

NOTE

INSTEAD OF TREATED THEY GET FEES: A HARD KNOCK LIFE FOR INDIGENT CRIMINAL DEFENDANTS AND THE NEED FOR UNBIASED DETERMINATIONS OF INDIGENT STATUS¹

I. INTRODUCTION

“You have the right to remain silent. Anything you say can and will be used against you in a court of law. *You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.*”² Almost every American should recognize these words, either from watching a television program, studying criminal law, or even being placed in the back of a police car.³ Although every citizen has the right to an attorney, the right to have one provided is not as absolute as one would think.⁴ An individual must first meet the test for indigent status in the jurisdiction in which they were arrested.⁵ Indigent status allows poorer citizens to have an attorney appointed to them by the court and sometimes get court fees waived.⁶ Each state has its own process for determining indigent status

1. See JAY-Z, *Hard Knock Life (Ghetto Anthem)*, on VOL. 2 ... HARD KNOCK LIFE (D&D Studios 1998).

2. *Miranda Rights*, MIRANDARIGHTS.ORG, <http://www.mirandarights.org> (last visited Sept. 17, 2019) (emphasis added); see also *Miranda v. Arizona*, 384 U.S. 436, 444, 478-79 (1966).

3. See *Miranda v. Arizona*, 384 U.S. at 478-79; *Miranda Rights*, *supra* note 2. These rights mandated by the Supreme Court have become ubiquitous in American culture, appearing as a popular and somewhat overused trope within various television shows and movies. See generally *MEN IN BLACK* (Columbia Pictures 1997); *SHREK 2* (Dreamworks Pictures 2004); *Law & Order Special Victims Unit: Honor* (NBC television broadcast Oct. 27, 2000); *The Closer: You Are Here* (TNT television broadcast July 25, 2005). The first script listing the rights identified by the Supreme Court came from a group of California district attorneys in 1966. Nick Keppler, *10 Facts About the Miranda Warning You Have the Right to Know*, MENTAL FLOSS (Nov. 4, 2016), <http://mentalfloss.com/article/86769/10-facts-about-miranda-warning-you-have-right-know>. The script was produced just weeks after the decision in *Miranda. Id.*

4. See Carrie Savage Phillips, *Oklahoma's Indigent Status Determination Scheme: A Call For Uniformity*, 66 OKLA. L. REV. 655, 657 (2014).

5. See *id.*

6. See Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 324 (2009).

and identifying the person who evaluates each case.⁷ Because there are no required federal standards for states to determine indigent status, there are a variety of tests that the states use, and most of them give full discretion to the decision-maker.⁸ Due to the fact that the tests in a majority of the states are completely discretionary with little oversight, two defendants in the same jurisdiction, with extremely similar circumstances but different decision-makers, could be given different indigent status determinations.⁹

Uniformity is not the only issue poor defendants face within the criminal justice system.¹⁰ With a few exceptions, the decision-maker is usually either the judge or a public defender on the case.¹¹ Most often, the judge is assigned as the decision-maker.¹² Both judges and public defenders in many jurisdictions have a conflict of interest in determining whether defendants are eligible for indigent status.¹³ In many states, the revenue from fees collected by courts are accessible by judges and fund the public defenders' salaries.¹⁴ Thus, if the decision-maker finds that the defendant is able to pay fees, the decision-maker will be able to benefit from the revenue of those fees.¹⁵ These decisions have critical impacts on the defendants' lives: If a defendant is incorrectly determined to be able to pay, and does not pay the fees, they will often receive additional fees and possibly jail time.¹⁶

The evaluation and effects of indigent status should be looked at with more scrutiny, as the poor population in America is consistently experiencing life-altering repercussions from this country's flawed judicial system.¹⁷ Given the gravity of implications that a wrongful negative determination or lackluster effect of a positive determination of indigent status could have on a poor defendant, important and reasonable updates should be made to how courts view potential indigent defendants.¹⁸

This Note discusses and advocates for the adoption of a model standard for indigent status determinations.¹⁹ Part II.A discusses the

7. Phillips, *supra* note 4, at 687-92.

8. *Id.* at 657-58, 687-92.

9. *Id.* at 655.

10. *See infra* Part II.

11. Phillips, *supra* note 4, at 687-92.

12. *Id.*

13. *See infra* Part III.A.

14. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

15. *See id.*

16. *See id.*

17. *See infra* Part II.B.

18. *See infra* Part IV.

19. *See infra* Part IV.

background and origin of indigent status, particularly through the creation and imposition of public defenders for these defendants.²⁰ Part II.B explains how poor citizens face many systematic challenges within the judicial system, and it shows that public defender appointments are not the only roadblocks these poor people face.²¹ Part III highlights the methods and effects of the indigent status tests that are currently implemented throughout the states.²² Part IV proposes a model standard for indigent status determinations, and it details the reasoning behind the chosen statutory language.²³

II. THE TREATMENT OF POOR CRIMINAL DEFENDANTS WITHIN THE CRIMINAL JUSTICE SYSTEM: A BRIEF OVERVIEW

Poor citizens have faced and continue to face systemic problems that prevent them from bettering their financial status, with many of those roadblocks being present within the criminal justice system.²⁴ This Part describes the historic progression of the treatment of indigent criminal defendants by the courts, specifically discussing the case law that established constitutional protections for an indigent defendant's right to have a defense attorney through the incorporation of the Sixth Amendment.²⁵ This Part also delves into the other barriers poor criminal defendants face throughout the criminal justice system (besides the availability of counsel) by highlighting a few controversial policies and practices: the prevalence of racial discrimination, the resurgence of quasi-debtor's prisons, pretrial release conditioned on cash bail, and incentivized incarceration schemes.²⁶

A. *The Judicial Branch Implementing Protections on Indigent Defendants*

The Sixth Amendment of the Constitution protects the rights of United States citizens regarding various aspects of the legal process.²⁷ These rights include: a speedy and public trial, an impartial jury, and the assistance of counsel, among others.²⁸ Before 1932, the Assistance of

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See Fred O. Smith Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2285 (2018).

25. See *infra* Part II.A.

26. See *infra* Part II.B.

27. See U.S. CONST. amend. VI.

28. *Id.*

Counsel Clause of the Sixth Amendment was interpreted to only give a defendant the opportunity to be represented by a private counsel.²⁹ The Supreme Court began to alter that interpretation in the landmark case of *Powell v. Alabama*.³⁰ In 1932, nine young black men were accused of raping two white teenage girls on a freight train passing through Alabama.³¹ In *Powell*, the defendants, who were not from Alabama, were not given an opportunity to contact their families and could not afford attorneys.³² The trial judge in Alabama appointed an unprepared attorney right before trial, which resulted in the defendants being found guilty and sentenced to death.³³ The Supreme Court of the United States reversed the convictions and found that Alabama had violated the Due Process Clause of the Fourteenth Amendment by restricting the defendants' ability to provide themselves effective representation.³⁴ The Court stated that it is the trial court's duty to provide counsel when a defendant of a capital crime is "unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like."³⁵

Subsequent jurisprudence viewed this decision narrowly.³⁶ In 1942, the Court explicitly stated that the Fourteenth Amendment did not incorporate the Sixth Amendment protections against the states.³⁷ The Court reasoned that *Powell* did not formally incorporate the Sixth Amendment and that it did not force states to provide counsel for all criminal defendants.³⁸ Instead, it claimed that the impact of *Powell* was confined to the extreme circumstances of the case, which, when viewed ad hoc, constituted a deprivation of procedural due process.³⁹ The Court further stressed that the requirement for states to provide assistance of counsel was limited only to crimes punishable by death, and for

29. *Right to Counsel*, FREE LEGAL ENCYCLOPEDIA, <http://law.jrank.org/pages/9884/Right-Counsel.html> (last visited Sept. 17, 2019).

30. 287 U.S. 45 (1932).

31. *Id.* at 50-51. The accusations arose after a fight broke out between the defendants and a group of white teenage boys on the train. *Id.*

32. *Id.* at 52. Also problematic in the eyes of the Supreme Court was the expediency of the process and the isolation the defendants faced. *Id.* They were arrested, detained, indicted, and subsequently sentenced to death all within two weeks. *Id.* at 52-53. The defendants' arrests were highly publicized and met with mobs of angry Alabamians whenever they were transported. *Id.* at 51.

33. *Id.* at 52-53. The defendants appealed their convictions and the trial court's decision was affirmed by the Supreme Court of Alabama. *Id.* at 50.

34. *Id.* at 60, 73. Justice Sutherland did not formally rely on the Assistance of Counsel Clause of the Sixth Amendment but repeated it throughout the opinion. *Id.*

35. *Id.* at 71.

36. *Right to Counsel*, *supra* note 29.

37. *Betts v. Brady*, 316 U.S. 455, 461-62 (1942).

38. *Id.* at 461-62.

