The Invisible Pillar of Gideon

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In 1996, the State of South Carolina charged Larry McVay with common-law robbery. McVay, who was employed part-time and took home less than $160 per week after taxes, claimed that after paying his basic living expenses he had no money left with which to hire an attorney. A South Carolina court disagreed and denied McVay's request for appointed counsel.[1] Seven years later, Scott Peterson was arrested for the murder of his wife and unborn child in California. Although Peterson owned a home, drove an expensive SUV, and was carrying $10,000 in cash when he was captured, he claimed to be indigent. The State of California agreed and appointed counsel for him.[2] The rationale underlying the Supreme Court's landmark decision in Gideon v. Wainwright was that in order for every defendant to stand equal before the law, the poor man charged with a crime must be provided with a lawyer to assist him.[3] Yet despite Gideon's pronouncement, the seemingly middle-class Peterson was appointed counsel, while the nearly penniless McVay was left to fend for himself. As Gideon celebrates its fortieth birthday, this Article confronts the question of what it means to be indigent in our federalist system and whether the Supreme Court could establish a framework for defining indigency that would equalize the right to appointed counsel across the fifty states.

Gideon v. Wainwright turned forty recently. Described as "an icon of criminal procedure,"[4] the Supreme Court's landmark decision held that indigent defendants accused of a felony have a "fundamental and essential" right to appointed counsel.[5] In subsequent years, the Court has put substantial meat on the bones of its pronouncement in *Gideon*. During the Warren and Burger eras, the Court extended the indigeut's right to appointed counsel to, inter alia, direct appeals that exist as a matter of right,[6] misdemeanor cases,[7] and pre-trial proceedings.[8] In the Rehnquist era, the Court has, for the most part, ceased the expansion of criminal procedure rights,[9] including the right to

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1. *See* United States v. McVay, 32 Fed. Appx. 661 (4th Cir. 2002) (holding that McVay's uncounseled conviction could make him eligible to be a career offender under the Federal Sentencing Guidelines).

2. Kimberly Edds, *Peterson Pleads Not Guilty; Calif. Man's Wife, Unborn Son Killed*, WASH. POST, Apr. 22, 2003, at A3.

3. 372 U.S. 335, 344 (1963).

4. Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 215 (2003).

5. *Gideon*, 372 U.S. at 344.

6. *See* Douglas v. California, 372 U.S. 353 (1963).

7. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); *see also* Scott v. Illinois, 440 U.S. 367 (1979) (holding that the right to appointed counsel does not extend to misdemeanor cases unless the defendant is actually sentenced to jail).

8. *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963).

9. Most observers believe that the predicted conservative "counter-revolution" has not

counsel.[10] For instance, the Court has adopted a nearly impenetrable test for ineffective assistance of counsel[11] and it has refused to extend the right to appointed counsel to collateral appeals.[12] While scholars may argue about whether the Court has extended the right to appointed counsel too far or not far enough, the conventional wisdom is that, like it or not, after forty years the major questions about an indigent's right to appointed counsel have been answered. This Article challenges that assumption by contending that a central aspect of the indigent's right to appointed counsel remains undefined. While it is axiomatic that the poor are entitled to a free lawyer, there is virtually no legal authority or scholarly commentary specifying how poor a defendant must be to qualify as indigent.

In the forty years since *Gideon* was decided, there has not been a single Supreme Court case defining what makes a criminal defendant poor enougb to be entitled to appointed counsel. Lower federal courts have only confronted the issue on rare occasions, and then only tangentially. In the absence of any Sixth Amendment case law, it has fallen predominately to state legislatures and state supreme court rules committees to define indigency. The standards adopted by the states vary widely; some have adopted specific guideposts such as the federal poverty guidelines, while others rely on vague standards that offer little guidance and leave trial judges with broad discretion. The result of these wide variations is that *Gideon* means something different in Alabama than it does in Florida. A defendant poor enough to be entitled to appointed counsel in one state might not have received a lawyer if he had committed his crime on the other side of the border.

The initial response to the observation that indigency definitions vary by state might be "so what." Our federalist system extols states as laboratories of experimentation[13]

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in fact occurred in the criminal procedure arena. For instance, two noted constitutional law scholars assert that the Court has "simply carried on the work of its predecessors." *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1056 (2001). Carol Steiker offers the more nuanced view that the Rehnquist Court has "accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions." Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996); *see also* Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1360 (2002) ("Disfavored Warren Court doctrines were altered through case-by-case adjudication so that they no longer threatened what Rehnquist and his 'law and order' colleagues regarded as 'legitimate law enforcement.'").

10. *But see* Alabama v. Shelton, 535 U.S. 654 (2002) (holding that a suspended sentence that may end in the actual deprivation of a defendant's liberty may not be imposed without appointed counsel). *See generally The Supreme Court, 2001 Term—Leading Cases: Right to Appointed Counsel for Suspended Sentences*, 116 HARV. L. REV. 200, 252–62 (2002).

11. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a petitioner must show counsel's performance was deficient and that the deficiency resulted in prejudice); *see also* Lockhart v. Fretwell, 506 U.S. 364 (1993) (applying the *Strickland* test).

12. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that there is no right to appointed counsel in collateral appeals); *see also* Murray v. Giarratano, 492 U.S. 1 (1989) (holding that capital petitioners have no right to appointed counsel in collateral appeals).

13. *See* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("The states may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *see also* New State Ice Co. v. Liebman,

and therefore, the argument goes, if one state defines indigency more broadly than another, so be it. However, if states had unfettered authority to define indigency, they could determine that virtually no one is poor enough to be entitled to appointed counsel. This would eviscerate *Gideon* by creating a situation in which there is a right to appointed counsel but no one is poor enough to take advantage of that right. Thus, in order for *Gideon* to remain viable, there must be a constitutional floor for the definition of indigency. In other words, a constitutional minimum definition of indigency is the invisible pillar of *Gideon*. To date, however, there is no recognized floor.

Part I.A of this Article briefly reviews the evolution of the indigent's right to counsel, demonstrating that in numerous Sixth Amendment decisions the Supreme Court has never squarely confronted the definition of indigency. Part I.B then offers multiple explanations for the Court's failure to take up the indigeney question. Part II then describes how states have filled the void left by the federal courts. Part II.B traces the indigency frameworks adopted by the fifty states and demonstrates how the rules or standards used to define indigency vary widely by state. Part III then seeks to demonstrate that some of the variations among the states are not commendable examples of federalism. Rather, the definitions of indigency adopted in certain states are so narrow as to eviscerate *Gideon*'s guarantee of appointed counsel.

Finally, Part IV considers multiple options for eliminating the varying and sometimes inadequate definitions of indigency adopted by the states. Part IV begins by analyzing the emerging trend of systemic challenges to states' entire indigent defense systems. While there are many benefits to this structural reform litigation, state-by-state lawsuits will not succeed in establishing a constitutional floor for the definition of indigency. As such, Part IV turns next to Congress and considers whether it has the institutional ability to eliminate the variations through national legislation, much like it has promulgated federal entitlement programs for welfare and poverty benefits. Drawing on political process theory, I explain the unlikelihood that Congress would enact such legislation. Moreover, Part IV considers the possibility that any legislative attempt to define the scope of a constitutional right might be held unconstitutional by the Supreme Court.

Given Congress' inability to solve the problem, I turn last to the Supreme Court of the United States. Part IV argues that because the Supreme Court often has difficulty with fact-bound inquiries, it should draw on fact finding conducted by federal agencies in other poverty-related contexts in order to create a constitutional floor for the definition of indigency.

I. THE SUPREME COURT AND THE RIGHT TO APPOINTED COUNSEL

A. A Brief Overview of the Development of the Right to Counsel[14]

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[15] Notably, the word "indigent" appears nowhere in the text of the Sixth Amendment, nor does the

285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

14. For a more detailed examination of the development of the right to counsel see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 11 (4th ed. 1999).

15. U.S. CONST. amend. VI.

Amendment explicitly specify that the government will provide counsel to those who are impoverished or indigent. Nevertheless, it did not take the Supreme Court long to determine that the Sixth Amendment guarantees the appointment of counsel to the indigent. In 1930, the Court observed in dicta that "[t]he man now charged with crime is furnished the most complete opportunity for making his defense . . . if he be poor, he may have counsel furnished him by the state."[16]

During the first half of the twentieth century, the key Sixth Amendment question was whether the right to counsel should be applied to state defendants. The early answer to this question was in the negative. In *Powell v. Alabama*,[17] the Court held that

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[18]

Yet the Court stressed the unusual facts of the case and strongly suggested that, in ordinary circumstances, indigent state defendants would not be entitled to appointed counsel. Ten years later, in *Betts v. Brady*, the Court explicitly held that the Fourteenth Amendment did not apply the Sixth Amendment to the states and therefore that state defendants were not guaranteed a right to counsel.[19]

In *Gideon*, the Court reversed *Betts* and held that the Sixth Amendment right to counsel applies to state defendants. Justice Black explained that

> The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours . . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[20]

In *Douglas v. California*, decided the same day as *Gideon*, the Court extended the right to appointed counsel to initial direct appeals that exist as a matter of right.[21] The Court utilized sweeping language, remarking that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[22] However, in neither *Gideon* nor *Douglas* did the Court attempt to define what it means to be indigent.

The following year, in *Hardy v. United States*, the Court held that an indigent defendant was entitled to a free copy of the trial transcript for his appeal.[23] In a

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16. Patton v. United States, 281 U.S. 276, 308 (1930). The Court reaffirmed this principle eight years later in the landmark decision of *Johnson v. Zerbst*, 304 U.S. 458 (1938), where it held that counsel must be appointed to all federal defendants who cannot afford it, unless they intelligently waive the right.

17. 287 U.S. 45 (1932).

18. *Id.* at 71.

19. 316 U.S. 455 (1942).

20. *Gideon*, 372 U.S. at 344.

21. 372 U.S. 353 (1963).

22. *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

23. 375 U.S. 277 (1964).

concurring opinion, Justice Goldberg penned a short footnote that attempted to explain indigency:

> Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." An accused must be deemed indigent when "at any stage of the proceedings [his] lack of means . . . substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right." Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.[24]

In the forty years since *Hardy* was decided, no member of the Court has ever cited Justice Goldberg's attempt to define indigency. Rather, the status of indigency has been assumed without explanation.[25]

For instance, following *Gideon*, the Court contemplated at what stage of criminal proceedings an indigent becomes entitled to counsel. Initially, the Court began with the proposition that counsel was required at any "critical stage of the prosecution,"[26] and held that an indigent's right to appointed counsel applies at interrogations,[27] preliminary hearings,[28] and pre-trial lineups.[29] Ultimately, the Court adopted a bright-line test in which the right to counsel attaches with the initiation of formal proceedings.[30] Yet, in none of these decisions did the Court address whether or why the petitioner was in fact indigent.

With respect to the right to appellate counsel announced in *Douglas*, the Court has since made clear that an appointed lawyer in a first appeal as of right must be effective,[31] but has refused to extend the post-trial right to appointed counsel much further. In a series of decisions, the Court held that indigents are not entitled to counsel for discretionary direct appeals,[32] collateral appeals,[33] or probation-revocation

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24. *Id.* at 289 n.7 (Goldberg, J., concurring) (quoting ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 8 (1963)) (omission and alterations in original).

