-increasing budget pressures, many have begun to look for non-traditional ways to pay for criminal prosecutions and to shift the costs of the system onto those charged with crimes. As these "user fees" proliferate, they have the potential to fundamentally change the nature of criminal prosecutions and the way we think of exercising constitutional rights. The shift from government funding of the processes and procedures of criminal litigation to user funding constitutes a privatization of criminal procedure.[4]

The most familiar user fee, which has been adopted by an increasing number of states in the last two decades, is the requirement that indigent defendants repay the state for the costs of their court-appointed lawyers.[5] States also have begun to assess additional costs for defendants in drug cases if the defendant refuses to waive her Confrontation Clause rights and requires a drug analyst to appear in court to testify regarding the chemical testing of the substance at issue in the case.[6] Similarly, many states now charge criminal defendants who elect a jury trial the costs of empaneling a jury.[7] In each of these examples, the state fixes a surcharge for those defendants who elect to exercise a constitutional right. Criminal defendants are charged a fee for the exercise of their Sixth Amendment rights to counsel, to confrontation, and to a jury.

Courts long ago squarely rejected as unconstitutional the practice of user fees in the context of voting.[8] Holding that states could not condition a citizen's right to vote on her ability to pay even a small amount, the Supreme Court in *Harper v. Virginia Board of Elections*[9] struck down Virginia's poll tax as violating

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4 *See infra* Part IV.
5 *See infra* Part II.A.
6 *See infra* Part II.B.
7 *See infra* Part II.C.
8 *See generally* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).
9 383 U.S. 663 (1966)

principles of equal protection.[10] Courts have been far more indulgent, however, in evaluating state requirements that those accused of crime pay for the costs of exercising Sixth Amendment rights within the context of their own criminal prosecution.

These á la carte procedural fees have proliferated over the past quarter century and the growing phenomenon calls out for re-examination. National events over the last few years have made the issue of criminal costs and fees even more timely and urgent than before. The 2015 report from the Department of Justice concerning Ferguson, Missouri, for example, highlighted that city's practice of using criminal costs and fees to fund municipal operations.[11] In 2016, the Department of Justice advised state courts that common court practices involving the imposition and collection of costs and fees associated with criminal charges may violate principles of due process and equal protection.[12]

Understanding the current problem requires a re-examination of the evolution of these rights.[13] At least since *Gideon v. Wainwright*,[14] a clear tension has existed between the expanded understanding of formal trial rights for those accused of crime and the practical costs associated with implementing those rights. The Court in *Gideon* recognized a constitutional obligation on states to provide counsel for those unable to afford private

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[10] *See id.* at 665 ("For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

[11] *See generally* U.S. DEP'T JUST., CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015) [hereinafter THE FERGUSON REPORT].

[12] *See generally* "Dear Colleague" Letter, Vanita Gupta & Lisa Foster, U.S. DEP'T JUST., CIV. RIGHTS DIV., Fines and Fees in State and Local Courts (Mar. 14, 2016). This guidance was later rescinded by Attorney General Jeff Sessions. Matt Zapotosky, *Sessions rescinds Justice Dept. letter asking courts to be wary of stiff fines and fees for poor defendants*, WASH. POST, Dec. 21, 2017, https://www.washingtonpost.com/world/national-security/sessions-rescinds-justice-dept-letter-asking-courts-to-be-wary-of-stiff-fines-and-fees-for-poor-defendants/2017/12/21/46e37316-e690-11e7-ab50-621fe0588340_story.html?utm_term=.4c62d7a330c9.

[13] *See infra* part II.

[14] 372 U.S. 335 (1963).

counsel but did not provide a solution for states to pay for this requirement.[15] This tension between recognition of a constitutional right and the requirement of government to fund the exercise of that right runs through the Court's recent jurisprudence on the Confrontation Clause, in which the Court recognized that a robust and broad understanding of confrontation rights would increase the costs of criminal trials.[16]

The willingness of American criminal justice systems to allow for user fees to be assessed for the exercise of constitutional rights is closely related to the neoliberal market model that has come to dominate American criminal justice.[17] As long as the process is neutrally applied and the rules equally enforced, judges and prosecutors are not seen as responsible for fair or equitable outcomes, only fair procedures.[18] Adversarial (free-market) criminal justice systems care less about accuracy of result and fairness of outcome and more about simply ensuring that the existing procedures are applied correctly. As with the free-market economic model, the free-market criminal justice model promises equality of opportunity and process but not a result that is necessarily fair or just. Putting a price tag on the processes of criminal procedure by way of user fees, however, threatens even the promise of procedural neutrality upon which the adversarial system is built.

Allowing—or even encouraging—the waiver of rights designed to ensure accuracy has a detrimental effect beyond the

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[15] At the time *Gideon* was decided, thirty-five states already provided counsel for indigent defendants accused of crimes, either by state constitution or by statute. *See* Brief for the State Government as Amici Curiae Supporting Petitioner, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 62-155) ("Today thirty-five states require counsel in non-capital cases, which is a strong indication of the fundamental nature of that right in the modern view.").

[16] *See infra* Part II.B.

[17] *See* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 19 (2016) ("Criminal process puts a priority on giving parties procedural opportunities but, as in the economic realm, the state is less committed to ensuring certain kinds of results").

[18] *See id.* ("The state—especially in the form of the judiciary, but in other respects as well—does less to 'coordinate' certain kinds of outcomes, including, ultimately, the accuracy and proportionality of court judgments.").

impact on the individual defendant. A broad and robust right to counsel in our adversarial system is justified not only to protect individual defendants but also to safeguard the integrity of the system.[19] The effects of these practices lie beneath the immediately visible surface. There is little current evidence which shows that statutes requiring payment by defendants for the costs of their appointed counsel have a chilling effect on the exercise of that right.[20] When considered with the additional and growing variety of user fees, however, it is likely that this phenomenon reduces the actual procedural safeguards that theoretically attend criminal trials. This is especially probable with regard to low-level crimes that constitute the vast bulk of the national criminal justice apparatus.

Beyond the practical effect of these user fees on the exercise of rights by defendants, this Article examines whether encouraging the alienability of these procedural rights changes the way we see them, and further diminishes their role in our system of adjudication.[21] Kim Krawiec discusses three categories of forbidden exchange: "(1) illegal ones; (2) inalienable ones; and (3) those that are both legal and alienable but in which exchange for profit is banned or limited."[22] Unlike markets in illegal drugs or other kinds of vice (which we ban for entirely different reasons), we forbid the sale of civic rights like the right to vote or to freedom of speech.[23]

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[19] *See, e.g.*, Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017); *see also* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171 (2017) ("Ferguson is illustrative of how a system grounded on constitutional deficiencies can be used as a tool for revenue generation, and how individual defense counsel can help to reform such systems of governance.").

[20] *See* Ronald F. Wright and Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2078–81 (2006) (noting the lack of empirical evidence regarding waiver rates following the passage of application fee laws in states and conducting an independent study that concluded that application fee statutes did not "profoundly" shift waiver rates in the two states surveyed).

[21] *See, e.g.*, Kimberly D. Krawiec, *Show Me the Money: Making Markets in Forbidden Exchange*, 72 LAW AND CONTEMPORARY PROBLEMS i (2009).

[22] *Id.*

[23] *See id.* (discussing entitlements that are legal but inalienable).

Krawiec finds

> Exchange (for any motive) in these . . . activities is . . . forbidden—not because we consider the items and activities harmful to society, but because they are so closely tied to the individual's rights and responsibilities as a member of the community that the state does not allow their separation.[24]

We do, however, allow for a defendant to "sell" her right to counsel or to a trial by jury in exchange for a reduction in court costs.[25]

As we increasingly allow for the segmentation of criminal procedural rights, and for costs to be assessed á la carte for those who exercise these rights, the adversarial adjudication system becomes gradually priced beyond the reach of most criminal defendants. Spreading the financial burden of the exercise of such rights across a broader range of social actors would remove the disincentive to actually exercise these rights.

A system that is so reliant on funding from the unwilling consumers necessarily ends up treating those who can pay better than those who cannot. Our system of criminal justice has been described as a "two-tiered system . . . where those who can pay their criminal justice debts can escape the system while those who are unable to pay are trapped and face additional charges for late fees, installment plan, and interest. These extra charges, which have been referred to as 'poverty penalties,'"[26] add up to a significant increased burden on those who can least afford it.[27]

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[24] *Id.*

[25] Of course plea bargaining is the ultimate "selling" of a fundamental right, although the trade there is one's right to be presumed innocent in exchange for a shorter prison sentence.

[26] Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prison*, 75 MD. L. REV. 486, 492 (2016).

[27] REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf (describing a system increasingly reliant on criminal defendants to support its system of criminal justice). The report suggests that Florida provides no exemptions for those unable to pay the fees. *Id.*

Section II of this article examines the variety of user fees that now accompany criminal trials in state jurisdictions and the trend toward shifting the financial costs of criminal adjudication onto the criminally accused.[28] The three main categories of fees that this Article addresses are those fees assessing defendants the cost of their appointed counsel,[29] additional fees for a defendant demanding the presence of a forensic witness as, for example, in a prosecution involving drug possession or driving while intoxicated,[30] and those charging a defendant the costs of empaneling a jury.[31] Section III analyzes the doctrinal limitations that courts have placed on states that seek to impose a financial burden on defendants who exercise constitutional trial rights.[32] Section IV examines the impact of financial costs and fees on those people who are predominantly the subjects of the American criminal justice system, poor people and people of color.[33] This Section addresses not only the criminalization of poverty but also the growing concern that some courts have come to function more as revenue generators than as stabilizing social institutions.[34] Finally, Section IV engages some of the philosophical challenges in converting public rights into private commodities that can either be exercised or waived for financial reasons.[35] The Article proposes solutions to ameliorate the effects of these rights-based user fees and argues for the importance of resisting the trend of privatizing constitutional trial rights.

II. User Fees in Criminal Procedure

Although many aspects of the criminal justice system have become monetized, this Article focuses on the imposition of costs and fees on defendants who elect to exercise certain constitutional trial rights. The rights enshrined in the Sixth Amendment[36] are exercisable or waivable at the election of the accused.

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28 *See infra* Part II.
29 *See infra* Part II.A.
30 *See infra* Part II.B.
31 *See infra* Part II.C.
32 *See infra* Part III.
33 *See infra* Part IV.
34 *See id.*
35 *See id.*
36 U.S. CONST. amend. VI.

Notwithstanding their alienability, each has always been seen as fundamental to the adversarial system of criminal justice.[37] Other issues relating to the "costs and fees" of criminal justice are outside of the scope of this Article, although the continued existence of a cash-based pretrial release system, for instance, shows another instance of the ways in which poor people are systematically disadvantaged by the current state of criminal procedure in most American states.[38]

The Sixth Amendment dictates how American criminal accusations are adjudicated, at least in theory:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[39]

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[37] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (extending the reach of the Sixth Amendment right to confrontation).

[38] Other costs and fees that can be described as automatic or non-discretionary are beyond the scope of this article. Booking fees and the general court costs that are assessed upon conviction, for example, are generally assessed against anyone convicted of a criminal offense. *See* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1186 (2014). Such booking fees can range from just a few dollars to several hundred dollars. *See id.* at 1186 nn.71–72. Some of these fees are imposed whether or not the charge results in a conviction. *See id.* at 1195 (noting that some asset forfeitures, allowing governments to seize money and property from individuals, occur only after criminal conviction whereas others go on regardless of the outcome in criminal proceedings).

[39] U.S. CONST. amend. VI.

