Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution

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PENALIZING POVERTY: MAKING CRIMINAL DEFENDANTS PAY FOR THEIR COURT-APPOINTED COUNSEL THROUGH RECOUPTMENT AND CONTRIBUTION

Helen A. Anderson*

Over thirty years ago the United States Supreme Court upheld an Oregon statute that allowed sentencing courts, with a number of important procedural safeguards, to impose on indigent criminal defendants the obligation to repay the cost of their court appointed attorneys. The practice of ordering recoupment or contribution (application fees or co-pays) of public defender attorney's fees is widespread, although collection rates are unsurprisingly low. Developments since the Court's decision in Fuller v. Oregon show that not only is recoupment not cost-effective, but it too easily becomes an aspect of punishment, rather than legitimate cost-recovery. In a number of jurisdictions, defendants are ordered to repay the cost of their attorney regardless of their ability to pay and without any notice or opportunity to be heard. Many are ordered to pay as a condition of probation or parole, which means they pay under threat of incarceration. In these jurisdictions, recoupment violates the Sixth Amendment, as well as the Due Process and Equal Protection Clauses. Constitutional problems are exacerbated by the potential for ethical violations: public defenders may have conflicts of interest when they are required to both submit bills to the court and object to those bills on behalf of their clients. And too often defendants are not warned at the outset that they may be responsible for attorney's fees or how those fees will be calculated. In any other context, a client is entitled under the ethical rules to a clear statement of the basis for the fee at the time the lawyer is engaged. In addition, the thirty years since Fuller have verified that recoupment is bad policy because it imposes punishing debt without real fiscal benefit. It is time to abandon practices that penalize defendants for being poor and exercising their right to counsel.

I. INTRODUCTION

I don't know why they put in this at no cost. If you are found innocent, it is no cost but if you are found guilty there is a

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We have all heard the ritual recital: "You have the right to a lawyer. If you want a lawyer and cannot afford one, a lawyer will be appointed at no cost to you." Most people, even lawyers, believe these public defenders and appointed counsel are free. In fact, indigent defendants can be made responsible for all or part of the cost of their lawyers. This article argues that such recoupment should be abandoned or, in the alternative, significantly restricted.

Throughout the country, debts for defense fees and costs are imposed on defendants either as recoupment (court-ordered reimbursement over time) or as contribution (a co-pay or application fee imposed at the time of appointment) or both. Recoupment might be a flat fee of several hundred dollars or the attorney's hourly fee for representation. Contribution rates range from $10 to $200 per case, and may or may not be credited toward recoupment. In addition, it is common for recoupment to be made a condition of probation or parole, so that defendants are threatened with incarceration if they fail to pay back the cost of their lawyers.

These policies have their roots in Supreme Court precedent. Over thirty years ago, the Court upheld an Oregon statute that allowed sentencing courts, with a number of important procedural safeguards, to impose the obligation to repay the cost of court-appointed attorneys on convicted indigent defendants. The practice of ordering recoupment or contribution is now widespread. How-

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1. This was one detective's comment on the Miranda warnings he read to the accused. Cummings v. Polk, 475 F.3d 230, 233 (4th Cir. 2007) (rejecting habeas petition where petitioner claimed Miranda warnings were flawed).

2. In my conversations with colleagues and other lawyers who have not practiced criminal law, most have expressed surprise upon learning that defendants might have to repay the state for appointed counsel. Indeed, the issue has received little notice from academics or even advocacy groups in the last twenty-five years. This may be changing—very recently there have been a few articles focusing primarily on practices in particular states. See, e.g., Kate Levine, If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute, 42 HARV. C.R.-C.L. L. REV. 191, 210-13 (2007); Lola Velázquez-Aguilú, Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense Is Failing, 2006 WIS. L. REV. 193, 213-15 (2006); Ronald F. Wright & Wayne A. Logan, The Political Economy of Application Fees for Indigent Criminal Defense, 47 WM. & MARY L. REV. 2045, 2085 (2006) (describing the trend in favor of application fees and various institutional actors' roles).

3. If the practice persists, however, perhaps the familiar Miranda warnings should be revised. See Cummings, 475 F.3d at 233 (when reviewing the Miranda rights with the defendant, the detective "crossed out the words 'at no cost'"); see also infra notes 149-152 and accompanying text.

