The Political Economy of Up-Front Fees for Indigent Criminal Defense

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Introduction

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

Legislators who draft the criminal justice portions of the state budget routinely express the hope that the government can “control the costs” of criminal defense lawyers for the poor. One method of doing so involves recovering at least part of the attorneys’ fees from the defendants themselves. Some defendants, although they may qualify for appointed counsel under the state’s standards for indigency, still earn enough to pay for part of their fees, or will earn enough at some future date to allow the state to recoup part of its costs after the criminal case ends.

But these traditional “recoupment” statutes require a great deal of judicial effort to sort the truly indigent from those with more marginal needs, and much clerical effort to track the defendant over time and collect the fees piecemeal. The disappointing revenues collected under

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the recoupment statutes has led many states, since the early 1990s, to experiment with a different cost control technique: statutes that instruct courts to assess up-front “application fees,” typically in the range of $25 to $100. The fees are charged automatically to criminal defendants who, despite their demonstrated poverty, are expected to “pay as they go,” often without regard for the outcome of their case. The fees, imposed on the front end of the criminal prosecution process, do not create the same administrative burdens as the more income-sensitive “recoupment” procedures. As we explain in Part I, they have now spread to just under half the states.

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

Counter-intuitively, it is defense organizations themselves that often initiate the idea of application fees, generally during a time of budgetary stress for a defender program. The high-level administrators who deal with budgets and negotiate with legislators tend to favor the fees from an institutional perspective. The application fees not only hold the promise of increasing revenue, they also purchase good will in the legislature by showing a willingness to contain costs and impose a measure of self-responsibility among the client base. As for the effects of fees on prospective clients, the high-level defense administrators downplay—without any direct empirical support—the burden on indigents.
Resistance to fees typically comes from lower in the defense ranks, from attorneys who represent indigent clients and view matters from an individual client perspective rather than an institutional vantage point. Perceiving themselves to be at the ramparts of the hallowed ideals of *Gideon v. Wainwright*, they stand for uncompromised principles of government responsibility to the poor during a criminal prosecution, and rely on anecdotal evidence to suggest that the fees, while comparatively small, will chill many defendants' willingness to request a lawyer.

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

Part III of this article tracks the fate of application fee laws after the legislature and governor sign off. This is the juncture where rank-and-file defense actors, quelled in the legislative debates, push back. In individual cases and strategic test cases alike, publicly appointed defense counsel challenge the laws on Sixth Amendment grounds. In ruling on these challenges, trial and appellate courts offer their own reactions to the application fee statutes: in two instances to date, courts have rules that the laws unduly burden the defendant’s right to counsel. The opinions, like the legislative debates, hypothesize the likely effect of the laws on a defendant’s decision to waive counsel; courts that overturn the statutes point to their potential effect on the waiver decision as a chief infirmity.

An equally important judicial reaction, however, happens at the trial level. Trial judges draft rules and establish courtroom routines that determine the real impact of the application fee statutes. In conjunction with lower-level defense attorneys who see the issue more from the vantage point of individual defendants, judges in local courtrooms apply the fees reluctantly and
create broad *de facto* limits on the reach of the fee statutes. While the upper-tier defense advocates share many priorities with legislators, the lower-tier defense advocates find their allies among the ranks of trial judges.

The defendant's waiver decision plays a starring role in all these debates and reactions to the application fee laws, but the central figure in the drama remains a mystery. Both the legislative debates and the judicial responses to fee laws are predicated on speculative empirical assumptions about the waiver decisions of defendants. Yet in the application fee context and in the criminal courtroom more generally, we know surprisingly little about waiver of counsel, including such basic facts as the number of criminal defendants who waive their legal right to appointed counsel and why they decide to do so.

In Part IV, we start to fill this informational deficit and examine the question of why the realities of counsel waiver remain hidden, despite the central importance of waiver to a major criminal justice funding issue. There are powerful reasons to believe that an application fee could seriously affect a defendant’s waiver decision, starting with anecdotal evidence from attorneys and judges who report increases in waivers after the application fee statutes take effect. Careful studies of the effects of “co-pay” systems in other settings such as medical insurance also give reason to believe that the effect on waiver of counsel could be significant. Yet, as reported here, data from court systems in two jurisdictions studied show no sign of increased waiver after the fee statutes were implemented.

How best to reconcile the conflicting views of the impact of fee statutes on the decisions by poor defendants to waive counsel? Part IV explores two competing explanations. First, perhaps the administrators of indigent defense organizations who supported the application fees
were correct, and defendants do not consider the fees to be large enough to affect their waiver
decisions. We believe that a better explanation, however, builds on the power of trial actors to
neutralize effects of any new criminal justice policy, at least in the short run. Application fee
statutes matter far less in practice than the political debate might indicate because the trial level
actors remain unsympathetic to them and implement them in ways that blunt their effects. In this
context, as in so many others in criminal justice, having the last word can matter the most.

I. The Spread of Indigent Defense Fees

The right of indigents to have government-funded counsel dates back to *Gideon v. Wainwright* (for felonies)\(^1\) and before that to *Powell v. Alabama*\(^2\) (for capital crimes). In both
cases, the Supreme Court concluded that the Sixth Amendment, although it does not require the
government to sponsor defense attorneys in all prosecutions,\(^3\) compels the states in serious cases
to provide attorneys for criminal defendants too poor to pay.\(^4\) In subsequent cases, the Court
expanded the right to include defendants accused of any criminal offense if conviction may “end
up in the actual deprivation of a person’s liberty.”\(^5\) This recent expansion of the right to

\(^{1}\) 372 U.S. 335 (1963).
\(^{2}\) 287 U.S. 45 (1932).
\(^{3}\) See U.S. CONST. AMEND. VI (providing only that “[i]n all criminal prosecutions, the accused shall enjoy the right...
...to have the Assistance of Counsel for his defense,” not that counsel be state-funded). Under English common law,
criminal defendants had a right to counsel in misdemeanor yet not felony cases; only in 1835 were accused felons in
England allowed counsel. See *Faretta v. California*, 422 U.S. 806, 821-26 (1975). By the time of the Framing of the
U.S. Constitution, twelve of the thirteen original states rejected their forebears rule and recognized the right to
counsel in all criminal prosecutions. See *Powell*, 287 U.S. at 64-65. For more on this history see Ronald F. Wright,
\(^{4}\) In 1938, the Court held that the Sixth Amendment required counsel in all federal criminal proceedings. See
to felony preliminary hearings, see *Coleman v. Alabama*, 399 U.S. 1 (1970); sentencing proceedings, see *Mempa v.
and *Douglas v. California*, 372 U.S. 353 (1963). No right to appointed counsel extends, however, to instances when
only a criminal fine is imposed (not prison or jail) and discretionary appeals. See *Scott v. Illinois*, 440 U.S. 367
appointed counsel encompassed a broader range of misdemeanors than ever before, and prompted some states to look more seriously for new sources of funding for the expanding system.\footnote{See, e.g., Editorial, Not Too Much of a Burden, GREENVILLE NEWS (Greenville, S.C.), Sept. 18, 2003 at 10A (noting that Greenville County responded to the “unfunded mandate” of Shelton by charging an application fee).}

This affirmative constitutional obligation, unlike others such as the warnings that the police must provide criminal suspects under Miranda v. Arizona,\footnote{384 U.S. 436 (1966).} sends powerful annual shock waves through the state budget.\footnote{Of course, the matter of the non-fiscal consequences of Miranda, as well as numerous other constitutional safeguards imposed on states by the Court, have long been debated. See, e.g., Paul Cassell, Miranda’s Social Costs: An Empirical Reassessment, 90 NW. U. L. REV. 387 (1995).} As the Supreme Court has expanded the right over time, and states themselves have made appointed counsel increasingly available,\footnote{See B. Mitchell Simpson, A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?, 5 ROGER WILLIAMS U. L. REV. 417, 418-19 (2002) (noting that 15 or fewer U.S. jurisdictions provide only the bare minimum of counsel coverage prescribed by the Supreme Court). While courts have seen fit to expand the scope of the right, legislatures have shown a ready willingness to offset such increases by lowering financial eligibility thresholds, thereby shrinking the overall pool of mandated counsel appointments. See, e.g., FLA. STAT. ANN. § 27.52(3)(b)(1) (defendant is indigent if his income is “equal to or below 200 percent of the then-current federal poverty guidelines” or receiving specified government assistance for the needy). Because of the wide variations in state standards for indigency, as noted by one commentator, “Gideon means something different in Alabama than it does in Florida.” Adam M. Gershowitz, The Invisible Pillar of Gideon, 80 IND. L.J. 571, 572 (2005).} the fiscal impact of appointed counsel has increased.\footnote{Between 1982 and 1999, for instance, state spending on appointed counsel increased more than two and one-half times in terms of inflation-adjusted dollars. See Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep’t of Justice, State-Funded Indigent Defense Services, 1999 2 (2001).} Today, 82% of state felony defendants utilize publicly funded counsel,\footnote{See Caroline Harlow, U.S. Bureau of Justice Statistics, Defense Counsel in Criminal Cases 1 (Nov. 2000).} and while the Supreme Court has acknowledged the associated costs,\footnote{See James v. Strange, 407 U.S. 128, 141 (1972) (recognizing that expansion of right to counsel has “heightened the burden on public revenues”).} federal money has never arrived to fully fund the federal constitutional mandate.\footnote{See DeFrances, supra note 10, at 1 (noting that over 90% of funding for appointed counsel originates from non-federal sources). As Darryl Brown recently observed, while the Court “is rigorous about protecting the formal right to counsel, ... it barely regulates the quality of counsel.” Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 CAL. L. REV. ---, --- (forthcoming 2005).} As a result, state and local
governments foot the bill mostly by themselves,¹⁴ annually spending millions to fulfill their constitutional obligation to fund indigent defense.¹⁵

In the 1990s, the combination of immediate budgetary shortfalls and constitutional challenges to under-funded indigent defense systems that threatened even larger expenses in the future¹⁶ forced state legislatures to take action. They pursued various alternate funding mechanisms for indigent criminal defense. In keeping with the privatization strategies increasingly in vogue,¹⁷ many states tried to trim their criminal defense budgets by shifting the costs of such services back to the consumers—indigent criminal defendants. Today, cost recovery mechanisms typically take two primary forms: (1) recoupment, a court order imposed at the conclusion of a case for the defendant to pay an amount reflecting the actual cost of attorney’s fees, and (2) contribution (sometimes referred to as “application fees,” “co-pays,” “user fees”, or “administrative” or “registration” fees), a fixed sum imposed at the time of appointment. The focus here will be on the latter, which we refer to collectively as application fees, the newest variety of cost recovery mechanism on the criminal justice landscape.

