Paying for *Gideon*

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INTRODUCTION

To protect the "noble ideal" that "every defendant stands equal before the law," *Gideon v. Wainwright* guaranteed the right to defense counsel for those who cannot afford it.[1] *Gideon*'s concept is elegantly simple: if you are too poor to pay for counsel, the government will provide. The much more complicated reality, however, is that since *Gideon*, courts have assigned counsel to millions of American defendants too poor to pay for an attorney, and later required those defendants to pay for their counsels' services.

Because schemes for recouping the costs of providing counsel from indigent defendants operate behind the scenes, I begin this Essay by pulling back the curtain to provide an overview of what the attempts to extract indigent defense fees and costs from the poor look like.[2] I describe how, in

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1. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

2. While in the past few years recoupment has been mentioned in the literature occasionally, in most work there is no discussion of the link between recoupment and collateral consequences. *See, e.g.*, Susan Herlofsky & Geoffrey Isaacman, *Minnesota's Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 572–74 (2011); Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the*

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. Once assessed, recoupment debt carries with it potentially debilitating collateral consequences—limitations on employment, housing, and public benefits—that effectively render one's capacity to pay recoupment debt even less likely. Where one cannot pay, either because of poverty at the time of imposition or by being pushed there as the result of collateral consequences, states and local governments often resort to arrest, probation revocation, and incarceration.

I turn next to the question of how we moved from *Gideon*'s guarantee that counsel would be furnished to anyone too poor to afford one, to a system where the poor are forced to pay for counsel and then punished for being unable to do so. I assert that *Gideon*'s protection against recoupment for those with no ability to pay has remained hidden in plain sight due to misinterpretations in two lines of cases. The first line involves a series of cases in which the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment required the waiver of financial barriers to accessing the courts (e.g., appellate filing fees). The second line involves the misapplication of the Fifth Amendment's collateral consequences doctrine to the Sixth Amendment's effective assistance of counsel jurisprudence, leading to a misunderstanding that to be

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Indigent?, 64 BROOK. L. REV. 181, 218–20 (1998); Rinat Kitai, *What Remains Necessary Following* Alabama v. Shelton *to Fulfill the Right of a Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35, 55–56 (2004); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2049–52 (2006); Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 193–94 (2007); Andrea L. Martin, Note, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1640–41 (2004); Lola Velázquez-Aguilú, Comment, *Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense Is Failing*, 2006 WIS. L. REV. 193, 216–17.

Where collateral consequences are referenced, recoupment is typically lumped in with other forms of criminal costs and fees, and as such, the potentially unique aspects of charging for the right to counsel are not explored. *See, e.g.*, Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction After* Padilla v. Kentucky *and* State v. Sandoval, 9 SEATTLE J. FOR SOC. JUST. 855, 874–77, 894 (2011) [hereinafter Stearns, *Intimately Related*] (asserting the reasoning in *Padilla* is applicable to a wide variety of collateral consequences); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of* Gideon *by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 966–70 (2013) [hereinafter Stearns, *Legal Financial Obligations*] (providing advocacy points and policy rationales related to the imposition of defense costs and other criminal debts); T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 208–09 (2012) (asserting that the imposition of court costs, including recoupment, contribute to a decrease in jury trial rates); Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 559–60 (2011–2012) (recommending a statute requiring courts to consider collateral consequences in assessing legal financial obligations including recoupment).

constitutionally effective, counsel need not advise a client about collateral consequences.

The intersection of these two lines of cases has obscured the unconstitutional nature of today's recoupment schemes, pushing *Gideon* out of the picture. Attempts by advocates, academics, and the courts to continue squeezing recoupment into a due process/equal protection/effective assistance of counsel framework misses the fact that today's version of recoupment—with collateral consequences in tow—is itself a *Gideon* problem.[3]

I end the Essay with a call for defense counsel to bring that problem to light by uncovering how today's recoupment schemes, particularly as they collide with collateral consequences, violate not just the spirit but the letter of *Gideon*.

I. RECOUPMENT AND ITS COLLATERAL CONSEQUENCES

Today, countless[4] people living in poverty are assessed indigent defense fees and related costs.[5] Despite having no meaningful ability to pay, people become enmeshed in a system that makes it nearly impossible to pay, and then punished—in ways both nonsensical and extreme—for their inability to pay.

These problems begin with the imposition of indigent defense costs, which may occur before appointment of counsel or at the point of sentencing. Several varieties of recoupment exist, ranging from application fees assessed at the initiation of the criminal process, to flat-fee charges for defense costs, to assessments directly tied to the actual expenses incurred at trial.[6] In some jurisdictions, courts have the option to waive these various charges, in others, the imposition is mandated by statute.[7] Where imposition

3. *See infra* note 75.

4. Very few, if any, jurisdictions track data related to recoupment, so determining an exact number of people affected by recoupment is not possible. What is known is that every jurisdiction in the United States has either a statutory or judicially recognized ability to order recoupment. *See* Richard J. Wilson, *Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy, Bad Law*, 3 CRIM. JUST., Fall 1988, at 16. However, a significant percentage of individuals charged with crimes in the United States are too poor to pay for counsel. *Cf. Indigent Defense Systems*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=28 (last visited May 20, 2014) (reporting that in 1996, 82% of felony defendants in the 75 most populous counties received publicly financed counsel, as did 66% of federal felony defendants).

5. In addition to attorney's fees, indigent defendants may be charged for the costs of experts, investigators, and other costs related to their defense. *See, e.g.*, *infra* notes 36–37. Because such charges are necessary for the right to counsel to be meaningful, I include both fees and costs as relevant to the issues detailed in this Essay, referred to collectively as "indigent defense costs."

6. *See, e.g.*, 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, 329–34 (2009); Velázquez-Aguilú, *supra* note 2, at 212–17; Wright & Logan, *supra* note 2, at 2052–54.

7. *See* Anderson, *supra* note 6, at 331–32.

is discretionary, courts typically have the ability to consider, and sometimes must consider, the defendant's ability to pay for indigent defense costs.[8]

But even under the best of circumstances—where courts are mandated to consider one's ability to pay—there is reason to believe that people too poor to pay for counsel are being charged for that service. While some judges must take the determination of one's ability to pay seriously, given the dire financial circumstances of the vast majority of criminal defendants, it strains credulity to believe that the majority of courts are truly attending to the practical effects of recoupment on the lives of indigent defendants.

