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The Cost of (In)Justice: A Preliminary Study of the Chilling Effect of the $50 Application Fee in Florida's Misdemeanor Courts

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THE COST OF (IN)JUSTICE: A PRELIMINARY STUDY OF THE CHILLING EFFECT OF THE $50 APPLICATION FEE IN FLORIDA'S MISDEMEANOR COURTS

*Alisa Smith**

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Abstract

At least 27 states, including Florida, charge application fees to poor defendants to determine whether they qualify for the appointment of counsel.[1] Whether these fees dissuade poor defendants from asserting their right to counsel is an empirical question with an empirical answer. The Supreme Court, however, has treated this question as a matter of settled fact, determining that added fees do not chill the assertion of the right to appointed counsel.[2] In reaching this conclusion, the Court did not

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1. JAMES DOWNING, THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 2, 4, 8 (2002).

2. *See* Fuller v. Oregon, 417 U.S. 40, 54 (1974).

rely on empirical studies or research,[3] and to date, no empirical research has directly answered this question. The present research begins to explore that empirical void. Relying on court observations and interviews with defendants who entered pleas during their misdemeanor court arraignments without counsel, this preliminary research found that the application fee might chill defendants' decisions to request appointed counsel, at least indirectly, and more empirical research is necessary on this important constitutional question.

INTRODUCTION

In 2010, Alisa Smith and Sean Maddan collected data for a study of the misdemeanor courts in Florida.[4] Of the many observed injustices, the most glaring was that poor people were charged a $50 application fee to determine if they were too poor to hire an attorney and qualify for representation by a public defender.[5] Although the fee applies in felony and misdemeanor cases alike, proceeding without counsel on felony charges is rare, and when it does happen, felony court judges take steps to ensure that defendants waive counsel with knowledge of the disadvantages of proceeding without counsel.[6] On the other hand, self-representation is common—perhaps the norm—in misdemeanor courts, and despite the Supreme Court holding that defendants are afforded the right to counsel when they are subject to incarceration,[7] most defendants proceed without counsel, and trial judges rarely take steps to ensure that defendants understand the gravity of proceeding *pro se*.[8]

Gideon v. Wainwright[9] guaranteed as a constitutional imperative that anyone too poor to hire an attorney and charged with a felony was entitled to representation under the Sixth Amendment, but the Court provided no guidance on exactly how the states should accomplish representation, no definition for who qualified as indigent, and no explanation about how

3. *See id.*

4. ALISA SMITH & SEAN MADDAN, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 14 (2011).

5. *Id.* at 22.

6. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2078–79 (2006).

7. Argersinger v. Hamlin, 407 U.S. 25, 36 (1972) (holding defendants had the right to counsel, but only in cases with the potential for jail); *see also* Scott v. Illinois, 440 U.S. 367, 374 (1979) (clarifying *Argersinger* by holding that misdemeanor defendants were only entitled to counsel if judges intended to impose a jail term); *see also* Alabama v. Shelton, 535 U.S. 654, 658–59 (2002) (holding that misdemeanants' sentenced to a suspended term were entitled to counsel because upon violation there was the potential for incarceration).

8. SMITH & MADDAN, *supra* note 4, at 14.

9. 372 U.S. 335 (1963).

public counsel would be funded.[10] The impact of *Gideon* was moderated, however, because many states already provided counsel for poor people charged with felonies.[11] "[S]tates, counties, and jurisdictions ha[d] established varying means of providing public representation for defendants unable to afford a private attorney."[12] Typical models for representing the poor include some combination of (1) public defender office; (2) assigned private counsel; and (3) contract system of private attorneys agreeing to represent indigent defendants.[13] While states adopted varying approaches to providing counsel for the poor, local governments and public defender agencies lobbied legislatures for cost-sharing models to support indigent representation.[14] The various funding approaches differed significantly from one another.[15]

In 1972, the Supreme Court extended the right to counsel to misdemeanor defendants.[16] In *Argersinger v. Hamlin*,[17] and that same day in *James v. Strange*,[18] the Court struck down the funding model for indigent representation implemented in Kansas as unconstitutional.[19] The Kansas recoupment law[20] violated the Equal Protection Clause because costs were assessed against those convicted and acquitted without providing any of the protections afforded to civil debtors.[21] Although the *Strange* Court unanimously invalidated the Kansas recoupment law, Justice Powell acknowledged that states had legitimate interests in preserving public funds and passing along those costs to criminal

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10. *See id.*; *see also* Kate Levine, If You Cannot Afford a Lawyer: *Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 192–93 (2007).

11. Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1034–35 (2013) ("At the time the Court decided *Gideon*, forty-four states already provided representation to all indigent felony defendants, and only five states limited such representation to capital cases.") (citing John F. Decker & Thomas J. Lorigan, Comment, *Right to Counsel: The Impact of* Gideon v. Wainwright *in the Fifty States*, 3 CREIGHTON L. REV. 103, 104, n.13 (1970)).

12. LYNN LANGTON & DONALD FAROLE, JR., SPECIAL REPORT, STATE PUBLIC DEFENDER PROGRAMS, 2007, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 3 (2010), https://www.bjs.gov/content/pub/pdf/spdp07.pdf.

13. *Id.* (finding that only one state, Maine, did not have a public defender system when data was collected in 2007; twenty-two states have a state public defender program and twenty-seven states have public defender offices administered at the county level).

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

15. *See id.*

16. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

17. *Id.*

18. 407 U.S. 128 (1972).

19. *Id.* at 133.

20. *See, e.g.*, *id.* at 128. These recoupment laws allow for the reimbursement of legal fees and costs associated with appointed representation.

21. *Id.* at 134–42.

defendants.[22] He particularly highlighted the potential impact of the *Argersinger* decision, which forecasted expanding criminal dockets:

> We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged state and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.
>
> We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.[23]

Unlike in the aftermath of *Gideon,* most states did not have systematic representation in place for misdemeanor offenders at the time the right to counsel was extended to misdemeanor defendants.[24] And, as Justice Powell predicted, misdemeanor prosecutions grew to comprise 77.5% of the total criminal caseload with an estimated 13.2 million cases filed

22. *Id.* at 141–42.
23. *Id.*
24. *Id.*

annually,[25] and with misdemeanor and ordinance violations comprising a large share of public defender representation.[26]

In *James v. Strange*, the Court avoided deciding "[w]hether the statutory obligation for repayment impermissibly deterred the exercise of [the right to counsel]."[27] Two years later, however, in *Fuller v. Oregon*,[28] the Court upheld an Oregon statute which provided criminal defendants the same rights as other judgment debtors and applied the fees to only those convicted of crimes, against both Equal Protection and Right to Counsel challenges.[29] The Oregon law, the Court held, was objectively reasonable.[30]

Important to this Article, the *Fuller* Court held the Oregon recoupment statute did not infringe on defendants' right to counsel, rejecting the argument that the repayment of legal costs affected defendants' ability to obtain legal services, and therefore did not "chill the assertion of constitutional rights by penalizing those who choose to exercise them[.]"[31] *Fuller* dealt with a felony offense, and the Court observed that the Oregon statute "merely provide[d] that a convicted person who later becomes able to pay for counsel may be required to do so."[32]

Whether poor people are dissuaded or chilled from asserting their right to counsel due to the added costs of applying for counsel or being held responsible for an unknown amount of representation costs are empirical questions with empirical answers. Although the Supreme Court treated the question as settled fact, in determining that these added fees do not chill the assertion of the right to counsel, the Court did not rely on

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25. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018) (providing the most recent estimate of misdemeanor case filings in the United States); *see also* ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS (2012) (estimating ten million misdemeanor case filings in 2010); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012); *see also* Susan S. Silbey, *Making Sense of the Lower Courts*. 6 JUST. SYS. J. 13, 13 (1981); *cf.* Patrick Walker, *Felony and Misdemeanor Defendants filed in the U.S. District Courts During Fiscal Years 1990–95: An Analysis of the Filings of Each Offense Level*, 26(6) J. CRIM. JUST. 503, 504–06 (1998) (noting that the number of federal misdemeanor filings was strongly dependent on enforcement practices of local authorities).

26. LANGTON & FAROLE, *supra* note 12, at 1 ("Misdemeanor and ordinance violations accounted for the largest share (43%) of cases received by public defender programs.").

27. *James*, 407 U.S. at 134.

28. 417 U.S. 40 (1974).

29. *See id.* at 50, 53–54.

30. *Id.* at 50.

31. *Id.* at 54 (quoting and distinguishing United States v. Jackson, 390 U.S 570, 581 (1968)).

32. *Id.* at 54.

empirical studies or research on that question.[33] There has also not been any research, to date, that has directly examined that question. The present research begins to explore that empirical void. Despite the *Fuller* holding, legal scholars and litigants continue to advance unconstitutionality claims that recoupment and contribution costs impede defendants too poor to hire counsel from obtaining court-appointed assistance and steadfastly contend that recoupment and contribution or copay fees violate the Sixth Amendment and the spirit of *Gideon*.[34] But, they do so with little more than speculation and anecdotes.[35] Unsurprisingly, anecdotes and logic have been unsuccessful in convincing the courts that these costs infringe on defendants' constitutional rights, particularly when these arguments are advanced by defendants who are actually represented by counsel.[36] As Justice Marshall noted in his dissenting opinion in *Fuller*, a challenge to these laws would be more germane if brought by an individual who had not exercised their constitutional right due to hardship resulting from the statutory fee.[37] To date, all constitutional challenges have been brought by defendants represented by counsel at trial, which "mak[es] it hard to argue that their right to counsel was actually chilled."[38]

At least 27 states, including Florida, charge upfront registration or application fees,[39] and these fees are more likely to pose an obstacle or barrier for misdemeanor defendants, who are poor, charged with "minor"

33. *See id.*; *see also* Wright & Logan, *supra* note 6, at 2047.

34. *See* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 325 (2009); *see also* Levine, *supra* note 10, at 192; *see also* Wright & Logan, *supra* note 6, at 2047; *see also* Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, ACLU (June 2017), https://law.yale.edu/system/files/area/center/liman/document/pdfees-report.pdf; *see also* Joseph Shapiro, *As Court Fees Rise, The Poor are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

35. Some legal scholars argue that many states' laws do not comply with the circumspection of *Fuller*, others continue to argue the laws violate Equal Protection and Due Process, and some focus on the ethical dilemma facing public counsels' who, in some states, are forced to seek additional costs against their clients' interests. Here, the focus is on whether these added costs infringe on the poor's right to counsel.

36. Anderson, *supra* note 34, at 360.

37. *Fuller*, 417 U.S. at 61 n.2 (Marshall, J., dissenting); *see also* Levine, *supra* note 10, at 207.

