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## Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel

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# Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel

John P. Gross\*

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*I. Introduction*

Fifty years ago the Supreme Court announced in *Gideon v. Wainwright*<sup>1</sup> that any person who is “too poor to hire a lawyer” must be provided with counsel.<sup>2</sup> The Court pointed out that “our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”<sup>3</sup> The Court reasoned that this “noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.”<sup>4</sup>

States have struggled to create indigent defense delivery systems that live up to the noble ideal that every defendant should stand equal before the law.<sup>5</sup> Chronic underfunding has led to excessive caseloads that have in turn raised questions about the effectiveness of the legal representation provided to those too poor to hire a lawyer.<sup>6</sup> While the effectiveness of the various indigent defense delivery systems across the country has repeatedly been called into question, what is seldom questioned is how states determine who is indigent.

The majority of states currently use some multiple of the Federal Poverty Guidelines to determine if a defendant is “indigent” and therefore eligible for assigned counsel.<sup>7</sup> The Federal Poverty Guidelines in no way reflect the actual cost of legal services. They were developed in the early 1960s and are based on the Department of Agriculture’s “Economy Food Plan,” which estimated the amount of money a family could spend on

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1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. *Id.* at 344.

3. *Id.*

4. *Id.*

5. See NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–101 (2009), <http://www.constitutionproject.org/pdf/139.pdf> (detailing states’ failures and explaining the need for reform).

6. See NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 20 (2011) (“The lack of sufficient funding is the leading cause of [excessive caseloads].”).

7. See *infra* notes 131–65 and accompanying text (describing how twenty-eight states base eligibility for assigned counsel on the Federal Poverty Guidelines).

food in order to meet minimal nutritional needs.<sup>8</sup> The use of the Federal Poverty Guidelines to determine eligibility for legal representation results in the denial of counsel to criminal defendants who are too poor to hire a lawyer.

This Article will discuss the ways in which the Supreme Court has attempted to define who is too poor to hire a lawyer<sup>9</sup> and will survey the existing eligibility criteria used by the states for assigned counsel in criminal cases. It will discuss the development of the Federal Poverty Guidelines, the way in which various federal agencies use them, and the way in which states use them to determine eligibility for assigned counsel, including the increasingly common categorization of defendants as partially or marginally indigent. This Article will then compare the Federal Poverty Guidelines to the Center for Women's Welfare's Self-Sufficiency Standards in an effort to demonstrate the unreasonably low income threshold often set by states when determining eligibility for assigned counsel. Rather than use the Federal Poverty Guidelines as a measure of who is "too poor to hire a lawyer," states should base eligibility determinations on a Self-Sufficiency Standard coupled with the actual costs associated with retaining competent defense counsel.

## *II. Meaningful Access to Justice or Meaningless Ritual*

The Supreme Court has devoted very little time to the issue of who is indigent, although it should be noted that the term indigent is itself a misnomer. While those defendants who are too poor to hire a lawyer are typically referred to as indigent,<sup>10</sup> courts have never required that defendants be wholly without means before they are eligible for assigned counsel.<sup>11</sup> In his letter of

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8. Gordon M. Fischer, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL. 43, 43 (1992).

9. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

10. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID), the National Legal Aid and Defender Association's National Indigent Defense Collaboration, and the fact that the author of this Article is Indigent Defense Counsel for the National Association of Criminal Defense Lawyers are all examples of how the term indigent has become synonymous with too poor to hire counsel.

11. *See Hardy v. United States*, 375 U.S. 277, 292-94 (1964) (Goldberg, J.,

transmittal of the Federal Criminal Justice Act of 1964 to President John F. Kennedy, Attorney General Robert F. Kennedy explained that “the term indigency is avoided because of its implication that only an accused who is destitute may need appointed counsel or services.”<sup>12</sup> In *Gideon*, the Court simply stated that those defendants who were too poor to hire a lawyer were entitled to counsel.<sup>13</sup> No guidelines were proposed as to how a trial court should make the determination that a defendant was unable to afford counsel.

One case that predates the Court’s decision in *Gideon* and that offers some guidance on indigency determinations is *Adkins v. E.I. DuPont de Nemours Co.*<sup>14</sup> In *Adkins*, the Court was called upon to interpret a statute that would have allowed a litigant to prosecute a claim in federal court without being required to prepay fees or costs if he submitted an affidavit that stated “that because of his poverty he is unable to pay the costs.”<sup>15</sup> The Court determined that a litigant need not be “absolutely destitute to enjoy the benefit of the statute.”<sup>16</sup> When making a determination regarding a litigant’s ability to pay court costs, the Court stated that the proper inquiry was whether he could pay the costs “and still be able to provide himself and dependents with the necessities of life.”<sup>17</sup>

The Court also noted that requiring litigants to expend all of their resources before they can claim the benefit of a statute that exempts those who are unable to pay because of poverty is simply bad public policy:

To say that no persons are entitled to the statute’s benefits until they have sworn to contribute to payment of costs, the

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concurring) (arguing that the government should provide free trial transcripts to those defendants “who cannot afford to purchase one,” rather than only those defendants who are wholly without means); *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948) (“We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute.”).

12. H.R. REP NO. 88-864, at 7 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2995 (referring to 18 U.S.C. § 3006A(a)).

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

14. *Adkins*, 335 U.S. 331.

15. *Id.* at 333.

16. *Id.* at 339.

17. *Id.* (internal quotation marks omitted).

last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support.<sup>18</sup>

It makes little sense to insist on the collection of court costs from a litigant who, once those costs have been paid, will then have to seek financial assistance from the state for the necessities of life.

Two additional cases that were decided in the decade before *Gideon* and that focus on the legal rights of the indigent are *Griffin v. Illinois*<sup>19</sup> and *Burns v. Ohio*.<sup>20</sup> In *Griffin*, the Court found that the state must provide a trial transcript to an indigent appellant if the transcript is necessary for determining the merits of the appeal.<sup>21</sup> The Court compared the requirement that an appellant pay for the cost of a transcript to a requirement that a defendant pay costs in advance of a trial and concluded that such a law “would make the constitutional promise of a fair trial a worthless thing.”<sup>22</sup> Under such circumstances the right to be heard and the right to counsel would be “meaningless promises to the poor.”<sup>23</sup> The Court ruled that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>24</sup> The effective denial of a right to appeal a criminal conviction to someone who was too poor to afford the costs of a trial transcript was seen by the Court as “a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.”<sup>25</sup> The Court clearly stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>26</sup>

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18. *Id.*

19. *Griffin v. Illinois*, 351 U.S. 12 (1956).

20. *Burns v. Ohio*, 360 U.S. 252 (1959).

21. *Griffin*, 351 U.S. at 19–20.

22. *Id.* at 17.

23. *Id.*

24. *Id.*

25. *Id.* at 19.

26. *Id.*

In *Burns*, the Court relied on its earlier holding in *Griffin* in ruling that a statute that requires an indigent defendant to pay a filing fee before he may file a motion for leave to appeal violates the Fourteenth Amendment's Due Process Clause.<sup>27</sup> The Court reiterated that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."<sup>28</sup>

In *Gideon*, the Court recognized the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>29</sup> As the Court had been in *Adkins*, *Griffin*, and *Burns*, it was concerned with the ability of the poor to have equal access to justice. In *Douglas v. California*,<sup>30</sup> decided the same day as *Gideon*, the Court extended the Sixth Amendment right to counsel to "the *first appeal*, granted as a matter of right to rich and poor alike, from a criminal conviction."<sup>31</sup> While the Court noted that the issue in *Griffin* was the right to a trial transcript on appeal and the issue in *Douglas* was the right to counsel on appeal, it came to the conclusion that "[i]n either case, the evil is the same: discrimination against the indigent."<sup>32</sup> The Court was once again concerned with the idea that justice could be purchased:

The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the

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27. *Burns v. Ohio*, 360 U.S. 252, 258 (1959).

28. *Id.*

29. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

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

31. *Id.* at 356 (citation omitted) (emphasis added).

32. *Id.* at 355.

errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.<sup>33</sup>

The Court's reasoning in *Gideon* and *Douglas* reflects the belief that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>34</sup> The presence of counsel ensures that every defendant will have meaningful access to the justice system and not a "meaningless ritual."<sup>35</sup>

The year after *Gideon* and *Douglas* were decided, the Court ruled in *Hardy v. United States*<sup>36</sup> that an indigent defendant is entitled to a free copy of a complete trial transcript on appeal.<sup>37</sup> In Justice Goldberg's concurring opinion in *Hardy*, he included a footnote in which he attempted to define "indigence":

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 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

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33. *Id.* at 357–58.

34. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

35. *Douglas*, 372 U.S. at 358.

36. *Hardy v. United States*, 375 U.S. 277 (1964).

37. *See id.* at 282 ("We conclude that this counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution.").



nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.<sup>38</sup>

The conception of indigency as a “relative concept” linked to the assertion of a particular right is consistent with the noble ideal that every defendant stands equal before the law. A defendant need not be “totally devoid of means,” nor must he be completely barred from asserting a right; it is sufficient that his lack of financial resources “substantially inhibit[s]” his defense.<sup>39</sup>

This line of reasoning is reflected in the Court’s decision in *Ake v. Oklahoma*<sup>40</sup> two decades later. In *Ake*, the Court ruled that an indigent defendant is entitled to a psychiatrist when he has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.<sup>41</sup> The Court pointed out that it “has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.”<sup>42</sup> While *Gideon* references an “obvious truth,”<sup>43</sup> *Ake* references the “elementary principle” grounded in “fundamental fairness” and derived from the belief “that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”<sup>44</sup> The Court referenced *Griffin*, *Burns*, *Gideon*, and *Douglas* and stated that “[m]eaningful access to justice has been the consistent theme of these cases.”<sup>45</sup> The Court also pointed out

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38. *Id.* at 289 n.7 (Goldberg, J., concurring) (citations omitted) (quoting ATT’Y GEN.’S COMM. ON POVERTY & THE ADMIN. OF CRIMINAL JUSTICE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 8 (1963)).

39. *Id.*

40. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

41. *See id.* at 84 (“[W]here the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.”).

42. *Id.* at 76.

43. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

44. *Ake*, 470 U.S. at 76.

45. *Id.* at 77. The Court also mentioned that these same principles have been extended to “quasi-criminal” proceedings such as paternity actions. *Id.* at

that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.<sup>46</sup>

While the Supreme Court requires states to provide indigent defendants with a fair opportunity to present a defense, there is no requirement that states provide defendants with the best defense money can buy. In *Ross v. Moffitt*<sup>47</sup> the Court ruled that a state does not have to provide counsel to an indigent appellant for a discretionary appeal to a state supreme court. While recognizing that the absence of counsel would be a “handicap” and that the presence of a skilled lawyer would “prove helpful to any litigant able to employ him,” the Court stated that just because “a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required.”<sup>48</sup> The Court made clear that states do not have “to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only [have] to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.”<sup>49</sup>

In *Griffin, Burns, Gideon, Douglas, and Ake*, the Supreme Court examined the various ways in which criminal defendants are at a disadvantage when they lack financial resources. The Court never offered an objective definition of what it means to be indigent; rather the Court looked to the ability of a defendant to participate meaningfully in judicial proceedings.<sup>50</sup> If a

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76 (citing *Little v. Streater*, 452 U.S. 1, 16 (1981) (holding that an indigent putative father was entitled to a blood test in paternity action)).