A. Extent and Variety of Application Fees

¹⁴See American Bar Association, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice (2004), available at http://www.abanet.org [hereinafter Broken Promise], at 42 (noting that “virtually no federal funds are allocated for defense services in the fifty states”).
¹⁵See Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002 at 35 (2003), available at http://www.abanet.org (noting that in 2002 state and local expenditures for indigent defense exceeded $2.8 billion). It bears mention that counties as well play a significant part in indigent funding. See Broken Promise, supra note 14, at 8 (noting that in six states counties provide 90% or more of indigent defense funds). For discussion of the methods of providing appointed counsel see id. at 2 (discussing use of public defender programs, rosters of private attorneys serving by appointment, and contract attorneys).
Currently, laws in 27 U.S. jurisdictions (24 states\textsuperscript{18} and 3 counties\textsuperscript{19}) authorize or compel judges to impose a fee on indigent criminal defendants who seek appointed counsel. The laws each condition appointment of counsel on payment of a fee, in amounts ranging from $10 (New Mexico) to $240 (Wisconsin),\textsuperscript{20} with several states tying fee amounts to the degree of the criminal offense charged,\textsuperscript{21} and others prescribing a monetary range while permitting the trial judge to assess a defendant’s relative ability to pay.\textsuperscript{22} Depending on statutory specifics, the fee is collected by the court\textsuperscript{23} or the public defender or other entity that screens defendants for counsel eligibility.\textsuperscript{24}

None of the application fee provisions permit counsel to be denied if a defendant fails to pay the required fee and laws in all states, save one (Florida), allow trial judges to waive fees

\textsuperscript{18} See ARIZ. REV. STAT. § 11-584B; ARK. CODE ANN. § 16-87-213(a)(2)(B); CAL. PENAL CODE § 987.5; COLO. REV. STAT. § 21-1-103(3); CONN. GEN. STAT. § 51.298; DEL. CODE ANN. tit. 9, § 4607(a); FLA. STAT. ANN. § 27.52(2)(a); GA. CODE ANN. § 15-21A-6; IND. CODE § 35-33-7-6; KAN. STAT. ANN. § 22-4529; KY. REV. STAT. ANN. § 31.211; LA CODE CIV. PROC. ANN. § 15:147(a)(1)(f); MASS. GEN. LAWS ch. 211D, § 2A; MINN. STAT. § 611.17; N. J. STAT. ANN. § 2B:24-17; N. M. STAT. ANN. § 31-15-12; N. C. GEN. STAT. § 7A-455.1; N. D. CENT. CODE § 29-07-01.1(1); OKLA. STAT. ANN. tit. 22 § 1355A; OR. REV. STAT. § 151.487(1); S. C. CODE ANN. § 17-3-30(B); TENN. CODE ANN. § 40-14-103(b)(1); VT. STAT. ANN. tit. 13, § 5238; WIS. STAT. § 977.075. In addition, Missouri law seemingly authorizes assessment of an up-front fee. See MO. REV. STAT. § 600.900(1)(c)(1) (a qualified indigent can be required to pay fee if “he is able to provide a limited cash contribution toward the cost of his representation”). However, the provision is seemingly not being used at this time. See Telephone Conversation with Dan Graylike, Senior Deputy Counsel, Office of Missouri State Public Defender, August 28, 2005 (transcript on file with authors).


\textsuperscript{20} See N. M. STAT. ANN. § 31-15-12 ($10); WIS. STAT. § 977.075 ($200-$400). See also KY. REV. STAT. § 31.211(1) (fee to be set “in an amount determined by the court,” which can order that payment can be made in lump sum or installment payments). Kentucky law also provides that any public defender that receives or attempts to secure any fee other than that authorized is subject to felony prosecution. See KY. REV. STAT. § 31.215.

\textsuperscript{21} See, e.g., IND. CODE § 35-33-7-6 ($50 for misdemeanor and $100 for felony); WIS. STAT. § 977.075 ($200 for misdemeanor and $400 for felony).

\textsuperscript{22} See, e.g., ARIZ. REV. STAT. § 16-87-213 ($10-$100); COLO. REV. STAT. § 21-1-103 ($10-$25); TENN. CODE ANN. § 40-14-103 ($50-$200). See also OR. REV. STAT. § 151.487(1) (imposing fee if the court “finds that the person has the financial resources that enable the person to pay in full or part the administrative costs of determining the eligibility of the person and the costs of the legal and other services to be provided at state expense. . . .”).

\textsuperscript{23} See, e.g., IND. CODE § 35-33-7-6; MINN. STAT. § 611.17(c); N. D. CENT. CODE § 29-07-01.1(b).

\textsuperscript{24} See, e.g., COLO. REV. STAT. § 21-1-103(3); N. M. STAT. ANN. § 13-15-12(C).
when a defendant is unable to pay.\textsuperscript{25} States are free, however, to condition appointment on future payment of the application fee, and to inform defendants how that collection will happen. In Delaware, for instance, if a defendant is unable to pay the prescribed $50 fee, he or she must report to the Commissioner of Corrections for directions on how to discharge the amount by means of work.\textsuperscript{26} In Minnesota, the fee is subject to the Revenue Recapture Act, allowing the state to garnish wages, seize property, file adverse credit bureau reports, and impound vehicles.\textsuperscript{27} Other coercive collection techniques include threatened revocation of probation for those who do not pay\textsuperscript{28} and the possibility of sentence enhancement in the event of nonpayment.\textsuperscript{29} Finally, in most states\textsuperscript{30} the fees are imposed regardless of whether the defendant is convicted of the offense charged.\textsuperscript{31}

**B. The Application Fee Trend**

Application fee laws have gained popularity over the last decade. According to one study, in 1994 only seven jurisdictions (six states and one county) authorized collection of up-front

\textsuperscript{25} See \textit{FLA. STAT. ANN.} \textsection 27.52. For a brief time in 2003, Minnesota law also refused to allow for waiver. As discussed \textit{infra}, however, this aspect of the law was deemed unconstitutional by the Minnesota Supreme Court. \textit{See infra} notes 116-126 and accompanying text.

\textsuperscript{26} \textit{DEL. CODE ANN. tit. 29, \textsection 4607.}

\textsuperscript{27} \textit{MINN. STAT. \textsection 270.A.03.}


\textsuperscript{29} \textit{See TENN. CODE ANN. \textsection 40-14-103(b)(1) (providing that failure to pay fee will not result in refusal to appoint counsel but any "wilful failure to pay such fee may be considered by the court as an enhancement factor when imposing sentence if the defendant is found guilty of criminal conduct.")}

\textsuperscript{30} \textit{See, e.g., KAN. STAT. ANN. \textsection 22-4529 ("if the defendant is acquitted or the case is dismissed, any application fee paid pursuant to this section shall be remitted to the defendant."); TENN. CODE ANN. \textsection 40-14-103 (specifying that the fee is "nonrefundable").}

\textsuperscript{31} \textit{See, e.g., ARK. CODE ANN. \textsection 16-87-213 (providing that indigents appointed counsel must pay $10-$100 fee regardless of case outcome, yet excusing not guilty indigents from requirement of reimbursement). In a handful of states, defendants are expressly allowed to seek judicial review of a fee order. \textit{See, e.g., N M. STAT. ANN. \textsection 13-15-12(C), OR. REV. STAT. \textsection 151.487(5).}
fees, today's increase to twenty-seven jurisdictions (twenty-three states and three counties) marks an increase of over 350% in just over ten years. The proliferation of laws reveals no geographic pattern: states in all regions of the country have adopted laws. The group includes states known for their progressive or liberal positions on social matters (e.g., California and Massachusetts), along with some states with a more conservative profile (e.g., Georgia and Kansas). Perhaps just as interesting are states such as Alabama and Texas, places not known for coddling criminal suspects, where the legislatures have refrained so far from adopting application fee laws. What the jurisdictions do share, as noted next, is a predictable political coalition in support of the laws.

II. Political Origins of Fee Statutes

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

Opposition to the idea, however, often comes from within these defense organizations, although usually from further down in the hierarchy, from those who more directly provide services to individual clients. The crucial debates on these questions, then, happen within the

defense organizations themselves rather than in the legislature. Prosecutors and law enforcement organizations might support the laws, but they do not carry the flag into battle. State legislatures tend not to pass these laws over the determined and united opposition of the existing defense organizations.