38. Levine, *supra* note 10, at 214–15.

39. DOWNING, *supra* note 1, at 4, 8.

crimes, and as observed by commentators and researchers,[40] regularly proceed without counsel.[41]

This Article explores whether an empirical basis exists for the assertion that pre-appointment contribution, co-payment, registration, or application fees chill misdemeanants' right to counsel contravening the Sixth Amendment. Part I provides a brief overview of *Gideon*'s promise of the right to counsel for those who are too poor to hire an attorney and the right as extended to misdemeanor offenders along with the Supreme Court's decisions that allow the state to assess representation costs to those appointed public counsel. Part II summarizes the national scope of recoupment and contribution provisions and reviews the limited scholarly research that contends that these laws violate the Sixth Amendment right to counsel. Part III focuses on Florida's recoupment and application fee laws that, scholars have noted, are some of the most stringent in the nation. Florida imposes both an application (or copayment) fee as well as recoupment or reimbursement costs, and it is the only state that prohibits judicial waiver of these imposed fees.[42] Part IV explains the methodology and results of the current study, including a brief overview of the findings reported in *Three-Minute Justice*,[43] highlighting the findings from Orange County, Florida in 2010, and comparing those findings to a semi-replication of that study with information gathered in Orange County in summer 2018.

To specifically address whether Florida's $50 application fee impedes or chills the assertion of the right to counsel, 14 misdemeanor defendants who waived counsel and entered a plea were interviewed after their court hearings and asked, among other questions: (1) whether they understood that they had the right to counsel; (2) whether they were informed that there was a $50 application fee; and (3) why they waived their right to counsel. Part V discusses the findings and draws conclusions about the potential of (1) the impact of pre-appointment application fees on misdemeanor defendants' waiver of counsel; and (2) the need for more research to assess whether the failure of trial judges to adequately advise defendants on the disadvantages of proceeding without counsel, the

40. *See* Hashimoto, *supra* note 11, at 488; Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011); STEPHEN F. HANLON ET AL., Denial of the Right to Counsel in Misdemeanor Cases: Court Watching in Nashville, Tennessee, Washington DC: American Bar Association, 8–9 (2017); Thomas B. Harvey et al., *Right to Counsel in Misdemeanor Prosecutions After* Alabama v. Shelton*: No-Lawyer-Courts and Their Consequences on the Poor and Communities of Color in St. Louis*, 29 CRIM. J. POL'Y REV. 688, 697 (2018).

41. *See* Porter, *supra* note 34, at 1; *see also* Shapiro, *supra* note 34.

42. *See* Fla. Stat. § 27.52(1)(b)–(c) (2018). Minnesota imposed a mandatory, non-waivable application fee, but shortly after its adoption, the Minnesota Supreme Court struck the provision as unconstitutional. State v. Tennin, 674 N.W.2d 403, 410–11 (Minn. 2004).

43. SMITH & MADDAN, *supra* note 4.

potential consequences of entering a plea beyond the imposed fine, and the imposed application fees and other costs that chill defendants' from asserting their right to counsel, or at least affect their perception about whether they *need* a lawyer for a misdemeanor charge.

I. *GIDEON*-TO-*FULLER*: THE RIGHT TO COUNSEL AND THE CHILLING EFFECT OF THE PRICE FOR JUSTICE

In 1963, the Supreme Court held that the Sixth Amendment right to counsel was fundamental, and Clarence Gideon, who was prosecuted in Florida for committing felony burglary, was unconstitutionally denied counsel.[44] In sweeping language, the Court recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[45] The Court did not, however, extend that right to misdemeanor cases for nearly ten more years, and even then, the right was not universally applied to all misdemeanants.[46]

In another Florida case, Jon Argersinger, who was convicted of misdemeanor possession of a concealed weapon, was denied counsel and sentenced to 90 days in jail.[47] The Supreme Court once again held that the denial of counsel violated the Sixth Amendment.[48] The Court extended the right to counsel in misdemeanor cases, but only for those that resulted in actual incarceration.[49] By broadening the scope of the Sixth Amendment, the Court placed greater burdens on states to provide some misdemeanants counsel. This burden was compounded thirty years later in *Alabama v. Shelton*,[50] when the Supreme Court held that misdemeanor defendants who were subject to potential incarceration were entitled to counsel as well, "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."[51] Despite the expansion of the right to counsel in misdemeanor cases, legal scholars continue to observe that significant numbers of constitutionally-entitled misdemeanor defendants remain unrepresented.[52] Some argue that it has been the passing along of

44. *Gideon*, 372 U.S. at 344.
45. *Id.*
46. *See Argersinger*, 407 U.S. at 36–37.
47. *Id.* at 26.
48. *Id.* at 37–38.
49. *Id.* at 40.
50. 535 U.S. 654 (2002).
51. *Id.* at 658.
52. Hashimoto, *supra* note 11, at 1026, 1031.

the costs associated with appointed counsel that has impeded or created barriers to defendants asserting that right.[53]

The Supreme Court has decided two cases on the constitutionality of recoupment statutes—those statutes that require defendants to reimburse the government for court-appointed counsel—but it has not addressed the constitutionality of application or pre-appointment fees. In *James v. Strange*, decided the same day as *Argersinger*, the Court avoided addressing the Sixth Amendment challenge, striking down as unconstitutional the Kansas recoupment law on Equal Protection grounds because it did not provide criminal debtors the same protection as civil debtors.[54] Despite the unconstitutionality holding, the Court signaled that recoupment provisions serve legitimate state interests:

> We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs.[55]

State interests in recouping costs associated with indigent defense were particularly important in the face of "expanding criminal dockets."[56] The Court's observation was prescient.[57]

Misdemeanor prosecutions doubled between 1972 and 2006, while felony prosecutions waned.[58] Far more defendants are prosecuted in misdemeanor than felony courts.[59] A 2016 study of fourteen state courts estimated that misdemeanors comprised 75% of the total criminal

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53. *See* Hashimoto, *supra* note 11, at 1032; Anderson, *supra* note 34, at 325.

54. *James*, 407 U.S. at 139, 141–42.

55. *Id.* at 141.

56. *Id.*

57. *Id.*

58. Carla J. Barrett, *Adjudicating "Broken Windows": A Qualitative Inquiry of Misdemeanor Case Processing in New York City's Lower Criminal Courts*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 62, 63 (2017); *see also* Roberts, *supra* note 40, at 327; *see generally* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts (2009); *see generally* ISSA KOHLER-HAUSMANN, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing (2018). Recent research, however, has estimated that although misdemeanors outpace felonies three-to-one, the trend in arrests and cases filed has declined over the last twenty years. Stevenson & Mayson, *supra* note 25, at 737.

59. Walker, *supra* note 25, at 504–05.

caseload.[60] When the Court decided *Argersinger* and extended counsel to misdemeanor prosecutions, few states were providing indigents with appointed counsel.[61] Justice Powell, concurring in *Argersinger*, raised the concern that the burden of requiring appointed counsel might actually impede "[t]he ability of various States and localities to furnish counsel."[62]

Although the Court in *James v. Strange* avoided the Sixth Amendment right-to-counsel challenge to recoupment statutes, several state courts directly addressed that argument.[63] The California Supreme Court, in *In re Allen*, held its reimbursement statute violated the right to counsel:

> [W]e believe that, as knowledge of [the recoupment] practice has grown and continues to grow, many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the [Supreme] [C]ourt in *Gideon*. . . .[64]

Taking another approach, the New Hampshire Supreme Court advised its legislature that a recoupment statute would be unconstitutional under the state's constitutional right to counsel provision.[65] And the American Bar Association noted in 1968 that "reimbursement for counsel 'should not be required' because 'the practice raises serious questions,' including whether waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation."[66]

In addition to rejecting due process and equal protection challenges to the Oregon recoupment law, the Supreme Court, in *Fuller v. Oregon*, rejected the view articulated by the California Supreme Court in *In re Allen* that "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal

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60. LAFOUNTAIN ET AL., *supra* note 25, at 15; *see also* Natapoff, *supra* note 25, at 1320; *see also* Walker, *supra* note 25, at 504–05 (noting that the number of federal misdemeanor filings was strongly dependent on enforcement practices of local authorities); *see also* Silbey, *supra* note 25, at 13.

61. *See Argersinger*, 407 U.S. at 59 (Powell, J., concurring) ("Many have concluded that the indigent's right to appointed counsel does not extend to all misdemeanor cases.").

62. *Id.*

63. *See James*, 407 U.S. at 134. *But see, e.g.*, In re Allen, 455 P.2d 143, 144 (Cal. 1969).

64. 455 P.2d at 144.

65. Levine, *supra* note 10, at 203–04 (citing Opinion of the Justices, 256 A.2d 500, 500 (N.H. 1969)).

66. American Bar Ass'n Project on Standards for Criminal Justice, Providing Defense Services 58–59 (Approved Draft 1968).

representation might impel him to decline the services of an appointed attorney, and thus 'chill' his constitutional right to counsel."[67] The Supreme Court found the "reasoning [of the California Court was] wide of the constitutional mark."[68] Rather than focusing on the potential impediment of the costs, the Court focused on eligibility: "[A]n indigent who accepts state-appointed legal representation [and] knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel."[69] In arriving at this conclusion, the Court relied on a nuanced and presumed understanding of the impact of recoupment fees on defendants' decision-making, noting that "Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so."[70] Relying on no empirical data, research, or actual facts, the Court distinguished cases where it had invalidated laws that "placed a penalty on the exercise of a constitutional right" because that was the only purpose of those laws to "chill the assertion of constitutional rights by penalizing those who choose to exercise them."[71]

Several states have likewise upheld imposed reimbursement fees,[72] and in one instance a co-payment fee, on poor defendants to survive a chilling-effect challenge.[73] For these courts, the crafted statutes imposed fees on defendants who might be able to pay for some of their representation at the close of the case or later, and therefore did not chill defendants' ability to obtain appointed counsel.[74] Particularly relevant here, the Minnesota Court of Appeals upheld a $28 *co-payment* fee as not chilling the right to counsel as long as the co-payment was deducted from the later-imposed legal representation costs and provided for judicial waiver of the fee.[75] The discretion to waive the requirement and the

67. *Fuller*, 417 U.S. at 51.

68. *Id.* at 52.

69. *Id.* at 53.

70. *Id.* at 54.

71. *Id.* at 54.