46. *Id.*

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

48. *Id.* at 616.

49. *Id.*; see also *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (requiring that an indigent defendant be provided with the “basic tools of an adequate defense”).

50. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (“[A]ccess to the courthouse doors does not . . . assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the

defendant's lack of financial resources limits his ability to assert basic rights or undermines the fairness of the judicial proceedings, then the defendant is considered indigent.<sup>51</sup>

There are two additional Supreme Court decisions that deal with recoupment laws and how their application may violate the due process rights of indigent criminal defendants. Almost a decade after *Gideon*, the Court deemed a recoupment law unconstitutional because it violated the due process rights of indigent defendants. In *James v. Strange*,<sup>52</sup> a Kansas recoupment statute that required a defendant to pay the costs of representation within sixty days of receiving notice of the amount owed or else the amount would become a civil judgment was held to violate equal protection because the defendant was barred from asserting the ordinary civil protections afforded to other debtors.<sup>53</sup> While the Court recognized a state's legitimate interests in recovering the costs associated with providing defense, the Court stated that such laws "need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect."<sup>54</sup> The Court went on to conclude that the statute at issue "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal

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raw materials integral to the building of an effective defense."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *Douglas v. California*, 372 U.S. 353, 358 (1963) (concluding that when an indigent defendant does not have access to a lawyer in a nondiscretionary first appeal, he "has only the right to a meaningless ritual, while the rich man has a meaningful appeal"); *Burns v. Ohio*, 360 U.S. 252, 258 (1959) ("Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio."); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

51. See, e.g., *Gideon*, 372 U.S. at 345 (concentrating on the layman's inability to determine the propriety of an indictment, to submit effective evidence, and to establish his innocence).

52. *James v. Strange*, 407 U.S. 128 (1972).

53. See *id.* at 141–42 ("State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.").

54. *Id.* at 141–42.

treatment under the law.”<sup>55</sup> The Court did not rule that any attempt to recoup defense costs by a state would be held to be unconstitutional but found that the statute in *James* violated the Equal Protection Clause because it denied the criminal defendant the protections available to civil debtors.<sup>56</sup>

Two years later, the Court upheld a recoupment statute in *Fuller v. Oregon*.<sup>57</sup> Unlike the statute at issue in *James*, the recoupment statute in *Fuller* afforded the defendant all the protections of civil judgment debtors.<sup>58</sup> In upholding the statute, the Court observed that the dividing line between those able to afford representation and those deemed to be indigent created a system in which a defendant who was barely able to afford counsel would be at a disadvantage. The Court noted in *Fuller* that

[w]e live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the poverty line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.<sup>59</sup>

The Court was resigned to the fact that “the dynamics of private enterprise” will impact the “distribution of legal assistance.”<sup>60</sup> Unless the Court were to adopt a rule that all defendants are entitled to publicly funded defense counsel, there will inevitably be a group of defendants who are not considered indigent, but who have such limited financial resources that they will have difficulty retaining counsel. The Court was willing to

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55. *Id.* at 142.

56. *Id.* at 141–42.

57. *Fuller v. Oregon*, 417 U.S. 40 (1974).

58. *See id.* at 47 (“The Oregon statute under consideration here suffers from no such infirmity [as the Kansas statute suffered in *James*]. . . . The convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors . . .”).

59. *Id.* at 53–54.

60. *Id.*

accept that defendants, whether they are ultimately convicted or not, will suffer some amount of “hardship.”<sup>61</sup>

A defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. The imposition of such dislocations and hardships without an ultimate conviction is, of course, unavoidable in a legal system that requires proof of guilt beyond a reasonable doubt and guarantees important procedural protections to every defendant in a criminal trial.<sup>62</sup>

If some amount of “financial hardship” is inevitable, then the issue is at what point is it substantial enough to implicate a defendant’s Sixth Amendment right to counsel? As the Court noted in *Adkins*, it is not necessary for a defendant to spend his “last dollar” in an effort to retain counsel; a defendant must be permitted “to provide himself and dependents with the necessities of life.”<sup>63</sup> Nevertheless, the “dynamics of free enterprise” combined with “a legal system that requires proof beyond a reasonable doubt,” results in a disproportionate financial burden on those defendants who have limited financial resources.<sup>64</sup> The indigent receive state-funded representation, the wealthy are able to use disposable income to retain counsel, and the poor are expected to borrow money and sell off their meager assets when they need legal representation.

### *III. How States Decide Who Is “Too Poor to Hire a Lawyer”*

Following the Supreme Court’s decision in *Gideon*, states began to devise systems for providing counsel to indigent defendants charged with crimes. Determining who was too poor to hire a lawyer was something left to the individual states, and

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61. *Id.* at 54.

62. *Id.* at 49–50.

63. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339–40 (1948) (internal quotation marks omitted).

64. *Fuller v. Oregon*, 417 U.S. 40, 53 (1974).

within the states, was something typically to the discretion of the trial court.<sup>65</sup> The Supreme Court made no attempt to define what level of income would qualify a defendant for appointed counsel.<sup>66</sup> It is reasonable to assume that its omission was intentional because the point at which a defendant will be too poor to hire a lawyer is dependent upon a number of factors, including the seriousness of the charge, the complexity of the case, a defendant's income, assets, and liabilities, as well as the typical fee charged by an attorney in a given area. The legal marketplace is complex, and it would be difficult to pinpoint with mathematic certainty the point at which a defendant would be unable to afford representation.

While the Court's failure to provide any guidance regarding which defendants were to be deemed too poor to hire a lawyer is realistic when we consider the complexity of the legal marketplace, it is also overly simplistic in that it categorizes defendants as either too poor to hire a lawyer or, in the alternative, able to afford representation. The reality is that many defendants may be able to afford some level of representation, but the amount of legal services that they can afford is minimal. In a criminal case, a defendant may be able to retain the services of a qualified defense attorney during the preliminary stages of the case but may not be able to pay for the attorney's assistance at trial. This fact raises similar concerns to those addressed by the Court in *Griffin*, *Burns*, *Gideon*, *Douglas*, and *Ake*—whether the poor have meaningful access to the justice system.

At first, it appears that many states spent little time making eligibility determinations. A defendant was too poor to hire a lawyer simply if he said that he was.<sup>67</sup> The assumption was that anyone charged with a crime would hire the best attorney he

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65. See *infra* notes 67–69 and accompanying text (explaining the process by which states began to establish standards for indigency).

66. See *supra* note 50 and accompanying text (explaining how the Court in *Griffin*, *Burns*, *Douglas*, and *Ake* never attempted to define indigent).

67. See ROBERT L. SPANGENBERG ET AL., U.S. DEPT OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 9 (1986) (“In the past, in many jurisdictions, counsel was appointed simply on the request of the defendant. Some judges asserted that the time and effort necessary for eligibility screening was unwarranted, since only a few defendants would be excluded.”).

could afford. The Supreme Court actually made this same assumption in *Gideon* when it noted that “there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.”<sup>68</sup> The Court’s view was that lawyers are “necessities, not luxuries.”<sup>69</sup>

Perhaps in response to the rising costs of providing indigent defense, states have established eligibility guidelines and screening procedures to ensure that only those defendants truly too poor to hire a lawyer will be assigned counsel. When defining indigency, most states have adopted the language used by the Court in *Gideon* and provide counsel to defendants too poor to hire a lawyer.<sup>70</sup> State statutes often list a number of factors that a trial court must consider when deciding if a defendant is eligible for assigned counsel. For example, in Maryland, the following factors are considered: “(i) the nature, extent, and liquidity of assets; (ii) the disposable net income of the applicant; (iii) the nature of the offense; (iv) the length and complexity of the proceedings; (v) the effort and skill required to gather pertinent information; and (vi) any other foreseeable expense.”<sup>71</sup> In New Jersey, courts consider the following:

- (a) the financial ability of the defendant to engage and compensate competent private counsel;
- (b) the current employment, salary and income of the defendant including prospects for continued employment if admitted to bail;
- (c) the liquid assets of the defendant, including all real and personal property and bank accounts;
- (d) the ability of the defendant to make bail and the source of bail posted;
- (e) . . . the willingness and ability of the defendant’s immediate family, friends or employer to assist the defendant in meeting defense costs;
- (f) . . . 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;
- (g) . . . the ability of the defendant to demonstrate convincingly that he has consulted at least three private attorneys, none of whom would accept the case for a fee within

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68. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

69. *Id.*

70. *Id.*

71. MD. CODE ANN., CRIM. PROC. § 16-210(c)(3)(i)–(vi) (West 2012).

his ability to pay; and (h) the ability of the defendant to provide all other necessary expenses of representation.<sup>72</sup>

Some states have incorporated language from the American Bar Association's *Standards for Providing Defense Services*, which recommend providing counsel "to persons who are financially unable to obtain adequate representation without substantial hardship."<sup>73</sup> This language reflects the Court's view in *Adkins* that the cost of obtaining legal representation should not prevent a defendant from maintaining the "necessities of life."<sup>74</sup> Many states define indigency not simply as the inability to hire an attorney, but rather as the inability to hire an attorney without "substantial hardship."<sup>75</sup> Alabama,<sup>76</sup> Arizona,<sup>77</sup> Florida,<sup>78</sup> Georgia,<sup>79</sup>

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72. N.J. STAT. ANN. § 2A:158A-14(a)–(h) (West 2013).

73. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-7.1 (1992) [hereinafter PROVIDING DEFENSE SERVICES].

74. *Adkins v. E.I. Dupont de Nemours & Co.*, 335 U.S. 331, 339 (1948). Based on the Court's holding in *Adkins*, it is reasonable to assume that criminal defendants are too poor to hire a lawyer if the cost of retaining counsel would deprive them or their dependents of the necessities of life. Compare *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."), with *Adkins*, 335 U.S. at 339 ("We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.>"). The American Bar Association's *Standards for Providing Defense Services* § 5-7.1 takes the same position. See PROVIDING DEFENSE SERVICES, *supra* note 73, § 5-7.1 ("Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.").

75. PROVIDING DEFENSE SERVICES, *supra* note 73, §5-7.1.

76. See ALA. CODE § 15-12-1(4)(b) (2012) ("A person that has an income level greater than 125 percent, but at or below 200 percent, of the most recently revised poverty income guidelines . . . and the court makes a written finding that not providing indigent defense services on the pending case would cause the person substantial hardship.").

77. See ARIZ. R. CRIM. P. 6.7(d) ("If in determining that a person is indigent . . . , the court finds that such person has financial resources . . . , the court shall order him or her to pay . . . such amount as it finds he or she is able to pay without incurring substantial hardship . . . .").

78. See FLA. R. CRIM. P. 3.111(b)(3) ("Counsel may be provided to a partially indigent person on request, provided that the person shall defray that portion of the cost of representation and the reasonable costs of investigation as he or she is able without substantial hardship to the person or the person's family . . . .").