This section begins by recounting the political background of the application fee statute in one state – North Carolina – followed by a review of the themes from the North Carolina story that also figure in application fee debates nationwide. We then discuss the implications of this specialized political environment, where debate within defense-oriented organizations—rather than the prosecutorial and law enforcement groups that normally dominate crime politics—largely determines the legislative outcome for a central matter in criminal justice administration.

A. The Defense Establishment and Application Fees

The idea for an application fee statute in North Carolina originated from within the defense establishment. The Commission on Indigent Defense Services (IDS), a statewide body created late in 2000 to establish standards and coordinate budgets for the county-level public defenders, set out to establish credibility with the key legislators in the appropriations process. In 2002, Democratic Governor Mike Easley asked all state agencies, including corrections and courts, to find budget cuts in an effort to shrink a growing deficit. As part of the Commission’s response to this budgetary challenge, the chief financial officer for IDS first proposed in April 2002 that the Commission ask for changes to the existing recoupment statutes to make them less “confusing.” The changes, she said, might include a “co-pay” of $40, modeled on a Florida law that “works well.” The Executive Director of IDS spoke in favor of a co-pay proposal, pointing out that “many people” who cannot afford $5000 to retain an attorney can afford a smaller co-
pay amount. The Commission Chair said he thought it was “important for the Commission to come forward with cost-saving ideas if possible.” Given this early endorsement from key leaders, the Commission authorized the staff to develop proposals for a co-payment from indigent clients.\textsuperscript{33}

From there, the idea gained momentum quickly. At its next two meetings, the Commission discussed a package of legislative proposals that included revisions to the existing recoupment statute (extending it to a larger group of defendants),\textsuperscript{34} along with a new $50 up-front fee to be charged to all defendants who receive publicly-funded counsel. Executive Director Tye Hunter, noting that the proposal would “pass if IDS pushes for it,” made the case in terms of overall program health: “look at this proposal in the context of the fund’s bad financial shape and the Commission’s earlier decision to ask the legislature for more money.”\textsuperscript{35} Hunter estimated that the fee could generate over a million dollars a year, and argued that it would have a limited impact on defendants, because judges would not treat payment of the fee as a precondition for receiving an attorney, and because “many clients can afford to pay $50.”\textsuperscript{36}

Initially some of the commissioners were reluctant to endorse the application fee, questioning “whether indigent defendants would be able to come up with that sum” because they come from “groups with high unemployment rates.”\textsuperscript{37} For such clients, “a $50 fee could mean no groceries” and the commissioners feared the fee “might pressure defendants into waiving

\textsuperscript{34} North Carolina IDS Commission, meeting minutes from June 21, 2002, available at http://www.ncids.org (recoupment extended to deferred prosecutions and infractions).
\textsuperscript{35} \textit{Id.} (“the context is to improve representation” and “any fees collected would be a source of income for the fund in the present fiscal year, which would benefit the clients as a whole”).
\textsuperscript{37} \textit{Id.}
attorneys.” These reservations mostly came from commissioners who were trial judges and practicing defense attorneys. When these commissioners asked if experience from other states could tell them anything about likely waiver rates, staff members responded that other states did not gather information about waivers and it would be “difficult to quantify.”

Ultimately, however, all but one of the commissioners were convinced that the application fee served the overall program well. Because the proposed statute explicitly stated that failure to pay the fee “shall not be grounds for denying appointment of counsel,” the language seemed to protect destitute defendants. Only Henry Boshamer, the commissioner appointed by the public defenders in the state, voted against the fee proposal. Indeed, the commissioners (led by the representative of the state bar association) turned aside an amendment that would have instructed judges to inform defendants that non-payment of the fee would not prevent them from receiving an attorney, because “no defendants will pay the fee if the judge tells them they do not have to pay it,” meaning that the fee “will not raise any revenue.” They left unchanged the current practice, which allowed judges to tell defendants that an appointed attorney is not free, because the defendant might have to pay for the services later after a recoupment hearing. The commissioners decided to “see how it works” and to consider rules later if necessary to reduce the number of waivers.

39 The minutes reflect objections from Boshamer (Public Defender), Hufstader, Morgan (Superior Court judge), Tally (Academy of Trial Lawyers), and Hurley. Some commissioners were also concerned that the fee would apply to defendants who are acquitted or whose cases are dismissed, in contravention of the North Carolina Constitution. See N.C. CONST. art. I, § 11 (providing that “[i]n all criminal prosecutions every [person] has the right...not [to] be compelled...to pay costs..., unless found guilty.”).
41 N.C. GEN. STAT. § 7A-455.1.
43 Id. Commissioner Joe Cheshire of the North Carolina Bar Association also opined that “most criminal defendants have done something wrong,” so he was “not concerned about requiring them to pay some small amount of money for a good attorney.” Id.
Once the IDS Commission settled on its proposal, the North Carolina Legislature passed the application fee statute without fanfare, buried in a larger budget bill. Observers all identified the IDS Commission as the source of the bill.\footnote{See Paul Garber, Court to Decide If Fee for Indigents Is Legal, WINSTON-SALEM J., Apr. 3, 2003 (IDS “pushed for the fees last year to help make up for budget shortfalls”).}

Soon after its passage, however, the public began to hear from the lower levels of the defense establishment. The Chief Public Defenders and private defense attorneys in various counties criticized the new law,\footnote{See Associated Press, Indigents' Fee Upset Again, RAILEIGH NEWS & OBSERVER, Mar. 13, 2003 (quoting Guilford County Public Defender Wally Harrelson: the fee statute “establishes a very dangerous precedent of imposing fines or costs or fees upon indigent defendants when the state runs short of money”); John Stevenson, Durham Senior Judge Rules $50 Application Fee Unconstitutional, DURHAM HERALD-SUN, Mar. 3, 2003.} and attorneys in many counties filed constitutional challenges at their first opportunity. Some of the critics emphasized that the fee would deter defendants from requesting appointed counsel, even though entitled to one. As Forsyth County Public Defender Pete Clary put it, “What people are being told and what they’re hearing when they get arrested is they can’t get a court-appointed attorney unless they have $50.”\footnote{See Paul Garber, Court Fee Is Under Fire, WINSTON-SALEM J., Mar. 13, 2003; see also Mike Fuchs, Public Defender Challenges Fee, GREENSBORO NEWS & RECORD, Mar. 12, 2003, at B13 (quoting Public Defender Harrelson: fee could have a “chilling effect” by discouraging some from getting court-appointed lawyers).} These front-line actors also dismissed the programmatic concerns of the IDS Commission: “I’m not in the money raising business, I’m in the business of helping clients” and found it “ironic that the people who were set up to protect the rights of indigents are the very people who asked for this [law] to be imposed.”\footnote{Id. (statements of Pete Clary and of Guilford County public defender Wally Harrelson).}

In the end, this criticism from the ranks did not alter the legislative outcome. A few months after passage of the original application fee statute, the IDS Commission debated whether they should ask for a repeal of the application fee, for “public relations” reasons.\footnote{North Carolina IDS Commission, meeting minutes for May 8, 2003.} They
decided, however, that they had already “weathered the storm” and would leave the fee in place. Indeed, Executive Director Hunter declared that he did “not understand” the fuss over the fee among public defenders, because the appointment of counsel was not strictly conditioned on payment of the required fee.49

B. Debate Themes

The political debate over application fees in North Carolina featured several themes that also appeared during similar debates elsewhere in the country. First, the organizational priorities of the debaters was predictable, and what the debaters said depended largely on where they stood in the organizational structure. Fee proposals appeared during times of special budgetary stress for indigent criminal defense programs, and not during more prosperous times when officials could propose more ambitious plans for improving services. For example, the Minnesota Legislature enacted application fees during a round of budget cuts designed to cut appropriations for the public defender service by 15%.50 Similarly, times of budgetary stress produced the debate over application fees in New Jersey, New Mexico, and many other states.51

In this context of weak and variable funding, the priorities for the leadership of defense groups followed naturally: as political actors, they saw application fees in terms of their short

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51 A budget crisis in New Jersey led to the creation of application fees in 1991; the same happened in New Mexico in 1991 and in Kentucky in 1993. See John B. Arango, Defense Services for the Poor: The Year in Review, CRIMINAL JUSTICE 43 (Spring 1995). See also Laura A. Bischoff, Taft Budget Plan Raises Fees, DAYTON DAILY NEWS, Feb. 13, 2003 (discussing proposed application fee legislation in Ohio intended as part of effort to generate $56 million in fees for state); Rachel Tobin Ramos, Fletcher Rallies Judges Against Bill to Fund PDS, FULTON COUNTY DAILY REP., Mar. 19, 2004 (relating that Georgia legislator used court administration bill as vehicle for enacting application fees for appointed counsel “because of the difficulty of funding a new program in lean budget years”).
and long-term budgetary effects. In some states, as in Ohio, the leaders of the defense organizations themselves advanced the application fee proposal, burnishing their reputation for fiscal responsibility.\footnote{In Ohio, the statewide Public Defender’s Office proposed an application fee in response to the governor’s call for agencies to find new sources of funding. See Mark Niquette, 
Critics Blast Proposed Lawyer Fee for the Poor, Columbus Dispatch, Feb. 15, 2003, at B1 (quoting spokesperson for Ohio Public Defender’s Office: the proposed application fee is “something in good budget times we would not have supported”); North Carolina IDS Commission, Meeting minutes for May 8, 2003, available at http://www.ncids.org (application fee “has been an important part of showing the Legislature that we are trying to raise money and be fiscally responsible”).} In other states, the defense establishment did not initiate the idea of application fee, but they endorsed it as the best available option in difficult financial times. As John Stuart, the State Public Defender in Minnesota, put it, “It would be much better if the work of the court system could be paid by general revenues. But this year that money was not there, so this system was put in place to keep from cutting the public defenders by $10 million.”\footnote{Margaret Zack, Hennepin County Public Defenders Contest New Law, Minneapolis Star-Tribune, July 3, 2003, at 1B; see also Bill Rankin, Indigent Defense Funding Proposed, Atlanta Journal-Constitution, Mar. 11, 2004 (quoting director of Georgia Public Defender Standards Council as favoring a funding package based partly on a $50 application fee: “As a result of all the effort that went into this issue, we feel they’ve come up with a reasonable solution of how to fund the statewide system.”).}

