

**DEBTORS' PRISON: VIRGINIA'S POOR SOURCE FOR  
FUNDING APPOINTED COUNSEL**

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### INTRODUCTION

Late in the August morning, the Alexandria, Virginia, court docket is nearing its halfway point and the judge is getting anxious for his lunch break. He does not like to stay on the bench too long if it can be helped. On a bench near the door, a young mother is wrestling her impatient toddler and waiting for her name to be called as her attorney, one of the Public Defender's newer hires, dashes from courtroom to courtroom, brokering plea deals, requesting continuances and almost begging for reasonable sentences for his many clients *du jour*. The attorney plops onto a bench as the clerk calls the mother's name and her attorney pops back up to take his seat at the defense table. The mother is a little slower as she quickly asks her attorney's law clerk to hold her son and makes her way to the open seat at the table.

The mother is neatly dressed in her work uniform. The prosecutor explains that she is in court because she has violated her probation. The woman has not been paying her court costs. Her attorney explains that she just started working at the local drugstore and has made a few payments, albeit meager compared to what she owes. The judge is unsympathetic, growling that he would feel better if she were in jail. Her attorney tries to explain that she cannot pay the court from jail. Begrudgingly, the judge agrees to give her a chance to prove herself, promising that if the payments do not increase, jail will inevitably follow.

Before the clerk has finished reading the next defendant's name and the mother has retrieved her wriggling child, the attorney has headed off to champion another defendant's cause. The mother sighs and heads for the door, wondering aloud whether she should have accepted the Public Defender. The question is valid, now that, despite her indigence, she is in violation of her probation because she cannot afford to reimburse the court for the cost of her attorney.

## NO “FREE LUNCHES” IN VIRGINIA

The idea of having a Public Defender is a common concept. Most Americans are familiar with the idea that if a criminal defendant cannot afford a lawyer, one will be appointed to represent him. Myriad television programs have ingrained the idea that, for reasons having to do with something about Miranda, along with the right to remain silent, anyone who is arrested has a right to a lawyer, whether or not he or she can afford one.<sup>1</sup> The protections afforded a suspect in custody change depending on whether or not the suspect has or requests an attorney.<sup>2</sup> However, in the mind of a defendant, the choice of whether to accept a court-appointed lawyer or make do alone may come down to a mere question of money. Chronically indigent defendants who have previous convictions, or whose friends or family have experience in the criminal justice system, often know that there is no such thing as a free lawyer, at least not in Virginia.

Virginia statute provides for “repayment of representation costs by convicted persons” as part of the cost of prosecution, which is typically assessed by the court as part of sentencing.<sup>3</sup> Payment of these costs is one of the conditions of probation that make up nearly every sentence issued by state courts. This means that defendants who do not pay their court costs will go back to jail. Because the court has already determined that the defendant is poor enough to qualify for an appointed attorney in the first place, it is seldom the case that a few days or months in jail will change the defendant’s financial situation in any way that facilitates paying such costs.<sup>4</sup> Thus,

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<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>2</sup> See e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981), *Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387 (1977), *Miranda*, *supra*, n. 1.

<sup>3</sup> Va. Code Ann. §19.2-163.4:1 (2004).

<sup>4</sup> Virginia’s code provides that “the court shall determine from oral examination of the accused or other competent evidence whether or not the accused is indigent...[C]ounsel shall be appointed for the accused if his available funds are equal to or below 125 percent of the federal poverty income guidelines prescribed for the size of the household of the accused by the federal Department of Health and Human Services.” Va. Code Ann. §19.2-159 (2007). The 2008 guidelines specify poverty as having an annual income of \$10,400 or below for a single person household. 73 Fed. Reg. 15, 3971-3972 (Jan. 23, 2008). The income amount increases \$3,600 for each additional person in the

court mandated reimbursement begets probation violation, which leads to increased jail time, lost wages or lost employment, and further delinquency in payment.

Virginia's practice of jailing criminal defendants because of their poverty is ripe for reevaluation and revision or elimination. It should be unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution and forces appointed attorneys onto ethically questionable ground. Further, it increases court expenses without increasing the likelihood of recovering those costs. It also leads to an unnecessarily increased probability of probation violation. Finally, the policy places undue hardship on impoverished convicted criminals, decreasing the likelihood of rehabilitation.

### **THE CONSTITUTIONAL RIGHT TO COUNSEL**

The original text of the Constitution included very sparse protections of what the colonists viewed as their fundamental rights. At the conclusion of the Constitutional Convention, many of the framers objected to the final product because of its lack of a Bill of Rights.<sup>5</sup> There was, however, some argument that most states had included procedural protections in their own laws, thus inclusion of such rights in the federal Constitution would be redundant and unnecessary in light of the small number of federal criminal defendants at that time.<sup>6</sup> However, many insisted on a Bill of Rights, including protections for those accused of criminal activities. Thus, the rights of defendants have been important from the inception of the United States.

The right to counsel is guaranteed by the Sixth Amendment to the Constitution, which was included in that Bill of Rights. "This constitutional right to counsel is 'one of the safeguards

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household. *Id.* Thus, a single mother with two children would qualify for appointed counsel if her yearly income were below  $\$22,000((10400 + (3600 \times 2)) \times 1.25)$ .

<sup>5</sup> James J. Tomkovicz, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 15-16 (2002).

<sup>6</sup> *Id.* Virginia's Constitution, interestingly if not surprisingly, has never included a right to counsel. *Betts v. Brady*, 316 U.S. 455, 465 (1942).

of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty”<sup>7</sup> The protections of the Sixth Amendment, however, apply only to federal defendants.<sup>8</sup> Defendants in state courts’ right to counsel, as guaranteed by the Constitution, did not develop until the 20<sup>th</sup> Century.