79. See GA. CODE ANN. § 17-12-2(6)(A), (C) (West 2012) (providing that a



Indiana,<sup>80</sup> Iowa,<sup>81</sup> Louisiana,<sup>82</sup> Maryland,<sup>83</sup> Michigan,<sup>84</sup>  
Montana,<sup>85</sup> New Mexico,<sup>86</sup> Oregon,<sup>87</sup> Vermont,<sup>88</sup> and

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person charged with a misdemeanor who earns less than 100% of the federal poverty guidelines and a person charged with a felony who earns less than 150% of the federal poverty guidelines are considered “indigent” unless they can show “undue hardship”).

80. See *Lamonte v. State*, 839 N.E.2d 172, 176 (Ind. Ct. App. 2005) (“If a defendant legitimately lacks financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.” (quoting *Hall v. State*, 826 N.E.2d 99, 104 (Ind. Ct. App. 2005))).

81. See IOWA CODE ANN. § 815.9(1)(b) (West 2012) (providing that a person with an income between 125% and 200% “of the most recently revised poverty income guidelines . . . shall not be entitled to an attorney . . . , unless the court makes a written finding that not appointing counsel on the pending case would cause the person substantial hardship”).

82. See LA. REV. STAT. ANN. § 15:175(A)(1)(b) (2013) (“A person will be deemed ‘indigent’ who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own.”).

83. See MD. CODE ANN., CRIM PROC. §16-210(a) (West 2012) (“An individual may apply for services of the Office as an indigent individual, if the individual states in writing under oath or affirmation that the individual, without undue financial hardship, cannot provide the full payment of an attorney and all other necessary expenses of representation . . .”).

84. See MICH. CT. R. 6.005(B), available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/1Chapter6CriminalProcedure.pdf> (“The determination of indigency must be guided by the . . . availability and convertibility, without undue financial hardship to the defendant and the defendant’s dependents, of any personal or real property owned . . .”).

85. See MONT. CODE ANN. § 47-1-111(3) (2012) (providing that a defendant is entitled to court-appointed counsel if his income is less than 133% of the federal poverty guidelines or “the disposable income and assets of the applicant and the members of the applicant’s household are insufficient to retain competent private counsel without substantial hardship”).

86. See N.M. STAT. ANN. § 31-16-2 (West 2013) (defining a “needy person” as one “who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets”).

87. See OR. REV. STAT. ANN. § 151.485(1) (West 2013) (“[A] person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person’s dependent family.”).

88. See VT. STAT. ANN. tit. 13, § 5201(3) (2013) (“‘Needy person’ means a person who at the time his or her need is determined is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation or who is otherwise unable to employ

Virginia<sup>89</sup> all use “substantial hardship” as a factor in eligibility determinations.

Several other states explicitly mention “economic necessities” or expenses that they categorize as “necessities.” In Alaska, an indigent person is one who cannot afford an attorney “without depriving the party or the party’s dependents of food, clothing, or shelter.”<sup>90</sup> In Delaware, a defendant is considered indigent when he is unable to retain legal counsel without impairing his financial ability to provide “economic necessities of life for himself and his family.”<sup>91</sup> In Hawaii, courts consider a defendant’s expenditures, “especially those which are reasonably necessary to provide him and his dependents with the necessities of life.”<sup>92</sup> In Nebraska, a defendant is indigent if he is unable to retain counsel “without prejudicing one’s financial ability to provide economic necessities for one’s self or one’s family.”<sup>93</sup> In Oregon, a person is eligible for assigned counsel if he is unable to retain counsel “without substantial hardship in providing basic economic necessities.”<sup>94</sup> Rhode Island defines an indigent defendant as someone “who after payment of necessary expenses for food, shelter and medical care” cannot afford to hire counsel.<sup>95</sup> And in Utah, a defendant is indigent if he lacks the means to pay for legal counsel “without depriving the person or the family of that person food, shelter, clothing and other necessities.”<sup>96</sup>

Still another component of the definition of indigency among the states, in addition to the cost of an attorney, is the cost of other necessary expenses associated with a defense. This additional factor takes into consideration the Court’s ruling in

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an attorney.”).

89. See VA. CODE ANN. § 19.2-159(B) (2012) (providing that if the accused is not a recipient of a state or federally funded welfare program, the court may appoint counsel after considering, among other factors, “[a]ll assets of the accused which are convertible into cash within a reasonable period of time without causing substantial hardship”).

90. ALASKA STAT. § 18.85.170(4) (2013).

91. *Potter v. State*, 547 A.2d 595, 599 (Del. 1988).

92. *State v. Mickle*, 525 P.2d 1108, 1111 (Haw. 1974).

93. NEB. REV. STAT. ANN. § 29-3901(3) (LexisNexis 2012).

94. OR. REV. STAT. ANN. § 151.485(1) (West 2013).

95. R.I. GEN. LAWS § 12-15-8 (2012).

96. UTAH CODE ANN. § 77-32-202(3)(a)(i) (West 2013).

*Ake* that in any criminal prosecution a state “must take steps to assure that the defendant has a fair opportunity to present his defense.”<sup>97</sup> Under this rationale, a defendant may be considered indigent if he lacks the resources to hire an investigator or an expert witness, and the failure to do so would effectively deny him an opportunity to present a defense.<sup>98</sup> For example, Connecticut defines an indigent defendant as someone who lacks the ability to retain an attorney “and to provide other necessary expenses of legal representation.”<sup>99</sup> Florida provides counsel to partially indigent defendants provided that they “defray that portion of . . . the reasonable costs of investigation as [they are] able without substantial hardship.”<sup>100</sup> Idaho defines a “needy person” as one who “is unable to provide for the full payment of an attorney and all other necessary expenses of representation.”<sup>101</sup> Kentucky,<sup>102</sup> Maryland,<sup>103</sup> New Jersey,<sup>104</sup> North Carolina,<sup>105</sup> Vermont,<sup>106</sup> and

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97. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

98. *See id.* at 83 (determining that the defendant was indigent because he could not afford to pay a psychiatric expert).

99. CONN. GEN. STAT. ANN. § 51-297(f) (West 2013).

100. FLA. R. CRIM. P. 3.111(b)(3).

101. IDAHO CODE ANN. § 19-851(c) (2012).

102. *See* KY. REV. STAT. ANN. § 31.100(3)(a) (West 2013) (“‘Needy person’ or ‘indigent person’ means . . . [a] person . . . who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation.”).

103. *See* MD. CODE ANN., CRIM. PROC. § 16-210(c)(2) (West 2012) (“Need shall be measured according to the financial ability of the applicant to engage and compensate a competent private attorney and to provide all other necessary expenses of representation.”).

104. *See* N.J. STAT. ANN. § 2A:158A-2 (West 2013) (“As used herein ‘indigent defendant’ means a person who is formally charged with the commission of an indictable offense, and who does not have the present financial ability to secure competent legal representation, . . . and to provide all other necessary expenses of representation.”).

105. *See* N.C. GEN. STAT. § 7A-450(a) (2012) (“An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter.”).

106. *See* VT. STAT. ANN. tit. 13, § 5201(3) (2013) (“‘Needy person’ means a person who at the time his or her need is determined is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation or who is otherwise unable to employ an attorney.”).

Wyoming<sup>107</sup> all include “other necessary expenses” when making indigency determinations.

While the ability to retain counsel will naturally depend upon the prevailing rates charged by counsel in a particular location, surprisingly few states consider the actual cost of retaining counsel when making an indigency determination. Although consideration may be given to the amount of money required “on a practical basis, to retain competent counsel,”<sup>108</sup> other factors, such as the Federal Poverty Guidelines, which do not reflect the actual cost of legal services, are used when making indigency determinations.<sup>109</sup> Maine, New Hampshire, and Wisconsin use standards that mention “the cost of retaining the services of competent counsel,”<sup>110</sup> “the minimum cost of obtaining qualified private counsel,”<sup>111</sup> and “the anticipated costs of effective representation,”<sup>112</sup> respectively. Utah requires the court to consider “the reasonableness of fees and expenses charged to the defendant . . . where the defendant is represented by privately retained defense counsel.”<sup>113</sup> Only two states take a defendant’s failed efforts to retain private counsel into consideration: New Jersey considers “the ability of the defendant to demonstrate convincingly that he has consulted at least three private attorneys, none of whom would accept the case for a fee within his ability to pay,”<sup>114</sup> and West Virginia considers whether a defendant “has made reasonable and diligent efforts to obtain private legal representation, and the results of those efforts.”<sup>115</sup>

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107. See WYO. STAT. ANN. § 7-6-106(c) (2012) (providing that the court must determine whether the defendant can pay for necessary expenses, and if so, allowing the court to compel such payment).

108. *Nikander v. Dist. Court*, 711 P.2d 1260, 1262 (Colo. 1986).

109. See *id.* (“Factors to be considered include whether the defendant has any dependents, whether he is employed, income from all sources, real and personal property owned, extent of any indebtedness, necessary living expenses, and the Eligibility Income Guidelines which reflect the current Federal Poverty Guidelines.”).

110. ME. R. CRIM. P. 44(b).

111. N.H. REV. STAT. ANN. § 604-A:2-c (2013).

112. WIS. STAT. ANN. § 977.02(3)(a) (West 2013).

113. UTAH CODE ANN. § 77-32-202(3)(b)(v) (West 2013).

114. N.J. STAT. ANN. § 2A:158-14(g) (West 2013).

115. W. VA. CODE ANN. § 29-21-16(e)(6) (West 2013).

Eligibility for assigned counsel requires that a state determine who is too poor to hire a lawyer. This means that eligibility for assigned counsel is a function of both how much money a defendant is able to spend and how much it would cost to retain a competent defense attorney. Even if the Federal Poverty Guidelines could be used to presume that a defendant had some disposable income, that fact alone does not establish that he is able to hire a lawyer. Some consideration must be given to the actual cost of representation in a specific area.

Another reality of the legal market that is ignored by many state standards regarding qualifications for assigned counsel is the fact that most defense attorneys require a substantial retainer before agreeing to represent a defendant.<sup>116</sup> Despite this fact some states take into consideration a defendant's ability to borrow money as well as his credit rating. Hawaii,<sup>117</sup> New Hampshire,<sup>118</sup> South Dakota,<sup>119</sup> and Wyoming<sup>120</sup> all explicitly authorize a trial court to consider a defendant's capacity to

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116. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 588 (2005)

[W]hile 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.

117. See *State v. Mickle*, 525 P.2d 1108, 1111 (Haw. 1974)

Obviously, no simple formula can be devised that will dispose of every case where court-appointed counsel is sought by the accused. However, in determining eligibility based on indigency, the trial court should take into consideration the . . . applicant's borrowing capacity and the extent to which such borrowing will affect his fixed monthly obligations . . . .

(emphasis omitted).

118. See N.H. REV. STAT. ANN. § 604-A:2-c (2013)

In determining a defendant's financial ability to obtain counsel, the rules adopted by the commissioner . . . shall contain a method for considering the defendant's ability to borrow some or all of the necessary funds. The rules shall also consider the possibility of the defendant paying his counsel fees in periodic installments.