39. *Id.* at 463-64.

defendants who were both too poor to hire an attorney and incapable of representing themselves.⁴⁰

In 1963, in the case of *Gideon v. Wainwright*,⁴¹ the Court changed its position on the matter and expanded the reach of *Powell*.⁴² In *Gideon*, a Florida man was arrested and charged with breaking and entering.⁴³ At trial, he asked the court to appoint counsel because he was unable to afford one, but his request was denied.⁴⁴ According to a Florida statute, judges were only supposed to appoint an attorney to an indigent defendant accused of a capital crime.⁴⁵ In its holding, the Court formally overturned *Betts v. Brady*⁴⁶ and ordered states to supply counsel for all indigent defendants charged with a felony.⁴⁷ The Court thereby incorporated the Sixth Amendment's Assistance of Counsel Clause through the Due Process Clause of the Fourteenth Amendment.⁴⁸ The Court claimed that the right to assistance by counsel is directly influential on the right to a fair trial.⁴⁹ The Court concluded that "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."⁵⁰ Nearly a decade later, in *Argersinger v. Hamlin*,⁵¹ the Court expanded this protection to state indigent defendants charged with a misdemeanor.⁵²

What is clear from the case law following *Gideon* is that all courts have an affirmative duty to protect an individual's right to a fair trial, and they are therefore required to assign an attorney when the defendant cannot afford one.⁵³ The Supreme Court has consistently upheld its decision that the assistance of counsel in a criminal trial is a fundamental

40. *Id.*

41. 372 U.S. 335 (1963).

42. *Id.* at 339 (holding that states must provide an attorney to defendants charged with a felony if they cannot afford one).

43. *Id.* at 336.

44. *Id.* at 337.

45. *Id.* This statute is consistent with the narrow interpretation holding in *Betts* and *Powell*. See *Betts*, 316 U.S. at 473; *Powell v. Alabama*, 287 U.S. 45, 71 (1932). After representing himself, Gideon was found guilty. *Gideon*, 372 U.S. at 337. Thereafter, Gideon submitted a petition for habeas corpus, which was rejected by the Florida Supreme Court. *Id.* at 337-38. Certiorari was later granted by the United States Supreme Court. *Id.*

46. 316 U.S. 455 (1942).

47. *Gideon*, 372 U.S. at 342 (finding that the Court in *Betts v. Brady* was incorrect "in concluding that the Sixth Amendment's guarantee of counsel is not [a] fundamental right").

48. *Id.*

49. *Id.*

50. *Id.* at 344.

51. 407 U.S. 25 (1972).

52. *Id.* at 47.

53. See *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002); *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987); *Argersinger*, 407 U.S. at 30.

right,⁵⁴ and the incorporation of the Sixth Amendment is consistent with the Court's treatment of other constitutional rights.⁵⁵ However, neither *Gideon* nor the cases following it gave guidance to the states on how to evaluate whether a defendant qualifies for indigent status.⁵⁶ This lack of guidance has resulted in disparities amongst the states regarding the criteria used, the method of determination, and the decision-maker of indigent status.⁵⁷

*B. Poor Citizens Are Subjected to Barriers within
the Criminal Justice System*

1. Racial Discrimination's Prevalence within the Criminal Justice System

Impoverished citizens in the United States face systematic challenges within the judicial system, making it increasingly harder to change their economic status.⁵⁸ Racism is still alive and prevalent in America today, and the judicial system—particularly the judges—are not immune from bias.⁵⁹ In a 2009 study, three law professors and a magistrate judge analyzed the prevalence of racial bias within the judiciary and sought to determine whether it could influence their decision-making.⁶⁰ The study found that 87% of the white judges who took the test had a “white preference” throughout the exam.⁶¹ This sample of judges who have a white preference was “statistically significantly stronger” compared to a sample of white individuals (non-judges) measured in another test.⁶² Although a judge is not the only individual with bias that defendants will

54. See *Shelton*, 535 U.S. at 661-62; *Finley*, 481 U.S. at 554-55 (1987); *Argersinger*, 407 U.S. at 30.

55. *Gideon*, 372 U.S. at 343. (“[C]ertain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.”) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)).

56. See generally *Argersinger*, 407 U.S. at 25; *Gideon*, 372 U.S. at 335.

57. See Phillips, *supra* note 4, at 687-92.

58. Smith, *supra* note 24, at 2285.

59. See Michelle Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 137 (2013); Jeffery Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

60. Rachlinski et al., *supra* note 59, at 1195. The researchers conducted an Implicit Association Test to 133 judges from various jurisdictions. *Id.* at 1207-09.

61. *Id.* at 1210.

62. *Id.* at 1210-11.

face along their path to incarceration, a judge's decision is "the most important, final, and visible act in the criminal justice process."⁶³

For an illustration of this bias in practice, consider the following: Statistics show that the prison population in America is "'overwhelmingly poor' and 'overwhelmingly, people of color.'"⁶⁴ In 2007, 29% of the prison population was unemployed, and 59% earned less than one thousand dollars a month.⁶⁵ The "line between poverty and racial bias is very blurred."⁶⁶ Minority racial groups are more likely to experience multidimensional poverty than their white counterparts.⁶⁷ White males have a much lesser chance of incarceration during their lifetime when compared to persons of color.⁶⁸ Hispanic males have a 17% chance of incarceration throughout their lifetimes, and black males have a 32% chance, while white males only face a 5.9% chance.⁶⁹ Hispanic and black males represent less than one-third of the general population but make up more than half of the prison population.⁷⁰ If Hispanic and black people were arrested at the same rate as their white counterparts, their prison populations would decline by nearly 40%.⁷¹

A survey conducted by the American Bar Association ("ABA") in 1999 showed that 90% of citizens believed that wealthy citizens had an unfair advantage in court, and 47% of individuals surveyed thought that minority and poor populations are treated unequally.⁷² This disparate treatment of minority and poor citizens within the criminal justice system is not a recent development; historically, black people were targeted

63. Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGE'S J. 6, 7 (1985). A minority defendant can also face bias from prosecutors, probation officers, and defense attorneys. *Id.* at 12.

64. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 517 (2016) (quoting Kristen D. Levingston & Vicki Tretsky, *Debtors' Prisons—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV. J. POV. L. & POL'Y 187, 188 (2007)).

65. *Id.* (citing Laurie L. Levenson & Mary Gordon, *The Dirty Little Secrets About Pay-to-Stay*, 106 MICH. L. REV. FIRST IMPRESSIONS 67, 67 (2007)).

66. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994).

67. RICHARD REEVES, ET AL., FIVE EVILS: MULTIDIMENSIONAL POVERTY AND RACE IN AMERICA 2, 9 (2016).

68. Sobol, *supra* note 64, at 517.

69. *Id.*

70. *Id.*

71. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet> (last visited Sept. 17, 2019) [hereinafter *Criminal Justice Fact Sheet*].

72. Linda Greenhouse, *47% in Poll View Legal System as Unfair to Poor and Minorities*, N.Y. TIMES (Feb. 24, 1999), <https://www.nytimes.com/1999/02/24/us/47-in-poll-view-legal-system-as-unfair-to-poor-and-minorities.html>.

through racist policies and laws.⁷³ Some of these laws were explicitly racist, and others were racist in their application to the public.⁷⁴

Regardless of their motivations, these laws were used to support a link between black citizens and crime, and some policymakers referred to then-newly accessible statistics as proof of black Americans' criminally dangerous nature.⁷⁵ This link helped further embolden racist ideologies already present within American society and culture.⁷⁶ The older, obviously racist policies have been replaced by facially neutral policies with minority and poor citizens suffering from inequitable administration of the law.⁷⁷ For example, in 2016, of all arrests made for drug possession and distribution, 71% of the defendants were white and 27% were black.⁷⁸ However, when observing sentencing in federal prisons, 22% of the defendants were white and 38% were black.⁷⁹ So, although black citizens only make up 27% of those arrested, they make up 38% of those sentenced in federal prisons.⁸⁰ These socioeconomic disparities make it challenging for a poor person to remove themselves from poverty, as aspects of this flawed criminal justice system "serve[] as both a direct cause and consequence of poverty."⁸¹

2. Modern-Day Debtors' Prisons

Courts have imposed legal financial obligations on 66% of felons sentenced to prison and on more than 80% of others convicted of felonies and misdemeanors.⁸² When convicted criminal defendants are unable to pay the fines and fees associated with their representation and convictions,

73. See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 1, 2 (May 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy_downloads/for-the-record-unjust-burden-racial-disparities.pdf.

74. *Id.* After the enactment of the Thirteenth Amendment, the Southern states responded by passing very harsh laws targeting the newly-freed citizens, including black codes, vagrancy laws, and convict leasing. *Id.* at 2. In the years following the civil war, the Northern states were not explicit in their racist policies. *Id.* at 2-3. However, neutral criminal laws were enforced disparately against black citizens. *Id.*

75. *Id.* at 3.

76. *Id.*

77. *Id.* at 4-5.