According to the 14<sup>th</sup> Amendment, ratified in 1868, state court defendants were guaranteed due process of law.<sup>9</sup> Nevertheless, it was 1932 before the Supreme Court found the Fourteenth Amendment to guarantee a right to counsel.<sup>10</sup> Even then, the *Powell* Court’s holding was limited only to the particular facts of that case, or a similar one.<sup>11</sup> The decision was significant because “[i]t recognized that at least for some defendants in state prosecution due process includes both the right to retain a lawyer and the right to have a lawyer furnished by the state.”<sup>12</sup> Further, the Court left open the possibility that noncapital defendants and even most, if not all, state criminal defendants may have a right to appointed counsel.<sup>13</sup>

The *Powell* Court based its decision on both history and the necessities of fundamental fairness. It looked to colonial statutes and found general rejection by the United States of the

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<sup>7</sup> Tomkovicz, *see supra* n.5, at xxiii (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

<sup>8</sup> Tomkovicz, *see supra* n. 5, at xxiii-xxxiv (citing *Barron v. Baltimore*, 32 U.S. 243 (1833)).

<sup>9</sup> U.S. CONST. amend. XIV.

<sup>10</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). The petitioners were among a group of young, illiterate black males accused of rape in Alabama. The judge ostensibly appointed the entire bar to represent the defendants, but no particular attorney came to their assistance until the day of the trial. They were quickly convicted and sentenced to death. The Supreme Court held that the petitioners had a right to retain counsel under the Sixth and Fourteenth Amendments, which had been violated. It also found that, had they been unable to retain counsel, the court should have appointed counsel for them.

<sup>11</sup> *Id.* at 71-72.

<sup>12</sup> Tomkovicz, *see supra* n. 5, at 25.

<sup>13</sup> *Id.*

common law practice of denying counsel to those accused of the most serious crimes.<sup>14</sup> The *Powell* majority further stated that

[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law....He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>15</sup>

Following its landmark decision in *Powell*, the Court further expanded the Sixth Amendment right to counsel in *Johnson v. Zerbst*.<sup>16</sup> In *Johnson*, the Court fully ignored the likely intent of the drafters of the Bill of Rights, that those who wished to retain counsel would be allowed to do so, and established a right to have counsel appointed for those who could not afford their own.<sup>17</sup> Thus, “unless an accused makes a valid waiver, he must be represented by a lawyer whom he has secured or, if he cannot retain legal assistance, by one that the government has appointed.”<sup>18</sup>

Four years after *Johnson v. Zerbst*, the right to counsel appeared to reach its limit. The Supreme Court stated that “[t]he due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment....”<sup>19</sup> Instead, the

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<sup>14</sup> *Powell*, see *supra* n. 10, at 60-66.

<sup>15</sup> *Id.* at 68-69.

<sup>16</sup> See *supra* n. 7.

<sup>17</sup> Tomkovicz, see *supra* n. 5, at 26.

<sup>18</sup> *Id.* at 27.

<sup>19</sup> *Betts v. Brady*, see *supra* n. 6.

*Betts* Court gave a totality of the circumstances test in which only cases requiring particular legal sophistication merited the right to appointed counsel in state court.<sup>20</sup>

When the circumstances—the complexities of the case, the abilities of the accused, and the jeopardy posed by the charges—demonstrated that a trial would not be fair unless the accused had expert assistance, the Constitution demanded that states appoint counsel. When the relevant factors indicated that an unaided defendant could adequately conduct the defense—that is, where a fair trial was possible without counsel—due process did not demand state-provided representation.<sup>21</sup>

Rather than make its own blanket determination, the Court decided that state courts and legislatures could determine themselves what due process required.<sup>22</sup> In this way, “[t]he case-by-case, ‘special circumstances’ approach did not deny counsel to any who truly needed help, whereas a *per se* counsel requirement would provide protection for some who needed none.”<sup>23</sup>

In 1963, the Supreme Court heard the case of Clarence Gideon, a Florida prisoner whose crime and procedural history were nearly identical to those of *Betts*.<sup>24</sup> The outcome was almost exactly the opposite, extending the right to appointed counsel to defendants in state court.<sup>25</sup> The Supreme Court found that its holding in *Betts* was both a departure from the precedent established by such cases as *Powell v. Alabama* and contrary to the “obvious truth” that a fair

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<sup>20</sup> See *id.* *Betts* involved a mere bench trial with the principle issue being one of witness credibility and, consequently, did not require the assistance of a defense attorney. The Court concluded that, “in the totality of these circumstances, a trial without the assistance of counsel was not fundamentally unfair.” Tomkovicz, *see supra* n. 5, at 29.

<sup>21</sup> Tomkovicz, *see supra* n. 5, at 29-30.

<sup>22</sup> *Betts*, *see supra* n. 6, at 466.

<sup>23</sup> Tomkovicz, *see supra* n. 5, at 30.

<sup>24</sup> Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Betts*, *see supra*, n. 6.

<sup>25</sup> See *Gideon*, *see supra* n. 24.

trial requires that counsel be appointed for indigent defendants.<sup>26</sup> The *Gideon* Court touted the importance of equal justice for all defendants, stating that “[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>27</sup>

There was no dissent, in the Supreme Court at least, to *Gideon*’s grand expansion of the right to counsel.<sup>28</sup> “One consistent trend [in the right to counsel] has been evident from start to finish—the history of the right to counsel has been one of constant, almost relentless expansion.”<sup>29</sup> For over 300 years, the importance of counsel in ensuring fair trials and just outcomes has been increasingly recognized, and the right to counsel has expanded accordingly.<sup>30</sup> Since *Gideon*, however, that expansion has largely ceased, giving way to increasingly narrow interpretations of the Sixth and Fourteenth Amendments.<sup>31</sup>

### **THE SUPREME COURT APPROVES REIMBURSEMENT**

Following the Supreme Court’s decision in *Gideon*, states began providing attorneys for indigent defendants. Funding such counsel is extremely costly, however, particularly in light of recent estimates that “nearly eighty percent of criminal defendants receive the services of counsel at government expense.”<sup>32</sup> States have attempted to mitigate these costs by passing along

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<sup>26</sup> Tomkovicz, *see supra* n. 5, at 33.