Each of these rights has evolved over the more than two centuries since their ratification,[40] and each has been a contested site in which stakeholders have argued the relative merits of efficiency, fairness, accuracy, and justice.[41] Nowhere in the Sixth Amendment are these procedural safeguards guaranteed to defendants without cost, and recently states have moved toward charging defendants for the exercise of these rights.

Although states have charged fees for those convicted of crimes since the nineteenth century,[42] there is a new trend of charging those facing criminal charges additional fees for the exercise of various constitutionally mandated trial rights.[43] What might have been the first "user fee" in the criminal context was in 1846, when Michigan authorized the recovery of medical costs from prisoners.[44] Over a century later, California introduced a mandatory crime victim fee of those convicted of crimes in 1965.[45] And Michigan again showed its innovative streak when it became the first state to charge prisoners for a portion of the costs of their own incarceration.[46] But these fees are imposed without regard to any actions or decisions of the defendant. Fees that are assessed only if the defendant exercises her right to counsel, or to confront

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40 JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 20 (2002) ("In 1791, that provision became the Sixth Amendment to the United States Constitution.").

41 *See generally id.* (discussing the development and contested history of the different provisions of the Sixth Amendment).

42 *See* Logan *supra* 38, at 1179 (discussing the extended history of criminal justice payments).

43 *See id.* at 1174–75 (discussing the increase in fees imposed on criminal defendants for use of the criminal justice system).

44 *See* Lauren-Brooke Eisen, *Paying for Your Time: Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 319 (2014) (citing DALE PARENT, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, Recovering Correctional Costs Through Offender Fees (1990), *available at* https://www.ncjrs.gov/pdffilesl/Digitization/125084NCJRS.pdf)) ("In 1846, the United States saw the birth of the first correctional fee law when Michigan enacted legislation authorizing counties to charge sentenced jail inmates for the costs of medical care.").

45 Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014) http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

46 *See id.* ("Michigan, in 1984, passed the first law to charge inmates for some of the costs of their incarceration.").

a witness, or to a jury trial, act as a surcharge on the invocation of those rights.

A. Right to Counsel

Described as the "master key"[47] that guarantees other procedural trial rights for those accused of crime, the right to counsel has a long and contested history.[48] Enshrined in the Sixth Amendment[49] and long held up as fundamental to a fair adversarial system, the contours of the right to counsel have fluctuated and evolved over modern American history.[50] While *Gideon v. Wainwright* and its progeny have defined the scope of the right to counsel and its applicability to the states, battles continue over who is entitled to court-appointed counsel, what are the expectations of court-appointed counsel, and who must ultimately pay for court-appointed counsel. And although the right of an indigent defendant facing a serious charge to court-appointed counsel is now clear,[51] many states have adopted the practice of charging defendants for their exercise of that right.[52]

Gideon and its progeny had imposed constitutional requirements on state criminal prosecutions without providing a source of funding. As states struggled to come up with the resources to pay for the vast numbers of appointed counsel

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47 Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment*, 30 U. CHI. L. REV. 1, 7 (1962).

48 *See generally* TOMKOVICZ, *supra* note 40 (outlining the lengthy history and development of the Sixth Amendment).

49 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.").

50 *See* John D. King, *Beyond Life and Liberty: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 8–15 (2013) (discussing the development, evolution, and current status of the Sixth Amendment in American jurisprudence)..

51 *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (finding the federal right to court-appointed counsel for indigent defendants to also apply to states).

52 Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014) http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

required to allow for the ever-increasing criminal adjudication systems, many states experimented with shifting the costs onto the individual "consumers" of the systems, the accused.[53]. The move away from government provision of the service to one in which the user was charged was in keeping with the neo-liberal economic project of the 1980s and 1990s.[54] Before long, some state governments took on the appearance of debt collectors, seeking to recover the funds owed them by defendants through collection techniques that included garnishment of wages, seizure of property, impounding of vehicles, revocation of probation, and the threat of sentence enhancement because of unpaid fees.[55]

Initially understood as a negative right that only forbade government actors from interfering with a defendant's ability to choose and retain counsel of her choice,[56] the right to counsel evolved in the twentieth century into an affirmative right, obligating the government to provide counsel to those accused of serious crime. *Powell v. Alabama*[57] marked the first time that the United States Supreme Court recognized a right of a defendant to court-appointed counsel.[58] Reversing the rape convictions of nine African American defendants tried in Alabama state court without any meaningful appointment of counsel, the Supreme

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53 *See id. See also* Wright and Logan, *supra* note 20, at 2059 (discussing the emergence of fee proposals being tied to budget cuts and "special budgetary stress for indigent criminal defense programs").

54 *See id.* at 2051–52 ("In keeping with the privatization strategies increasingly in vogue, many states tried to trim their criminal defense budgets by shifting the costs of such services back to the consumers—indigent criminal defendants.").

55 *See id.* at 2053 (discussing the different fee collection methods used by several states).

56 *See* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 AM. CRIM. L. REV. 35, 42 (1991) (noting "that 'the right to counsel meant the right to retain counsel of one's choice and at one's expense'" (quoting W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 21 (1955))); *see also* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.").

57 287 U.S. 45 (1932).

58 *See id.* at 71 (finding the constitutional right to appointed counsel in specific circumstances of capital cases).

Court held for the first time that, at least in certain serious cases in which the defendants were incapable of mounting their own defense or retaining counsel, the Fourteenth Amendment required states to appoint counsel for defendants.[59] The Court, stressing the serious and extreme nature of the charges and the defendants' inability to either represent themselves or to secure trial counsel, created an extremely narrow rule limited to the facts of the case before it.[60] Nevertheless, *Powell* established the important principle that the Sixth Amendment's right to counsel, through the Fourteenth Amendment, did bind the states in certain circumstances and did endow a positive right to court-appointed counsel, rather than a more limited negative right against state interference.[61]

Three decades after *Powell*, *Gideon v. Wainwright*[62] made the right to court-appointed counsel categorical, holding in definite terms that defendants facing serious charges in state courtrooms had a federal constitutional right to court-appointed counsel.[63] In felony prosecutions, such as the one at issue in *Gideon*, the Court rejected any weighing of factors or balancing tests and instead found a categorical right to court-appointed

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59 *See id.*

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of the law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

60 *See id.* (concluding that the specific circumstances necessitated counsel).

61 *See id.* ("[W]e are of the opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.").

62 372 U.S. 335 (1963).

63 *See* TOMKOVICZ, *supra* note 40 at 29 ("According to the *Gideon* Court, the fundamental nature of the right to counsel had been established in *Powell v. Alabama*—ten years before *Betts* was decided. Although the *Powell* Court limited its holding . . . 'its conclusions about the fundamental nature of the right of counsel [were] unmistakable.'" (quoting Gideon, 372 U.S. at 343)).

counsel.[64] The expansive holding of *Gideon* was subsequently extended to cases that involved actual incarceration (rather than simply the potential for incarceration), even in misdemeanor prosecutions.[65] In *Scott v. Illinois,*[66] however, the Court limited the scope of the right to appointed counsel, holding that in criminal prosecutions that do not carry the possibility of incarceration, defendants do not enjoy any federal constitutional right to court-appointed counsel.[67]

The specter of increased costs runs throughout the Supreme Court's right-to-counsel cases and resource constraints continue to interfere with the vision of *Gideon*.[68] Beginning in the

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64 *See* King, *supra* note 50 at 10 ("Thus, in Gideon, the Court rejected a balancing-test approach in favor of a categorical requirement of counsel, at least in felony cases.").

65 *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) ("[I]n those [misdemeanors] that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy.").

66 440 U.S. 367 (1979).

67 *See id.* at 373 ("[W]e believe that . . . actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . [thus] warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.").

68 *See* King, *supra* note 50 at 39 ("[C]ost-based arguments have been made against every expansion of the right to counsel." (citing Turner v. Rogers, 131 S. Ct. 2507, 2510–11 (2011). *See also* Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger, 407 U.S. at 49–50 (Powell, J., concurring); Gideon, 372 U.S. at 344; Powell v. Alabama, 287 U.S. 45, 72–73 (1932)). The Supreme Court has an inconsistent record regarding whether and how it should consider the practical costs of recognizing a new constitutional right in the field of criminal procedure. The issue is explicitly addressed in many of the right-to-counsel cases and in *Miranda v. Arizona*, but some of the Justices have taken the position that consideration of costs is always an inappropriate consideration in construing constitutional protections for those accused of crime. *See* Baldwin v. New York, 399 U.S. 36, 75 (1970) (Black, J., concurring) (stating that the value of a jury trial far outweighs all costs to society for all crimes and in all criminal prosecutions). For a contrary opinion, see Justice Breyer's suggestion that judges "in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.' And since 'the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.'" Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005). Justice Alito's concurring opinion in DA's Office v. Osborne shows a justice who is considering

1980s and 1990s, states struggled to pay for the costs associated with a dramatically expanding criminal justice system. The size of the criminal justice system exploded with the War on Drugs and costs of every aspect of the system rose accordingly. In the three decades between 1980 and 2010, the incarcerated population in the United States rose from approximately 500,000 to more than 2.3 million.[69] During roughly the same period, total expenditures by states and municipalities on corrections rose from approximately $17 billion to approximately $71 billion.[70] And among all of the other associated costs, states had to find the money to pay the court-appointed defense lawyers that the system required.

The trend of charging criminal defendants for court-appointed counsel took off in the 1990s, growing from seven jurisdictions in 1994 to 27 in 2006.[71] By 2017, at least 43 states had adopted the practice.[72] The explosion of such fees took place in geographically and politically diverse states from California and Massachusetts to Kansas and Georgia.[73] Typically, the

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the real-world costs of recognizing a new constitutional protection. *See* DA's Office v. Osborne, 557 U.S. 52, 83–84 (2009) (Alito, J., concurring) (discussing the financial implications of post-conviction DNA testing). As support for his position against recognizing a right of defendants to obtain and test DNA post-conviction, Alito referred to the "severe backlogs in state crime labs." *Id.* at 84.

69 JAIL, PRISON, PAROLE, AND PROBATION POPULATIONS IN THE US, 1980-2013, https://felonvoting.procon.org/view.resource.php?resourceID=004353 (last visited Feb. 22, 2018).

70 United States Department of Education, State and Local Expenditures on Corrections and Education (July 2016), https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf.

71 *See* Wright & Logan, *supra* note 20, at 2052–54 (noting the uptick in jurisdictions imposing fees on defendants).

72 *See* Shapiro, *supra* note 52 ("The NPR survey found, with help from the Brennan Center for Justice at New York University School of Law, that in at least 43 states and D.C., defendants can be billed for a public defender.").

73 *See* Wright & Logan, *supra* note 20, at 2054. Wright and Logan document a fascinating political and cultural dynamic within the public defender community around this issue of allocating some of the costs of appointed counsel onto defendants, with the higher-level administrators generally in favor of such mechanisms (if only begrudgingly in the face of inadequate state funding) and the rank-and-file public defenders generally opposed to the assessment of such fees on their clients, for both philosophical and pragmatic reasons. *See id.* at 2047 (articulating the "counterintuitive"

genesis of these "user fees" for criminal defendants using appointed counsel arose out of a budgetary shortfall and indigent defense funding crisis, with the leadership of public defender agencies reconciling themselves to support such fees as better than the alternative, in light of budget cuts by the state legislatures.[74] Coalitions between tough-on-crime legislators and leaders of the criminal defense establishment have led to the proliferation of these fees.[75]

States vary in the specifics of how they charge defendants for their court-appointed counsel. Some assess application fees at the beginning of a criminal prosecution, while others charge a recoupment fee that is added to other court costs at the conclusion of the prosecution.[76] Of those that charge after-the-fact recoupment fees, some assess a flat fee for each charge, and some actually charge the defendant for all defense costs accrued in the defense of a case, including costs of defense experts and investigators.[77] States also vary greatly in the extent to which they factor in a defendant's ability to pay, with some states ignoring that factor altogether.[78]

B. Right to Confront

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dynamic of those within the public defender system who support user fees and those that resist those some fees).