119. See *State v. Dale*, 439 N.W.2d 112, 116 (S.D. 1989) ("The type and nature of information which should be furnished is as follows: . . . income from whatever source and ability to borrow money.").

120. See WYO. R. CRIM. P. 44(d) ("In making a determination of eligibility, the judicial officer shall consider . . . the defendant's capacity to borrow money.").

borrow money when making an indigency determination. Maine and Oklahoma both require consideration of a defendant's "credit standing" in the community before finding a defendant to be eligible for assigned counsel.<sup>121</sup>

While Justice Goldberg's definition of indigency mentions that it would be a mistake to deny defendants appointed counsel based on the fact that they made bail,<sup>122</sup> a number of states use the fact that a defendant has made bail as a factor in determining indigency. Florida considers whether a defendant "has been released on bail in an amount of \$5,000 or more [or w]hether a bond has been posted" when making a determination regarding indigency.<sup>123</sup> Missouri requires the trial court to consider "all the circumstances of the case," which includes the "ability to make bond."<sup>124</sup> New Jersey considers the "ability of the defendant to make bail and the source of bail posted,"<sup>125</sup> and West Virginia considers whether a defendant "has posted a cash bond for bail or has obtained release on bond . . . and the amount and source of the money provided for such bond."<sup>126</sup> Using the fact that defendants have made bail to deny them appointed counsel has the potential to force defendants to choose between their liberty and their right to an attorney.

#### *IV. Using the Federal Poverty Guidelines to Determine Eligibility*

While the Supreme Court has never set forth specific guidelines to determine indigency, and while some states grant the trial court wide discretion when it makes the determination,

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121. See ME. R. CRIM. P. 44(b) ("In making its determination the court shall consider . . . the defendant's credit standing . . ."); OKLA. STAT. tit. 22, ch. 18 app. § I, r. 1.14(A)(1) (2012) ("The qualifications for a defendant to have court-appointed counsel . . . include, but are not limited to . . . the accused's credit standing in the community.").

122. See *Hardy v. United States*, 375 U.S. 277, 289 n.7 (1964) (Goldberg, J., concurring) ("[T]he 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.").

123. FLA. STAT. ANN. § 27.52(4)(a)(1)–(2) (West 2013).

124. MO. ANN. STAT. § 600.086(1) (West 2013).

125. N.J. STAT. ANN. § 2A:158A-14(d) (West 2013).

126. W. VA. CODE ANN. § 29-21-16(e)(8) (West 2013).

the majority of states have turned to a formulaic approach to determining eligibility for assigned counsel. Those states all use a multiple of the Federal Poverty Guidelines when making eligibility determinations. While it is unclear how the Federal Poverty Guidelines became intertwined with eligibility determinations for assigned counsel, there are a number of factors that may have contributed to their adoption by the majority of states over the last fifty years. The first is that their development coincides with the Supreme Court's decision in *Gideon*, as well as the "War on Poverty" announced by the Johnson Administration in January 1964.<sup>127</sup> Second, the Legal Services Corporation (LSC) was created by the Economic Opportunity Act of 1964 and was charged with providing civil legal services to the nation's poor.<sup>128</sup> In determining eligibility guidelines for their services, the LSC decided to use 125% of the Federal Poverty Guidelines.<sup>129</sup> Over time, a variety of federal agencies adopted the Federal Poverty Guidelines as a method of determining eligibility for benefits.<sup>130</sup> As costs associated with providing indigent defense rose, states turned to eligibility guidelines as a way of cost control. In searching for some objective criteria to use when making eligibility determinations, states began to adopt the Federal Poverty Guidelines.

There are currently twenty-eight states that use the Federal Poverty Guidelines when determining eligibility for assigned counsel.

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127. See Fischer, *supra* note 8, at 43 ("The Johnson Administration announced its War on Poverty in January 1964, not long after the publication of Orshansky's initial poverty article.").

128. See 42 U.S.C. § 2996b(a) (2012) ("There is established in the District of Columbia a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.").

129. See 45 C.F.R. § 1611.3(b) (1977) ("Unless specifically authorized by the Corporation, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty-five percent (125%) of the official poverty threshold as defined by the Office of Management and Budget.").

130. See, e.g., 47 C.F.R. § 64.610(d)(2) (2011) (requiring an income that does not exceed 400% of the Federal Poverty Guidelines to be eligible for benefits under the National Deaf-Blind Equipment Distribution Program).

- Alabama: A person is presumptively eligible for “indigent defense services” if he has an “income level at or below 125 percent” of the Federal Poverty Guidelines.<sup>131</sup> If he has an income that is above 125% but below 200% of the Federal Poverty Guidelines, then the court can still assign counsel if it finds that “not providing indigent defense services on the pending case would cause the person substantial hardship.”<sup>132</sup>
- Alaska: The court may appoint counsel without further inquiry if “the gross annual income available to the defendant is less than the adjusted federal poverty guidelines amount for the defendant’s household size, and other financial resources (cash, assets, and credit) available to the defendant are worth less than 50 percent of . . . the likely cost of private representation through trial.”<sup>133</sup>
- Colorado: Defendants who are at or below the Federal Poverty Guidelines are automatically eligible for assigned counsel while those earning in excess of 175% are ineligible under the Federal Poverty Guidelines.<sup>134</sup>
- Connecticut: The Connecticut Division of Public Defender Services has established income eligibility guidelines that permit a finding of indigency if the defendant’s income is at or below 150% of the Federal Poverty Guidelines when charged with a misdemeanor and at or below 200% of the Federal Poverty Guidelines when charged with a felony.<sup>135</sup>

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131. ALA. CODE § 15-12-1(4)(a) (2012).

132. *Id.* § 15-12-1(4)(b).

133. ALASKA R. CRIM. P. 39.1(f).

134. COLORADO SUPREME COURT, CHIEF JUSTICE DIRECTIVE 04-04: APPOINTMENT OF STATE-FUNDED COUNSEL IN CRIMINAL AND JUVENILE DELINQUENCY CASES AND FOR CONTEMPT OF COURT attachments A–C (2011), [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-04amended06-11withAttachmentBrevised3-1-12.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-04amended06-11withAttachmentBrevised3-1-12.pdf) (providing tables and charts to calculate whether a defendant qualifies for assigned counsel).

135. See Conn. Pub. Defenders, *Income Eligibility Guidelines*, DIVISION OF PUB. DEFENDER SERVICES (May 5, 2012, 11:04 AM), <http://www.ct.gov/ocpd/cwp/view.asp?a=4089&q=505266> (last visited Apr. 2, 2013) (providing tables that explain the maximum gross incomes for assigned counsel eligibility depending on the number of the accused’s dependents) (on file with the



- Florida: “An applicant . . . is indigent if the applicant’s income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services or if the person is receiving Temporary Assistance for Needy Families–Cash Assistance, poverty-related veterans’ benefits, or Supplemental Security Income (SSI).”<sup>136</sup>
- Georgia: An indigent defendant is: “[A] person charged with a misdemeanor, violation of probation, or a municipal or county offense punishable by imprisonment who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents.”<sup>137</sup>
- Iowa: “A person is entitled to an attorney appointed by the court to represent the person if the person has an income level at or below one hundred twenty-five percent of the United States poverty level . . . unless the court determines that the person is able to pay for the cost of an attorney to represent the person on the pending case.”<sup>138</sup>
- Kansas: “An eligible defendant shall mean a person whose combined household income and liquid assets equal less than the most current federal poverty guidelines . . . .”<sup>139</sup>
- Kentucky: The court, in determining whether a person is a needy person and in determining the extent of his inability to pay, shall consider various factors, including “[t]he poverty level income guidelines compiled and published by the United States Department of Labor.”<sup>140</sup>

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Washington and Lee Law Review).

136. FLA. STAT. ANN. § 27.52(2)(a) (West 2013).

137. GA. CODE ANN. § 17-12-2(6)(A) (2012).

138. IOWA CODE ANN. § 815.9(1)(a) (West 2012).

139. Kan. Admin. Regulations Pertaining to the State Bd. of Indigent Def. Servs., 105-4-1(b) (2011), <http://www.sbids.org/forms/ksbidsreg.pdf>.

140. KY. REV. STAT. ANN. § 31.120(2)(h) (West 2013).

- Louisiana: A person will be deemed “indigent” who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. “Substantial financial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than 200% of the Federal Poverty Guideline.<sup>141</sup>
- Maine: Defendants are eligible for assigned counsel if their income is below 110% of the Federal Poverty Guidelines.<sup>142</sup> “Applicants whose income exceeds 110% of the Federal Poverty Guidelines may be eligible for assigned counsel if they have extraordinary necessary monthly expenses that render them unable to retain counsel.”<sup>143</sup>
- Maryland: “For an individual whose assets and net annual income are less than 100 percent of the federal poverty guidelines, eligibility for services of the Office may be determined without an assessment regarding the need of the applicant.”<sup>144</sup> “For an individual whose assets and net annual income equal or exceed 100 percent of the federal poverty guidelines, eligibility for the services of the Office shall be determined by the need of the applicant.”<sup>145</sup>

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141. LA. REV. STAT. ANN. § 15:175(A)(1)(b) (2013).

142. See Me. Comm’n on Indigent Legal Servs. 94-649, Chapter 401, § 1(2)(D), <http://www.maine.gov/mcils/rules/rules/Indigency%20Guidelines%20Final%20Adopted%20to%20SOS.pdf> (establishing guidelines for determining financial eligibility of defendants for assigned counsel).

143. *Id.* § 1(2)(F).

144. MD. CODE ANN., CRIM. PROC. § 16-210(b) (West 2012).

145. *Id.* § 16-210(c)(1); see also *Office of the Pub. Defender v. State*, 993 A.2d. 55, 69 (Md. 2010) (holding that it was reversible error to only consider the Federal Poverty Guidelines when determining eligibility).

[W]here the local OPD declines representation to a defendant erroneously, because of the local OPD’s failure to consider properly the statutorily-mandated criteria for determining indigency, and where a court finds, upon its subsequent mandatory independent review, that the individual qualifies for representation, the trial

- Massachusetts: A defendant is indigent if his income, after taxes, is “125 per cent or less of the current poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended.”<sup>146</sup>
- Minnesota: “A defendant is financially unable to obtain counsel if the defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits.”<sup>147</sup>
- Missouri: “A defendant may be considered indigent if his/her gross pay and other sources of income do not exceed the federal poverty guideline as issued in the Federal Register by the U.S. Department of Health and Human Services.”<sup>148</sup>
- Montana: “An applicant is indigent if the applicant’s gross household income . . . is at or less than 133% of the poverty level set according to the most current federal poverty guidelines . . . .”<sup>149</sup>
- Nevada: Nevada’s Indigent Defense Commission issued a report that found that the methods utilized in Nevada’s courts and defender offices to determine eligibility for assigned counsel vary widely.<sup>150</sup> The report recommended

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court, in carrying out its role as “ultimate protector” of the Constitutional right to counsel, may appoint an attorney from the local OPD to represent the indigent individual unless an actual and unwaived or unwaivable conflict of interest would result thereby.