72. Levine, *supra* note 10, at 214 ("Between 1974, when *Fuller* was decided, and 2005 appellate courts in Alaska, California, Florida, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nevada, North Carolina, North Dakota, Ohio, South Dakota, and West Virginia have entertained and dismissed challenges to their reimbursement statutes."); *see also* Gerald A. Bos & Eugene B. Livaudais, *Constitutional Law—Recoupment Statutes—Reimbursement of Indigent Defense Costs Upheld*, 49 TUL. L. REV. 699, 702–03 (1975) (providing a review of the recoupment statutes upheld by state and Supreme Court decisions).

73. *See* Donovan v. Commonwealth, 60 S.W.3d 581, 585 (Ky. Ct. App. 2001); *see also* State v. Webb, 591 S.E.2d 505, 513 (N.C. 2003) (holding that the appointment fee imposed after conviction was constitutional and did not have a chilling effect on a defendant's constitutional right to counsel and notice); *see also* State v. Cunningham, 663 N.W.2d 7, 10–11 (Minn. Ct. App. 2003).

74. *See Donovan*, 60 S.W.3d at 581; *see Cunningham*, 663 N.W.2d at 10–11.

75. *Cunningham*, 663 N.W.2d at 10–11.

narrow construction of the statute was consistent, the court concluded, with *Fuller* and the Sixth Amendment.[76] As long as the fee was not enforced against an indigent for whom it would result in manifest hardship, it survived a Sixth Amendment challenge.[77]

In 2003, the Minnesota legislature amended its co-payment statute, making the payment of a $50 co-payment for public defender assistance an obligation that was not waivable by the trial judge.[78] A constitutional challenge was leveled against the amended statute, in *State v. Tennin*, on the ground that "the statute violated [Tennin's] right to counsel under the Minnesota and United States Constitutions."[79] Tennin was charged with misdemeanor prostitution, and she indicated that her income was limited to $250 per month in public assistance.[80] Upon learning of the co-payment fee, she initially declined representation, but later she determined that she needed counsel and paid the $50 fee.[81] Applying the Minnesota Court of Appeals' reasoning in *Cunningham*, the Minnesota Supreme Court held its mandated co-payment statute unconstitutional because, without the waiver protection, the co-payment subjected poor defendants to manifest hardships and violated the right to counsel under the United States and Minnesota Constitutions.[82]

None of the challenging litigants were unrepresented at trial, including Tennin.[83] No challenge to the constitutionality of the cost-sharing statutes has relied on empirical data to determine the effect, if any, of the imposed fees on waivers of counsel.[84] Scholars continue to argue that "[t]he broadest challenge" to these laws is to assert that these fees and costs chill poor defendants from exercising the right to counsel,[85] and as Helen Anderson remarked, "[t]he fact that the *Fuller* Court found no unconstitutional chill from the narrowly tailored Oregon statute at issue in that case does not mean that no recoupment [or contribution] statute will cause an unconstitutional chill."[86] Whether these laws pose a

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76. *Id.* at 11.

77. *Id.* at 12.

78. State v. Tennin, 674 N.W.2d 403, 405–06 (Minn. 2004) ("The 2003 amended version of section 611.17, subdivision 1(c), instituted three significant changes: (1) the statute created a co-payment obligation upon appointment of the public defender rather than at disposition of the case; (2) it deleted the express language establishing a judicial waiver of the co-payment; and (3) it increased the amount of the co-payment.").

79. *Id.* at 405.

80. *Id.*

81. *Id.*

82. *Id.* at 405, 410–11.

83. *See Tennin*, 674 N.W.2d at 405; *see Fuller*, 417 U.S. at 40; *see James*, 407 U.S. at 129; *see* In re Allen, 455 P.2d at 143.

84. Anderson, *supra* note 34, at 360.

85. Levine, *supra* note 10, at 213.

86. Anderson, *supra* note 34, at 360.

"chilling" effect is an empirical question deserving of an empirical answer.

II. RECOUPMENT AND CONTRIBUTION PROVISIONS AND THE LIMITED SCHOLARLY RESEARCH ON APPLICATIONS FEES

Shortly after the Supreme Court issued its decision in *Gideon*, states and the federal government adopted recoupment statutes, and within 10 years of that decision, 17 states had implemented statutes to recover legal costs associated with indigent defense.[87] Today, every jurisdiction in the United States has either a statutory or judicially approved mechanism for contribution to or repayment of public counsel costs by defendants.[88] These "statutory recovery system[s] [are] designed to recoup all or some of the costs associated with the government's constitutional obligation to provide counsel to indigent criminal defendants."[89]

Litigation and scholarship have focused on the constitutionality and effect of recoupment or reimbursement laws with a range of challenges on equal protection, due process, and defenders' conflict of interest grounds.[90] The use of contribution, copayment, or application fees, particularly concerning misdemeanor defendants, and the potential for violating the Sixth Amendment has garnered far less attention.[91]

Without a national repository that gathers data on misdemeanor arrests, prosecutions, convictions, sentencing, and the appointment of counsel, little empirical research is available to examine these important questions.[92] "[Researchers] are left with the strategy of sampling court data from state systems" and waiver rates "look[] different from state to state, and different from one year to the next."[93] Most of the discussion

87. Bos & Livaudais, *supra* note 72, at 700.

88. Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1931 n.4 (2014) (citing Richard J. Wilson, *Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy, Bad Law*, 3 CRIM. JUST. 16, 16 (Fall 1988)); *see also* Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 218 (1998); *see also* Levine, *supra* note 10, at 193.

89. Holly, *supra* note 88, at 218 (citing generally Francis M. Dougherty, *Validity, Construction and Application of State Recoupment Statutes Permitting State to Recover Counsel Fees Expended for Benefit of Indigent Criminal Defendants*, 39 A.L.R. 4th 597 (1985)).

90. Failing to pay the debts associated with criminal justice fines, courts costs, and fees may result in incarceration, and in 2015, "at least ten lawsuits were filed against municipalities for incarcerating individuals in modern-day debtors' prisons." Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 486 (2016).

91. Wright & Logan, *supra* note 6, at 2078 ("The application fee debate, however, has lacked any analogous empirical evidence. This dearth of consumer-level data is part of a larger knowledge gap about the waiver of counsel more generally."); *see also* Anderson, *supra* note 34, at 360.

92. Wright & Logan, *supra* note 6, at 2080; Hashimoto, *supra* note 11, at 1025.

93. Wright & Logan, *supra* note 6, at 2080.

about chilling effects is speculative, based on anecdotal evidence about the likely behavior of rational actors. There is a dearth of empirical evidence about the actual effects of different recoupment and contribution schemes on waiver rates."[94]

Research by Ronald Wright and Wayne Logan provides the only research, to date, that concentrated on the effect of application fees.[95] Wright and Logan examined trends in the misdemeanor waiver rates after the implementation of the application fee in Minnesota and North Carolina.[96] They found that there was not a significant increase in the waiver rate in either state.[97] Wright and Logan determined that "[t]he arrival of the new application fee statutes in [North Carolina and Minnesota] did not profoundly shift the waiver rates as reflected in these aggregate court statistics."[98] These results were not as expected. Wright and Logan noted that trial court actors anticipated that the additional fee would significantly increase waivers of counsel and other studies showed that consumer behaviors were negatively influenced by co-payments in other settings, like medical appointments.[99]

In understanding these incongruent findings, Wright and Logan discounted the explanation that public defense organization administrators, who supported these fees, were correct when they suggested that the fees would not be large enough to affect waiver decisions.[100] Rather, they thought the results were more likely reflective of "the power of trial actors to blunt the effects of any new criminal justice policy, at least in the short run."[101] Trial judges might be "generous in granting waivers," or judges and defense attorneys can downplay the importance of the fee, which would result in fewer waivers.[102] No matter the reason for the findings, Wright and Logan recognized that "the court data [was] not well suited to answer the important questions about waiver."[103] Rather "[t]he people who matter most here—the defendants—cannot be heard through aggregate statistics about case processing."[104] Wright and Logan advocated for "track[ing] waiver decisions of individual defendants," including their reasons for choosing the appointment of public counsel, or waiving that right.[105]

94. Anderson, *supra* note 34, at 360.
95. Anderson, *supra* note 34, at 360.
96. Anderson, *supra* note 34, at 360.
97. Wright & Logan, *supra* note 6, at 2080–82.
98. Wright & Logan, *supra* note 6, at 2081.
99. Wright & Logan, *supra* note 6, at 2048–49.
100. Wright & Logan, *supra* note 6, at 2083.
101. Wright & Logan, *supra* note 6, at 2083–84.
102. Wright & Logan, *supra* note 6, at 2084.
103. Wright & Logan, *supra* note 6, at 2085.
104. Wright & Logan, *supra* note 6, at 2085.
105. Wright & Logan, *supra* note 6, at 2086.

Their "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."[106] Whether application fees chill the right to counsel remains an open empirical question.

III. FLORIDA, "CASH REGISTER JUSTICE,"[107] AND ITS "ABYSMAL FAILURE" IN FUNDING ITS COURTS AND COLLECTING FEES[108]

In an article published in 1996, Judge Scott J. Silverman summarized the history of and critiqued Florida's law on imposing and recouping attorney's fees from publicly represented criminal defendants.[109] In 1989, the Florida Supreme Court, in *Bull v. State*,[110] upheld Florida's recoupment statute, which advised defendants that they may be required to repay the costs of appointed counsel or if insolvent, repay those costs later when they are financially able.[111] Florida's recoupment law was originally enacted in 1963, the same year that *Gideon v. Wainwright*[112] was decided, and it was intended to allow the State of Florida to impose a lien on defendants' properties for those convicted, as well as acquitted.[113] In 1977, the Legislature substantially rewrote the law to apply only to defendants found guilty, and the imposed lien was to be recorded in the county's, not the State's, favor at sentencing as a statutory lien.[114] The law also provided defendants with the right to notice and hearing on the amount of the repayment lien.[115]

At the time that Judge Silverman wrote the article, the lien and assessment of costs was not mandatory, but discretionary, and it was the duty of the assigned public defender to request the imposed fees.[116] The practice, however, was that public defenders were not "uniformly

106. Wright & Logan, *supra* note 6, at 2087.

107. REBEKAH DILLER, BRENNAN CTR. FOR JUST., THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 1 (2010), https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf?nocdn=1 (providing a comprehensive review of Florida's reliance on imposing fees and fines on criminal defendants, the burdens of those costs without examining the associated consequences, and recommendations to repair Florida's broken system).

108. Scott J. Silverman, *Imposing and Recouping Attorneys' Fees from Publicly Represented Criminal Defendants*, 70 FLA. B.J. 18, 26 (1996) (concluding that "[i]n practice and with few exceptions, Florida's recoupment statute is an abysmal failure."); *see also James*, 407 U.S. at 133 (observing that in the two years the Kansas law was in effect, it collected only $17,000, but cost the state $400,000).

