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# *The Indigent Counsel Fee in Massachusetts as a Cost of Being Charged with a Crime*

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**ABSTRACT**

When indigent defendants in Massachusetts are charged with a crime and receive a court-appointed lawyer, they are also charged something else: a fee. This $150 fee is imposed on criminal defendants by the state as soon as they receive a constitutionally guaranteed "free" legal defense. The Article focuses on this inherent contradiction and identifies its far-reaching effects in undermining individuals' constitutional protections. Massachusetts's indigent counsel fee "chills" the right to counsel, creating a straightforward result for indigent individuals who are faced with a choice between paying for a "free" lawyer and not disclaiming their constitutional right to one. The deeper problem is that this fee cuts across the presumption that every person is innocent until proven guilty. The Article then argues that the presumption of innocence is violated by obliging individuals to pay, or alternatively perform community service for free, by virtue of the state's decision to bring criminal charges against them. Therefore, being charged with a crime already carries consequences and signals that the defendant is no longer considered fully innocent in a flagrant violation of the premise of a just legal system. There should be no grey area concerning the interpretation of either the presumption of innocence or for constitutional rights. There should be no fee for having been dragged into the criminal justice system by the government's unilateral decision.

**AUTHOR'S NOTE**

Stanisław Krawiecki holds a J.D., *cum laude*, from Harvard Law School, where he was the Editor-in-Chief of the Harvard Human Rights Journal, as well as a student attorney at the Criminal Justice Institute ("CJI"). The author is immensely grateful to CJI for the opportunity to work with fantastic people fighting uphill battles--both clients and advocates. Special thank you to Audrey Murillo, an inspiration, a model of passion, humility, and human-first approach to lawyering, for her supervision and comments. Thank you to the entire UMass Law Review team for confidence in the critical ideas and for making this article better than the author ever imagined.

*"I'm sure Mr. Attorney will do more than 150 dollars' worth of work for you on this case."*[1]

*That's not the point of indigent defense, is it?*

## INTRODUCTION

"Do I have to pay you?" This question concluded my first meeting with my first client as a student criminal defense attorney in Massachusetts. Mr. Jones[2] and I talked for about two minutes in a small windowless conference room after I was assigned to serve as his student attorney at arraignment. Before we headed back to the courtroom, Mr. Jones was not as concerned about the criminal charges levied against him as he was about the pecuniary consequences of receiving court-appointed counsel.

Luckily, my answer for Mr. Jones was ready. Within the first five minutes of arriving at the courthouse that morning, I heard a judge and a clerk tell the persons being arraigned that coming to court would cost them $150 or ten hours of community service. I was stunned. These people had just met their lawyer, some only after approaching the podium to hear their charges for the first time. I thought I had signed up for a law school clinic providing free criminal representation to indigent persons. Thankfully, a senior lawyer at my clinic explained that because we had waived this fee, any clients assigned to us would not have to pay or work, and I happily shared this with my client.

Mr. Jones did not have to pay me. But most indigent defendants in the Commonwealth of Massachusetts do. His question is one that every indigent defendant in Massachusetts should ask—and the answer is most often "yes."[3] Despite the promise of *Gideon v. Wainwright*,[4] which seemingly guaranteed free legal counsel to those who cannot afford it,

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1 Statement by a judge to a defendant in the Roxbury Boston Municipal Court, overheard in October 2021.

2 All names in this Article are altered to preserve anonymity.

3 Curt Brown, *Bar Criticizes Court Fees*, S. COAST \TODAY, https://www.southcoasttoday.com/story/news/2004/07/21/bar-criticizes-court-fees/50442533007/ [https://perma.cc/Q6CB-PZM4] (last updated Jan. 13, 2011, 9:26 AM).

4 "From the . . . beginning . . . state and national constitutions and laws . . . laid great emphasis on . . . fair trials before impartial tribunals . . . [where] every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face . . . accusers without a lawyer to assist him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

the $150 fee in Massachusetts is imposed on anyone who "appears in court without counsel."[5] The only alternative presented to defendants is to perform ten-to-fifteen hours of community service.[6] Seeing that I was upset after this information was shared with every defendant in the courtroom, the senior lawyer at my clinic explained that this was simply the Massachusetts standard.

This Article refuses to accept the court-appointed counsel fee as a systemic necessity. Compared to the harsher realities of our criminal justice system, such as incarceration, the $150 fee seems insignificant. However, it clearly distresses many people involved in the criminal justice system, as exemplified by Mr. Jones. Furthermore, the fee just seems wrong in principle; it criminalizes indigency by imposing a penalty for being charged with a crime. However it is justified, whether administratively or practically, paying for a defense attorney is *not* receiving the free assistance of a lawyer.

Therefore, this Article discusses the constitutional issues caused by Massachusetts's $150 counsel fee that is imposed on criminal defendants receiving a court-appointed attorney.[7] There are two kinds of statutory schemes addressing appointed counsel fees: recoupment and contribution. Recoupment is the practice of ordering (convicted) defendants to repay a portion or a statutorily decided amount of the expenses incurred by their assigned counsel *after the case is over*.[8] In contrast, the Massachusetts scheme concentrates on contribution: the

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5 MASS. SUP. JUD. CT. R. 3:10, § 2. *See also Potential Money Assessments in Criminal Cases*, COMMONWEALTH OF MASS. [hereinafter *Potential Money Assessments*] (emphasis in original), https://www.mass.gov/doc/potential-money-assessments-in-criminal-cases-chart/download [https://perma.cc/J59Q-VVET] (stating that the $150 fee is "**MANDATORY** when counsel appointed for defendant who is indigent").

6 "A person seeking to work off a counsel fee in community service shall perform 10 hours of community service, in a community service program administered by the administrative office of the trial court, for each $100 owed in legal counsel fees, which may be prorated." *Potential Money Assessments*, *supra* note 5. *See generally* MASS. GEN. LAWS ch. 211D, § 2A(g) (2023) (stating that "[t]he court may authorize a person for whom counsel was appointed to perform community service in lieu of payment of the counsel fee.").

7 *See* MASS. GEN. LAWS ch. 211D, § 2A(f) (2023) (mandating that those who qualify for indigency and are provided with counsel "shall be assessed a counsel fee of $150, which the court may waive only upon a determination from officer's data verification process that the person is unable to pay . . . within 180 days.").

8 Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 UNIV. MICH. J.L. REFORM 323, 329-30 (2009).

defendant must contribute to their counsel fees while the case is ongoing.[9] While the topic of appointed counsel fees has been discussed in a few powerful articles, it does appear understudied.[10] Most of the existing scholarship focuses on recoupment schemes, and those discussing contribution schemes analyze them through a recoupment framework.[11]

This Article opens with *Fuller v. Oregon*, the leading Supreme Court case discussing the constitutionality of charging indigent defendants for the assistance of counsel.[12] The *Fuller* analysis has been treated as the standard for the constitutionality of indigent counsel fees *sensu lato*, and has been applied thus far when analyzing the Massachusetts contribution scheme.[13] However, the case also centered on a recoupment statute instead of a contribution system like that of Massachusetts, so it left open a number of questions about the constitutionality of contribution schemes.[14] Accordingly, after

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9 "Contribution is usually a fixed sum imposed at the time of appointment [of counsel]." *Id.* at 333.

10 *See generally* Matheson Sanchez & Shytierra Gaston, *Reforming Monetary Sanctions: Implications of the Massachusetts Criminal Justice Reform Act*, 34 FED. SENT. R. 145 (2022); Anderson, *supra* note 8; 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 (2007); Andrew Cohen & David Carroll, *The Right to an Attorney: Theory vs. Practice*, BRENNAN CTR. FOR JUST., (Dec. 20, 2021) https://www.brennancenter.org/our-work/analysis-opinion/right-attorney-theory-vs-practice **[**https://perma.cc/QL2U-3WTB] (discussing "the gap between what the Constitution guarantees and what people can actually get when it comes to public defenders[,]" the "insufficient number of attorneys" and the "chronic underfunding" of the assigned counsel system, in the absence of a state-wide public defender institution.).

11 *See, e.g.*, Fuller v. Oregon, 417 U.S. 40 (1974); Anderson, *supra* note 8; Levine, *supra* note 10.

12 *See* Anderson, *supra* note 8, at 324-25 (noting that "debts for defense fees and costs . . . . have their roots in Supreme Court precedent . . . . [including] *Fuller v. Oregon*") (citing *Fuller*, 417 U.S. 40 (1974)).

13 *See* Levine, *supra* note 10, at 208 (discussing and "examin[ing] how the Supreme Court's decision in *Fuller* has manifested itself in Massachusetts").

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> As part of a recoupment statute passed in 1971, Oregon requires that in some cases all or part of the "expenses specially incurred by the state in prosecuting the defendant" . . . be repaid to the State, and that when a convicted person is placed on probation repayment of such expenses may be made a condition of probation. These expenses include the costs of the convicted person's legal defense.

*Fuller*, 417 U.S. at 43 (footnotes omitted).

introducing *Fuller*, this Article argues that the Massachusetts counsel fee "chills" the Sixth Amendment right to counsel. The Article then builds upon this *Fuller*-like argument to propose more innovative claims: the Massachusetts counsel fee also affects the right to proceed *pro se* and creates an unjustifiable blend of free and paid counsel.

The second half of this Article argues that the fee creates an issue wholly divorced from the right to counsel: it is also contrary to the principle of presumption of innocence, which should extend to all kinds of pre-trial treatment of defendants.[15] This Article is an attempt to think outside the box and challenge the burdens impacting a system that purports to protect individual rights of everyone before trial. Therefore, the fee is used as an entry point into discussing the paradoxes caused by a government's attempt to play the criminal justice system. The Massachusetts counsel fee thus illustrates a deeper issue with the system: the unconstitutional treatment of defendants at the pre-trial stages.[16]

## I. THE MASSACHUSETTS COUNSEL FEE CHILLS THE RIGHT TO COUNSEL

### A. *Fuller v. Oregon*: Charging Indigent Defendants for the Assistance of Counsel

In *Fuller v. Oregon*, the defendant challenged the constitutionality of an Oregon recoupment scheme after being sentenced to a five-year

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[15] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

[16] Consider this excerpt from a Hampden County, Massachusetts opinion:

> On May 3 and 4, 2004, no Hampden County bar advocates appeared in Springfield District Court, the busiest District Court in the Commonwealth, to accept assignments. As a result, many indigent defendants, including the nineteen original Lavallee petitioners, were arraigned on those two days without benefit of counsel. A judge set bail or issued an order of preventive detention for each unrepresented petitioner.

*See* Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 901-02 (Mass. 2004) (footnote omitted). In that case, the Supreme Judicial Court discussed the § 211 compensation scheme but did not address the fees assessed to indigent defendants. *See generally id.*

probation conditioned upon the repayment of legal fees.[17] The Oregon statute established that a sentencing court could order a convicted person to repay costs, including counsel fees, as a condition of probation, provided either that the party could afford to pay or that repayment did not otherwise cause "manifest hardship."[18] The Court upheld the statute as constitutional because repayment was not mandatory; a defendant would not be required to pay for representation unless he was able to do so.[19] According to the Court, this was an adequate statutory safeguard for indigent persons.[20]

More specifically, *Fuller* held that the Oregon recoupment statute was constitutional under the Sixth Amendment because it does not infringe upon the Sixth Amendment right to counsel insofar as it only required recoupment from those convicted defendants who are able to pay and guaranteed free counsel during the pendency of the case.[21] De

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17 *Fuller*, 417 U.S. at 41-42. Mr. Fuller was also required to "satisfactorily comply[] with the requirements of a work-release program at the county jail that would permit him to attend college" as the other condition to his probation. *Id.* at 42.