4. See infra Part II.

ever, the history of these practices since Fuller v. Oregon\(^6\) shows that such programs all too often lead to serious constitutional violations, as well as ethical problems in the representation. Furthermore, recoupment and contribution are poor policy, serving neither fiscal interests nor the purposes of punishment. Recoupment and contribution should be abandoned or, at the very least, sharply curtailed.

It may seem peculiar that defendants can be ordered to repay the cost of a public defender, since, after all, only those too poor to hire a lawyer qualify for public defense. Nevertheless, the Fuller Court made clear that the guarantee of Gideon v. Wainright\(^7\)—that counsel be provided to the indigent criminal defendant—is not undercut so long as recovery is only sought from those who have the ability to pay.\(^8\) The state has a legitimate interest in recovering funds from those with the means to pay without substantial hardship.

But, in the years since the Court gave its qualified approval to recoupment, recoupment practices in a significant number of jurisdictions have evolved into an aspect of punishment which no longer serves the legitimate purpose of cost recovery. This occurs in two major ways: (1) when the obligation to pay for attorneys' fees is imposed without any finding of ability to pay, so that the obligation is imposed on the destitute as well as those with means, and (2) when the obligation is imposed without notice and without an opportunity to be heard as to ability to pay and as to the amount imposed.

Jurisdictions that do not interpret Fuller narrowly, and thus do not require a pre-imposition determination of ability to pay, as well as notice and an opportunity to be heard, are imposing debts for legal services in violation of the Sixth Amendment, as well as the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendment. If the obligation is imposed regardless of ability to pay, the potential “chilling” effect on the exercise of the Sixth Amendment right to counsel is profound. As indigents weigh the cost of accepting appointed counsel, they may realize that even if it is never enforced, a judgment for attorney's fees can affect credit and job or housing searches. Such a judgment becomes a penalty on an indigent's right to counsel.

Furthermore, basic due process is violated if the obligation is imposed without notice and opportunity to be heard regarding the

\(^{6}\) Id.

\(^{7}\) 372 U.S. 335 (1963).

\(^{8}\) Fuller, 417 U.S. at 46, 53–56.
ability to pay or the amount. A criminal defendant should be entitled to at least as much process as a civil debtor who has an obligation reduced to judgment. The Court applies a blended due process and equal protection test to issues involving poverty and access to the courts. Recoupment programs without the safeguards of Fuller fail this test. In addition, a separate equal protection violation results when indigent defendants are threatened with incarceration for failure to pay as a condition of probation or parole; defendants who owe their private attorneys money are not similarly threatened. The essence of these constitutional violations is procedural: without procedures to ensure that the debt is imposed only on those with the ability to pay, in a reasonable amount, and without the threat of imprisonment, recoupment goes beyond legitimate cost recovery and penalizes a fundamental right.

The persistent constitutional deficiencies of recoupment and contribution programs are exacerbated by professional ethics problems. Recoupment and contribution may create conflicts of interest for defense counsel, who must submit the bill and who may benefit directly from the order. At the same time, these attorneys are ethically responsible for objecting to the order on behalf of their client, and for raising challenges to the process. In addition, most recoupment programs do not meet the requirements that most professional codes set for attorneys fees. Defendants are not apprised, prior to the representation, that they will be charged and on what basis. There is no assurance that the fees will be “reasonable.” Instead, an amount is simply imposed at sentencing. And despite the fact that defendants may end up paying for the entire cost of their attorney, they are denied the right to counsel of choice. Courts have justified the denial of choice to defendants who receive appointed counsel on the basis that they are not paying. But the line between those who retain counsel privately and those who enjoy the services of court-appointed counsel becomes less clear with recoupment and contribution.

Recoupment and contribution have also proven to be bad policy. Programs that comply with due process requirements will not be cost-effective, but rather will add to the heavy load of fines and costs already imposed upon convicted offenders. This burden will fall only on those who decide to rehabilitate, and it will only make that rehabilitation more difficult. Recoupment is a poor sentencing tool, as it bears no relationship to the severity of the crime or the defendant's actions, but rather depends on the complexity of the proceedings. Thus, defense cost recovery should be aban-

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If recoupment must be retained for political reasons, it should be a purely civil obligation imposed only on those found to have the ability to pay, and only with the basic due process protections that attend the imposition and enforcement of any other civil judgment.