109. Silverman, *supra* note 108, at 18.

110. 548 So. 2d 1103 (Fla. 1989).

111. *Id.* at 1105; Silverman, *supra* note 108, at 20.

112. *See* 372 U.S. at 335.

113. Silverman, *supra* note 108, at 20.

114. Silverman, *supra* note 108, at 20.

115. Silverman, *supra* note 108, at 20.

116. Silverman, *supra* note 108, at 24.

comply[ing] with the statute."[117] Judge Silverman suggested the "legislature might consider either amending or abolishing the law, since statewide compliance is infrequent and unpredictable."[118] Particularly, he asserted that the Legislature should adopt "a fee or lien schedule [that] could streamline the statute, reduce the necessary paperwork, promote uniform statewide compliance, fund additional public defenders, and preserve scarce judicial and public defender resources."[119]

Whether Judge Silverman's article was the impetus for the change in Florida law is unknown, but in 1996, the Florida Legislature "added more than 20 new categories of financial obligations for criminal defendants and, at the same time, eliminated most exemptions for those who cannot pay."[120] Florida's criminal justice system relies on these imposed fees and costs to operate the court system, and these new fees and costs were adopted without examining whether cumulative debt promotes recidivism and hinders reentry.[121]

As part of the larger move to burden criminal defendants with fees and costs,[122] the Legislature adopted an application fee, which initially required that a $40 fee be paid into the county repository at the time the affidavit of indigency was filed.[123] Originally, the law allowed for judicial waiver of the fee, i.e., the trial judge could review "the financial information contained in the affidavit, [and determine] that the fee should be reduced, waived, or assessed at the disposition."[124] In 1997, the Florida Legislature directed the clerks of court to transfer the collected application fees to the Indigent Criminal Defense Trust Fund, but permitted the clerk to retain a percentage for administrative costs.[125] The Legislature also amended Florida Statute § 27.56 to allow the application fee to be included in the judgment assessed against defendants following conviction[126] and amended Florida Statute § 948.03 (1997) to provide that payment of the indigency application fee to be made a condition of probation or community control.[127]

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117. Silverman, *supra* note 108, at 24.

118. Silverman, *supra* note 108, at 26.

119. Silverman, *supra* note 108, at 27.

120. DILLER, *supra* note 107, at 1.

121. DILLER, *supra* note 107, at 1. Although beyond the scope of this Article, legal scholars have identified collateral consequences associated with recoupment and contribution fees (Colgan, *supra* note 88, at 1930) and a link to the cycle of poverty and incarceration; *see, e.g.*, Christopher Hampson, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1025 (2016); *see* Sobol, *supra* note 90, at 516.

122. DILLER, *supra* note 107, at 5–6 (providing a comprehensive chart of year-to-year "[l]egislative [a]ction [e]xpanding [c]ourt-[r]elated [d]ebt" from 1997 to 2009, in Florida).

123. 96-232 Fla. Laws 865.

124. *Id.*

125. 97-107 Fla. Laws 5.

126. *See id.* at 8.

127. *Id.* at 11.

In 2003, the Legislature amended the provisions so that the clerk of the circuit court, not trial judges, determined indigence.[128] In 2004, the Legislature revised the law to allow the clerks of court to contract with third parties to make assessments about indigency using a form created by the Florida Supreme Court and allowing defendants to seek review of the clerks' decisions to the court having jurisdiction over their criminal cases.[129] In the first instance, however, it was the clerk who assessed indigency, providing assistance to those who are unable to complete the affidavit. Indigency, in 2004, meant individuals' earnings were equal to or 200% below the federal poverty level based on the number of individuals in the defendants' households.[130] The legislature limited the "determination of indigence [to] a ministerial act of the clerk and not a decision based on further investigation or the exercise of independent judgment by the clerk."[131]

It was in 2004 that the Legislature removed the authority for judicial waiver, mandating payment of the fee along with the filing of the financial affidavit, or within seven days after filing.[132] Florida stands in stark contrast to the other forty-nine states as the only state that does not authorize trial judges to waive or reduce the fee.[133] That same year, the law required clerks of court to notify sentencing judges of non-payment, and further required judges to assess the unpaid application fee as part of the sentence or as a condition of probation or judgment.[134] The statute was amended in 2005 to ensure that non-paying indigent defendants were not refused counsel or other required due process services, and limited the administrative fee retained by the clerk to two percent.[135] The Legislature instituted a "presumption that [individuals are] not indigent if [they] own[], or [have] equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of $2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not

128. 2003-402 Fla. Laws 17.
129. 2004-265 Fla. Laws 14.
130. *Id.* at 15.
131. *Id.* at 14–15.
132. *Id.*
133. Wright & Logan, *supra* note 6, at 2053.
134. 2004-265 Fla. Laws 15.
135. 2005-236 Fla. Laws 11.

exceeding $5,000."[136] In 2008, the Legislature raised the application fee to $50.[137]

Again burdening the clerks, the Florida Legislature in 2010 obligated them to conduct record reviews of property and motor vehicle ownership to evaluate indigence claims, and that legal representation costs must be determined and paid within ninety days after disposition of the case, notwithstanding any appeals.[138] Two years later, the Legislature removed this obligation making the review of property and motor vehicle records permissive, so clerks "may" conduct these reviews, but they were not required to do so.[139] No further changes have been made to the statutes. Florida still mandates the payment of a $50 non-waivable application fee to determine whether defendants are poor enough for the appointment of the public defender, whose services carry a minimum and mandated fee of $50 in misdemeanor cases.[140]

No Florida appellate court has struck down as unconstitutional the application fees or the legal representation costs as violating the Sixth Amendment.[141] More pointedly, no court has even discussed the constitutionality of the imposed fees as infringing upon or chilling the assertion of the right to counsel.[142] Several Florida appellate courts have reversed the imposed minimum public defender costs when defendants were not given notice or an opportunity to contest the amount of the lien.[143] Others have steadfastly held that the statutory minimum fees,

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136. *Id.*; *see* John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1175 (2013) (surveying and critiquing existing eligibility criteria for the appointment of counsel by particularly arguing that the use of the federal poverty standards are an unreliable and inappropriate standard for determining indigency).

137. 2008-111 Fla. Laws 5.

138. 2010-162 Fla. Laws 9, 12.

139. 2012-100 Fla. Laws 3; 2012-123 Fla. Laws 4.

140. FLA. STAT. § 27.52(1)(b) (2018).

141. Anderson, *supra* note 34, at 333 n.48 (opining Florida's law that imposes the $50 application fee without allowing judicial waiver is likely unconstitutional); Hanson v. Passer, 13 F.3d 275, 282 (8th Cir. 1994) (granting habeas relief when partially indigent defendant denied counsel for failure to first pay $1,000).

142. Contribution fees may also lead to conflicts of interest when administered by public defender agencies. *See* Anderson, *supra* note 34, at 369. Since these are legislated and mandatory fees, public defenders in Florida do not face this particular conflict of interest. In cases where defenders are requesting costs above the statutory minimum, however, the conflict of interest is poignant.

143. *See, e.g.*, Chestnut v. State, 145 So. 3d 193, 194 (Fla. Dist. Ct. App. 2014) (remanding with directions either to strike the $100 indigent legal assistance lien imposed pursuant to section 938.29, Fla. Stat. (2009) or give the defendant the opportunity to contest); *see, e.g.*, Youman v. State, 112 So. 3d 693, 694 (Fla. Dist. Ct. App. 2013) (striking a $100 indigent legal assistance lien imposed under section 938.29(1)(a), Fla. Stat. (2008) without informing the defendant of his right to contest the amount of the lien); *see, e.g.*, G.D. v. State, 42 So. 3d 327, 327–28 (Fla. Dist.

including the $50 application fee, are mandatory, providing for no trial court discretion and therefore notice and opportunity to contest the imposed amounts is not necessary.[144] The First District, in an *en banc* decision, receded from its own precedent that required notice and hearing to contest the mandatory public defender fees.[145] Holding that the public defender lien and the $50 application fee are minimum requirements imposed by statute, the *Mills* court concluded that the amount is "binding on the court and the defendant alike" and "no hearing is necessary or appropriate."[146] The minimum fee of $100 applies to persons convicted of felonies, and $50 for those convicted of misdemeanors.[147] The *Mills* court observed that the minimum fee and the defendant's liability "for payment of the assessed application fee under [section] 27.52" are mandatory.[148] "The Legislature requires that this $50 application fee be assessed as part of the sentence pursuant to Section 983.29, if not paid prior to disposition of the case."[149]

Unlike felony defendants, constitutionally-entitled misdemeanor defendants frequently waive their right to counsel and proceed *pro se*.[150] "The only available nationwide data on representation rates in misdemeanor cases come from a Bureau of Justice Statistics (BJS) survey of inmates confined in local jails."[151] This study revealed that 30% of jailed misdemeanor defendants, i.e., defendants who were constitutionally-entitled to counsel, reported that they were not

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Ct. App. 2010) (reversing the public defender's fee imposed pursuant to § 938.29, Florida Statutes (2008) because the statute required notice and an opportunity to object to the mandatory fee).

144. Dabel v. State, 79 So. 3d 873, 875 (Fla. Dist. Ct. App. 2012) (holding that because the public defender application fee is "clearly mandatory and not within the trial court's discretion, no notice was necessary; the statute itself provides notice that any applicant for court-appointed counsel is required to pay $50"); *see also* State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (reasoning that a defendant receives constructive notice of the imposition of statutorily mandated fees by virtue of their being published in the Laws of Florida or the Florida Statutes).

145. All judges on the First District participated in the hearing, and in this instance the decision was nearly unanimous with only a single judge concurring in part and dissenting in part. Mills v. State, 177 So. 3d 984, 988 (Fla. Dist. Ct. App. 2015).

146. *Id.* at 987.

147. *Id.* at 986.

148. *Id.* at 988.

149. *Id.* (citing §§ 938.29(1)(a); 27.52 (1)(b), Fla. Stat. (2018)); *see also* Alexis v. State, 211 So. 3d 81, 83 (Fla. Dist. Ct. App. 2017) (reversing the trial court's order imposing fees over the statutory minimum without a hearing to contest the amount).

150. Hashimoto, *supra* note 11, at 1019, 1024; Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 442 (2007) (noting that less than 0.5% of federal felony defendants represented themselves in court).