18 *Id.* at 44-46.

19 "Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay." *Id.* at 53-54.

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> The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.

Fuller v. Oregon, 417 U.S. 40, 53 (1974) (footnote omitted).

21 With respect to a possible Equal Protection challenge to the fee, that exceeds the scope of this Article. However, it is worth noting that an independent Equal Protection challenge was also raised and rejected in *Fuller*, highlighting another perspective on counsel fee statutes. The Court succinctly summarized this Equal Protection argument:

> The petitioner's first contention is that Oregon's recoupment system violates the Equal Protection Clause . . . because of various classifications explicitly or implicitly drawn by the legislative provisions . . . . The petitioner contends further . . . that the Oregon statute denies equal protection of the laws in another way–by discriminating between defendants who are convicted on the one hand, and those who are not convicted or whose convictions are reversed, on the other.

spite this holding, the state nevertheless charges an individual for exercising their fundamental right to have government-appointed legal counsel when it imposes a payment for assigning this counsel.[22] Even if defendants are not charged for counsel at the start of the case, such as in a contribution system, they will still know that they might be liable for counsel fees at the close of the case, such as in *Fuller*. Accordingly, this system undermines the right to counsel because the individual might be incentivized to refuse an assigned lawyer, thereby surrendering this constitutional right.[23]

The *Fuller* Court rejected this "chilling" argument.[24] The Court did not believe that the potential imposition of a counsel fee following trial would have a discernible impact on a defendant's decision to accept court-appointed counsel.[25] Therefore, because free counsel was guaranteed, at least until after recoupment was possibly imposed,

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*Id.* at 46-49. The Court also noted that "[the statute] 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." *Id.* at 50 (footnote omitted). In *Fuller*, the Court also discussed *James v. Strange*, which held a Kansas law invalid under the Equal Protection Clause because it compelled repayment of counsel fees regardless of indigency status. *See id.* at 46-47; James v. Strange, 407 U.S. 128, 129-31 (1972). In *James*, the Court held that the exemptions made available to indigent persons "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *James*, 407 U.S. at 142.

22 "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding the Sixth Amendment's guarantee of counsel to be a fundamental right for a criminal defendant).

23 This argument mirrors that of *United States v. Jackson*, where the Federal Kidnapping Act was invalidated on the grounds that it "chilled," or deterred, the exercise of a constitutional right. United States v. Jackson, 390 U.S. 570, 581-83 (1968). Crucially, the Supreme Court held that it was irrelevant whether the statute's deterrent effect was intended by the legislature. *Id.* at 582 (citations omitted) ("Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.").

24 The Court determined that knowledge of the potential requirement to repay legal fees "in no way affects [the indigent person's] eligibility to obtain counsel." Fuller v. Oregon, 417 U.S. 40, 53 (1974). Further, the Court explained that Oregon's system for providing a court-appointed attorney did not infringe upon an indigent person's constitutional right to counsel on the grounds that the knowledge of potential repayment might compel them to decline the services of an appointed attorney and "chill" their constitutional right to counsel. *Id*. at 51-52.

25 *See id.* at 51-53.

defendants were not incentivized to shun their constitutional right to counsel.[26] As stated by the Court:

> The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel . . . . [O]nly those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay.[27]

However, the $150 counsel fee in Massachusetts actually does chill the right to counsel: principally because Massachusetts's contribution scheme is different than the recoupment scheme in *Fuller*, but also because the *Fuller* Court got it wrong. Paradoxically, the exercise of the right to counsel in Massachusetts triggers a fee that discourages this same exercise. In fact, court-appointed lawyers are assigned to anyone who "appears in court without counsel," which applies (and is communicated as early as arraignment) to a majority of defendants in some Massachusetts courts.[28] Thus, it is an automatic triggering of the right to counsel that could push defendants to shun this same right.

### B. Closer Scrutiny Suggests that the Massachusetts Fee is Unconstitutional

The fee creates an unconstitutional paradox. As stated, the crucial difference between the Massachusetts and *Fuller* schemes is that the *Fuller* statute was one of recoupment, or a *post factum* fee potentially imposed on a defendant following trial.[29] Conversely, the Massachusetts $150 counsel fee is grounded in a contribution model and is instead

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[26] *Id.* at 51-52.

[27] *Id*. at 53 (footnote omitted).

[28] MASS. SUP. JUD. CT. R. 3:10, § 1(d) and§ 2; Erica J. Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 425-26 (2007) (hypothesizing that discussing pro se representation in criminal cases may be a rising new norm); *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/XSX2-PLA4]; Marc Russo, *Pro Se, Court's Back in Session, Lawyer Survey*, MGR REPORTING (Aug. 10, 2020), https://mgrreporting.com/2020/08/10/pro-se-courts-back-in-session-lawyer-survey/ [https://perma.cc/R9GV-4XQA] (discussing *pro se* representation in civil cases).

[29] *Compare* MASS. GEN. LAWS ch. 211D, § 2A (2023) *and* MASS. SUP. JUD. CT. R. 3:10, § 1(d) and§ 2 *with* Fuller v. Oregon, 417 U.S. 40, 50 (1974).

imposed at arraignment.[30] Unlike *Fuller*'s recoupment scheme, a contribution scheme increases the fee's chilling effect on the right to counsel because the judge explicitly tells the defendant about the fee prior to trial, and further informs the defendant that the fee represents a payment for the services of an attorney.[31]

Indeed, the Massachusetts fee differs in this way not only from *Fuller*, but also *Calhoun v. Young*,[32] which highlighted the crucial distinction between the statutory schemes. In *Calhoun*, an inmate brought suit against the state of New Jersey, among other defendants, alleging that the state "violated his constitutional rights by 'attempting' to charge him approximately $1,500 in expenses for his court-appointed counsel."[33] In rejecting this constitutional challenge, the court relied in part on the fact that New Jersey only "attempt[ed]" to charge the defendant for a public defender.[34] In Massachusetts, however, there can be no such mistake: the defendant is promptly informed of their now-outstanding liability and that they shall either pay the fee or reimburse it through their labor. Unlike New Jersey's, Massachusetts's charge is real.

How can this scheme not chill the Sixth Amendment right to counsel? Imagine the plight of the indigent defendant. After being

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30 The fee is imposed on whoever "appears in court without counsel," which for most defendants means their first court appearance at arraignment. *See* MASS. SUP. JUD. CT. R. 3:10, § 1(d) and§ 2; MASS. GEN. LAWS ch. 211D, § 2A(f) (2023).

31 When I was working in the criminal defense clinic as a law student, I heard judges refer to the fee in a manner that made it seem reasonable given the amount of work an attorney would do on a case. However, as illustrated by this Article, criticisms of the fee are not grounded in how much work the attorney will do on the defendant's case but instead in the right that all people have to counsel in criminal cases, regardless of their ability to pay.

32 "The New Jersey Public Defender Act includes [both] reimbursement and lien provisions." Calhoun v. Young, 288 Fed. App'x. 47, 49 n.2 (3d Cir. 2008) (citation omitted).

33 Other defendants to the suit included the plaintiff's public defender and the attorney's supervisor. *Id.* at 49 (footnote omitted). Plaintiff alleged that his public defender "violated his rights by discontinuing his representation after Calhoun refused to plead guilty" and that the supervisor "violated his constitutional rights by not taking corrective action against [the employee attorney], and conspiring to deprive indigent criminal defendants of their constitutional rights by securing their convictions through guilty pleas." *Id.* (footnote omitted). The court rejected both claims, holding that § 1983 does not apply to public defenders as they are "not acting under color of state law," and the *respondeat superior* theory used for the supervisors did not constitute a federal claim. *Id.* at 49-50 (citation omitted).

34 *Id*. at 50.

dragged into court, the defendant is assigned a lawyer they likely don't know and had not met prior to approaching the podium. To add insult to this injury, the defendant will be assigned a fee for this "free service." If the defendant is unable to pay, or cannot perform the community service offered as an alternative, the defendant might try to get rid of their *state-provided* counsel as soon as possible. This very dynamic is addressed by two state court cases: *White Eagle v. State* and *State v. Cunningham*.[35]

In *White Eagle*, the defendant was charged with third-degree forgery and when completing his application for court-appointed counsel, he listed "none" under "assets, liabilities, and anticipated receivables" because he was unemployed at the time.[36] At his sentencing hearing, counsel indicated that his client was likely to find employment as he had a job interview scheduled; the court suspended the imposition of a sentence, instead ordering the defendant to two years' conditional probation, and further ordered him to "reimburse Haakon County for the amount of court-appointed counsel fees incurred in the case."[37] The defendant twice indicated that he would accept those conditions, including repayment, but later filed a petition for post-conviction relief, "alleging that the stated condition of probation requiring repayment of attorney fees was unconstitutional."[38] The South Dakota Supreme Court ultimately held that the condition of repayment of counsel fees for a person on probation would have a "chilling effect" on the constitutional right of counsel unless it is enforced *only* "where the probatee has funds available for such repayment."[39]

Although *White Eagle* cautions against the practice of unilaterally requiring *post-factum* repayment, this caution should be applied even more stringently to Massachusetts's practice of requiring defendants to make co-payments as a prerequisite for representation.[40] As articulated

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35 White Eagle v. State, 280 N.W.2d 659 (S.D. 1979); State v. Cunningham, 663 N.W.2d 7 (Minn. Ct. App. 2003).

36 *White Eagle*, 280 N.W.2d at 660.

37 *Id.*

38 *Id.*

39 *Id*. at 661.

40 "Therefore, we suggest that the circuit courts make a practice of informing an indigent defendant of such potential conditions, pointing out also, . . . that such condition may only be enforced upon the court's finding that he is indeed capable of making repayment." *Id.* at 662. *See* MASS. GEN. LAWS ch. 211D, § 2A(f) (2023) (mandating that those that qualify for indigency and are provided with counsel during their first appearance before the judge "shall be assessed a counsel fee of

by the *White Eagle* court, having to pay counsel fees can chill the right to counsel for people of limited means, even under a recoupment system.[41] Unfortunately, this chilling occurs all too often in Massachusetts' contribution system, where the indigent client is not made aware of the fee until their arraignment.[42]

Similarly, in *Cunningham*, the defendants unsuccessfully contested the constitutionality of a $28 co-payment fee that was imposed for the use of public counsel.[43] The defendants argued that "the co-payment infringes on their rights to counsel and equal protection under the Minnesota and United States Constitutions," and that the trial court erred in imposing these payments.[44] Three defendants further argued that they were impermissibly ordered to pay twice: first the $28 co-payment and again when they reimbursed the public defender's office by paying them $20.[45] The statute at issue "mandate[d] imposition of the co-payment upon disposition of a case, . . . [but] provide[d] no guidance as to when a court should exercise its discretion to waive the co-payment requirement."[46] Despite ruling that the co-payments were constitutional, the lack of statutory limits for collection raised "serious

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$150, which the court may waive only upon a determination from officer's data verification process that the person is unable to pay . . . within 180 days.").

41 *White Eagle*, 280 N.W.2d at 661. *See also* Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, ACLU OF S. CAL. (June 17, 2017), https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf [https://perma.cc/3UYE-W8BY] ("For the poorest defendants, upfront registration fees are especially troubling. These fees discourage some defendants from exercising their right to a lawyer and can frustrate a public defender's attempts to build trust with clients.").