25. For instance, in *Argersinger v. Hamlin*, 407 U.S. 25, 26 (1972), which extended the right to appointed counsel to misdemeanor defendants, Justice Douglas began his opinion with "[p]etitioner, an indigent," but offered no explanation why Argersinger was indigent.

26. United States v. Wade, 388 U.S. 218, 236–37 (1967).

27. Massiah v. United States, 377 U.S. 201, 205–06 (1964).

28. White v. Maryland, 373 U.S. 59, 60 (1963).

29. *Wade*, 388 U.S. at 218.

30. *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 674 n.16 (1992); *see also* Kirby v. Illinois, 406 U.S. 682 (1972) (holding that pre-indictment lineups are not critical stages that carry a right to counsel).

31. Evitts v. Lucey, 469 U.S. 387 (1985).

32. Ross v. Moffitt, 417 U.S. 600 (1974).

33. Pennsylvania v. Finley, 481 U.S. 551 (1987); *see also* Murray v. Giarratano, 492 U.S. 1 (1989) (no right to counsel in death-penalty appeals).

proceedings.[34] Moreover, in recent years, the Court has devoted considerable attention to the meaning of "effective assistance of counsel."[35] In the landmark case of *Strickland v. Washington*,[36] and numerous subsequent decisions,[37] the Court has addressed claims of deficient performance by counsel and prejudice to the defendant (and almost universally rejected such challenges).[38]

In these decisions, and dozens of others, the Court has fleshed out the meaning of an indigent defendant's Sixth Amendment right to appointed counsel. Yet, despite the vast number of cases addressing an indigent's right to counsel, the Court has never considered or set forth a definition of indigency, thus leaving the matter entirely to the states.[39]

B. Why Has the Court Never Defined Indigency?

It is impossible to know for certain why the Court has never defined indigency. However, there are at least four plausible explanations: (1) there is no need for such a definition; (2) the population of effected defendants has little interest in contesting the issue; (3) the institutional actors most likely to litigate the issue have a disincentive to do so; and (4) the Court has relied on the fact-bound nature of indigency as a reason to defer to trial courts. Although only the latter argument is convincing, I address them all in turn.

I. The States Have Done a Fine Job

The simplest explanation why the Court has never defined indigency is that the states have done a perfectly fine job handling that task, and no potentially indigent

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34. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that counsel will be "both undesirable and constitutionally unnecessary in most revocation hearings, [but] there will remain certain cases in which fundamental fairness . . . will require that the State provide at its expense counsel for indigent probationers or parolees"). Recently, the Court rejected the argument that *Gagnon* entitled Alabama to impose a suspended sentence on an indigent defendant without the benefit of appointed counsel. *See* Alabama v. Shelton, 535 U.S. 654 (2002).

35. *See, e.g.*, William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

36. 466 U.S. 668 (1984).

37. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364 (1993); Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainwright, 477 U.S. 168 (1986).

38. *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 284 (1997) ("Under *Strickland*, ineffective assistance is easily alleged but almost impossible to prove."). *But see* Wiggins v. Smith, 539 U.S. 510 (2003) (finding ineffective assistance of counsel).

39. *See* Craig Peyton Gaumer & Paul R. Griffith, *Presumed Indigent: The Effect of Bankruptcy on a Debtor's Sixth Amendment Right to Criminal Defense Counsel*, 62 UMKC L. REV. 277, 286 (1993) ("To date, however, the Supreme Court has not established a bright-line test of indigence to be used in determining whether a defendant is sufficiently destitute to warrant court-appointed counsel."); *see also* Douglas McCollam, *The Ghost of Gideon*, THE AM. LAW., Mar. 2003, at 63, 64 ("[T]o this day the Court has offered remarkably little guidance on how the states should organize representation of the poor.").

defendants have been denied the right to appointed counsel. As such, there has been no need for the Court to interfere. As explained in greater detail in Parts II and III, this explanation is erroneous. Because some states have defined indigency very narrowly, there is a serious question whether the rules in those states are constitutionally deficient. Moreover, because many states have adopted vague guideposts, rather than clear rules, for defining indigency, the Court could not be confident that trial judges in those states had considered the correct factors or set the appropriate benchmarks for determining indigency. As such, it does not seem plausible that the states' "excellent" track record in defining indigency is the reason for the Supreme Court's lack of involvement.

2. The Borderline Case Explanation

A second possible explanation why the Court has not set forth a minimum definition of indigency is that the most egregious cases have already been weeded out of the system by the time the Supreme Court gets involved. Thus, certiorari petitions alleging denial of counsel present only borderline cases that would not raise judicial eyebrows.

All states consider the seriousness of the offense in determining whether a defendant is indigent. Trial courts are more likely to appoint counsel to defendants facing the most serious charges and the longest prison terms.[40] Furthermore, all states appoint counsel to the truly destitute, those who could be described as paupers. This leaves what could be termed "borderline cases": defendants who have some, but not much, income and who are facing less serious crimes and shorter prison terms. Defendants in borderline cases are quite likely to plea bargain, waive their rights to appeal, and accept their (comparatively) short sentences.[41] As such, those most likely to be denied appointed counsel do not have an incentive to challenge the denial.

There are flaws in the "borderline" explanation. First, the Supreme Court has held that a conviction obtained in violation of the right to counsel creates a jurisdictional defect.[42] Thus, the waiver of appellate rights might not be enforceable and the defendant may be free to challenge the court's conclusion that he was not indigent. Second, even those defendants sentenced to comparatively short sentences have an incentive to appeal their convictions. While a three-year sentence for burglary or drug crimes might not be long in comparison to a life sentence for murder, it does provide enough time for a case to work its way out of the state system and to the Supreme Court. Thus, the "borderline" theory is unpersuasive.

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40. *See, e.g.*, N.J. STAT. ANN. 2A:158A-14 (West 2004) ("Need shall be measured according to . . . an assessment of the probable and reasonable costs of providing a private defense, based upon the status of the defendant, *the nature and extent of the charges and the likely issues*.") (emphasis added).

41. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2494, 2497 (2004) (explaining that (1) "[g]uilty defendants generally know that they are guilty, and are aware of the likely evidence against them, so they can predict the probable trial outcomes" and (2) ninety-five percent of criminal defendants plead guilty).

42. Custis v. United States, 511 U.S. 485 (1994).

3. The Institutional Actor's Disincentive

A third and more plausible explanation for the Court's failure to confront the indigency definition is that the institutional actors most likely to press the issue have no incentive to do so. Nationwide, public defenders shoulder most of the burden of dealing with indigent defendants.[43] Public defender offices are terribly overburdened; in most jurisdictions they lack the funding to hire adequate staff, and each public defender must handle far more cases than she can effectively deal with.[44] Similarly, many jurisdictions provide indigent defense services through fixed-price contracts, whereby a lawyer is paid a lump sum to defend all of the jurisdiction's indigent defendants.[45] Because public defenders and fix-priced contractors already have more cases than they can handle, they would lack the incentive to bring a challenge to their state's definition of indigency. A successful challenge would result in more defendants being classified as indigent and would create even more work for public defenders and contractors. Already overburdened public defenders reasonably might believe that adding more cases to their workload would further harm their representation of existing clients.[46] Thus, the lawyers most involved with the indigent defense system lack the incentive to challenge a state's narrow definition of indigency.

This argument, while plausible, fails to account for other participants in the indigent defense system, including organizations such as the National Association of Criminal Defense Lawyers, that work on behalf of indigent defendants. Moreover, indigent defendants themselves are capable of challenging the government's refusal to appoint counsel by bringing *in forma pauperus* appeals. Indeed, much of the Supreme Court's docket consists of such *in forma pauperus* suits, and Gideon himself filed his appeal without the assistance of counsel.[47] Accordingly, the institutional actor argument is likely flawed.

4. The Fact-Finding Explanation

The most likely explanation for the Court's failure to define indigency is that it views indigency as a factual question that requires deference to the trial court. Appellate courts, including the Supreme Court, tamper with trial courts' factual

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43. *See* Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1809 n.14 (2000) (citing sources).

44. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 664 (1986) ("Attorneys who work in public defender offices commonly complain of an excessive caseload which prohibits their having adequate time to prepare their cases.").

45. Observers have criticized fixed-price contracts, particularly those that are awarded to the lowest bidder. *See, e.g.*, Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 307 (2002) ("The greatest problems with inadequate defense counsel are created by low-bid fixed-price contracts. . . ."); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783.

46. *See* Klein, *supra* note 44, at 664.

47. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 3–7 (1964).

findings only when they are "clearly erroneous."[48] The underlying rationale is that the trial court, which sees the evidence first hand and can question witnesses, is in a better position to make factual findings than an appellate court working from a paper record. As explained *infra*, in Part II, the determination of indigency is a heavily fact-bound inquiry. Courts must analyze, inter alia, a defendant's assets, his debts, and the cost of hiring a lawyer. Thus, the Supreme Court might see indigency solely as a factual question that requires great deference to the trial judge. Because such factual decisions are rarely reversed, it would make sense that the Court would not grant certiorari to a case questioning an indigency determination.[49]

II. STATES FILL THE VOID

> This court has considered indigency on a case-by-case basis, as have most other jurisdictions.[50]
>
> –Supreme Court of Arkansas

In the absence of any direction from the Supreme Court of the United States, the determination of indigency has been left in the hands of the states. In most states, the legislature or state supreme court has filled this gap by adopting a standard—rather rather than a rule—for determining indigency. As scholars have long recognized, rules are hard and fast (such as do not drive over fifty-five mph), while standards are seemingly open-ended (such as do not drive unreasonably fast).[51] States have adopted "standards" by providing criteria for judges to consider, without providing any hard-and-fast requirements. In these states, trial judges have wide discretion to grant or deny appointed counsel. By contrast, a handful of states have adopted rules for defining indigency, such as providing that anyone who earns less than 125% of the poverty line is presumptively indigent. Because such rules are more rigid and provide a predetermined floor, judges in these states have limited discretion. Before analyzing the differences among the states, I begin by noting those broad factors that many states commonly consider in determining indigency.

A. Common Factors in State Definitions of Indigency

Although no two states employ exactly the same criteria, there are certain factors that are commonly considered by states in determining indigency.[52] First and foremost,

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48. *See, e.g.*, Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394, 406 (2001).

49. Although the factual nature of an indigency determination may be a plausible explanation why the Court has not defined indigency to date, that reason should not continue to keep the Court from broaching the question. *See infra* Part IV.C.