Similarly, in Colorado the Office of the State Public Defender backed a fee as a means to reduce its misdemeanor caseload—and thereby provide additional resources for its felony-level representations.\footnote{See Spangenberg Group, supra note 32, at 5-6.}

Just as the budgetary perspective drove the choices of defense establishment leaders, the needs of individual clients dominated the views of application fee critics, who predictably came from the lower tiers of the defense organizational infrastructure.\footnote{See Steve Karnowski, Public Defenders Now Coming With a Cost, Associated Press, Nov. 14, 2003 (noting that in Minnesota while “many public defenders condemn the new fees, the state’s chief public defender supports them.”).} To critics, budgetary and broader political considerations were someone else’s concern; a matter of deep constitutional principle was at stake, and public defenders should never take the first step to compromise this principle. As noted by one critic, a Texas public defender, there is “something outrageous about
charging poor people for the exercise of their Sixth Amendment right. We wouldn’t charge fees for welfare benefits."

Similarly, critics of up-front fees highlighted the waiver consequences of fee laws, positing that a fee, even a small one, would chill the likelihood of poor defendants to request counsel. Critics failed to present any hard data on the waiver question, but invoked vivid reminders about the reality of poverty, along with anecdotes suggesting that a small fee could have effects on counsel decisions for a large group of defendants. As one public defender in Minnesota described the effects, a fee that ranges between 50 and 200 dollars “is literally taking the food out of the mouths of their children.”

56 Lynn O. Rosenstock, Indigent Defense, 28 CHAMPION 50 (Aug. 2004) (quoting Kathryn Kase, staff attorney for the Texas Defender Service); see also Robert E. Pierre, Right to an Attorney Comes at a Price; Minnesota Law Requiring Fees for Public Defenders is Challenged, WASH. POST, Oct. 20, 2003, at A1 (shifting costs of defense to defendants “without regard to the consequences [is] inconsistent with the fundamental right to counsel”); Bill Rankin, Indigent Defense is Back on Rails, ATLANTA JOURNAL-CONSTITUTION, May 2, 2004 (quoting Georgia defense attorney Stephen Bright, criticizing application fees: “This is a fundamental constitutional obligation that the state has. The cost of paying for it should be shared by everyone.”). Cf. Schilb v. Kuebel, 404 U.S. 357, 378 (1971) (Douglas, J., dissenting) (state payment of counsel is an “unavoidable consequence of a system of government which is required to proceed against its citizens in a public trial.”) (Douglas, J., dissenting).

57 See Pierre, supra note 56 (quoting Professor Norman Lefstein: the “danger is that people will not avail themselves of the right to counsel to avoid the charge”); Zack, supra note 53 (quoting Jim Kamin, first assistant Hennepin County Public Defender in Minnesota as opposing fee because “individuals who can’t afford it may not seek a public defender and try to represent themselves”); see also Peter C. Erlinder, Muting Gideon’s Trumpet: Pricing the “Right to Counsel” in Minnesota Courts, BENCH & BAR 16, 21 Dec. 2003 (asserting that application fees “may do more to solve the courts’ and public defenders’ funding problems by coercing ‘waivers’ of Gideon and Miranda than by generating ‘income’ from desperate indigents who pay the fees”).

58 See Amy Mayron, Law on Legal Aid Fee Voided, PIONEER PRESS (St. Paul), Sept. 3, 2003, at B1 (quoting Hennepin County assistant public defender Geoffrey Issacson: “They’re trying to balance the budget on the back of our clients. You’re hitting the people who absolutely have the least ability to absorb that hit. I think it’s atrocious. The last thing they need is something on their credit rating”); Pierre, supra note 56 (quoting Minnesota public defender Daniel Homstad: “The poorest of the poor will be most affected. Nothing could be worse than that.”); Steven H. Pollek, $50 for a Free Lawyer? It’s Been Hard to Collect, FULTON COUNTY DAILY REP., June 30, 2005 (quoting a Georgia public defender: “in Fulton [County] many clients don’t have the money for the fee—especially those who are already in jail.”).

59 Zack & Louwagie, supra note 50, at 1B, see also Brett Barrouquer, Senators Back Fee for Anyone Seeking Public Defender, THE ADVOCATE (Baton Rouge), May 6, 2003 (opponent of application fee bill in Louisiana says $40 can make it possible for some to eat meals they otherwise would not eat); Pam Louwagie & Margaret Zack, Court Rejects Fees for Defense, MINNEAPOLIS STAR-TRIBUNE, Feb. 13, 2004, at 1A (although state public defender office supported application fees, “some other public defenders argued that the law might have meant the difference between defense and dinners for some clients”).
the application fees taken alone are fairly small, they assume greater magnitude when combined
with the litany of other fees that defendants must pay, such as probation services fees and victim
assistance fund fees.60

After field-level critics shifted the focus of the debate away from the system’s financial
viability and onto client effects, supporters of the fees typically offered several replies that
related to individual clients. They stressed that the up-front fee was not very large when
compared to other expenses involved in every criminal defense.61 In many states supporters
noted that the statute allowed a judge to waive the fee for truly destitute individuals.62 Or if there
was no explicit power for the judge to waive, the statute said that payment of the fee was not a
precondition to obtaining an attorney.63 Others downplayed the practical significance of the laws
by pointing to the inevitable obstacles that would prevent the state from fully collecting the
fees.64 As the director of the Louisiana Indigent Defense Assistance Board pointed out, the
collection of application fees often falls to local public defender offices, and the “law does not

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60 See Rosenstock, supra note 56, at 51.
61 See Barrouguere, supra note 59 (quoting unspecified Louisiana state senator: “Many people can afford the fee, but
not the cost of an attorney for the duration of their criminal cases”), Louwagie & Zack, supra note 50 (quoting
Minnesota State Representative Steve Strachan: the $200 maximum application fee is “not even an hour’s worth of
time for most attorneys”), Pierre, supra note 56 (quoting Minnesota State Rep. Eric Lipman: “These are modest
amounts. We’re trying to get some balance here. Too many judges just waived the fee as a general rule.”).
62 See Mark Niquette, Critics Blast Proposed Lawyer Fee for the Poor, COLUMBUS DISPATCH, Feb. 15, 2005 (noting
assertion by spokesperson for Ohio Public Defender’s Office that judges would have ability to waive a proposed
application fee “if they determine someone can’t pay it”).
63 See Zack, supra note 53 (quoting Minnesota State Public Defender John Stuart: “nobody will be denied an
attorney” because of non-payment of fee, the state will wait to collect until there is another way to obtain the fee,
such as a tax refund).
64 See Karnowski, supra note 55 (main tool for collecting unpaid fee is “fairly weak”), Mayron, supra note 58
(collection of unpaid fee handled by civil action, and collection is a low priority for state revenue workers); Pollak,
supra note 58 (quoting chair of Georgia Public Defender Standards Council: it is “very unlikely” that state would
attempt to collect unpaid application fees because “the collection efforts would exceed the $50”).
spell out repercussions” for offices that fail to collect the fee.65 Finally, the supporters of fees even speculated that the small investment by a client could improve the attorney-client relationship, because the payment would give the client a stake in the representation, and an enhanced expectation that the public defender is a “real” lawyer.66

The supporters of fees, like their critic counterparts, typically presented no empirical support and no relevant program data to support these hypotheses about expected client behavior. The argument was based instead on economic reasoning about the likely incentives that clients face, assuming rational action by clients in the face of predictable options.