42 *See The Bail Process: Arrest to Arraignment*, COMMONWEALTH OF MASS. [hereinafter *The Bail Process*], https://www.mass.gov/info-details/the-bail-process-arrest-to-arraignment [https://perma.cc/YY99-Z4KY] (last updated May 4, 2022); Christopher Zoukis, *Indigent Defense in America: An Affront to Justice*, CRIM. LEGAL NEWS (Apr. 2018) https://www.criminallegalnews.org/news/2018/mar/16/indigent-defense-america-affront-justice/#:~:text=According%20to%20the%20National%20Legal,defendants%20cannot%20afford%20a%20lawyer [https://perma.cc/Y3J6-5S5R] ("The American Bar Association warned as far back as 2004 that . . . . Even a $200 fee could cause an indigent defendant to 'forgo the assistance of counsel, thereby increasing the possibility of wrongful conviction.'").

43 *See generally* State v. Cunningham, 663 N.W.2d 7 (Minn. Ct. App. 2003).

44 *Id.* at 9.

45 *Id.*

46 *Id.* at 11.

constitutional concerns" for the court.[47] In Massachusetts the statutory limits are equally imprecise, and it is unclear whether they would solve the issue anyway.[48]

### C. Responding to Critics Who Trivialize the Fee's Effect on the Exercise of the Right to Counsel

The main counterargument, as raised by *Fuller*[49] and alluded to by now-Professor Levine,[50] is that if the defendant does not know of the fee *before* they exercise their right to counsel, then surely there is no chilling effect on their decision to exercise the right. The argument, paradoxically, could be even stronger here, because counsel in Massachusetts is assigned without a criminal defendant's express authorization. In Massachusetts, the defendant often does not even get the chance to have his decision chilled.[51]

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47 "The lack of statutory limitations on . . . the co-payment raises serious constitutional concerns. The statute does not specifically provide that those . . . remain[ing] indigent or those for whom payment would [constitute] a manifest hardship must remain exempt from having any obligation to repay the services of a public defender." *Id.* The court then narrowly construed the statute because it provided such broad discretion to the courts and held that "a defendant is exempt from the co-payment and courts must exercise their discretion to waive the co-payment when a defendant is indigent or when the co-payment would cause a defendant to suffer manifest hardship." *Id.*

48 "If a defendant charged with a crime for which a sentence of imprisonment or commitment to the custody of the Department of Youth Services may be imposed initially appears in any court without counsel, the judge shall follow the procedures established in [MASS. GEN. LAWS] c. 211D and in . . . Rule 3:10." MASS. R. CRIM. P. 8, https://www.mass.gov/rules-of-criminal-procedure/criminal-procedure-rule-8-assignment-of-counsel [https://perma.cc/SJ69-FG57]. *See also* Jackson v. Commonwealth, 346 N.E.2d 714, 715 (Mass. 1976) (noting the "broad discretion" of a Superior Court judge "to appoint and order payment [of counsel] to represent or advise [defendants], to whatever extent [they] will accept representation, advice, and assistance, in an effort to ensure a fair, orderly and expeditious trial.").

49 Fuller v. Oregon, 417 U.S. 40, 51-53 (1974).

50 *See, e.g.*, Levine, *supra* note 10, at 214-215 (arguing that a constitutional challenge would be at its strongest if a right was actually affected). Professor Levine published this article while working as a Law Clerk to the Hon. Robert B. Patterson, Jr. at the United States District Court for the Southern District of New York. *Id.* at 191, n.a1. She is now a Professor of Law at Benjamin N. Cardozo School of Law. *Kate Levine*, CARDOZO SCH. OF L., https://cardozo.yu.edu/directory/kate-levine [https://perma.cc/V4P9-SDTK].

51 MASS. R. CRIM. P. 8, https://www.mass.gov/rules-of-criminal-procedure/criminal-procedure-rule-8-assignment-of-counsel [https://perma.cc/SJ69-FG57] (mandating the appointment of counsel under

Or does he? Another client of mine, Mr. Brown,[52] started our first meeting by saying: "I am not sure if I will be able to pay you. And I have two jobs so not much time for community service. Can you still help me?" Mr. Brown's sincere concern was heartbreaking, though I did what I could to ease his stress. Fortunately, because of the clinic's waiving of the fee, the statutory obligation was not imposed on him. But how did Mr. Brown know of the fee? We met before it was even announced to him.[53] I later learned that he had been sitting in the courtroom audience since 9:00 that morning and had heard the fee announced to several other defendants who were called before him. What if we were unable to waive Mr. Brown's fee and he had told me he did not want a lawyer after hearing that he had to pay or work? This was well within the realm of possibility, given our initial introduction.

Accordingly, the fee can and does have a chilling effect on the right to counsel. That's a serious problem for a constitutional right, a problem serious enough to re-consider at least the breadth of *Fuller*'s holding. As exemplified by Mr. Brown, assignment of counsel under these terms has the capacity to create resentment and tension between a client and their lawyer.[54] Clients might be stressed when talking to their attorney, because it could remind them of their impending bill or ten hours of community service.[55] Or, worse, because they were not provided the free counsel guaranteed by our Constitution, the client could resent the attorney, further straining the attorney-client relationship.[56] This tension is a real chill, or at minimum a burden, on the free and full exercise of the right to counsel.[57] The fee is thus unconstitutional, and should be eradicated.

Furthermore, the "ability to pay"[58] assessment mechanism in Massachusetts courts is insufficient to prevent this chilling effect.

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MASS. GEN. LAWS ch. 211D (2023) and MASS. SUP. JUD. CT. R. 3:10 § 2 (when a defendant initially "appears in court without counsel.").

52 Name has been changed.

53 This procedure is atypical: most defendants will meet their attorneys at the same time the fee is announced.

54 *See* Anderson, *supra* note 8, at 371 (remarking that "defendants may be resentful of having to pay for an attorney who was foisted upon them.").

55 *See id.* (noting the ways in which appointed counsel fees impact the attorney-client relationship).

56 *See id.*

57 *See id.*

58 Or "indigency status." *See* MASS. GEN. LAWS ch. 211D, § 2A(f) (2023); MASS. SUP. JUD. CT. R. 3:10, § 1.

Crucially, there is no statutorily mandated assessment of the ability to pay prior to the imposition of the counsel fee, nor is there a disclaimer when the fee is imposed at arraignment that payment will be conditioned on assessing the ability to pay.[59] Because the court is silent as to assessment, anyone who considers themselves unable to pay may choose not to retain counsel. Indeed, it is unclear exactly when the assessment happens; Massachusetts Supreme Judicial Court Rule 3:10 provides that the judge makes a determination as to the ability to pay based on the recommendation of the court's probation department.[60] Additionally, Massachusetts General Laws, Chapter 211D provides that the assessment happens "not later than 6 months after the appointment of counsel,"[61] although some municipal court cases do not last even that long. Regardless, assessment rarely happens at arraignment, meaning that it is a process occurring in the background while the defendant knows only that he is liable for a fee. Furthermore, it appears that a proper assessment only occurs at trial,[62] leaving defendants to ponder whether their assigned counsel is worth the payment or community service between arraignment and trial.

Substantively, the assessment, when provided, also does not alleviate the effect of the fee on the defendant's approach to assigned counsel. Even individuals who are clearly lacking funds to provide for their own counsel can be deemed "able to contribute"; any criminal defendant above 125% and less than 250% of the federal poverty line can be classified as "indigent but able to contribute."[63] This means that people barely getting by are asked to contribute to their counsel's remuneration.[64] But the right to free counsel is not a right of degree,

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59 *See* MASS. GEN. LAWS ch. 211D, § 2A(c) (2023) ("Not later than 6 months after the appointment of counsel, and every 6 months thereafter, the chief probation officer or the officer's designee shall conduct a further reassessment of the financial circumstances of the person for whom counsel was appointed to ensure that the person continues to meet the definition of indigency.").

60 MASS. SUP. JUD. CT. R. 3:10, § 5(b) and (c).

61 *See* MASS. GEN. LAWS ch. 211D, § 2A(c) (2023).

62 *See, e.g.*, Commonwealth v. Mortimer, 971 N.E.2d 283, 287 (Mass. 2012) (citing Commonwealth v. Delorey, 339 N.E.2d 746, 750 (Mass. 1975)) (remarking that "[t]ypically, this court does not 'substitute [its] judgment for that of the trial judge on the factual issue whether the defendant [is] able to pay for counsel.'").

63 MASS. SUP. JUD. CT. R. 3:10, § 1(i)(i).

64 For context, a single individual is below 125% of the federal poverty line when their yearly income is less than $18,225, or $350 per week. An individual is below 250% when their yearly income is less than $33,975, or roughly $650 per week. Thus, to qualify as "able to contribute" in Massachusetts (125-250% of the federal

where some pay "very little" for assigned counsel while others pay nothing. It is an absolute right to free counsel[65] and this scheme interferes with it. Hence, Massachusetts unsurprisingly leaves potentially saving the scheme to judges' discretion.[66] But discretion cannot solve a facially unconstitutional problem.

Skeptics could argue that the fee is meaningless for defendants when deciding whether to retain assigned counsel given the judges' discretion, the fee being relatively low, and the many other factors that impact a defendant's decision to accept appointed counsel. But *Ludwig v. Massachusetts*, which discusses the disadvantages of the Massachusetts two-tiered trial system that guarantees a jury trial only on the second tier, is on point here.[67] In that case, the defendant was charged with negligent operation of a motor vehicle and moved for a "speedy trial by jury" at the beginning of trial; this motion was denied and he was ultimately found guilty and fined $20.[68] The defendant then "asserted his statutory right to a trial De novo before a six-man jury in the District Court," before filing a motion to dismiss during the *de novo* proceeding, asserting that he was deprived of his right to a jury trial at the first tier

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poverty line), a single individual must annually earn between $18,225 and $33,975. *See Federal Poverty Guidelines – 2023*, MASS. LEGAL SERVS. (Jan. 19, 2023), https://www.masslegalservices.org/content/federal-poverty-guidelines-2023 [https://perma.cc/5YX6-3UFP] (noting the figures for 125% of the FPL); *Program Eligibility by Federal Poverty Level for 2023*, COVERED CAL. (Oct. 2022), https://www.coveredca.com/pdfs/FPL-chart.pdf [https://perma.cc/BEQ4-T3PN] (noting the figures for 250% of the FPL).

65 Desist v. United States, 394 U.S. 244, 268 (1969) (Harlan, J., dissenting) (emphasis added) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)) (opposing the retroactivity of criminal procedure decisions and writing that *Gideon* "had already established the proposition that the State must provide *free* counsel to indigents at the criminal trial.").

66 MASS. SUP. JUD. CT. R. 3:10, § 5(f) ("Even where a party meets or fails to meet the definitions of 'indigent' or 'indigent but able to contribute,' the judge retains the discretion to determine that the interests of justice require a different determination based on the party's available funds in relation to the party's basic living costs, or special circumstances, or both.").

67 *See* Ludwig v. Massachusetts, 427 U.S. 618, 635 (1976) (Stevens, J., dissenting). The Massachusetts "two-tier" system applies only to certain crimes, with no trial by jury available to a person accused of one of these crimes in the lower tier. Ludwig v. Massachusetts, 427 U.S. 618, 619-20 (1976). If the defendant is convicted following the first, jury-less trial, "the defendant may take a timely 'appeal' to the second tier and, if he so desires, have a trial De novo by jury." *Id.* at 620.