50. Hill v. State, 802 S.W.2d 144, 145 (Ark. 1991).

51. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 959 (1995). For a sampling of the scholarship on the difference (or lack thereof) between rules and standards, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

52. According to one leading treatise, "[g]eneral agreement exists as to most elements considered in determining whether the resources available to the defendant are sufficient to retain counsel." *See* LAFAVE, ET AL., *supra* note 14, § 11.2(g) at 531.

states look to a defendant's assets—including, but not limited to, income, savings, stocks, bonds, and home ownership.[53] While the non-liquidity of a defendant's assets is a consideration, it is often offset by his potential borrowing power.[54] Some states will also consider the financial resources of the defendant's spouse and other family members.[55] Balanced against the defendant's assets are his basic living expenses, debts, dependents, and other obligations.[56]

In addition to the defendant's financial status, states also take account of the seriousness of the charged offense.[57] Because it is more expensive to hire a lawyer for a murder charge than for a burglary charge, the presumption may be that a burglary suspect can afford to hire counsel, but a murder suspect with similar assets cannot.

Finally, most states provide that a defendant can still be considered indigent even if he posted bail or bond.[58] The underlying principle is that a defendant should not have to choose between posting bond and obtaining the assistance of counsel.[59] Nevertheless, some states consider the posting of bond as a sign of additional resources and therefore consider the bond amount in determining whether the defendant is indigent.[60]

States collect the above-described information through an affidavit of indigency completed by the defendant.[61] On occasion, this affidavit can be supplemented or verified through investigation, but "[b]ecause of the tremendous volume of indigency cases, the vast majority of determinations will be based on the information furnished in the defendant's affidavits."[62]

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53. *See, e.g.*, IOWA CODE ANN. § 815.9 (West 2003) ("[T]he court shall consider not only the person's income, but also the availability of any assets subject to execution, including but not limited to cash, stocks, bonds, and any other property . . . .").

54. *See, e.g.*, ALASKA R. CRIM. P. 39.1(c)(1) ("In assessing the defendant's ability to pay the likely cost of private representation through trial, the court shall consider all resources available to the defendant, including . . . credit or borrowing ability.").

55. *See* ARIZ. R. CRIM. P. 6.4(a) cmt. ("In making a determination of whether or not a defendant is indigent, the court should consider . . . other sources of family income.").

56. *See, e.g.*, LA. REV. STAT. ANN. 15:147(B)(1) (West 2004) ("In determining whether or not a person is indigent and entitled to the appointment of counsel, the court shall consider . . . outstanding obligations, and the number and age of dependents."); *accord* Hill v. State, 805 S.W.2d 651, 653 (Ark. 1991) (concluding that defendant was indigent because his student loans, legal fees, and overdue child support exceeded his assets).

57. *See, e.g.*, ALA. CODE § 15-12-5(b) (2004) ("In determining indigency, the judge shall recognize . . . the effort and skill required to gather pertinent information and the length and complexity of the proceedings."); N.J. STAT. ANN. 2A: 158A-14 (West 2004) ("Need shall he measured according to . . . an assessment of the probable and reasonable costs of providing a defense, based upon the status of the defendant, the nature and extent of the charges and the likely issues.").

58. *See, e.g.*, GA. CODE ANN. § 17-12-19.9 (repealed 2004) ("Release on bail shall not necessarily preclude a person from being considered indigent."); IDAHO CODE § 19-854(b) (Michie 2004) ("Release on bail does not necessarily prevent [the defendant] from being a needy person.").

59. *See* LAFAVE ET AL., *supra* note 14, § 11.2(g) at 534 & n.265.

60. *See* FLA. STAT. ANN. § 27.52 (3)(c)(1) (West 2003).

61. *See* LAFAVE ET AL., *supra* note 14, § 11.2(g) at 534 n.279.

62. *Id.* at 537.

Many states consider some or all of the factors described above when determining indigency. It would be a gross over-generalization, however, to say that there is a typical method employed by a majority of states to determine indigency. As described below, the definitions of indigency vary widely by states and most are quite vague.

B. Classifying State Definitions of Indigency

1. States with No Guideposts and Unfettered Discretion

Numerous states have failed to adopt any guideposts or intelligible standards for determining who is indigent. Rather, they have promulgated statutes or rules that contain empty words stating only that an indigent is someone too poor to pay for counsel. As such, trial judges in these states appear to have unfettered discretion not only in the final decision whether a defendant is indigent, but also in determining what factors should be considered in assessing indigency.

Arkansas is a typical example. The Arkansas Code provides only that "[i]ndigent person" means "a person who, at the time his need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto."[63] This definition provides no guidance as to whether the trial judge should consider the severity of the offense, whether the defendant posted bail, the assets of the defendant's estranged wife, or countless other factors.

North Carolina's definition of indigency is similarly vague. The North Carolina General Statutes and the North Carolina Rules both state that "[a]n indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation."[64] The commentary to the North Carolina Rules explains that one must look to North Carolina case law to find indigency criteria, but that even the cases "do not establish a precise measure of indigency."[65] Recognizing the deficiency, the commentary states that the North Carolina's Office of Indigent Defense Services "is working on developing more detailed standards and expanding the basic statutory definition of indigency."[66]

Over a dozen other states have vague definitions of indigency that offer no guidance on whether particular defendants are indigent.[67] In these states, trial judges have nearly

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63. ARK. CODE ANN. § 16-87-201(3) (Michie 2003).

64. N.C. GEN. STAT. § 7A-450 (2004); N.C. INDIGENT DEFENSE SVCS. R. § 1.4 (2004).

65. N.C. INDIGENT DEFENSE SVCS. § 1.4 cmt. (a) (2004) (explaining that the cases "direct that various factors, such as the person's employment, income, and assets be weighed in determining whether a person is indigent.").

66. *Id.*

67. *See* CAL. CODE 27706 (a) (West 2004); DEL. CODE ANN. tit. 29 § 4602 (2004); 725 ILL. COMP. STAT. 5/113-3 (West 2004); IND. CODE ANN. § 33-9-11-1 (repealed 2004); MASS. GEN. LAWS ch. 211D, § 2 (West 2004); MONT. CODE ANN. § 46-8-111 (2004); NEB. REV. STAT. ANN. §§ 29-301–29-303 (Michie 2004); NEV. REV. STAT. §171.188 (Michie 2004); N.Y. 18A §§ 716–721; S.D. CODIFIED LAWS §23A-40-6 (Michie 2004); HAW. REV. STAT. ANN. § 802-4 (2003); OR. REV. STAT. § 151.485 (2003); PUERTO RICO STAT. § 428 (2003); 16 PA. CONS. STAT. § 9960.6 (2002); D.C. SUPER. CT. R. 44 (2004); COLO. R. CRIM. PRO. 44(a) (West 2003); CONN. SUPER. Ct. R. § 37-6(a) (2003); N.D. R. CRIM. PRO. 44 (providing for a commission that will adopt guidelines for criteria for eligibility of counsel to indigents); *see also* State v. Mickle, 525 P.2d 1108 (Haw. 1974) (recognizing that since the Hawaii legislature failed to adopt any

unfettered discretion to choose the factors to be weighed and to make the ultimate decision whether a defendant is indigent. Furthermore, some state appellate courts have determined that a trial judge's indigency determination is reviewed only for an abuse of discretion.[68] Under this highly deferential standard, the trial judge's decision will not be rigorously reviewed and it seldom will be reversed.[69]

2. States with Vague Standards and Wide Discretion

A number of states have moved beyond platitudes and adopted general, but vague, guideposts for assessing whether defendants are indigent. These vague criteria leave trial judges with wide discretion to determine who can and cannot afford a lawyer. For instance, the Alabama Code provides:

> In determining indigency, the judge shall recognize ability to pay as a variable depending on the nature, extent, and liquidity of assets, the disposable net income of the defendant, the nature of the offense, the effort and skill required to gather pertinent information and the length and complexity of the proceedings.[70]

The Alabama Rules of Criminal Procedure expand this indigency definition to require that "the court should consider such factors as the defendant's income, sources of income, and sources of income of other members of the family; property owned; outstanding obligations; and the number and ages of any dependents."[71] These guideposts, while identifiable, leave trial judges with wide discretion. For instance, if a defendant earned only $150 per week and had no other assets or debts, the Alabama statute would offer no guidance about whether he should be considered indigent.

Almost two dozen states have adopted similar criteria that provide trial judges with some guidance but nevertheless afford them wide discretion to make indigency determinations.[72] In these states, like those that offer no criteria whatsoever, it is

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guideposts for the determination of indigency, the court promulgated a detailed standard).

68. Initially, it makes sense that an indigency determination would be reviewed for abuse of discretion because it appears to be a mixed question of law and fact—the facts being the defendant's assets and debts. However, in certain circumstances—such as when a state has failed to adopt any guideposts for determining indigency—a colorable argument can be made that the indigency determination must be subject to de novo review. As discussed in Part IV, for *Gideon v. Wainwright* to have any meaning, there must be a constitutional floor for defining indigency. The question of whether a state has fallen below that floor could be seen as a pure question of law that merits de novo review. Indeed, the Supreme Court has recently held that punitive damages awards are subject to de novo review even though they arguably could be seen as involving factual determinations. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424 (2001).

69. *See* Mark P. Painter & Paula L. Welker, *Abuse of Discretion: What Should it Mean Under Ohio Law*, 29 OHIO N.U. L. REV. 209, 219 (2002) (quoting authorities on rarity of abuse of discretion reversals); *see also* Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 639 (1992) (stating with regard to the "clearly erroneous" standard that "this study indicates how infrequently a district judge's finding of fact is deemed clearly erroneous").

70. ALA. CODE § 15-12-5 (2004).

71. ALA. R. CRIM. PRO. 6.3 cmt.

72. *See* GA. CODE ANN. § 17-12-19.9 (2004); IDAHO CODE § 19-854(b) (Michie 2004); KY. REV. STAT. ANN. § 31.120 (Michie 2004); LA. REV. STAT. ANN. § 15: 147(B)(1) (West

impossible to discern from the statutes whether Gideon's mandate is being carried out. Trial judges could be using their wide discretion to broadly provide appointed counsel, or they could be using that discretion to process cases through the system quickly by declining to appoint counsel in questionable circumstances.

3. States with Rules and Low Discretion

A few states have gone beyond vague criteria to adopt specific guideposts for determining whether defendants are indigent. The detailed rules adopted by these states are:

> Alaska: A defendant is presumed to be indigent if (1) he receives public assistance, such as food stamps or Medicaid; (2) he was found to be indigent within the last 12 months; or (3) his gross annual income is less than the adjusted federal poverty guidelines for his household size and his other assets are less than half of the amount necessary to hire a lawyer.[73]

> Florida: A defendant is indigent if his income is "equal to or below 200 percent of the then-current federal poverty guidelines . . . or if the person is receiving Temporary Assistance for Needy Families, poverty-related veterans' benefits, or Supplemental Security Income (SSI)."[74]

> Iowa: A defendant is indigent if he "has an income level at or below one hundred twenty-five percent of the United States poverty level."[75]

2004); MD. CODE ANN. , [Public Defender] 27A §7 (2004); MISS. CODE ANN. § 25-32-9(1) (2004); MO. REV. STAT. §600.086 (West 2004); N.J. STAT. ANN. § 2A: 158A-14 (2004); N.M. STAT. ANN. §31-16-5 (Michie 2004); OHIO REV. CODE ANN. § 120.05 (West 2004); R.I. GEN. LAWS § 12-15-8 (2004); TENN. CODE ANN. § 40-14-202(2) (2004); W. VA. CODE § 29-21-16 (Michie 2004); N.H. REV. STAT. ANN. § 604-A: 2-c (2003); KAN. STAT. ANN. § 22-4504 (2003); WIS. STAT. ANN. §977.07(2) (West 2003); WYO. STAT. ANN. § 7-6-106 (Michie 2003); ARIZ. R. CRIM. P. 6.4 cmt.; ME. R. CRIM. P. 44(b); MICH. R. CRIM. P. 6.005(B); TEX. CODE CRIM. P. ANN. art. 26.04(m).