Part II of this article gives an overview of recoupment and contribution as it is practiced throughout the country. Part III describes the constitutional limits to recoupment, as laid out in a series of Supreme Court cases from the 1970s. Part IV describes how jurisdictions have since diverged on questions of imposition, amount, and enforcement, and shows how a significant number of jurisdictions now treat recoupment as an aspect of punishment. Part V shows that recoupment violates the Sixth Amendment, and the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments in jurisdictions that do not provide the safeguards of a pre-imposition determination of ability to pay or notice and opportunity to be heard on the amount and ability to pay. Part VI argues that many recoupment programs lead to legal representation that violates the Model Rules of Professional Conduct, and consequently the professional codes of most jurisdictions. These ethical violations exacerbate the constitutional problems with many recoupment and contribution programs. Part VII argues that recoupment and contribution are bad policy because, even when implemented constitutionally, they add to an already crushing financial burden on defendants and are rarely cost-effective. Finally, Part VIII makes specific recommendations.

II. Overview of Recoupment and Contribution

The following is a general overview of recoupment and contribution to give the reader a sense of how both operate throughout the United States. As will be seen, there is significant variation both among and within jurisdictions. The overview is based on a study of statutes, cases, and what reports exist. Such sources can give only part of the picture, however, since recoupment, in practice, can

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10. Terminology can be confusing, as the distinction between recoupment and contribution can blur, and some sources use the term "reimbursement." Here, I use the term "recoupment" to refer to when a defendant is ordered by a court to repay all or part of the expense of counsel. "Contribution" refers to a request (either by a court or indigency screening agency) to make a payment before or at the start of proceedings. If the defendant does not make the contribution payment, many jurisdictions allow the court to order repayment. Thus recoupment on occasion will include what was initially a request for contribution if the defendant does not or cannot pay at the outset and is ordered to pay by the court. See infra pp. 332, 333-34.
also be governed by county rules, particular contract terms for public defense in an area, local practice, and judicial discretion.\textsuperscript{11} Unfortunately, most jurisdictions do not keep good records on enforcement and collection of recoupment and contribution.\textsuperscript{12}

To understand recoupment, it is important to know something about the state’s obligation to provide counsel to the indigent. In \textit{Gideon v. Wainwright}, the Supreme Court held that indigent criminal defendants charged with felonies in state courts are entitled to counsel at public expense under the Sixth Amendment.\textsuperscript{13} The Court had already ruled that federal defendants were entitled to counsel under the Sixth Amendment,\textsuperscript{14} as were state capital defendants under the Fourteenth Amendment.\textsuperscript{15} Until \textit{Gideon}, however, the Court had resisted imposing the requirement of court-appointed counsel more broadly, recognizing that the expense to the states would be substantial. But since \textit{Gideon}, the constitutional right to counsel has expanded to include defendants charged with certain misdemeanors,\textsuperscript{16} many defendants facing probation revocation,\textsuperscript{17} minors charged in juvenile delinquency proceedings,\textsuperscript{18} convicted defendants appealing as of right,\textsuperscript{19} and more. In addition, many more indigents have a statutory right to court-appointed counsel.\textsuperscript{20}