68 *Id.* at 622-23.

and "that he had been subjected to double jeopardy."[69] When this motion was denied, the defendant waived a jury at the second tier and was again adjudged guilty and fined $20.[70] The Supreme Court held that this two-tiered system did not interfere with the defendant's right to a jury trial, and furthermore that it did not violate the Double Jeopardy Clause.[71]

However, as argued by a dissenting Justice Stevens, if the jury-less first-tier proceeding "is meaningless for the defendant, [then] it must be equally meaningless for the Commonwealth."[72] The same can be said about the $150 counsel fee, which exists only because the Commonwealth of Massachusetts wants to recoup money from the very people the state is constitutionally obligated to provide free counsel to. Hence, the practice of requiring indigent persons' money or time without adequate safeguards creates a burden on the right to counsel in Massachusetts.

Therefore, the Massachusetts counsel fee chills the right to counsel. The argument for a challenge could also be phrased a different way: *Miranda* warnings are supposed to express the essence of the constitutional right to counsel, which is free counsel.[73] Thus, when the *Allen* court held that co-payment and recoupment schemes are inconsistent with constitutionally-required *Miranda* warnings

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69 *Id.* at 623 (citation omitted).

70 *Id.*

71 *Id.* at 626, 631.

72 Ludwig v. Massachusetts, 427 U.S. 618, 635 (1976) (Stevens, J., dissenting).

73 As stated by the *Miranda* Court:

> In order fully to apprise a person interrogated of the extent of his rights under this system . . . it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent–the person most often subjected to interrogation–the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Miranda v. Arizona, 384 U.S. 436, 473 (1966) (footnotes omitted).

promising free counsel, the fees had to fall.[74] The *Cummings* court raised a similar concern, and by relying on a deferential standard of a review, denied a challenge to a *Miranda* warning that suggested that one might have to pay for a lawyer (as opposed to entitlement to a free lawyer).[75] The right to free counsel would be a farce if police are obligated to inform a defendant being interrogated of the right to free counsel, but courts are then permitted to opt out of fully implementing this right. The specific language of a *Miranda* warning card commonly used by police in Massachusetts reads, in relevant parts: "[y]ou have the right to consult with a lawyer" and "[i]f you cannot afford a lawyer and want one, a lawyer will be provided, at no cost to you, by the Commonwealth."[76]

The Massachusetts Supreme Judicial court Rules, however, contradict this guarantee of free counsel. Section 2 of Rule 3:10 provides that if a party appears in court without counsel, "the party may be entitled to the appointment of counsel at public expense."[77] The Rule then clarifies that counsel might be appointed at "no cost or at a reduced cost"[78] —but this will only further chill the right to counsel because the

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[74] *See In re* Allen, 455 P.2d 143, 144-45 (Cal. 1969) (citation omitted) (holding recoupment unconstitutional as "an impediment to the free exercise of a right guaranteed by the Sixth Amendment" because the fee "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 Court in *Gideon*.").

[75] *See* Cummings v. Polk, 475 F.3d 230, 241 (4th Cir. 2007) ("Although the impact of Hunter's ad hoc statements to Cummings may be debatable, we are obliged in this § 2254 proceeding to apply AEDPA's deferential standard of review."). In this case, a defendant who was suspected of murder was questioned by police, given his *Miranda* warnings, and provided with a *Miranda* rights form. *Id.* at 233. "The form provided that '[i]f you want a lawyer before or during questioning but cannot afford to hire one, one will be appointed to represent you at no cost before any questioning.'" *Id.* (citation omitted). The detective giving the warning struck the "at no cost" language and explained that if the defendant was found guilty, he may be required to reimburse the state. *Id.* (citation omitted). The court upheld this conduct as reasonable after applying its deferential standard of review. *Id.* at 241.

[76] *See Policy and Procedure: In Custody Questioning*, BRAINTREE POLICE DEP'T ( Apr. 16, 2019), https://braintreema.gov/DocumentCenter/View/4544/In-Custody-Questioning [https://perma.cc/MJ4W-DPFG] (explaining the Town of Braintree, Massachusetts's policies for in-custody questioning, emphasizing the use of preprinted *Miranda* cards, and providing sample language).

[77] MASS. SUP. JUD. CT. R. 3:10, § 2.

[78] *Id.*

meaning of the term "reduced costs" is unclear. It is misleading to impose a counsel fee on every defendant appearing at arraignment after they were advised by law enforcement that the Constitution affords them the protection of free, court-appointed counsel. Moreover, this information is actually not disseminated to defendants in certain state courts prior to assignment,[79] thereby creating a larger web of constitutional issues that transgress the fundamental principle that the state must provide free counsel to indigent clients at a criminal trial.[80] If this right is promised outside of the courts but then abrogated by court practices, indigent defendants rightly feel cheated, confused, and potentially distrustful towards their lawyers.[81]

### D. The Fee Affects the Right to Proceed Pro Se

Contradictorily, the same Massachusetts mechanism that chills the right to counsel also denies the defendant an opportunity to proceed *pro se*. Most would think that the rights to counsel and to proceed *pro se* are antithetical, where the diminishing of one enhances the other. However, the two rights are far from contradictory; the right to counsel is an entitlement that attaches as soon as charges are filed,[82] while the right

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79 *See The Bail Process*, *supra* note 42 (noting that the probation department is to determine a defendant's eligibility for a court-appointed attorney during an interview which occurs immediately before the defendant's arraignment, that "the minimum counsel fee is $150" or "15 hours of community service" if they cannot afford the fee, and that "[t]he judge will [then] assess the legal counsel fee at the defendant's arraignment.").

80 Desist v. United States, 394 U.S. 244, 268 (1969) (Harlan, J., dissenting) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)) (remarking that *Gideon* "had already established the proposition that the State must provide free counsel to indigents at the criminal trial.").

81 Based on my own experience with, among other clients, Misters Jones and Brown. *See also* Anderson, *supra* note 8, at 371 (noting the ways in which appointed counsel fees impact the attorney-client relationship).

82 *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008) (citations omitted) ("This Court has held that the right to counsel . . . applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."); United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that the defendant's right to counsel does not attach until after "any adversar[ial] judicial proceedings [have] been initiated against them."); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) (holding that the right to counsel attaches at arraignment).

to proceed *pro se* is the defendant's right to make a decision, which exists alongside the right to counsel as an affirmative right.[83]

Every defendant has the right to proceed *pro se*, but the right is subject to constraints because a lawyer is presumed necessary to protect the fairness of the system. A defendant's request to proceed *pro se* will be granted only if he does so "competently and intelligently" with a factual understanding of the proceedings.[84] In addition to determining whether a defendant is competent to waive counsel, the waiver of his constitutional rights must also be "knowing and voluntary."[85] Although these requirements primarily refer to the defendant's understanding of the substantive legal issues involved, to successfully proceed *pro se*, the defendant should have the necessary information relevant to both the case and the decision to obtain counsel.

However, the Massachusetts procedure denies the right to proceed *pro se* because counsel is typically appointed at arraignment by default.[86] Consequently, a piece of crucial information for many defendants–the fact that they are liable for a $150 fee–is only disseminated after counsel is assigned and starts working on the case. This withholds vital information from defendants that is necessary and material to making a fully informed decision about whether to proceed *pro se*.

The prescribed procedure can nevertheless be defended on grounds of efficiency: it would be impracticable to call a defendant onto the stand, have the judge explain the fee, and then determine the defendant's comprehension. However, if the $150 fee creates a choice between efficiency and full respect for a constitutional right, then the validity of

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83 *See* Faretta v. California, 422 U.S. 806, 807 (1975) (holding that a court cannot "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.").

84 "A criminal defendant may not be tried unless he is competent. [*sic*] . . . , and he may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently.'" Godinez v. Moran, 509 U.S. 389, 396 (1993) (citations omitted).

85 Parke v. Raley, 506 U.S. 20, 28-29 (1992) (citations omitted) (discussing how a guilty plea involves the waiver of constitutional rights, and that the waiver of any constitutional right must be "knowing and voluntary.").

86 "If you're charged with an offense for which you could receive jail time and you can't afford a lawyer, the judge will appoint a lawyer . . . . Either before or after the arraignment, you'll have an opportunity to talk briefly during a recess or outside the courtroom." *Your Arraignment or First Appearance in Court*, COMMONWEALTH OF MASS., https://www.mass.gov/info-details/your-arraignment-or-first-appearance-in-court [https://perma.cc/Q6J6-BR52].

the procedure and the fee itself should be questioned. Methods to circumvent the impact the fee has on defendants' constitutional rights do not fix the issue; rather, they uphold a policy choice over truly protecting defendants' fundamental rights. The fact that defendants can still later fire their assigned lawyer and proceed *pro se* also does not fix the issue because it is unclear whether any part of the fee would then be cancelled. This is especially true if the defendant meanwhile completes the community service, thereby providing the Commonwealth with labor which cannot later be "cancelled."

Moreover, there is a more complex issue: the fee either encourages *pro se* beyond what the Constitution might contemplate, or at least unreasonably prevents it. The Constitution includes a presumption against *pro se* proceedings because a lawyer is believed to be extremely valuable to defendants facing criminal charges.[87] Of course, the presumption can be overridden, but this should only be for reasons related to the personal autonomy of defendants.[88] Meanwhile, the Massachusetts counsel fee exceeds these constitutional limitations by encouraging *pro se* appearances. For example, because "[t]he defendant is not a party to any negotiation as to a basis for the [counsel] charge,"[89] the defendant might terminate the lawyer, whom he perceives to be responsible for the unexpected charge. Therefore, the decision to proceed *pro se* would result from a negative thought process ("I don't want/can't pay for a lawyer") as opposed to a positive one based on personal autonomy ("I want to represent myself").

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87 *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's own clearly indicated goals."); Faretta v. California, 422 U.S. 806, 835-36 (1975) (holding that there is a Sixth Amendment right to proceed *pro se* where the defendant is "literate, competent, and understanding, and . . . [is] voluntarily exercising his informed free will," even if the trial judge tries to convince them otherwise for their own benefit.). When taken together, these two holdings indicate that a defendant's ability to proceed *pro se* can and will be limited if necessary.

88 "'[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under this own banner if he so desires and if he makes the choice "with eyes wide open."'" Commonwealth v. Mott, 308 N.E.2d 557, 561 (Mass. App. Ct. 1974) (quoting United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)).

89 *In re* Allen, 455 P.2d 143, 146 (Cal. 1969).

The mechanism of the fee's imposition may also prevent defendants from exercising the right to proceed *pro se*. Because counsel is assigned and the fee is imposed without consulting most defendants, some may feel compelled to accept the court's decision, thereby becoming unnecessarily discouraged from proceeding *pro se*. This concern would be less pronounced if defendants were consulted before counsel is imposed, though then this might result in either long delays caused by explaining the rights to counsel and to proceed *pro se*, or an unnecessary implicit suggestion that a lawyer is not needed. As exemplified in *Commonwealth v. Mott*, a denial of the right to conduct one's own defense can result in further litigation, such as the granting of a new trial.[90] Thus, the consequences of denying the right to proceed *pro se* limits judicial efficiency and underscores how the counsel fee indirectly impacts the efficiency of our courts.

This combination of encouragement and discouragement, both for the wrong reasons, creates a circular paradox, wherein the state wants to discourage *pro se* proceedings per the Constitution but instead later encourages it by allowing a potential savings of $150. Additionally, more defendants proceeding *pro se* would perhaps relieve pressure on public defenders.[91] However, the counsel fee may mitigate this potential benefit; in the absence of necessary information to make an informed decision, more defendants may receive an appointed lawyer than would otherwise accept one. Thus, empirical research on the actual effect of the fee–positive, negative, or mixed–is warranted.