78. *Id.* at 6. This statistic is probably best explained as the result of policies enacted during the war on drugs: drug free school zones and mandatory minimum sentencing, among others. *Id.*

79. *Id.* In the state prison system, both white and black citizens were sentenced at an equal thirty-one percent. *Id.*

80. *Id.*

81. Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS 1, 1 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

82. Sobol, *supra* note 64, at 508.

many choose an alternative to paying if their jurisdictions offer it.⁸³ Many state and local judicial systems allow convicted defendants to work off their court debts by doing community service.⁸⁴ Although on occasion the defendants are able to avoid paying off a significant debt, the programs often require the defendants to work many hours a week at minimum wage with any proceeds raised going directly to their debt.⁸⁵ This is problematic for many individuals who are already in poverty: How can they work to get themselves out of poverty when they are already working full-time hours to pay off a court debt?⁸⁶ These lost hours could have been contributed towards utility bills, groceries, or other daily living expenses.⁸⁷

Some critique these harsh penalizations for failing to pay fees and they further criticize “voluntary” debt relief programs as a continuation of the long-ago rejected institution of debtors’ prisons.⁸⁸ Records of operational debtors’ prisons go as far back as biblical times, and their popularity “ebbed and flowed” throughout much of history.⁸⁹ The practice of imprisoning debtors became a common practice in America in the late eighteenth century.⁹⁰ This system caused large amounts of incarceration when America’s economy declined.⁹¹ States began to enact legislation abolishing debtors’ prisons, beginning with Kentucky in 1821.⁹² The first federal law banning these prisons was not enacted until 1933.⁹³

Although laws banning imprisonment for debt are active in every state and at the federal level, failure to pay criminal justice debt—like fees, fines, and restitution charges—is still a significant reason for incarceration in today’s judicial system.⁹⁴ These modern debtor’s prison practices arise in four different contexts: (1) courts will punish a defendant who fails to pay criminal justice debt by revoking or withholding their

83. Rebecca Beitsch, *An Alternative to Paying Court Debt: Working It Off*, PEW CHARITABLE TRS. (Apr. 4, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/04/an-alternative-to-paying-court-debt-working-it-off>.

84. *Id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUST. SYS., TEN GUIDELINES ON COURT FINES & FEES 2, 3 (Aug. 2018) [hereinafter ABA PRESIDENTIAL TASK FORCE]; Sobol, *supra* note 64, at 494; Beitsch, *supra* note 83.

89. Sobol, *supra* note 64, at 494-95.

90. *Id.* at 496.

91. *Id.* at 497. Thousands of poor debtors were incarcerated in 1797 when a financial crisis occurred. *Id.* This epidemic led to the first bankruptcy law protecting merchant debtors but not lay-person debtors. *Id.*

92. *Id.*

93. *Id.* at 498.

94. *See id.* at 506.

probation or parole; (2) defendants may be incarcerated for failing to pay criminal justice debt; (3) defendants are forced to choose whether to serve prison time or pay their debt, which often is not much of a choice considering the defendants' financial situations; and (4) law officials will arrest individuals who have failed to pay criminal justice debt and hold them in jail until an ability-to-pay hearing.⁹⁵ Today, courts will comply with the law as long as there is some assessment into the defendant's ability to pay.⁹⁶ In later sections, this Note will discuss how these state-specific ability-to-pay measures, while seemingly well-intended, yield inconsistent and often problematic results.⁹⁷

3. Pre-Trial Release Condition on Cash Bail

Each year, thousands of citizens are arrested and detained prior to being found guilty of any crime.⁹⁸ This can occur simply because poor defendants are often unable to pay the bail imposed by the judge prior to trial.⁹⁹ This policy more often than not allows for wealthier defendants to navigate the criminal justice system with fewer restrictions on their liberty.¹⁰⁰ For example, a rich defendant charged with rape could spend the days leading up to trial in his home, whereas a poor defendant charged with trespassing could spend weeks in jail before trial.¹⁰¹

Richard Stanford was a sixty-three-year-old war veteran when he was arrested for trespassing in 2017.¹⁰² He had no money and was living with his daughter who had little disposable income.¹⁰³ Because he could not afford his \$2600 bail bond, he spent three weeks in jail until he would appear in court again.¹⁰⁴ At court, he was asked to choose between pleading guilty (being released based on time-served) or pleading not

95. See *id.*; Rebekah Diller, *Court Fees As Revenue?*, BRENNAN CTR. FOR JUST. (July 30, 2008), <https://www.brennancenter.org/analysis/court-fees-revenue>.

96. Sobol, *supra* note 64, at 507.

97. See *infra* Part III.B.

98. Arpit Gupta & Ethan Frenchman, *The US Bail System Punishes the Poor and Rewards the Rich*, QUARTZ (Feb. 2, 2017), <https://qz.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich>.

99. *Id.*

100. See *id.*

101. Compare *id.*, with Matt Hamilton, *Former Stanford Swimmer Accused of Raping Unconscious Woman on Campus*, L.A. TIMES (Jan. 27, 2015, 9:16 PM), <http://www.latimes.com/local/lanow/la-me-ln-former-stanford-swimmer-accused-of-rape-20150127-story.html>. These examples are not offered as hypotheticals but instead are real-life cases evidencing what is essentially a sanction on poverty. Gupta & Frenchman, *supra* note 98; Hamilton, *supra*.

102. Gupta & Frenchman, *supra* note 98.

103. *Id.*

104. *Id.*

guilty and going back to jail to await his next court appearance.¹⁰⁵ He, like many others in his situation, was desperate to return to society, and as a result, pled guilty.¹⁰⁶

Consider the more tragic case of Kalief Browder, a New York teenager who was wrongfully arrested for allegedly stealing a backpack.¹⁰⁷ He was in jail at Riker's Island for three years while he awaited trial because he could not afford to post bail.¹⁰⁸ During Kalief's three-year pretrial "sentence," he spent the majority of his time in solitary confinement and suffered various forms of abuse.¹⁰⁹ Multiple times, he requested and was denied approval to speak with mental health professionals about the stress he was undergoing.¹¹⁰ When he tried to commit suicide in prison, the guards punished him by taking away his sheets, books, and "starv[ing him] for two or three [d]ays."¹¹¹ When offered a deal to plead guilty in return for time-served, Kalief rejected the offer because he wanted to maintain his innocence.¹¹² His case was dismissed at trial, and two years later, as a result of the psychological trauma he suffered in prison, Kalief killed himself.¹¹³

Like debtors' prisons, the practice of cash bail is not a new idea, but its implementation has evolved throughout the years.¹¹⁴ Originally, defendants were required to find someone to post bail as a surety, in case they fled before a guilty verdict.¹¹⁵ This practice, with origins in England, gained popularity among the American colonies and was incorporated into the American system.¹¹⁶ In recent years, surety-based bail has

105. *Id.*

106. *Id.* However, there are defendants who refuse to admit guilt when they are innocent, thus imposing them to more unjustified detention. See Magaret Talbot, *The Case Against Cash Bail*, NEW YORKER (Aug. 25, 2015), <https://www.newyorker.com/news/news-desk/the-case-against-cash-bail>.

107. P.R. Lockhart, *New York's Justice System Failed Kalief Browder. Now the City Will Pay His Family \$3.3 Million*, VOX (Jan. 25, 2019), <https://www.vox.com/2019/1/25/18196524/kalief-browder-estate-settlement-new-york-rikers>.

108. *Id.* More specifically, Kalief's family could not initially afford to pay the \$3000 bail, and even after they successfully raised the funds, the judge said Kalief no longer qualified for bail. *Id.*

109. Jillian Weinberger & Arwa Gunja, *The High Cost of Delayed Justice*, TAKEAWAY (June 10, 2015), <https://www.wnycstudios.org/story/kalief-browder-and-juvenile-justice-system>.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Almost four years since his death, Kalief's estate eventually settled the case brought against New York City for \$3.3 million. Lockhart, *supra* note 107.

114. Kelly Allen, *The Evolution of Money Bail Throughout History*, W. HAYWOOD BURNS INST. (Apr. 18 2016), <https://www.burnsinstitute.org/blog/the-evolution-of-money-bail-throughout-history>. The practice of cash bail was first developed in the Anglo-Saxon period of England, 410-1066. *Id.*

115. *Id.*

116. *Id.*

morphed into a completely new imposition on defendants.¹¹⁷ Cash bail paid in full became a condition for release, and the effects were immediately and intensely felt by the poor population.¹¹⁸ The current cash bail system has garnered strong opposition by elected officials, and a few states have enacted legislation and constitutional amendments limiting or even banning the use altogether.¹¹⁹ Moreover, the United States' privatized system—release from prison conditioned on cash bail—is not a common practice when compared to other countries.¹²⁰ In fact, “[t]he United States is one of only two countries that allow for-profit bail bonding.”¹²¹ Even the country where bail originated, the United Kingdom, does not implement it for-profit.¹²²

If the arrestee or a close friend or family member is unable to afford to post bond in full, they may only have two options: (1) stay in prison until their trial date, or (2) contract with a private company to loan the amount needed for bail.¹²³ For indigent defendants, after all of the court proceedings, they could walk away with bail debt owed to a private surety company and court debt for the numerous fees and costs imposed throughout the judicial process.¹²⁴

117. *Id.*

118. *Id.* Many poor defendants who could not afford bail in full would contract with creditors who would cover their debt in return for payments with interest rates that poor defendants still had trouble paying. *Id.*

119. Joseph Neff, *Senators Take Aim at Bail Industry Backers*, MARSHALL PROJECT (Aug. 6 2018), <https://www.themarshallproject.org/2018/08/06/senators-take-aim-at-bail-industry-backers>; see also Youngjin Choi, *Lessons From California and New Jersey Bail Reform Legislation*, N.Y.L.J. (Dec. 7, 2018, 11:30 AM), <https://www.law.com/newyorklawjournal/2018/12/07/lessons-from-california-and-new-jersey-bail-reform-legislation>.