Exactly why that happens is not readily discernible, but shifting the burden of paying for indigent defense to the poor creates perverse incentives that pressure both courts and counsel to ignore the consequences of recoupment. In some jurisdictions, judges are pressured to impose a variety of costs, including indigent defense fees, upon defendants in order to bolster judicial budgets.[9] The acquiescence to recoupment schemes by indigent defense counsel in some jurisdictions may also be tied to monetary pressures, particularly where public defender offices or independently assigned counsel are funded partially or entirely on fees imposed upon and collected from their clients.[10]

Regardless of the reasons why, the result is that with few exceptions, today's recoupment schemes either effectively (by engaging in an essentially meaningless determination of one's ability to pay) or officially (by mandating imposition of fees and costs regardless of ability to pay) fail to attend to *Gideon*'s protection for those who are too poor to pay for counsel.

Moreover, even after the initial assessment of indigent defense fees, recoupment is intertwined with an extraordinary array of collateral consequences that further undermine *Gideon*'s protections. As detailed below, those consequences serve to push deeper into poverty those who may have otherwise been able to pay at least some portion of indigent defense fees.

The *Gideon* Court could not have contemplated the collateral consequences in effect today. Beginning in the 1990s—thirty years after the Court decided *Gideon*—proponents of the "tough on crime" movement pushed to create an extensive web of consequences for criminal convictions related to employment, housing, public benefits, and the like.[11] These consequences both decreased the likelihood that one would be able to pay

8. *Id.*

9. *See* AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 25–28 (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing the New Orleans courts' funding scheme).

10. *See, e.g.*, *id.* at 26–27; Wright & Logan, *supra* note 2, at 2055–68.

11. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 142–48 (2011) (describing President Bill Clinton's 1996 push to exclude offenders from public housing).

indigent defense costs and resulted in increasingly punitive responses to an inability to pay.

Take, for example, collateral consequences related to employment. Since the 1990s, Congress and state legislatures have erected numerous barriers to employment for a wide variety of misdemeanor and felony offenses. These barriers are often imposed automatically, without the possibility of waiver, and may include ineligibility or termination from employment for a variety jobs, including truck driving,[12] employment on a vessel,[13] working as an airport baggage handler,[14] and more. Courts may impose additional discretionary barriers following a conviction, such as ineligibility for employment in certain agricultural fields[15] and ineligibility for or discharge from military service.[16]

Even where there are not explicit barriers to particular types of employment, the consequences of conviction may impede one's ability to find work. In most states, for example, the government may garnish 35% of one's wages for the payment of fines and fees, including attorney fee recoupment.[17] The administrative hassle of processing wage garnishment may discourage potential employers from hiring garnishees.[18] These various restrictions and bureaucratic burdens result in a shrinking pool of employment possibilities for those convicted of criminal offenses, in turn reducing the likelihood that a person so convicted will be able to pay off his criminal debt.

The repercussions of criminal debt on employability do not end there. In many jurisdictions, so long as recoupment debt exists, the debtor is unable to seal records of his conviction regardless of whether he has completed all other terms of the sentence.[19] In turn, because many employers and landlords conduct criminal history searches, the existence of an unsealed record may further exacerbate one's ability to find work or

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12. *See* 49 U.S.C. § 31310(b) (2006) (establishing mandatory ineligibility to operate a commercial vehicle).

13. *See* 33 C.F.R. § 6.10-1, 6.10-7 (2014) (requiring vessel employees to be of such "character and habits of life . . . that . . . would not be inimical to the security of the United States").

14. *See* 49 C.F.R. § 1544.229(b), (c) (2014) (excluding from employment anyone with a "disqualifying criminal offense").

15. *See, e.g.*, 9 C.F.R. § 362.4(a)(1)(viii) (2014) (allowing rejection of an application for employment in a poultry business for certain criminal convictions).

16. *See* 10 U.S.C. § 504(a) (2006 & Supp. V 2012) (allowing for dismissal from the military upon conviction); *id.* § 1161 (same).

17. *See* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'T JUSTICE CTR., REPAYING DEBTS 8 (2007), *available at* http://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_full_report-2.pdf. Some states also garnish tax returns. *See, e.g.*, CAL. REV. & TAX. CODE § 19280 (West 2013); IDAHO CODE ANN. § 1-1624 (2010).

18. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1782 (2010).

19. *See id.* at 1785; *see also* WASH. REV. CODE §§ 9.94A.637–640, 10.97.060 (2012).

housing.[20] Additionally, unpaid debt alone may prevent a person from finding work or housing, as credit checks are increasingly used in employment and rental decisions.[21]

Poor job prospects are not the only relevant economic consequences; conviction for a crime might result in ineligibility for, or denial of, a variety of public benefits. Certain convictions, for example, result in automatic exclusion from federally-funded housing assistance.[22] Further, where paying for one's indigent defense costs is made a condition of probation or parole, failure to pay may result in exclusion from public housing,[23] social security,[24] food stamps,[25] and Temporary Assistance for Needy Families ("TANF").[26] In other words, an inability to pay one's criminal debt may increase the costs of securing basic necessities like food, clothing, and shelter. As those costs take up more and more of one's available finances, the likelihood that one can pay indigent defense costs decreases.

What is more, in many jurisdictions recoupment debt accrues significant interest—in some jurisdictions as high as 12 to 15%—so long as it is outstanding.[27] Many jurisdictions also impose additional collection costs during the period of collection, adding to the principle.[28] As a result, recoupment debt does not remain stagnant, but continues to grow over time, reducing the likelihood that it will ultimately be paid.

If a defendant is unable to pay for recoupment, either because he was too poor at the outset, or rendered so as the result of collateral consequences, the repercussions can be severe. Many jurisdictions engage in highly punitive tactics in seeking repayment, including issuing arrest warrants for individuals who miss payments.[29] Following an arrest for missed recoupment payments, people may be incarcerated while awaiting a determination as to whether the failure to pay was willful or the result of poverty,[30] which may result in additional indigent defense fees, as well as

20. *See* Harris et al., *supra* note 18, at 1780–81.

21. *See* Jennifer Bayot, *Use of Credit Records Grows in Screening Job Applicants*, N.Y. TIMES (Mar. 28, 2004), http://www.nytimes.com/2004/03/28/jobs/use-of-credit-records-grows-in-screening-job-applicants.html.