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90 "The defendant argues that the denial of his request to proceed *pro se* violated the constitutional right of an accused to defend himself. We are inclined to agree, at least to the extent that such right is secured by the Massachusetts Constitution." *Mott*, 308 N.E.2d at 560 (1974). The Massachusetts Appeals Court then reversed his conviction and ordered a new trial. *Id.* at 561.

91 It is no secret in the legal industry that public defenders are overworked and underfunded. In fact, this is the reason why counsel fees are imposed. *See* COMMONWEALTH OF MASS. HOUSE POST AUDIT AND OVERSIGHT BUREAU, FAIR AND COST EFFECTIVE – ENSURING AN ADEQUATE DEFENSE WHILE PROTECTING THE TAXPAYERS; REVIEW OF THE INDIGENT DEFENSE COUNSEL PROGRAM (2012) [hereinafter FAIR AND COST EFFECTIVE], https://archives.lib.state.ma.us/bitstream/handle/2452/200463/ocn821650749.pdf?sequence=1&isAllowed=y [https://perma.cc/4TGW-GNPP] (suggesting that investigations into indigency be more stringent, that rates of repayment be raised, and that no counsel be provided for minor misdemeanors).

### E. The Right to Counsel vs. the Right to Retained Counsel

Mr. Jones once called me to ask if he could refer a friend. "He can pay you," he assured me, even though I had already explained that my student attorney status prevented me from accepting a case by myself.[92] His statement represents how indigent defendants not only receive a lawyer that is not free, but is also one that they cannot choose.

The right to *retained* counsel *of choice* is an extremely powerful one under Supreme Court jurisprudence. If one pays for their counsel, they have the right to both choose and fire their lawyer, and this is a right with which no one can interfere.[93] In this way, the client-lawyer relationship is almost sacred,[94] and, if proven on appeal, "erroneous deprivation" of a retained lawyer by the court will win the case.[95] Unlike an allegation of ineffective assistance of counsel,[96] there is no requirement that prejudice be shown for "erroneous depravation", not even harmful error.[97] On the other hand, no such protection is afforded to those represented by appointed counsel; the sole safeguard is that the lawyer be competent, and no meaningful attorney relationship is guaranteed by the right to counsel in this instance.[98] Therefore, there is

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92 *See* MASS. SUP. JUD. CT. R. 3:03(1)(b) (requiring student attorneys in Massachusetts to be under the "general supervision of a member of the bar of the Commonwealth" while representing "indigent defendants in criminal proceedings").

93 "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed to them." *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 151-52 (2006) (citations omitted) (remanding for a new trial where the trial court deprived a criminal defendant of his paid counsel of choice).

94 *See, e.g.*, Luis v. United States, 578 U.S. 5, 8-9 (2016) (holding that the government's freezing of assets that were "untainted by the crime" and intended to pay for counsel undermined the defendant's fundamental right to choose her counsel as a paying client.).

95 "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, . . . 'unquestionably qualifies as "structural error."'" *Gonzalez-Lopez*, 548 U.S. at 150 (citation omitted).

96 *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a "defendant must show that the deficient performance [of counsel] prejudiced the defense.").

97 *Gonzalez-Lopez*, 548 U.S. at 146-151.

98 *See, e.g.*, Morris v. Slappy, 461 U.S. 1, 3, 5, 13-14 (1983) (holding that the Sixth Amendment does not guarantee a meaningful relationship with appointed counsel, and that forcing defendant to accept a replacement lawyer for trial after his existing lawyer fell ill, instead of granting a continuance, was appropriate).

no right to counsel of choice for the indigent.[99] Only when there are reasonable and convincing circumstances can the failure to respect a request for a specific lawyer rise to a level of a constitutional violation.[100]

This distinction is at least partly built on the premise that retained counsel is paid for by the defendant, which warrants more control over the trajectory of their case.[101] However, if indigent defendants are required to pay for their lawyer, they should also be able to choose them.[102] This is not the case in Massachusetts.[103] Indigent defendants in Massachusetts have to pay for free counsel but thereafter receive none of the benefits of paid counsel. It's a blend that guarantees the worst of both worlds.

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99 "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed to them." United States. v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006) (citation omitted). *See* Drumgo v. Superior Court of Marin County, 506 P.2d 1007, 1009 (Cal. 1973) (citations omitted) ("We have repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than the one requested by [an indigent] defendant.").

100 "[W]e hold that . . . [a] statement of preference, timely made, is supported by objective considerations of the consequence here involved, and where there are no countervailing considerations of comparable weight, it is an abuse of sound judicial discretion to deny the defendant's request to appoint the counsel of his preference." *See* Harris v. Superior Court of Alameda County, 567 P.2d 750, 759 (Cal. 1977).

101 *See, e.g.*, Luis v. United States, 578 U.S. 5, 8-9 (2016).

102 *See* 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, 185 n.26 (1998) (footnote omitted) (citing a variety of authority standing for the proposition that defendants who pay for their lawyer also enjoy the Sixth Amendment right to choose their counsel).

103 I have witnessed, on numerous occasions, a lawyer asking to withdraw from a case when the client failed to appear; in some cases, this was done without the attorney attempting to justify the client's absence. Massachusetts permits withdrawal of representation on this, and other, grounds. *See* MASS. R. PRO. CONDUCT 1.16(a-b) (indicating that 1.16(a)(1) mandates withdrawal where "the representation will result in violation of the rules of professional conduct or other law;" 1.16(b) permits withdrawal where a client has or intends to take criminal or fraudulent action or where a client fails to pay and may cause "unreasonable financial burden" on the attorney; and 1.16(b)(7) includes a catchall provision, allowing for withdrawal where "other good cause . . . exists.").

## II. THE MASSACHUSETTS COUNSEL FEE OFFENDS THE PRESUMPTION OF INNOCENCE

The Massachusetts fee also carries constitutional problems distinct from the rights related to defending oneself.[104] Counsel fees imposed on unconvicted defendants infringe on their presumed innocence, regardless of their choice to complete community service instead of paying the fee. Of course, this observation rests on an expansive reading of the presumption of innocence, but although it is sometimes obscured by existing constraints on the application of the presumption, this reading is entirely reasonable. Thus, imposing the counsel fee or community service on indigent defendants before trial denies them the presumption of innocence, and therefore imposes punishment on unconvicted persons in direct violation of the Fifth and Fourteenth Amendments' Due Process clauses.[105]

Although not explicit in the wording of the Fifth and Fourteenth Amendments, the presumption of innocence afforded to all unconvicted defendants in criminal cases is an uncontroversial, universal constitutional principle.[106] However, the presumption was quickly limited to a strictly trial-bound principle[107]; although early courts defended the applicability of the presumption of innocence before

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104 The right to counsel is instinctively affected by a fee charged for having an assigned counsel. However, the law should also be analyzed through common sense, out-of-the-box, and instinctive thinking, as long as it is grounded in plausible legal reasoning.

105 *See* Anderson, *supra* note 8, at 325-26 ("[B]asic due process is violated if the obligation [to pay a counsel fee] is imposed without notice and opportunity to be heard regarding the ability to pay or the amount."). *See generally* Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441 (1978) (discussing how pre-trial procedures, such as imposing a counsel fee on indigent defendants, violates the presumption of innocence as well as basic due process rights).

106 "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). *See also* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 728 (2011) (discussing the historical interpretation of the presumption of innocence).

107 Bell v. Wolfish, 441 U.S. 520, 533 (1979) (noting that the presumption of innocence has "no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun"); *see also* Brandon L. Garrett, *The Myth of the Presumption of Innocence*, 94 TEX. L. REV. 178, 183 (2016).

trial,[108] contemporary jurisprudence has questioned the idea. For example, in 1978's *Taylor v. Kentucky*, the Supreme Court held that presumption of innocence only applies at trial[109] because it is intrinsically linked to reasonable doubt.[110] Additionally, in *In re Winship*, the Court stated that "[t]he [reasonable doubt] standard provides concrete substance for the presumption of innocence."[111]

Thus, the main function of the presumption of innocence is to require the evidence at trial to be sufficiently convincing for a judge or jury to find the defendant guilty. This is expressed by the reasonable doubt standard, which requires the party bearing the burden of proof to "'impress[] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"[112] This also seems to be the understanding of the principle adopted by Massachusetts through Model Jury Instruction 2.160:

> The law presumes the defendant to be innocent of (the charge) (all the charges) against him (her). This presumption of innocence is a rule of law that compels you to find the defendant not guilty unless and until the Commonwealth produces evidence, from whatever source, that proves that the defendant is guilty beyond a reasonable doubt.[113]

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[108] "Historically, the presumption of innocence . . . guaranteed that guilt would not be determined before trial." Baradaran, *supra* note 106, at 728.

[109] Taylor v. Kentucky, 436 U.S. 478, 483-84 (1978) (citation omitted) (holding "'that failure to give . . . an instruction [on the indictment's lack of evidentiary value] denies the defendant due process of law.'"). In *Taylor*, the defense had "requested the trial court to instruct the jury that '[t]he law presumes a defendant to be innocent of a crime,' and that the indictment, previously read to the jury, was not evidence to be considered against the defendant." *Id.* at 480-81 (footnote omitted).

[110] *See In re* Winship, 397 U.S. 358, 363 (1970) (citation omitted).

[111] *Id.* (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). *See also* Hankerson v. North Carolina, 432 U.S. 233, 241 (1977) (discussing the reasonable doubt standard laid out by *Winship*).

[112] *In re* Winship, 397 U.S. at 363-64 (citation omitted).

[113] Lynda M. Connolly, *Instruction 2.160: Presumption of Innocence; Burden of Proof; Unanimity*; *in* 1 CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT (MCLE) (2019).

### A. The Intersection Between the Pretrial Status of Criminal Defendants and the Presumption of Innocence

Another interpretation of the presumption of innocence, in line with *Hankerson* and *Winship*,[114] expands the presumption of innocence beyond reasonable doubt at trial to include the pre-trial treatment of defendants.[115] Considering the plain meaning of the phrase "presumption of innocence", it is clear that it should be applicable to pre-trial defendants. According to *Webster's Dictionary*, "presumption" is defined as "a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact."[116] Thus, the correct interpretation of the presumption of innocence should require the state to treat defendants consistently with complete innocence (and "consequences") at any point until and in in the absence of proof to the contrary. The state's duty to establish the defendant's guilt should extend to proceedings which precede the start of trial.[117] At any pre-trial stage, a defendant is merely *charged* with a crime, and the prosecution has yet to discharge its burden to prove them guilty.[118] This expansive application of the presumption of innocence helps to meaningfully safeguard the rights of pre-trial detainees and equalizes the power imbalance between criminal defendants and prosecutors, thereby making guilty pleas more fair and not the result of the coercive effect of pre-trial measures.[119] Moreover, it is the logical

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114 *See generally Hankerson*, 432 U.S.; *In re* Winship, 397 U.S..

115 *See, e.g.*, Baradaran, *supra* note 106, at 728-29 (discussing how historically, the presumption of innocence attached upon arrest and charge); Daniel Kiselbach, *Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence*, 31 CRIM. L.Q. 168, 177 (1989) ("[A] broad view of the presumption of innocence is that an accused has the right to be treated as an innocent citizen prior to the adjudication of guilt at his trial.").

116 *Presumption*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/presumption [https://perma.cc/4CRV-5ZS5].