*Id.*

146. MASS. GEN. LAWS ch. 261, § 27A(b) (2000).

147. MINN. STAT. ANN. § 611.17 (West 2013); *see also* State v. Jones, 772 N.W.2d 496, 502–03 (Minn. 2009) (holding that a district court must consider all of the available information regarding a defendant’s financial circumstances that are relevant to the defendant’s eligibility for a public defender and cannot simply rely on the Federal Poverty Guidelines to determine eligibility).

148. MO. CODE REGS. ANN. tit. 18, § 10-3.010(3)(A) (2012).

149. MONT. CODE ANN. § 47-1-111(3)(a) (2012).

150. *See In re Review of Issues Concerning Representation of Indigent Defendants and Juvenile Delinquency Cases*, ADKT No. 411, Exhibit B at 20 (Nev. Nov. 20, 2007) [hereinafter Nevada Indigent Defendants], available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func->

the adoption of a standard for determining indigency that would create a presumption of indigency if the defendant earned less than 200% of the Federal Poverty Guidelines.<sup>151</sup>

- New Mexico: The New Mexico Public Defender Department uses the Federal Poverty Guidelines to determine eligibility.<sup>152</sup>
- North Dakota: The North Dakota Commission on Legal Counsel for Indigents has established guidelines to determine eligibility for indigent defense services.<sup>153</sup> Defendants are automatically qualified if they are eligible for Temporary Aid to Needy Families (TANF) or Supplemental Security Income (SSI), but those with income in excess of 125% of the Federal Poverty Guidelines are generally not qualified unless there are exceptional factors.<sup>154</sup>
- Ohio: An applicant is “presumptively eligible” for assigned counsel if his income is below 125% of the Federal Poverty Guidelines<sup>155</sup> and “presumptively ineligible” if his income is over 187.5%.<sup>156</sup>
- South Carolina: A presumption that the person is indigent shall be created if the person’s net family income is less

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startdown/368 (describing the various methods used in Nevada for determining who is eligible for defense services at the public’s expense).

151. See *id.* at Exhibit B at 20 (specifying the recommendation for the presumption of “substantial hardship” for certain defendants such that the defendant should be regarded as indigent).

152. See *What are the Guidelines for Determining Eligibility*, N.M. PUB. DEFENDER DEP’T, [http://www.pdd.state.nm.us/clients/What\\_are\\_the\\_Guidelines\\_for\\_Determining\\_Eligibility.php](http://www.pdd.state.nm.us/clients/What_are_the_Guidelines_for_Determining_Eligibility.php) (last visited Apr. 2, 2013) (stating that New Mexico refers to the Federal Poverty Guidelines in calculating eligibility for a public defender) (on file with the Washington and Lee Law Review).

153. See *Guidelines to Determine Eligibility for Indigent Defense Services*, N.D. COMM’N ON LEGAL COUNSEL FOR INDIGENTS, 2 (Apr. 20, 2011), <http://www.nd.gov/indigents/docs/guidelines.pdf>. (“If one of these conditions is not met, indigent defense services are not provided by the Commission.”)

154. See *id.* at 7–8 (describing automatic qualification for indigent defense services and the role of the federal poverty level in determining eligibility).

155. OHIO ADMIN. CODE 120-1-03(C) (2013).

156. *Id.* 120-1-03(D).

than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.<sup>157</sup>

- Tennessee: “When making a finding as to the indigency of an accused, the court shall take into consideration . . . the poverty level income guidelines compiled and published by the United States department of labor.”<sup>158</sup>
- Utah: Indigency means that a person “has an income level at or below 150% of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services.”<sup>159</sup>
- Vermont: Defendants must pay a portion of the cost of representation based on a formula derived from the Federal Poverty Guidelines;<sup>160</sup> defendants who make 200% or more of the Federal Poverty Guidelines must pay 100% of the cost of representation.<sup>161</sup>
- Virginia: “If the accused does not waive his right to counsel or retain counsel on his own behalf, counsel shall be appointed for the accused if his available funds are equal to or below 125 percent of the federal poverty income guidelines prescribed for the size of the household of the accused by the federal Department of Health and Human Services . . . . If the available funds of the accused exceed 125 percent of the federal poverty income guidelines and the accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional

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157. S.C. CODE ANN. REGS. 602(b)(3) (2013).

158. TENN. CODE ANN. § 40-14-202(c)(4) (2013).

159. UTAH CODE ANN. § 77-32-202(3)(a)(ii) (West 2013).

160. See VT. STAT. ANN. tit. 13, § 5238(b) (2013) (defining the required copayment of persons assigned counsel).

161. See *id.* (establishing a chart that calculates the defendant’s percentage of direct cost per case based on his income as a percentage of the federal poverty level).

circumstances, and where the ends of justice so require, appoint an attorney to represent the accused.”<sup>162</sup>

- Washington: Indigent means a person who is “receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level.”<sup>163</sup>
- West Virginia: The West Virginia Public Defender Service uses eligibility guidelines that are 150% of the Federal Poverty Guidelines.<sup>164</sup>
- Wisconsin: When determining eligibility, the representative of the state public defender shall “treat income as available to the person to pay the costs of legal representation only if the gross income exceeds 115 percent of the federal poverty guideline.”<sup>165</sup>

In addition, a number of states delegate the responsibility for providing indigent defense to individual counties.<sup>166</sup> While it is difficult to determine with precision just how many of these counties use the Federal Poverty Guidelines when determining eligibility, there is a great deal of evidence that suggests that their use is widespread.

A survey of the 254 counties in Texas found that thirty-eight counties considered defendants eligible for assigned counsel if they made less than 100% of the Federal Poverty Guidelines, fifty-four counties found defendants eligible for assigned counsel

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162. VA. CODE ANN. § 19.2-159(B)(3) (2012).

163. WASH. REV. CODE ANN. § 10.101.010(3)(c) (West 2013).

164. See *Frequently Asked Questions*, W. VA. PUB. DEFENDER SERVS., (Jan. 18, 2013), <http://www.wvpds.org/> (last visited Apr. 2, 2013) (describing factors a court should use in determining eligibility under West Virginia Code § 29-21-16, including income guidelines that are established by the West Virginia Public Defender Services and based on the Federal Poverty Guidelines) (on file with the Washington and Lee Law Review); see also W. VA. CODE ANN. § 29-21-16(a) (West 2013) (stating that West Virginia Public Defender Services must establish, review, and update financial guidelines for determining eligibility for legal representation).

165. WIS. STAT. ANN. § 977.02(3)(c) (West 2013).

166. See, e.g., PA. CONS. STAT. ANN. § 9960.6(b) (West 1969) (giving the public defender of each county in the state the power to appoint counsel to a person “after being satisfied of the person’s inability to procure sufficient funds to obtain legal counsel to represent him”).

if they made less than 125% of the Federal Poverty Guidelines, and six counties found defendants eligible for assigned counsel if they made less than 150% of the Federal Poverty Guidelines.<sup>167</sup>

District courts in Michigan are responsible for appointing attorneys to represent indigent persons accused of misdemeanors or ordinance violations.<sup>168</sup> There are approximately 100 district courts in the state.<sup>169</sup> The chief judge of a circuit court is also responsible for assigning counsel to indigent defendants who are accused of felonies.<sup>170</sup> There are fifty-seven circuit courts in the state.<sup>171</sup>

The Third Judicial Circuit Court of Michigan, which is the largest circuit court in Michigan, defines an indigent defendant as someone who has a gross income level at or below 133% of the Federal Poverty Guidelines;<sup>172</sup> a person who has a gross income level greater than 133% of the Federal Poverty Guidelines is not indigent absent other mitigating circumstances.<sup>173</sup> If retaining counsel would result in substantial hardship for someone who has a gross income level greater than 133% of the Federal Poverty Guidelines, the court can appoint counsel but may require the person to contribute to the cost of representation.<sup>174</sup>

167. TEX. TASK FORCE ON INDIGENT DEF., *THE COSTS AND BENEFITS OF AN INDIGENT DEFENDANT VERIFICATION STUDY 3* (2007), <http://www.txcourts.gov/tide/pdf/Supplement%20to%20Verification%20Study-%20FINAL.pdf>.

168. See MICH. COMP. LAWS ANN. § 600.8317 (West 2012) (“The district court and the several judges thereof may . . . appoint attorneys to represent indigent persons accused of misdemeanors or ordinance violations . . .”).

169. *Michigan Trial Courts*, MICH. CTS. ONE CT. OF JUSTICE, <http://www.courts.michigan.gov/courts/trialcourts/pages/default.aspx> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

170. See MICH. COMP. LAWS ANN. § 775.16 (West 2012) (“Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused’s examination and to conduct the accused’s defense.”).

171. *Michigan Trial Courts*, *supra* note 169.

172. See *Determination of Indigence and Substantial Hardship Guidelines*, STATE OF MISS. JUDICIARY (2012), <https://www.3rdcc.org/Documents%5CAdministration%5CBudgetFinance%5CCollections%5C2012%20Poverty%20Level%20Guidelines%5E%5E%5E.pdf> (“A party may be deemed ‘indigent’ if the person has a gross income level at or below one hundred and thirty-three percent (133%) of the United States poverty level . . .”).

173. See *id.* (defining a person who is not indigent but allowing for mitigating circumstances).

174. See *id.* (defining the circumstances in which an otherwise ineligible

Nebraska is divided into twelve judicial districts that encompass ninety-three counties<sup>175</sup> with district courts having jurisdiction over felonies and county courts having jurisdiction over misdemeanors.<sup>176</sup> The Third Judicial District, which encompasses Lincoln County, Nebraska, the second most populous county, has enacted a rule that defines an indigent defendant as someone “receiving an annual gross income of 125% or less of the current federally established poverty level.”<sup>177</sup>

A report concluded that New York State had guidelines for the appointment of counsel in only a few of their sixty-two counties and that, even in those counties, the guidelines were not uniformly applied.<sup>178</sup> The result is that a defendant may be deemed eligible for the appointment of counsel in one county and ineligible in a neighboring county or even in a different court in the same county.<sup>179</sup> And in Pennsylvania, each county’s public defender has the authority to set eligibility guidelines.<sup>180</sup>

There are a few state courts that have rejected the idea that economic formulas can be used when making eligibility

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person can obtain appointed counsel).

175. *District Court Judge Address List*, STATE OF NE. JUD. BRANCH, <http://www.supremecourt.ne.gov/dc/judges> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

176. *See The Nebraska Judicial System*, STATE OF NE. JUD. BRANCH (Nov. 19, 2012), <http://www.supremecourt.ne.gov/4853/nebraska-judicial-system> (last visited Apr. 2, 2013) (describing the roles of the district courts and the county courts) (on file with the Washington and Lee Law Review).

177. State of Ne. Jud. Branch, *Rules of the District Court for the Third Judicial District*, Rule 3-13 (June 23, 2010), <http://www.supremecourt.ne.gov/external-court-rules/4163/rule-3-13-appointment-counsel-indigent-parties-standards-and-procedures> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

178. *See* COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15–16 (2006), [http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf) (concluding that there are “no clear standards” regarding eligibility determinations and procedures).

179. *See id.* (noting the confusion resulting from the lack of uniformity among counties).