The rejoinder of critics to this series of claims about clients amounted to a weary sigh – the response of veterans to the idealistic claims of theorists who lack practical wisdom. While the statutes did state the principle that payment of the up-front fee was not a precondition for receiving an attorney, critics asserted that this subtlety was lost on most poor clients. Indigent clients do not calculate the practical odds that the state will invoke its civil enforcement options; they only hear the message that a lawyer is not free.67

Even if a waiver provision is in place, allowing judges to excuse some defendants from paying the fee, defendants might not picture this waiver applying to them.68 According to the head of Michigan’s appellate defender office, even though defendants were told that they could

65 Meghan Gordon, Fee Has Provided $44,000 to Public Defender, TIMES-PICAYUNE (New Orleans), July 20, 2004 (noting comment by director of Louisiana Indigent Defense Assistance Board to the effect that not every district attempts to collect the application fees).
66 See Pollak, supra note 58 (quoting director of Georgia Public Defender Standards Council: “I think even poor people should be given the dignity of making contributions for their defense, if they can.”); Spangenberg Group, supra note 32, at 4.
67 The North Carolina defense establishment explicitly rejected an effort to instruct judges to clear up this potential misunderstanding among defendants. See supra note 43.
68 As noted, at present the laws of all but one state (Florida) contain a waiver provision. See supra note 25 and accompanying text.
avoid the up-front fee if they plead guilty, they were not always informed that they would nevertheless still get counsel even if they plead not guilty and cannot pay. Given such strategic omissions in the notice that clients receive, many defendants fell into the trap and a “system of perfunctory waiver” was the result.69

This fissure within the defense community, repeated in state after state, takes place without much practically relevant advice from professional organizations. The recommendations from professional groups either remain agnostic, or assume that application fees are tolerable only as an alternative to recoupment. The Criminal Justice Standards of the American Bar Association stake out a position against recoupment: it “should not be required, except on the ground of fraud in obtaining the determination of eligibility.”70 The ABA policy with respect to up-front fees or “contribution,” on the other hand, is more tempered. According to the Standards, while the imposition of a fee potentially conflicts with the Sixth Amendment,71 an appropriately limited fee, imposed after proper notice, might be acceptable.72 This tempered view is justified, the ABA Standards reason, because contribution is an improvement over traditional recoupment practices. Contribution amounts to far less than repaying the total cost of representation, and does not impose “long-term financial debts” on the defendant. Because up-front fees are normally not charged “unless there is a realistic prospect that the defendants can make

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69 See Paul Garber, Court Fee Is Under Fire, WINSTON-SALEM J., Mar. 13, 2003 (quoting Forsyth County Public Defender Pete Clary: “The unfortunate effect of this is that some people are scared to ask for a court-appointed lawyer because they’re under the impression that they have to have this money up front”). Rosenstock, supra note 56, at 51 (quoting Jim Neuhard, Director of the Michigan State Appellate Defender Office).

70 See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS ON PROVIDING DEFENSE SERVICES, ELIGIBILITY FOR ASSISTANCE, Stnd. 5-7.2(a) (3d ed. 1992). In support of its position, the ABA notes “compelling policy reasons,” including that exercise of the right to counsel would be chilled and that a long-term financial obligation might interfere with the rehabilitation. See Commentary to Stnd. 5-7.2.

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

72 Id. Stnd. 5-7.2(b)(c).
reasonably prompt payments,”73 contribution is less likely than recoupment “to chill the exercise
by defendants of their right to counsel.”74 Similarly, the National Legal Aid & Defender
Association Guidelines for Legal Defense Systems support imposition of a “limited cash
contribution,” so long as there is some assurance that the fee will not impose a financial
hardship.75

On their face, these recommendations give conditional approval to application fees. Yet,
given the political reality of the up-front fees that have been enacted around the country—they
actually supplemental the income from traditional recoupment, rather than creating an alternative
to recoupment—neither the ABA Standards nor the NLADA Guidelines endorse the current crop
of application fees.76 Nor, given the political atmosphere, does it appear likely that legislatures

73 Potential clients “required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of
the obligation to make a contribution…. Contribution should not be imposed unless satisfactory procedural
safeguards are provided.” Id. at Commentary to Stnd. 5-7.2.
74 Id. In August 2004, the ABA House of Delegates adopted Guidelines in an effort to elaborate on the “procedural
safeguards” urged but not specified in the 1992 Standards. See American Bar Association, Recommendation # 110:
ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases (Aug. 9, 2004) [hereinafter ABA,
In doing so, the ABA, while noting that the Guidelines were not intended to “modify” Standard 5-7.2, emphasized
that additional guidance is “urgently needed at this time.” Id. at 6. The ABA also evinced considerably greater
concern over fees in principle, cautioning that “[t]he use of application fees carries an unacceptable risk of chilling
the exercise of the right to counsel. To a defendant of limited means, a fixed fee as high as $200 may represent a
substantial financial burden. Because the fee is usually assessed before any representation is provided, indigent
defendants may choose to waive their right to counsel as soon as they learn of the fee to avoid the obligation of
payment.” Id. at 4.
75 National Legal Aid and Defender Association, National Study Commission on Defense Services
Stnd. 1.7 (1976). The Guidelines also advise that the public defender office itself should assess the fee. The defender
“should determine the amount to be contributed,” which should be “made in a single lump sum payment
immediately upon, or shortly after, the eligibility determination.” Id. at 1.7(a). The fee should not exceed (1) 10% of
the total maximum that would be payable for the representation under the assigned counsel fee schedule or (2) a
“sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.” Id. at 1.7(b).
76 See Associated Press, States Starting to Charge for Public Defenders, available at CNN.com, Nov. 14, 2003 (New
York, Massachusetts, Louisiana and Kansas raised existing court-related fees to help pay for lawyers for indigent
defendants). For an exception to this trend, see John B. Arango, Defense Services for the Poor: Nebraska Reforms
Indigent Defense System, CRIMINAL JUSTICE 38 (Fall 1995) (Wisconsin legislature adopted up-front fee in place of
 governor’s proposal to collect $11 million from recoupments following conviction). The realities of the notice to
prospective clients and the limited time that judges can devote to any waiver decision may also put these fees
outside the coverage of both groups’ recommendations.
will accept the procedural protections and substantive limits that the professional organizations list as preconditions.\footnote{See, e.g., ABA, Recommendations, supra note 74, at 7-10 (urging inter alia that defendants be permitted to be heard and mount witnesses on question of whether a fee can be afforded, backed by right of judicial review of initial determination).}

Standards of professional ethics also offer little concrete guidance for defenders who must operate with application fees after the passage of the new laws. Because the application fee statutes often require that public defenders themselves collect the fees, they raise ethical concerns. Defenders face the temptation of using the fee to control a burdensome caseload,\footnote{See Scott J. Silverman, Imposing and Recouping Attorneys' Fees From Publicly Represented Criminal Defendants, 70 FLA. B.J. 18 (1996).} by stressing the costs of representation to defendants already sitting on the fence, especially among misdemeanor defendants known for making hasty and improvident waivers.\footnote{See Broken Promise, supra note 14, at 39; Robert C. Boruchwitz, The Right to Counsel: Every Accused Person's Right, WASH. STATE BAR NEWS (Jan. 2004), available at http://www.wsba.org/media/publications/barnews/2004/ jan-04-default.htm.} Public defenders can also create distrust among their clients by raising the issue of fees and collections at the start of the attorney-client relationship.\footnote{See Pollak, supra note 58 (quoting noted Georgia defense attorney Stephen Bright as saying that fee “puts the public defenders themselves in a difficult position to start out the relationship with a client by trying to collect a fee”).} Moreover, in an insidious sense, with fees in place and legislative appropriations built around the projected revenues from those fees, defense counsel have an incentive not to advocate for reduced fees or waivers because any victory for a client will reduce the public defense budget.\footnote{See Rogenstock, supra note 56, at 51 (noting view expressed by Michigan public defender Jim Neuhaus).}

While the factions of the defense establishment argue among themselves about the desirability of application fees, prosecutors and their professional organizations remain quietly on the sidelines of the dispute. They typically support the idea of fees, because the income from those fees takes some pressure off the general tax revenues devoted to law enforcement and

\footnote{See, e.g., ABA, Recommendations, supra note 74, at 7-10 (urging inter alia that defendants be permitted to be heard and mount witnesses on question of whether a fee can be afforded, backed by right of judicial review of initial determination).}

\footnote{See Scott J. Silverman, Imposing and Recouping Attorneys' Fees From Publicly Represented Criminal Defendants, 70 FLA. B.J. 18 (1996).}


\footnote{See Pollak, supra note 58 (quoting noted Georgia defense attorney Stephen Bright as saying that fee “puts the public defenders themselves in a difficult position to start out the relationship with a client by trying to collect a fee”).}

\footnote{See Rogenstock, supra note 56, at 51 (noting view expressed by Michigan public defender Jim Neuhaus).}
When prompted by legislators or journalists, prosecutors publicly express their support for the fees. They also publicly fret that if defense lawyers are not available, they must extend unduly lenient plea deals to defendants, based on the need to avoid jail time (and thus the trigger of the constitutional right to counsel). In the end, however, prosecutors play a less pivotal role on this question than the defense organizations, because it affects so directly the attorney-client relationships of their adversaries.

As for the attitude of judges toward the application fees, they divide much like the different levels of the defense establishment. While some judges express their support for the fees, based on the idea that any new revenue source for the court system is welcome, judges at the trial level (especially in misdemeanor court) express more concern about the effect of the fees on prospective clients. Like the field-level defense attorneys, the trial-level judges speak with concern about defendants who might waive their access to an attorney because of the fee.