117 *See* Baradaran, *supra* note 106, at 724 ("Preventing judges from deciding defendants' guilt [at] pretrial ensured that defendants would remain at liberty before trial.").

118 Betterman v. Montana, 578 U.S. 437, 442 (2016) (citation omitted) (remarking that "[p]rior to conviction, the accused is shielded by the presumption of innocence").

119 The 1951 case *Stack v. Boyle* held that the right to bail stems directly from the presumption of innocence because pre-trial detention without bail would give the government the right to imprison innocent individuals. Stack v. Boyle, 342 U.S. 1, 4 (1951) *superseded by statute*, Bail Reform Act of 1984, 18 U.S.C. § 3142. In *Stack*, the Supreme Court stated that "[u]nless [the] right to bail before trial is

reading of the presumption of innocence, because anyone who is acquitted or was ultimately not prosecuted despite being charged should not be led to consider themselves anything but fully innocent—nor should the society be led to consider or be invited to treat them differently. Thus, up until a verdict, no punitive measures should be imposed on criminal defendants. Indeed, it is clear that the presumption of innocence is extinguished once a conviction is entered at trial.[120] Therefore, due process should shield the accused from any punishment, such as the $150 counsel fee or community service, unless or until they are proven guilty.[121] A conviction extinguishes the presumption of innocence, but our existence as citizens creates it, not the start of a trial.

The presumption of innocence should therefore extend to the pretrial process and should preclude any measures which would have a punitive or otherwise distressing effect on the defendant,[122] such as the indigent counsel fee. The presumption of innocence was traditionally conceived to prevent the infliction of punitive measures on defendants during the pre-trial stages; it concentrated on preserving freedom and liberty of those not yet convicted of a crime.[123] The presumption's essential purpose is to prevent defendants from being punished unless they are

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preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4. *See also* Baradaran, *supra* note 106, at 724 ("Preventing judges from deciding defendants' guilt [at] pretrial ensured that defendants would remain at liberty before trial.").

120 *See Betterman*, 578 U.S. at 442 (observing that the presumption of innocent applies before a defendant is convicted); Herrera v. Collins, 506 U.S. 390, 399 (1993) (citation omitted) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.").

121 *See* Thaler, *supra* note 105, at 441 (footnote omitted) ("If we take seriously the criminal process's concern that the margin of error in factfinding be reduced so that an innocent person is not punished until he is found to be legally guilty, then we must reexamine the dogma that the due process and presumption of innocence principles can have no applicability to pretrial procedure.").

122 *See, e.g.*, *id.*

123 The 1951 case *Stack v. Boyle* held that the right to bail stems directly from the presumption of innocence because pre-trial detention without bail would give the government the right to imprison innocent individuals. Stack v. Boyle, 342 U.S. 1, 4 (1951) *superseded by statute*, Bail Reform Act of 1984, 18 U.S.C.S. § 3142. In *Stack*, the Supreme Court stated that "[u]nless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4. *See also* Baradaran, *supra* note 106, at 724 ("Preventing judges from deciding defendants' guilt [at] pretrial ensured that defendants would remain at liberty before trial.").

convicted.[124] Indeed, even post-*Taylor*, those concerned with rights guaranteed by the Constitution argued that the presumption of innocence protects the accused against deprivation of liberty, following from the requirement of "'due process of law' within the meaning of the Fourteenth Amendment."[125] In fact, this reading is not exclusive to the United States; in Canada, the famous case *R v. Oakes* held that the constitutional presumption of innocence relates to both trial, where it demands a burden of proof, and pre-trial, where it bans infringing on the person's right to life, freedom, or security.[126]

Article XII of the Massachusetts Declaration of Rights seems to codify a similar idea: that no one can be deprived of liberty, property, or estate unless there is a judgment brought against them.[127] It codifies a presumption of innocence that would extend infinitely backwards from trial. In fact, Article XII appears to be broader than either *Oakes* or *Stack* because it extends the presumption to deprivation of property.[128] What implications does that potential extension have? Is it enough to extend to pre-trial charges?

Presumption of innocence means not only 'absent conviction, no imprisonment,' but also 'absent conviction, no punishment.'[129] This

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124 Connolly, *supra* note 113.

125 *See* Baker v. McCollan, 443 U.S. 137, 150 (1979) (Stevens, J., dissenting) ("In my judgment, such procedures [to verify identity] are required by the Due Process Clause, and the deprivation of respondent's liberty [for eight days despite a claim of mistaken identity] occasioned by their absence is a violation of his Fourteenth Amendment rights.").

126 R. v. Oakes, [1986] 1 S.C.R. 103, 111-12, 118, 141-42 (1986 Supreme Court of Can.).

127 MASS. DECLARATION OF RIGHTS art. XII.

128 *See* R. v. Oakes, [1986] 1 S.C.R. 103, 119 (1986 Supreme Court of Can.) (citation omitted) ("[T]he presumption of innocence is referable and integral to the general protection of life, liberty and security of the person"); Stack v. Boyle, 342 U.S. 1, 3-4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); MASS. DECLARATION OF RIGHTS art. XII ("And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.").

129 *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 630-31 (2005) (discussing that keeping a defendant shackled during trial not only gives the jury the physical perception of guilt, but it also unconstitutionally interferes with the "defendant's ability to participate in his own defense" and communicate with his counsel, and arguing that this diminishes a defendant's right counsel and his ability to secure a meaningful defense); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (footnotes

definition of presumption of innocence is based on a recent Supreme Court case, *Nelson v Colorado*.[130] In *Nelson*, the Court invalidated a Colorado statute that "condition[ed] refund[s] on defendants' proof of innocence by clear and convincing evidence" because it was "not an adequate remedy for the property deprivation [the defendants] experienced."[131] The Court required Colorado to refund fees and court costs to two defendants whose convictions were invalidated without a retrial[132] because, where the finding of guilt is annulled, the original, pre-trial presumption of innocence is restored.[133] Hence, a defendant cannot be liable for "anything more than minimal procedures," including fees in this case, if he is not validly convicted.[134] In this way, one could argue that *Nelson* was a case about trial and post-trial burden shifting.[135] However, *Nelson* can also be read as providing the grounds to again extend the role of the presumption of innocence beyond just

omitted) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Waddell v. Lloyd, No. 16-14078, 2019 U.S. Dist. LEXIS 50192, at *9 (E.D. Mich. Mar. 26, 2019) (citations omitted) ("[P]retrial detainees are entitled to a presumption of innocence . . . . So punishment of any kind is not permitted."); Lee v. Richland Par. Det. Ctr., No. 3:11-cv-0925, 2011 WL 6057859, at *7 (W.D. La. Oct. 25, 2011) (quoting Bell v. Wolfish, 441 U.S. 520, 534-37 (1979)) ("Clothed with the presumption of innocence, pre-trial [defendants] have a constitutional right to be free from punishment."). *See also* Garrett, *supra* note 107, at 183 (quoting Bell v. Wolfish, 441 U.S. 520, 533 (1979)) ("[T]he presumption [of innocence] 'has no application to a determination of the rights of a pretrial [defendant] before his trial has even begun.'").

130 "[O]nce those convictions were erased, the presumption of [the defendants'] innocence was restored." Nelson v. Colorado, 581 U.S. 128, 135 (2017) (citation omitted).

131 *Id*. at 137-38 (footnote omitted) (citation omitted).

132 *Id.* at 136-39.

133 *Id.* at 135.

134 "To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." *Id.* at 139.

135 *See generally id.*

requiring the court to provide proper jury instructions on the prosecutor's burden to prove the crime beyond a reasonable doubt.[136]

Fees and other measures unilaterally imposed on defendants before trial violate the presumption of innocence by dehumanizing the defendant. Indeed, presuming a person innocent until proven guilty plays an essential humanizing role in preserving and defending that person's dignity.[137] Thus, naturally, innocent defendants cannot maintain their own dignity when the state imposes measures which, by their nature, read as punishment or direct repercussions stemming from the conduct alleged in the charge.[138] What is the value of presumption of innocence if the person entitled to it only feels like the system grants them a 'half-innocent' status? The argument below demonstrates that the Massachusetts counsel fee is indeed a form of pre-trial punishment and at the same time a measure which, by signalizing and treating a defendant as not fully innocent, infringes on their dignity. In addition,

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136 *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 630-31 (2005) (discussing that keeping a defendant shackled during trial not only gives the jury the physical perception of guilt, but it also unconstitutionally interferes with the "defendant's ability to participate in his own defense" and communicate with his counsel, and arguing that this diminishes a defendant's right counsel and his ability to secure a meaningful defense); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (footnotes omitted) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Waddell v. Lloyd, No. 16-14078, 2019 U.S. Dist. LEXIS 50192, at *9 (E.D. Mich. Mar. 26, 2019) (citations omitted) ("[P]retrial detainees are entitled to a presumption of innocence . . . . So punishment of any kind is not permitted."); Lee v. Richland Par. Det. Ctr., No. 3:11-cv-0925, 2011 WL 6057859, at *7 (W.D. La. Oct. 25, 2011) (quoting Bell v. Wolfish, 441 U.S. 520, 534-37 (1979)) ("Clothed with the presumption of innocence, pre-trial [defendants] have a constitutional right to be free from punishment."). *See also* Garrett, *supra* note 107, at 183 (quoting Bell v. Wolfish, 441 U.S. 520, 533 (1979)) ("[T]he presumption [of innocence] 'has no application to a determination of the rights of a pretrial [defendant] before his trial has even begun.'").

137 Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 284 (2002).

138 "Pre-trial detention is warranted only where there is a finding of guilt or that an accused has subverted justice on release." *See* Kiselbach, *supra* note 115, at 177-78 (footnote omitted). This is because the presumption of innocence directs "authorities to ignore any factual probability of guilt in dealing with an accused." *Id.* at 177 (footnote omitted).

the argument flags the community service alternative as even more blatantly punitive.

### B. The Counsel Fee Constitutes Pretrial Punishment

A financial burden, or the community service alternative, imposed on pre-trial defendants infringes upon the presumption of innocence. The Massachusetts counsel fee essentially punishes defendants who are already at arraignment for merely being charged with a crime—something that is in most cases entirely up to the discretion of the Commonwealth.[139] Similarly to *Nelson*, where the Court ordered restitution of court fees following reversed convictions, the Massachusetts counsel fee closely resembles a court fee because it is a fee that is imposed statutorily, as opposed to a monetary imposition by the defendant's attorney.[140] In *Nelson*, the Supreme Court rejected a state statute that created a procedural burden on the defendant to recover their fees because it violated their restored presumption of innocence.[141] Similarly, the Massachusetts counsel fee places a procedural burden on an indigent defendant to access free counsel, with no system to ensure recovery of this fee if the defendant is not convicted.[142] Like in *Nelson*, the Massachusetts counsel fee imposes a burden on a defendant's presumption of innocence.

However, *Nelson* did not simply hold that court fees should not be imposed on any unconvicted defendant. It instead utilized the *Mathews* due process test to determine whether it was constitutional to impose the fees given the high burden to recoup them if a defendant became eligible to do so.[143] The *Mathews* test balances government interests, private

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139 This is the standard procedure in Massachusetts, with no discretion left to judges apart from very few exceptions. *See, e.g.*, Commonwealth v. Newberry, 131 N.E.3d 230, 232 (Mass. 2019) (holding that judges must arraign defendants prior to assigning them to pretrial diversion if the Commonwealth seeks arraignment).