74 *See id.* at 2055 ("Their [the defense leadership's] 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.").

75 *See id.* at 2070 (describing the political coalitions that "have made possible the recent broader private subsidization movement, aptly referred to as 'pay-as-you-go' criminal justice").

76 *See id.* at 2046 (discussing the variation in ways that states assess users fees and noting the shift from recoupment fees to up-front application fees in order to decrease the administrative burden).

77 Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1931, n.5 (2014) ("In addition to attorney's fees, indigent defendants may be charged for the costs of experts, investigators, and other costs related to their defense.").

78 *See id.* at 1929–30 ("[I]n many jurisdictions, consideration of whether one has the ability to pay for counsel is essentially meaningless, whereas in other jurisdictions, courts are required to impose recoupment without any such consideration at all.").

No area of criminal procedure has received more attention from scholars and courts over the past decade or so than the right to confront adverse witnesses. The constitutional command that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[79] recently became the basis of yet another fee that can be imposed on criminal defendants. This provision of the Constitution was subjected to a radical reappraisal in *Crawford v. Washington*.[80] Following that decision, this portion of the Sixth Amendment is now interpreted to provide a broad procedural safeguard for criminal defendants at trial. In some instances, this right requires the prosecution to presents its lab analysis witnesses. This costly venture was held by the Supreme Court to be necessary to satisfy the criminal defendants' confrontation right.[81] But who should be responsible for the costs associated with the appearance of those witnesses? One response of legislatures worried about the cost of defendants exercising these rights has been to impose the costs of doing so on the defendants themselves.

After receiving little attention for the first century after its adoption, the Confrontation Clause was interpreted in *Mattox v. United States*[82] to be a "general rule" that "must occasionally give way to considerations of public policy and the necessities of the case."[83] This relaxed approach to the right of confrontation was further endorsed in 1980 in *Ohio v. Roberts*,[84] in which the Supreme Court allowed out-of-court statements to be used

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79 U.S. CONST. amend. VI.

80 541 U.S. 36 (2004).

81 Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (concluding that admission of lab analysis certificates against a defendant at trial violates his Sixth Amendment right to confront the witnesses against him).

82 156 U.S. 237 (1895).

83 *Id.* at 242. In *Mattox*, the defendant's murder conviction had been reversed by the Supreme Court. Two witnesses who had testified at his initial trial had died by the time of his second trial and their testimony was read to the second jury over the defendant's Confrontation Clause objection. *Id.* at 241. The Supreme Court affirmed Mattox's second conviction, holding that the dictates of the Confrontation Clause were not absolute and that the reading of the prior testimony did not contravene "[t]he primary object" of the Clause. *Id.* at 242.

84 448 U.S. 56 (1980).

against a criminal defendant as long as the declarant was shown to be unavailable and the out-of-court statement possessed "adequate 'indicia of reliability.'"[85]

In 2004 the Supreme Court in *Crawford v. Washington*[86] breathed new life into the Confrontation Clause and overturned *Ohio v. Roberts* in no uncertain terms.[87] The Court held that testimonial out-of-court statements could be admitted against a defendant only if the declarant was unavailable to testify and if the defendant had a prior opportunity to confront the witness about the subject matter of the statement.[88] In *Crawford*, the Supreme Court rejected the *Roberts* test as having departed impermissibly from the original meaning of the Confrontation Clause.[89] The change in approach was dramatic and immediate, and courts struggled to accommodate the new approach to the confrontation right. The Court quickly undertook the task of refining and clarifying its understanding of the confrontation right—seeking first to define "testimonial" in *Davis v. Washington*[90] and *Hammon v. Indiana*,[91] and to address whether the Confrontation Clause had any regard for non-testimonial hearsay,[92] as well as to clarify whether and how a defendant could forfeit the protections of the Confrontation Clause through her own wrongful conduct.[93]

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85 *Id.* at 66.

86 541 U.S. 36 (2004).

87 *See id.* at 68–69 (overruling *Ohio v. Roberts*).

88 *See id.* at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

89 *See id.* at 63 ("The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.").

90 547 U.S. 813 (2006).

91 546 U.S. 976 (2005).

92 *See* Crawford, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .").

93 Giles v. California 554 U.S. 353 (2008) ("We consider whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.").

In 2009 in *Melendez-Diaz v. Massachusetts*,[94] the Court again considered the scope of the new confrontation right, addressing whether a criminal defendant had similar confrontation rights when the out-of-court statement in question was a forensic analysis.[95] In *Melendez-Diaz*, the Court considered whether a laboratory analysis from a state-employed lab technician certifying that a substance was cocaine fell within the scope of the Confrontation Clause.[96] The majority in *Melendez-Diaz* concluded that the laboratory certificates were testimonial statements and that the analysts were witnesses against the defendant for purposes of Sixth Amendment protection.[97] Accordingly, because the defendant had no prior opportunity to cross-examine the witnesses (and because the witnesses were not shown to have been unavailable at trial), introduction of the laboratory certificates violated the defendant's Confrontation Clause rights.[98] Consequently, the prosecution would be required to present the lab technician for cross-examination if it intended to introduce a laboratory certificate.[99] The Court did not resolve the question of who should bear the costs of presenting such a witness.[100]

Predictions about the effects of the *Melendez-Diaz* decision on the administration of criminal justice were swift, extreme, and divided. Despite Justice Scalia's reassurance in the majority opinion that "the sky will not fall,"[101] Massachusetts Attorney General Martha Coakley predicted that misdemeanor drug

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94 557 U.S. 305 (2009).

95 *See id.* at 309 (discussing the procedural posture and issue presented in the case).

96 *See id.* (stating the issue before the Court).

97 *See id.* at 312 ("In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment.").

98 *See id.* at 329 (stating the conclusion of the Court).

99 *See id.* (requiring the prosecution to present the lab analysist in order to satisfy the defendant's Confrontation Clause right).

100 *See id.* at 341 (Kennedy, J., dissenting) (discussing the costs imposed on the administration of justice as a result of the majority's decision).

101 *Id.* at 325. In his majority opinion, Justice Scalia claimed that the "dire predictions" of the dissent were exaggerated because "it is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Id.* at 328.

prosecutions would "grind to a halt" because of the decision.[102] Alongside the doctrinal arguments about the meaning and requirement of the Sixth Amendment's Confrontation Clause and its applicability to the States, the Justices engaged in a lengthy discussion in *Melendez-Diaz* about the costs of recognizing a constitutional prohibition against out-of-court statements in this context.[103] The dissent focused on the "heavy societal costs" that the majority opinion imposed, both in terms of the likelihood that some guilty defendants would go free but also the increased financial cost of criminal trials now that states would be forced to comply with this understanding of the confrontation right.[104] The majority recognized that its decision "may make the prosecution of criminal trials more burdensome."[105] It reasoned first, however, that any potential increased cost of prosecution was not a valid consideration in construing constitutional provisions[106] but also

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102 Ivana Deyrup, *Causing the Sky to Fall: The Legal and Practical Implications of Melendez-Diaz,* HARV. L. & POL'Y REV. at 1. In her article, Deyrup provides useful statistics on the early impact of *Melendez-Diaz* and on states' response to the decision. *Id.* Chief of Law Enforcement for Utah AG said, "This case may well have the biggest financial impact in many years on the cost of policing and prosecution." Ken Wallentine, *12 Supreme Court Cases Affecting Cops*, POLICEONE.COM (Nov. 11, 2009), https://www.policeone.com/legal/articles/1964272-PoliceOne-Analysis-12-Supreme-Court-cases-affecting-cops/.

103 Compare Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326 (2009) ("Despite [this rule's widespread use among states], there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial."); *and id.* at 328 ("[T]here is little reason to believe that our decision today will commence the parade of horribles respondent and the dissent predict."); *with id.* (Kennedy, J., dissenting) at 341 ("By requiring analysts also to appear in the far greater number of cases where defendants do not dispute the analyst's result, the Court imposes enormous costs on the administration of justice.").

104 *See id.* at 343. ("The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process.").

105 *Id*. at 325.

106 *See id.* at 325 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause--like

that the economic predictions of the dissent were exaggerated and overblown.[107] This conversation about the economic costs of the newly-understood right to confrontation continued in subsequent Confrontation Clause cases,[108] and has not been resolved to the satisfaction of some prosecutors and state legislators who are trouble by the increased costs of compliance.

Another of the practical concerns expressed after *Melendez-Diaz* was the prospect of gamesmanship on the part of defendants and their lawyers in refusing to stipulate to certificates of analysis and thereby demanding the presence of the drug analyst without any meaningful intention to confront or cross-examine the witness.[109] A representative from a Virginia Department of Forensic Science laboratory described the problem in vivid terms: in responding to 13 subpoenas, the analysts "spent 74 hours out of the office, traveled 2,600 miles and testified only twice for a total of 10 minutes. They were never questioned by the defense."[110]

In response to the *Melendez-Diaz* decision, states quickly drafted legislation to contain costs and to head off the potential for gamesmanship among defendants (or defense attorneys) who might exercise their right to confront scientific witnesses solely in hopes that those witnesses would not appear in court. Kansas, for example, attempted to address this problem by allowing the

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those other constitutional provisions--is binding, and we may not disregard it at our convenience.").

107 *See id.* ("We also doubt the accuracy of respondent's and the dissent's dire predictions.").

108 See, e.g., Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) ("We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.").

109 *See* Deyrup, *supra* note 102 (discussing the concern of *Melendez-Diaz* opponents that defendants would call analysts without intending to contest their conclusions).

110 *See id.* n.45 (citing Alan Cooper, *Prosecutors, analysts deal with* Melendez-Diaz *fallout*, VIRGINIA LAWYERS WEEKLY (Nov. 30, 2009), http://valawyersweekly.com/blog/2009/11/30/prosecutors-analysts-deal-with-melendez-diaz-fallout/).

admission of a certificate of analysis over the defendant's formal objection "unless it appears from the notice of objection and grounds for that objection that the conclusions of the certificate . . . will be contested at trial."[111] The Kansas Supreme Court held that this statute violated the Confrontation Clause, as interpreted in *Melendez-Diaz*.[112]

Statutes that shifted the burden of production onto criminal defendants seemed clearly unconstitutional after *Melendez-Diaz*,[113] but notice-and-demand statutes seemed to present a way for states to accommodate the newly-invigorated right to confront while still containing costs.[114] The majority opinion in *Melendez-Diaz* itself provided guidance to states considering this approach, cautioning that states could not shift the burden of calling witnesses onto the defendant but could require that the defendant object in advance of trial to the state's use of testimonial hearsay at trial.[115]

Just four days after deciding *Melendez-Diaz*, the Supreme Court agreed to consider the constitutionality of Virginia's notice-and-demand statute in *Briscoe v. Virginia*.[116] Seeing the writing on the wall, however, Virginia's General Assembly quickly convened and altered its notice-and-demand statute to conform to the requirements set forth in *Melendez-Diaz*.[117] The Supreme Court remanded *Briscoe* to the Supreme Court of

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111 KAN. STAT. ANN. § 22-3437(3) (2008).