73. *See* ALASKA R. CRIM. PRO. 39.1(f).

74. FLA. STAT. ANN. § 27.52(3)(b)(1) (West 2003); *see also* FLA. STAT. ANN. § 27.52(3)(c)(1)–(3) (West 2003).

> [T]he existence of any such fact creates a presumption that the applicant is not indigent: (1) defendant has been released on bail in the amount of $5,000 or more (2) the defendant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property or (3) the defendant retained private counsel immediately before or after filing affidavit asserting indigence.

If the second factor were interpreted literally, a defendant who owned any personal property – even the shirt on his back – would be presumed not indigent. It is unlikely that this was the Florida Legislature's intent.

75. IOWA CODE § 815.9(a) (West 2003); *see also* IOWA CODE § 815.9(b) (2003) (A defendant with an income level between 125%, but below 200% of the poverty guidelines "shall not be entitled to an attorney appointed by the court, unless the court makes a written finding that not appointing counsel on the pending case would cause the person substantial hardship.")

Minnesota: A defendant is indigent if he or a dependent residing in his household "receives means-tested governmental benefits."[76]

South Carolina: A defendant is presumed to be indigent if his "net family income is less than or equal to the [Federal] Poverty Guidelines . . . . Net income shall mean gross income minus deductions required by law."[77]

Utah: A defendant is indigent if he "has an income level at or below 150% of the United States poverty level."[78]

Vermont: A defendant is presumed to be indigent if (1) he is "receiving any kind of welfare aid which constitutes a major portion of subsistence" or (2) his "gross income is at or 150% below the poverty income guidelines for nonfarm families established under the Community Services Act of 1974."[79]

Virginia: A defendant is indigent "if his available funds are equal to or below 125 percent of the federal poverty ineome guidelines."[80]

Washington: A defendant is indigent if he receives public assistance—such as food stamps, Medicaid, or supplemental security income—or his annual income after taxes is less than or equal to 125% of the federal poverty guidelines.[81]

A quick glance at these statutes demonstrates that the definitions of indigency vary widely by states. For instance, a defendant with an income level at 150% of the federal poverty guidelines would be entitled to appointed counsel in Utah, but not Iowa or Washington.

An individual earning twice the federal poverty guidelines would be entitled to counsel if he were arrested in Florida. However, if the defendant were charged on the Alabama side of the border there would be no way to know whether he would be entitled to appointed counsel because Alabama's vague standard for indigency leaves trial judges with wide discretion.[82] In one Alabama courtroom, a defendant with an income level that was 200% of the poverty guidelines might be considered indigent, while in another Alabama courtroom the defendant might be denied appointed counsel.

In sum, the meaning of indigency—and the guarantee of the right to appointed counsel—varies widely by state and even within the states themselves.

III. THE ABSENCE OF A CONSTITUTIONAL FLOOR AND THE EVISCERATION OF *GIDEON*

A. Gideon's Unrecognized Constitutional Floor

Our federalist system encourages states to act as laboratories of experimentation. Certain states forbid drivers from making a right turn on red. Other states have

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76. MINN. R. CRIM. PRO. 5.02 subd. 3.

77. S.C. APP. CT. R. 602(b)(3).

78. UTAH CODE ANN. § 77-32-202(3)(ii) (2004).

79. VT. R. CIV. PRO. 3.1(b)(1).

80. VA. CODE ANN. § 19.2-159(3) (Michie 2004). In exceptional circumstances, Virginia courts will appoint counsel if the defendant's available funds exceed 125% of the federal poverty guidelines. *Id.*

81. WASH. REV. CODE § 10.101.010(1)(a) & (c) (West 2004).

82. *See* ALA. CODE § 15-12-5 (2004).

abolished the sales tax. Urban states impose strict gun laws, while rural states renounce them. The freedom to experiment allows states to place higher values on certain favored behavior, while placing more significant restrictions on disfavored behavior.[83]

Experimentation thrives in the criminal law area. Using a cell phone while driving is unlawful in certain jurisdictions.[84] Virginia punishes ex-felons in possession of a firearm more severely than other states.[85] Thirty-eight states authorize the use of capital punishment, while a dozen states forbid executions.[86] The list of examples is seemingly endless.[87]

Yet clearly there are constitutional limits on the scope of experimentation.[88] Virginia is free to punish ex-felons for possessing firearms, but the State cannot interrogate them on the whereabouts of the guns in violation of their Miranda rights.[89] Oklahoma is entitled to utilize the death penalty, but it may not execute children under the age of sixteen.[90] Put simply, the Constitution acts as a floor that limits certain state experimentation.[91]

The idea of a constitutional floor applies with equal force to the right to appointed counsel. In *Gideon* and its progeny, the Supreme Court held that the Sixth Amendment guarantees the right of appointed counsel to indigent criminal defendants. As a result, after *Gideon*, states were no longer free to experiment with the idea of not assigning counsel to indigent defendants. It would make no sense if states were able to covertly flout *Gideon*'s mandate by defining indigency so narrowly as to eliminate the right to appointed counsel. In other words, if states had free reign to adopt any definition of indigency that they wished, they could effectively abolish the indigent's right to appointed counsel by defining indigency so narrowly that no one would qualify.

Take the following (exaggerated) example: Faced with budget shortfalls, a Midwestern state ("Midwestern") recognizes that 80% of its criminal defendants receive appointed counsel, at great cost to the state.[92] Midwestern determines that it

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83. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

84. *See, e.g.*, N.Y. VEH. & TRAF. § 1225-c (McKinney 2001).

85. *See* Tom Jackman, *Virginia Jurists Denounce Mandatory Sentences; Felons With Guns Get No Breaks*, WASH. POST, Oct. 9, 1999, at B1.

86. *See* Atkins v. Virginia, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting).

87. *But see* Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994) (discussing the proliferation of federal statutes targeting intrastate crime and the loss of states as laboratories).

88. *See, e.g.*, Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 340 (1997) ("As a result of the[] Warren Court decisions, the notion that there were 'fifty laboratories' to experiment with the rights of defendants died . . . .").

89. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

90. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

91. *See, e.g.*, Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787 (1999) (discussing the concept of a constitutional floor and advocating such a floor in the search and seizure area).

92. *See, e.g.*, Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583 (1995) ("Estimates of the percentage of criminal defendants represented by appointed

could save millions of dollars by simply defining indigency so narrowly that only a handful of criminal defendants would qualify for appointed counsel. As such, Midwestern passes a law defining an indigent defendant as someone who earns less than seventy-five dollars per month, approximately 10% of the federal poverty guidelines.[93] Midwestern contends that it is complying with *Gideon*'s mandate because it is still appointing counsel to indigent defendants.

Although, the Midwestern example is obviously exaggerated, it nevertheless illustrates why there must be a constitutional floor on the definition of indigency for *Gideon* to have any meaning. Without such a floor, states could define away the right to appointed counsel. And there is a colorable argument that some states—perhaps unintentionally—have done just that.

B. Falling Below the Floor

It is not an easy task to produce evidence that states—in the absence of a specified constitutional floor—have defined indigency so narrowly as to eviscerate *Gideon*. When trial judges rule that defendants are not indigent, they usually rule from the bench without reducing their decisions to writing. Arguably indigent defendants who are denied counsel often plead guilty, waive their appellate rights, and never again raise the question of whether they should have been appointed counsel.[94] Thus, a large number of potentially indigent defendants never press their claim through the judicial system, and the evidence of possible denials of the right to appointed counsel are lost forever.

Because there is no central database containing the financial information of those who have been denied appointed counsel, the evidence instead must come from state statutes defining indigency and a handful of court decisions denying the appointment of counsel. Let us begin with the statutes.

1. Unduly Narrow Statutory Definitions of Indigency

As discussed in Part II, most states bave adopted vague guideposts for defining indigency, making it difficult to know whether indigent defendants are being denied appointed counsel in these states. Nine states, however, have adopted clear rules for defining indigency by relying on the federal poverty guidelines or federal entitlement programs. It is these rules that demonstrate the evisceration of *Gideon*.

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counsel . . . generally hover around seventy-five to eighty percent.").

93. The poverty level for a single individual in 2003 was $8,980. Annual Update of the HHS Poverty Gnidelines, 68 Fed. Reg. 26, 6456-58 (Dep't of Health and Human Serv. Feb. 7, 2003), *available at* http://aspe.hhs.gov/poverty/03fedreg.pdf [hereinafter "Annual Update"].

94. *But see supra* text accompanying note 42 regarding the non-waiver of jurisdictional defects, particularly the right to counsel.

a. The Realities of 125% of the Poverty Guidelines

In Virginia,[95] a defendant is indigent if "his available funds are equal to or below 125% of the federal poverty guidelines."[96] In exceptional circumstances, Virginia courts will appoint counsel if the defendant's funds exceed 125% of the poverty guidelines,[97] but in the ordinary case a defendant at 126% of the poverty level is expected to retain counsel with his own funds. In 2003, the poverty level for a single individual was $8,980.[98] In theory, this sum represents the minimum amount of money that an individual needs for basic subsistence.[99] By setting the definition for indigency at 125% of the poverty guidelines, Virginia requires anyone making in excess of $11,225 per year to retain private counsel. By way of example, an individual who works forty hours per week, fifty-two weeks per year, at $5.50 per hour would earn $11,440, too much to be appointed counsel.[100]

Can a worker earning 126% of the poverty level be expected to pay for his own lawyer? Let us assume that every dollar up to the poverty level ($8,980) is spent on basic living expenses such as food, shelter, health care, transportation, and clothing. After subtracting $8,980 from $11,315 (which is 126% of the federal poverty guidelines), the criminal defendant would have, at most, $2,335 with which to hire a lawyer. Of course, the $2,335 sum is based on the unrealistic assumptions that (1) the defendant is arrested after earning his very last paycheck of the year and (2) that he has saved every available penny. In reality, the defendant might have (1) been arrested in February, before he had a chance to save any money, or (2) already spent his discretionary income on entertainment (or squandered it on drugs).

It is doubtful that an individual earning 126% of the federal poverty level would have any discretionary funds, no less $2,335, with which to hire a lawyer. Nevertheless, let us assume that a criminal defendant earning 126% of the poverty guidelines would have half of the discretionary income ($1,168) with which to hire a lawyer. While this small sum might be sufficient to hire a lawyer for certain low-level

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95. Of the nine states that have adopted clear rules for determining indigency, Virginia has neither the narrowest nor the most expansive definition. Moreover, Virginia's rule is nearly identical to that employed by Iowa and Washington. Accordingly, Virginia is a representative example. *See supra* text accompanying notes 73–80.