140 In *Nelson*, the Court ordered restitution of funds that Colorado was withholding from defendants whose convictions were reversed. Nelson v. Colorado, 581 U.S. 128, 130 (2017). The Colorado Supreme Court had upheld the refusal to provide refunds because the defendants failed to complete the procedural requirements of the Exoneration Act. *Id.* at 131-33. However, the Supreme Court found that the defendants' presumption of innocence was restored upon the reversal of their convictions, so the state could not impose such high procedural burdens for the restitution of withheld funds. *Id.* at 135-37.

141 *Id.* at 135-36.

142 MASS. GEN. LAWS ch. 211D, § 2A (2023); MASS. SUP. JUD. CT. R. 3:10, § 11.

143 *Nelson*, 581 U.S. at 134-37. *See also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

interests, and the risk of erroneous deprivation of this private interest.[144] Although this test seems permissive, the Massachusetts counsel fee might fail it.

First, the Massachusetts counsel fee could fail the *Mathews* test depending on how the court defines the private interest at stake.[145] Massachusetts could define the fee as a counsel fee and argue that it is in defendants' best interest because it helps them obtain a better criminal defense. However, that would be a paradox: justifying imposing payment for free counsel on those who may not be able to pay because it benefits the defendant. Rather, a better formulation would recognize the defendant's interest in not being burdened (or punished) with any consequences of being in court until proven guilty. Since the accused are not destined to be convicted, they risk erroneous deprivation where they are charged a fee prior to the disposition of their trial. One could say that is enough of a compensation. Massachusetts could also simply provide for easy restitution of the fees to those acquitted. However, in *Nelson*, the Court held that the burden and trouble imposed on defendants who wanted to recover their fees created a significant risk.[146] Even if Massachusetts created a system to recoup the counsel fee that is imposed at arraignment once a defendant is acquitted, this could be unconstitutional under *Nelson*.[147] Moreover, if a defendant chooses to complete community service rather than pay the $150 fee, recoupment becomes more complicated.

Thus, given the fact that recovering the fee could be troublesome, and receiving compensation for the community service hours worked

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144 *Mathews*, 424 U.S. at 334-35.

145 "As we recognized last Term . . . 'the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests.'" *Id.* at 341 (citing Fusari v. Steinberg, 419 U.S. 379, 389 (1975)). In *Mathews*, the issue was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." *Id.* at 323. While obviously different in form than the Massachusetts counsel fee, the substance is the same: the government's withholding of funds from individuals entitled to receive a benefit.

146 Nelson v. Colorado, 581 U.S. 128, 139 (2017). ("To comport with due process, a State may not impose anything more than minimal procedures" on acquitted defendants seeking recovery of fees after the reversal of their conviction.).

147 *See generally id.* (holding a similar statutory scheme, the Exoneration Act, to be unconstitutional).

practically impossible,[148] the risk of erroneous deprivation created by a scheme that charges a fee or imposes work obligations is heightened. And as for the government interest at stake, charging a mere $150 would not solve the public defense funding issue.[149] In fact, as discussed *infra*, there are more promising solutions.

Furthermore, the Massachusetts counsel fee is also objectionable on more traditional grounds. Based on a lay understanding of the presumption of innocence, it is in a way analogous to the right to bail and other measures that may cause prejudice to a defendant. The harmful effect of learning about the pending fee or community service, let alone having to satisfy this requirement, should not be underestimated. Mr. Brown works two jobs to support himself and his family, which includes a newborn and a daughter in need of constant care. As referenced, it was no surprise that Mr. Brown was yet another person who started our conversation by asking about the payment; he had observed the court practices before his own case was called. He was also anxious about not having time to perform the alternative community service. Like the infringement on liberty connected to the right to bail in *Stack*, the counsel fee makes presumption of innocence meaningless outside of trial. Before his trial had even started, Mr. Brown felt like he was already being punished and put against the wall by the Commonwealth. This creates an enormous prejudice against defendants and at the same time might equate to punishment.

Measures imposed on defendants can have an enormous effect on the person, even if the effect is not intended.[150] One scholar has argued

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148 There are no procedures provided for compensation: it's a contribution that's essentially forfeited upon completion. *See* MASS. GEN. LAWS ch. 211D, § 2A(f) (2023).

149 *See* Ginger Jackson-Gleich and Wanda Bertram, *Nine Ways that States Can Provide Better Public Defense*, PRISON POL'Y INITIATIVE (July 27, 2021), https://www.prisonpolicy.org/blog/2021/07/27/public-defenders/ [https://perma.cc/GG8K-NLBJ] ("[M]ass incarceration persists . . . because people too poor to afford their own lawyers are denied meaningful representation in court . . . . [which] happens because public defense systems . . . are severely underfunded and overburdened."); Thanassis Cambanis, *Poor Lack Counsel in Massachusetts; Lawyers Cite Low Pay*, BOS. GLOBE, Nov. 18, 2003, at 1, ProQuest, Doc. ID. 463824607 (noting that the Massachusetts public defense budget for fiscal year 2003 was $80.6 million, and the court-appointed counsel fee could "potentially rais[e] $20 million in revenue each year.").

150 "While there may be no 'intent' to punish, pre-trial detention, even with the 'least necessary restraint,' has consequences (social, psychological, economic, and legal) which are felt as punishment by the accused and may be seen as punishment by society." Thaler, *supra* note 105, at 451 (footnotes omitted).

that an unconvicted detainee should be granted the same right to due process and presumption of innocence protections as any other citizen.[151] The same should apply to any unconvicted, charged defendant. The effect of a $150 fee is undeniably lower than the effect of taking away liberty. But this difference should not justify charging indigent individuals a fee for the simple fact of being charged with a crime. Prejudice to a person, as opposed to prejudice to the trial itself, is equally an unconstitutional violation of the presumption of innocence.[152]

This prejudice to person can amount to punishment. Even if a counsel fee is not designed as a punishment, it still has a punitive effect. It makes indigent defendants pay, either for free counsel, or for being charged with a crime, or both, depending on the point of view. Punishment has been defined as "the causing of a person to undergo loss or suffering for his sin, crime, or fault."[153] The Massachusetts counsel fee essentially inflicts a loss on a person as a consequence for a criminal charge that has yet to (and may never) be proven beyond a reasonable doubt. Is that fair? Or, in other words, "[i]f it suffices to accuse, what will become of the innocent?"[154]

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151 *See id*. at 457, 459 (footnote omitted) (questioning "[w]hy does the unconvicted detainee waive his right . . . to the system's due process and presumption of innocence protections?" and concluding "[t]o restrict to the trial stage the detainee's access to such principles as due process and the presumption of innocence is to make such fundamental principles 'like a comb given us only after we have become bald.'").

152 *See* Barker v. Wingo, 407 U.S. 514, 532 (1972) (footnote omitted) ("Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."); Smith v. United States, 418 F.2d 1120, 1124 (D.C. Cir. 1969) (Skelly Wright, J., dissenting) (outlining other prejudices that may occur to the defendant in the pretrial phase, such as a "prejudice to [his] ability to defend against the charge, and prejudice to his person." The Court describes two forms of prejudice to the to the person, stating: "[p]rejudice to the person takes the milder form of anxiety and stigma when the accused is released on bail. Its more virulent form, more oppressive to the accused and more destructive of the presumption of innocence, is extended to pre-trial incarceration.").

153 Thaler, *supra* note 105, at 450 (citing WEBSTER'S NEW WORLD DICTIONARY (college ed.) 1180 (1964)).

154 Coffin v. United States, 156 U.S. 432, 455 (1895) (quoting Caesar Julian, Rerum Gestarum, L. XVIII, c. 1.).

The alternative conceived by the Massachusetts General Laws does not fare much better. If a defendant cannot pay, they must perform community service, valued at no more than ten dollars per hour.[155] Moreover, forcing someone to work without being convicted of any crime has a quasi-punitive effect on the charged defendant. For example, in *Turner v. Ware*, the plaintiff (also the defendant in the underlying criminal case) argued that, because his criminal case was expeditiously dismissed, Massachusetts was engaging in "slavery" by requiring him to complete community service if he was unable to pay the $150 appointed counsel fee.[156]

In that case, the *pro se* plaintiff brought a civil rights action, arguing that Massachusetts's then-Governor Baker and Attorney General Healey "knowingly facilitate[d] a criminal justice system that purportedly force[d] defendants not convicted of crimes to pay or engage in slavery to pay off court costs," while three other defendants perpetrated the harm.[157] The court dismissed the complaint on purely procedural grounds, finding that Baker and Healey were not involved either as perpetrators or direct supervisors, while the latter three defendants could not be sued for violations of the federal civil rights statute because they were not state actors.[158] However, the court cited *Fuller*[159] and *Opinion of Justices*[160] as potentially supporting a Thirteenth Amendment argument, where requiring uncompensated labor of indigent defendants who are unable to pay their appointed counsel fee may constitute slavery.[161]

The latter citation is an advisory opinion of the New Hampshire Supreme Court regarding the constitutionality of proposed amendments to laws concerning the appointment of counsel for indigent

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155 *See* MASS. GEN. LAWS, Chapter 211D, § 2A (g) (2023); *Potential Money Assessments*, *supra* note 5 ("A person seeking to work off a counsel fee in community service shall perform 10 hours of community service, in a community service program administered by the administrative office of the trial court, for each $100 owed in legal counsel fees, which may be prorated.").

156 Turner v. Ware, No. 17-12283-WGY, 2018 U.S. Dist. LEXIS 66601, at *1-2, *4 (D. Mass. Apr. 18, 2018).

157 *Id.* at *4. Those other defendants were a private security firm owner, a private security guard, and a Burger King franchise owner. *Id.* at *1.

158 *Id.* at *3-9.

159 *Id.* at *5 (citing Fuller v. Oregon, 417 U.S. 40, 53-54 (1974)).

160 *Id.* at *5 (citing Opinion of Justices, 431 A.2d 144 (N.H. 1981)).

161 Turner v. Ware, No. 17-12283-WGY, 2018 U.S. Dist. LEXIS 66601, at *5-6 (D. Mass. Apr. 18, 2018).

defendants.[162] One proposed amendment evaluated by the court would permit the state to "recoup" the cost of an appointed public defender and *oblige defendants unable to pay to perform labor for the state*.[163] In relevant parts of the opinion, the court first highlighted that the obligation to compensate the state could only be imposed on convicted defendants because "to require a defendant who has been acquitted to reimburse the State for expenses resulting from the State's prosecution would certainly be unfair and perhaps unconstitutional."[164]

Later, the court quoted the Thirteenth Amendment and held that "requiring a convicted defendant who is unable to reimburse the State for [appointed counsel] expenses to satisfy his debt by performing uncompensated labor for the State would be proscribed by the [T]hirteenth [A]mendment."[165] The court advised that the only way that service, in lieu of financial compensation, could be constitutional was if it was: (1) a part of his conviction or probation; or (2) made optional for those who become able to pay.[166] In other words, a criminal defendant could not be *forced* to provide the state with labor because it would constitute servitude unless the labor was imposed as part of the punishment following conviction.[167]

This *Opinion* has particularly telling lessons for the Massachusetts system. First, it highlights the unfairness inherent in requiring an unconvicted defendant to repay the state for the cost of appointed counsel—essentially punishment or consequence derived from the state's actions.[168] Second, it crucially points to the constitutional

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162 Opinion of Justices, 431 A.2d 144, 146-47 (N.H. 1981).

163 *Id.* at 148-50.

164 *Id.* at 149 (citations omitted).

165 *Id.* at 151 (citations omitted).