120. See PRETRIAL DETENTION REFORM WORKGROUP, *PRETRIAL DETENTION REFORM, RECOMMENDATIONS TO THE CHIEF JUSTICE* 1, 33 (2017) [hereinafter WORKGROUP]. The only other country is the Philippines. *Id.*

121. *Id.*

122. See *id.*; Allen, *supra* note 114. The United Kingdom's bail system differs from the United States system in how it is enforced. *The American Bail Bond System*, BBC NEWS (July 14, 2006), http://news.bbc.co.uk/2/hi/uk_news/5179656.stm. The United Kingdom does not permit the use of private bail-bondsmen and bounty hunters to track down non-payers. *Id.*

123. WORKGROUP, *supra* note 120, at 34-35. Some private bail surety companies require the arrestee or family member “to collateralize the full amount of the bail with real or personal property.” *Id.* In California specifically, “[i]f neither the defendant nor the cosigner is able to satisfy these costs with cash, the bail agent may seize and liquidate any collateral (often the home or personal property of the defendant, family, or friends) or may attempt to satisfy the debt through other means.” *Id.* However, California has since made strides to revise its bail system and pledged to stop imposing cash bail as of October 2019. Choi, *supra* note 119.

124. See Anderson, *supra* note 6, at 333; Choi, *supra* note 119. This debt may even include payment owed to their public defender. Shapiro, *supra* note 14.

4. Incentivized Incarceration

Judicial systems have created such effective revenue streams that jurisdictions have become increasingly dependent upon them.¹²⁵ Because the criminal justice system has essentially become for-profit, jurisdictions will want their judicial systems to collect as much revenue as possible.¹²⁶ By structuring the judicial system in such a way to fund itself, the government could allocate more money to other programs or parts of the government.¹²⁷ The fees that criminal defendants must pay often fund unrelated or seemingly superfluous state and local government projects.¹²⁸

In Allegan County, Michigan, a man had to pay a one thousand dollar general “court costs” fee after he pleaded guilty to forging a prescription of pain medication.¹²⁹ Half of this fee reimbursed the public defender fund, which employed his court-appointed attorney, and the other half went to general operating costs of the court, including the funding for a gym for county employees.¹³⁰ In Louisiana’s Orleans Parish Criminal District Court, judges are able to impose multiple fees at various stages of the court proceedings.¹³¹ Most of the revenue from these fees goes to a general fund accessible by the court.¹³² These fees pay the salaries of some court officials, and the same judges who imposed the fees are able to access the revenue through benefits for themselves and their spouses.¹³³

The Department of Justice released a report in 2015 detailing and criticizing the criminal justice policies of the town of Ferguson, Missouri.¹³⁴ The report found, among other things, that the law enforcement and criminal justice procedures and policies were based on generating revenue instead of promoting public safety.¹³⁵ More than 20% of Ferguson’s municipal revenue came from a “system of ticketing and criminalization that targeted the black population overwhelmingly.”¹³⁶

125. See Beitsch, *supra* note 83; Diller, *supra* note 95.

126. Diller, *supra* note 95.

127. See *id.*

128. Shapiro, *supra* note 14.

129. *Id.*

130. *Id.*

131. Vanessa Romo, *Federal Judge Rules Against Imprisoning Those Who Can't Pay Court Fees*, NPR (Aug. 6, 2018, 9:17 PM), <https://www.npr.org/2018/08/06/636187743/federal-judge-rules-against-imprisoning-those-who-cant-pay-court-fees>.

132. *Id.*

133. *Id.*

134. See generally C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1, 43-62 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

135. *Id.*

136. Janine Jackson, *'They Are Incentivized to Arrest People Because It Raises Money'*, FAIRNESS & ACCURACY IN REPORTING (Aug. 12, 2016), <https://fair.org/home/they-are-incentivized->

The rapid deterioration of the relationship between police officers and citizens of Ferguson witnessed after the shooting of Michael Brown is attributable to the years of subsidizing the local economy through excessive fines and fees imposed on those citizens.¹³⁷ Donna Murch, an author and a professor of history at Rutgers University, found that the government's "resource extraction" policy through incarceration was to blame for the escalating tension between the Ferguson citizens and the police.¹³⁸ She further contends that this policy targeting the black population is an example of the evolution of the racist criminal policies seen directly after the Civil War.¹³⁹

III. STATE INDIGENT STATUS DETERMINATION SCHEMES: PROBLEMATIC IN EXECUTION AND EFFECT

Indigent status determination schemes that states have implemented within their judicial systems can be classified into three categories: discretionary, bright-lined, and a combination between the two.¹⁴⁰ Because there is no formal indigent status standard imposed on the states,¹⁴¹ the effects of indigent status and subsequent treatment of indigent defendants after conviction vary among the states.¹⁴² States are split as to whether fee waivers and court-appointed attorneys are both categorized under indigent status.¹⁴³ Some states have the process of waiving fees and other court costs for the inability to pay separate from the determination of indigent status—thus having court-appointed attorneys as the only benefit of claiming indigent status.¹⁴⁴

This Part discusses the drawbacks that completely discretionary tests have on the integrity of the indigent status determination scheme: potential bias from the decision-makers and a likelihood of inconsistent determinations of similarly situated defendants.¹⁴⁵ This Part also concentrates on the effects that an incorrect determination, or even a correct determination, of lackluster indigent status could have on a poor

to-arrest-people-because-it-raises-money.

137. *Id.*

138. *Id.*

139. *Id.*; see *supra* Part II.B.1.

140. See Phillips, *supra* note 4, at 687-92.

141. See *supra* Part II.A.

142. See generally WASH. UNIV. SCH. OF L., PROJECT OF THE CRIMINAL JUSTICE CLINIC (Nov. 2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_indigent_status_guidelines_wash_u_crim_just_clinic_project.authcheckdam.pdf.

143. *Id.*

144. *Id.*

145. See *infra* Part III.A.

defendant.¹⁴⁶ Specifically, this Part will discuss the problems that occur when indigent status does not compel the waiver of all fees and costs associated with the representation, and the court procedures that are currently used to compel all criminal defendants, indigent or not, to pay court-issued financial obligations.¹⁴⁷

A. *The Completely Discretionary Determination
Test Invites Potential for Bias*

1. Judges' Conflict of Interest as Decision-Makers

The discretionary test for indigent status is the most popular test among the states, with twenty states granting full discretion to decision-makers and twenty-five granting full discretion with guidelines.¹⁴⁸ Currently, thirty-two states have appointed judges as the decision-makers of defendants' indigent status.¹⁴⁹ Because of the incentivized incarceration programs present throughout the nation, there is a strong conflict of interest for these judges.¹⁵⁰ In *Cain v. City of New Orleans*,¹⁵¹ the court asserted that the defendant deserved to have a neutral forum to decide whether or not he was deserving of indigent status.¹⁵² Judges are able to use their discretion to waive fees, but most of the time they will subject poorer defendants to payment plans.¹⁵³ These plans often come with interest, additional fees tacked on, and punishment for missing deadlines.¹⁵⁴ If judges are able to tap into the revenue stream attained through the imposition of court fees, wouldn't many of them want to use their discretion to find that a defendant is able to afford the costs imposed by the court?¹⁵⁵

Considering the extremely high standard of ethical responsibility required by judges, it could be an ethical gray area for a judge to determine indigent status in that situation.¹⁵⁶ Judges have a higher ethical standard than attorneys regarding conflicts of interest under the ABA's model

146. See *infra* Part III.B.

147. See *infra* Part III.C.

148. Phillips, *supra* note 4, at 687-92.

149. *Id.*

150. Smith, *supra* note 24, at 2313; see *supra* Part II.B.4.

151. No. 15-4479, 2017 WL 467685 (E.D. La. Feb. 3, 2017).

152. *Id.* at *18. "[The] Court finds that plaintiffs have plausibly alleged that the bond fee system described . . . and implemented by the Sheriff is inconsistent with the right to an impartial judge guaranteed by the due process clause of the Fourteenth Amendment." *Id.*

153. Shapiro, *supra* note 14.

154. *Id.*

155. See *id.*

156. See MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2014).

ethics rules.¹⁵⁷ Under the circumstances mentioned above, there is a reasonable argument to be made that the judge's financial interest in finding that a potentially indigent defendant is able to pay court fees—thus allowing their fees to be accessed by the judge—creates an “appearance of impropriety.”¹⁵⁸ “Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.”¹⁵⁹ By allowing judges to continue deciding whether a defendant is able to pay in these circumstances, states are increasing the likelihood of ethical violations occurring.¹⁶⁰

2. Public Defenders' Conflict of Interest as Decision-Makers

Currently, thirteen states have the public defender assigned to the defendant's case as the decision-maker of their indigent status.¹⁶¹ Forty-three states have programs in which defendants can be billed for having public defenders, and those fees help fund the state's public defender program.¹⁶² In Louisiana, there is a scheme in which defendants who plead or are found guilty must pay a thirty-five dollar fee.¹⁶³ This fee goes directly to the public defender fund.¹⁶⁴ The former defendants claimed that their public defenders had a competing interest in advising them to plead guilty, which in turn supplemented their salary.¹⁶⁵ Additionally, in Louisiana, public defenders are the final authority on a defendant's indigent status.¹⁶⁶ Thus, there is an incentive among public defenders to find that their client is able to pay the court fees so they can contribute to their own salaries.¹⁶⁷

157. *See id.*; MODEL RULES OF PROF'L CONDUCT r. 1.7 & 1.8 (AM. BAR ASS'N 2018). Under federal law, federal judges must recuse themselves from matters in which their impartiality might reasonably be questioned. 28 U.S.C. § 455 (2012).