112 State v. Laturner, 218 P.3d 23, 39 (Kan. 2009) (striking portions of the Kansas statute as unconstitutional under the Sixth Amendment).

113 *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) ("Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse witness no-shows from the State to the accused.").

114 *See* Deyrup, *supra* note 102. (distinguishing between burden shifting statutes and notice-and-demand statutes).

115 *See* Melendez-Diaz at 324 ("The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."). The Court saw true notice-and-demand statutes as simply accelerating the timing of the defendant's Confrontation Clause objection and therefore saw no constitutional infirmity with these statutes. *Id.* at 326–27.

116 559 U.S. 32 (2010).

117 *See* VA. CODE ANN. §§ 19.2-187, 19.2-1878.1.

Virginia, which concluded that the old notice-and-demand statute impermissibly shifted the burden of proof onto the defendant and reversed the defendant's conviction.[118]

Virginia's revised notice-and-demand statute, passed during a special session in 2009, responded not only to the *Melendez-Diaz* decision but also to the predicted dramatic rise in subpoenas for drug analysts.[119] The notice-and-demand statute passed in Virginia requires any prosecutor wishing to introduce a certificate of analysis at trial in lieu of live testimony to provide notice to the defendant at least 28 days prior to the trial along with a notice of the defendant's right to object to such out-of-court testimony.[120] The defendant then has fourteen days within which to object to the admission of the certificate.[121] If the defendant files such a timely objection, the certificate is rendered inadmissible. At no point is the defendant required to state a reason for her objection or to declare an intention to cross-examine any live witness who might appear.[122] The majority of American jurisdictions have now adopted some form of notice-and-demand statute similar to this.[123] Some states go

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118 *See* Cypress v. Commonwealth, 699 S.E.2d 206, 214–15 (Va. 2010) (stating the conclusion of the Virginia Supreme Court).

119 In the nine months preceding the *Melendez-Diaz* decision, forensic analysists were subpoenaed an average of 528 times per month. *See* Stephen Wills Murphy & Darryl K. Brown, *The Confrontation Clause and the High Stakes of the Court's Consideration of* Briscoe v. Virginia, 95 VIRGINIA LAW IN BRIEF 97, 98 (2010). In July, the month following *the Melendez-Diaz* decision, forensic analysts were subpoenaed 1885 times with similar totals for subsequent months, *See id.*; *see also* Anne Hampton Andrews, *The* Melendez-Diaz *Dilemma: Virginia's Response, A Model to Follow*, 19 WM. & MARY BILL RTS. J. 419, 440 (2010) (describing similar statistics concerning the increase in subpoenas following the *Melendez-Diaz* decision). The Virginia Department of Forensic Science painted a fairly bleak picture of the financial implications of *Melendez-Diaz* and the Commonwealth's ability to assume that burden—concerning the number of needed analysts, vehicles, and budgetary increases to satisfy the new requirement. *See id.* (discussing the realistic implications of the decision on Virginia's financial state at that time).

120 *See* VA. CODE ANN. § 19.2-197.1(A)(1).

121 *See* VA. CODE ANN. § 19.2-197.1(B).

122 *See* VA. CODE ANN. § 19.2-197.1(B).

123 For a good general description and taxonomy of notice-and-demand statutes, see Jennifer Sokoler, Note: *Between Substance and Procedure: A Role*

further and also require a certification that the requesting party intends to actually conduct a cross-examination.[124] When the defendant does not then conduct the cross-examination certified to, she is charged an additional fee.[125] Although such a requirement seems to violate the defendant's Confrontation Clause rights as described in *Melendez-Diaz*, they remain on the books in some states.

When Virginia's General Assembly adopted the notice-and-demand procedures, it simultaneously added another provision that imposed a fee on defendants who exercised their rights under *Melendez-Diaz*.[126] This was a change from the previous provision, which had provided that:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence . . . shall have the right to call the person performing such analysis or examination . . . as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear *at the cost of the Commonwealth*.[127]

The new statute amends the final sentence as follows:

> Such witness shall be summoned and appear at the cost of the Commonwealth; however, if the accused calls the person performing the analysis or examination as a witness and is found guilty of the

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for States' Interests in the Scope of the Confrontation Clause, 110 COLUM. L. REV. 161, 181–96 (2010).

[124] Alabama requires the requesting party to "include a statement of the basis upon which the requesting party intends to challenge the findings contained on the certificate of analysis." ALA. CODE ANN. § 12-21-302. If the defendant "fails to conduct the cross-examination previously certified to," then she is assessed the costs of bringing the witness to court. ALA. CODE ANN. § 12-21-302(b).

[125] *See id.* ("If the request for subpoena is granted, and the requesting party subsequently fails to conduct the cross-examination previously certified to, the court shall assess against the requesting party, all necessary and reasonable expenses incurred for the attendance in court of the certifying witness.").

[126] *See* VA. CODE ANN. § 19.2-187.1(F) (2016) (imposing a fee on defendants who demand confrontation and then are found guilty).

[127] VA. CODE ANN. § 19.2-187.1 (2008) (amended 2016) (emphasis added).

> charge or charges for which such witness is summoned, $50 for expenses related to that witness's appearance at hearing or trial *shall be charged to the accused as court costs*.[128]

With one hastily appended provision, Virginia imposed a tax on the exercise of a defendant's constitutional right to confront witnesses.[129]

Several states currently impose costs on defendants who choose to exercise their confrontation right as defined in *Melendez-Diaz*, either explicitly as Virginia does or generally under a rule that imposes costs on defendant for each witness called.[130] The United States Supreme Court has not addressed in any of its recent Confrontation Clause decisions which party would bear the costs of producing these witnesses, or whether there is any constitutional problem with assessing defendants an extra fee for exercising their right to confront adverse witnesses.

C. Right to Jury Trial

The right to trial by jury is central to American notions of criminal justice, but even this right has become the subject of user fees. The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[131] As with the examples above concerning the defendant's right to counsel and right to confront adverse witnesses, many states charge defendants for the exercise of their right to a jury trial. In

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128 VA. CODE ANN. § 19.2-187.1(F) (2016) (emphasis added).

129 *See id.*

130 ALA. CODE ANN. § 12-21-302 (assessing all "necessary and reasonable" expenses if the defendant requests and receives a subpoena and then fails to conduct a cross-examination; COLO. REV. STAT. § 18-1.3-701 (imposing "reasonable" fees, including for chemical analysis, on the defendant upon a motion by the prosecutor); LA. REV. STAT. ANN. § 13:847 (imposing on the defendant generalized witness subpoena fees); N.C. GEN. STAT. § 7A-304 (imposing a $600 fee to be assessed against the defendant); S.D. CODIFIED LAWS § 23A-27-27 (imposing fees on the defendant in the judgment as costs for witnesses, blood test fees, and other chemical analysis test fees); VA. CODE ANN. § 19.2-187.1(B) (imposing a $50 fee if found guilty).

131 U.S. CONST. amend. VI.

Apprendi v. New Jersey,[132] Justice Scalia wrote that the "jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free."[133] In many states, that is no longer true.

Several states explicitly add a fee for the election of a jury trial. Delaware charges an additional $78 per charge if the defendant elects a jury trial instead of a bench trial.[134] Colorado,[135] Illinois,[136] Mississippi,[137] Missouri,[138] Montana,[139] Nevada,[140] Ohio,[141] Oklahoma,[142] Texas,[143] Virginia,[144] West

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132 530 U.S. 466 (2000).

133 *Id.* at 498 (Scalia, J., concurring).

134 *See* DEL. CRIM. R. GOV'G C.P. 58 (charging defendants in the Court of Common Pleas $52 for a non-jury case and $130 for a jury case).

135 *See* Christie v. People, 837 P.2d 1237, 1244 (Colo. 1992) (stating that the state's jury fee "does not constitute an undue burden on the right to a jury trial").

136 *See* People ex rel. Flanagan v. McDonough, 180 N.E.2d 486, 487 (1962) (discussing the permissibility of state law that allows for jury fees with an increase in fee associated with a 12-person jury).

137 *See* MISS. CONST. ANN. Art. 14, § 261.

138 *See* State v. Wright, 13 Mo. 243, 244 (1850) (rejecting the defendant's argument that the jury tax violated Missouri's constitutional guarantee "that right and justice ought to be administered without sale, denial or delay").

139 *See* State v. Fertterer, 841 P.2d 467 (Mont. 1992) ("[T]he constitutionality of the foregoing statute [allowing the court to assign costs for the jury as part of sentence] has been upheld against claims of a violation of due process rights under the Constitution."), overruled on other grounds by State v. Gatts, 928 P.2d 114 (Mont. 1996).

140 *See* NEV. REV. STAT. ANN. § 178.3975 (allowing costs to be assessed on defendants); *but see* Korby v. State, 565 P.2d 1006 (1977) (rejecting jury and associated fees when a defendant is acquitted).

141 *See* OHIO REV. CODE ANN. § 2947.23 (imposing costs on a defendant for a jury if the jury has been sworn).

142 *See* OKLA. STAT. ANN. tit. 28, § 153 (authorizing a thirty-dollar fee imposed on a defendant for any time a jury is requested).

143 *See* TEX. CRIM. PROC. CODE ANN. art. 102.004 (authorizing jury fees by court); *see also* TEX. CRIM. PROC. CODE ANN. art. 102.0045 (authorizing an additional jury cost of four dollars to be used to reimburse counties for the cost of jury services).

144 *See* Kincaid v. Commonwealth, 105 S.E.2d 846, 848 (Va. 1958) ("The costs of a jury are an expense incident to the prosecution, and its collection violates no constitutional right of the accused.")

Virginia,[145] and Wisconsin[146] all provide expressly for an additional charge to be assessed against a defendant who elects a jury and is convicted. Other states have general statutes authorizing assessment of the costs and fees of the prosecution against a defendant, which could be read to include a larger fee if the defendant was tried by a jury. Washington even offers defendants a choice between a 6-person and a 12-person jury, with the larger jury commanding double the price.[147]

Many states employ a two-tiered criminal adjudication system, with misdemeanors being tried initially to a judge but then subject to a *de novo* appeal by the defendant to a higher court, in which the case may be decided by a jury if state or federal law grant the defendant that right.[148] Most of the states with such a system assess an additional charge for any defendant who chooses to exercise her right to a jury trial, and in most instances the defendant must first have the case decided by a judge. Although these systems protect defendants' rights in that they give the accused two bites at the apple, they also introduce a surcharge for the defendant who wants the protection of the jury.

Arkansas has a two-tiered criminal trial system, with misdemeanors being triable initially either in district court or circuit court, entirely at the discretion of the prosecutor.[149] Because anyone accused of any criminal violation has a right to be tried by a jury according to state law, those initially convicted in district court have the right to a *de novo* appeal to circuit court, in which that person may elect to be tried by a jury.[150] In order to

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145 *See* State ex rel. Ring v. Boober, 488 S.E.2d 66, 71 (W. Va. 1997) (rejecting defendant's argument that the potential jury fee "imposed an unreasonable burden upon the exercise of an indigent defendant's constitutional right to a jury trial").

146 *See* WIS. STAT. ANN. § 814.51 (authorizing the assessment of one entire day's jury fees for a jury, including all mileage costs against the defendant if a jury is demanded and is later withdrawn within two business days of trial).

147 *See* Wash. CRR 6.1 (allowing defendant to elect between a jury of six or twelve); WASH. REV. CODE ANN. § 36.18.016 (imposing different costs based on the size of the jury).