22. *See, e.g.*, 42 U.S.C. § 13663 (2006) (establishing that registered sex offenders are prohibited from public housing); 24 C.F.R. § 5.855(a) (2012) (permitting officials to deny public housing to applicants who have engaged in drug-related or violent criminal activity).

23. 42 U.S.C. §§ 1437d(*l*)(9)(2), 1437f(d)(1)(B)(v)(II).

24. *Id.* § 1382(e)(4)(A)(ii).

25. 7 U.S.C. § 2015(k)(1)(B) (Supp. V 2012).

26. 42 U.S.C. § 608(a)(9)(A)(ii).

27. *See, e.g.*, *infra* note 38 and accompanying text.

28. Collection costs can be quite significant. In Florida, for example, private collection companies are allowed to charge up to 40% of the amount due. *See* FLA. STAT. § 938.35 (2013).

29. *See, e.g.*, R.I. FAMILY LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND 4, 19–20 (2007), *available at* http://csgjusticecenter.org/wp-content/uploads/2013/07/2007-RI-Family-Life-Center.pdf.

30. *See, e.g.*, *id.* at 9; *see generally* AM. CIVIL LIBERTIES UNION, *supra* note 9.

costs related to the incarceration.[31] The inability to pay may even result in the revocation of one's probation and in the imposition of a prison term.[32]

State v. Nash exemplifies the severity of the repercussions that follow the failure to pay recoupment. Keith Nash was charged with a felony sex offense in Washington in December 1998, and the court appointed counsel to represent him because of his indigency.[33] Three months later, Mr. Nash was convicted and sentenced to spend 107 months in prison.[34] The court also sentenced Mr. Nash to pay statutory fines totaling $1000 and a criminal filing fee of $110.[35] On the day of sentencing, his appointed counsel submitted a cost bill in the amount of $2366.00,[36] which the court then added to the pecuniary penalties imposed against Mr. Nash, along with an additional $500 in "[c]ourt appointed defense expert and other defense costs."[37] The court further ordered that Mr. Nash pay interest—which in Washington accrues at twelve percent per year from the date of judgment[38]—as well as costs of collecting his "legal financial obligations," and any supervision fees the Department of Corrections may impose after his release.[39]

Mr. Nash's sentencing form included the following preprinted statement entitled "Ability to Pay Legal Financial Obligations":

> The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.[40]

There is little evidence in the record, however, that the trial court actually undertook any meaningful analysis of Mr. Nash's ability to pay. Beyond its finding just three months earlier that Mr. Nash was indigent, the court considered a presentence report provided by the probation department. The report included only limited information relevant to Mr.

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31. *See* AM. CIVIL LIBERTIES UNION, *supra* note 9, at 10 (describing how inability to pay court fees may lead to "a lifetime debt").

32. *Cf.* MCLEAN & THOMPSON, *supra* note 17, at 8 (reporting that 12% of probation revocations are linked to failures to pay fines and fees); *see infra* note 50 and accompanying text.

33. Order Appointing Counsel, State v. Nash, No. 98-1-00932-7 (Wash. Super. Ct. Dec. 15, 1998). All documents relating to Mr. Nash's case and cited herein are on file with the author.

34. Judgment and Sentence at 5, *Nash*, No. 98-1-00932-7.

35. *Id.* at 3.

36. Motion & Affidavit for Order Authorizing Payment of Court-Appointed Counsel at 4, *Nash*, No. 98-1-00932-7.

37. Judgment and Sentence, *supra* note 34, at 3.

38. *Id.* at 4 (citing WASH. REV. CODE § 10.82.090).

39. *Id.* at 4–5.

40. *Id.* at 2.

Nash's financial circumstances, including his educational, military, and employment history, and an indication that he had a child to support.[41]

Mr. Nash's attorneys provided no briefing on the subject prior to sentencing. Further, there is no indication that anyone—not defense counsel, not the State, and not the court—even calculated the amount of interest that would accrue during Mr. Nash's prison term, let alone considered that even if he were among the few prisoners to obtain employment in prison, the limited wages afforded prisoners would make almost no dent in his criminal debt.[42]

Nor did anyone appear to consider the effect of restrictions on housing and employment that arise from felony convictions—and particularly convictions for sex offenses—that would decrease the likelihood that Mr. Nash would be able to pay his criminal debts post-prison.[43] There is no mention in the record, for example, that although Mr. Nash is a disabled veteran,[44] he and any other veterans convicted of felony offenses are deemed ineligible for residency in military retirement homes.[45] Put simply, it is not evident how the court concluded that Mr. Nash would likely become able to pay any of his criminal debt, the bulk of which related to indigent defense fees and costs.

Though not considered by the court, it is not surprising that Mr. Nash was unable to pay off his indigent defense fees and costs while in prison or upon release. The amount of money he had at his disposal at any given time while incarcerated averaged less than $10,[46] leaving him essentially nothing to contribute toward relieving the debt. By the time he was released from prison, $4183 in interest had accrued, more than doubling his initial criminal debt.[47] What is more, Washington's Department of Corrections assessed an additional $50 per week in treatment costs, as it was allowed to

41. Report of Presentence Investigation at 6, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Mar. 9, 1999).

42. *Cf.* Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. FOR SOC. JUST. 293, 302 (2006) (describing how, in Washington prisons, most inmate wages range between $0.35 and $1.10 per hour).

43. *See supra* notes 11–26 and accompanying text.

44. Transcript of Oral Argument at 8, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Aug. 20, 2008) [hereinafter *Nash* Transcript].

45. 24 U.S.C. § 412(b) (2006 & Supp. V 2012). I have previously commented on the discrepancies between politicians' statements regarding their commitment to honoring the sacrifices of veterans and the exclusion of veterans who commit crimes from public benefits, particularly given indications that some criminal activity may be linked to service-related trauma. *See* Beth A. Colgan, *The Presidential Politics of Prisoner Reentry Reform*, 20 FED. SENT'G REP. 110, 116–17 (2007).

46. *See* Motion to Terminate Legal Financial Obligations, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Sept. 10, 2007) [hereinafter *Nash* Motion, Sept. 2007].