C. Political Theory and Internal Defense-Side Politics

According to most theoretical accounts of the legislative process, when it comes to matters of criminal justice, a simple model offers the most powerful insight: prosecutors and law
enforcement always get what they want from the legislature. 86 For instance, when the legislature considers whether or not to expand the reach of the substantive criminal law, prosecutors lobby in favor of a new weapon in their arsenal. Legislators tend to ally themselves with the prosecutors, because that is their surest path to re-election. 87 Voters and political donors generally picture themselves as potential victims of crime, and approve of expanded powers and budgets for those who fight crime. As for those who might also picture themselves as criminal suspects or defendants, they overwhelmingly come from social groups that have no money for campaign contributions and relatively few votes on election day. 88 As Robert Kennedy famously put it, “the criminal defendant has no lobby.” 89

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

The prosecutor-centered theory of crime legislation, however, does not explain all criminal justice debates equally well. There are some more complex settings where a pro-prosecution anti-defendant outcome in crime politics is not assured. For instance, when legislatures consider how to set criminal penalties, the high costs of prison beds sometimes leads them to deny prosecutors the longer authorized sentences that they seek. 90 Alternatively, when

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87 See id.
88 See generally Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused, 44 Syracuse L. Rev. 1079 (1993). See also Harold J. Krent, The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking, 84 Geo. L.J. 2143, 2168-69 (1996) (noting that “legislators need not fear that enacting most criminal measures will dry up campaign coffers. Throughout history, criminal offenders have been from the poorest strata of society...Nor will legislators necessarily lose votes if they are insensitive to the needs of convicted felons. Felons often cannot vote...”).
89 Anthony Lewis, Gideon’s Trumpet 211 (1964) (quoting then-U.S. Attorney Robert F. Kennedy).
legislatures structure the criminal court system, they at times respond to the wishes of judges and the organized bar, groups that might contradict the requests of prosecutors and incidentally benefit criminal defendants.91

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

Prosecutors do not usually oppose application fees and sometimes actively support them.92 The fees increase the total amount of funds available to the justice system without drawing on general tax revenues, and hold promise for at once lessening the annual appropriations secured by public defenders and strengthening prosecutors’ own negotiating positions for funds. In the end, however, the prosecutors are not the pivotal actors. The internal debate on the defense side settles the outcome, and support from the prosecutors only makes the decision easier.

Similar political coalitions are likely to produce other monetary obligations targeting indigent defendants, such as recoupment of fees and definitions of indigency. This coalition has

91 See Wright, supra note 3, at 265-67.
92 See supra notes 82-84 and accompanying text.

Wright & Logan
made possible the recent broader private subsidization movement, aptly referred to as "pay-as-you-go" criminal justice.\textsuperscript{93}

This setting emphasizes the common ground between the leaders of prosecutor organizations and the leaders of defense organizations, who view issues from a similar systemic perspective.\textsuperscript{94} The leadership from both types of organizations are at bottom political animals who establish long-term relationships with key legislators, and are willing to trade short-term losses for long-term gains. Despite the naturally occurring conflicts between defense and prosecution leadership groups,\textsuperscript{95} they share core common interests in the viability of the criminal courts.\textsuperscript{96} They also share common problems in managing their employees, the rank-and-file attorneys who staff their respective offices.\textsuperscript{97}


\textsuperscript{94} See Kim Taylor-Thompson, \textit{Effective Assistance: Reconceiving the Role of the Chief Public Defender}, 2 J. Inst. of Leg. Ethics 199, 199-200 (1999) [hereinafter Taylor-Thompson, Reconceiving] (noting that "[i]n the last two decades, chief defenders have been locked into a narrow managerial role...Wedged between competing obligations to clients and funding authorities chief defenders have narrowly defined their function as controlling the office’s operations to stay within budget guidelines.").

\textsuperscript{95} Evidence of this conflict is seen in California where over the course of its seven-year existence the State Public Defender Office doubled the appellate reversal rate, only to have its budget cut in half and eventually disappear. See Charles M. Sevilla, \textit{Gideon and the Short Happy Life of California’s Public Defender Office}, \textit{Champion} 44 (Jan.-Feb. 2003). \textit{Cf.} William J. Stuntz, \textit{The Political Constitution of Criminal Justice}, 37 available at ssrn. (on file with authors) (noting that while legislatures prefer publicly appointed defense counsel to contest merits of prosecutions counsel are predisposed to bring nettlesome procedural claims).

\textsuperscript{96} See \textit{Broken Promise, supra} note 14, at 13 (quoting statement of former U.S. Attorney General Janet Reno to this effect). \textit{See also}, e.g., Foster \textit{v. Carson}, 347 F.3d 742 (9th Cir. 2003) (litigation jointly filed by county public defender and district attorney challenging indigent defense cutbacks, which would curtail counsel appointments for three months, and thereby create major backlogs in the prosecutor’s office). As Kim Taylor Thompson points out, in the early years of public defense, during the first decades of the 1900s, defender offices were "team players," dedicated to reducing "conflicts with the prosecution" and increasing system efficiency, not providing zealous assistance to their clients. Kim Taylor-Thompson, \textit{Individual Actor v. Institutional Player: Alternating Visions of the Public Defender}, 84 Geo. L.J. 2419, 2424-25 (1996).

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

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

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

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98 Compare Taylor-Thompson, Reconceiving, supra note 94, at 203 (noting that “[i]n a political arena that thrives on exchange relationships, chief defenders have chosen not to barter”).
is more accessible to the entire group?99 The answer to this question could tell the defense leadership whether to trade an advantage for some defendants in exchange for a disadvantage for others. Unfortunately, defense leaders have no reliable way to answer this question, because they do not routinely talk to clients—and even if they do, they have no information about those defendants who waive counsel and never become their clients.

III. Judicial Responses

Thus far, we have canvassed the political dynamic that created application fee statutes so quickly in so many states. This account, however, leaves out a key institution: the judiciary. Judges, along with prosecutors and defense lawyers, on a daily basis operate the buttons and levers of the criminal justice machinery in U.S. courthouses. Yet judges also are asked to redesign those buttons and levers from time to time, when asked to rule on the constitutionality of statutes and the legality of justice system practices. With application fees for defendants who request a state-paid defense attorney, judges have made important choices both as operators and as re-designers of the machine.

Insulated (in theory at least) from the broader fiscal and public relations benefits of the laws, judges have erected practical obstacles to the application fees in the everyday routines of the courtroom. In jurisdictions that allow judges to waive the application fee, some trial judges grant waivers based on a minimal showing or even issue blanket orders waiving the fee for entire

99 See Daryl K. Brown, Rationing Criminal Defense Entitlements: An Argument From Institutional Design, 104 COLUM. L. REV. 801 (2004) (arguing that attorneys' fees ration defense services using the wrong criteria, although individual clients make rationing choices for themselves, they have poor information and use criteria society as a whole would not).
categories of defendants. Where the statute empowers the clerk of the court to collect a fee, the judges who supervise the work of the judicial bureaucracy might do little or nothing to promote vigorous collection. If the statute entrusts the public defender offices with announcing or collecting the fee, judges might signal that they will tolerate unenthusiastic collections from the office. Given the many opportunities for judges to mute the enforcement of the application fee statutes, it is little wonder that these statutes routinely produce disappointing revenues.

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

In North Carolina, trial courts in Durham, Forsyth, Orange, and Guilford County enjoined implementation of the State’s $50 “appointment fee,” concluding that its imposition on convicted and acquitted defendants alike violated state and federal constitutional law. In response, the

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100 See Steven H. Pollak, $50 for a Free Lawyer? It’s Been Hard to Collect, FULTON COUNTY DAILY REP., June 30, 2005 (noting that state court judge in Houston County, Georgia issued an order waiving the application fee in all criminal cases).
101 See, e.g., Amy Sherman, Defendants Squeezed for Drug Tests, Probation COSTS, PIONEER PRESS (St. Paul), Dec. 27, 2003, at B1 (noting that Minnesota secured only $93,000 during first three months of its non-waivable co-payment, far short of the hoped for $5,000,000 over the year); Spangenberg Group, supra note 32, at 29 (reporting 6-20% rate of fee collection). Cf. Amy Sherman, Inmates’ Jail Fee Yields Little Green “Pay-to-Stay” Program was to Offset, PIONEER PRESS (St. Paul), Sept. 14, 2003, at C1 (noting that Minnesota counties collected from inmates far less than that projected for room and board).
102 This paucity of challenges, it bears mention, is striking given the number of fee provisions in existence, and the enormous amount of litigation in recent years generated by other criminal justice-related fees. See, e.g., State v. Beltran, 825 P.2d 27, 29 (Az. Ct. App. 1992) (invalidating on ex post facto grounds a conviction “surcharge”). In an unpublished order, the Massachusetts Supreme Judicial Court held in 1992 that a “counsel fee,” then in the amount of $40 (since raised to $200), was constitutionally permissible because it did not condition availability of counsel on ability to pay the fee. See Stephen Cameron v. Justice of the Taunton District Court, Slip Op. (Supreme Judicial Court for Suffolk County, June 5, 1992). Cf. Hanson v. Passer, 13 F.3d 275, 280 (8th Cir. 1994) (holding that a “court cannot withhold the constitutionally-mandated appointment until a sum of money is paid.”).
103 See State v. Draper, Guilford County District Court, 02 CR 104461 (2003); State v. Kelly, Orange County Superior Court, No. 02 CR 952 (2003); State v. McNeil, District Court of Durham County, No. 02 CR 19580
State Attorney General asked the North Carolina Supreme Court to enter a statewide ruling to clarify the applicability of the fee in the state’s remaining ninety-seven counties. In a highly unusual move, the Supreme Court agreed to allow the state an appeal from a trial court ruling, and ordered that court personnel should continue to apply the fee in all counties pending a final ruling from the court itself.