166 *Id.* at 151-52.

167 The Court also reminded that:

> It is no answer to say that the "servitude" that would be imposed by [the proposed amendment] is not involuntary because the defendant is free to waive his right to counsel and thereby not incur that expense. To espouse this position would be to condition an indigent defendant's enjoyment of his thirteenth amendment rights upon his relinquishment of his sixth amendment right to counsel. To require a person to surrender one constitutional right in order to gain the benefit of another is simply intolerable.

*Id.* at 151 (citations omitted).

168 Opinion of Justices, 431 A.2d 144, 146-47 (N.H. 1981).

deficiencies in a community service scheme.[169] If imposed on defendants whose cases are dismissed, or any defendant convicted of a crime who is unable to repay the state, it is essentially forced labor that is unrelated to punishment for a criminal offense.[170] Thus, by this logic, the Massachusetts scheme comes awfully close to running afoul of the fundamental prohibition of slavery. Furthermore, as it is a consequence of having been *charged* (not convicted) with a crime, it makes a satire out of the presumption of innocence in the process.

The expansive view of the presumption of innocence, potentially encompassing issues with the counsel fee, is inapposite not only to a narrow interpretation but also to a misconception of what presuming innocence should mean. Sheldon Finkelstein argued in his article *Why Should the Innocent Pay* that private defense costs should be returned to acquitted defendants or when the government otherwise fails to prove the defendant's guilt.[171] He rests this claim on an argument that charging ultimately innocent persons is antithetical to the presumption of innocence, and reimbursement would preserve their constitutional rights.[172] The presumption of innocence clearly exists before trial,[173] but Finkelstein's argument extends this presumption to a trial ending in acquittal.[174] Reimbursing private defense costs "ensure[s] that defendants are not deterred from exercising their right to counsel" and it holds the government, rather than the defendant, accountable where criminal charges lack a sufficient basis.[175] Therefore, charging an indigent defendant a fee to access their right to counsel would be antithetical to the presumption of innocence.

In making this argument, Finkelstein relied on a passage from *Fuller*: "[a] defendant whose trial ends without conviction or whose conviction is overturned on appeal *has been seriously imposed upon by society* without any conclusive demonstration that he is criminally culpable."[176] The burdens imposed by trial are steep enough without the

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169 *Id.* at 149.

170 *Id.* at 149, 151-52.

171 *See generally* Sheldon M. Finkelstein, *Why Should the Innocent Pay: A Proposal to Reimburse the Acquitted*, 6 CRIM. JUST. 14 (1991).

172 *Id*. at 14-17.

173 *See* Taylor v. Kentucky, 436 U.S. 478, 483-84 (1978); *In re* Winship, 397 U.S. 358, 361-63 (1970); Coffin v. United States, 156 U.S. 432, 453 (1895).

174 Finkelstein, *supra* note 171, at 14-15.

175 *Id.* at 16.

176 *Id.* (emphasis added) (quoting Fuller v. Oregon, 417 U.S. 40, 49 (1974)).

added insult of requiring a defendant to pay for the ordeal; any fees paid should be returned.[177] Both Finkelstein and the *Fuller* Court do not go far enough: a defendant awaiting trial deserves relief because he is also seriously imposed upon by society and likewise without any conclusive demonstration that he is criminally culpable. Thus, there should be as much reason to not charge them for their defense as there is for acquitted defendants. Ultimately, the argument of this Article might be controversial, but it is simple.

Furthermore, in *Giaccio v. Pennsylvania*, a statute allowed juries to force defendants to pay costs even after acquittal and allowed the punishment of acquitted defendants (including via incarceration) if they did not pay these costs.[178] Finding the statute unconstitutional, a concurring Justice Fortas stated that imposing a penalty or fee on a defendant who has not been found guilty violates a defendant's due process rights.[179] The Massachusetts counsel fee should be analyzed in a similar way because, absent any finding of guilt, defendants must pay a fee to access their constitutional right to counsel. Like in *Giaccio*, and following Finkelstein's reasoning, this violates defendants' presumption of innocence and right to due process.[180] Otherwise, a systemic paradox will persist—one which presumes innocence at trial but allows punishment before proven guilty.

## CONCLUSION

This Article has scrutinized the $150 counsel fee charged by Massachusetts upon indigent defendants and demonstrated that it violates several well-established constitutional principles. The fee chills the constitutional right to counsel by encouraging indigent defendants to drop their assigned counsel, thereby creating tension between clients and their lawyers at their first meeting: arraignment. Paradoxically, the fee also contradicts the right to proceed *pro se*. Although, in some ways,

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177 *Id.* at 64.

178 Giaccio v. Pennsylvania, 382 U.S. 399, 400-01 (1966).

179 "In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a state to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." Giaccio v. Pennsylvania, 382 U.S. 399, 405 (1996) (Fortas, J., concurring). Similarly, Finkelstein concludes that "requiring the payment of costs after vindication is a form of punishment in itself, and violates a defendant's right to due process of law." Finkelstein, *supra* note 171, at 17.

180 *See id.; Giaccio*, 382 U.S. at 405.

it encourages proceeding without a lawyer, it also provides incomplete information, potentially making the defendant's decision to accept counsel about money and not the capacity of either the defendant or the lawyer. In some circumstances, the fee can also "lock in" an assigned counsel. For example, if the defendant completes his community service in advance of his trial, this makes proceeding *pro se* functionally improbable. In this way, the fee makes a farce out of the right to counsel by obliging indigent defendants to pay for their "free" lawyer without providing the same benefits wealthier people receive with their paid lawyer, including the right to switch attorneys. Lastly, the counsel fee should be viewed as a payment or obligation to work that is imposed on the defendant before trial. Ergo, it punishes, or at least unfairly burdens, indigent defendants in Massachusetts by denying them the full protection of the presumption of innocence. We must not understate how valuable $150 or ten hours of community service can be.

Therefore, the fee is a problem. The natural reaction would be to simply scrap the fee. But there is an inherent paradox: now that the fee has existed for years, removing it without deeper thought might make things worse. The right to counsel could be further undermined by eradicating the fee because it supports the public defender system; without the fee, it may become troublesome to hire enough public defenders.[181] Thus, exacerbated underfunding could violate the indigent defendant's right to counsel.[182] However, removing the fee will at least

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[181] *See generally* Brief of Boston Bar Association as Amici Curiae Supporting Petitioners, Lavallee v. Justices of the Hampden Superior Court, 811 N.E.2d 895 (Mass. 2004) (No. 09268), 2004 WL 1936201 (outlining the history of indigent access to free counsel in Massachusetts, the subsequent creation of the Committee for Public Counsel Services and cautioning that the current inadequate compensation for private attorneys representing indigent defendants in Springfield and Holyoke District Courts has created a constitutional crisis for those indigent defendants). The Committee for Public Counsel Services ("CPCS") provides criminal defense representation for indigent individuals. *See* COMMONWEALTH OF MASS. OFF. OF THE STATE AUDITOR, COMM. FOR PUB. COUNS. SERVS. & OFF. COMM'R PROBATION'S ADMIN. & OVERSIGHT STATE-SPONSORED LEGAL SERVS. TO INDIGENT INDIV. DIST. CT., 2011-1104-3C, at 1-2, 5 (2011) (describing the history of the role CPCS has in providing and coordinating counsel services for indigent defendants).

[182] Molly Heidorn, *An "Obvious Truth": How Underfunded Public Defender Systems Violate Indigent Defendants' Right to Counsel*, 52 NEW ENG. L. REV. 159, 160 (2018) (arguing "that an inevitable violation of indigent defendants' constitutional rights under the Sixth Amendment occurs when state public defender agencies are underfunded.").

prevent an initiative to raise the fees,[183] which could further strain public defenders' relationships with their clients. Thus, eradicating the fee will solve the "chilling" issue by resolving both the tension between lawyer and client stemming from mandated payments for "free" counsel, and the temptation to fire one's lawyer and proceed *pro se* for reasons unrelated to the attorney's competence.

Prior assessment of the defendant's ability to pay the fee will also not solve the issue. Although the guidelines encourage this assessment "prior to the person's first appearance in court" under the Criminal Justice Reform Act,[184] this may increase delays already experienced by defendants due to COVID-19. Therefore, defendants are left in limbo, having a summons or warrant against them but no case progress. A recent case, *Mills v. Smith*, held that states are not required to assess a defendant's ability to pay before imposing a cost on the defendant.[185] However, the challenge was brought in a federal district court against a recoupment mechanism, so the consequences of this holding as applied to Massachusetts's contribution system are unclear.[186]

The only real solution to the problem of the Massachusetts counsel fee's interaction with the right to counsel and the presumption of innocence is to reduce the amount of criminal charges that are brought. *James v. Strange* justified potential recoupment payments imposed on defendants because of the expanding criminal dockets in the nation's courts, despite holding that the recoupment statute at issue "embodie[d] elements of punitiveness and discrimination which violate the rights of

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183 *See* FAIR AND COST EFFECTIVE, *supra* note 91 (suggesting that investigations into indigency be more stringent, that rates of repayment be raised, and that no counsel be provided for minor misdemeanors).

184 GUIDE TO JUDICIARY POLICY, VOL. 7: DEFENDER SERIES, PART A: GUIDELINES FOR ADMINISTERING THE CJA AND RELATED STATUTES CH, 2: APPOINTMENT AND PAYMENT OF COUNSEL § 210.40.20(b) (2022).

185 Mills v. Smith, No. 18-136E, 2021 WL 2191044, at *6 (W.D. Pa. Apr. 26, 2021). In that case, the petitioner brought an action against the District Attorney of the County of Erie, PA and the PA Attorney General, arguing, *inter alia*, "that the trial court illegally imposed court costs and fines in violation of his right to due process." *Id.* at *5. In reaching its holding, the court analyzed *Fuller v. Oregon* and other cases, including *Bearden v. Georgia*, in which the Supreme Court held that "a sentencing court may not revoke an indigent defendant's probation because he is unable to pay his court-ordered debt." *Id.* at *6 (citing Bearden v. Georgia, 461 U.S. 660, 672-73 (1983).

186 *Id.* at *4-6.

citizens to equal treatment under the law."[187] In that case, the Court noted that expanding criminal dockets and expanding protections for defendants' right to counsel could be important state interests when weighing the constitutionality of indigent counsel fees.[188]

But this very expansion of criminal dockets is often the primary cause and evil.[189] Only reversing it will move the system towards achieving what the fee is not: reducing pressure on public defenders while ensuring that innocent people do not have to have their day in court. The $150 Massachusetts counsel fee infringes upon essential rights and highlights deep underlying issues with our criminal justice system. It is part of the system's criminalization of poverty, not a solution to it.

> *[T]here's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.*
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> ***Lewis Carroll, Through The Looking Glass***[190]

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187 James v. Strange, 407 U.S. 128, 141-42 (1972). In *James*, the petitioner brought "a constitutional challenge to a Kansas recoupment statute, whereby the State may recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants." *Id.* at 128.

188 *Id.* at 141-42.

189 *James* also discussed expanding protections for criminal defendants to access their right to counsel and federal control of revenue sources as driving factors which 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." *Id.* at 141. Without intervention by the legislature to reprioritize funding, many states could find themselves liable for civil action due to insufficient funding of defense for indigent defendants. *See* Heidorn, *supra* note 182, at 160, 173-74, 180, 185-87.

190 The inspiration to include this quote is drawn from LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence - A Brief Commentary*, 37 CLEV. ST. L. REV. 393, 415 (1989).