96. VA. CODE § 19.2-159(3) (Michie 2004). In exceptional circumstances, Virginia courts will appoint counsel if the defendant's available funds exceed 125% of the federal poverty guidelines. *See id.*

97. *Id.*

98. *See* Annual Update, *supra* note 93, at 6457.

99. Since their inception in the 1960s, the poverty guidelines have been calculated by multiplying an individual's necessary food budget by three. *See* PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY 4 (1990); Gordon M. Fisher, *Some Popular Beliefs About the U.S. Poverty Line as Reflected in Inquiries from the Public*, 30 THE SOCIOLOGIST 6 (1996). Because the poverty guidelines are based on food consumption data from the 1950s, scholars believe that the present day guidelines may be at least 50% lower than the comparable measures were in the 1960s. *See* RUGGLES, *supra* at 167–68.

100. The federal minimum wage is $5.15 per hour. *See* 29 U.S.C. § 206(a)(1) (2000). Working forty hours per week, fifty-two weeks per year, a minimum wage worker would earn $10,712 and would (barely) be entitled to appointed counsel.

misdemeanors, it would prove insufficient to retain a lawyer for a serious felony defense.

b. Paying a Lawyer's Up-Front Retainer

When a criminal defendant facing a felony charge and multiple years of incarceration walks into a lawyer's office, the lawyer will identify four possible scenarios: (1) the defendant will be convicted at trial and incarcerated, and accordingly will lack the incentive and ability to pay his legal bills; (2) the defendant will be acquitted at trial but, being a dishonest individual who is no longer in need of legal help, will refuse to pay his legal hills and will "skip town";[101] (3) the defendant will be convicted at trial, but will recognize that it was not his attorney's fault and will work hard to pay his legal debts from behind bars; or (4) the defendant will be acquitted at trial and, either being an upstanding citizen or afraid of further legal troubles, will pay his legal bills.

While some attorneys may trust their clients to pay the bill, the overwhelming majority of criminal defense lawyers—whether practical or jaded—will adopt a more pessimistic view. Accordingly, it is the practice of criminal defense attorneys to charge an up-front retainer before agreeing to represent a criminal defendant.[102] Although retainer fees vary, a typical defense lawyer will likely demand 50% of the fee up front. Some lawyers will actually seek 100% up front, by silently doubling their fee and demanding immediate payment of half of the doubled fee.[103]

Whether the defendant can afford the retainer fee of course depends on what the lawyer charges to defend the particular offense. Again fee levels will vary, depending on the seriousness of the crime, the quality of the lawyer, the geographic region of the country, and numerous other variables. Nevertheless, we can attempt to piece together some possible fees by multiplying typical hourly rates by the number of hours an attorney is likely to spend on a particular case.

c. The Average Lawyer's Hourly Charge

The American Bar Association recommends that attorneys be paid an hourly rate of $113 for representing indigent defendants accused of federal crimes.[104] The Criminal Justice Act, which seeks to guaranty adequate representation to indigent defendants

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101. *See* Peter Lushing, *The Rise and Fall of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 514 (1991) ("Criminal clients are not inclined to pay after a losing trial, and an acquittal, known to them as 'justice,' is not something for which they often feel obliged to pay.").

102. *See* United States v. McVay, 32 Fed. Appx. 661, 668 n.3 (4th Cir. 2002) (King, J., dissenting) ("Common sense, as well as time-honored practice, dictates that defense lawyers procure their fees before a criminal case is concluded . . . [L]awyers must get the money 'up-front,' or risk not being paid at all.").

103. As Professor Lushing has explained, "[n]ecessity is the mother of ingenuity for the criminal practitioner, who might first silently determine his fee, then quote the client a fee twice as large, and request that he get paid 'one-half' up-front.' *See* Lushing, *supra* note 101, at 515.

104. *See* Ralph C. Martin, *Report and Recommendation*, 2001 A. B. A. SEC. CRIM. JUST. (on file with author).

charged with federal crimes, is less generous, providing for an hourly rate of up to sixty dollars for in-court time and forty dollars for out-of-court time.[105]

It stands to reason that attorneys in private practice will charge far more than the rate paid to appointed lawyers by the government under the Criminal Justice Act. First, private lawyers will assume that defendants who have not been designated as indigent will have money to hire a lawyer. Indeed, defendants who are charged with a crime and are not entitled to appointed counsel may be quite scared and will be in great need of a paid lawyer's services.[106] As such, most lawyers will anticipate that "non-indigent" criminal defendants are willing to pay substantial sums. Second, unlike appointed lawyers who are paid by very reliable state or federal courts, lawyers in traditional private practice must seek remuneration from criminal defendants, a far less reliable group. Because of the prospect that criminal defendants will "skip town" or, worse yet, be incarcerated after receiving the lawyer's services, criminal defense attorneys have an incentive to raise their hourly rates to recover more money up-front. In other words, a lawyer who could be assured of reimbursement for all 100 hours of work might charge eighty dollars per hour. A lawyer concerned that his client might skip town without paying for half of the work hours might charge a rate of $160 per hour to ensure that he recoups all of his costs. Put simply, a criminal defense lawyer in private practice will charge more than the forty to sixty dollars per hour provided for indigent defendants under the Criminal Justice Act.

At the same time, the hourly rate proposed by the American Bar Association for representation of indigent federal defendants is likely to be higher than the rate charged by some criminal defense lawyers in private practice. The ABA is an entity that lobbies on behalf of lawyers and has an interest—undoubtedly for good reasons—in increasing lawyers' minimum level of compensation. While an hourly rate at $113 may be in the best interests of criminal defendants and the legal profession, it would be questionable to assert that a criminal defendant would be unable to find a lawyer charging below this rate. Therefore, as a realistic matter, let us assume that a defendant seeking to hire his own counsel will not be able to find anyone to take the case at a cost of less than ninety dollars per hour.

d. The Number of Hours per Case

In calculating the up-front retainer we must next determine how many hours the lawyer will need to work at the ninety dollar rate. Unfortunately, there do not appear to be any statistics on the average number of hours it takes to adequately defend particular crimes.[107] Perhaps the reason for the dearth of guidance is that every case is

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105. *See* 18 U.S.C. § 3006A(d) (2000).

106. *See* Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 628 (1993) ("[D]efendants are psychologically vulnerable and may face substantial time pressures in finding counsel who are available to represent them during the critical early stage of the prosecution. The search costs will be even greater if a defendant is incarcerated.").

107. The ABA, which admirably has advocated reasonable minimum fees and effective representation of criminal defendants, has not recommended a minimum number of hours that counsel should devote to particular types of cases. *See* Email from Shubi Deoras, Assistant Committee Counsel for ABA Standing Committee on Legal Aid and Indigent Defendants, to Adam Gershowitz (Sept. 11, 2003) (stating that the ABA does not recommend the amount of

different and it is not possible to draw any bright lines about how many hours a defense lawyer should spend on, for example, a conventional armed robbery case. Nevertheless, I will make an educated guess for purposes of fleshing out our hypothetical.

Imagine that a defendant is accused of robbing a victim at gunpoint, and that the police recovered a gun from the defendant after a warrantless, and arguably unconstitutional, search. The defense attorney should spend a number of hours working on a motion to suppress the gun as the fruit of an unconstitutional search. She should also, at minimum, interview the defendant, survey the crime scene, and locate and interview witnesses. The defense attorney might then spend time negotiating a possible plea bargain with the prosecutor. If no plea agreement were reached, the case would proceed to trial, and the lawyer would have to select a jury, draft an opening statement and closing argument, prepare witnesses for examination, and contemplate the cross-examination of hostile witnesses. This, of course, is in addition to the time actually spent in court trying the case and waiting through breaks while the judge and jury are out of the courtroom. In sum, it is difficult to imagine an armed robbery defense being conducted competently in less than thirty hours. In an ideal world, a defense lawyer might spend ten times that many hours.

e. One Year's Funds Are Insufficient To Pay the Retainer

At ninety dollars per hour, thirty hours of work would cost $2,700. If the lawyer demanded a true 50% retainer, the defendant would have to write a check for $1,350. If the lawyer wanted to ensure full payment, she might double her fee to $5,400 and demand half ($2,700) up front.[108] As explained above, a defendant earning 126% of the federal poverty guidelines (and reasonably spending half of his discretionary income on other expenses before getting into legal trouble) would have only $1,168 remaining at the end of the year. Thus, after saving half of one year's discretionary income, our hypothetical defendant would not have sufficient funds to even pay the retainer of an extremely low-priced attorney. Being too "wealthy" to receive appointed counsel, and too poor to hire a private lawyer, this defendant would be denied access to any counsel and would have to proceed pro se in violation of *Gideon*'s mandate.

1. Judicial Evisceration of *Gideon*: The Anecdotal Example

The National Legal Aid & Defender Association contends that "Georgia counties routinely deny counsel to indigent defendants in non-felony cases" and that some Wisconsin courts set the financial eligibility threshold so high that individuals eligible for Medicaid coverage or food stamps would not be appointed counsel.[109] An example from South Carolina demonstrates that the narrow construction of indigency adopted by some courts is resulting in the denial of appointed counsel to the truly indigent.

In 1996, Larry Wade McVay was arrested for robbery in Lexington County, South Carolina.[110] McVay completed an affidavit of indigency stating that his gross weekly

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time indigent defense counsel should spend per case) (on file with the author).

108. *See* Lushing, *supra* note 101, at 515.

109. *See* Nat'l Legal Aid & Defender Ass'n, Gideon *Reviewed: The State of the Nation 40 Years Later* (2003) (on file with author).

110. *See* United States v. McVay, 32 Fed. Appx. 661, 664, 2002 U.S. App. LEXIS

income was $182 per week.[111] After taxes, McVay took home about $160 per week, and he had no other savings or sources of income.[112] McVay claimed to have a $275 monthly rent payment; $80–100 in monthly utility costs; $60–65 in weekly food expenses; and the additional expense of paying his cousin's car insurance in exchange for receiving transportation to work.[113] As one judge recognized, "[a]llowing for these basic living expenses, McVay was left with a disposable income of virtually nothing."[114]

In 1996, South Carolina law provided that "a presumption of non-indigency is created if the gross income of the accused exceeds $125 per week."[115] Because he earned $182 per week, McVay was presumed not to be indigent and the court concluded that McVay could not overcome the presumption and therefore was not entitled to appointed counsel.

McVay then sought to retain private counsel. The first two lawyers he approached offered to take his case for lump sum fees of $8,000 and $10,000 respectively, with each lawyer demanding half of the sum up-front.[116] McVay, however, did not have $4,000.[117]

Unable to retain private counsel, McVay proceeded pro se at trial, was convicted of the robbery charge, and sentenced to prison. After his release, McVay again found himself in trouble with the law, and he pleaded guilty to armed robbery in federal court. Because McVay had two prior felony convictions, he was categorized as a career offender and sentenced to 188 months imprisonment.[118] On appeal, McVay contended that he should not have been sentenced as a career offender because he was denied appointed counsel in connection with his 1996 burglary conviction. Although a majority of the Fourth Circuit panel rejected McVay's appeal, a dissenting judge concluded that McVay was so poor that he should have been afforded appointed counsel. The dissent observed that the inclusion of McVay's uncounseled conviction in the career offender calculus increased McVay's armed robbery sentence by eleven-and-a-half years.[119]

The absence of a minimum definition of indigency has permitted some states to eviscerate the Sixth Amendment right to counsel by leaving certain defendants in a position where they are too "wealthy" to receive appointed counsel and to poor to retain a private lawyer. For *Gideon v. Wainwright* and the indigent's guarantee of appointed counsel to have any meaning, there must be a minimum constitutional floor for the definition of indigency.