<sup>27</sup> *Gideon*, *see supra* n. 24, at 344. “The Supreme Court was well aware that those who were being denied assistance under the *Betts* rule were not only the poor. A disproportionate number of them were members of minority groups. The recognition of an unqualified right to appointed counsel was a means of ensuring equal justice for all. In this respect, *Gideon* was not an isolated decision. It was one of a number of rulings by the Warren Court aimed at promoting equality for criminal defendants and others who were socially and legally disadvantaged.” Tomkovicz, *see supra* n. 5, at 34.

<sup>28</sup> *See Gideon*, *see supra* n. 24.

<sup>29</sup> Tomkovicz, *see supra*, n. 5, at 34.

<sup>30</sup> *Id.* at 36.

<sup>31</sup> *Id.* at 36.

<sup>32</sup> Bill Whitehurst, *Report and Recommendation #110 of Standing Committee on Legal Aid and Indigent Defendants regarding ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*, 1 (Aug. 9, 2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf>.



some of the expense to indigent defendants in various ways.<sup>33</sup> Some states require all defendants to pay a “contribution fee” or a set amount as part of the request for appointed counsel.<sup>34</sup> In other states, only convicted defendants pay a fee, called recoupment or reimbursement, to compensate the state for its expenditure on their behalf.<sup>35</sup> Virginia allows recoupment, providing that “the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall be taxed against the person defended as a part of the costs of the prosecution...”<sup>36</sup>

Indigent defendants attempted to challenge recoupment in various ways, including arguing that such statutes constitute an unconstitutional constraint on the Sixth Amendment right to an attorney and a violation of equal protection. While some challenges met with success,<sup>37</sup> the Supreme Court eventually upheld the constitutionality of such statutes.<sup>38</sup>

In *Fuller v. Oregon*, the petitioning defendant argued that Oregon’s reimbursement statute violated his constitutional right to equal protection under the law in two ways.<sup>39</sup> First, the petitioner relied upon previous Supreme Court holdings that rejected recoupment if defendants were not afforded the same procedural protections as other civil debtors.<sup>40</sup> The Court rejected this argument noting that “[t]he convicted person from whom recoupment is sought...retains all

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<sup>33</sup> See, e.g., *id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Va. Code Ann. § 19.2-163.4:1 (2004).

<sup>37</sup> See, e.g., *James v. Strange*, 407 U.S. 128 (1972). The Supreme Court invalidated Kansas’s recoupment statute based on the Equal Protection Clause of the Fourteenth Amendment. Recoupment was assessed as a civil debt, but defendants did not enjoy the same procedural protections afforded other civil debtors. The Court did not reach the question of whether all statutory recoupment schemes were unconstitutional. The Court held that “[s]tate 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.” *Id.* at 141-142.

<sup>38</sup> See *Fuller v. Oregon*, 417 U.S. 40 (1974).

<sup>39</sup> *Id.* at 46-50.

<sup>40</sup> *Id.* at 46-48 (citing *James v. Strange*, see *supra* n. 37).

the exemptions accorded other judgment debtors.”<sup>41</sup> The Court also made repeated mention of the fact that recoupment was only sought from defendants who had gained the ability to pay for counsel subsequent to receiving appointed counsel,<sup>42</sup> and that the defendant retained the opportunity to show that the debt would “impose manifest hardship,” and thus be relieved from the obligation.<sup>43</sup> Second, the defendant argued that the statute impermissibly discriminated between defendants who were convicted and those who were acquitted and thus violated the convicted defendants’ right to the equal protection of the laws.<sup>44</sup> The Court found this distinction permissible because of the great inconvenience already imposed on the wrongfully accused.<sup>45</sup> The Court also rejected an *amicus curiae* argument that the Oregon statute created an “impermissible discrimination based on wealth.”<sup>46</sup> In doing so, the Court again emphasized that the statute “is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.”<sup>47</sup>

The defendant also argued that Oregon’s recoupment statute violated the Sixth Amendment rights guaranteed by *Gideon*.<sup>48</sup> He contended that “a defendant’s knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus ‘chill’

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<sup>41</sup> *Id.* at 47.

<sup>42</sup> *See generally, id.*

<sup>43</sup> *Id.* at 47.

<sup>44</sup> *Id.* at 48-50.

<sup>45</sup> *Id.* at 49-50. The Court pointed out that “[t]his legislative decision [to free acquitted defendants from potential liability] reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.”

<sup>46</sup> *Id.* at 53 n.12.

<sup>47</sup> *Id.* at 53.

<sup>48</sup> *Id.* at 51-54.

his constitutional right to counsel.”<sup>49</sup> Calling Oregon’s statute “fundamentally different” from other laws that penalized the exercise of constitutional rights, the Court again referred to the statute’s assurance that only those who could afford to pay would be made to do so.<sup>50</sup> *Fuller v. Oregon*, now thirty-four years old, is that last word the Supreme Court issued on recoupment or contribution fees for indigent defendants.

### **MATERIAL DIFFERENCES FROM APPROVED RECOUPMENT SCHEMES**

While *Fuller* may seem to indicate that Virginia’s recoupment statute is constitutionally sound, in fact the *James v. Strange* Court specifically limited its ruling and declined to determine whether Virginia’s recoupment was likewise constitutional, leaving the door open to a subsequent challenge.<sup>51</sup> Two important differences from the statute approved in *Fuller* reveal the shortcomings of Virginia’s recoupment scheme and indicate that the statute’s constitutional validity may not be a closed question. The Supreme Court’s subsequent decision in *Faretta v. California* altered the face of the Sixth Amendment, creating an increased need to provide indigent defendants with a genuine choice between appointed counsel and self-representation. Moreover, Virginia’s statute lacks the procedural protections that the *Fuller* Court touted as keeping it from equal protection or Sixth Amendment violations.