\begin{itemize}
  \item An in-depth national report that takes all these local variations into account is beyond the scope of this article. The Spangenberg Group has done a number of reports on indigent defense, many on behalf of the ABA. See The Spangenberg Group, http://www.spangenberggroup.com (last visited Nov. 22, 2008). A 1986 national report discussed expenditures and cost recovery for indigent defense, including recoupment programs. ROBERT L. SPANGENBERG ET AL., U.S. DEP’T OF JUST., CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES (1986). In 2001, the group followed up with a report on contribution programs. JAMES DOWNING, THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE (2001), available at http://www.spangenberggroup.com/pub_list.html. In addition, the group has done studies for individual counties and states on public defense.
  \item See Wright & Logan, supra note 2, at 2063 n.78.
  \item Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
  \item Powell v. Alabama, 287 U.S. 45, 73 (1932).
  \item See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (setting forth criteria for determining when provision of counsel is necessary to meet due process requirements).
  \item In re Gault, 387 U.S. 1 (1967).
  \item Parents and children involved in parental termination or dependency proceedings, for example, often have a statutory right to counsel. See, e.g., Laura K. Abel & Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, 40 CLEARRINGHOUSE REV. J. POVERTY L. & POL’Y 245, 245–46 (July–Aug. 2006); Jean Koh Peters, How Children Are Heard in Child Protective Proceedings, in the U.S. and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study, 6 NEV. L.J. 966 app. C. at 1074–81 (2006) (compiling information on all fifty states’ practice with respect to the appointment of counsel for chil-
Soon after this obligation to provide counsel was placed upon the states, many jurisdictions began to look for ways to recoup the costs of defense counsel from indigent defendants. The majority of criminal defendants qualify for appointed counsel—about 80% of state prosecutions, and 66% of federal cases. Even when provided cheaply, public defense is a significant part of most county, city and/or state budgets, and the recipients of these services are not a popular group. Thus, there has been a persistent effort to move the costs of indigent defense onto the defendants themselves.

One way to recover costs is through recoupment: ordering defendants to repay all or part of the cost of counsel, usually over a period of time. Another approach, more popular in recent years, is contribution: an upfront “application fee” or “co-pay.” Contribution is generally thought of as a small payment that the defendant can afford to make at the time of appointment of counsel. However, the line between recoupment and contribution is not always clear, especially when contribution fees can be as high as $200, and defendants who do not pay contribution at the outset can be ordered to pay it as a term of their sentence or as a condition of probation.

A. Recoupment

Recoupment refers to a judicial order requiring the defendant to reimburse the government for the cost of representation. Such recoupment orders can take various forms. The order might be made a part of the judgment and sentence, and collected in the

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same way as fines or other costs. It might also be a civil judgment, enforced as would any civil judgment. Defense costs include not only attorney’s fees, but also investigative and expert services. In 1986, thirty-six states had statutes that authorized recoupment, and the remaining states allowed cost recovery (which might include attorney’s fees) at the discretion of the trial judge. In addition, a majority of counties permit judges to order recoupment. Recoupment schemes vary in whether they apply to acquitted defendants, whether they apply to defendants who are sent to prison, whether recoupment payment can be made a condition of probation and/or parole, and how fees are determined.

Who pays recoupment and to whom payment is made. Some recoupment statutes clearly apply only to convicted defendants. In some states, however, fees can be recouped from defendants even if they are acquitted, there is a mistrial, or the case is reversed on appeal. Most schemes suggest that payment goes to an arm of the

23. The order in Fuller v. Oregon required defendant to reimburse the state for fees for a defense investigator. 417 U.S. 40, 41-42 (1974); see also Dennis A. Goschka, Recoupment Statutes: Free Defense—For a Price, 53 J. Urb. L. 89, 93 (1975-76) (discussing defense-related services to which an indigent may be entitled).


25. SPANGENBERG ET AL., supra note 11, at 33.

26. E.g., ALA. CODE § 15-12-25 (2007); FLA. STAT. § 938.29(1) (2007); KAN. STAT. ANN. § 22-4529(1) (2007) (application fee of $100 refunded if defendant acquitted); N.C. GEN. STAT. § 7A-455 (2007); UTAH CODE ANN. § 77-32a-1 (2007); VA. CODE ANN. § 19.2-163 (2000); WASH. REV. CODE § 10.01.160 (2007) (“Costs may be imposed only upon a convicted defendant . . . .”); W. VA. CODE § 29-21-16(g) (2007) (when “adverse judgment has been rendered against” indigent).