180. *See* Dauphin Cnty. Pub. Defender’s Office v. Court of Common Pleas, 849 A.2d 1145, 1151 (Pa. 2004) (reaffirming the public defender’s “discretion to represent individuals whose income exceeds the Federal Poverty Income Guidelines . . . but who have satisfied the Public Defender that they are unable to obtain sufficient funds to obtain legal counsel”).



determinations.<sup>181</sup> Nevertheless, the Federal Poverty Guidelines have become the standard for determining eligibility for assigned counsel in the majority of states and counties across the country.

*V. Using the “Economy Food Plan” to Determine Who Can Afford to Hire an Attorney*

The Federal Poverty Guidelines were developed by Mollie Orshansky, an economist working for the Social Security Administration in the early 1960s.<sup>182</sup> The Guidelines were never meant to be a general measure of poverty;<sup>183</sup> they were only to be used to assess the relative risks of low economic status.<sup>184</sup> The U.S. Census Bureau has stated that “the official poverty measure should be interpreted as a statistical yardstick rather than a complete description of what people and families need to live.”<sup>185</sup>

The Guidelines are of limited value because they are based solely on the cost of food.<sup>186</sup> Orshansky used the data from the

181. See, e.g., *Tinsley v. Commonwealth*, 185 S.W.3d 668, 672 (Ky. Ct. App. 2006) (“The exact point on the economic scale at which a defendant becomes indigent and therefore entitled to have counsel furnished is not subject to precise measurement . . .” (citation omitted)); *Lamonte v. State*, 839 N.E.2d 172, 176 (Ind. Ct. App. 2005) (“It is not possible to set specific financial guidelines for the determination of indigency.”); *State v. Vincent*, 883 P.2d 278, 282 (Utah 1994) (“We think it best to loosely define indigency at the present time, creating . . . a rather broad pasture for trial judges applying the law of indigency to the facts before them.”); *People v. Gillespie*, 201 N.W.2d 104, 106 (Mich. Ct. App. 1972) (“It is impossible to lay down absolute standards as to what constitutes indigency.” (internal quotation marks omitted)); *State v. Dale*, 439 N.W.2d 112, 115 (S.D. 1989) (“Indigence should be considered without resort to artificially pre-determined fiscal standards or guidelines . . .”).

182. See Fischer, *supra* note 8, at 2 (“The poverty thresholds were developed in 1963–64 by Mollie Orshansky . . .”).

183. See *id.* (stating that Orshansky’s original purpose for the thresholds was not to measure poverty).

184. See *id.* (stating that Orshansky’s intent for the poverty thresholds was to “develop a measure to assess the relative risks of low economic status . . . among different demographic groups of families with children”).

185. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 45 (2005), <http://www.census.gov/prod/2005/pubs/p60-229.pdf>.

186. See Fischer, *supra* note 8, at 4 (describing how Orshansky developed the poverty thresholds using food plans prepared by the Department of Agriculture).

Department of Agriculture's "Household Food Consumption Survey," which indicated that Americans spent about one-third of their household income on food.<sup>187</sup> She then used the dollar amounts from the Department of Agriculture's "Economy Food Plan," which estimated the minimum amount of money that could be spent on food to ensure an adequate level of nutrition and multiplied those by three to arrive at the poverty thresholds.<sup>188</sup> Over the years, the Federal Poverty Guidelines have been updated annually based on the Consumer Price Index.

The Guidelines do not take into account the cost of housing, child care, health care, transportation, or other necessary expenses.<sup>189</sup> Because the threshold assumes that one-third of household income will be spent on food<sup>190</sup> and has only been updated using the Consumer Price Index,<sup>191</sup> it does not take into account relative changes in household budgets over the last fifty years. For example, consumers spent only 13.7% of their income on food during 2011.<sup>192</sup> The Guidelines also do not account for specific family composition<sup>193</sup> or geographic location;<sup>194</sup> households are simply made up of a certain number of people and apply throughout the continental United States.

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187. *See id.* (stating that the data underlying Orshansky's plan came from the Agriculture Department's 1955 Household Food Consumption Survey).

188. *See id.* at 5 (articulating Orshansky's "multiplier" methodology" for deriving the poverty thresholds).

189. *See id.* at 4 ("[E]xcept for the area of food, no definitive and accepted standards of minimum need for major consumption items existed either then or today.").

190. *See id.* at 5.

191. *See id.* at 8 (stating that the Consumer Price Index is the basis for any annual changes to the poverty threshold).

192. *Consumer Expenditures—2011*, U.S. DEP'T OF LABOR, 2 (Sept. 25, 2012), <http://www.bls.gov/news.release/pdf/cesan.pdf> (illustrating the shares of average annual expenditures on food by income quintiles, the average of which is 13.7%).

193. *See Fischer, supra* note 8, at 4 ("Orshansky did not develop the poverty thresholds as a standard budget—that is, a list of goods and services that a family of a specified size and composition would need to live at a designated level of well-being . . .").

194. *See id.* at 10 (stating that the 1970 revisions to the poverty threshold eliminated the distinction between "farm" and "nonfarm" families).

*VI. Eligible for Food Stamps but Ineligible for Assigned Counsel*

Despite their limitations, the Federal Poverty Guidelines, or percentage multiples of them, are used as an eligibility criterion for a wide range of federal programs. To be eligible for the Department of Agriculture's Women, Infants, and Children Program (WIC), which provides food, nutrition education, and health screening to pregnant women and children, household income must be below 185% of the Federal Poverty Guidelines.<sup>195</sup> To be eligible for the Supplemental Nutritional Assistance Program (SNAP), formerly the Food Stamp Program, household income must be below 130% of the Federal Poverty Guidelines.<sup>196</sup> The Department of Agriculture's National School Lunch Program provides free lunches to children from families with incomes at or below 130% of the Federal Poverty Guidelines;<sup>197</sup> children from families with household income between 130% and 185% of the Federal Poverty Guidelines are eligible for reduced price meals and cannot be charged more than forty cents.<sup>198</sup>

To be eligible for the Department of Health and Human Services' Low Income Home Energy Assistance Program (LIHEAP) that provides assistance in managing costs associated with energy bills and weatherization, household income must be below 150% of the Federal Poverty Guidelines.<sup>199</sup> The Department of Health and Human Services Children's Health Insurance Program (CHIPs) serves uninsured children up to age nineteen in families with incomes too high to qualify them for

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195. See *WIC Income Eligibility Guidelines 2012–2013*, U.S. DEP'T OF AGRIC (July 13, 2012), <http://www.fns.usda.gov/WIC/howtoapply/incomeguidelines.htm> (last visited Apr. 2, 2013) (stating the program's eligibility requirements on the basis of income) (on file with the Washington and Lee Law Review).

196. *Supplemental Nutritional Assistance Program*, U.S. DEP'T OF AGRIC. (Oct. 4, 2012), [http://www.fns.usda.gov/snap/applicant\\_recipients/eligibility.htm#income](http://www.fns.usda.gov/snap/applicant_recipients/eligibility.htm#income) (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

197. *National School Lunch Program*, U.S. DEP'T OF AGRIC., 2 (Aug. 2012), <http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPPFactSheet.pdf>.

198. *Id.*

199. *LIHEAP Eligibility Criteria*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (May 8, 2012), <http://www.acf.hhs.gov/programs/ocs/resource/liheap-eligibility-criteria> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

Medicaid.<sup>200</sup> While states have broad discretion in setting income eligibility for CHIPS, forty-six states and the District of Columbia cover children in families up to or above 200% of the Federal Poverty Guidelines, and twenty-four of these states offer coverage to children in families with income at 250% of the Federal Poverty Guidelines or higher.<sup>201</sup>

The Department of the Treasury funds Low Income Taxpayer Clinics (LITC), which represent low-income taxpayers before the Internal Revenue Service and assist the taxpayers in audits, appeals, and collection disputes.<sup>202</sup> For purposes of the funding, a low-income taxpayer is defined as having a household income below 250% of the Federal Poverty Guidelines.<sup>203</sup> The LSC sets maximum eligibility guidelines for individuals seeking civil legal assistance at 125% of the Federal Poverty Guidelines.<sup>204</sup> While LSC provided legal assistance to 2.3 million people in 2011, it estimates that legal aid offices turn away 50% or more of the people who apply for assistance and, based on the U.S. Census Bureau's 2011 statistics on poverty, that nearly one in five Americans qualified for civil legal assistance funded by LSC.<sup>205</sup>

Many states have chosen to define eligibility for assigned counsel in criminal proceedings based on a multiple of the Federal Poverty Guidelines. Viewed in isolation, that decision might appear reasonable. However, when compared to eligibility guidelines for federal assistance programs like WIC, SNAP,

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200. See *CHIPS Eligibility Standards*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/CHIP-Eligibility-Standards-.html> (last visited Apr. 2, 2013) (stating the purpose of CHIPS) (on file with the Washington and Lee Law Review).

201. *Id.*

202. See *Low Income Taxpayer Clinics*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/Low-Income-Taxpayer-Clinics> (last visited Apr. 2, 2013) (describing the funding that the IRS offers to Low Income Taxpayer Clinics) (on file with the Washington and Lee Law Review).

203. *Low Income Taxpayer Clinic Income Eligibility Guidelines*, LEGAL SERVS. CORP. (Aug. 4, 2012), <http://www.irs.gov/uac/Low-Income-Taxpayer-Clinic-Income-Eligibility-Guidelines> (last visited Apr. 2, 2013) (on file with the Washington and Lee law Review).

204. 45 C.F.R. § 1611.3(c) (2005).

205. *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP. (2012), <http://www.lsc.gov/about/what-is-lsc> [hereinafter *Fact Sheet*] (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

school lunches, LIHEAP, and CHIPS, their use to determine eligibility for assigned counsel seems unreasonable.

Georgia defines an indigent person as “a person charged with a misdemeanor . . . who earns less than 100 percent of the Federal Poverty Guidelines.”<sup>206</sup> In Missouri, “a defendant may be considered indigent if his/her gross pay and other sources of income do not exceed the federal poverty guidelines.”<sup>207</sup> In Maine, defendants are eligible for assigned counsel if their income is below 110% of the Federal Poverty Guidelines.<sup>208</sup> In Virginia, “counsel shall be appointed for the accused if his available funds are equal to or below 125% of the federal poverty income guidelines.”<sup>209</sup>

The result is that in Georgia, Missouri, Maine, and Virginia, a defendant charged with a misdemeanor may be ineligible to receive state-funded representation because she has an income slightly above 125% of the Federal Poverty Guidelines but is eligible for federal assistance through WIC (185%), SNAP (130%), the School Lunch Program (130%), LIHEAP (150%), and CHIPS (200%). A defendant making just above 125% of the Federal Poverty Guidelines receives federal assistance to pay for food, heat, and medical care for his children but is somehow not regarded by some states as too poor to hire a lawyer. The LSC’s income eligibility guidelines (125%), when considered in context, reflect a desire to devote scarce resources to the poorest of clients and not a realistic estimate of an income level at which someone could be expected to hire an attorney. It should also be noted that the LSC provides assistance in civil cases in which there is not a constitutional requirement that counsel be provided.<sup>210</sup> The LSC is actually prohibited from funding any form of legal assistance in

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206. GA. CODE ANN. § 17-12-2(6)(A) (2012).