1626 (4th Cir. Feb. 1, 2002), *cert. denied*, 536 U.S. 933 (2002).

111. *See id.* McVay earned seven dollars per hour, but did not have the opportunity to work more than twenty-seven hours per week.

112. *See id.* at 668 (King, J., dissenting).

113. *See id.* (King, J., dissenting).

114. *Id.* (King, J., dissenting).

115. *See* S.C. CODE ANN. § 602(B) (Law Co-op. 1996). South Carolina law further provided that "[w]here the accused's income exceeds the presumptive amount and a presumption of non-indigency is created, but liabilities and debts exist as complicating factors, a final determination of indigency may be made by the judge with jurisdiction over the court in which the matter is to be heard." *Id.*

116. *McVay*, 32 Fed. Appx. at 668 (King, J., dissenting).

117. *Id.* (King, J., dissenting).

118. *See id.* at 663.

119. *See id.* at 668 n.4 (King, J., dissenting).

IV. DEFINING INDIGENCY: INSTITUTIONAL PROBLEMS AND SOLUTIONS

While it is apparent that many states have adopted vague and inadequate definitions of indigency, rectifying that problem is not simple. In this Part, I examine three options and, after exposing their theoretical and practical flaws, recommend that the Supreme Court craft a solution based on factual findings already undertaken by Congress and federal agencies in other poverty-related contexts.

A. Systemic Challenges To State Indigent Defense Systems

In many states, the entire indigent defense system is in crisis.[120] As one observer describes:

> Lawyers representing indigent defendants often have unmanageable caseloads that frequently run into the hundreds, far exceeding professional guidelines. These same lawyers typically receive compensation at the lowest end of the professional pay scale. Stories of intoxicated, sleeping, or otherwise incompetent public defenders are legion, such that it has become trite to lament the sometimes shockingly incompetent quality of indigent defense counsel in America today.[121]

An increasing number of scholars and criminal defense lawyers accordingly have come to believe that retrospective appeals on behalf of individual criminal defendants are futile both in the short and long term.[122] In response, litigators have begun leveling systemic challenges to states' entire indigent defense systems. For example, lawyers have asserted that excessive public defender caseloads constitute ineffective assistance of counsel.[123] Another approach has been to assist counties in filing civil rights actions against state governments to demand greater funding.[124] In other states, lawyers have filed class action suits seeking injunctions forcing the state to increase funding for indigent defense.[125]

These systemic challenges to entire indigent defense systems are similar to the structural reform litigation involving school desegregation and prisons.[126] If successful,

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120. *See* Note, *Gideon's Promise Unfulfilled*, 113 HARV. L. REV. 2062, 2063 (2000); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice For All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74–75 (1993).

121. Note, *supra* note 120, at 2064.

122. *See* Dripps, *supra* note 38 at 279–80; Note, *supra* note 120, at 2068–69.

123. *See* State v. Peart, 621 So.2d 780 (La. 1993) (sustaining challenge to indigent defense system and holding that defendants would be presumed to have received ineffective assistance of counsel until legislative action was taken); Platt v. State, 664 N.E.2d 357 (Ind. Ct. App. 1996) (rejecting challenge to public defender system); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996) (same).

124. *See, e.g.*, Mississippi v. Quitman County, 807 So.2d 401 (Miss. 2001).

125. *See, e.g.*, New York County Lawyers' Assoc. v. State, 742 N.Y.S. 2d 16 (N.Y. App. Div. 2002).

126. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978) (challenging prison system's use of isolation cells as an unconstitutional violation of the prohibition against cruel and unusual punishment); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (challenging

these broad-based challenges to indigent defense systems could solve multiple problems, including excessive caseloads, underpayment of public defenders and appointed counsel, and the unduly narrow definition of indigency utilized by that particular state.[127] To be successful, however, systemic challenges must overcome numerous significant obstacles.

First, courts are reluctant to find standing or a justiciable controversy in such suits.[128] Second, the resources necessary to level a systemic challenge are considerable, and coordinating and funding such actions in numerous states would be extremely difficult. Third, both state and federal courts likely will be reluctant to undertake massive structural supervision of an entire indigent defense system. The Supreme Court, for instance, has signaled its frustration with lengthy structural reform litigation.[129] Fourth, there are pitfalls associated with both state and federal forums. State court judges, even in the supreme courts, are often elected and may be unwilling to order a costly overhaul of an indigent defense system that would take money from taxpayers' pockets in order to benefit criminal defendants.[130] Federal courts, while less beholden to constituents, present an unfavorable abstention doctrine that usually results in the dismissal of the lawsuit.[131]

Despite these formidable challenges, some systemic challenges to indigent defense systems have been successful. For instance, in a recent class action, a New York judge ordered more money to be spent on the indigent defense system.[132] Additionally, litigation has resulted in favorable settlements in Pennsylvania and Connecticut (and limited successes in Arizona, Louisiana, and Oklahoma). Nevertheless, there have also been a substantial number of failures.[133] To date, no statewide systemic challenge bas concerned the definition of indigency and, in any event, a statewide challenge could not result in a nationwide minimum standard for indigency.

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certain aspects of a school system's desegregation plan).

127. For the argument in favor of the structural approach, see Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991).

128. *See, e.g.*, *Kennedy*, 544 N.W.2d at 21 (concluding that ineffective assistance of counsel challenge to public defender system was non-justiciable).

129. *See* Lewis v. Casey, 518 U.S. 343, 386 (1996) (Thomas, J., concurring) ("[T]he federal judiciary is ill equipped to make these types of judgments, and the Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy.");Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 548 (1999) ("The Supreme Court appears particularly impatient with the continued presence of school desegregation cases.").

130. *See* McCollam, *supra* note 39 ("Some attribute the state judiciary's reluctance [to revamp indigent defense] to the political vulnerability of elected judges who can't afford to be seen as 'soft' on crime, even if they're sympathetic to the problems of indigent defense.").

131. *See, e.g.*, Younger v. Harris, 410 U.S. 37 (1971); Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) (detailing the Eleventh Circuit's dismissal on abstention grounds a decision which appeared sympathetic to a systemic challenge to Georgia's indigent defense system); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1102 (1994) (noting the broadness of Younger abstention).

132. *See* N.Y. County Lawyers' Ass'n v. State, 742 N.Y.S.2d 16 (N.Y. App. Div. 2002) (raising hourly rates for appointed counsel to ninety dollars per hour).

133. *See* McCollam, *supra* note 39 (explaining that systemic challenges in Minnesota, New Jersey, and Georgia have failed).

B. The Unlikely Congressional Solution

The inadequacy of state-by-state reform efforts indicates that only a national body can successfully promulgate a minimum definition of indigency. This leaves us with either Congress or the Supreme Court. I begin with the former.

The question of what it means to be indigent requires fact-finding. For instance, what is the average cost of retaining a criminal defense attorney for a robbery charge? Do most attorneys require that a substantial portion of the fee be paid up front? Can someone earning just above the poverty guidelines pay for rent, food, and other basic living expenses and still have funds remaining to pay a lawyer? Congress, of course, is well suited to undertake this fact-finding.[134] Indeed, following *Gideon*, Congress held hearings on the need for effective assistance of counsel and passed the Criminal Justice Act of 1964.[135] Congress set minimum rates for the compensation of appointed attorneys, and it raised the rates in 1970 and 1986.[136] As such, one could posit that Congress could determine a minimum definition of indigency and then pass legislation (with the President's signature or over his veto) that would implement a constitutional floor for the definition of indigency below which none of the states could pass. There are two problems with such a solution, however.

First, Congress is not likely to be interested in fixing the indigent defense problem. As Abner Mikva has explained, Congress is a reactive institution that is ill-suited to effectively dealing with abstract constitutional issues.[137] In the abstract, Congress will not be interested in helping the criminally accused. Criminal defendants are not popular; to the contrary, they are the quintessential discrete and insular minority identified by political process theorists.[138]

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134. *See, e.g.*, Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182 (2001) ("Congress undoubtedly has the capacity to find social facts, while the courts face important obstacles in attempting to engage in accurate factfinding."). Professor Devins asserts, however, that Congress's incentive to take fact-finding seriously is driven by its own agenda. *See id.* at 1182–86.

135. The Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2000)).

136. *Id.* Unfortunately, Congress did not follow through on the funding of the increased rates. *See* Ronald Goldstock, *Report to the House of Delegates*, 1998 A.B.A. CRIM. JUST. SEC. REP. 1.

137. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

138. *See* JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (setting forth a theory of judicial review in which courts should avoid substantive policymaking and defer to the political branches except where a group has been cut off from the political process or to protect discrete and insular minorities); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) ("Legislatures undervalue the rights of the accused at both the investigatory and adjudicatory stages of the criminal process . . . . It follows that the active judicial development of constitutional rules governing police, prosecutors, and the criminal trial process is a legitimate exercise of judicial review.").

For the past forty years, politicians have benefited from being tough on crime.[139] Beginning with Barry Goldwater, the law and order issue has been a hallmark of the Republican Party, and has been used to tar and feather liberal Democratic candidates.[140] By the 1990s, the Democrats realized that their support for liberal crime policies was "a major political liability" and since then have adopted the tough on crime position as well.[141] As such, "control of the crime issue [has become] a necessary, though perhaps not sufficient, requirement for political victory in America"[142] and all politicians, whether running for the first time or seeking re-election, take a tough on crime position.[143] Accordingly, scholars have observed that criminal legislation is "almost entirely one-directional."[144] Legislatures criminalize more activity without taking existing laws off the books or making criminal violations harder to prove.[145]

The other relevant political reality of the past forty years has been budget shortfalls.[146] Voters make three contradictory demands on politicians: greater discretionary spending, lower taxes, and a balanced budget. In order to satisfy the voters, politicians are reluctant to cut "their" programs, and instead find it easier to reduce funding for programs utilized by nonvoters, such as felons[147] (or potential felons),[148] including indigent defense. Thus, at the state level, funding for public

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139. *See, e.g.*, Sara Sun Beale, *What's Law Got to Do With It?: The Political, Social, Psychological and Other Non-Legal Factors Influencing Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40 (1997) (explaining that "[c]rime first became a major issue in national politics in the 1960s.").

140. *See id.* at 40–42.

141. *Id.* at 42.

142. Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 577 (1996).

143. *See* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 18–19 (2004) ("Given the emotive force of crime as an issue, few public officials are willing to risk the 'for criminals' label.").

144. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001).

145. *See id.* Professor Stuntz offers a systemic description of how the interplay between prosecutorial discretion and judicial deference to the legislature's law-making power leads to a "one-way ratchet" in which legislatures criminalize more conduct without removing laws from the books. *Id.* at 509, 547.