47. Petitioner's Motion for Modify, Clarification and Amending Judgment and Sentence, Community Custody App. 6, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Feb. 25, 2008) [hereinafter *Nash* Motion, Feb. 2008].

do under the trial court's sentencing order.[48] Unable to find work or housing, and unable to seek treatment for his mental or physical health issues as the result of restrictions imposed by the court due to the nature of his offense, Mr. Nash was released from prison homeless, unemployed, and with zero assets to his name.[49]

Mr. Nash's indigency did not stop the State from threatening to collect on Mr. Nash's debt. The State issued a notice to Mr. Nash stating that he had "failed to make a payment for 7 months. Failure to pay is a violation of your court order and will result in action by the [Department of Corrections]."[50] Under the threat of incarceration, Mr. Nash attempted to return to court to seek remission, which is allowed under Washington's recoupment scheme, pursuant to which imposed costs may be remitted where they impose a "manifest hardship on the defendant or the defendant's immediate family."[51] Mr. Nash filed several pro se motions seeking remission of his indigent defense fees and other economic sanctions.[52]

Mr. Nash attempted to explain his poverty at the hearing on his motions, stating that he had no employment and was unable to obtain medical treatment.[53] Before denying Mr. Nash's motion, the court asked a single question: "You're not employed and you don't have a payroll deduction, do you?"[54] The court later explained: "The fact that you have financial difficulties now does not mean that . . . you're going to have them always, it doesn't mean that . . . your circumstances won't change sometime in the future."[55]

Throughout the course of the hearing, Mr. Nash repeatedly attempted to explain the relationship between the collateral consequences of conviction and his inability to pay the criminal debt imposed by the court.[56] In particular, he explained that he was homeless because he lacked housing

48. Petitioner's Affidavit in Support Thereof, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Feb. 25, 2008) (filed as Appendix Exhibit 5 in *Nash* Motion, Feb. 2008).

49. *Id.*

50. *See Nash* Motion, Feb. 2008, *supra* note 47, at app. 6.

51. WASH. REV. CODE § 10.01.160(4) (2012).

52. *See, e.g.*, *Nash* Motion, Sept. 2007, *supra* note 46; Motion to Terminate Legal Financial Obligations, *Nash*, No. 98-1-00932-7 (Wash. Super. Ct. Apr. 27, 2007).

53. *Nash* Transcript, *supra* note 44, at 5–6.

54. *Id.* The court apparently made this remark because on the first page of the motion Mr. Nash had listed a statute that allowed for relief from wage garnishment instead of the statute that allowed for more generalized relief. *See Nash* Motion, Sept. 2007, *supra* note 46, at 1. In the body of the motion, however, Mr. Nash referred to the correct statute. *See id.* at 3. The argument presented by Mr. Nash, who was appearing pro se, matched the latter statute. *See Nash* Transcript, *supra* note 44, at 6 (arguing that he was suffering a "hardship").

55. *Nash* Transcript, *supra* note 44, at 6–7.

56. *See id.* at 1–21.

eligibility due to his conviction, and that restrictions stemming from his conviction had made it impossible for him to find work.[57]

The record from this hearing suggests why the court was reluctant to acknowledge that Mr. Nash had no capacity to pay for recoupment. On a related motion in which Mr. Nash sought relief from requirements that he pay for sex offender treatment given his lack of employment and housing, the court stated that if it granted Mr. Nash's motions on the basis that he lacked the ability to pay, "every defendant would come in here and say, oh, I'm not working so I can't [pay]."[58]

In sum, just as it had done at sentencing, the trial court determined that there was a likelihood that Mr. Nash would be able to pay despite the lack of any evidence suggesting that such a conclusion was reasonable.[59]

Mr. Nash appealed the trial court's decision on his request for relief on due process grounds.[60] He argued that because the court rejected his petition, despite unrebutted evidence of his inability to pay, the hearing was meaningless.[61] The Washington Court of Appeals rejected that claim, reasoning that because the Department of Corrections had not yet acted on its threat to seek parole revocation should Mr. Nash continue to miss payments, "any conclusion that the payment of the [costs] due created a manifest hardship would have been purely speculative" and therefore his claim was not yet ripe for review.[62] In reaching this conclusion the court engaged in no analysis of the difficulties created by the mere existence of the debt, including those detailed above relating to employment, housing, and public benefits.[63] As such, the court ignored the practical effects of indigent defense debt and how they might, in fact, result in a manifest hardship.

Mr. Nash's case—his poverty and the essentially meaningless consideration of his ability to pay—are not unique.[64] Today's recoupment

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57. *See id.* at 5–6, 8–13, 15–16, 19.

58. *Id.* at 10–11.

59. *See id.* at 6–7.

60. *See* State v. Nash, No. 38514-7-II, 2011 WL 198695 at *3 (Wash. Ct. App. Jan. 6, 2011).

61. *Id.* At the trial court hearing on Mr. Nash's motions, the prosecution did not contradict any of Mr. Nash's claims. Instead, the prosecutor affirmed that Mr. Nash was homeless. *Nash* Transcript, *supra* note 44, at 18. The prosecutor also speculated that Mr. Nash could obtain employment through "you know, construction or holding onto a road sign or something, or flaggers, whatever they are called." *Id.* at 17.

62. *Nash*, 2011 WL 198695, at *3.

63. *See generally id.*

64. What does make Mr. Nash's case unique is that there is a significant record regarding the trial and appellate courts' treatment of the case. The lack of transparency regarding recoupment systems exists in part because of a general failure to litigate recoupment at the trial or appellate level, and in part because courts and other governmental and private entities involved in collections are loath to release records related to recoupment. *See, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 9, at 40–41 (describing refusals by government officials to release data related to the collection and ultimate distribution of fees and fines).

practices do precisely what Justice Frankfurter warned against: They "keep the word of promise to the ear of those [too poor to pay for counsel] and break it to their hope."[65]

II. *GIDEON*: HIDING IN PLAIN SIGHT

The Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[66] Twenty-five years before *Gideon* was announced, the Supreme Court was faced with interpreting the meaning of this provision in *Johnson v. Zerbst*.[67] The Court explained:

> This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights.[68]

Such a fundamental right, the Court reasoned, did not mean that a defendant could be represented by an attorney he provided, but that where the defendant happened to be poor, "counsel must be provided."[69]

Gideon, of course, extended this interpretation of the Sixth Amendment's language to the states by reasoning that, as a right "fundamental and essential to a fair trial," it was incorporated against the states through the Fourteenth Amendment's Due Process Clause.[70] In doing so, *Gideon* embraced the basic understanding that the Sixth Amendment stood for the concept that if one is too poor to pay for an attorney, the government will furnish one. Indeed, Justice Harlan remarked, just six years later, that *Gideon* "established the proposition that the State must provide *free* counsel to indigents at the criminal trial."[71]

This does not suggest that all recoupment schemes are unconstititonal. For example, the assessment of a portion of indigent defense costs would be constitutional when applied against someone who is provided counsel due to partial indigence but who is able to pay that portion.[72] But *Gideon* cannot be reasonably read to mean that the Sixth Amendment guarantees that

65. Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

66. U.S. CONST. amend. VI.

67. Johnson v. Zerbst, 304 U.S. 458 (1938).

68. *Id.* at 462.

69. Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (citing *Johnson*, 304 U.S. 458).

70. *Id.* at 342–43 (internal quotation marks omitted).

71. Desist v. United States, 394 U.S. 244, 268 (1969) (Harlan, J., dissenting) (emphasis added) (regarding the retroactivity of a decision related to unconstitutional search and seizure).

72. Such assessment would be unconstitutional were it to carry with it collateral consequences or allow for collection mechanisms that, in effect, punish the defendant. *See infra* note 124 and accompanying text.

counsel will be provided for the poor, only to allow the State to later attempt to punish the poor when they cannot pay. To borrow a page from Justice Frankfurter:

> To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[73]

How then, did we move from the simple concept provided by *Gideon* that counsel must be provided for the poor, to a system in which defendants found to be indigent by the court are then charged for the costs of counsel and later punished financially or incarcerated if they remain too poor to pay? *Gideon* itself foreshadowed the answer.

In a footnote, the *Gideon* Court wrote that its holding two lines of cases portended its holding: Fourteenth Amendment Due Process and Equal Protection Clause cases regarding access to various aspects of the criminal system other than the right to counsel, and cases involving the effective assistance of counsel.[74] Following *Gideon*, constitutional misinterpretations in both lines of cases obscured *Gideon*'s command that the government furnish counsel for the poor, leaving the invalidity of today's recoupment practices hidden in plain sight.[75]

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73. Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment) (quoting JOHN COURNOS, A MODERN PLUTARCH 27 (1928)).

74. *Gideon*, 372 U.S. at 348 n.2 (Clark, J., concurring) (discussing *Griffin*, 351 U.S. 12 and *Ferguson v. Georgia*, 365 U.S. 570 (1961)).

75. Legal scholarship regarding recoupment has focused on constitutional arguments within the confines of the misinterpretations that I detail here. *See, e.g.*, Anderson, *supra* note 6, at 357–69 (discussing due process and equal protection, chilling, and conflicts of interest); Holly, *supra* note 2, at 221–29 (arguing for the right to counsel of one's choice); Stearns, *Intimately Related*, *supra* note 2, at 874–79, 894 (arguing that the failure to advise clients regarding collateral consequences of fees, fines, and costs—including recoupment—is ineffective assistance of counsel in light of *Padilla v. Kentucky*, 559 U.S. 356 (2010)); Wilson, *supra* note 4, at 18–20 (referring to Fourteenth Amendment challenges and chilling); Levine, *supra* note 2, at 199–202, 213–21 (recommending challenges to recoupment related to due process and chilling after briefly raising the idea that *Gideon* was originally understood to require free counsel); Martin, *supra* note 2, at 1649–60 (discussing due process and equal protection challenges); Velázquez-Aguilú, *supra* note 2, at 233–35 (discussing Fourteenth Amendment challenges); *see also* Emily Germain Shea, Note, *The Taxation of Legal Services: Does It Violate the Right to Counsel or the Attorney-Client Privilege?*, 25 SUFFOLK U. L. REV. 1163, 1179–83 (1991) (arguing taxing legal services could result in chilling). Though many of these arguments have the potential to be successful—particularly arguments regarding the ineffectiveness of counsel in relation to recoupment practices—they do not account for the more basic constitutional problem: forcing the poor to pay for counsel violates the Sixth Amendment in the first instance.

A. EQUAL PROTECTION AND DUE PROCESS CASES

The first line of cases—those involving financial barriers to criminal systems—fell under the umbrella of the Fourteenth Amendment, resting on the Due Process Clause, the Equal Protection Clause, or both. *Griffin v. Illinois*, the foundational case in this line, involved an Illinois statute that required a defendant perfecting an appeal to file a transcript of the trial court's proceedings; the statute provided free transcripts to capital defendants, but required non-capital defendants to pay.[76] In concluding that the statute violated both the Due Process and Equal Protection Clauses, the Court penned a line oft-repeated in the right-to-counsel context: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[77] *Griffin* was followed by several decisions interpreting the Fourteenth Amendment as prohibiting the imposition of various fees and costs that prevented the poor from obtaining access to justice.[78]

The influence of this line of cases on the Court's understanding of the right to counsel was made evident in *Gideon*'s companion case, *Douglas v. California*.[79] Decided on the same day as *Gideon*, *Douglas* involved the right to counsel on an appeal as of right.[80] Rather than grounding its decision providing for the right to counsel on such an appeal in the Sixth Amendment as the *Gideon* Court had done, the *Douglas* Court relied on the Equal Protection Clause,[81] pointing to *Griffin* as its most relevant authority.[82] The Court embraced the concept that: "'[d]enial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin*'. . . . In either case the evil is the same: discrimination against the indigent."[83]

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76. *Griffin*, 351 U.S. at 13–15.

77. *Id.* at 19.

78. *See, e.g.*, Smith v. Bennet, 365 U.S. 708, 713–14 (1961) (finding that a $4 habeas filing fee violates equal protection); Burns v. Ohio, 360 U.S. 252, 258 (1959) (finding that a $20 filing fee for discretionary appeal "has no place in our heritage of Equal Justice Under Law").

79. Douglas v. California, 372 U.S. 353 (1963).

80. *Id.* at 354.

81. *Id.* at 356 ("[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination." (internal quotation marks omitted) (citing Williamson v. Lee Optical of Okla., 348 U.S. 483, 483 (1955))).

82. *Id.* at 355.