207. MO. CODE REGS. ANN. tit. 18, §10-3.010(3)(A) (2012).

208. See *supra* note 142 and accompanying text (establishing guidelines for determining financial eligibility of defendants for assigned counsel).

209. VA. CODE ANN. § 19.2-159 (2012).

210. Compare *Fact Sheet*, *supra* note 205 (noting that LSC helps low-income individuals and families with cases involving family law, housing and foreclosure, consumer issues, income maintenance, military issues, and response to disasters), with U.S. CONST. amend. VI (“In all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” (emphasis added)).

criminal proceedings.<sup>211</sup> The fact that some states like Georgia, Missouri, and Maine use a multiple of the Federal Poverty Guidelines below 125% when determining eligibility for assignment of counsel in a criminal case is completely unrealistic. A far more reasonable, but still imprecise, estimate of the costs of obtaining specialized legal assistance comes from the guidelines used by LITCs (250%).

Some states have created a presumption of eligibility for assigned counsel based on the fact that a defendant is receiving some type of needs-based benefit, eligibility for which is typically based on the Federal Poverty Guidelines. For example, Florida considers a defendant indigent if he is “receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans’ benefits, or Supplemental Security Income (SSI).”<sup>212</sup> Louisiana considers all defendants “who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing” to be indigent and eligible for assigned counsel.<sup>213</sup> Massachusetts defines an indigent defendant as “a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans’ benefits programs or who receives assistance under Title XVI of the Social Security Act or the medicaid program.”<sup>214</sup> Minnesota considers a defendant financially unable to obtain counsel if “the defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits.”<sup>215</sup> In North Dakota, defendants are automatically qualified if they are eligible for TANF or SSI, but those with income in excess of 125% of the Federal Poverty Guidelines are generally not qualified unless there are exceptional factors.<sup>216</sup> And Washington

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211. See 42 U.S.C. § 2996f(b) (2010) (“No funds made available by the Corporation . . . may be used . . . to provide legal assistance with respect to any criminal proceeding . . .”).

212. FLA. STAT. ANN. § 27.52(2)(a) (West 2013).

213. LA. REV. STAT. ANN. § 15:175 (2013).

214. MASS. GEN. LAWS ch. 261, § 27A(a) (2013).

215. MINN. STAT. ANN. § 611.17(a)(1) (West 2013).

216. See N.D. Comm’n on Legal Counsel for Indigents, *supra* note 153, at 7–8 (describing automatic qualification for assigned counsel).

considers a defendant to be indigent if he is receiving “temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care . . . pregnant women assistance benefits, poverty-related veterans’ benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income.”<sup>217</sup>

While some states find defendants who are already receiving certain need-based federal benefits automatically eligible for assigned counsel, other states actually consider these benefits as “income” when making eligibility determinations. Courts in Arizona,<sup>218</sup> Arkansas,<sup>219</sup> and South Dakota<sup>220</sup> have held that two of the factors that should be used when determining indigency are income from social security and unemployment benefits. Louisiana requires that the trial court consider “income or funds from employment or any other source, including public assistance, to which the accused is entitled.”<sup>221</sup> Ohio also considers “unemployment compensation . . . temporary assistance to needy families (TANF) compensation, disability compensation, and all other similar forms of compensation/governmental assistance comprising household income.”<sup>222</sup> And while Virginia courts presume that a defendant is indigent if he is “a current recipient of a federally funded public assistance program,” they also consider income from social security benefits, veteran’s benefits, and other regular support from an absent family member.<sup>223</sup> The result is that a defendant can be receiving federally-funded public assistance and be ineligible for assigned counsel. Even worse, those federal benefits, which are designed to

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217. WASH. REV. CODE ANN. § 10.101.010(3)(a) (West 2013).

218. *See Morger v. Superior Court*, 637 P.2d 310, 311 (Ariz. Ct. App. 1981) (including “social security and unemployment compensation” as factors “ordinarily to be considered in determining indigency”).

219. *See Hill v. State*, 802 S.W.2d 144, 145 (Ark. 1991) (“While there is no brightline test for indigency, which is a mixed question of fact and law, some of the factors to be considered are . . . income from employment and governmental programs such as social security and unemployment benefits . . .”).

220. *See State v. Dale*, 439 N.W.2d 112, 116 (S.D. 1989) (stating that the court should consider social security and unemployment compensation when reaching a decision on indigency).

221. LA. REV. STAT. ANN. § 15:175(B)(1) (2013).

222. OHIO ADMIN. CODE 120-1-03(A)(1) (2013).

223. VA. CODE ANN. § 19.2-159(B) (2012).

meet basic needs, are viewed as income that can be used to retain counsel by state courts.

### *VII. Selling Off Your Meager Assets*

The clearest evidence that states have underinclusive eligibility guidelines for assigned counsel is the designation of “marginally indigent defendants”<sup>224</sup> or defendants who are “indigent but able to contribute.”<sup>225</sup> States have created a category of defendants who they do not regard as “indigent” and therefore are not entitled to assigned counsel, but who they realize are still too poor to hire a lawyer. These defendants are required to sell off their meager assets to help offset the cost of providing themselves with defense counsel.<sup>226</sup>

Florida defines a “partially indigent” defendant as “a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person’s family.”<sup>227</sup> Ohio defines “marginally indigent” defendants as those with a “total monthly gross income that is less than 187.5 per cent of the current federally established poverty levels, pursuant to the ‘Federal Poverty Guidelines.’”<sup>228</sup> In Kansas, a defendant is partially indigent “if the defendant’s combined household income and liquid assets are greater than the defendant’s reasonable and necessary living expenses but less than the sum of the defendant’s reasonable and necessary living expenses plus the anticipated cost of private legal representation.”<sup>229</sup> Maine does a similar calculation and then requires a defendant to make periodic payments based on the amount by which income exceeds

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224. OHIO ADMIN. CODE 120-1-03(B).

225. MASS. R. SUP. JUD. CT. 3:10(g).

226. *See, e.g.*, VA. CODE ANN. § 19.2-159(B)(2) (“If the accused shall claim to be indigent and is not presumptively eligible under the provisions of this section, then a thorough examination of the financial resources of the accused shall be made with consideration given to . . . assets of the accused which are convertible into cash . . .”).

227. FLA. R. CRIM. P. 3.111(b)(3).

228. OHIO ADMIN. CODE 120-1-03(B) (2013).

229. Kan. Admin. Regulations Pertaining to the State Bd. of Indigent Def. Servs., *supra* note 139, at 105-4-5(a).



necessary expenses to reimburse the state for the cost of assigned counsel.<sup>230</sup> Massachusetts categorizes defendants who have an income greater than 125% but less than 250% of the Federal Poverty Guidelines as “indigent but able to contribute.”<sup>231</sup> Trial courts in Minnesota determine whether or not a defendant is able to make “partial payment,”<sup>232</sup> while courts in Missouri can require a “limited cash contribution.”<sup>233</sup> Courts in North Carolina have found that “partially indigent” defendants contribute whatever they can to the cost of their representation.<sup>234</sup>

Many states also look at the ability of a defendant to convert assets into cash. Maine considers the “availability and convertibility of any assets owned by the defendant.”<sup>235</sup> One of the factors Maryland uses to determine a defendant’s financial ability to retain counsel is “the nature, extent, and liquidity of assets.”<sup>236</sup> New Jersey considers “the liquid assets of the defendant, including all real and personal property and bank accounts.”<sup>237</sup> Virginia considers “all assets of the accused which are convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the ability of the accused to maintain home and employment.”<sup>238</sup> In a recent decision, the Massachusetts Supreme Judicial Court ruled that a trial court should consider a defendant’s retirement funds when determining if she is eligible for assigned counsel.<sup>239</sup>

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230. Me. Comm’n on Indigent Legal Servs., *supra* note 142, § (1)(2)(E) (establishing a process for determining whether a defendant is able to reimburse the state for the expense of assigned counsel).

231. MASS. R. SUP. JUD. CT. 3:10(g).

232. MINN. STAT. ANN. § 611.20(2) (West 2013).

233. MO. CODE REGS. ANN. tit. 18, § 10-3.010(4)(A) (2013).

234. N.C. GEN. STAT. § 7A-455(a) (2012). *See also* State v. Boyd, 418 S.E.2d 471, 475–76 (N.C. 1992) (emphasizing that North Carolina law requires defendants to “contribute whatever they can to the cost of their representation” and that the state must fund “the remaining necessary expenses of representation”); State v. Hoffman, 190 S.E.2d 842, 850 (N.C. 1972) (noting that Section 7A-455(a) demonstrates the “legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense”).

235. ME. R. CRIM. P. 44(b).

236. MD. CODE ANN., CRIM. PROC. § 16-210(c)(3)(i) (West 2012).

237. N.J. STAT. ANN. § 2A:158A-14(c) (West 2013).

238. VA. CODE ANN. § 19.2-159(B)(2) (2012).

239. *See* Commonwealth v. Mortimer, 971 N.E.2d 283, 290 (Mass. 2012)

The result is that many defendants who are marginally indigent are required to become indigent before counsel will be appointed. States refuse to acknowledge that these defendants are too poor to hire a lawyer and instead have created a new category of criminal defendants: indigent but able to contribute. These defendants are required to sell off whatever assets they own and to empty their savings accounts to offset the cost of providing them with defense counsel. The end result is that the states make sure that those defendants who are marginally indigent at the time they are arrested will be completely destitute by the time the case ends, even if it ends in a dismissal.

*VIII. Economic Self-Sufficiency Means Being Able to Avoid Substantial Hardship*

In defining who is too poor to hire a lawyer, it is necessary to determine both the cost of legal services and how those costs will impact a particular defendant. Because a defendant need not be destitute to be eligible for assigned counsel, the question becomes at what point does the cost of retaining counsel compromise a defendant's ability to maintain, as the Supreme Court said in *Adkins*, the "necessities of life"?<sup>240</sup> Taking another cue from *Adkins*, consideration must be given to how the cost of retaining counsel will impact a defendant's ability to be self-sufficient because "[t]he public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the

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(concluding that a trial judge may consider retirement funds to be available funds in indigency determination). Funds contained in the defendant's individual retirement account (IRA), minus the amount of preretirement withdrawal penalties and tax burdens, were available for the defendant's defense against murder charges under a rule governing determination of a defendant's indigency for purposes of appointment of counsel. *Id.* The policy of protecting retirement savings was required to be balanced against the fundamental constitutional right to be represented by counsel in a criminal prosecution and the concomitant public obligation to provide counsel for those who truly cannot afford to be represented in such proceedings. *Id.* The defendant, after forfeiting an early withdrawal penalty, could reasonably be considered to have funds available for his defense. *Id.*

240. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

expense of supporting the person thereby made an object of public support.”<sup>241</sup>

The “Self-Sufficiency Standard” created by the Center for Women’s Welfare (CWW) provides much better criteria for making indigency determinations.<sup>242</sup> The Self-Sufficiency Standard defines the amount of income necessary to meet basic needs without public subsidies or private assistance.<sup>243</sup> The Standard was intended initially as a performance measure for the goal of “self-sufficiency” in federal job training programs, and it is based on all major budget items faced by working adults: housing, child care, food, health care, transportation, taxes, and miscellaneous costs.<sup>244</sup> It also calculates the most recent local or regional costs of each basic need, and it varies costs by age groups of children. The Self-Sufficiency Standard developed by CWW provides a realistic measurement of the income requirements for seventy different family types across each county in a given state.<sup>245</sup>

The Self-Sufficiency Standard focuses on the level of adequate income necessary to meet basic needs and is therefore a more accurate assessment of eligibility for assigned counsel. If a defendant’s income is insufficient to meet basic needs, then it is reasonable to assume that requiring him to hire counsel will result in a substantial hardship. If a defendant’s income was below the Self-Sufficiency Standard, he should be considered too poor to hire an attorney. If a defendant’s income exceeded the Self-Sufficiency Standard, it would then be necessary to estimate the actual cost of retaining competent counsel to see if the defendant was still too poor to hire a lawyer.