158. MODEL CODE OF JUD. CONDUCT r. 1.2.

159. *Id.* cmt. 1. Furthermore, the Model Rules do not explicitly give examples for the term “conduct.” *Id.* cmt. 3. The Rule is “necessarily cast in general terms.” *Id.*

160. *See id.*

161. Phillips, *supra* note 4, at 687-92.

162. Shapiro, *supra* note 14.

163. *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 714 (5th Cir. 2012).

164. *Id.*

165. *Id.* at 714-15.

166. Phillips, *supra* note 4, at 689. Judges in Louisiana give the initial determination of indigent status. *Id.* Moreover, although not particularly related to this Note, it is problematic that public defenders, whose role is to give poor defendants their constitutionally-mandated defense, are able to supplement their salary by convincing defendants to plead guilty. *See* Phillips, *supra* note 4, at 689. In other words, if these defendants are found innocent, then no fee is collected by the public defenders. *See* Phillips, *supra* note 4, at 689.

167. Smith, *supra* note 24, at 2313.

*B. Completely Discretionary Tests Create
Contradicting and Improper Judgments*

By subjecting defendants to completely discretionary tests, similarly financially-situated defendants could receive different judgments depending solely on the decision-maker appointed to their cases.¹⁶⁸ In Allegheny County, Pennsylvania, the “lack of clear and uniform standards on what constitutes ability to pay” has led to seemingly unconstitutional results.¹⁶⁹ According to state rules, a judge is only able to detain a criminal defendant for not paying fees if he or she finds that the defendant is actually able to pay and has chosen not to.¹⁷⁰ Because there is “no universal standard,” judges will differ in their approach to evaluating the ability to pay.¹⁷¹ Judges will consider a variety of factors present in the defendant’s case as to whether they could in fact pay.¹⁷² These factors differ from case to case and different judges place emphasis on different factors.¹⁷³ Some judges consider whether the defendant’s family has money, or if the defendant has purchased alcohol, cigarettes, or other “luxury” items in lieu of paying the court fees.¹⁷⁴ Absent clear standards, judges are able to impose their own standards of a necessary purchase onto a poor defendant’s life.¹⁷⁵ This is problematic, especially considering the wealth gap between judges and impoverished citizens, as well as the implicit socioeconomic bias prevalent in the judiciary.¹⁷⁶ Furthermore, there is no indication as to whether these judges inquired into or considered whether these defendants suffer from addiction, which would have shined some light on how “necessary” the purchase was.¹⁷⁷ More carefully tuned standards should be applied to the decision-maker and

168. See Phillips, *supra* note 4, at 655.

169. Kate Giammarise & Christopher Huffaker, *Jailed Over Unpaid Fines, Court Costs: Debtors’ Prisons?*, U.S. NEWS & WORLD REP. (Feb. 24, 2018), <https://www.usnews.com/news/best-states/pennsylvania/articles/2018-02-24/jailed-over-unpaid-fines-court-costs-debtors-prisons>.

170. See *id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. See *supra* Part II.B.1.

177. See Giammarise & Huffaker, *supra* note 169. Moreover, judges should not consider making these types of purchases prior to court payments as an outright negative factor due to the correlation of poverty and addiction. See Bill M., *Drug Addiction and Poverty: Understanding the Connection*, MONARCH SHORES (Sept. 18, 2018), <https://www.monarchshores.com/food-for-thought/drug-addiction-and-poverty>. The lack of access to rehabilitation services perpetuates addiction within impoverished communities. *Id.* “If there are no financial resources, there is no access to a rehab center, which can put a person at risk of dying from an overdose or spiraling out of control and becoming lost in their addiction forever.” *Id.*

effects of indigent status because the stakes are so high.¹⁷⁸ As University of Pittsburgh School of Law professor David Harris stated, “[t]he Constitution is very clear, the law is very clear, you cannot be jailed for failing to pay when you can’t pay.”¹⁷⁹

Because judges have differing opinions on what being able to pay means, defendants who likely should be considered for indigent status may slip through the cracks.¹⁸⁰ Tom Barrett was arrested in Augusta, Georgia, for stealing a two-dollar can of beer.¹⁸¹ Instead of prison time, he was given twelve months of probation and ordered to wear an alcohol-monitoring bracelet.¹⁸² He was also ordered to pay an eighty-dollar startup fee for this program, and since he was living off of food stamps at the time, he could not afford the fee and spent one month in jail.¹⁸³ After he was released back into probation, he had monthly payments of nearly \$400 of supervision fees.¹⁸⁴ When Barrett fell behind in these payments he was sentenced to twelve months in prison.¹⁸⁵

Stephen Papa was a homeless Iraq war veteran in his twenties when he was arrested for crimes related to climbing on the roof of an abandoned building.¹⁸⁶ One month after his arrest, Papa owed \$2600 in fines, restitution, and court fees.¹⁸⁷ When the judge sought an installment payment of fifty dollars, Papa only had twenty-five dollars, but he also had a newly-acquired promising job at a steel factory.¹⁸⁸ However, because he could not pay the installment that the judge wanted, he was

178. Giammarise & Huffaker, *supra* note 169.

179. *Id.*

180. *See id.*

181. Erin Fuchs, *Exorbitant Probation Fees Put Georgia Man in an Impossible Catch-22*, BUS. INSIDER (Feb. 6, 2014, 1:10 PM), <https://www.businessinsider.com/human-rights-watch-report-on-for-profit-probation-2014-2>.

182. *Id.*

183. *Id.*

184. *Id.* Curiously, the funds being raised by Barrett’s sentence were not being collected by the State. *Id.* Instead, the State had sold the collection rights to Sentinel Offender Services, LLC, a private entity. *Id.* Barrett was able to keep up with these payments for a while by gaining as much income as he could, including donating blood plasma twice a week. *Id.*

185. *Id.* He was released after he served two months. *Profiles of Those Forced to ‘Pay or Stay’*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/310710716/profiles-of-those-forced-to-pay-or-stay>.

186. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>. Papa spent the day drinking with friends, and when they climbed onto an abandoned roof, they were arrested by police. *Id.*

187. *Id.*

188. *Id.*

sentenced to twenty-two days in jail.¹⁸⁹ When Papa was released from jail, he lost his job.¹⁹⁰

Although giving complete discretion to a decision-maker may invite bias to play a role in the determination and lead to inconsistent judgments of similarly situated defendants, completely objective tests have the potential to be just as problematic.¹⁹¹ In New Jersey, there has been criticism from multiple civil rights groups about the State's use of a risk-assessment computer program in the decision of whether a defendant may qualify for bail or will be detained prior to trial.¹⁹² Opponents claim that programs like the one being implemented by New Jersey have a potential for defective determinations due to the prejudicial nature of the data.¹⁹³ The imposition of this algorithm is a result of the amendment made to New Jersey's Constitution in 2014, allowing the pretrial detention for certain criminal defendants without an opportunity for bail.¹⁹⁴ A representative of the American Civil Liberties Union mentioned that other states are looking to the effectiveness of New Jersey's program to potentially consider implementing similar programs within their jurisdictions.¹⁹⁵

C. *The Effects of Indigent Status*

Determinations of a defendant's indigent status should be done correctly and unbiasedly because court and attorney fees can have intense and long-lasting effects on poorer populations.¹⁹⁶ Courts can seek payment from criminal defendants—regardless of indigent status—in various

189. *Id.*

190. *Id.*

191. See Colleen O'Dea, *Civil Rights Coalition Calls for End to Core Element of NJ Bail Reform*, NJ SPOTLIGHT (July 31, 2018), <https://www.njspotlight.com/stories/18/07/30/civil-rights-groups-call-for-end-to-core-element-of-nj-bail-reform>. For a portrayal of these issues in the entertainment industry, consider an episode of the legal drama *For the People*. See *For the People: 18 Miles Outside Roanoke* (ABC television broadcast Mar. 27, 2018). In this particular episode, a judge was determining the sentence for a young indigent defendant. *Id.* The judge was planning on using risk assessment software that utilized an objective algorithm, which calculated the likelihood of the defendant to commit a crime in the future, or his chance of recidivism. *Id.* However, the public defender argued that the judge's subjective opinion in sentencing decisions is what led to her recidivism rate being considerably lower than that of the algorithm. *Id.* Potential reasons for the lower statistic likely included the judge's experience and ability to consider intrinsic factors not easily quantifiable. *Id.*

192. O'Dea, *supra* note 191.

193. *Id.*

194. *Id.* The civil rights groups criticize not only the use of the fully-objective program, but also the lack of New Jersey's transparency about the effectiveness of the program. *Id.*

195. See *id.* Considering states are interested in implementing similar bail systems, the trend of completely objective tests with little human input could spread to other areas of criminal law. *Id.*