83. *Id.* (alterations in original) (quoting People v. Brown, 357 P.2d 1072, 1076 (Cal. 1960)). The Court maintained its focus on the Sixth Amendment as the basis of the right to counsel in cases interpreting whether a particular moment within the criminal process constituted a critical stage at which counsel is required. *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 137 (1967) (finding that a probation revocation hearing is a critical stage); Escobedo v. Illinois, 378 U.S. 478, 485–86 (1964) (finding same for pre-indictment interrogation where attorney was requested); Massiah v. United States, 377 U.S. 201, 206–07 (1964) (finding same for post-indictment interrogation); White v. Maryland, 373 U.S. 59, 60 (1963) (finding same for

This amalgamation of constitutional rights may have had little effect on the constitutionality of charging indigent defendants for their appointed counsel but for a challenge to New Jersey's response to *Griffin*.[84] *Rinaldi v. Yeager* involved a New Jersey statute that allowed county treasurers to garnish the prison wages of any defendant who had received a transcript for his appeal; it did not provide for collection against people who received transcripts but were not incarcerated either because their appeals were successful or because incarceration was not required post-appeal.[85]

The *Rinaldi* Court determined that the distinction drawn by the statute between those who were and were not incarcerated violated the Equal Protection Clause.[86] In doing so it noted as an aside: "We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination."[87]

Though this comment was made in the context of an Equal Protection Clause challenge to a transcript fee—entirely distinct from the Sixth Amendment right to counsel guaranteed in *Gideon*—the idea that states might charge for what the Court had required they provide to criminal defendants quickly infected the provision of indigent defense counsel.

Kansas seized on that idea in defending a statute by which it sought to recoup indigent defense fees, which had been struck down as unconstitutional by its state courts. On appeal to the Supreme Court, Kansas questioned whether "the Constitution require[s] that the state provide *free counsel* to every indigent accused of a crime regardless of his subsequent ability to reimburse the state for expenses paid on his behalf?"[88] Pointing to *Rinaldi*'s dicta, Kansas argued that the "right to counsel and/or equal

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preliminary hearing where plea is taken). Where the question presented related to an appeal or barriers to accessing the courts, however, the Court relied on the *Griffin* and *Douglas* Courts' interpretations of the Fourteenth Amendment. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 617–18 (1974) (declining to extend *Douglas* to discretionary appeals); Mayer v. Chicago, 404 U.S. 189, 197–99 (1971) (finding a transcript fee unconstitutional where ultimate punishment limited to a fine); Entsminger v. Iowa, 386 U.S. 748, 750–52 (1967) (finding that a transcript procedure where access to appellate court hinged on attorney's willingness to file a transcript violated Fourteenth Amendment); Swenson v. Bosler, 386 U.S. 258, 259 (1967) (finding that a defendant has a constitutional right to counsel where counsel perfected the appeal but then withdrew prior to a merits briefing).

84. Rinaldi v. Yeager, 384 U.S. 305, 305–06 (1966) (reciting the facts of the case, where an inmate had his prison wages garnished to pay for the cost of the transcript for his unsuccessful appeal).

85. *Id.* at 307–08.

86. *Id.* at 308.

87. *Id.* at 309.

88. Brief of Appellant at 13, James v. Strange, 407 U.S. 128 (1972) (No. 71-11), 1972 WL 135745.

protection cases" including *Gideon* merely required states to provide what the poor person could not afford at the time of trial or appeal, but allowed for recoupment later,[89] so long as it did not "needlessly burden[] the exercise of a constitutional right."[90]

In the opinion that resulted—*James v. Strange*—the Court sidestepped the question posed by Kansas, instead focusing on the equal protection problems created by the distinction the Kansas statute created between civil and criminal debtors rather than the question of whether recoupment was or was not consistent with *Gideon*.[91] But again, the Court hinted that some form of recoupment might be permissible, at least with respect to the Equal Protection Clause:

> We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs.[92]

With dicta from two cases now hinting that recoupment of indigent defense fees might be constitutional, the next challenge to recoupment was teed up. *Fuller v. Oregon*, which reached the Court just two years after *James*, involved an Equal Protection challenge to Oregon's recoupment statute.[93] The statute had multiple safety valves for indigent defendants subject to recoupment, including that it required courts to consider at sentencing whether the defendant "is or will be able to pay" fees and costs by "tak[ing] account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."[94] The statute in turn forbade any order to pay if it appeared at sentencing that "there [was] no likelihood that

89. *Id.* at 14–15.

90. *Id.* at 17 (citation omitted).

91. *James*, 407 U.S. at 134–35 ("There is certainly no denial of the right to counsel in the strictest sense. Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds."). The Court declined to consider whether the statute also impermissibly deterred people from exercising their right to counsel. James v. Strange, 407 U.S. 128, 134 (1972). For a discussion of the possible chilling effect of recoupment practices, see Anderson, *supra* note 6, at 359–61.

92. *Id.* at 141 (footnotes omitted).

93. Fuller v. Oregon, 417 U.S. 40, 46 (1974).

94. *Id.* at 45 (quoting OR. REV. STAT. § 161.665(3) (1973)) (internal quotation marks omitted).

a defendant's indigency will end."[95] It also created a post-sentencing opportunity for defendants to seek remission of the recoupment order where it would "impose manifest hardship on the defendant or his immediate family" and prohibited any contempt order for failure to pay unless the failure was willful.[96]

In upholding the constitutionality of the statute, the Court addressed an argument raised in the dissent authored by Justices Thurgood Marshall and William Brennan. The dissent argued that the statute violated the Equal Protection Clause because unlike a civil debt, the failure to pay indigent defense fees may result in incarceration where recoupment is made a condition of probation.[97] The Court rejected the idea that this distinction conflicted with its *James* holding by noting that probation in Oregon could only be revoked for an intentional violation of a court order. Probation could never be revoked against a truly indigent defendant because the recoupment statute only allowed collection of indigent defense fees where the defendant had the means to pay.[98] Oregon's recoupment statute, as a result, was within the limits of the Fourteenth Amendment.

Fuller and *James* are the only two cases in which the Court has directly addressed indigent defense recoupment statutes,[99] and on the surface, they

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95. *Id.* (quoting State v. Fuller, 504 P.2d 1393, 1397 (Or. 1973)) (internal quotation marks omitted).

96. *Id.* at 45–46 (quoting OR. REV. STAT. § 161.665(4) (1973)).

97. *Id.* at 47–48 & n.9; *id.* at 59–61 (Marshall, J., dissenting).

98. *Id.* at 48 n.9 (majority opinion). The *Fuller* Court also rejected the argument that distinguishing between convicted defendants and those whose cases were dismissed, resulted in acquittal, or were reversed on appeal violated the Equal Protection Clause. In doing so, the Court focused on the repercussions for a defendant of a criminal trial concluding without a conviction, noting: "His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged." *Id.* at 50. Given those effects, the Court determined that a legislative determination to prohibit recoupment in such cases "reflects no more than an effort to achieve elemental fairness" and therefore could not be deemed invidious discrimination. *Id.* at 50.