148 Massachusetts, Virginia, Arkansas where else…

149 *See* Arkansas Atty. Gen. Op. No. 2001-298 (Oct. 22, 2001).

150 *See* ARK. R. CRIM. P. Rule 28.1 (detailing the right to a de novo appeal in circuit court from a trial court decision).

exercise that right to a jury trial, however, the accused must pay an extra $165 fee, which is nonrefundable without regard to whether the charge results in conviction, acquittal, or dismissal.[151] Neither the Arkansas Code nor the Rules of Criminal Procedure appear to allow such fees to be waived in the case of indigent defendants attempting to exercise their rights to a jury trial.[152]

In *Duncan v. Louisiana*,[153] the Supreme Court held that the right to a jury trial was fundamental to the American system of criminal justice and so bound the states through the Fourteenth Amendment.[154] The Court in *Duncan* explained the importance of the jury: "An inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[155] *Duncan* held that states were required to provide a jury trial for any defendant facing a "serious offense," defined in that case as one carrying a potential sentence of at least a two-year period of incarceration.[156] Two years after *Duncan*, the Court extended its definition of "serious offense" to include any crime for which the authorized imprisonment was at

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151 This fee consists of a $150 filing fee and an additional $15 "technology fee." *See* Ark. Sup. Ct. & Ct. of App 6-7 (detailing the fees taken from a defendant which can be recovered on reversal).

152 *See* ARK. CODE ANN. § 21-6-403; *see also* Brief for Arkansas Public Law Center as Amicus Curiae Supporting a Petition for a Writ of Certiorari, Carrick v. Hutchinson, 2015 WL 5466138, at 7, n.3 (2015) (No. 15-204). Those defendants whose cases originate in circuit court are not required to pay either of these fees in order to have their cases heard by a jury. *See* ARK. CODE ANN. § 21-6-403(f).

153 391 U.S. 145 (1968).

154 *See id.* at 149

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

155 *Id.* at 156. Patrick Henry defended the importance of the jury as a local community protection against government over-reach and intrusion: "This gives me comfort—that as long as I have existence, my neighbors will protect me." NEIL COGAN, THE COMPLETE BILL OF RIGHTS 438 (1998).

156 Duncan, 391 U.S. at 161–62.

least six months.[157] A crime for which the maximum authorized punishment is less than six months' incarceration is presumed to be a petty offense, and therefore outside of the scope of the federal constitutional right to a trial by jury.[158] The Supreme Court has allowed, however, that this presumption of pettiness is rebuttable if the defendant can show other indicia that demonstrate seriousness.[159]

Whether specific or general, waivable or not on the basis of indigency, and explained to the defendant in advance or added on to her bill after trial, each of these additional fees acts as a tax on the exercise of the jury trial right. States differ in their application of jury trial fees and the amount that defendants are charged. And many states have resisted the temptation to impose additional fees for defendants who exercise their right to a jury trial.[160] But in many jurisdictions across the country, criminal defendants now must decide between keeping their costs down and exercising the right to a trial by jury.

III. Doctrinal Limitations of User Fees

Although the presumption in American courts is that the government bears the costs of prosecuting criminal cases, legislatures may impose specific costs on the defendant by statute.[161] When such specific statutory authorization exists,

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157 *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."); *see also* Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989) ("The possibility of a sentence exceeding six months, we determined, is 'sufficiently severe by itself' to require the opportunity for a jury trial." (quoting Baldwin, 399 U.S. at 69, n.6)).

158 *See* Blanton, 489 U.S. at 543 (stating that for society's purposes, a crime carrying a maximum term of six months or less can be understood as petty).

159 *See id.* (discussing the rebuttable presumption of a crime carrying a sentence of six months or less as not entitled to a jury trial).

160 Alaska, Connecticut, Idaho, Kansas, Michigan, New Hampshire, North Dakota, Ohio, and South Carolina are a few states in which either the legislature or the courts have decidedly rejected fees for jury trials.

161 See United States v. Bevilacqua, 447 F.3d 124, 127 (1st Cir. 2006) ("American legal tradition does not, absent specific statutory authority, require

courts tend to defer to the legislative prerogative to impose such costs and reject challenges to those fees as unconstitutional.[162] Courts have placed limits on a legislature's power to impose these costs and fees, however, where they are seen as having the potential to chill the exercise of the right in question.[163]

One of the earliest attempts to challenge the imposition of fees on indigent defendants who had been appointed counsel at trial was in the 1972 case of *James v. Strange*.[164] David Strange was charged with first-degree robbery.[165] With the assistance of court-appointed counsel, Mr. Strange entered a plea of guilty to the reduced charge of pocket picking and was given a suspended sentence.[166] When Mr. Strange was subsequently assessed a $500 fee for the recoupment of payment made by the state to his attorney, he argued that the assessment of the fee violated his constitutional right to equal protection.[167] Although the Supreme Court agreed with Mr. Strange that the Kansas recoupment fee was unconstitutional, Justice Powell wrote a narrow opinion that focused on the specifics of the Kansas statue.[168] The Kansas recoupment statute provided that an indigent defendant who does not repay the amount assessed within 60 days of being notified of the obligation would have a judgment docketed against her and allowed for a lien to be executed on the defendant's real estate.[169] The state was also entitled to garnish the defendant's wages, and the defendant was not entitled to exemptions that Kansas law allowed for other debtors.[170] The Supreme Court found that the

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defendants to reimburse the government for the costs of their criminal investigations or their criminal prosecutions.").

[162] *See* Logan & Wright, *supra* note 38, at 1207 ("On the whole, challengers lose more often than they win because courts defer to legislative judgments in enacting statutes that require the payment of specific costs or fees.").

[163] See *id.* at 1209. (citing Burns v. Ohio, 360 U.S. 252, 258 (1959); Griffin v. Illinois, 351 U.S. 12, 16-19 (1956); State v. Dudley, 766 N.W.2d 606, 617 (Iowa 2009); State v. Tennin, 674 N.W.2d 403, 410-11 (Minn. 2004); State v. Webb, 591 S.E.2d 505, 509-10 (N.C. 2004)).

[164] 407 U.S. 128 (1972).

[165] *Id.* at 129.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 135–36.

[169] *Id.* at 130.

[170] *Id.* at 131

relatively unfavorable treatment shown to debtors under the recoupment statute when compared to other types of debtors violated principles of equal protection.[171] The Court found it especially troubling that even acquitted defendants were not only charged the recoupment fee, but were also subject to the unfavorable recovery terms and denied basic debtor exemptions.[172]

The Court in *Strange* went to great lengths to avoid the broader issue of whether recoupment statutes violated the Sixth Amendment by chilling or deterring the exercise of the right to counsel. While the court below had ruled that the Kansas statute was unconstitutional because it "needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel,"[173] the Supreme Court decided the case on the much narrower equal protection grounds shown by the way the different debtors were treated under Kansas law.[174] There is evidence that the Court did not want to discourage the experimentation that was going on among the states in their attempts to fund the growing need for indigent defense counsel.[175] The Court declined Mr. Strange's invitation for a sweeping ruling that would eliminate or discourage recoupment fees: "Given the wide differences in the features of these statutes [among the various states that allow for recoupment of fees for court-appointed counsel], any broadside pronouncement on their general validity would be inappropriate."[176]

The Supreme Court addressed the more general issue of the constitutionality of recoupment fees just two years later in 1974 in *Fuller v. Oregon*.[177] In *Fuller*, the Court considered a

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171 *See id.* at 140–41 ("[T]o impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice, no less than in *Rinaldi*, a discrimination which the Equal Protection Clause proscribes.").

172 *Id.* at 139.

173 *Id.* at 134 (quoting 323 F. Supp. 1230, 1233 (D. Kan. 1971)).

174 *See id.* at 140–41 (concluding that the Kansas statute constituted a violation of the Equal Protection Clause).

175 Powell correspondence with Wilkinson.

176 James v. Strange, 407 U.S. 128, 133 (1972).

177 417 U.S. 40 (1974).

challenge to Oregon's recoupment statute, by which criminal defendants were required to repay costs of their own defense to the state after conviction.[178] Charged with third-degree sodomy and other charges, Mr. Fuller was appointed counsel by the trial court after it concluded that he was indigent and therefore unable to hire his own lawyer.[179] His court-appointed lawyer in turn hired an investigator to work on Fuller's case.[180] After pleading guilty to the charge of third-degree sodomy, Fuller was sentenced to a five-year period of probation, conditioned upon him reimbursing the state for the costs of his defense, including both his lawyer's and investigator's fees and costs.[181]

Fuller appealed his sentence, arguing that the state violated the Constitution in conditioning his successful completion of probation on his repayment of the fees for his court-appointed defense.[182] The Court disagreed, however, finding no equal protection violation and no direct violation of the Sixth Amendment as applied to the states through the Fourteenth Amendment.[183] With regard to Fuller's equal protection claim, the Court held that differentiating between convicted defendants and those who were either acquitted or had their charges dismissed

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178 *Id.* at 41. In a separate but related line of cases, the Supreme Court has placed strict limits on when a judicial officer personally can benefit from the outcome of a case. In *Tumey v. Ohio*, the Court invalidated a system in which the judge was paid a flat rate per conviction (but not acquittals or dismissals), holding that the pecuniary interest of the judge cast doubt on the impartiality of the system. 273 U.S. 510 (1927). Half a century later, the Court similarly ruled that a system whereby judges were paid per warrant issued, but not those warrant applications that were denied, was unconstitutional. *Connally v. Georgia*, 429 U.S. 245, 251 (1977) (deeming this practice a violation of the Constitution). Instances in which the revenues generated went to the general fund (out of which the judge is paid) rather than to the judge personally, however, have been upheld. *See* Dugan v. Ohio, 277 U.S. 61, 65 (1928) (finding the judge's relationship to the city's general fund was "too remote to warrant a presumption of bias toward conviction" and thus to trigger constitutional concern). While the personal profit by a judicial officer from prosecution and conviction generally violates due process, no such general prohibition exists from a municipality or state profiting in this manner.

179 Fuller, 417 U.S. at 41.

180 *Id.*

181 *Id.* at 41–42.

182 *Id.* at 42.

183 *Id.* 50–52.

was constitutionally permissible, and that the distinction between those two classes of criminal defendants was not invidious.[184] The Court put great weight on the fact that Oregon's recoupment statute contained a number of exemptions for those unable to repay the state.[185] These exemptions, the Court held, distinguished Fuller's case from the statute at issue in *James v. Strange*.[186]

The Court also rejected Fuller's argument that Oregon's recoupment statute violated his Sixth Amendment right to counsel, as applied to the states through the Due Process Clause of the Fourteenth Amendment.[187] Fuller argued that Oregon's statute could chill the exercise of a defendant's constitutional right to counsel by making the exercise costly.[188] Rejecting this claim, the Court reasoned that the potential burden of repayment of the costs of court-appointed counsel did not interfere with the right to counsel guaranteed in *Gideon v. Wainwright*:

> We live in a society where the distribution of legal assistance, like the distribution of all goods and

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184 *Id.* at 50 ("This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.").

185 *Id.* at 47.