151. Hashimoto, *supra* note 11, at 1024 (citing INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN LOCAL JAILS (2002), https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/4359/version/2).

represented by counsel.[152] A study of Florida misdemeanor defendants found that 66% appeared at arraignment without counsel, and only in a third of those cases did the trial judge inform defendants of the disadvantages of proceeding without an attorney.[153] Of more significance to this article and study, most waived the right to counsel only after being informed that they would have to pay $50 to file an application for a public defender and an additional, minimum fee of $50 for representation.[154] Although informative, the Florida study did not interview defendants to learn why they proceeded without counsel,[155] or said another way, the research did not "[l]isten[] in the right places [to] hear the answers from criminal defendants themselves."[156]

IV. EMPIRICAL STUDY OF THE EFFECT OF THE $50 APPLICATION FEE

Although some evidence suggests that misdemeanor defendants are waiving counsel due to "prohibitively high fees,"[157] there is no direct empirical data that supports the argument. Scholarly work has largely relied on speculation and anecdotes rather than empirical data in understanding waivers of counsel. Even the singular empirical exception by Wright and Logan observed that relying on aggregated court statistics added little to our understanding of the effect of application fees.[158] This study begins to explore that empirical void by conducting a semi-replication of the *Three-Minute Justice* court observation study in Orange County, Florida followed by interviews with defendants to listen to their voices on the reason that they proceeded without counsel.[159]

A. *Three-Minute Justice*

In 2010, undergraduate students collected information on the processing of cases in misdemeanor courts in 21 Florida counties.[160] After being instructed on the right to counsel in misdemeanor court

152. Hashimoto, *supra* note 11, at 1024 (citing INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN LOCAL JAILS (2002), https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/4359/version/2).

153. SMITH & MADDAN, *supra* note 4, at 15.

154. SMITH & MADDAN, *supra* note 4, at 18.

155. SMITH & MADDAN, *supra* note 4, at 14.

156. Wright & Logan, *supra* note 6, at 2087.

157. *See* Hashimoto, *supra* note 11, at 1032; *see, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 5–6 (2018) (highlighting the case of Larry Thompson, who was arrested in Orange County, Florida for failing to pay mounting fines, fees, and costs associated with a traffic charge, which added more debt to an individual who did not have a meaningful way to pay); *see also* Wright & Logan, *supra* note 6, at 2061.

158. Wright & Logan, *supra* note 6, at 2083.

159. SMITH & MADDAN, *supra* note 4.

160. SMITH & MADDAN, *supra* note 4, at 14.

proceedings, students were provided a 16 page court observation instrument to collect data on misdemeanor cases at arraignments.[161] In addition to due process measures, students collected information on waivers of counsel and the announcement of the $50 application fee for appointment of the public defender.[162] They found that "[m]ost often public defenders or trial judges at the beginning of arraignment proceedings announced the costs associated with choosing public counsel."[163] Since Florida does not allow trial judges to waive the $50 application fee, the fee, along with any other representation costs, are imposed on defendants "as special conditions of probation or reduced to a lien on [defendants'] property."[164] During this study, one observer witnessed a courtroom where defendants were given a rights-waiver form that included a standard assessment of $50 for a plea at arraignment and $350 in assessments for public defender costs upon entry of a plea *after* arraignment.[165] In other words, defendants were penalized for entering a not guilty plea after arraignment.[166]

As the focus of the study in *Three-Minute Justice* was not on the impact of the application fee on defendants' right to counsel, the study did not examine whether defendants who were notified about the fee were more or less likely to seek public counsel. Moreover, the *Three-Minute Justice* report was an observation-only study; defendants were not interviewed about their decisions to proceed with or without counsel.[167]

Even without this insight, the findings were interesting. Few defendants were in custody at the time of arraignment; most were released on their own recognizance.[168] Most defendants were represented at arraignment by a public defender (49.4%) followed by those who represented themselves (37.4%) and private counsel (13.2%).[169] In larger counties, however, defendants were significantly more likely to proceed without counsel, and in smaller counties, defendants were significantly more likely to hire a private attorney ($p<0.05$).[170] Another interesting finding from the study was that defendants who were represented by counsel (public or private) were significantly more likely to enter not guilty pleas at arraignment ($p<0.05$).[171]

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161. SMITH & MADDAN, *supra* note 4, at 14.
162. SMITH & MADDAN, *supra* note 4, at 18.
163. SMITH & MADDAN, *supra* note 4, at 18.
164. SMITH & MADDAN, *supra* note 4, at 18.
165. SMITH & MADDAN, *supra* note 4, at 17.
166. SMITH & MADDAN, *supra* note 4, at 17.
167. SMITH & MADDAN, *supra* note 4, at 14.
168. SMITH & MADDAN, *supra* note 4, at 21.
169. SMITH & MADDAN, *supra* note 4, at 21 t.2.
170. SMITH & MADDAN, *supra* note 4, at 21 t.2.; A p-value of 0.05 or less shows that there is some association among the variables.
171. SMITH & MADDAN, *supra* note 4, at 23 t.9.

Orange County was one of the 21 counties included in the *Three-Minute Justice* study.[172] For this Article, the data from Orange County was filtered from the larger study and analyzed.[173] Of the 1,649 total cases in the study, 66 were collected in Orange County, Florida (Orlando). The majority (54.7%) of observed cases involved non-DUI driving crimes, including driving with a suspended license, followed by possession of marijuana or open container of alcohol or disorderly conduct (25.0%). Property (9.4%), battery and assault (1.6%), and all other crimes (9.4%) rounded out the remaining offenses. Most defendants (85.9%) were charged with only a single crime and almost all defendants (97%) were out of custody at their arraignments. Forty percent were out on bond, 31% were released on their own recognizance, and 12.5% were released after posting a cash bond. The remaining (10.9%) were out on other forms of release, ranging from a notice to appear (4.7%) or a summons to appear (6.2%).

Most (70.4%) defendants were represented by counsel, and all but one of these defendants was represented by court-appointed (or public) counsel. Nearly 30% represented themselves. Defendants were most often advised of their rights via playing a video recording (76.6%) or a written form (73.4%). Most defendants (76.6%) entered a plea of guilty or no contest at arraignment. Defendants' arraignments in Orange County were as quick as the state average with 84.4% of arraignments—from advisement of charges, entering a plea and imposing a sentence—taking three minutes or less. The most commonly imposed punishments were fines and/or court costs. Nearly 63% were required to pay court costs and 58% were required to pay a fine. Jail was infrequently imposed with only one person being sentenced to jail (time-served).

B. *Replication in Orange County, Florida*

Since 2007, until the most recently available data in June 2017, there has been a steady decline in county criminal filings and dispositions in the State of Florida.[174] Chart 1, County Criminal Filings and Dispositions FY 2007–08 to FY 2016-17, reveals this trend.[175] This pattern of declining filings and dispositions affected Orange County, Florida as well. In 2010–11, there were 48,354 misdemeanor, ordinance, driving and driving-under-the-influence filings and by 2016–17 that incidence

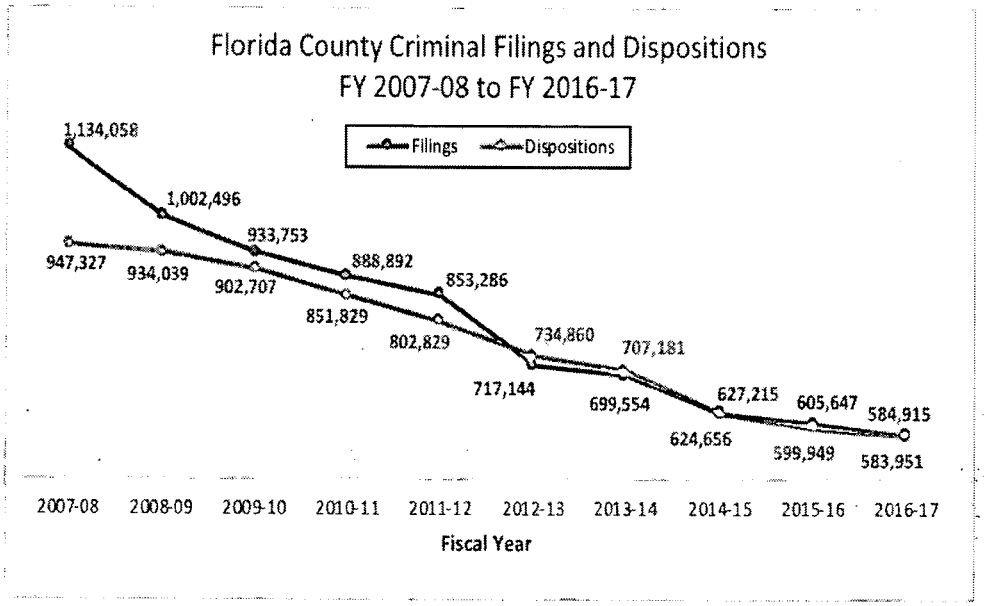
172. SMITH & MADDAN, *supra* note 4, at 14.

173. The disaggregated data from the Three-Minute Justice study is on file with the author.

174. This Florida trend is consistent with the findings from recent research which found that nationally, the number of misdemeanor arrests and filings have declined markedly over the last twenty years. Stevenson & Mayson, *supra* note 25.

175. 2016–2017 was the most recent statistical data available from Florida. *See* Florida Office of the State Courts Administrator, FY 2016–17 Florida Statistical Reference Guide, 7-1, http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-7_County-Criminal.pdf

rate had fallen to 30,834.[176] In 2010–11, there were 45,314 dispositions in Orange County,[177] and in 2016–17, there were only 30,857 dispositions.[178]



To assess whether court processing had changed, two undergraduate students, using the same court observation instrument that was used to collect data for the *Three-Minute Justice* report, observed and collected information on misdemeanor court proceedings in July 2018[179] (i.e., eight years later) in Orange County (Orlando), Florida. Before conducting their court observations and data collection, students completed CITI[180]

176. *See id.*

177. *See* Florida Office of the State Courts Administrator, FY 2010–11 Florida Statistical Reference Guide, 7–1, https://www.flcourts.org/content/download/218418/1976454/Reference Guide10-11-Ch7.pdf.

178. *See* Florida Office of the State Courts Administrator, FY 2016–17 Florida Statistical Reference Guide, 7–1, http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-7_County-Criminal.pdf.

179. Immediately before data collection, the elected state attorney in Orange County implemented a new bail policy, which granted some non-violent misdemeanor release without bond. *See* Press Release, ACLU of Fla., *Florida Campaign for Criminal Justice Responds to Ninth Judicial Circuit Bail Reform Announcement* (May 16, 2018), https://www.aclufl.org/en/press-releases/florida-campaign-criminal-justice-reform-responds-ninth-judicial-circuit-bail-reform.