28. People v. Bramlett, 455 N.E.2d 1092 (III. App. Ct. 1983) (upholding recoupment of fees incurred during mistrial); State v. Hill, No. 03-0560, 2004 WL 433844 (Iowa Ct. App. Mar. 10, 2004) (upholding award of recoupment for fees incurred during mistrial); State v. Johnson, No. 01-0889, 2003 WL 118212 (Iowa Ct. App. Jan. 15, 2003) (upholding recoupment order where defendant’s conviction was reversed on appeal); State v. Hubbel, 20 P.3d 111, 116 (Mont. 2001) (upholding trial court’s authority to order repayment of attorney’s fees for first trial and successful appeal as well as second trial), overruled on other grounds by State v. Hendricks, 75 P.3d 1268, 1270-71 (Mont. 2003). Thus, in these jurisdictions, a defendant who must be retried because of prosecutorial or judicial error will owe more than a defendant who received a fair trial the first time.
government.\textsuperscript{29} However, in a few jurisdictions, statutes specify that payment shall go to the appointed attorney or public defender.\textsuperscript{30}

\textit{How recoupment payment is enforced:} Recoupment orders may be enforced as civil judgments, part of the criminal sentence, a condition of probation, or some combination thereof.\textsuperscript{31} Some jurisdictions specifically allow contempt proceedings for non-payment, while others disallow it.\textsuperscript{32} When recoupment is ordered as a condition of probation or suspended sentence, it is often part of a package of financial obligations on which the defendant must make regular payments under threat of revocation and incarceration.\textsuperscript{33} In a few jurisdictions, the court may order the defendant to "work off" a recoupment debt through public service.\textsuperscript{34}

\textit{How recoupment is calculated:} Recoupment may simply be the hourly rate of the appointed attorney times the number of hours worked on behalf of the defendant, in addition to investigative or expert fees. Sometimes this hourly rate is established by statute or rule.\textsuperscript{35} Other jurisdictions set a schedule of flat fees for various types of cases.\textsuperscript{36} Some courts are given great discretion in setting
the recoupment amount, others are required to base the amount on clear evidence. Trial courts generally have authority to waive all or part of the fee.

Despite the enthusiasm for recoupment in state and local governments, such programs have never been proven cost-effective. A 1984 Justice Department study revealed that less than 10 percent of recoupment orders were collected. Furthermore, a 1986 study showed that while it is possible for revenues to exceed costs in a tightly run and carefully administered recoupment program, in most instances recoupment programs were not cost-effective. The recoupment program reviewed by the Supreme Court in a 1972 case spent $400,000 collecting $17,000 over two years.

Since that 1972 decision, recoupment has become just one of an ever-growing number of financial obligations imposed on convicted criminal defendants, making repayment even less likely. Defendants, whose job prospects are dim and who are often laboring under massive accrued child-support debt, generally do not have the resources to pay restitution, fines, fees, and other court costs, let alone recoupment debt.

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37. E.g., People v. Brown, 506 N.E.2d 1059 (Ill. App. Ct. 1987) (record that trial took four days was sufficient to justify reimbursement award of $500).


39. SPANGENBERG ET AL., supra note 11, at 33-35.

40. Richard J. Wilson, Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy, Bad Law, 3 CRIM. JUST. 16, 43 (1988).

41. SPANGENBERG ET AL., supra note 11, at 61-67.


44. Id. at 7-8.
Realizing that recoupment was not always sound fiscal policy, states turned to another method of cost recovery—contribution. Contribution can take many forms and may be referred to as "application fees," "co-pays," "user fees," "administrative fees," or "registration fees."\(^4\) Contribution is usually a fixed sum imposed at the time of appointment. Amounts set by statute can range from $10 to $480 and are usually tied to the offense charged.\(^5\) Contribution might also be imposed at the county level, regardless of whether there is a fee set by the state.\(^6\) In almost every jurisdiction, the court may waive the fee.\(^7\) If the defendant does not make the payment, counsel will typically not be denied, but the court might order future payment enforced through probation revocation, garnishment, or other coercive methods.\(^8\) Thus, like recoupment, contribution may become a judgment debt and/or condition of probation.