186 *See id.* at 47–48 ("The legislation before us, therefore, is wholly free of the kind of discrimination that was held in *James* v. *Strange* to violate the Equal Protection Clause."). Among the refinements that Oregon included in its recoupment statute that had been absent in *Strange* were the following: only those defendants convicted of a crime could be forced to repay, only those who were able to repay the state could be required to do so, sentencing judges were required to consider each person's finances in deciding whether or not to impose such a burden, and those required to repay the costs of their own defense could petition the sentencing court to reconsider and could not be held in contempt for failure to repay if that person could show that the failure to do so was not because of an intentional or bad-faith refusal to pay. *See id.* at 45–46 (noting "the conditions that must be satisfied before a person may be required to repay the costs of his legal defense").

187 *Id.* at 51.

188 *Id.* While not arguing that his counsel was ineffective or that the fees assessed for those purposes constituted unreasonable compensation for his counsel, Fuller "assert[ed] that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of a court-appointed attorney and thus 'chill' his constitutional right to counsel." *Id.*

> services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.[189]

While recognizing that recoupment statutes could be found unconstitutional if they constituted a penalty on the exercise of the right to appointed counsel, the Court found that Oregon's statute was not such a penalty because it burdened only those who foreseeably had the ability to pay without hardship.[190]

State and lower federal courts have occasionally ruled unconstitutional state recoupment statutes when they have strayed from what the Supreme Court authorized in *Fuller*. Such statutes have been ruled unconstitutional if they do not inquire into a defendant's ability to pay,[191] if they do not afford the defendant the same exemptions and procedural protections given to other debtors under state law,[192] and if the state seeks to treat defendants who have been acquitted more harshly than

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189 *Id.* at 53–54.

190 *Id.* at 54.

191 *See, e.g.*, State v. Dudley, 766 N.W.2d 606, 623 (Iowa 2009) ("[I]mposing mandatory reimbursement without regard to ability to pay infringes an indigent defendant's right to counsel."); Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) (concluding that "a court should not order a convicted person to pay" expenses unless he is presently able to pay them "or will be able to pay them in the future considering his financial resources and the nature of the burden that payment will impose. If a person is unlikely to be able to pay, no requirement to pay is to be imposed"); Fitch v. Belshaw, 581 F. Supp. 273, 277 (D. Or. 1984) (holding the state's statute that imposed repayment obligation without any determination of the defendant's ability to pay "unconstitutionally chills an indigent defendant's exercise of Sixth Amendment right to counsel"); State v. Tennin, 674 N.W.2d 403, 410–11 (Minn. 2004) (holding mandatory recoupment statute to violate defendant's federal and state right to counsel).

192 State v. Dudley, 766 N.W.2d 606, 616–18 (Iowa 2009) (discussing the invalidity of the state statute based on denial of exemptions to the criminal defendant).

defendants who have been convicted.[193] Generally, however, *Fuller* has provided a roadmap to the states on how to require reimbursement of the costs of one's own court-appointed lawyer without violating constitutional principles of due process, equal protection, or the Sixth Amendment right to counsel.[194]

Challenges to the imposition of fees for the exercise of other constitutional rights are less frequent than those involving recoupment statutes in the right-to-counsel context. Courts have considered, both before and after the *Melendez-Diaz* decision, the extent to which states can constitutionally impose a burden, either financial or procedural,[195] on a criminal defendant who wishes to confront a scientific witness at trial.[196] Although simple notice-and-demand statutes have been held constitutional, courts have struck down statutes that require a defendant to assert a specific objection to the out-of-court statement and grounds for that objection.[197] In *State v. Campbell*,[198] the North Dakota Supreme Court upheld that state's notice-and-demand statute as a reasonable requirement, noting that while the statute required defendants who were able to pay to be assessed the costs of the witness's appearance, the statute exempted indigent defendants from this financial burden.[199] In upholding Virginia's notice-and-demand statute in a case that preceded the decision in *Melendez-Diaz*, the Virginia Court of Appeals noted that the Commonwealth bore the costs associated with the witness's appearance at trial and upheld the statute as a "reasonable procedure" that "encourages judicial and governmental economy . . . ."[200] Shortly after the Virginia Court of Appeals' decision, the Virginia General Assembly amended the statute in

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194 *See generally* Fuller v. Oregon, 417 U.S. 40 (1974).

195 *See* Sokoler, *supra* note 123, at 190, nn.145, 154.

196 *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (requiring confrontation for testimonial laboratory results by laboratory analysts).

197 *See, e.g.*, State v. Laturner, 218 P.3d 23, 37–38 (2009) (concluding that the demands of Kansas's statute went beyond that authorized in *Melendez-Diaz* and caused the defendant's confrontation right to be violated).

198 719 N.W.2d 374 (N.D. 2006).

199 *Id.* at 378.

200 Brooks v. Commonwealth, 638 S.E. 2d 131, 136 (2006).

significant ways, including to shift the costs associated with calling the scientific witness onto the defendant.[201]

States have taken various approaches to the practice of charging criminal defendants for the exercise of their right to be tried by a jury.[202] Striking down that state's jury trial fee in 1979, the New Hampshire Supreme Court declared that "a criminal defendant cannot be required to purchase a jury trial—even for so nominal a sum as eight dollars."[203] In reaching the conclusion that such a fee violated the state constitution, the court compared a jury trial fee to the voting poll tax that was struck down by the United States Supreme Court in *Harper v. Virginia Board of Elections*.[204] In that case, the Supreme Court declared that conditioning a person's vote on a payment of a fee violated principles of equal protection, "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it."[205] Other states have flatly prohibited the practice of charging criminal defendants an additional charge for empaneling a jury, although often pursuant to principles of state law.[206]

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201 *See* VA. CODE ANN. § 19.2-187.1(F) (2016).

202 Although not involving a financial surcharge, the United States Supreme Court struck down the capital sentencing provision of the federal kidnapping statute as unconstitutional because it allowed for a capital sentence only after a jury trial. *See* United States v. Jackson, 390 U.S. 570 (1968). The Court said that this placed too high a price on the exercise of one's right to a jury trial. *See id.* at 581 ("The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.").

203 State v. Cushing, 399 A.2d 297, 297–98 (N.H. 1979).

204 *See id.* at 298 (comparing the "purchase of a jury trial" to the poll tax struck down in *Harper v. Virginia Board of Elections*).

205 Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966).

206 *See, e.g.*, People v. Kennedy, 25 N.W. 318, 320 (Mich. 1885) ("[I]t would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the constitution of the state gives them—a trial by jury."); People v. Hope, 297 N.W. 206, 208 (Mich. 1941) ("[A]ssessing costs against a defendant for a jury in a criminal case is not permissible under the laws of this State. Every person charged with a criminal offense has a constitutional right to a trial by jury."); *see also* T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CAL. L. REV. 183, 211, n.161 (2012). Several states have expressly considered

IV. The Problem with Privatizing Fundamental Rights

The proliferation of user fees in criminal procedure turns fundamental rights into commodities. Those charged with crime can either buy enhanced procedural protections or forego those safeguards in order to save money. The commodification of trial rights risks creating a secondary class of criminal justice for poor people,[207] but it also risks changing the way that we conceive of fundamental rights. Markets affect the way that society views goods, and a market in procedural protections for those accused of crime threatens to undermine the way society views the purposes and objectives of the criminal justice system.

A. Principled Problems

Many have acknowledged that the criminal adjudication system could not function if everyone charged with crime exercised the full panoply of trial rights afforded them by the Constitution.[208] The adversarial system depends on most criminal defendants waiving their procedural rights and, therefore, the system makes the exercise of those rights costly.[209] The most

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and rejected this argument. *See id.* at 212, n.165 (citing states that have considered constitutional challenges to the imposition of jury fees and have rejected them).

[207] Of course, a strong argument can be made that the American system of criminal justice has already developed into a two-tiered system, with overwhelmed public defenders handling the bulk of the criminal cases, while those few defendants with money are able to hire private counsel and fully exercise their formal trial rights. Phil McCausland, *Public defenders nationwide say they're overworked and underfunded*, NBC NEWS (Dec. 11, 2017), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111.

[208] Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1095 (2013) (discussing the impracticality of the American criminal justice system if defendants were to assert all of the constitutional rights afforded to them).

[209] Michelle Alexander, Op-Ed., *Go to Trial: Crash the Judicial System*, N.Y. TIMES, Mar. 11, 2012, at SR 5

> The Bill of Rights guarantees the accused basic safeguards, including the right to be informed of charges against them, to an impartial, fair and speedy jury trial, to cross-examine witnesses and to the assistance of counsel. But in this era of

vivid and widespread example of this is our system of plea bargaining,[210] in which a defendant who turns down a plea offer and forces the state to prove its case is subject to the well-known "trial tax" and will likely spend more time behind bars if convicted after a trial.[211]

In his examination of the rhetoric of citizenship in Supreme Court cases, Bennett Capers concludes that the law's vision of the "good citizen" as one who cooperates with law enforcement and freely waives her rights is troubling and at odds with an idea of a free and equal society.[212] Capers critiques the Court's repeated invocations of "good citizens" as those who will freely speak with law enforcement, notwithstanding their right to be left alone: "There is something deeply problematic about a model of good citizenship that relies on citizens *foregoing* their citizenship rights. Just as there is something problematic with a model of good citizenship that, in effect if not by design, chills democratic dissent."[213]

Capers goes on to argue that the problems with imposing cultural expectations of citizenship as a price to be paid for the exercise of rights does not fall equally on all citizens.[214] Of course, there is an unequal distribution of power across social groups,

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> mass incarceration—when our nation's prison population has quintupled in a few decades partly as a result of the war on drugs and the "get tough" movement—these rights are, for the overwhelming majority of people hauled into courtrooms across America, theoretical. More than 90 percent of criminal cases are never tried before a jury. Most people charged with crimes forfeit their constitutional rights and plead guilty.

210 See, e.g., Lafler v. Cooper 566 U.S. 156, 157 (2012) (acknowledging that "criminal justice today is for the most part a system of pleas, not a system of trials").

211 J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 32 GPSOLO 74, 75 (2015) (discussing the imposition of a "trial tax" on criminal defendants asserting their constitutional right to a trial).

212 I. Bennett Capers, *Criminal Procedure and the Good Citizen*, COLUM. L. REV. (forthcoming 2018) (manuscript at 56) (finding as contrary to democratic ideals the notion that "good citizens" include those willing to cooperate with police officers).

213 *Id.* at 46.

214 *See id.* at 46–47 (discussing the racial inequality implications of "citizenship talk").

which leads to a disproportionate burden on people of color in the actual exercise of their rights.[215] "We should be troubled by citizenship talk that requires minorities to prove or 'work' their citizenship, and to perform as passive, non-questioning and indeed second-class citizens."[216] These critiques are as true in the context of trial rights as in the Fourth Amendment context with which Capers is primarily concerned. We should be troubled by a criminal justice system that systematically discourages the exercise of trial rights by defendants, especially if that burden falls most heavily on already marginalized groups. The impact of "á la carte" procedural fees disproportionately impacts poor people and people of color, leading to functionally different criminal adjudication systems based on access to money.

Applying Capers's formulation in the context of trial rights implicates citizenship in two ways: financial and philosophical. The privatization or commodification of trial rights requires a criminal defendant to purchase rights that should simply flow from citizenship, and which have previously been thought to be incident to citizenship. Moreover, the expectations of citizenship differ for marginalized subjects of the criminal justice system. Poor people and people of color, the disproportionate subjects of American systems of criminal justice, are expected to passively acquiesce in the restriction of their trial rights, and to accept the limited form of citizenship that is offered to them.

The history of states' attempts to impose poll taxes on those wishing to exercise their right to vote is instructive. Defended by states as simply attempts to fund the electoral process, these surcharges on the right to vote also discouraged participation in elections.[217] After initially finding no constitutional infirmity in state poll taxes, the Supreme Court later reversed itself, concluding that such taxes were an unconstitutional infringement on the right to equal protection.