180. The students successfully completed the social-behavioral-educational research course offered through the CITI Program. This course introduces students to "regulatory and ethical issues important to the conduct of research involving human subjects." CITI PROGRAM, Social-Behavioral-Educational (SBE) Basic, https://about.citiprogram.org/en/course/human-subjects-research-2/ (last visited Mar. 19, 2019).

training to understand the importance and ethical limits of human subjects' research. Later, they learned the basics of criminal procedure and constitutional rights. They were also trained to efficiently use the *Three-Minute Justice* observation instrument.[181]

1. General observations

The observers collected information from only two court proceedings, so this replication provides some baseline comparison, but the findings are not generalizable. Bailiffs in both courtrooms gave defendants two forms: (1) an Application for Criminal Indigent Status, and (2) a Plea of Guilty or No Contest to a Criminal Charge in County Court form. Defendants were advised to read and complete the forms. Even if they wanted to waive counsel, or enter a not guilty plea, bailiffs explained that filling out the forms in advance would save time. This is where the similarities between these two court hearings diverged.

Court Room A. In the first courtroom, the bailiff explained some of the rights to the group of defendants and he emphasized the importance of the proceedings. In addition, a pre-recorded message by a judge was played for defendants advising them of their constitutional rights. The recording was dated, informing defendants that the application fee for appointed counsel was $40, not $50. The fee was correctly identified, however, on the application forms handed to defendants. The video was played a second time in Spanish for the several Spanish-speaking defendants in the courtroom. It appeared to the observers that few defendants listened to the video, as they were advised to fill out their forms while the video played.

A male assistant public defender spoke to the group before the trial judge took the bench. He advised defendants of the purpose of the arraignment proceedings, their rights, their options, and his availability to represent them. He did not mention the fee. He explained that for some charges, like driving under the influence, there would not be any offers to enter a plea. The public defender advised the group that if they were not citizens, the entry of a plea could result in deportation, and he advised that they speak to an immigration lawyer and that the public defender's office was available to assist. He expressed his willingness to speak with defendants (without official appointment) before the trial judge took the bench, and several defendants informally spoke with him about their cases.

The trial judge, a female, then advised the group of their options, cautioned them against discussing the facts of their cases, and reminded them to complete the forms, even if they were not needed. The trial judge called defendants up one at a time to discuss their cases. Overall, this

181. *See* SMITH & MADDAN, *supra* note 4.

judge asked defendants questions and ensured that they understood the proceedings. For one, non-English speaking defendant, the trial judge took pains to ensure that he understood the proceedings and their importance before accepting his plea. For another, the judge was uncomfortable with the defendant entering a plea to a criminal charge, and she asked the prosecutor to reduce the charge to a civil infraction, which did occur. The trial judge did not emphasize the application fee or cost associated with the appointment of counsel.

Court Room B. In the second courtroom, the bailiff did not advise defendants of any of their rights, and no video recording was played to explain the proceedings or the defendants' constitutional rights. The female public defender told the group of defendants that they may already be appointed a public defender. She explained their options at an arraignment proceeding, which included the entry of a plea of not guilty, guilty or no contest. She advised that many individuals qualified for pretrial diversion. She informed the group that petit theft could be enhanced to a felony on the third conviction. She also informed the group that an adjudication, but not the withholding of adjudication, on a marijuana charge would result in a one-year driver's license suspension.. Furthermore, she explained that the presiding judge was a "senior" judge who was filling in that day and that, if the senior judge was unwilling to offer to withhold adjudications, they should enter pleas of not guilty and return to court because the assigned judge would withhold adjudication on possession of marijuana charges.

Although "speed" and "timeliness" of the proceedings were emphasized in both courtrooms, the female judge in the second courtroom particularly stressed that the "fastest way to get you out of here is to complete the forms and be ready when your name is called." This judge interacted with individual defendants, but she did not ensure that defendants understood the importance of the proceedings, or their right to counsel. In most instances, she mentioned counsel after the defendants expressed a desire to enter a plea, and then apparently as an afterthought she stated, "you know you have the right to an attorney."

For the first case in this second courtroom, which was a city ordinance violation, the trial judge mistakenly thought the charge was not criminal, so when the defendant said he wanted to talk to an attorney, the trial judge told him that he was not entitled to a public defender. The defendant was homeless, and the prosecutor reduced the charge to a civil infraction with a fine of $230. The judge accepted the defendant's plea, but she did not advise him of any other rights. In accepting his plea, she noted only that he appeared alert and intelligent. Despite being homeless, the defendant said that he could pay the $230 fine within sixty days.

2. Observational data

For this preliminary replication of the *Three Minute Justice* study, the two judges were white females and 29 total cases were observed. Although the sample size is small, the 29 observed cases revealed few improvements in the processing of cases since 2010, and at least with regard to the appointment of counsel, due process worsened.

While in 2010, 54.7% of defendants were charged with non-DUI (driving under the influence) driving crimes (including driving with a suspended license), in 2018, 41.2% (n=12) of processed and resolved cases were non-DUI driving crimes, ranging from driving with a suspended license and reckless driving to driving without a proper tag. Neither trial judge in the 2018 hearings accepted a plea at arraignment when defendants were charged with DUI. The short- and long-term consequences for a DUI conviction are steep in Florida,[182] and the trial judges provided defendants the opportunity to hire counsel or consult with appointed counsel. Again, similar to 2010, the next most common serious charge in this 2018 replication was possession of marijuana (20.7%, n=6), followed by petit theft (6.9%, n=2), resisting an officer without violence (6.9%, n=2), violation of probation (6.9%, n=2), alcohol-related offenses (6.9%, n=2), and battery and assault (3.4% n=1). Most defendants were charged with only a single crime (58.6%, n=16.9), but far fewer than in 2010 (85%), and all defendants were out of custody at their arraignments.[183]

One of the starkest differences between the two samples concerned representation by counsel. In 2010, most (70.4%) of defendants were represented by counsel in Orange County. In 2018, few (17.2%, n=5) were represented by counsel. Two were represented by private counsel, and three others were represented by the public defender. Over 80% (n=24) represented themselves. All defendants were provided a written waiver of rights in 2018, and as mentioned above, defendants in one courtroom heard a video-recorded message from a judge advising them of their options and rights.

In this 2018 study, all defendants were handed an application for the appointment of the public defender upon entry into the courtroom. The application advised defendants that there was a fee associated with applying for counsel and it required defendants to complete an affidavit which inquired about the number of their dependents, their take-home income, and any other income, including social security or unemployment benefits. Defendants were asked to list their total

182. Florida Highway Safety and Motor Vehicles, *Florida DUI and Administrative Suspension Laws*, https://www.flhsmv.gov/driver-licenses-id-cards/education-courses/dui-and-iid/florida-dui-administrative-suspension-laws/ (last visited Nov. 8, 2019).

183. The bond information was not available for the defendants in 2018.

liabilities and debts and answer three questions about receiving temporary or permanent government assistance. Finally, defendants were asked if they posted bond or if the bond was posted by someone else.

During individual interactions with the trial judges in 2018, few defendants were advised of their right to counsel (37.9%, n=11)), asked if they wanted to hire counsel (31.0%, n=9), asked if they wanted counsel (55.2%, n=16), or asked if they could afford counsel (58.6%, n=17). Fewer defendants (34.5%, n=10) were advised of the importance of an attorney, the benefits of counsel (13.8%, n=4), and the disadvantages of proceeding without counsel (13.8%, n=4).

Similar to 2010, most defendants (65.5%, n=19) in 2018 entered a plea of guilty or no contest at arraignment. In accepting the plea, the trial judges most often determined whether the plea was voluntary (73.9%, n=21) and if they understood that they were giving up their right to trial (69.6%, n=20). But, many defendants were not advised of those rights. In 2018, fewer were advised that by entering a plea they were giving up their right to an attorney (52.4%, n=15), the right to cross examination (27.8%, n=8), the right to present a defense (23.5%, n=7), and the right to have the state prove the case against them (18.8%, n=5). Few defendants (4.2%, n=1) were advised of their right to an appeal or that deportation was a possible consequence of entering their plea (34.8%, n=10).

No defendant was sentenced to jail. In 2018, most defendants were fined (37.9%, n=11) and/or charged costs (37.9%, n=11). The remainder of defendants were given a pretrial diversion option. The total costs and/or fines ranged from $147 to $700. Only one individual was sentenced to probation.

In 2010, 85% of defendants' cases were resolved—from advisement of charges, entering a plea, and imposing a sentence—in three minutes or less. In 2018, judges were a bit slower, but arraignments remained quick for (65.2%, n=18) of defendants whose cases were completed in three or fewer minutes. See Table 1, 2010–2018 Comparison of In-Court Observations.

Table 1 2010–2018 Comparison of In-Court Observations

	2010 (n=64)	2018 (n=29)
Percent Represented by Counsel	70.4%	17.2%
Video-Informed of Rights	76.6%	50.0%
Written Rights Form	73.4%	100.0%
Plea of Guilty and No Contest	76.6%	65.5%
Sanction: Fine and/or Costs	63.0%	56.0%

C. *Defendant Interviews*[184]

In 2010, defendants were not interviewed about their decision to waive counsel.[185] In 2018, none of the 29 total defendants were interviewed following the above-described and observed court proceedings. Court observers returned to later court proceedings on several different days, observed the proceedings to identify defendants, and interviewed them.

The defendant interviews were focused on the reasons that defendants waived counsel and assessing whether the application fee chilled the assertion of their right to appointed counsel. In these later court proceedings, defendants were handed the same application and affidavit form for the appointment of counsel—as described above—as they entered court. In some courtrooms the video-recorded rights were played, and in others, bailiffs and/or the assistant public defenders advised defendants generally about the court proceeding and their rights.

Observers interviewed only those defendants who were sentenced after entering guilty or no contest pleas and waiving counsel. They followed those defendants out of the courtroom and into the hallway, outside the hearing of the proceedings, other defendants, and court personnel. Each defendant was asked if they would be willing to answer a few questions, taking no longer than five to ten minutes. The observers explained that they were not associated with the courts, but a local university working on a research project. Interviewers assured the defendants of anonymity and explained that the interview was voluntary. Consistent with observations of defendants who were summoned to arraignment, the vast majority of interviewed defendants were black or Hispanic. None were white/Caucasian. Of the fourteen interviewed defendants, eight were Hispanic (three females, five males), and six black/African American (one female, five males). The most common charges of those interviewed were possession of marijuana and petit theft. Between five and ten defendants declined to participate.

After interviewing the first 11 defendants, the observers and authors reviewed the transcribed responses and noted prominent themes. Many defendants waived counsel because they did not perceive a "need" for a lawyer, most understood that they had a right to counsel, but some did not know about the application fee, despite each defendant being handed an "Application for Criminal Indigent Status" form upon entry into court.

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184. IRB approved this research as part of a larger project that included interviewing defendants about their reasons for waiving counsel.