146. *See generally* BOB WOODWARD, THE AGENDA (1994).

147. Nearly all states disenfranchise prisoners, and many states deny the vote to ex-felons. For an overview of the state laws, see *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1939 (2002). As Professor Karlan has recently pointed out, 1.4 million black men were disenfranchised in the 1996 election, more than the number who were actually enfranchised by the passage of the Fifteenth Amendment in 1870. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004).

148. The group most likely to find itself entangled with the criminal justice system—young, impoverished minorities—is also least likely to vote. *See* U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000, *available at* http://www.census.gov/population/www/socdemo/voting/p20-542.html. Legislatures therefore can cut indigent defense programs without risking significant backlash from this group.

defenders and appointed counsel is an easy target,[149] despite the dire consequences of cutting such programs. For example, the Mississippi Supreme Court has twice noted that the state's indigent defense system is underfunded and twice admonished the legislature to correct the problem, yet no improvements have been made.[150]

State and federal legislators are cut from the same cloth, and it is hard to imagine Congress being more enthusiastic about funding indigent defense services than the state legislators who have ignored the problem to date.[151] Federal legislation providing a minimum definition of indigency would almost certainly cost additional money. Whether that money came from state or federal coffers, it would be an unpopular expenditure and contrary to legislators' interests in being re-elected. If Congress provided extra federal funding for criminal defendants, it would anger voters. If Congress sought to have states provide more funding for criminal defendants, it would anger both voters and powerful state politicians. In short, the political branches of the federal government have little incentive to fix problems associated with indigent defense.[152]

Second, even if Congress were inclined to roll up its sleeves and determine the appropriate minimum definition of indigency to be adopted by all the states, it is possible that the Supreme Court might find such an action unconstitutional. In recent years, the Court has been adamant that it alone has the power to define constitutional rights.[153] While many scholars have questioned the Court's claim to be the exclusive interpreter of the Constitution,[154] virtually no academics have stepped forward to

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149. *See, e.g.*, Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2448–49 (1996).

150. *See* McCollam, *supra* note 39, at 63–64.

151. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 805 (2004) ("Indigent defense is widely underfunded, and the political structures through which funding decisions are made suggest little hope for improvement."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 55–56 (1997) (explaining that "[o]verall funding for criminal defense has declined on a per case basis since the late 1970s" and that the standard politician's gripe is that more funding will only result in more defendants "winning on 'technicalities'").

152. *See* Note, *supra* note 120, at 2062 ("The political process failure in this area is unsurprising, for indigent defendants, by definition, lack the financial and political capital necessary to pursue effective reform efforts.").

153. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Cooper v. Aaron, 358 U.S. 1 (1958). For the academic endorsement of this position, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

154. *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) ("While the courts remained responsible for declaring the boundaries, it was recognized that the Constitution contemplated room for the political actors to give substantive meaning within those boundaries."); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1547–48 (2000) (arguing that the power of interpretation should belong to whichever institution—Congress or the Court—that provides the greatest protection to the Bill of Rights); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 1 (2001); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111

challenge the Court's claim to be the ultimate arbiter of constitutional rights.[155] A similar pattern can be found in the halls of Congress. Few legislators have questioned the Court's status as the ultimate decisionmaker.[156] Indeed, when it comes to dealing with unpopular areas, such as indigent defense, legislators are happy to tell their constituents that the courts are responsible for those matters.[157]

If Congress did decide to take it upon itself to bind all fifty states to a minimum definition of indigency, it arguably would be defining the scope of the Sixth Amendment right to counsel.[158] In other words, Congress, not the Court, would be saying what the Constitution means. Of course, if the Court agreed with the precise contours of Congress's definition, then a legislative exposition of that definition would not be a problem. The rub would come if the Court believed that Congress had adopted too broad of a definition of indigency. An aggrieved state would complain that Congress had forced it to spend more money on indigent defense than is required by the Sixth Amendment, and that such legislation is therefore unconstitutional. Given that the Rehnquist Court has sided with the states and struck down approximately thirty federal statutes,[159] the Court might be sympathetic to such a federalism argument.

HARV. L. REV. 153, 185–88 (1997) (arguing that that the Court should defer to Congress's enforcement of the Fourteenth Amendment, inter alia, when "there are no judicially manageable standards for decisionmaking . . . [and] when constitutional questions turn on empirical or predictive judgments").

155. *See* Kramer, *supra* note 154, at 7 (noting that of the "not insubstantial literature" all but one scholar "defend models in which the other branches remain subservient to the Supreme Court"). The one scholar, according to Kramer, is Michael Stokes Paulsen.

156. *See* Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1322 (2002) (explaining that although the Rehnquist Court has struck down twenty-nine statutes, Congress has not expressed outrage at the Court's actions and accordingly there has been no call to limit the Court's jurisdiction or otherwise "curb" the Court).

157. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (explaining that the Court's long-term constitutional regulation of capital punishment has legitimized it in the eyes of the public); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995) (arguing that judicial supremacy in enforcement of the Bill of Rights causes the elected branches to defer to the courts and undermines majoritarian protection of rights).

158. This is perhaps an oversimplification. A generation ago, the Supreme Court recognized Congress's authority to enforce the Fourteenth and Fifteenth Amendments and intimated that Congress could interpret constitutional provisions in a way that would expand, but not restrict, those rights. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (setting forth the infamous one-way ratchet theory); *see also* South Carolina v. Katzenbach, 383 U.S. 301 (1966). The Court's recent decision in *City of Boerne* appears to implicitly overrule the *Katzenbach* decisions. *See, e.g.*, Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251, 256 (2003) ("*City of Boerne* was at least implicitly a rejection of the vision of shared constitutional interpretation expressed a generation earlier in *Katzenbach v. Morgan* . . . . "). Nevertheless, as Laurence Tribe explains, prior to *Boerne* the scope of *Katzenbach v. Morgan* had long been unclear, and matters are not necessarily more lucid in its aftermath. *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-16, at 941 (3d ed. 2000).

159. Devins, *supra* note 156, at 1307.

Thus, in the unlikely event that Congress were inclined to define indigency, its definition might be overruled by the Supreme Court. Legislators still smarting from previous overrulings might be disinclined to invite another reversal. This is particularly true where there is no political gain to be had.

C. The Supreme Court Solution: Circumventing Fact-Finding

Because state-by-state structural reform litigation will not solve the indigency problem, and because any congressional solution is unlikely, it falls to the Supreme Court to set a minimum definition of indigency. It is not difficult to assert that the Court is the appropriate body to create a minimum definition of indigency. As explained below, political process theory easily places the indigency question into the Court's arena. It is, however, difficult to believe that the Court will successfully accomplish the task on its own. The definition of indigency is a fact-bound question, and the Supreme Court is not a fact-finding institution.[160] As such, I recommend that the Court set a constitutional floor for indigency by drawing on facts already found by Congress and federal agencies.

1. Why the Supreme Court?

The underlying premise of our democracy is that policy decisions should be made by politically accountable, elected officials. Decisions made by unelected, life-tenured judges are "countermajoritarian."[161] The most prominent attempt to circumvent the countermajoritarian difficulty is political process theory, and in particular the work of John Hart Ely.[162] Ely's theory, which has been widely criticized[163] and less widely defended,[164] posits that the Court should embroil itself in the political process only to (1) protect the political access of minority groups, and (2) invalidate legislative actions that are designed to prejudice discrete and insular minorities.[165] Although political process theory can be invoked in numerous fields of constitutional law,[166] it is perhaps most at home in the criminal procedure arena.[167] As Professor Michael Klarman has

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160. *See, e.g.*, Cross, *supra* note 154, at 1547–48 (arguing that "[l]imited fact-finding ability is another weakness undermining the judicial process quality defense of judicial supremacy in enforcing the Bill of Rights.").

161. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962). *But see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (rejecting the premise of the countermajoritarian difficulty).

162. *See* ELY, *supra* note 138.

163. The critical literature is voluminous. The best and earliest examples include Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981), and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

164. For the best defense (at least of the process prong) see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

165. *See* ELY, *supra* note 138, at 102–03, 151.

166. *See* Klarman, *supra* note 164, at 750–63 (discussing process theory's application to equal protection, free speech, fundamental rights, and free exercise cases).

167. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996) ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to

observed, "[b]ecause the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political process theory demands judicial superintendence."[168] Put simply, elected officials typically have little or no interest in protecting the rights of criminal defendants. Only a "counter-majoritarian" institution—the Supreme Court—can safeguard their rights.

Process theory is applicable to criminal procedure generally, and the right to appointed counsel specifically. Because indigent criminal defendants are often disenfranchised or do not exercise their right to vote, there is no affirmative reason for politicians to legislate a minimum definition of indigency.[169] To the contrary, in a world of limited resources, legislators have reason to oppose any minimum definition of indigency based on its costs. Assuming a balanced budget, more spending on appointed counsel means either higher taxes or less spending on politically popular programs. No elected official realistically would favor funding the rights of criminal defendants over the politically popular programs desired by constituents.[170] Thus, criminal defendants are an out group and cannot expect Congress to set forth the minimum definition of indigency that is implicitly called for by *Gideon v. Wainwright*.

Given that Congress is not likely to act, and that a minimum definition of indigency is the invisible pillar of *Gideon*, it is proper for the Court to assert its counter-majoritarian weight. Such a task will not be easy, however. While the Supreme Court is quite good at speaking in terms of lofty constitutional principles, it is not a fact-finding institution and sometimes has difficulty when its legal rulemaking depends in part on fact-bound questions.[171]

2. Defining a Flexible Constitutional Floor for Indigency

Because of the difficulties the Court faces in fact-finding, it should avoid deseending into difficult factual questions. As such, the Court should adopt a flexible constitutional floor for the definition of indigency based on the federal poverty guidelines and the federal programs that utilize those guidelines.

a. The Case for the Federal Poverty Guidelines

Throughout this Article, I have spoken of the need to recognize a constitutional floor—a minimum definition of indigency below which none of the states can pass.

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protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.").

168. Klarman, *supra* note 164, at 766.

169. *See supra* Part IV.B.

170. *See* Note, *supra* note 120, at 2066 ("Prior to *Gideon*, indigent defense was not a political priority and few jurisdictions had organized public defender or assigned counsel systems on their own initiative.").

171. For instance, while the Court has confidently declared that obscenity is not protected speech, it has never been able to successfully define what is obscene. *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 188 (1999) ("The first period [of obscenity jurisprudence], which lasted from the 1957 decision in *Roth* until 1973, was dominated by the Warren Court's frustrating and largely unsuccessful efforts to define 'obscenity.'"). Similarly, while the Court recently ruled that it is unconstitutional to execute the mentally retarded, it was unwilling or unable to define what it means to be mentally retarded. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

There are at least three types of constitutional floors that could be employed in the indigency context: (1) a rigid numerical floor that sets forth the exact income of those who are indigent, (2) a purely qualitative standard that attempts to set guideposts without invoking any specific numerical criteria, or (3) a flexible standard that relies on already identified numerical indicators specified by federal agencies.