In February 2004, in a unanimous decision, the court invalidated the fee in State v. Webb. Basing its decision on North Carolina law, the Webb Court agreed with lower courts concluding that the fee violated a provision of the state constitution that imposed financial liability only upon those “convicted” of crimes and limited such liability to “costs.” The State argued that the fee, which was imposed regardless of the outcome in a defendant’s case, was part attorney’s fee and part administrative cost, thus taking it outside the ambit of the constitutional prohibition. The Court disagreed, concluding that the fee constituted a cost by another name: it was imposed to “support that part of the criminal justice system that enables the State constitutionally to prosecute indigents who qualify for court-appointed counsel.” The fee was designed to reimburse the State for costs “necessarily incurred in the conduct of the

106 591 S.E.2d 505 (N.C. 2004).
107 See id. at 509 (citing and discussing N.C. CONST. ART. I, SEC. 23 and its predecessor provisions, providing that “[i]n all criminal prosecutions, every person charged with [a] crime has the right ... not [to] be compelled to ... pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.”).
108 Id.
109 Id.
prosecution," and, as such, violated the state constitutional prohibition against compelling acquitted defendants to pay costs. 111

On the other hand, the Court concluded that the law could be imposed on convicted defendants. 112 Moreover, the Court concluded that the law, when applied only to convicted defendants, did not have an unconstitutional chilling effect on a defendant’s Sixth Amendment right to counsel because the fee served the valid purpose of defraying the costs of prosecution and was not intended to punish those who sought court-appointed counsel. 113 Furthermore, a defendant’s knowledge that he someday might be required to repay costs of services chilled the defendants’ choice to rely on counsel no more than recoupment or other established practices. 114

A similar chain of judicial events sealed the fate of Minnesota’s law. The law provoked an immediate constitutional challenge, because (1) unlike the prior fees law, this new statute contained no waiver provision permitting courts to exempt defendants from paying on the basis of undue financial hardship, and (2) the new law increased the prior co-payment from $28 to a range of $50 to $200, depending on the level of the offense charged. 115 A trial judge in Hennepin County (containing Minneapolis) brokered an arrangement with the County Public Defender, who decided to challenge the constitutionality of the law as a “strategic litigation project.”

110 Id. (quoting State v. Wallin, 89 N.C. 578, 580 (1883), internal quotation marks removed).
111 Id. at 510.
112 Id. at 512. The Court upheld use of application fees pursuant to a severability provision in the law. Id.
113 Id. at 513 (citing Fuller v. Oregon, 417 U.S. 49, 53 (1974)).
114 Id.
115 See MINN. STAT. § 611.17 subd. (1)(c) (Supp. 2003). According to the applicable guidelines, the co-payment was based on “the level of the offense at the time the public defender is appointed. Subsequent dismissals or amendments do not impact the assessed fee.” Fourth Judicial District, State of Minnesota, Public Defender Eligibility Guidelines—Criminal Division (effective Sept. 2, 2003) (emphasis in original) (on file with authors). Prior to the law’s amendment in 2003, the co-payment was set at $28 and its imposition was subject to judicial waiver in instances of defendants’ financial hardship. See MINN. STAT. § 611.17 (2002). In State v. Cunningham, 663 N.W.2d 7 (Minn. Ct. App. 2003), the Minnesota Court of Appeals rejected arguments that the waivable $28 co-pay violated the right to counsel and the equal protection rights of poor and minority defendants.
undertaken by local defenders despite the State Public Defender's highly visible support for the law. Under the arrangement, the judiciary in Hennepin County—in the interest of avoiding having the courts clogged with repeated challenges—agreed to suspend imposition of the co-payment until a designated county judge could hear a hand-picked test case. On September 2, 2003, two months after the mandatory co-payment statute took effect, the judge invalidated the non-waivable law on Sixth Amendment grounds and enjoined its application in Hennepin County, and thus effectively in the state as a whole. Because the court was "well aware of the financial impact [its] ruling might have on the public defender budget," the matter was certified for accelerated appellate review.

On appeal, the Minnesota Supreme Court affirmed, invalidating one of the nation's two mandatory, non-waivable fee provisions. In a unanimous decision, the Court in State v. Tennin conceded the government's right in principle to require co-payments, but like the trial court, faulted the lack of any judicial waiver power in the statute. In the absence of such a waiver condition, the law differed from the Oregon recoupment law previously upheld by the

116 Email correspondence from Leonardo Castro, Hennepin County Chief Public Defender, to Wayne Logan, Aug. 4, 2005 (on file with authors).
117 Id.
118 State v. Tennin, Findings of Fact, Order and Certification, Hennepin County Dist. Court File No. 03061357, Sept. 3, 2003, at 6 (on file with authors). The court was at pains to note the "administrative problems" that the county would face "if it chose to collect the co-payment in thousands of cases and was then required to refund those payments." Id. at 8.
119 See MINN. STAT. § 484.01 (specifying that Minnesota district trial courts are courts of general jurisdiction whose rulings have state-wide injunctive effect).
120 Tennin, Findings of Fact, No. 03061357, at 7-8.
121 State v. Tennin, 674 N.W.2d 403 (Minn. 2004).
122 The other provision, as noted above, is contained in Florida law, see supra note 25 and accompanying text, and has yet to be judicially challenged.
123 Tennin, 674 N.W.2d at 408.
U.S. Supreme Court in *Fuller v. Oregon.* Because the law imposed a fee without permitting an independent judicial determination of a defendant's ability to pay, the *Tennin* Court concluded that the law deprived defendants of their right to counsel in violation of the Minnesota and U.S. Constitutions.

In sum, courts—at trial and appellate levels—play an indisputably critical part in the evolution and existence of fee laws. As an initial matter, the administrative officials from the judiciary play a supporting role in the creation of the laws themselves, motivated by fiscal concerns for the health of the system. Appellate rulings that enlarge the right to counsel also give extra force to such fiscal concerns among all the different leadership groups. Later, when the laws are implemented, courts figure squarely in the application and ultimate fate of fee laws. The institutional resistance to application fees surveyed above, it is important to note, is not unique to this particular reform effort. As noted in a recent report of the American Bar Association, courts often impose legal and procedural obstacles to implementation of indigent defense reform efforts.

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

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124 The Oregon law contained the equivalent of two waiver provisions. One waiver opportunity arose at imposition, turning on a defendant's inability to reimburse, and another after trial, should s/he become unable to pay. *Fuller,* 417 U.S. at 46.
125 *Tennin,* Findings of Fact, supra note 118, at 10.
126 See supra notes 82-84 and accompanying text. Cf. William J. Stuntz, *The Political Constitution of Criminal Justice,* available at ssrn. (on file with authors) (arguing that increases in constitutional protections trigger legislative desires to increase the expanse and severity of substantive criminal law provisions).
127 See *Broken Promise,* supra note 14, at 29 (noting same and providing examples).
IV. Fees and Waiver Rates

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

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

Based on the operation of co-payments in settings other than criminal justice, such expectations of waiver appear well-justified. For instance, when health insurance came to be dominated by co-payments after the advent of managed care, serious effort went into studying the behavior of consumers faced with increased co-payments. Instead of relying on aggregate statistics about the total number of insurance policyholders, researchers utilized surveys and

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128 See Associated Press, Indigents’ Fee Upset Again, RAleigh News & Observer, Mar. 13, 2003 (quoting Durham District Court Judge Jim Hill); Mike Fuchs, Public Defender Challenges Fee, Greensboro News & Record, Mar. 12, 2003, at B13 (Durham County District Court Judge said he noticed a decline in the number of people applying for court-appointed lawyers).
129 See Editorial, Charging the Indigent Only Courts Insensitivity, Greensboro News & Record, Mar. 10, 2003, at A6 (noting that although amended statute was in effect only since December, “already judges noticed the number of people applying for court-appointed lawyers declining”).
130 See, e.g., John B. Arango, Defense Services for the Poor, Criminal Justice 35 (Winter 1998) (Wisconsin indigents must pay up-front fee ranging from $50 to $500, and as a result “more persons are appearing without representation, which means the judge must appoint counsel. The effect is to shift responsibility for indigent defense from the state to the counties, which must pay for appointed counsel.”).
other techniques to examine the choices of individual consumers. This empirical work shows that such up-front costs can discourage many patients from seeking medical care. In light of these data, practicing physicians (like their peer front-line actors in criminal defense) have resisted recent efforts to increase medical insurance co-pays among the poor, despite positions adopted by medical leadership to the contrary.

Despite this parallel from co-payments in other arenas, defense counsel lack any specific data to support their supposition that the fee statutes increase the occurrence of waiver. Indeed, the issue has not received the type of consumer-level research in the courts that it has in the insurance markets and elsewhere. Beyond the particulars of waiver vis-à-vis application fee laws, it is remarkable how little is known about the realities of waiver of counsel more generally. It is common to hear that waiver rates are quite low, but these estimates are limited to felony cases. For instance, in the federal system and in large urban counties in the state systems, the felony waiver rate is reported at less than one percent. Instances of waiver are thus treated as anomalies, perhaps a result of mental impairment among defendants or a breakdown in relations between defendants and appointed counsel.

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132 See Robert Pear, Doctors Argue Against Higher Co-Payments for Medicaid, N.Y. TIMES, Aug. 18, 2005 (noting same and discussing controversy surrounding issue of whether Medicaid Commission should increase co-pays among the poor).
133 See Marie Higgins Williams, The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better Defined Roles, U. COLO. L. REV. 789, 815 (2000) (noting same). See also Broken Promise, supra note 14, at 28 (observing that lack of reliable data on indigent defense “acts as a significant barrier to identifying, evaluating, and identifying structural deficiencies.”)
134 See Caroline Harlow, Bureau of Justice Statistics, Defense Counsel in Criminal Cases 1 (Nov. 2000) (stating that in 75 largest counties in United States in 1996, 0.4% of felony defendants in terminated cases waived available defense counsel; in federal system, 0.3% of felons waived counsel)
135 See Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes, and Executive Materials 702-09 (2d ed. 2003).
But waiver is a closer question for misdemeanor defendants, and this unpredictable waiver decision carries serious consequences, both for the system and for the individuals involved. The financial stakes for the system are high because misdemeanor defendants significantly outnumber felony defendants. A small shift in the percentage of misdemeanor defendants who request appointed counsel could overwhelm the system. For this reason of volume alone, criminal justice officials responsible for assembling a budget each year have every reason to study closely the waiver choices of misdemeanor defendants.