185. There were ten county-criminal judges assigned in Orange County, Florida in 2018. Observers interviewed defendants who appeared before five different judges at arraignment hearings. Judges in Orange County rotate presiding over arraignment hearings, so it was not possible to interview defendants who appear before all judges in the narrow time frame (Summer 2018) of data collection.

Given these themes, the remaining three interviewed defendants were asked additional, clarifying questions. The entire script, the initial interview questionnaire, and the additional clarifying questions are found in Appendix 1.

Introductory questions determined whether defendants were aware of the outcome of their case (the entry of their plea, adjudication, and sentence). A second set of questions focused on their waivers of counsel, including most importantly why they waived counsel. A third group of questions focused on their knowledge of the court system and their case, particularly, their knowledge about the possible consequences associated with entering a plea and their satisfaction with the court and court personnel.

The clarifying questions, which were asked of only three defendants, focused on why they thought that they did not need a lawyer, and if they thought there were advantages of proceeding with a lawyer, or disadvantages of proceeding without one. If they knew about the application fee, defendants were asked if they knew what the fee was for, if it affected their decision about accepting an appointed lawyer, and if they could afford the fee. Those who were unaware of the fee were asked if they read the forms that were given to them in court and if knowing about the fee would that have affected their decision about being appointed a lawyer. Finally, the remaining defendants were asked if they were aware of any potential consequences or problems that might result from entering their plea; for example, with employment, housing, or licensing.

The primary hypothesis tested by this preliminary research was that defendants may waive counsel due to the chilling effect of the application fee, that the cost would dissuade poor defendants from using a lawyer. To fully understand defendants' decisions, explicit themes[186] and concepts[187] that naturally emerged in coding the defendants' answers were identified regarding their understanding of the proceedings, their right to counsel, the application fee and potential consequences of entering a plea, their reasons for waiving counsel, and their satisfaction with the court.[188] The themes and concepts that materialized are discussed in detail below.[189]

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186. Themes are sentences or words that are counted as a unit. BRUCE L. BERG, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES 246–47 (4th ed. 2001).

187. Concepts are counted units that are more "sophisticated type of word counting[.]" *Id.*

188. Defendants' answers were coded using their literal terms, called in vivo coding by A.L. Strauss. *See* ANSELM L. STRAUSS, QUALITATIVE ANALYSIS FOR SOCIAL SCIENTISTS 58 (1987).

189. The interviews were semi-structured, meaning that they generally followed the same format, but interviewers were able to ask clarifying or follow-up questions when appropriate to understand the defendants' answers. The primary researcher and two interviewers coded each of the defendant's answers to identify patterns. Unlike other textual or content analysis, the coding of the defendants' answers was not controversial or subject to much interpretation. Despite the

1. The results-oriented focus of defendants

As with the two trial judges, defendants focused on resolving their cases quickly and at that moment with little or no attention to potential, future consequences from their day in court. Two defendants did not know the maximum punishment that they faced from the charges; an additional defendant reported that the trial judge informed him of the general "consequences" of entering a plea, but he did not elaborate on those consequences. A fourth defendant presumed that jail and background checks were a potential consequence. The remaining defendants were unaware of any other consequences of entering their pleas:

> Interviewee #1: "When I was sitting down I was thinking about my current job and I'm only 20, so I'm not going to have a real career at the moment. I'm still in college, but my current job, *I wonder if they're going to send this to them or my job and then my job and talk to me about that but if they do, I like where I work, but if they fire me, I guess I don't want to work there anyway.* [Defendant didn't understand the difference between adjudication and withholding adjudication] I always thought adjudication was like a slap on the wrist or you come back and you have this timeframe and you serve or money to pay or drug tests, or time to be wasted. I didn't want to go down the route where I had to stop smoking for months at a time or let alone more than one. [Is that why you didn't take the pretrial diversion] Yeah, *I probably should have asked about pretrial diversion* and the no contest for the pretrial diversion and see about community service with them, but what's the whole point of me being here in the first place. We have to redefine what guilty means then."
>
> Interviewee #2: "But, *I'm grateful for what I did get because when the situation happened, I could get a suspended license.*"
>
> Interviewee #3: "No [Judge didn't tell him of any consequences]."
>
> Interviewee #7: "No... *He didn't say anything other than the jail time and the maximum amount of fines.*"
>
> Interviewee #8: "*No ma'am he just gave us that straight up.*"

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straightforward nature of the defendants' answers, we compared our individual coding of the answers to ensure intercoder reliability. We also used two-dimensionality to describe the defendants with their gendered and racial appearance.

> Interviewee #9: "Ma'am *I really don't know*. It was just so quick."
>
> Interviewee #10: "He did, but *I really wasn't paying attention*. I was just happy."

The defendants approached the conclusion of their cases in a results-oriented manner, focusing on the immediacy of the sanction, which was in every case a fine (except for Interviewee #1, who negotiated community service to replace his fine). When asked if they knew their sanction and how their case resolved, defendants responded with some of the following answers:

> Interviewee #1: "Yes, to probation officer to sign up for *community service*."
>
> Interviewee #2: "Basically, withheld the cannabis and gave me the paraphernalia charge. Dismissed the cannabis and withheld the paraphernalia, and *gave me a $273 fine*."
>
> Interviewee #4: "*I had to pay $273*."
>
> Interviewee #6: "I don't know I just think the costs of everything afterwards is kinda outrageous... *Almost $400 so*. . .for petty theft of a box of chicken."
>
> Interviewee #10: "Ended pretty good. No contest, I don't really know really [know the original charge, I guess] resisting the arrest of an officer. *I just have to write an apology letter*. [No fine?] I did, but I'm from out of state, *so my bond paid for it*."
>
> Interviewee #1: "It ended in uh, *just me paying fines*, no contest to possession of cannabis."

Interviewee # 10 downplayed the payment of his fine; the trial judge took his cash bond as payment. Overall, defendants focused on the immediate penalty, overlooking or not understanding the potential for future consequences of entering a plea.

2. The Indirect "Chill" of the Application Fee

All of the defendants understood either that they had the right to counsel or the right to court-appointed counsel, however, four indicated that they were not offered counsel. Despite knowing that they had the right to counsel, each interviewed defendant proceeded without counsel.

Few defendants directly mentioned the $50 application fee or the costs associated with appointed counsel as the reason for waiving counsel. Eight were unaware of the fee, even though in every courtroom,

defendants were handed the "Application for Criminal Indigent Status" form, which advised defendants of the $50 application fee and defendants completed along with their financial information. Two of the three defendants who were asked clarifying questions indicated that they were not informed by the judge of the fee, but one stated that he had read about the fee in his paperwork.

One defendant expressly and directly identified the fee as a factor in his decision to waive counsel:

> Interviewee #9: "Yes, I believe 50 dollars, I believe. [Did it factor into your decision?] Yes, it did. If I'm getting a public defender that means I don't have the money to afford it."

An additional defendant, stated that the $50 application fee factored into his decision not to get an attorney:

> Interviewee #12: "The money situation, yeah."

A general inability to afford counsel was the reason given by two other defendants:

> Interviewee #4: "I can't afford one and I didn't really think I would need one today."
>
> Interviewee #9: "Because I lost my job due to this and I don't have money."

The majority of defendants, however, asserted that they waived counsel because they did not think that they *needed* a lawyer or downplayed the seriousness of the charges, claiming that they were able to represent themselves:

> Interviewee #3: "Because it is a *little situation* so I could've just done it by *myself.*"
>
> Interviewee #4: "Because I figured it was something petty so I *don't need* it."
>
> Interviewee #6: "I just feel like *I didn't really need one.* I understand what the charges and everything [sic] but I just feel like I didn't really need one for *something so small.*"
>
> Interviewee #7: "It was my *first offense*, so I don't think *I needed one.*"
>
> Interviewee #8: "I didn't really... *It didn't say that I needed one.*"
>
> Interviewee #10: "I really *didn't need one.*"

> Interviewee #11: "I was ready for a public defender depending on the outcome, but I just wanted to *try it on my own*."

This also was true of the three defendants who were asked clarifying questions. Each stated that they did not *need* a lawyer. When they were asked why and whether a lawyer would have helped, the three defendants did not perceive the criminal charges as serious and saw no reason to get a lawyer:

> Interviewee #12: "I feel like I didn't need one. [Why?] It was a misdemeanor. [Would a lawyer have helped? Advantages if you had a lawyer?] No because I was red handed, so there's no point... even a lawyer couldn't get me off. [Did you not want to waste the money on it?] Yeah."

> Interviewee #13: "Because I thought it wasn't needed really... it was a petty charge. Yeah I just felt like it wasn't needed. It was nothing really major. [Any advantages or disadvantages to having or not having an attorney?] Not with this case."

> Interviewee #14: "I didn't see a reason to. [Do you know any advantages or disadvantages to having an attorney?] Not for possession of cannabis... not really."

3. Perceptions of Fairness

Defendants' perceptions on the fairness of the proceedings and judge were mixed. For those that were not satisfied, they concentrated on the belief that possession of marijuana should not be criminalized and were frustrated by the judges' inability to dismiss the charges:

> Interviewee #1: "No. I would *prefer not to have been arrested* and wasted everyone's time. . . . I would prefer it would be nothing, because we treat alcohol the same way. I mean like an open container would make sense, but for marijuana and open container doesn't really make sense. No, *I thought [the judge] would be able to just completely drop charges*, just completely in general, just due to that, especially because of the state that we are in, so I never knew that they're going to charge me. I don't want to pay any money whatsoever towards something like this."

> Interviewee #2: "*I don't think marijuana should be illegal*, to me when it comes to that, I don't think it was handled fairly. But, I'm grateful for what I did get because when the situation happened, I could get a suspended license. He was getting ready to take me in, but he started listening to me and I'm a veteran and this is why I smoke the marijuana, and this

> is the reason that I smoke the marijuana, there is no intent to sell on my record."

The satisfied defendants focused on their immediate, and again results-oriented, perceptions of fairness. They perceived the court as fair and they were satisfied because other defendants received the same sanction, a fine:

> Interviewee #4: "Yes. It was my first offense and I've never done anything like this before. It was under 20 grams, *so I think it was pretty reasonable just to pay the fine.*"
>
> Interviewee #5: "Yes. *From what I heard everybody got the same thing...* on my case everybody got the same."
>
> Interviewee #7: "Yeah, but he [co-defendant] doesn't. His was just more expensive. We did the exact same thing we were together. [In this instance, the trial judge imposed a larger fine on the male co-defendant than the female codefendant; she thought the fine was fair, and he did not due to the inequity]."
>
> Interviewee #11: "Yeah for the most part because the charge. [sic] What it is related to is something that is still illegal, so I mean it is going to be treated like any other illegal drug. *So I mean for the outcome I think it's fair.*"

V. DISCUSSION AND CONCLUSION

Although this is a preliminary study with a small sample size, the findings begin to shed light on the growing problem of unrepresented defendants in misdemeanor courts and the reasons that they waive counsel. Advocates advance that application or registration fees chill access to counsel, and this research lends some support to their argument, but it does so indirectly.