99. Though not on point, the Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), has also affected the development of recoupment statutes around the country. The *Bearden* Court addressed the revocation of probation for failure to pay a fine and restitution where the defendant had no meaningful ability to pay. *Id.* at 661. While the Court determined that the trial court erred by revoking the probation without first considering whether the failure to pay was "through no fault of his own," the Court also left open the possibility that revocation might be allowed regardless of ability to pay if there were no other methods of punishing the failure to pay available. *Id.* at 668–69. The requirement that one's ability to pay be contemplated before revocation itself suffers from a similar lack of rigor evident in determinations upon initial imposition of fees and costs. *See supra* notes 33–65 and accompanying text. *Bearden*'s approval of using probation revocation and incarceration as a collection method has clearly infected the development of recoupment mechanisms in some jurisdictions. *See generally* AM. CIVIL LIBERTIES UNION, *supra* note 9. This results in pulling recoupment practices farther and farther from what the Court contemplated in *Fuller* and *James*.

The probation revocation practices at issue in *Bearden* may also be constitutionally infirm on other grounds. I previously analyzed the constitutionality of the imposition and collection of

appear to bless their use. Yet, the Court has never answered the question of whether charging a person who cannot pay for his attorney violates the Sixth Amendment guarantee afforded in *Gideon*.

What is more, a close reading of *James* and *Fuller* supports the conclusion that imposing a burden on a person to pay what he cannot afford does indeed violate the Sixth Amendment. Take the dicta noted above from *James*: in a vacuum, it appears to suggest that recoupment may be permissible in all cases. This statement was made, however, in the context of an opinion in which the Court detailed the practical effects of a conviction on a person's ability to pay. The Kansas statute at issue excluded criminal debtors from protections afforded civil debtors, including limitations on garnishment of wages, protection during times of illness, and attachment on personal items, "furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt."[100]

The *James* Court recognized the difficulty that poor people under any circumstances have providing for basic necessities, and how such difficulties would be exacerbated by recoupment.[101] Therefore, in finding that the statute violated the Equal Protection Clause, the *James* Court pointed to the ways in which the statute trapped people in poverty. This, in turn, supports the conclusion that where recoupment is applied to people who cannot in fact pay, it is constitutionally unsound.

This conclusion is further bolstered by the fact that *James* was decided on the same day as *Argersinger v. Hamlin*, in which the Court extended the Sixth Amendment right to counsel to any offense that may result in incarceration, whether a misdemeanor or felony.[102] In his concurring opinion, Justice Powell expressed concern that the holding would strain "[t]he ability of various States and localities to furnish counsel" due in part to a lack in some areas of available funding,[103] particularly in rural areas with "meager financial resources."[104] He went on to note that "[t]he successful implementation of the majority's rule would require state and local

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fines, restitution, defense fees, and other pecuniary penalties for the purposes of the Eighth Amendment's Excessive Fines Clause. My assessment indicates that the Clause should provide greater protections than those afforded by *Bearden*. *See generally* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014)

100. James v. Strange, 407 U.S. 128, 135 (1972).

101. *Id.* at 136 (noting that Kansas's recoupment statute "risk[ed] denying him the means needed to keep himself and his family afloat"); *id.* at 139 (regarding difficulty of finding employment where one has a criminal record and the lack of protections in Kansas against wage garnishment).

102. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

103. *Id.* at 59 (Powell, J., concurring).

104. *Id.* at 61 (Powell, J., concurring).

governments to appropriate considerable funds . . . for indigent defense."[105] Such concerns necessarily mean that the Court contemplated that the funds to pay for indigent defense for the poor would come out of government coffers.

That same concept is evident in *Fuller*. Though the *Fuller* Court upheld Oregon's recoupment statute, it did so in light of the fact that the statute contemplated that courts were prohibited from imposing recoupment on defendants who had no meaningful ability to pay and further prohibited any attempts to collect from those who remained in poverty.[106] As with *James*, this supports the conclusion that recoupment lacks constitutional validity where the poor are required to pay for counsel guaranteed by the Sixth Amendment.

B. INEFFECTIVE ASSISTANCE OF COUNSEL CASES

In addition to the influence of the Fourteenth Amendment cases, a second line of cases—the Sixth Amendment's effective assistance of counsel cases—may also explain how the potential unconstitutionality of recoupment schemes has remained hidden.

Though the initial burst of litigation following *Gideon* related to the expansion of the right to counsel to all critical stages of the criminal process,[107] the question of whether counsel was or was not effective has dominated Sixth Amendment discourse since. In turn, effective assistance cases were, until 2010,[108] significantly influenced by the development and expansion of the collateral consequences doctrine.

That doctrine, which originally arose in the context of the constitutionality of plea bargaining under the Fifth Amendment, provides that a trial court has properly discharged its duty to ensure that a guilty plea is entered knowingly and voluntarily so long as the court has informed the defendant of the direct—as opposed to collateral—consequences of conviction.[109]

The interrelationship between the court's duties under the Fifth Amendment and counsel's duties under the Sixth Amendment allowed the collateral consequences doctrine to infiltrate the idea of effective assistance of counsel. The rule that a guilty plea must be entered knowingly and voluntarily,[110] combined with the defendant's right to the effective assistance

105. *Id.* at 61 n.30 (Powell, J., concurring); *see also* Levine, *supra* note 2, at 201–02 (noting that language from the *Argersinger* opinions suggests an understanding that counsel was to be provided at no cost to indigent defendants).

106. Fuller v. Oregon, 417 U.S. 40, 44–45 (1974).

107. *See supra* note 83.

108. *See infra* notes 120, 123 and accompanying text.

109. *See* Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

110. *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985).

of counsel at the guilty plea phase, led the Court to conclude that in advising a client whether to enter a guilty plea, defense counsel is effective so long as "that advice [falls] within the range of competence demanded of attorneys in criminal cases."[111]

The Court considered the application of this test to a collateral consequences question in *Hill v. Lockhart*, a case in which a court-appointed attorney failed to advise his client that he would be required to serve half of his sentence before being eligible for release on parole.[112] The Court declined to reach the question of whether the collateral consequences doctrine applied, reasoning that regardless of the result the defendant could not prevail on appeal because the advice resulted in no prejudice.[113] Separately, the concurring justices noted that there may be times in which the failure to advise a client regarding parole eligibility could be constitutionally ineffective.[114]

Though neither *Hill*'s ultimate holding nor the concurring justices' remarks logically entailed the expansion of the collateral consequences doctrine to the Sixth Amendment right to counsel arena, following *Hill* it was widely believed that to be constitutionally effective, counsel need not explain collateral consequences to a client.[115] And while courts lack a consensus about what exactly qualifies as "direct" or "collateral,"[116] a number of consequences directly related to recoupment process, such as the possibility of parole revocation[117] or exclusion from public benefits,[118] at times have been treated as collateral.