196. See *supra* Part II.B.

forms of fees, some of which are ordered after judgment seeking to reimburse the government for the cost of representation, having a trial, or administrative services.¹⁹⁷ These fees may be imposed upon defendants as court-imposed debts and/or conditions for probation.¹⁹⁸

Because most indigent defendants are still susceptible to these court costs and fees, and since most indigent status statutes do not outright waive all court costs and fees, indigent defendants may be subjected to additional punishment if they fail to pay their court debts.¹⁹⁹ Although most courts have the option to waive fees for indigent defendants, many will instead require them to follow a payment plan, often with interest, and subject to a violation of their probation if they fail to keep up with these payments.²⁰⁰ The Supreme Court case *Bearden v. Georgia*²⁰¹ made it clear that judges may not sentence someone to prison simply for failing to pay court fees unless that refusal to pay was “willful.”²⁰² The *Bearden* court did not explicitly state what the standard for “willful” should entail, causing differing interpretations among jurisdictions.²⁰³ Thus, if an indigent status statute does not provide an indigent defendant with a complete waiver of court costs and fees, judges could evaluate every expense a defendant exercised as a factor, moving them closer toward a willful refusal to pay court debt.²⁰⁴

The system of imposing expensive court costs against defendants is meant to serve a deterrent effect to dissuade them from committing crimes in the future.²⁰⁵ Instead, expensive court costs can steer indigent defendants to commit additional crimes and take extraordinary measures to evade the authorities.²⁰⁶ Most of these costs appear in the following two categories: recoupment and contribution.²⁰⁷

197. Shapiro, *supra* note 14.

198. Anderson, *supra* note 6, at 333.

199. *See generally* WASH. UNIV. SCH. OF L., *supra* note 142. Illinois’ indigent status statute is one exception to this generalization, as it specifically allows for a complete waiver of all fees through a rule. *Id.*

200. *See id.*; *see also* Shapiro, *supra* note 14.

201. 461 U.S. 660 (1983).

202. *Id.* at 668.

203. Shapiro, *supra* note 14.

204. *See id.*; Giammarise & Huffaker, *supra* note 169.

205. Shapiro, *supra* note 14.

206. Tim Lockette, *Court Costs Drive Some Alabama Residents Back to Crime, Study Claims*, ANNISTON STAR (Oct. 10, 2018), https://www.annistonstar.com/news/calhoun/court-costs-drive-some-alabama-residents-back-to-crime-study/article_21d98096-cd22-11e8-b66e-4f5ef80a4b16.html; Robert Siegel, *Court Fees Drive Many Poor Defendants Underground*, NPR (May 21, 2014), <https://www.npr.org/templates/transcript/transcript.php?storyId=314607003>.

207. Anderson, *supra* note 6, at 329.

1. Recoupment

Recoupment refers to the judicial order in which a court seeks reimbursement in full or in part of the services they provided to the defendant in order to have a trial.²⁰⁸ Recoupment statutes governing how to calculate the amount owed vary from state to state.²⁰⁹ The Supreme Court has ruled on the validity of an Oregon recoupment statute in the landmark decision of *Fuller v. Oregon*.²¹⁰ The statute provided that the state could seek reimbursement of the costs of a court-appointed attorney if the defendant was convicted.²¹¹ The challenger claimed that because there is a possibility that a poor defendant would have to pay for an attorney if found guilty, many would not seek to be represented at all, thus chilling the defendant's constitutional right to an attorney.²¹² The court rejected this argument due to the procedural safeguards Oregon included in its statute, most notably the clause that stated only defendants who could afford to pay would be required to pay.²¹³

Many jurisdictions have loosely interpreted this decision, causing many defendants to not be given the procedural safeguards the *Fuller* Court used as the primary reason for upholding the statute's constitutionality.²¹⁴ The *Fuller* Court stated, "Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship."²¹⁵ The Oregon statute required the Court to determine an individual's ability to pay before any imposition of fees.²¹⁶ This context is either ignored or overlooked by some jurisdictions which subject individuals to fees without first having an ability-to-pay hearing.²¹⁷

In New Jersey and Florida, public defenders are able to file liens on defendants' property for unpaid attorney's fees without first having an ability-to-pay hearing.²¹⁸ A Kansas court held that the state trial court was not required to determine whether a defendant was able to pay a one-hundred-dollar application fee.²¹⁹ The Alaska Supreme Court upheld a

208. *Id.* at 324.

209. *Id.* at 330.

210. 417 U.S. 40, 43 (1974).

211. *Id.* at 47.

212. *Id.* at 51.

213. *Id.* at 49-50.

214. Anderson, *supra* note 6, at 337-38.

215. *Id.* at 338 (quoting *Fuller*, 417 U.S. at 54).

216. *Id.*

217. *See id.*

218. *Id.* at 344.

219. *Id.*

judgment requiring the payment of unpaid court-appointed attorney's fees when there was no inquiry into the defendant's ability to pay.²²⁰ The relevant Alaskan statute never required an inquiry into the ability to pay unless the defendant formally objected.²²¹ The same recoupment practices are utilized by states that have an obligation to pay these fees as a condition for parole or probation.²²² Some states have gone so far from the decision in *Fuller* by only requiring an ability-to-pay determination before a state seeks to enforce a recoupment order.²²³ Specifically, Washington considers the ability to pay as forward-looking: "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer."²²⁴

2. Contribution

Contribution refers to various forms of fees that often supplement recoupment efforts.²²⁵ These are referred to as administrative fees and represent a finite amount usually imposed unilaterally across the board, but are able to be waived.²²⁶ Twenty-seven states require indigent defendants to pay registration fees upfront ranging from ten dollars to five-hundred dollars depending on the circumstances.²²⁷ Although the copays and application fees offered in lieu of hiring a private attorney seem like a very good deal to many poor citizens, when compared to the actual cost the government spends on public defenders, these fees likely

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 345.

224. *Id.* (quoting *State v. Blank*, 930 P.2d 1213, 1220 (Wash. 1997)).

225. *Id.* at 346.

226. *Id.*

227. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052-53 (2006). The following are state-wide upfront public defender registration costs: Arkansas' fee is no more than \$100, no less than \$50; Colorado's fee is \$25; Connecticut's fee is \$25; Delaware's fee is \$50; Florida's fee is \$40; Indiana's fee is \$50 for a misdemeanor and \$100 for a felony; Kentucky's fee is \$50 plus a \$2.50 clerk handling fee; Massachusetts' fee is \$200; New Jersey's fee is \$200; New Mexico's fee is \$10; North Dakota's fee is \$25; Oklahoma's fee is \$40; Oregon's fee is \$20; South Carolina's fee is \$25; Tennessee's fee is no more than \$200, no less than \$50; Vermont's fee is \$25; and Wisconsin's fee is no more than \$400, no less than \$200. ABA COMM. ON LEGAL AID & INDIGENT DEFENDANTS, PUBLIC DEFENDER APPLICATION FEES 2, 5-20 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/pdapplicationfees2001_narrative.pdf. The following are examples of states that have a county-based approach to upfront public defender costs: Arizona's counties range from \$250 to \$500; California's counties range from \$50 to \$120; Georgia's counties range from \$20 to \$200; Ohio's counties range from \$30 to \$75; and Washington's counties impose a \$25 fee. *Id.* at 20-25.

have the potential to exceed that cost.²²⁸ These contribution fees differ from recoupment in that they are generally waivable by the court.²²⁹ However, there is no requirement to have an ability-to-pay determination prior to the potential waiver of contribution fees.²³⁰ Further, if contribution fees do not get waived, they become enforced as a part of the defendant's sentence, conditions for probation, or another court order.²³¹ Thus, contribution debt for various fees may accumulate against a defendant without any inquiry into their ability to pay.²³²

IV. A MODEL INDIGENT STATUS STANDARD WILL PROVIDE CLARITY, UNIFORMITY, AND FAIRNESS TO POOR CRIMINAL DEFENDANTS

As discussed, the majority of the current indigent status statutes lend themselves to bias and potential conflicts of interest of the decision-makers and lack the necessary effects to prevent undue hardship to indigent defendants.²³³ This Part introduces the underlying principles and rationales of the proposed model standard for indigent status determinations.²³⁴ Further, this Part includes a model rule for indigent status determinations that have been developed from various aspects of different states' indigent status statutes.²³⁵

A. A Neutral Third Party as the Decision-Maker

A party unrelated to the current matter should be the one to determine whether an individual meets the standard to remove any chance of bias from the occasion.²³⁶ Allowing the judge or public defender assigned to the case as the decision-maker of indigent status leaves the door open to potential bias, including conflicts of interest, tainting the determination.²³⁷

228. See Anderson, *supra* note 6, at 353.

229. *Id.* at 346.

230. *Id.*

231. *Id.*

232. *Id.*

233. See *supra* Part III.

234. See *infra* Part IV.A–C.

235. See *infra* Part IV.D.

236. See *supra* Part III.

237. See *id.* This rationale is consistent with the holding in *Cain v. City of New Orleans*, No. 15-4479, 2017 WL 467685 (E.D. La. Feb. 3, 2017) at *18 (stating in part, that a defendant should be given a neutral forum to determine his or her indigent status).