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215 *Id.* at 46.

216 *Id.* at 46-47.

217 David Schultz & Sarah Clark*, Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 391 (2011) (describing the poll tax's varied history, most notably its adoption in the South after the Civil War with the intention of disenfranchising African Americans and poor whites).

In 1937, the Supreme Court unanimously rejected a challenge to the practice of poll taxes in state elections, holding that Georgia's imposition of a $1 poll tax on men between the ages of 21 and 60 was constitutional.[218] Georgia law prohibited anyone from voting who could not show that they had paid the poll tax, exempting men over 60 as well as all women from the requirement.[219] The Court rejected arguments that such a voting restriction violated either the Equal Protection Clause or the Privileges and Immunities Clause.[220]

Less than three decades later, however, the Court changed course. In *Harper v. Virginia State Board of Elections*, the Court held that Virginia's poll tax "not to exceed $1.50" violated the Equal Protection Clause of the Fourteenth Amendment.[221] The Court made clear that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard."[222] The Court criticized Virginia's poll tax, stating that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ."[223] Finally, the *Harper* Court concluded that the introduction of wealth or payment as a factor in the exercise of the right to vote constituted invidious discrimination on the basis of wealth and so could not be tolerated, and that the relatively modest amount of the fee required did not affect the unconstitutional nature of the poll tax.[224] Because of the fundamental nature of the right to vote, "any alleged infringement . . . must be carefully and meticulously

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218 *See* Breedlove v. Suttles, 302 U.S. 277, 283–84 (1937) (finding as constitutional the imposition of a poll tax).

219 *Id.* at 281–82.

220 *Id.* at 218, 283.

221 Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966) (holding that "the opportunity for equal participation by all voters" is required and thus striking the poll tax).

222 *Id.* at 666.

223 *Id.* at 667. The *Harper* Court expressed no disapproval, however, of the use of literacy tests as a prerequisite to allowing a citizen to vote, believing that the ability to read and write "has some relation to standards designed to promote intelligent use of the ballot." *Id.* at 666 (quoting Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959)).

224 *See id.* at 670 ("The degree of the discrimination is irrelevant.").

scrutinized."[225] Subsequent cases have upheld voting regulations such as the requirement that a person seeking to vote produce identification[226] but have not retreated from *Harper*'s prohibition against any fee for voting.

Just as the right to vote is "preservative," the right to counsel is fundamental to the exercise of all of the other procedural rights and safeguards that attend a criminal trial in the United States. And the rights to confront witnesses and to have one's case decided by a jury are similarly fundamental to our notions of a fair criminal justice system. The arguments advanced by the Court in *Harper* should apply with equal force in the context of constitutional trial rights designed to ensure fairness and accuracy.

Ironically, the constitutionality of recoupment statutes seems to depend upon a widespread ignorance of their existence. As the Supreme Court of California expressed in invalidating that state's recoupment statute prior to *Fuller*:

> [A]s knowledge of [the recoupment] practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement . . . for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the [Supreme] Court in Gideon.[227]

The constitutionality of post-*Fuller* recoupment statutes—or any elective trial right—rests on a belief that they do not chill the exercise of the right to counsel because so few

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225 *Id.* at 667 (quoting Reynolds v. Sims, 377 U.S. 533, 561–62 (1964)).

226 Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

227 In re Allen, 455 P.2d 143, 144 (Cal. 1969), quoted in Fuller v. Oregon, 417 U.S. 40, 51 (1974).

people know about the surcharges involved.[228] As they become more a routine feature of criminal adjudication, however, this argument falls apart, and the user fees will deter the invocation of fundamental rights just as the California Supreme Court predicted.

B. Pragmatic Problems

Increased costs and fees interfere with the central criminal justice goals of rehabilitation and successful reentry, making it more difficult for those with convictions to obtain housing and employment, as well as to remain successful on probation, parole, or supervised release.[229] In addition to making it objectively more difficult for those involved in the criminal justice system to

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[228] In *James v. Strange*, Justice Powell wrote the opinion that found the recoupment statute unconstitutional on very narrow grounds, not reaching the issue of whether the statute impermissibly chilled the exercise of the right to counsel. In a cover note to a draft of the opinion, law clerk J. Harvie Wilkinson III discouraged Powell from finding it unconstitutional because it chilled the exercise of the right to counsel: "Once we get into the business of saying a particular statute chills the right to counsel, there will be no end to the chilling, no rational way to save these statutes." Memorandum from J. Harvie Wilkinson III to Justice Lewis Powell (on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law). Wilkinson goes on to counsel against using a due process rationale, in that the defendants are not given notice of the requirement to repay the state at the time of the exercise of their right to counsel:

> [O]nce we get to the point of requiring notice, then we are slowly falling into what I think would be the liberAl's [sic] desires to have all of these statutes invalidated under the right to counsel thesis. If you have to notify a guy of the debt right before you assign him counsel, then it obviously is going to "chill" him a little bit, and all these recoupment statutes are in trouble.

See id.

[229] *See* Traci R. Burch, *Fixing the Broken System of Financial Sanctions*, 10 CRIMINOLOGY & PUB. POL'Y 539, 543 (2011); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 978 (2013); Katherine Becker & Alexis Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 509–10 (2011); Kirset D. Livingston & Vicki Turetsky, *Debtors' Prison: Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 187, 191–92 (2007).

re-establish themselves as productive citizens, an over-reliance on court costs and fees to fund the criminal justice system affects the perceived procedural fairness of the system. Perhaps unsurprisingly, poor people who have difficulty paying the costs of their own involvement in the criminal justice system perceive the system as less fair and more biased against them.[230]

The Supreme Court in *Strange* also expressed a general critique of recoupment statutes as contrary to the public policy of successful re-entry into society of those convicted of crimes:

> A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation, and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.[231]

All of these costs come in exchange for little revenue, if revenue generation is even the point of the costs and fees associated with the exercise of rights. The futility of recoupment systems was recognized as early as 1972 by the Supreme Court in *Strange*:

> We do not inquire whether this statute is wise or desirable . . . . Misguided laws may nonetheless be constitutional. It has been noted both in the briefs and at argument that only $17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended.[232]

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230 R. Barry Ruback et al., *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 FED. PROBATION 3, 26, 30 (Dec. 2006).

231 James v. Strange, 407 U.S. 128, 139 (1972).

232 *Id.* at 133.

More recent examinations of recoupment systems have shown a similarly poor return on investment.

The increasing practice of imposing user fees on criminal defendants coincides with an ever-expanding web of collateral consequences that make it difficult for those convicted of crimes to obtain employment.[233] Since the Court decided *Fuller*, these surcharges have multiplied and defendants have become more aware of surcharges as a routine aspect of criminal procedure. The practice of imposing user fees is at once more routine and also more damaging to defendants now than it was, and it is clear that the burdens of a commodified criminal procedure system fall more heavily on disadvantaged groups.[234] Because of this changed historical context, we can see more clearly the dangers of using costs and fees either as a revenue-generator or as a disincentive to the exercise of trial rights. *Fuller*, therefore, should be re-examined in light of this changed context. As the seriousness of even a minor conviction continues to rise, as measured in both direct and collateral consequences,[235] the effect of a tax on trial rights becomes more pernicious.

C. Solutions

One preliminary measure to address the problem of privatization of trial rights is to ensure that all state systems are conducting indigency inquiries and waiving costs and fees for those unable to pay. The available evidence suggests that many states are simply not conducting such inquiries and many of the

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233 *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1103 (2013) (discussing the marked increase in collateral consequences for criminal convictions) (citing Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION, Sept. 1996 at 10, 11–15; Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214–15 (2010)).

234 *See* Sobol, *supra* note 26, at 516 ("The adverse impact of this two-tiered system on the poor and minorities is reflected in the disproportionate assessment of fees, additional monetary sanctions, barriers to re-entry, and stress on families.").

235 *See* King, *supra* note 50, at 20–36 (discussing how misdemeanor convictions affect criminal defendants and specifically detailing several categories of potential collateral consequences).

statutes imposing fees on the exercise of trial rights do not even provide for such waivers.[236] States that do not allow for waivers of these fees based on indigency, however, are vulnerable to due process attack. A robust commitment to only imposing such user fees on those with the ability to pay would ameliorate the most pernicious effects of these rights-based user fees. Historically, however, indigency determinations have been ineffective and inconsistently applied. Since 1983, *Bearden v. Georgia*[237] has prohibited incarceration for failure to pay absent a finding of willfulness, but these protections have proven largely illusory in practice.[238]

Even if the truly indigent were relieved from the financial requirements of rights-based user fees, those criminal defendants who do not qualify as indigent are subject to deciding whether or not to pay for their constitutional rights. It is hard to imagine that the result will be anything other than a chilling effect on the exercise of these rights, especially as they become a more common and well-known aspect of our criminal justice system. As more people become aware of the piecemeal imposition of fees for each right invoked, defendants will become more selective about which ones they use and the exercise of the rights will be chilled by the potential costs.[239]

Beyond either of these rationales, charging defendants for the exercise of trial rights is offensive to our historical understanding of the very nature of these constitutional rights. By turning rights into commodities, we degrade the rights. The only way to address this phenomenon is to eliminate rights-based user fees altogether. Just as the Supreme Court reclaimed the nature of the right to vote as something beyond commerce and the market in *Harper v. Virginia Board of Elections*,[240] the Court

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236 *See* Wayne Logan, Mercenary Criminal Justice, 2014 Ill. L. Rev. 1175, 1189.

237 461 U.S. 660 (1983).

238 *Id.* at 667.

239 *See* Fuller v. Oregon, 417 U.S. 40, 51 (1974) (predicting that as defendants become more aware of the fees associated with invocation of constitutional rights, fewer defendants will invoke such rights).

240 383 U.S. 663, 670 (1966).

should re-examine its precedent allowing states to impose surcharges on defendants for exercising their rights at trial.

Recently, the practice of using low-level courts as revenue generators has come under criticism. The Ferguson Report took a comprehensive look at the practice and condemned it, finding that the focus on revenue eclipsed any focus on community safety or well-being.[241] Court fees and costs act as a regressive tax that affects entire communities instead of just those accused of crime. But using courts not only to pay for their own expenses but also for other municipal services is an easy political sell, and the practice shows no sign of disappearing. And even in the face of data showing lackluster results in actually collecting money from those accused of crime, the imposition of such fees is a politically popular move.[242]

As a result, the use and popularity of court costs and fees has greatly increased in recent years.[243] Criminal defendants have increasingly been seen as the answer to the funding problems that have befallen states and municipalities as cash-strapped legislatures have reduced funding without meaningfully addressing hyper-incarceration or shrinking the size of the criminal justice apparatus. Some municipalities have even used their criminal justice systems as a profit center,

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241 THE FERGUSON REPORT at 2 (describing police instinct to view African American residents "less as constituents to be protected than as potential offenders and sources of revenue").

242 *See* Wright and Logan, *supra* note 20, at 2070 ("Collecting such fees from defendants remains politically popular despite the disappointing monetary results that typically accrue.").