#### **The *Faretta* Right to Self-Representation**

One likely contributor to the trend against expansion of the Sixth Amendment is defendants’ rejection of its guarantee to counsel. In 1975, the Supreme Court held that the Sixth

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<sup>49</sup> *Id.* at 51.

<sup>50</sup> *Id.* at 52-54. The Court did seem almost to lower the income ceiling above which defendants would be forced to pay for their own counsel, pointing out that, “[a] defendant in a criminal case who is just above the line separating the indigent from the non-indigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to should the expense of their legal defense...” *Id.* at 53-54.

<sup>51</sup> *James v. Strange*, see *supra* n. 37 at 132-133.

and Fourteenth Amendments include not only a right to counsel, but also a right to refuse counsel and represent oneself.<sup>52</sup> The *Faretta* Court held that “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”<sup>53</sup> While the Court recognized that “it is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,”<sup>54</sup> it nevertheless held that defendants must have the opportunity to refuse counsel if they so desired.

The Court’s decision in *Faretta* was significant because it not only allowed defendants to waive the right to counsel, but also gave them a separate right to self-representation.<sup>55</sup> Following *Faretta*, courts not only have to ensure knowing, intelligent and voluntary waiver of the right to counsel, but also have to tread lightly to avoid pressuring the defendant into abandoning either the constitutional right to counsel or the now-constitutional right to act as one’s own counsel.<sup>56</sup>

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.<sup>57</sup>

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<sup>52</sup> *Faretta v. California*, 422 U.S. 806.

<sup>53</sup> *Id.* at 819.

<sup>54</sup> *Id.* at 834.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 820.

Thus, defendants' "*Faretta* Right" often acts as a two-edged sword. Because a defendant can choose to represent herself, she has a choice to refuse appointed counsel and may therefore choose self-representation for reasons other than a desire to be captain of her own defense team. A defendant may refuse an appointed lawyer in order to avoid the costs that may accompany the attorney's services and the trial judge will not challenge or probe the defendant's motivation in order to avoid chilling any constitutional right.

*Faretta* may seem to legitimize recoupment statutes because defendants have a choice to refuse counsel and thus avoid any state-imposed attorney fees. The state allows all defendants to choose whether to accept counsel then passes the economic consequences of that decision on to the defendant. Hiding behind *Faretta* as a justification for requiring indigent defendants to reimburse the state fails, however, because the Court approved reimbursement as a condition of probation a year before its *Faretta* decision.<sup>58</sup> Thus defendants could be forced to shoulder the cost of their attorney before they even had the right to refuse counsel. The *Faretta* Court asserted that "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction."<sup>59</sup> Pretending that all indigent defendants who waive the right to counsel do so because they do not desire an attorney perpetuates a similarly untenable fiction.

The *Faretta* court pointed out that "[w]hat were contrived as protections for the accused should not be turned into fetters."<sup>60</sup> This same maxim applies to the right to self-representation as well as the right to counsel. Courts should not be so protective of a defendant's right to represent himself that he represents himself not because he would not prefer a lawyer but because he cannot afford to pay the state back and would rather avoid incarceration.

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<sup>58</sup> *Cf. Id* and *Fuller v. Oregon*, see *supra* n. 38.

<sup>59</sup> *Faretta*, see *supra* n. 52, at 821.

<sup>60</sup> *Id.* at 815.

## No Guarantee That Fees Will Not Burden Defendant

The Supreme Court has clearly stated that the Sixth Amendment is not violated by the defendant assuming the risk that he will someday be forced to pay for his appointed attorney.<sup>61</sup> However, the Court approved scheme with the caveat that “[t]he sentencing court must take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.”<sup>62</sup> Recoupment statutes are permissible only where, “the recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.”<sup>63</sup> Virginia’s recoupment statute contains no such qualification, and is thus materially different from the Oregon statute the Court approved in *Fuller*. To comply with *Fuller*’s holding the statute should ensure that “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.”<sup>64</sup>

**No subsequent determination of indigence.** In Virginia, a defendant’s ability to pay for counsel is assessed only once before trial. When the defendant arrives in General District Court for advisement, his first court date, he has the option to apply for a court-appointed attorney. He must fill out a form indicating his assets and income, swear to its truth, and the judge determines whether or not he qualifies for a public defender or other appointed representation.<sup>65</sup> This evaluation is never revisited, no matter the financial obligations subsequently placed on the defendant. His ability to pay is not mentioned at sentencing when, in addition to whatever fines

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<sup>61</sup> See *Fuller*, see *supra* n. 38.

<sup>62</sup> *Id.* at 44 (citing applicable statute: Ore. Rev. Stat. §161.665(1)(1973)).

<sup>63</sup> *Fuller*, see *supra* n. 38, at 44.

<sup>64</sup> *Id.* at 53.

<sup>65</sup> This procedure allows the judge to determine indigence according to Va. Ann. Code §19.2-159 (2007).

and restitution are ordered, the judge makes paying “the cost of prosecution,” which includes the cost of appointed counsel, one of the many conditions of probation.

The defendant’s ability to pay is not officially considered, though it is often argued by defense attorneys, when the defendant appears at a probation violation hearing for failure to pay court costs, including the cost of appointed counsel. In contrast to federal court, where defendants are regularly relieved of the obligation to pay any part of the cost of prosecution, Virginia state court holds no consideration of the burden such fees might place on the defendant.<sup>66</sup>

The Supreme Court has held that defendants cannot be imprisoned for refusing to pay fines without some demonstration that the refusal was willful rather than a result of the defendant’s poverty.<sup>67</sup> That holding applied to fines and restitution imposed as part of a punishment scheme rather than mere recoupment of state costs,<sup>68</sup> whereas in Virginia court costs are not assessed as punishment, but merely to mitigate the costs of administering the criminal justice system and allow the state to recoup some of its expenditure.<sup>69</sup> It seems, however, that the same limitations on imprisonment by reason of poverty that concerned the *Bearden* court would be relevant whether or not the fines are imposed as part of a punishment scheme.