In most jurisdictions, contribution is a supplement, not an alternative, to traditional recoupment.\(^9\) The contribution amount is either credited toward the recoupment order or treated as a separate charge.\(^10\) Many states authorize both contribution and recoupment, but do not specify whether contribution should be credited toward recoupment.\(^11\)

Contribution programs can be more cost-effective than recoupment, since the contribution fee is sought at the time of appointment and does not require a hearing or court action unless it is to become part of the sentence or formal collection procedures. Reports on the rates of collection are mixed. According to

45. Wright & Logan, supra note 2, at 2052.
46. See id. at 2052 n.20 (listing statutes authorizing contribution fees).
47. Downing, supra note 11, at 20–25. This report discusses county level fees imposed in various counties in Arizona, California, Georgia, Ohio and Washington.
48. Florida statute apparently does not permit the court to waive the $50 application fee. Fla Stat. §§ 27.52, 938.29 (2008). This lack of a waiver provision is probably unconstitutional. See Hanson v. Passer, 13 F.3d 275 (8th Cir. 1994) (granting habeas relief when partially indigent defendant denied counsel for failure to first pay $1000).
49. Wright & Logan, supra note 2, at 2053–54.
50. Id. at 2065.
one study, only 6 to 20 percent of contribution is collected.53 Yet other studies suggest some jurisdictions are getting better at collecting fees of all kinds.54 Payment at the time of appointment is essentially voluntary because appointment of counsel may not constitutionally be conditioned on payment,55 but indigents may not always realize this. Accordingly, jurisdictions that collect the contribution fee before proceedings, rather than at the conclusion of the case, have a greater collection rate.56

Both contribution and recoupment apply to defendants who have been determined indigent—unable to pay for private counsel. Indigency is not always binary; some defendants may be adjudged indigent but able to contribute, or partially indigent.57 These defendants may be ordered to sign a promissory note for part of the cost,58 or simply be ordered to make partial payment at the time of appointment or shortly after.59 (The "co-pays" or "application fees" demanded of all indigents in many jurisdictions can be seen as an effort to redefine all indigents as partially indigent.) In practical effect, such "partial indigency" orders are often indistinguishable from recoupment orders. A finding of partial indigency raises many of the same issues as a recoupment order imposed on a fully indigent defendant: e.g., is the right to counsel impermissibly "chilled" by an order of partial payment? Has the defendant been afforded notice and opportunity to contest the finding of partial indigency and the amount of payment ordered?

53. Downing, supra note 11 at 29. Yet the same report notes that 90% of defendants in Pima County paid the $25 application fee. Id. at 20.
54. David E. Olson & Gerard F. Ramker, Crime Does Not Pay, But Criminals May: Factors Influencing the Imposition and Collection of Probation Fees, 22 Just. Sys. J. 29, 30 (2001). "[J]urisdictions that restrict the use of installment plans, require payments within relatively short periods of time (between two and four weeks) and strictly enforce penalties for non-payment have higher fee and fine collection rates." Id. at 31. These findings support the idea that up-front contribution fees are easier to collect than recoupment.
55. Hanson v. Passer, 13 F.3d 275, 279–80 (8th Cir. 1994).
56. Downing, supra note 11 at 28.
57. The difference between such "partially indigent" defendants and the "indigent but ordered to repay" is one of degree. If the defendant is ordered to pay immediately or within a short time (based on the court's evaluation of the defendant's financial situation at the initial application for court-appointed counsel), then the defendant has essentially been judged partially indigent. If, however, the defendant is found indigent but then ordered to repay the entire sum (and especially if the defendant is ordered to repay without any consideration of the defendant's financial situation), then the defendant is an indigent who must repay. In between are those who are found indigent but then ordered to pay a portion of the costs of counsel over a limited time upon a finding that they have the ability to pay. "[A] defendant's level of financial resources is a point on a spectrum rather than a classification." Bearden v. Georgia, 461 U.S. 660, 666 n.8 (1983).
59. Spangenberg et al., supra note 11, at 49.
In a series of decisions several decades ago, the Supreme Court upheld recoupment but delineated the constitutional limits of recoupment programs. Indigent defendants may be ordered to reimburse the state for the cost of counsel if the court finds, at the time of the order, that the defendant has the ability to make repayment or will be able to pay. Furthermore, repayment may be made a condition of probation, and probation may be revoked for failure to pay, but only where the trial court makes findings that the failure to pay was willful or that the defendant did not make a bona fide effort to acquire the resources to pay. Recoupment may be enforced through civil judgment procedures as long as recoupment debtors are afforded the same rights and protections as other civil judgment debtors.