In other words, at the very time that *Fuller* and *James* were misinterpreted to obscure *Gideon*'s promise that the poor would be provided

111. McMann v. Richardson, 397 U.S. 759, 770–71 (1970).

112. *Hill*, 474 U.S. at 53, 56.

113. *Id.* at 60.

114. *Id.* at 62–63 (White, J., concurring).

115. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698–99 (2002). This is not to say, of course, that all lawyers fail to address collateral consequences. Dedicated defense counsel undoubtedly have long been advocating for their clients with respect to collateral consequences, despite the uphill battle I describe in this Essay. *Cf.* Josh Bowers, *Fundamental Fairness and the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUIT 52, 52–53 (2011) (noting that the Supreme Court's announcement in *Padilla* that defense counsel must inform clients about the immigration consequences of accepting a plea "came as nothing new to some lawyers in the defense bar who have long understood that they have a professional obligation to attend to *all* significant consequences of conviction, not just traditional criminal consequences" (emphasis in original)).

116. *See* Chin & Holmes, *supra* note 115, at 704–05.

117. *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 622 (1976) (describing parole revocation as a "collateral consequence").

118. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring) (including "disqualification for public benefits" in a list of possible collateral consequences); *but see* United States v. Littlejohn, 224 F.3d 960, 966–67 (9th Cir. 2000) (determining that denial of public benefits was a direct consequence because the denial was automatic).

counsel, the collateral consequences doctrine was misinterpreted to create disincentives for counsel to be aware of the web of consequences that push more and more people into poverty, thereby triggering *Gideon*'s protections. Under such circumstances, it is perhaps not surprising that the constitutionality of today's recoupment systems remains unchallenged.

III. THE CONSTITUTIONALITY OF RECOUPMENT: BRINGING *GIDEON* TO BEAR

Gideon guaranteed that when a poor person is haled into court, the government will provide counsel. Recoupment schemes that charge people with no means to pay for their counsel and then punish them for being unable to pay fundamentally violate that promise.

Defense counsel must play a leading role in restoring the promise of *Gideon*. The Sixth Amendment, after all, does not merely guarantee that the poor will be provided "a person who happens to be a lawyer,"[119] it guarantees a lawyer who will vigorously advocate for what is just and fair. The Court's recent decision in *Padilla v. Kentucky* set the stage for full-throated advocacy in the context of recoupment, when it explained that it had never approved of the extension of the collateral consequences doctrine into the effective assistance of counsel arena.[120] Put simply, defense counsel must do more than merely submit a cost bill and step aside;[121] they must inform the court of which statutory restrictions on employment, housing, and public benefits may or will apply post-conviction, calculate the interest and collections costs that will apply to the debt, document the client's financial responsibilities, and educate the court about other potential limitations on an a client's ability to pay.

If the court is precluded from considering such evidence or simply does not do so in any meaningful way, and thereafter imposes recoupment costs against a person who cannot pay, a challenge to such practices should ensue.[122] And there is reason to believe that such challenges may have legs. In *Padilla*, the Court exhibited a willingness to consider how changes in the law over the last few decades have "dramatically raised the stakes" for criminal defendants, thereby converting what once might have been seen as a mere tangential result of conviction (in that case, immigration) to a position of constitutional significance.[123] The fact that collateral

119. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

120. *Padilla*, 559 U.S. at 367–68 (declining to extend collateral consequences doctrine to deportation proceedings following a criminal conviction).

121. *See supra* notes 36–45 and accompanying text.

122. Given the lack of resources available for indigent defense appeals, as well as potential conflicts of interest that may exist for indigent defense counsel, *see, e.g.*, Anderson, *supra* note 6, at 367–69; Wright & Logan, *supra* note 2, at 2055–68, there is a role for private bar to play in these reform efforts. *Cf.* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 283–311 (2010) (discussing the viability of class action litigation related to indigent defense funding).

123. *Padilla*, 559 U.S. at 364.

consequences related to employment, housing, and public benefits have expanded so significantly and are coupled with highly punitive mechanisms for collecting indigent defense fees from those who have no means to pay has the capacity to offend the sensibilities of the Court.

To be sure, were the Court to engage in a proper reading of *Gideon*, it would not prevent a state from seeking recoupment of a portion of indigent defense fees if the defendant had the means to pay that portion; but *Gideon* prohibits the imposition of any amount beyond the defendant's reach. It also forbids application of collateral consequences and punitive collection efforts related to any recoupment amounts assessed.[124]

Recognition of this protection may have the added benefit of bringing to light policy decisions regarding the imposition of collateral consequences that effectively increase the pool of people who cannot reasonably contribute toward their defense costs.[125] Fewer and fewer people have the capacity to contribute to indigent defense costs because the web of collateral consequences reduces one's ability to secure employment and housing, and to access the social safety net. Should policymakers want to expand the scope of constitutionally appropriate recoupment practices, collateral consequences will have to be reduced or eliminated.

In the fifty years since the Court handed down *Gideon*, we have failed to live up to its promise in many ways,[126] but perhaps none more so than by requiring people who are too poor to pay for the counsel they are guaranteed to foot the bill for their defense or face punishment if they cannot pay. It is time to do what the *Gideon* Court itself sought to accomplish: "In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice."[127]

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124. Among other things, this would require states and localities to forgive any interest and collection fees that might accrue due to an inability to pay the entirety of a recoupment amount in a single lump payment at the time of assessment.

125. Recoupment schemes may also exacerbate the cost of criminal systems. Because it is impossible to pull blood from a stone, jurisdictions often spend more attempting to collect on recoupment—including the salaries of court clerks or other personnel who manage collections, the costs of hearings related to failure to pay, and incarceration costs where courts find individuals in contempt or revoke probation—than they ever will collect. *See, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 9, at 8–9.

126. *See generally* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013).

127. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).