**Insufficient notification of defendant.** Virginia’s scheme raises further concerns that defendants will accept or reject counsel based on misunderstanding of their options and the

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<sup>66</sup> In a rather unscientific survey, I spent twelve weeks in state courts nearly every day and never heard mention of defendant’s ability to pay from anyone but their defense attorneys. A single day in federal court produced three sentencing hearings in which the defendant was found not responsible for court costs by reason of his or her indigence.

<sup>67</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983).

<sup>68</sup> *See Id.*

<sup>69</sup> *See Wicks v. Charlottesville*, 208 S.E.2d 752, 756 (Va. 1974) (quoting *Angela v. Commonwealth*, 10 Gratt. 696, 701 (1853)). “Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense.”

potential results of the decision. Defendants may accept appointed counsel without realizing that, if convicted, they will be responsible to repay the state for those costs. No such warning is provided at advisement. Furthermore, even if the theoretical possibility of a hearing to determine ability to reimburse the state for the cost of defense counsel exists, defendants may be unaware of that option and thus choose to forgo counsel. The ABA has specifically recognized that, “[e]ven where there is opportunity for judicial waiver or reduction of the fee, there is always considerable risk that a defendant will not be notified properly of this opportunity and consequently will decide to forgo the assistance of counsel, thereby increasing the possibility of wrongful conviction.”<sup>70</sup> Unfortunately, every indigent defendant must weigh these options without the guiding hand of counsel and decide without an attorney trained in the intricacies of the law to explain and advise him of every option and its potential financial implications.<sup>71</sup>

#### **Catch-22**

## Washington and Lee University

Indigent defendants in Virginia find themselves in a precarious position where no good alternative exists. If the defendant accepts counsel, she cannot argue that her Sixth Amendment right has been chilled; she has still opted for counsel. Choosing to accept counsel thus ensures that she will have to pay recoupment. If, on the other hand, the defendant waives the right to counsel, while the “chill” argument may be present, making it would require a level of legal sophistication regularly taught in law school, but more than rare among indigent defendants.<sup>72</sup>

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<sup>70</sup> Whitehurst, *see supra* n.32, at 4.

<sup>71</sup> This concern is particular to those defendants who arrive at advisements without an attorney. Those who know they can afford and will retain counsel have typically consulted with counsel prior to advisement and are nearly always accompanied by their attorney. It is only those defendants who have opted to appear pro se or are hoping to qualify for appointed counsel who face advisement alone.

<sup>72</sup> Perhaps the only party who both could and would make this argument is an indigent lawyer (unlikely, even on a Public Defender’s salary) facing the possibility of jail time. The risks of performing a “test case” with such a scheme, however, are hardly minimal in light of the fact that conviction would be required for an appeal to take place. Most lawyers are not interested in adding such a conviction to their record because of its potentially detrimental effects on standing before the local bar, among other more obvious reasons.



Former Federal Judge David Bazelon articulated this dilemma well in his observation that with regard to

‘street crime,’ the crime bred by poverty and racism, the crime committed by the dispossessed, disadvantaged, and alienated of our society...offenders almost always lack the intellectual or financial means to invoke the rights and considerations which are guaranteed to all persons by our Constitution. They need someone who will effectively invoke those rights in their behalf. That someone is counsel.<sup>73</sup>

Even the *Faretta* Court recognized that “[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.”<sup>74</sup> Included among these benefits is the ability to know exactly what it is he relinquishes. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’...That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious.”<sup>75</sup> Thus, if an indigent defendant’s economic limitations compel him to waive his right to counsel, and his lack of legal training prevents him subsequently challenging the dilemma with which he has been presented, the constitutionality of Virginia’s recoupment scheme is unlikely to be challenged in any meaningful way.

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<sup>73</sup> David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 2, 5 (1973).

<sup>74</sup> *Faretta*, see *supra* n. 52, at 835.

<sup>75</sup> Tomkovicz, see *supra* n.5, at 26 (quoting *Johnson v. Zerbst*, see *supra* n. 7, and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

## BAD POLICY

During its analysis of Kansas' recoupment statute, the Supreme Court acknowledged that while constitutional, such statutes may nevertheless be inadvisable. "We do not inquire whether this statute is wise or desirable....Misguided laws may nonetheless be constitutional."<sup>76</sup> Instead, the Court left such decisions to the states. "Our task...is not to weigh this statute's effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch."<sup>77</sup>

While certainly not controlling of the legislature's choices, the weight of the legal community's opinion seems to be against statutory recoupment schemes like Virginia's. "[C]urrent ABA policy recommends against requiring reimbursement, except where defendants have made fraudulent representations regarding their financial status in order to be found eligible for counsel."<sup>78</sup> The majority of states have also taken a different approach to recouping defense costs.<sup>79</sup> Virginia's recoupment statute amounts to poor policy, creating difficulties for all involved. It (1) places attorneys in a precarious ethical position, (2) arguably costs the state more money than it earns and (3) disproportionately burdens those defendants who are trying to rehabilitate themselves.

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<sup>76</sup> *James v. Strange*, see *supra*, n. 37, at 133.

<sup>77</sup> *Id.* at 133-134.

<sup>78</sup> Whitehurst, see *supra* n.32, at 2.

<sup>79</sup> *Id.* at 4. The ABA reported that in 2001, more than half the states utilized the "application fee" model rather than recoupment. The report further stated that, "[m]ost statutes provide that, after a fee is imposed, the court may waive or reduce the fee if it finds the defendant is unable to pay."

## Ethical Dilemmas for Defense Counsel

**Conflicting interests.** A defense attorney, like all lawyers has a duty to represent the interests of her client.<sup>80</sup> This duty remains the same whether defense counsel is retained by the defendant or appointed by the court.