243 *See* Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 5, 2015), at A12; Jacob Shamsian, *An Alabama Town is Being Accused of Violating People's Rights with a Practice that was Outlawed 200 Years Ago*, BUSINESS INSIDER, (Sept. 10, 2015); THE FERGUSON Report at 17 (discussing the sources of Ferguson's revenue and noting the amount that comes from court costs and fees); Shapiro, *supra* note 45; Claire Greenberg et al., *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079, 1088 (2016). In Alabama, for example, the funding for the state court system shifted dramatically from 2008, in which roughly half of the state court appropriations came from money generated by the courts, to 2013, in which almost all of the funding was generated by the courts. *See Greenberg* et al., *supra* note 243, at 1101 (2016).

funding other governmental functions through criminal costs and fees.[244]

The wide variety of costs and fees has increased over time and has now come to serve as a fiscal crutch for cash-strapped governments.[245] This phenomenon has skewed the priorities of criminal justice systems and tends to encourage aggressive prosecution of even minor crimes and to exacerbate the problem of mass incarceration.[246] And the possibility of requiring poor defendants themselves to fund the vast machinery of criminal justice systems "creates perverse incentives that pressure both courts and counsel to ignore the consequences of recoupment."[247]

Over the past several decades, we have created various markets in the realm of criminal procedure. The most well-recognized and studied has been the defendant's right to trial, which can be waived in exchange for various types of consideration.[248] Indeed, criminal defendants now waive their right to trial in over 95% of cases, trading in that commodity for either a reduction in charges or a shorter sentence or both.[249] In his book, Free Market Criminal Justice: How Democracy and Laissez Faire Undermine the Rule of Law, Darryl Brown describes plea bargaining as a deregulated free-market model, which is defined by

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244 *See* THE FERGUSON REPORT at 10; AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS Prisons 8 (2010) [hereinafter IN FOR A PENNY] (discussing the use of legal financial obligations ("LFOs") as a source of revenue for city, county, and state governments).

245 *See* Logan & Wright, *supra* note 38, at 1190; *see also* THE FERGUSON REPORT at 17 (detailing the importance of criminal defendant's court costs and fees to the Ferguson revenue fund).

246 Kevin Baker, *Cruel and Unusual Punishment: Why Prisoners Shouldn't Pay Their Debt*, AM. HERITAGE MAG., at 22, 22 (July 2006), www.americanheritage.com/content/cruel-and-unusual ("A government that can fob off costs on criminals has an incentive to find criminals everywhere.").

247 Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1932 (2014).

248 Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1196 (2011) (discussing the trade-off of waiving constitutional rights to receive lower levels of punishment or other benefits).

249 Erica Goode, *Stronger Hand for Judges in the "Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012) (stating that "97 percent of federal cases and 94 percent of cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence").

> the private market's moral indifference to effects of unequal resources among contracting parties, its exceedingly thin concept of coercion, and its minimal regulation of outcomes according to criteria of fairness, rather than party consent. In these respects and many others, democratic and market norms in criminal justice simultaneously supplant legal rules and facilitate expansive state enforcement authority.[250]

We have entered what could be described as the Lochner[251] era of criminal adjudication, as the ideology of private party control has fully occupied the field without a corresponding focus on disparate bargaining power.[252] As market-based norms and rhetoric have come to dominate how we think of criminal adjudication, it becomes more difficult to resist and to maintain norms and rhetoric that are centered on dignity, justice, and fairness.[253]

Many states have procedures that allow defendants to pay money either to avoid jail time or, in some cases, to avoid criminal prosecution altogether.[254] Deferred prosecution agreements allow someone suspected of criminal activity to agree to pay a victim or the state or to engage in other activities in exchange for an agreement by the state not to prosecute.[255] Such agreements have been widely used (and criticized) in prosecutions of corporations

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250 DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 12 (2016).

251 Lochner v. New York, 198 U.S. 45 (1905).

252 *See* BROWN, supra note 250, at 13 ("[T]he modern trend has been to expand parties' control over the adjudication process, and American justice systems have in some important respects gone further down this road, giving one or both parties the ability to waive nearly all rights and procedures.").

253 *See id.* at 63 ("One reason for this relative paucity of attention [paid to how free-market ideology influences American criminal justice] is that market rationality in American criminal procedure law is almost too obvious to warrant notice.").

254 *See* Logan & Wright, *supra* note 38, at 1188 (detailing the practice of pre-trial abatement, in which "local law or practice allows defendants in minor cases to pay an amount to the police or the courts that stops the prosecution from going forward").

255 *See id.* at 1187 (discussing the use of prosecutorial intervention through "deferred prosecution agreements").

suspected of violating financial and other laws.[256] Similarly, many states condition entry into a pre-trial diversion program on the defendant's payment of a diversion fee; those unable to pay the fee are ineligible for the pre-trial diversion program.[257] Such treatment for those with the ability to pay extra costs and fees continues after judgment, with states charging convicted defendants for the costs of their own incarceration and supervision.[258] And some states now allow prison cell upgrades for prisoners able to pay extra.[259]

Although we talk of defense lawyers, juries, and confrontation as being essential to the American system of criminal justice, practices increasingly discourage the actual use of these features of adversarialism, especially in misdemeanor courtrooms. A system that is serious about actually using these procedural safeguards could easily implement systems to encourage their use, the simplest of which would be eliminating the costs and fees associated with them.

V. Conclusion

Tom Barrett was charged in 2012 with stealing a can of beer worth two dollars.[260] He was offered a court-appointed lawyer but decided to represent himself to avoid being charged the additional $50 fee that Georgia charges defendants who are appointed a lawyer.[261] "Now he says that was a mistake."[262]

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256 BRANDON GARRETT, TOO BIG TO JAIL 68 (2014) (detailing year totals for corporate deferred prosecutions).

257 *See* Logan & Wright, *supra* note 38, at 1187, n.77 (discussing the charges associated with pre-trial diversion programs).

258 *See id.* at 1192–93 (detailing probation and parole fees).

259 *See* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMIT OF MARKETS 3 (2012) ("A prison cell upgrade: $82 per night. In Santa Ana, California, and some other cities, nonviolent offenders can pay for better accommodations—a clean, quiet jail cell, away from the cells for nonpaying prisoners.").

260 Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014), https://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor.

261 *Id.*

262 Shapiro, *supra* 45.

Barrett, who was homeless at the time of his charge, was sentenced to probation but could not afford the $400 monthly payment to the private probation company that oversaw his probation. When he fell behind on his payments, his probation was revoked and he was sent to jail. The effects of this kind of economic calculus are predictable and preventable,[263] and courts and legislatures should take steps to avoid putting poor defendants like Mr. Barrett in this situation.

Increased reliance on user fees to fund governmental functions disproportionately harms those who are least able to pay.[264] The majority of those caught up in the criminal justice system are poor,[265] and a disproportionate number are people of color.[266] Over 80% of criminal defendants qualify for court-appointed counsel, even under the very narrow definitions employed by some states.[267] Those unable to post bail, perversely, can end up not only being detained prior to trial but also being charged for the costs of that pre-trial detention. And defendants of color have been shown to be more likely to be detained pre-trial

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263 *See* Cass R. Sunstein, *It Captures Your Mind*, N.Y. REV. OF BOOKS (Sept. 26, 2013) ("Because they lack money, poor people must focus intensely on the economic consequences of expenditures that wealthy people consider trivial and not worth worrying over."). A court system could, therefore, either make procedural safeguards like right to counsel the default choice out of which a defendant could affirmatively opt out, or at least provide corrective information about the increasingly severe collateral consequences of even minor convictions.

264 *See* Sobol, *supra* note 26 at 516 (explaining that the adverse impact of the two-tiered system falls disproportionately on the poor and minorities and citing examples).

265 *See* Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE, July 9, 2015 (finding that "in 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages").

266 *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Sept. 29, 2017) (detailing racial disparities in incarceration in the American criminal justice system).

267 *See* Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013) ("[A]t least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel.").

due to an inability to post bail.[268] And because most court costs and fees are imposed as flat fees, without regard to a defendant's ability to pay, the burdens fall disproportionately on poor defendants.[269]

Anecdotal evidence show how difficult it can be for a poor person to pay off the bare minimum court costs and fees, and that burden can get significantly heavier if the person chooses to exercise her right to counsel or other elective trial rights. "According to Federal Reserve surveys, fully one third of Americans say they are 'just getting by.' Thirty-eight percent could not pay for a $400 emergency without selling an asset or borrowing; 14 percent couldn't pay at all."[270] These costs and fees have dramatically increased in recent years, as has the total amount of personal debt attributable to criminal justice costs and fees.[271] The growth of financial penalties, whether classified as fines, restitution, or fees, has tracked the phenomenon of hyper-incarceration over the past four decades.[272]

By charging additional fees for the exercise of trial rights, states transform those fundamental rights into commodities. No state has yet begun to charge defendants for each peremptory strike used, or for each hour of court time taken up by their trials,

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268 RAM SUBRAMANIAN, VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 15 (2015) ("Black men are also disproportionately held pretrial as a result of an inability to post monetary bail.").

269 *See* Sobol, *supra* note 26, at 518, nn. 273–75 ("Financial sanctions . . . disproportionately impact those at lower income levels. Typically, fines and fees in the United States system are imposed without consideration of the income of defendants.").

270 Jeff Madrick, *America: The Forgotten Poor*, N.Y. REV. OF BOOKS, June 22, 2017, at 49.

271 *See id.* (showing an increase in court-related debt in Florida since 1997). *See also* Greenberg et al., *supra* note 243, at 1100, n.94 (2016) (collecting evidence that costs and fees have dramatically increased in recent years). *See also* A lexis Harris, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1769 (2010).

272 *See* Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 556–57 (2011) ("[T]he growth of fines, fees, and other debts accompanied the trend line in the increase of incarceration since the early 1970s . . . .").

but the logic of these absurdities is not different from the examples of states charging defendants for other procedural rights.

This intrusion of market ideology into an area that had previously seen in a different light has at least two broad problems: it exacerbates structural unfairness in a system that already disadvantages poor people, and it degrades how we conceive of fundamental rights.[273] With regard to the first, placing a price tag on a fundamental right may well have the effect of making it available to one group of defendants but practically unavailable to another. "In a society where everything is for sale, life is harder for those of modest means. The more money can buy, the more affluence (or lack of it) matters."[274]

A deeper critique of the commodification of trial rights, however, has to do with the way we conceive of those rights and their place in our constitutional structure. Even if we accept the idea that poor people have reduced access to procedural safeguards in criminal trials, we may object to positioning these rights as just one more good to be bought or sold. Discussing the intrusion of market norms and practices into what had been more sacred realms, Michael Sandel writes that

> [I]n order to decide where [the market] belongs, and where it doesn't, it is not enough to argue about property rights on the one hand and fairness on the other. We also have to argue about the meaning of social practices and the goods they embody. And we have to ask, in each case, whether commercializing the practice would degrade it.[275]

Once we see the right to a trial by jury as something that might cost us $125, as a six-person jury would in the state of Washington, or $250, as a twelve-person jury would in the same

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273 *See* SANDEL, *supra* note 259, at 186 (describing his two objections about the application of market ideology into various areas: "One is about coercion and unfairness; the other is about corruption and degradation").

274 *See id.* at 8.

275 *See id.* at 188.

state, while a bench trial would cost us nothing,[276] we have entered the world of market values. And we have profoundly changed how trial rights are considered. Re-conceiving of these rights as something to be bought and sold not only corrupts the idea of fundamental rights,[277] it also acts as a de facto tax on the adversarial system.

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[276] *See* Wash. CRR 6.1 (allowing defendant to elect between a jury of six or twelve); WASH. REV. CODE ANN. § 36.18.016 (imposing different costs based on the size of the jury).

[277] *See* SANDEL, *supra* note 259, at 34 ("To corrupt a social good is to degrade it, to treat it according to a lower mode of valuation than is appropriate to it.").