*B. A Mixed Bright-Line and Discretionary
Standard for Indigent Status*

The model standard for indigent status should be based off the standard currently applied by Maryland.²³⁸ This test is a combination of discretionary guidelines with presumptive thresholds which automatically qualifies certain defendants.²³⁹ Decision-makers using this type of test are able to utilize the best benefits of completely discretionary tests and bright-line tests.²⁴⁰ Discretionary components allow the decision-maker to consider an individual's unforeseen and changing circumstances.²⁴¹ Bright-line rule components give a considerable amount of efficiency, predictability, and uniformity to the results and notice to the individual being evaluated.²⁴² Hopefully, by combining the aspects of both tests, the negative aspects of each will be reduced.²⁴³ For example, a large drawback of bright-line rules is that they consider a few criteria as very important, controlling the result, and may potentially ignore other criteria that are just as important.²⁴⁴ By complementing clear parameters with relevant discretionary factors to consider for the cases that fall in an ethical gray area, decision-makers will be able to take these important components into account.²⁴⁵ Regardless of whether the defendant is found innocent or guilty, they should not be subjected to numerous fees if they are found to be indigent.²⁴⁶

C. The ABA's Guidelines on Court Fines and Fees

The ABA formed the Task Force on Building Public Trust in the American Justice System ("Task Force") in 2016 to respond to growing societal disapproval of criminal justice policies in America.²⁴⁷ The Task Force had determined that by addressing exorbitant court fines and fees, it could have the greatest impact on their goal of building back public

238. See WASH. UNIV. SCH. OF L., *supra* note 142.

239. *Id.*

240. See Phillips, *supra* note 4, at 669.

241. *Id.* at 662-63.

242. *Id.* at 669.

243. *Id.*

244. *Id.* at 663.

245. *Id.* at 663, 669.

246. *Id.*

247. ABA PRESIDENTIAL TASK FORCE, *supra* note 88, report at 1. Specifically, these concerns included increasing racial tensions, retaliation against law enforcement, and growing distrust of the judicial system as a whole. *Id.* The Task Force had three primary goals to guide their research and recommendations: (1) encourage the adoption of new practices for criminal justice reform, (2) establish a consensus on which reforms needed to be achieved, and (3) educate the public as to how the new procedures would change the criminal justice system. *Id.*

trust.²⁴⁸ Specifically, the Task Force found that “the imposition and enforcement of these fines and fees have disproportionately harmed the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system, and trapping people in cycles of punishment simply because they are poor.”²⁴⁹ The Task Force developed ten Guidelines to help guide government officials and other lawmakers in addressing and reforming existing laws and developing new laws regarding court fines and fees.²⁵⁰ The ABA’s ten Guidelines can be broken down into four general categories: (1) limitations on fees, (2) limitations on sanctions for the nonpayment of fees, (3) regulations of the ability-to-pay standard, and (4) general applicability of the Guidelines.²⁵¹

1. Limitations on Fees

Guideline 1 of the ABA recommendations is for lawmakers to impose limitations on the purpose and amount of fees.²⁵² The fees “must be related to the justice system and the services provided to the individual.”²⁵³ Currently, states impose fees whose proceeds help fund unrelated programs and accounts.²⁵⁴ These various programs include libraries, the Crime Victims’ Rights Fund, retirement plans for judges, construction of new law schools, state police, and emergency medical air transportation, among other things.²⁵⁵ These funding purposes are in addition to the common practice of raising revenue to support the court system itself.²⁵⁶ The ABA found that because the judicial system serves the entire public, it “should be entirely and sufficiently funded by general government revenue.”²⁵⁷

Guideline 1 also recommends limiting the amount and types of fees that defendants should be subject to.²⁵⁸ The Task Force discusses the imposition of “user fees” and “collection fees” in the connection of a criminal offense or conviction.²⁵⁹ It recommends that all such fees should

248. *Id.*

249. *Id.* at 2.

250. *Id.* at 1.

251. ABA PRESIDENTIAL TASK FORCE, *supra* note 88, report at 3. Also included in these Guidelines is a discussion on the limitation of fines, but because the topic of this Note primarily deals with fees (not fines), that discussion has been omitted. *Id.*

252. *Id.* at 1.

253. *Id.*

254. *Id.* at 1, 10 nn.1 & 3; *see supra* Part II.B.4.

255. *Id.*

256. *See supra* Part II.B.4.

257. ABA PRESIDENTIAL TASK FORCE, *supra* note 88, at 2.

258. *Id.*

259. *Id.* User fees are surcharges applied to a defendant’s case and include examples such as

be eliminated, and if imposed at all, must not be considered a substantial hardship relative to the financial circumstances of the individual.²⁶⁰ The Task Force more sternly contends that when an individual is found not able to pay, the courts should not inflict fees.²⁶¹ Such fees include those for: probation, payment plans, diversion programs, community service, or appointment of counsel.²⁶²

2. Limitations on Sanctions for the Nonpayment of Fees

ABA Guidelines 3 and 5 aim to prohibit courts from subjecting individuals to disproportionate sanctions for simply not paying their court-imposed debts.²⁶³ Specifically, Guideline 3 asserts that incarceration should *never* be a sanction, and suspension of a driver's license is considered "out of proportion."²⁶⁴ Guideline 5 prohibits a sanction for the nonpayment of court costs (willful or not) that deprives an individual's fundamental rights.²⁶⁵ The rights mentioned include the right to vote and to the custody and control of one's children.²⁶⁶ The Task Force made the argument that collecting fines and fees is not a valid government interest when the sanction deprives a fundamental right.²⁶⁷

Guideline 6 suggests that the court must consider alternatives to disproportionate sanctions when the individual is found not able to pay, and any alternative must be reasonable.²⁶⁸ Some proposed examples of appropriate alternatives are an extension of time to pay, a reduction of the amount owed, and a waiver of the amount owed.²⁶⁹ Further, any non-monetary alternatives, like community service, must be appropriate for the individual's circumstances.²⁷⁰ The court must consider the individual's financial, mental, and physical capacity, and if there would be any undue interference with their existing responsibilities (for example, caregiving or employment).²⁷¹

"supervision fees" and "drug testing fees." *Id.* "Collection fees" are payable to private collection firms for the cost of collecting fees. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 3-5.

264. *Id.* at 6-7.

265. *Id.*

266. *Id.* at 8. In Georgia, for example, a person convicted of a felony is required to pay all outstanding court debt before they are permitted to vote, essentially acting as a poll tax. *Id.* at 9.

267. *Id.* at 9.

268. *Id.* at 10.

269. *Id.*

270. *Id.* at 11.

271. *Id.*

3. Regulations Regarding the Ability-to-Pay Standard

Guideline 7 establishes parameters to follow when adopting an ability-to-pay standard.²⁷² The standard must be “clear and consistent” and must consider at a minimum the following factors when determining whether an individual is, in fact, able to pay:

receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.²⁷³

In addition to regulating what the actual standard must include, the guidelines also suggest how the standard should be applied and the effects it should have.²⁷⁴ Guideline 4 suggests the courts must have an ability-to-pay hearing before any fees or sanctions for non-payment of fees, including incarceration, are imposed upon an individual.²⁷⁵ Further, courts must provide “adequate and meaningful notice” of these hearings, along with appropriate advising of all the pertinent rights of the individual.²⁷⁶ As to the effect of finding that an individual does not have the ability to pay, Guideline 8 supposes that an indigent defendant must be provided counsel “without cost” and that such counsel be provided for all proceedings whenever incarceration could be the result.²⁷⁷ Further, the Task Force rejects that the cost of providing counsel incurred by the court is a valid justification for failing to provide counsel when it is required by law.²⁷⁸

4. General Applicability

The ABA recommends that all information regarding court fines and fees should be publicly available.²⁷⁹ Ultimately, the ABA requests transparency from the court regarding: the court’s revenue received from fees imposed; the amount of fees imposed, waived, and collected in each case; any cost the court incurred from imposing non-monetary

272. *Id.*

273. *Id.*

274. *Id.* at 11.

275. *Id.* at 7-8.

276. *Id.* at 8. Specifically, the commentary notes the right to counsel. *Id.*

277. *Id.* at 11. This Guideline is in direct opposition to the practice of twenty-seven states that require a registration fee for a public defender. *See supra* Part III.C.2.

278. *Id.* at 12.

279. *Id.* at 13.

alternatives; and data regarding the demographics of the individuals ordered to pay these fees.²⁸⁰ Further, Guideline 10 mandates that any designation of collection rights for fees to private companies must involve strict oversight.²⁸¹ Because it is a common occurrence for jurisdictions to sell contracts to private entities to govern probation or diversion programs, it is imperative that the government ensure their practices avoid harmful behavior, including charging interest, reselling collection rights, and intimidation, among other types of conduct.²⁸²

D. *The Model Rule*

The following model statute has two primary goals of enforcement: (1) the model statute is intended to create uniform and accurate findings of indigent status by neutral decision-makers, and (2) the model statute will increase the effectiveness of an affirmative finding of indigent status.²⁸³ Together, these aims will make it less likely that an indigent defendant will suffer debt-related injuries by simply defending himself in criminal court.²⁸⁴ The language of the statute is based off of, and has been modified from, various state indigent status statutes and the ABA recommendations on criminal fines and fees.²⁸⁵ The proposed language is as follows:

1. Indigent Status Determination

- A. A potential indigent criminal defendant will automatically qualify for indigent status if:
 - (1) the defendant or any dependent of the defendant who resides in the same household as the defendant receives means-tested state or federal governmental benefits,²⁸⁶ or
 - (2) the defendant's net yearly income is less than 200% of the federal poverty guidelines.²⁸⁷
- B. Notwithstanding Subdivisions A(1) and A(2) of this Section, a neutral third-party must determine whether a potential indigent defendant qualifies for indigent status. The neutral third-party shall:
 - (1) not have any role or interest in the defendant's case besides to determine indigent status; and

280. *Id.* at 14.