The fact that the state selects and compensates an indigent's defender does not alter the duties and obligations of counsel. An indigent's appointed lawyer is expected to play the same adversary system roles as privately retained counsel. Her essential functions are to ably, loyally, and zealously promote and defend the interests of the accused in confrontations with the prosecutors and the legal system.<sup>81</sup>

Virginia's recoupment situation puts the appointed attorney in a precarious position. The attorney is often uniquely aware of the essential functions she can perform for her client, but she is also keenly aware of the defendant's financial limitations. While her fees increase as the case becomes more complicated and the number of hours she must dedicate to preparation continue to swell, she knows that the costs to the defendant are similarly growing. The appointed attorney must decide which avenues are worth pursuing, at increased cost to the defendant, and which should be abandoned in favor of a more economical, if simpler case. Meritorious arguments may go under-researched and unargued because of counsel's concern for her client's financial state.

The defense attorney always has the option to pursue every argument to its fullest in hopes of gaining acquittal, which would free the defendant from any obligation. Such an "all or nothing" attitude is not usually a wise option, however. The vast majority of defendants who are haled into court are not acquitted of all charges. Instead, the defense attorney often serves to

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<sup>80</sup> See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1999).

<sup>81</sup> Tomkovicz, *see supra* n. 7, at 55 (*citing Polk County v. Dodson*, 454 U.S. 312 (1981)).

reduce the charges significantly and help the defendant, whether through a plea deal or a trial, to obtain a lesser sentence and add a lesser offense to his record. Such bargains often require leverage, which comes in the form of meritorious motions and arguments. These cannot be made without adequate research and preparation, neither of which is free to the defendant.

The conflict of increasing fees for improved advocacy do not seem unique to attorneys representing the indigent. Many privately retained attorneys work on an hourly fee basis and, in fact, the best attorneys cost more per hour than a recent law school graduate might. The particular crisis for attorneys representing indigents can be highlighted by evaluating the costs of counsel in terms of opportunity cost, or what the defendant must give up in order to pay for the attorney. It is difficult to feel sorry for the executive accused of white collar crime who must sell his second yacht or even his summer home in Tuscany to fund an adequate defense. Even the middle class worker charged with driving under the influence will probably do just fine if he must wait another year before taking his wife to Myrtle Beach on vacation or buying a flat screen television because of attorney's fees. The indigent defendant, however, may forgo medicine, child support, essential repairs on the family's only car, or even rent in an attempt to meet the court's demands. If the cost of recoupment could be measured in utility to the defendant of the income surrendered to pay for defense counsel, an appointed attorney would likely be the highest paid lawyer available.

A lawyer who has chosen to represent indigent defendants is intensely aware that he "as the defendant's advocate, is the one who must prod the system's conscience to insure that the man or woman is not lost for the crime. Counsel must see to it that his client's individual needs will not be overwhelmed by the system's pressing need for administrative efficiency."<sup>82</sup> Passing

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<sup>82</sup> David L. Bazelon, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 170-171 (1987).

on the cost of counsel to a defendant who has proven that he cannot afford it also places a great burden on the lawyer who must decide how much time to give the defense and how much money to leave with which the client can attempt to live.

**Violates prescribed fee scheme.** In addition to the moral dilemma created by representing indigent defendants under Virginia's recoupment scheme, appointed attorneys face a more concrete ethical challenge with regard to fees. The ABA Model Rules of Professional Conduct specify that before beginning representation, attorneys must inform clients of "the basis or rate of the fee and expenses for which the client will be responsible."<sup>83</sup> This fee must be reasonable to comply with the Model Rules.<sup>84</sup> Instead, when indigent defendants accept representation they "are not apprised, prior to the representation, that they will be charged [for the cost of their representation] and on what basis. There is no assurance that the fees will be 'reasonable.' Instead, an amount is simply imposed at sentencing."<sup>85</sup>

It is possible that defendants who are simply aware of the "bottom line" amount they must pay to the court,<sup>86</sup> may be charged, convicted, released and return to society without ever becoming aware that their attorney was not, in fact, funded by the state. Participation in such a scheme undermines the ethics of the attorneys who are appointed. This problem could easily be fixed by merely informing clients of their financial obligations with regard to appointed counsel, though it may cause even more defendants, first time offenders as well as those familiar with the process, to forgo the benefits of representation in favor of a less expensive version of justice.

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<sup>83</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (1983).

<sup>84</sup> MODEL RULES OF PROFESSIONAL CONDUCT R. 1.5(a) (1983). See also VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (1999). "A lawyer's fees shall be reasonable and adequately explained to the client."

<sup>85</sup> Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel through Recoupment and Contribution*, 4, available at [http://works.bepress.com/helen\\_anderson/1/](http://works.bepress.com/helen_anderson/1/).

<sup>86</sup> This figure may include fines, restitution and other charges in addition to recoupment.

## Administering Recoupment Scheme Unlikely To Generate Revenue

The *James* Court recognized that recoupment laws may serve important state interests,<sup>87</sup> including mitigating some of the astronomical cost of administering the criminal justice system. However, contrary to this purpose “contribution fees typically do not generate much revenue....[T]hose programs that maintained data on fee collection rates reported only a 6-20% rate of collection.”<sup>88</sup> In 1984, the Justice Department found that “less than 10 percent of recoupment orders were collected. Furthermore, a 1986 study showed that while it is possible for revenues to exceed costs in a tightly run and carefully administered recoupment program, in most instances recoupment programs were not cost-effective.”<sup>89</sup> An examination of statistics released by the Virginia judiciary and the Virginia Criminal Sentencing Commission reveals that it is unlikely Virginia is gaining any profit from its attempts to recoup court costs.

During 2006, the Commonwealth paid \$94.4 million for the representation of indigent defendants.<sup>90</sup>

These expenditures were made to court-appointed attorneys from the Criminal Fund administered by the Supreme Court and to public defender personnel from funds administered by the Public Defender Commission....Payments from the

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<sup>87</sup> *James v. Strange*, *supra* n. 37, at 141. “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”

<sup>88</sup> Whitehurst, *supra* n. 32, at 6.