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241. *Id.*

242. *See The Self-Sufficiency Standard*, CTR. FOR WOMEN’S WELFARE, <http://www.selfsufficiencystandard.org/standard.html> (last visited Apr. 2, 2013) (describing the Self-Sufficiency Standard) (on file with the Washington and Lee Law Review).

243. *See id.* (defining the Standard).

244. *See id.* (explaining how the Self-Sufficiency Standard is calculated).

245. *See id.*

*IX. Using the Self-Sufficiency Standards to Determine Eligibility for Assigned Counsel*

Eligibility for assigned counsel would be expanded significantly if the Self-Sufficiency Standard replaced the Federal Poverty Guidelines. When generating Self-Sufficiency Standards for individual states, CWW compares the Self-Sufficiency Standard to other income benchmarks such as the Federal Poverty Guidelines and the minimum wage.<sup>246</sup> CWW published Self-Sufficiency Standards in 2011 for four states—Colorado, Maryland, Ohio, and Washington<sup>247</sup>—that also use the Federal Poverty Guidelines to determine eligibility for assigned counsel. Comparing the level of income that qualifies a defendant for assigned counsel to these other income benchmarks reveals the extent to which defendants who are too poor to hire a lawyer are being denied counsel.

Colorado makes defendants who are earning over 175% of the Federal Poverty Guidelines presumptively ineligible for assigned counsel.<sup>248</sup> Using the Federal Poverty Guidelines from 2011 and assuming a household composition of one adult, one preschool child, and one school-aged child, a defendant living in Logan County, Colorado, would be presumptively ineligible for assigned counsel if they made more than \$32,427.<sup>249</sup> However, CWW estimates the average Self-Sufficiency Wage for Logan County to be \$36,931.<sup>250</sup>

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246. *See id.* (comparing the Standard to the Federal Poverty Guidelines and illustrating how the Standard has been used in some states).

247. *Find the Self-Sufficiency Standard for Your State*, CTR. FOR WOMEN'S WELFARE, <http://www.selfsufficiencystandard.org/pubs.html> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

248. *C.J. Directive 04-04: Appointment of State Funded Counsel in Criminal and Juvenile Delinquency Cases and for Contempt of Court*, SUP. CT. OF CO., OFFICE OF THE C.J., attachments A, B, & C (July 2011), [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-04amended06-11withAttachmentB revised3-1-12.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-04amended06-11withAttachmentB revised3-1-12.pdf).

249. *See* Annual Update of HHS Poverty Guidelines, 76 Fed. Reg. 3637-02 (Jan. 20, 2011) [hereinafter Update of HHS Poverty Guidelines] (placing the poverty guideline for a three-person household at \$18,530). A defendant living in a three-person household is ineligible for assigned counsel in Colorado if he makes more than 175% of \$18,530, i.e., \$32,427.

250. Diana M. Pierce, *The Self-Sufficiency Standard for Colorado 2011*, COLO. CTR. ON LAW & POLICY, 11 (Oct. 2011), <http://www.selfsufficiencystandard.org>.

To illustrate how the cost of childcare, something the Federal Poverty Guidelines do not consider, can affect a person's ability to be economically self-sufficient and therefore able to retain counsel, we can compare the Self-Sufficiency Wage of a single adult to an adult with a preschool child as a dependent. Under the Federal Poverty Guidelines, a defendant without any dependents who was living in Denver, Colorado, would be ineligible for assigned counsel if he made more than \$19,057,<sup>251</sup> while the Self-Sufficiency Wage in Denver for a single adult was estimated by CWW to be \$19,296.<sup>252</sup> A defendant who had to care for a preschool child would be ineligible for assigned counsel if he made more than \$25,742,<sup>253</sup> but CWW estimates his Self-Sufficiency Wage to be \$42,245.<sup>254</sup> This type of discrepancy illustrates the limited value of the Federal Poverty Guidelines when making eligibility determinations.

Maryland uses the Federal Poverty Guidelines as a factor in making eligibility determinations for assigned counsel; defendants who make less than 100% of the Federal Poverty Guidelines are presumptively eligible.<sup>255</sup> In Prince George's

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org/docs/Colorado2011.pdf.

251. See Update of HHS Poverty Guidelines, *supra* note 249 (placing the poverty guideline for a one-person household at \$10,890). A defendant living alone with no dependents is ineligible for assigned counsel in Colorado if he makes more than 175% of \$10,890, i.e., \$19,057.

252. Pierce, *supra* note 250, at 66.

253. See Update of HHS Poverty Guidelines, *supra* note 249 (placing the poverty guideline for a two-person household at \$14,710). A defendant living in a two-person household is ineligible for assigned counsel in Colorado if he makes more than 175% of \$14,710, i.e., \$25,742.

254. Pierce, *supra* note 250, at 66.

255. See MD. CODE ANN., CRIM. PROC. § 16-210(b) (West 2012) ("For an individual whose assets and net annual income are less than 100 percent of the federal poverty guidelines, eligibility for services of the Office may be determined without an assessment regarding the need of the applicant."); *id.* § 16-210(c) ("For an individual whose assets and net annual income equal or exceed 100 percent of the federal poverty guidelines, eligibility for the services of the Office shall be determined by the need of the applicant."); see also Office of the Pub. Defender v. State, 993 A.2d. 55, 69 (Md. 2010) (holding that it was reversible error to only consider the Federal Poverty Guidelines when determining eligibility).

[W]here the local OPD declines representation to a defendant erroneously, because of the local OPD's failure to consider properly the statutorily-mandated criteria for determining indigency, and where a court finds, upon its subsequent mandatory independent

County in 2011, the CWW estimates the Self-Sufficiency Wage for an adult with one preschool child and one school-aged child would be \$60,426.<sup>256</sup> The Federal Poverty Guideline for a family of three in 2011 was only \$18,530.<sup>257</sup> Even if the Federal Poverty Guidelines are only one factor of many used in determining eligibility, the fact that the Self-Sufficiency Wage is more than three times the Federal Poverty Guidelines calls into question the relevance of the Federal Poverty Guidelines to any part of the eligibility determination.

In Ohio, defendants are presumptively ineligible for assigned counsel if they have an income above 187.5% of the Federal Poverty Guidelines.<sup>258</sup> The CWW calculated the Self-Sufficiency Standard as a percentage of the Federal Poverty Guidelines for all eighty-eight of the counties in Ohio.<sup>259</sup> There was only one county, Darke County, where the Self-Sufficiency standard was below 187.5% of the Federal Poverty Guidelines, and only by .5%.<sup>260</sup>

In Washington, a defendant is indigent if he is making less than 125% of the Federal Poverty Guidelines.<sup>261</sup> That would mean that in 2011, a single defendant could not make more than \$13,612; a defendant who was a single parent with one child could not make more than \$18,387; and a defendant who was a single parent with two children could not make more than \$23,162.<sup>262</sup> The Self-Sufficiency Standard in Spokane County,

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review, that the individual qualifies for representation, the trial court, in carrying out its role as “ultimate protector” of the Constitutional right to counsel, may appoint an attorney from the local OPD to represent the indigent individual unless an actual and unwaived or unwaivable conflict of interest would result thereby.

*Id.*

256. Diana M. Pearce, *The Self-Sufficiency Standard for Maryland 2012*, MD. CMTY. ACTION P'SHIP, 10 (Feb. 2012), <http://www.selfsufficiencystandard.org/docs/Maryland2012.pdf>.

257. See Update of HHS Poverty Guidelines, *supra* note 249 (placing the poverty guideline for a family of three at \$18,530).

258. OHIO ADMIN. CODE 120-1-03(D) (2013).

259. Diana M. Pearce, *The Self-Sufficiency Standard for Ohio 2011*, OHIO ASS'N OF CMTY. ACTION AGENCIES, 45-47 (May 2011), <http://www.selfsufficiencystandard.org/docs/Ohio%20SSS%202011.pdf>.

260. *Id.* at 45.

261. WASH. REV. CODE ANN. § 10.101.010(3)(c) (West 2013).

262. See Update of HHS Poverty Guidelines, *supra* note 249.

Washington, in 2011 for a single adult was estimated by CWW to be \$17,082; for an adult with a preschool child it was \$34,059; and for an adult with one preschool child and one school-aged child it was \$41,750.<sup>263</sup>

Using the Federal Poverty Guidelines to determine eligibility for assigned counsel ignores economic realities. While it may make some sense to use guidelines based on the percentage of a household's budget spent on food to determine eligibility for programs such as WIC or TANF, it makes no sense to use those same guidelines to determine a defendant's ability to retain legal counsel.

### X. Conclusion

Eligibility for assigned counsel should not be based on something as arbitrary as the Federal Poverty Guidelines. The noble ideal that every defendant stands equal before the law can never be realized if states are permitted to deny counsel to those too poor to hire a lawyer. Across the country, defendants are being denied the right to counsel guaranteed to them in *Gideon* because of unrealistic eligibility guidelines for the appointment of counsel. Defendants are then forced to either represent themselves or to sell off their meager assets in order to hire a lawyer. States have effectively used the Federal Poverty Guidelines to redefine what it means to be too poor to hire a lawyer. A defendant may not be indigent, but he can somehow still be too poor to hire a lawyer.

It has been said that there is "no war between the Constitution and common sense."<sup>264</sup> Using an unrealistic benchmark like the Federal Poverty Guidelines to determine who qualifies for assigned counsel is not only a violation of the Sixth Amendment's right to counsel. It is also bad public policy. It makes no sense to "save money" by refusing to provide counsel to a defendant who will then become eligible for public benefits once he spends the money necessary to hire a lawyer. Criminal

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263. Diana M. Pearce, *The Self-Sufficiency Standard for Washington State 2011*, WORKFORCE DEV. COUNCIL OF SEATTLE-KING CNTY., 47 (Oct. 2011), <http://www.selfsufficiencystandard.org/docs/Washington2011.pdf>.

264. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

prosecutions will turn the working poor into the unemployed and destitute. Until states adopt realistic guidelines for determining eligibility for assigned counsel, justice will come with a price tag attached to it.