The waiver decision also has major consequences for individual defendants charged with misdemeanors. Sentencing law and practice make a criminal record especially important in setting the sentence for any future offense, influencing outcomes even when counsel has not been afforded, and the manifold future consequences of a misdemeanor conviction often escape the notice of a defendant who has no attorney.

Despite these consequences, no state-level data are available with respect to misdemeanor waivers. Without a national repository of comparable statistics, we are left with

136 See Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics Online, tbl. 4.6, available at http://www.albany.edu/sourcebook/pdf/t46.pdf (noting that in 2002 there were 2.3 million felony charges and over 9 million misdemeanor charges in U.S.).


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

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

140 The Bureau of Justice Statistics, part of the U.S. Department of Justice, has gathered statistics on the processing of felony defendants in 75 large urban counties. See Harlow, supra note 134. However, there are no comparable studies showing the courtroom reality in smaller jurisdictions or in misdemeanor cases.
the strategy of sampling court data from state systems. The state court data that inform our study suggest that waiver levels for misdemeanors are significantly higher than for felonies. The waiver rates are also intriguingly fluid: the percentage of defendants waiving counsel looks different from state to state, and different from one year to the next.\textsuperscript{141}

For the period January 2000 to July 2005, the waiver rate in North Carolina for those convicted of felonies was 2.74\%, while the waiver rate for all misdemeanor convictions during the same time was 38\%.\textsuperscript{142} The trend for the most serious misdemeanors moved up slightly, from 31.2\% in 2000 to 35.2\% in 2004.\textsuperscript{143} In Minnesota, the waiver rate for serious felony defendants during 2000-2005 was 3.79\%, for other felonies 8.76\%,\textsuperscript{144} and for gross misdemeanors 20.77\%.\textsuperscript{145} As in North Carolina, the trend for the most serious misdemeanor cases in Minnesota moved slightly up during this period, from 19.9\% to 23.3\%.

The arrival of the new application fees in these two states did not profoundly shift the waiver rates as reflected in these aggregate court statistics. For misdemeanors, the application fees might be expected to convince more defendants to waive an attorney and avoid paying the fee, because the consequences are less severe. Yet this did not occur. The waiver rate for

\textsuperscript{141} For a proposal to give the federal government a leading role in securing criminal justice data from different jurisdictions, see Marc L. Miller & Ronald F. Wright, "The Wisdom We Have Lost": Sentencing Information in the Federal System, 58 STAN. L. REV. --- (forthcoming 2005).
\textsuperscript{142} The misdemeanor waiver rate in North Carolina falls closely in line with estimates for misdemeanors in the federal system. See Harlow, supra note 134, at 1 (reporting federal misdemeanor waiver rate of 38.4\%).
\textsuperscript{143} The most serious misdemeanors in the North Carolina Criminal Code, Class 1 misdemeanors, all carry the possibility of a jail term. All of the North Carolina waiver rates discussed in this Part are based on case-level data maintained by the North Carolina Administrative Office of the Courts.
\textsuperscript{144} Note that the waiver rates for felonies reported from both Minnesota and North Carolina are several times higher than the rates of 0.4\% reported for felonies in the federal system and in the 75 largest counties in the United States. See Harlow, supra note 134, at 1. The variation may reflect differences between urban jurisdictions and statewide averages for state criminal courts, or distinctive practices in North Carolina and Minnesota, or differences in reporting techniques.
\textsuperscript{145} The waiver rates for Minnesota are calculated based on monthly county-level data provided to the authors by the Minnesota Administrative Office of the Courts.
counsel in Minnesota did not spike up during the period (July and August of 2003) when the application fee statute was officially in effect. Although the waiver rate did increase, as the table reflects, this was part of a small longer-term increase in the waiver rate, extending both before and after the brief era of the application fee statute. \(^{146}\)

Similarly, in North Carolina the waiver rate showed no sign of moving up in response to the new application fee statute, implemented between December 2002 and January 2004. \(^{147}\) In fact, the rates for 2003, when the fee law was in full effect, moved down for all three categories of misdemeanor cases, as well as cases originally charged as misdemeanors rather than felonies.

\(^{146}\) The calculations for the Minnesota table exclude cases from Hennepin County (Minneapolis), which never implemented the application fee statute on a routine basis.

\(^{147}\) To account for the full period of the statute’s operation, the North Carolina table includes December 2002 and January 2004 in the 2003 calculation.
We are left, then, with conflicting evidence: the observations of the trial court actors, together with the carefully documented behavior of consumers who encounter co-payments in other settings, tell us that application fees should prompt higher levels of waiver of defense counsel, especially in misdemeanor cases. On the other hand, the court statistics from the two states studied do not reveal an increase in the percentage of waiver cases during the periods when the courts implemented the new application fee statutes.

How best to reconcile the conflicting evidence about the impact of the fee statutes on defendant waiver choices? A simple answer is possible. Perhaps the administrators of indigent defense organizations who supported the application fees were correct: as they posited, indigent defendants did not consider the fees to be large enough to affect their waiver decisions.
We believe that a better explanation, however, starts with the power of trial actors to blunt the effects of any new criminal justice policy, at least in the short run. In many criminal justice settings, it appears that field-level actors can effectively slow down or redirect changes that start at the top. For instance, sentencing commissions know that support ("buy-in") from trial judges and prosecutors is necessary—at least in the short term—if new sentencing rules are to have any real effects on the pattern of sentences imposed.\textsuperscript{148} Similarly, in the law enforcement realm, new policies affecting change (e.g., mandatory arrest for domestic abusers) often experience a lag in implementation, revealing a need for systematic training and persuasion to ensure compliance by police.\textsuperscript{149}

The same dynamic might give trial judges and defense attorneys in the field a short-term veto power over the application fees. In states where judges can waive the application fees for defendants in the greatest need, the trial judges might prove quite generous in granting the waivers.\textsuperscript{150} Even where the fee is mandatory, the judges supervise the court personnel that collect the fees and could move slowly to establish procedures for collection. Judges in some jurisdictions hold the responsibility for describing the fees to defendants, and could change the emphasis of their descriptions in ways that might convince defendants to minimize the practical importance of the fees. The same holds true for defense attorneys: in jurisdictions where they collect the fees and describe the fee options to potential clients, they hold the power to downplay fees.


\textsuperscript{150} See supra note 100 and accompanying text.
While some of these dampening effects could remain in place for the long run, they are especially effective in the short term. Because first trial and later appellate courts struck down the application fee statutes in North Carolina and Minnesota, and the constitutional status of the statutes remained doubtful for most of the time they remained in effect, resistance among trial court actors may have been especially significant.

We have mentioned two possible interpretations of the systemwide counsel waiver statistics in two states: one interpretation concludes that application fees are too small to affect defendant choices about waiver, while the other declares that trial actors were able to blunt any short-term effects from the application fees and prevented any large changes in the waiver rates for a short time. Whichever interpretation comes closer to the truth, a more profound conclusion also follows from the court data: it is not well-suited to answer the important questions about waiver. The people who matter most here – the clients – cannot be heard through aggregate statistics about case processing.

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

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

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

**Conclusion**

Even though publicly funded indigent defense is considered an “unavoidable consequence” of our adversarial system, states in recent years have turned to indigents themselves to help cover the ever-increasing costs of their defense. With application fees, state legislators found a way to defray the costs of indigent defense and situate themselves within the broader politically popular “pay-as-you-go” movement sweeping the nation.

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151 To this end, an effort was made in this study to examine a random sample of case files of individuals who waived counsel in several Minnesota counties. Unfortunately, the same three dozen files examined contained no information whatsoever on the reasons for waiver.
The political economy of application fees, however, has greater nuance than kindred reform efforts also adversely affecting criminal defendants. Counter-intuitively, much of the originating interest and support for the fees arises from within the criminal defense organizational leadership itself, which strategically aligns itself with prosecutorial and other typically anti-defense interests in legislative debates. While ultimately successful in political terms, the strategy creates a stark rift within the indigent defense infrastructure, prompting rank-and-file public defenders to challenge the laws—with some success—on legal and constitutional grounds in the name of their individual indigent clients.

As so often is the case with new policy initiatives, however, the public controversy surrounding application fees has been premised on suppositions with weak factual support. Advocates of application fees, the defense leadership included, posited that the fees would have only modest effect on the willingness of indigent defendants to accept the state's offer of appointed counsel. Critics responded that the fees, targeting those in the worst position to pay for a government service, would inevitably chill the right to counsel. Both groups based their predictions on their own limited information about potential defense clients.

In the preceding pages we undertook the first steps toward understanding defendant decisions to waive counsel. Statewide court data fail to reveal any impact on waiver rates when two states, Minnesota and North Carolina, enacted application fee statutes. This statewide pattern might be read as vindication of the advocates of application fee statutes. We think such a conclusion is premature, because trial actors have the power to dampen the effects of criminal justice policy changes imposed from the top, especially in the short run.
More importantly, our preliminary survey of aggregate court statistics points to a need for different measurement techniques: the gathering of case-level information that captures local courtroom variety and the reasoning of individual defendants. We have until now failed to grasp the huge impact of counsel waiver for the quality and cost of criminal justice. Listening in the right places will help us hear the answers from criminal defendants themselves, providing a critical empirical basis to inform future policy decisions.