<sup>89</sup> Anderson, *supra* n. 85, at 10 (citing Richard J. Wilson, *Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy*, *Bad Law*, 3 Fall Crim. Just. 16, 43 (1988), and Robert L. Spangenberg, National Institute of Justice, *Containing the Costs of Public Defense*, at 61-67 (1986)).

<sup>90</sup> Judiciary Year in Review, A-140, available at [http://www.courts.state.va.us/reports/2006/state\\_of\\_the\\_judiciary\\_report.pdf](http://www.courts.state.va.us/reports/2006/state_of_the_judiciary_report.pdf).

Criminal Fund to court appointed counsel increased from \$57.8 million to \$59.9 million, an increase of 3.5% during the year. Court appointed attorney costs constituted 73.7% of total Criminal Fund expenditures in fiscal year 2006.<sup>91</sup>

The number of defendants for whom counsel was appointed and funded by the Criminal Fund increased 6.7% to 210,829 in 2006.<sup>92</sup> These attorneys received an average of \$284 per charge.<sup>93</sup> Fortunately, the court recovered \$12.1 million or 20.3% of this cost, though the exact origin of these “revenues” is unclear from the Judiciary’s Report.<sup>94</sup> Even with the most generous assumption, that all \$12.1 million came from recoupment alone, the amount represents only a small portion of the Commonwealth’s expenditure.

The true cost of recoupment comes into focus, however, when one realizes that the amount recovered cannot simply be subtracted from the cost of appointed counsel as a pure reduction of spending. The total costs of administering the recoupment scheme must all be considered. Ignoring the overhead expenditures of the clerical work expended to maintain records of defendants’ obligations and efforts expended to collect their debts, the imprudence of the program comes into focus by considering the costly probation violation hearings that result from defendants’ inability to pay according to the court’s desires.

In 2007, the Virginia Criminal Sentencing Commission collected 11,497 Sentencing Revocation Reports for felony violations of probation, suspended sentence and good behavior.<sup>95</sup> “In more than one-quarter of violation cases (27%), offenders were cited for failing to follow

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* This figure actually decreased from \$293 per charge the year before.

<sup>94</sup> *Id.* “The district courts recouped \$5.7 million in Commonwealth revenues and the circuit courts also collected \$6.4 million in 2006 from indigents convicted of crimes; together, these revenues represent 20.3% of the amount spent on court appointed counsel fees.”

<sup>95</sup> Virginia Criminal Sentencing Commission Annual Report 2007, 45, available at <http://www.vcsc.virginia.gov/2007VCSCReport.pdf>.

special conditions imposed by the court, such as failing to pay court costs and restitution....”<sup>96</sup>

Before a defendant’s sentence is revoked, he appears in court so the judge can make a finding that he has violated a condition of his probation, suspended sentence or good behavior. The defendant’s lawyer is present at that hearing. The attorney’s appearance at probation violation hearings usually does not constitute 20% of the work he does on the defendant’s case. If the original sentence was imposed as part of a quickly reached plea deal, however, and the defendant has several probation violation hearings, more than 20% of the attorney’s services may be dedicated to such hearings. Regardless, the appointed attorney is far from the only person present in the courtroom for the hearing who is being paid by the Commonwealth. In addition to the defense attorney, at least one Commonwealth’s Attorney is at the hearing, along with a probation officer. Numerous court personnel including the judge, his clerk, the court reporter, possibly an interpreter and at least two sheriff’s deputies are also present and paid for the time it takes to complete the hearing. This is to say nothing of the overhead costs of maintaining the courthouse while some of its resources are consumed by the hearing.

In addition to the hearing itself, a defendant is often held in custody preceding the hearing, and will return to incarceration if found in violation. He must be transported between the jail and the courthouse at the state’s expense. The cost of a prison bed in Virginia is estimated at \$25, 709 per year or roughly \$59.24 per day.<sup>97</sup> This additional jail time puts a strain on resources that in many cases are already operating beyond their ability. For example, Virginia’s jails were at 118 percent capacity in 2003.<sup>98</sup> Thus, recoupment provides only meager

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<sup>96</sup> *Id.* at 47. These figures are of limited utility because defendants are often cited for violating more than one condition of probation.

<sup>97</sup> Virginia Criminal Sentencing Commission, *Fiscal Impact Statement for Proposed Legislation: HB 2756* (Dec. 27, 2006).

<sup>98</sup> DOJ SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, 91.



returns, if any at all, and produces more work for an already inundated system. Recalling that recoupment is *never* a part of punishment in Virginia,<sup>99</sup> this increased in costs is brought to bear on the Commonwealth for the sole purpose of recovering *at most* 20% of its expenditure to provide a single player in the courtroom action.

While it is true that “a defendant’s level of financial resources is a point on a spectrum rather than a classification,”<sup>100</sup> and *some* indigent defendants do have *some* ability to pay *something*, it is important to remember that recoupment expenses will be far from the only pull on the defendant’s limited resources. Upon release from prison, defendants typically owe significant sums to various entities, including child support and restitution.<sup>101</sup> Furthermore, a recently released convict’s job prospects are often extremely dim at best.<sup>102</sup> What little money defendants are able to pay the court might more appropriately be given to victims and contributed to restitution.

## Washington and Lee University

The cost of providing representation for indigent defendants is certainly not trivial, as the Supreme Court has repeatedly recognized.<sup>103</sup> However, as one law clerk noted, after a disappointing experience acting as a public defender and discovering that her services were not actually free to the defendant, “[m]any constitutional requirements ‘burden’ the states; it is not the Court’s job to lessen the burden that the Constitution itself imposes.”<sup>104</sup>

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<sup>99</sup> See *supra* n. 69 and accompanying text.

<sup>100</sup> *Bearden v. Georgia*, see *supra* n. 67 at 666, n. 8.

<sup>101</sup> See *generally Repaying Debts*, Bureau of Justice Assistance & Council of State Governments (2007), available at [http://reentrypolicy.org/special\\_projects/financial\\_obligations#repaying](http://reentrypolicy.org/special_projects/financial_obligations#repaying).