281. *Id.*

282. *Id.* at 14-15.

283. *See infra* Part IV.D.1-2.

284. *See infra* Part IV.D.1-2.

285. *See infra* Part IV.D.1-2; *see also supra* Part IV.C. *See generally* WASH. UNIV. SCH. OF L., *supra* note 142.

286. *See* WASH. UNIV. SCH. OF L., *supra* note 142.

287. *See id.* This Subdivision is based off of Florida's indigent status statute. *See id.*

- (2) determine whether the disposable income and assets of the defendant are insufficient to retain competent private counsel without substantial hardship to the defendant.²⁸⁸

C. The neutral third-party as identified in Subdivision B(1) of this Section shall abide by the following guidelines in determining whether the defendant may qualify for indigent status²⁸⁹:

- (1) a defendant's financial ability to pay shall be measured in terms of the defendant's individual resources and not in terms of the defendant's family's resources;
- (2) the fact that bond was posted shall not be used as grounds to deny indigent status;
- (3) assets seized in raids and held by authorities may not be considered available to the defendant and thus may not be used to prove his or her ability to pay;
- (4) the defendant's presumed employability shall form no proper basis to deny indigent status; and
- (5) any doubts as to whether the defendant qualifies for indigent status shall be resolved by finding indigent status rather than denying it.

D. The neutral third-party as identified in Subdivision B(1) of this Section shall conduct an evaluation of the indigent defendant's ability to pay before any imposition of a fee or sanction for nonpayment of fees.²⁹⁰

2. Effect of Indigent Status

If the defendant meets the test in Section 1(A), or if the neutral third-party identified in Section 1(B)(1) determines that the potential indigent defendant qualifies for indigent status, then²⁹¹:

- A. If the defendant requests the assistance of counsel for his or her defense, the public defender will be appointed to his or her case; and
- B. The court shall enter an order allowing the defendant to defend his or her case without the payment of fees, costs, or charges.
- (1) This order shall cover all administrative charges, including any reimbursement or contribution efforts related to the costs of representation.

288. *See id.* This Subdivision is based off of Minnesota's indigent status statute. *See id.*

289. *See id.* The following factors are based on those identified by the Court of Special Appeals in *Baldwin v. State*, 444 A.2d 1058 (1982), and subsequently adopted by the Maryland Legislature. *See id.*

290. *See supra* Part IV.C. This clause is based off of Guideline 4 proposed by the Task Force. *See supra* Part IV.C.

291. *See* WASH. UNIV. SCH. OF L., *supra* note 142. The following results are based on the indigent status statute and rules of Illinois. *See id.*

(2) This order shall not excuse any criminal fine imposed against a guilty defendant as determined by the legislature.

V. CONCLUSION

The current policies of the United States criminal justice system require substantial changes to attain socioeconomic equity because currently, the system is broken.²⁹² The United States' prison system accounts for 21% of the world's prisoners while the United States population only accounts for 5% of the world's population.²⁹³ Today, the United States prison population for drug-related offenses is greater than the entire prison population in 1980.²⁹⁴ Further, the sentencing of individuals for violent and property crimes has increased even though the rates in which these crimes were committed have decreased.²⁹⁵ In 2015, 4.6 million individuals were on probation or parole in the United States, and almost 7 million were subject to some form of criminal justice supervision.²⁹⁶ Reasonable people offer differing approaches on how to incorporate changes to the system, but most if not all agree that change is required.²⁹⁷

The model rule proposed above will not, on its own, place impoverished citizens at the same level as their wealthy counterparts, nor does it attempt to be the perfect answer to the sum of problems plaguing our criminal justice system.²⁹⁸ Instead, this solution seeks to remove one troubling piece from the equation, which consistently disadvantages poor citizens.²⁹⁹ Hopefully, clear, fair, and uniform indigent status standards will help create a path to future reform and allow our most vulnerable to

292. See *Criminal Justice and Equity*, GOV'T ALL. ON RACE & EQUITY (Apr. 23, 2016), <https://www.racialequityalliance.org/2016/04/23/criminal-justice-and-equity>.

293. *Criminal Justice Fact Sheet*, *supra* note 71.

294. *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> (last updated Aug. 2019).

295. *Id.*

296. *Fact Sheet: Prisons and People in Prisons*, SENTENCING PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Facts-About-Prisons.pdf> (last updated Aug. 2017).

297. See, e.g., Kamala D. Harris, *Three Ways To Fix Our Criminal Justice System*, TIDAL (Oct. 15, 2018), <http://read.tidal.com/article/three-ways-to-fix-our-criminal-justice-system>; Jessica S. Henry, *Top 10 Ways to Fix the Criminal Justice System*, HUFFINGTON POST (Dec. 22, 2014), https://www.huffingtonpost.com/jessica-s-henry/top-10-ways-to-fix-the-cr_b_6362274.html; *Leading Criminal Justice System Change: The Critical Role of Local Law Enforcement*, INT'L ASS'N OF CHIEFS OF POLICE, <http://www.policemagazine.org/leading-criminal-justice-system-change-the-critical-role-of-local-law-enforcement> (last visited Sept. 17, 2019).

298. See *supra* Part II.

299. See *supra* Part III.

exist within our criminal justice system with one less disadvantage.³⁰⁰ The judicial system is intended to be an equal, fair, and equitable forum for every American, which frankly is not our reality.³⁰¹

The disparate treatment of poor citizens in our criminal justice system is not a new issue, and to call it a pervasive problem should not be controversial.³⁰² The topic has been addressed within various spheres of influence, including the press,³⁰³ academia,³⁰⁴ and the entertainment industry.³⁰⁵ Regardless of the zealous advocacy for change showcased by political activists and the majority of Americans recognizing the existence of a problem, the inequitable application of the law against those in poverty is widespread and requires sweeping changes with substantial reevaluations of how our legislators and public officials treat our country's poor.³⁰⁶ Although there have been strides in a few jurisdictions to address the inequitable circumstances poor criminal defendants face, the majority of these efforts address the mishandling of indigent defendants' cases after the defendants have qualified for indigent status.³⁰⁷

300. See *supra* Part IV.

301. See *supra* Part II.B.

302. See *supra* Part II.

303. See Harry Cheadle, *The Rules Are Different for the Rich*, VICE (Oct. 6, 2017), https://www.vice.com/en_us/article/ne7yv7/the-rules-are-different-for-the-rich; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433>.

304. See, e.g., Anderson, *supra* note 6; Sobol, *supra* note 64.

305. See *How to Get Away with Murder: Lahey v. Commonwealth of Pennsylvania* (ABC television broadcast Mar. 1, 2018). An episode of the popular television show *How to Get Away with Murder* portrayed a fictional Supreme Court oral argument focusing on the treatment of indigent criminal defendants assigned to public defenders. *Id.* Specifically, the appellant advocated for the Court to incorporate a stronger imposition of the Assistance of Counsel Clause of the Sixth Amendment. *Id.* Appellant argued that the criminal justice system has treated minority and impoverished citizens so poorly that they have "been relegated to a subclass of human existence." *Id.* Further, she argued that if the Court found for the Commonwealth in this case, it would turn a blind eye to the invidious mismanagement of the governmental program and effectively dismantle the constitutional protections they swore an oath to protect. *Id.*

306. See Greenhouse, *supra* note 72. "90 percent of respondents said affluent people and corporations had an unfair advantage in court." *Id.*; see also Stephen Lurie, *Why It Matters that Politicians Have No Experience of Poverty*, ATLANTIC (June 2, 2014), <https://www.theatlantic.com/politics/archive/2014/06/why-it-matters-that-politicians-have-no-experience-of-poverty/371857>.

307. See Kaitlin Ryan, *A Fairer Fight*, ALPENA NEWS (Nov. 5, 2018), <http://www.thealpennews.com/news/local-news/2018/11/a-fairer-fight>; Bruce Vielmetti, *'I'm Going to Stand Up': Northern Wisconsin Judge Demands Answers from State on Public Defender Crisis*, MILWAUKEE J. SENTINEL (Nov. 1, 2018), <https://www.jsonline.com/story/news/crime/2018/11/01/northern-wisconsin-judge-demands-answers-public-defender-crisis/1805271002>.

While it is very important to ensure indigent defendants are being provided with equitable treatment during the course of their representation, it should be just as imperative that they receive a fair and unbiased evaluation of their eligibility in the first place.³⁰⁸ And if they are found eligible, they must not be subject to the costs incurred by their representation.³⁰⁹

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308. *See supra* Part III.A.

309. *See supra* Part III.B.

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