First, and glaringly, the percentage of defendants who were unrepresented in 2018 grew substantially as compared to 2010. Given that there has been a steady decline in the overall filing and disposition of misdemeanor cases (see Table 1),[190] the increase in defendants proceeding without counsel is alarming, and in the opposite direction of the recommendation by the *Three-Minute Justice* report on Florida's

190. *See* Florida Office of the State Courts Administrator, FY 2016–17 Florida Statistical Reference Guide, 7-1, http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-7_County-Criminal.pdf.

misdemeanor courts.[191] The reason for fewer and fewer defendants benefiting from counsel was the primary question under study.[192]

Defendants were aware of their right to counsel, but they proceeded without counsel, entering pleas and resolving their cases. The overarching focus seemed to be on expediency and efficiency, getting cases revolved quickly and moving on. Defendants' short-sighted, results-oriented approach was reinforced by trial judges. Trial judges emphasized the quickness of the proceedings. They did not adequately advise defendants of their rights, nor were they advised of the advantages of using a lawyer or the disadvantages of proceeding without one. This lack of advisement from trial judges is significant; it undermines the gravity of the offenses. Without proper advisement, defendants are left with the incorrect presumption that legal counsel is dispensable.

Defendants were handed plea and indigency forms. They were advised to fill out the forms whether they would be used, or not. Trial judges advised defendants that those with uncompleted forms would be moved to the end of the docket. Focusing on the quickest way to get out of court likely impresses upon defendants that misdemeanor cases are unimportant and encourage them to focus on resolving their cases quickly. This may explain why defendants likewise focused on an expedient outcome, rather than appreciating the possible short- and long-term consequences of their pleas. During interviews, some defendants admitted that they did not pay attention to the judge or advisements, but were simply happy to leave with only a fine.

Defense lawyers and public defenders tend to slow down the pace of proceedings, focusing on defendants' rights and due process.[193] Every defendant reported that they knew about their right to counsel, but most presumed that they did not need one. A few defendants expressly identified their inability to pay the application fee as a reason for waiving counsel. Obviously, for these defendants, the fee posed a direct chilling effect on the assertion of their right to counsel.

Most defendants explained that they did not "need" a lawyer or implied that they did not need one because the charge was minor. The three defendants, who were asked clarifying questions, directly connected the perceptions of need and insignificance. Even without

191. *See* SMITH & MADDAN, *supra* note 4, at 20.

192. Another striking pattern was that most defendants summoned and appearing at arraignments were Hispanic or black/African-American. Although the lack of diversity among those hauled into court for minor crimes was not the focus of this particular research, it has been the focus of a number of others. *See* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 9 (2016). The reason for this stark contrast should be studied further.

193. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 27 (1979); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 14 (1964).

directly stating that the fee influenced their decision, the other defendants' reasons reflect a balancing of economies. In deciding that they did not need a lawyer, defendants tacitly asserted that lawyers were not worth the cost. Since there was a cost, or a presumed cost as some defendants noted, they balanced whether it was worth the money to pay for an attorney with the risk of representing themselves. Balancing costs in everyday life poses different risks than those associated with the decision to represent oneself in court. When deciding whether to hire a lawn service, the balance is one of time and effort against money. It is not that most people cannot mow their own lawns, they simply don't want to. Handling one's own criminal court case, however, involves much greater complexity, with potentially severe long-term consequences that are absent from other mundane decisions.

The interviewed defendants did not fully appreciate the potential long-term consequences associated with entering misdemeanor pleas and trial judges did not inform them of any of those consequences. Defendants were left with the misperception that their misdemeanor charges were minor.[194] These criminal offenses were not civil traffic crimes and many were punishable by up to one year in jail.[195] Some crimes, such as petit theft and driving under the influence, may be prosecuted as felonies upon a third offense.[196] Misdemeanor convictions can carry significant collateral consequences. These include the loss of driving privileges, removal from public housing, reduced educational and employment opportunities, revoked professional licenses, and potential deportations.[197]

Scholars have noted the increasing fees and costs passed on to defendants[198] and the immediate and long-term consequences of misdemeanor adjudications.[199] Future research should focus on the indirect connections between the chilling effect of fees, the lack of

194. *See How Even Misdemeanor Violations Can Have Lasting Consequences on Job Prospects*, PBS NEWSHOUR (July 5, 2015, 1:53 PM), https://www.pbs.org/newshour/show/even-misdemeanor-violations-can-lasting-consequences-job-prospects; Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; BORUCHOWITZ ET AL., *supra* note 58, at 12–13.

195. *See, e.g.*, FLA. STAT. § 775.08(2) (2018).

196. In Florida, for example, defendants charged with their third petit theft or DUI may be prosecuted for a third-degree felony, which carries a punishment of up to five years in prison. *See* FLA. STAT. §§ 812.014(3)(c), 316.193(2)(b) (2018).

197. BORUCHOWITZ ET AL., *supra* note 58, at 12, 28, 34; Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1141, 1154 (2015); Natapoff, *supra* note 25, at 1325–26; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 261–62 (2015).

198. DILLER, *supra* note 107, at 1, 5–6.

199. BORUCHOWITZ ET AL., *supra* note 58, at 12–13; Murray, *supra* note 197, at 1143–44; Natapoff, *supra* note 25, at 1316–17.

adequate advisement of rights and consequences, and defendants' decisions to waive counsel. In the present study, a few defendants expressly waived counsel because they could not afford it. Other intimated the balancing of economies, deciding that they did not need a lawyer. One defendant observed that fees and fines for his own charges had noticeably increased. Interviewee #3 stated: "Well back then it was my first charge, back in 2013. So, I was eligible [for] pretrial diversion. Now this one is my second one so I'm not eligible to do it. From 2013 to now, yeah. In 2013 there were barely any fines."

Without defense lawyers involved in misdemeanor cases, oversight often falls short in the misdemeanor courts, and there is limited assurance that defendants are adequately informed. Prosecutors and judges may ensure that there are no egregious constitutional violations, but they rely on minimal information from police reports. Defendants tend to focus on factual, rather than legal guilt. Challenges to the admissibility of evidence, ensuring the constitutionality of searches and seizures, and confirming the sufficiency of evidence have been truncated in these courts because of the absence of defense lawyers. As noted before, defense lawyers do indeed slow down the process of justice, but for the good reason of ensuring fairness and due process.[200] Most defendants, even those charged with misdemeanor offenses, "need" lawyers, whether they realize it or not. Society and the judiciary likewise need defense lawyers to guarantee integrity of the courts.

Going forward, more research should be dedicated to understanding why defendants waive their constitutional right to counsel, continuing to examine whether the crush of mounting fees, including application fees, chills the assertion of the right to counsel and if trial judges are inadvertently sending defendants the wrong message that misdemeanor crimes are unimportant and lawyers are unnecessary. Additionally, research should explore whether adequately informed defendants—those told about the disadvantages of proceeding without counsel and the potential for short–term and long–term consequences of entering pleas to misdemeanor charges—might make different decisions, including taking advantage of their right to counsel, or at a minimum consulting counsel in court. Moreover, well-informed defendants might be more likely to consult counsel, or perceive the need for counsel, if that counsel is actually free.

200. *See* FEELEY, *supra* note 193, at 27; *see* Packer, *supra* note 193, at 14.

Appendix 1

Script: Hello, my name is _____ with University of Central Florida, and I am working on a research project. We are trying to evaluate due process, the right to counsel in misdemeanor courts, the reasons that individuals waive their rights, and their satisfaction with the court process.

We would like to ask you questions about your court experience – it should take only 5-10 minutes. To be able to look over the results later, we need to audio tape the interview. After we transcribe the interview, we will not link your name to your statement and we will destroy the audio file. We will not share your name with anyone. We hope to write articles or reports about the court process. We won't use your name and we won't identify you in articles or reports. We'll use what you say to write the report.

We are not working for anyone in the court system. You do not have to talk to us at all. This is completely voluntary. We would like to know about your experience, but there is no benefit to you or your case. If you agree to answer questions and change your mind that is perfectly okay. Just tell us you don't want to answer our questions, or simply walk away. You can ask us whatever questions that you like before you decide.

Would you be willing to answer a few questions and be recorded?

Case Questions:

Was your case finished today? How did it end? How did you plead? To what charges? What was your sentence? Were you convicted (adjudicated), or not?

Questions about Waiving Counsel

1. Why didn't you have an attorney?
2. Were you offered an attorney?
3. Were you advised that you had the right to an attorney?
4. Did you know that you could get a court–appointed attorney?
5. Were you told about an application fee? If so, do you know how much the fee was? Did that factor into your decision about getting a court–appointed attorney?
6. Have you ever used an attorney before?
    a. If yes, do you think having an attorney made a difference?
    b. If yes before, why not now?

Knowledge about Case/Courts

1. Have you come to court before? If yes, was this time in court different?

2. Do you know the maximum punishment or sentence for the misdemeanor that you were charged with?

3. Did the judge tell you about any other consequences from pleading guilty/being found guilty today? Do you know of any other consequences?

Court Satisfaction

Were you treated fairly by the Judge?

Prosecutor?

Court Deputy?

Do you think the outcome was fair? Why, or why not?

Do you feel like you understood your rights, and the rights that you gave up? For example, the right to a trial.

Additional Clarifying Questions[201]

1. Defendants who state that they didn't think they needed a lawyer:
   a. Why, do you think that you didn't need a lawyer?
   b. What do you think a lawyer would or would not do?
   c. Do you think that there might be advantages of proceeding with a lawyer, or disadvantages of proceeding without one?
2. If the defendants knew about the application fee:
   a. Do you know what the fee was for?
   b. Did the fee affect decision about getting appointed a lawyer?
   c. Could you afford the fee?
3. If the defendant was unaware of the fee:
   a. Did you read the forms that were given out in court?
   b. If about the fee would the fee have affected your decision to proceed without counsel?
4. Are you aware of any potential consequences or problems that might result from entering your plea? For example, any effect on your employment, housing or licensing?

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201. Additional questions that were not asked should focus on the difference it might make if defendants were actually offered counsel:

a. Would an "offer" of an attorney make a difference?

b. If an attorney was available in court, would you have, at least, spoken to an attorney, even briefly?