The first approach would require the Court to simply pick a magic number or formula and hold that anyone below that number is indigent. The flaws in this approach are obvious. How would the Court identify the magic number or derive the formula? The Justices are not able to hold hearings on what constitutes indigency. Moreover, they lack the expertise to select a magic number without assistance. In short, the Court lacks the institutional ability to establish a rigid numerical floor.

The second approach—a qualitative standard—initially seems more plausible. Constitutional law textbooks are filled with three-pronged tests, and the Court certainly has promulgated many successful verbal formulations of constitutional rights. However, as the Court discovered in attempting to define obscenity, certain concepts are simply elusive. While the Justices may "know it when [they] see it,"[172] it is unlikely that they could translate indigency into a prescribed verbal formulation that would offer sufficient guidance to trial judges.

The third approach—a flexible standard based on already identified numerical indicators specified by Congress and federal agencies—is more practical. This approach provides for the Court to look to the federal poverty guidelines (an "already-identified numerical indicator") and to use those guidelines to offer a flexible definition of indigency.[173]

In the early 1960s, an economist at the Social Security Agency named Mollie Orshansky devised a framework for measuring poverty by utilizing the generally accepted standards for adequate food and multiplying that number by three.[174] Orshansky's poverty thresholds still serve as the primary federal poverty measure and are updated annually by the Census Bureau.[175] The poverty thresholds are the basis for the federal poverty guidelines, which are a simplified figure issued by the Department of Health and Human Services and used for administering eligibility for certain federal programs.[176] Each year the federal poverty thresholds and guidelines are adjusted to

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172. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

173. As a general matter, courts do not look to social science indicators in defining the contours of criminal procedure. For an argument that courts should consider such facts and research in making criminal procedure decisions, see Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000). For a more recent treatment, see Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004) (arguing for the consideration of social science in the criminal law arena).

174. For a more detailed explanation of Orshansky's approach, see Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL. No. 4, Winter 1992, at 3, *available at* www.ssa.gov/history/fisheronpoverty.html.

175. *See id.*

176. The poverty thresholds are a statistical measure used to calculate the number of people in poverty. The poverty guidelines are a simpler figure utilized for administering eligibility for certain federal programs. *See id.*

keep pace with the Consumer Price Index.[177] In essence, the federal agencies conduct fact-finding about poverty and translate that fact-finding into a baseline number for administering poverty-related programs.

Rather than create its own formula out of whole cloth, the Court could draw on the fact-finding already undertaken by these federal agencies and utilize the federal poverty guidelines. To adopt the federal poverty guidelines is not a revolutionary idea. A handful of states have utilized multiples of the poverty guidelines in setting their definitions of indigency.[178]

There are, of course, problems with the federal poverty guidelines. The guidelines are based on food consumption data from the 1950s and are therefore outdated. As one scholar explains, "[o]ver time . . . the goods people consume are likely to change dramatically, and the definition of the minimum needed for subsistence is likely to change as well."[179] Thus, while only heating may have been considered essential in the 1960s, today perhaps both heating and air conditioning are seen as necessities. The same scholar is also critical of the fact that the guidelines are based on gross income, rather than after-tax disposable income.[180]

While there is significant criticism of the poverty guidelines, the fact remains that they are the single most common administrative measure of eligibility for poverty-related programs. In essence, the poverty guidelines are how the federal government determines who is poor. By adopting the poverty guidelines as the framework for determining indigency, the Court could avoid most of the difficult factual inquiries that are implicit in the question of what it means to be indigent. I say "most" because the Court would still face the difficult task of determining the appropriate multiple of the poverty guidelines to use as the constitutional floor. Nevertheless, I believe the Court is adequately positioned to answer this question.

b. The 200% Solution

In selecting the appropriate multiple of the federal poverty guidelines, it is easiest to begin with what the Court should not do. The guidelines announce the minimum funds necessary for basic subsistence. In theory, an individual at 100% of the poverty guidelines is using all of his income for food, housing, and other life necessities. It is therefore logical to conclude that an individual at 100% of the poverty guidelines would have no additional funds to pay an up-front retainer to a lawyer, and that the minimum definition of indigency must be set higher.

Other federal programs provide similar guidance. Individuals earning 120% of the poverty guidelines are considered special low income Medicare beneficiaries and are excused from paying part of their Medicare premium.[181] Individuals earning up to 130% of the poverty guidelines receive food stamps because their income is presumed to be too low to afford necessary nourishment.[182] If earning 120% or 130% of the

177. RUGGLES, *supra* note 99, at 41.

178. *See supra* text accompanying notes 73–75, 77–81.

179. RUGGLES, *supra* note 99, at 17.

180. *See id.* at 136.

181. *See* Northwest Justice Project, *Help with Medicare Deductibles and Co-Payments* (on file with author).

182. *See* United States Department of Agriculture, Food and Nutrition Service, *Food*

poverty guidelines is not sufficient to pay for health care and food, it is difficult to see how such an income would enable an individual to pay significant up-front fees to a lawyer.

The same logic applies at 150% and 185% of the poverty guidelines. The Low Income Home Energy Assistance Program assists those earning up to 150% of the poverty guidelines with the expenses of heating or cooling their residence.[183] The National School Lunch Program provides the children of families earning up to 185% of the poverty guidelines with either free lunches or meals not exceeding forty cents per day.[184] Again, individuals with insufficient income to heat their homes or feed their children are unlikely to have the necessary funds to hire an attorney.

There are federal and state programs that utilize multiples in excess of 185% of the federal poverty guidelines. These programs, however, serve more specialized purposes and assist a smaller number of individuals. For instance, most states set the income threshold for the AIDS Drug Assistance Program at 300% or 400% of the federal poverty guidelines.[185] While one could argue that the minimum definition of indigency should be set closer to these higher percentages, such an argument would be tenuous. By comparison to the Food Stamp Program (which assisted 19 million people in 2002)[186] and the National School Lunch Program (which provides meals to 26 million children per day),[187] the Drug Assistance Program benefits a far smaller number of individuals. Moreover, the exorhitant cost of prescription medication to treat HIV demonstrates the need for the considerably higher multiple of the federal poverty guidelines.[188]

While it is difficult to assert that the minimum definition of indigency should be set at 400% of the poverty guidelines, a reasonable case can be made that 200% is an appropriate multiple. Food, health care and heat are basic life necessities that must be procured before an individual can spend money on a lawyer. Federal agencies have determined that those at or below 185% of the poverty guidelines are entitled to assistance with these basic necessities. Put simply, if an individual at 185% of the poverty guidelines cannot afford more than forty cents per day to provide his child

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Stamp Program: Frequently Asked Questions, at http://www.fns.usda.gov/fsp/faqs.htm (last visited Apr. 3, 2005) [hereinafter USDA, *Food Stamp Program*].

183. *See* United States Department of Health and Human Services, Administration for Children and Families, *Low Income Home Energy Assistance Program Eligibility Guidelines, at* http://www.acf.hhs.gov/programs/liheap/eligible.htm (last visited Apr. 3, 2005).

184. United States Department of Agriculture, Food and Nutrition Service, *National School Lunch Program, Program Fact Sheet, at* http://www.frac.org/html/federal_food_programs/programs/nslp.html (last visited Apr. 3, 2005) ("Children from families with incomes at or below 130 percent of the poverty level are eligible for free meals. Those with incomes between 130 percent and 185 percent of the poverty level are eligible for reduced-priced meals, for which students can be charged no more than 40 cents.") [hereinafter USDA, *National School Lunch Program*].

185. The Access Project, *AIDS Drug Assistance Programs, at* www.atdn.org/access/states (last modified July 16, 2004). Some states set the eligibility criteria for this program as high as 500% or as low as 200% of the poverty guidelines. *Id.*

186. USDA, *Food Stamp Program, supra* note 182.

187. USDA, *National School Lunch Program, supra* note 184.

188. *See* Theresa Agovino, *Experimental AIDS Drug Raises Treatment Hopes, Pricing Fears*, ASSOCIATED PRESS, Aug. 21, 2002 (discussing the effect of the high cost of medications on the drug assistance programs).

with a school lunch, then that individual likely cannot afford the significant up-front retainer required to hire a lawyer. Accordingly, I conclude that the definition of indigency should be set at 200% of the federal poverty guidelines, just above the highest multiple of the mainstream federal assistance programs. Such an approach guarantees that the truly poor are not being denied counsel, while at the same time ensuring that states are not forced to unnecessarily subsidize those who could in fact afford a lawyer.

c. A *Flexible* 200% Solution

The 200% solution is simply a rough estimate, not a perfectly crafted figure. As such, it should not be set in stone. There may be circumstances where a defendant at 180% of the poverty guidelines reasonably could afford counsel. There may also be situations where someone at 220% of the poverty guidelines would have no prospect of retaining any private lawyer. Just as it has been counterproductive for the Court to leave the states with unbridled discretion to determine indigency, it likewise would be ill-advised for the Court to forbid the states from departing from the 200% solution. As such, I recommend that the Court assert a flexible 200% solution—in essence, a rebuttable presumption.

The Court's experience in the punitive damages area is instructive. Over the last two decades the Court has become concerned about unconstitutionally excessive punitive damages awards, and it has imposed a constitutional ceiling on those awards.[189] One factor the Court has considered in assessing constitutionality has been the ratio of punitive to compensatory damages. After nearly fifteen years of struggling with this factor, the Court seemed to reach resolution in 2003 when it explained that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[190] In effect, the Court set a flexible constitutional ceiling on punitive damages awards, whereby most double-digit ratios would be considered unconstitutional but some might survive.

The Court would be well served to adopt a similar approach with regard to the minimum definition of indigency. The Court should advise the states that, "in practice, few situations in which the defendant is below 200% of the poverty guidelines and not appointed counsel will satisfy the Sixth Amendment." This approach maintains some flexibility for departure while making clear that in the typical case an individual below 200% of the poverty guidelines cannot afford to hire his own attorney.

CONCLUSION

Although the Supreme Court has decided dozens of Sixth Amendment cases involving the indigent's right to appointed counsel, it has never addressed what it means to be indigent, and instead it has left the definition of indigency entirely in the

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189. *See* BMW of N. Am. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 451, 453 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). The Court's interest in this area can be traced to an article by Dean John Jeffries. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

190. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

hands of the states. The states have not risen to the task, however, and in some cases they have construed indigency so narrowly as to eviscerate the right to appointed counsel. In order for the Supreme Court's decision in *Gideon v. Wainwright* to remain viable, there must be a constitutional floor for the definition of indigency. Although Congress, as a fact-finding entity, would be well suited to defining indigency, elected officials have little interest in diverting federal funds to guarantee the rights of criminal defendants. As such, it falls to the Supreme Court to establish the constitutional floor. Given the Court's limited fact-finding skills, it should draw on the findings of federal agencies that specialize in poverty programs. Because federal agencies assist individuals earning up to 185% of the poverty guidelines with basic life necessities, such as food, health care, and heat, the Court should recognize that individuals at those income levels would be unable to hire a private attorney. The Court therefore should set a flexible constitutional floor for the definition of indigency at 200% of the federal poverty guidelines.