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *Fuller*, see *supra* n. 38, *James*, see *supra* n. 37, *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring).

<sup>104</sup> Kate Levine, note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’s Reimbursement Statute*, 42 Harv. C.R.-C.L. Rev. 191, 205 (2007). One formal federal judge proposed an alternative that appears to be an ultimatum: “If the price of a truly constitutional trial becomes too great, we have two alternatives: we can reduce the number of trials by limiting the scope of the criminal sanction, or we can make the

## Recoupment Discourages Defendants Trying to Escape Both Crime and Poverty

Perhaps most important in the policy considerations behind recoupment, Virginia's scheme is in direct opposition to a major goal of the criminal justice system: rehabilitation. "When recoupment is ordered as a condition of probation or suspended sentence, it is often part of a package of financial obligations on which the defendant must make regular payments under threat of revocation and incarceration."<sup>105</sup> The defendant who is most likely to pay recoupment is the man attempting to fulfill his obligation to the Commonwealth and return to life as a contributing member of society. In contrast, a convicted criminal who may be planning to reoffend or at least remains unconcerned with his own rehabilitation, is much less likely to worry about court costs, knowing that if he is not arrested for failing to pay costs he will likely be arrested for something else before too long.

The road from jail to full membership in society is long, slow and often extremely difficult. Increasing the financial burden on a released criminal will only make the journey more difficult.

A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship.<sup>106</sup>

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defendant pay the price by denying him protections that the Constitution guarantees." Bazelon, *see supra* n. 82, at 170. Virginia seems to want to have it both ways.

<sup>105</sup> Anderson, *see supra* n. 85, at 9.

<sup>106</sup> *James v. Strange*, *see supra* n.37, at 139.

In striking down Kansas' recoupment scheme, the Supreme Court reiterated that "[s]tate 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."<sup>107</sup>

Burdensome fees on defendants not only inhibit victims' access to restitution, but also prevent the impoverished criminal seeking rehabilitation from attending to other pressing expenses. What the state refuses a man in appointed counsel, it may provide for him in subsidized housing or welfare for his children.

The courts find it too easy to limit their inquiry to whether or not a man is a burglar or a thief. But the same man may also be the father of a sick child for whom he cannot secure medical care. He may be a school drop-out unable to secure work. Despite the fact that the system is concerned with only part of the man, it puts the whole man in jail. It is not unlike the medical specialist who treats a particular condition. If the patient dies a week later from another ailment, what service has the doctor rendered?<sup>108</sup>

Recoupment is not meant as a form of punishment, but it certainly has the power to contribute to hopelessness for the indigent defendant attempting to pay for the attorney he cannot afford.

### **PROPOSAL FOR CHANGE**

It is probable that the Commonwealth would experience the greatest financial gain by eliminating its recoupment scheme altogether. While a perfect world would include access to a free lawyer for every indigent defendant, a few changes will significantly improve the current system. I propose a series of procedural protections that would better protect defendants' rights, make recoupment more constitutionally sound and decrease both money and resources dedicated

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<sup>107</sup> *Id.* at 141-142.

<sup>108</sup> Bazelon, *Defective Assistance*, see *supra* n. 73, at 46.

to recovering the costs of appointed counsel. These suggestions are adapted from the ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases.<sup>109</sup>

First, courts should ensure that indigent defendants understand their potential obligation to reimburse the Commonwealth for the cost of prosecution. This advisement could easily be added to the colloquy between judges and defendants upon appointment of counsel. Second, defendants who wish to waive counsel should be asked specifically whether they are doing so to avoid the cost of an attorney. If the answer is affirmative, further inquiry should be made so that the defendant's Sixth Amendment right to counsel is protected. Third, if recoupment is assessed, it should be upon finding by the court that the defendant is able to pay the cost of counsel without substantial hardship. This assessment of the defendant's financial situation can properly be incorporated into the sentencing hearing. If the judge does impose the cost of counsel upon the defendant, his reasons for so doing should be clear in the record. Fourth, failure to make the appropriate payments should not result in imprisonment. The defendant's obligation should be treated like a civil debt, as any other attorney's fee would be, subject to the same methods of enforcement. Finally, the defendant should retain the right to petition the court for waiver of recoupment fees upon showing of inability to meet the obligation, much the same as the process for obtaining appointed counsel.

## CONCLUSION

If the young mother described at the beginning of this paper were to appeal to either the state or federal Supreme Court for assistance, she may meet with limited success. The Court would surely say that her Right to Counsel had not been chilled because she enjoyed the assistance of an attorney throughout her case. However, the fact that her financial situation had

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<sup>109</sup> See Whitehurst, *see supra* n. 32. "[T]he Guidelines provide detailed recommendations, in accordance with relevant case law and standards, regarding the procedures that should be taken to ensure against the violation of constitutional rights in the event a jurisdiction requires defendants to contribute to their defense." *Id.* at 6.

not materially changed, but the cost of counsel was assessed against her anyway might give the Court pause. Without departing from its decision in *Fuller*, the Court would have a difficult time dismissing her plight and would likely require that Virginia implement some sort of protection for defendants in her situation. However, the resulting change may simply be another line in the judge's sentence: "I find the defendant financially able to reimburse the state for the cost of her attorney" (almost exactly the opposite of what the federal judges waiving the cost of prosecution typically say). Her financial obligation may not change at all.

The proposed statutory changes, on the other hand, could brighten her situation considerably, in addition to reducing Virginia's overall spending on criminal justice. She would have known that the assistance of counsel might also increase her obligation to the Commonwealth. The judge may have been forced to acknowledge that "you can't squeeze blood from a turnip" in this situation. Her restitution may be paid sooner. Perhaps most importantly her son would be cared for better and her job prospects improved. She would not be sentenced to leave either her son or her job for a period in jail simply because she was too poor to pay for her constitutional rights.