In 1972, the Court struck down a Kansas recoupment statute on equal protection grounds in James v. Strange. Under the statute, the defendant had to pay the cost of defense within 60 days of receiving notice of the amount. If not paid within that time, the amount was reduced to a civil judgment and began to accrue interest. The judgment could then be enforced like any civil judgment except that the statute specifically provided that "[n]one of the exemptions provided for in the code of civil procedure shall apply to any such judgment," except the homestead exemption. According to the Court, by stripping the defendant of the ordinary civil protections afforded other civil judgment debtors, the statute offended the Equal Protection Clause. Thus, any recoupment statute that relies on enforcement of civil judgments must not discriminate against recoupment debtors.

The James court did not endorse recoupment as a policy, and noted, "Misguided laws may nonetheless be constitutional." The Court was struck by the harshness of the law, which removed limits on garnishment and exemptions for severe personal and family illness. The Court acknowledged the state's legitimate interest in recoupment, but concluded: "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.\footnote{\id{at 141-42.}}

Two years later, in \textit{Fuller v. Oregon},\footnote{\cite{417 U.S. 40 (1974).}} the Court upheld an Oregon recoupment statute against various constitutional challenges. \textit{Fuller} was the last word on recoupment from the Supreme Court, and therefore requires careful study. Lower courts have differed on how narrowly or broadly to read the decision.

The Court framed the question presented as "whether Oregon may constitutionally require a person convicted of a criminal offense to repay the State the costs of providing him with effective representation of counsel, when he is indigent at the time of the criminal proceedings but subsequently acquires the means to bear the costs of his legal defense."\footnote{\id{at 41.}} The defendant had been sentenced to five years probation conditioned in part on repayment of the costs of his defense. In upholding the statute, the Court relied on four features of the Oregon statute: (1) the statute applied only to convicted persons; (2) the sentencing court could not order repayment unless it found the defendant "is or will be able to pay";\footnote{\id{at 45 n.5 (quotating \textsc{OR. REV. STAT.} § 161.665 (1973)).}} (3) a convicted person ordered to repay could at any time petition the court for remission if payment would impose manifest hardship on the defendant or his immediate family;\footnote{\id{at 45-46.}} and (4) no convicted person could be held in contempt for failure to repay if the default was not an intentional refusal to obey the court nor due to a failure to make a bona fide effort to pay.\footnote{\id{at 46.}}

The Court found the Oregon statute did not run afoul of the Equal Protection Clause under \textit{James v. Strange} because it provided that where the obligation was enforced as a civil judgment the recoupment debtor received all the protections afforded other civil judgment debtors.\footnote{\id{at 47.}} While the dissent argued that the threat of imprisonment through probation revocation violated equal protection because such a threat could not be used against convicted persons who failed to pay a private attorney,\footnote{\id{at 60-61 (Marshall, J., dissenting).}} the majority and concurring justice found that argument not properly raised.\footnote{\id{at 48 n.9; id. at 57 (Douglas, J., concurring).}
Nor did the majority seem particularly receptive to the contention: "[T]he imposition of a repayment requirement upon those for whom counsel was appointed but not upon those who hired their own counsel simply does not constitute invidious discrimination against the poor." 77

The Fuller Court also rejected the argument that the recoupment statute infringed on the defendant's Sixth Amendment right to counsel by "chilling" the exercise of that right. 78 The defense argued that indigents might refuse the offer of a public defender once they knew that they would be ultimately responsible for the cost. 79 But the Court reasoned that, at the time of need, nothing stood in the way of an indigent obtaining counsel at no cost. "The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so." 80 Further, the Court held that requiring an indigent to take some account of potential cost was not unconstitutional:

A defendant in a criminal case who is just above the 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. 81

Throughout the decision, the Fuller majority relied on the limitations of the Oregon statute to defeat constitutional challenges. The fact that the statute only imposed the repayment obligation on those who would be able to pay was referred to in rejecting the equal protection argument, 82 the "chilling" of the right to counsel argument, 83 an argument that the statute discriminated unconstitutionally based on wealth, 84 and an argument that the statute

77. Id. at 48 n.9. The majority also found that equal protection was not offended by recouping only from defendants who were convicted, rather than from all indigent defendants. Id. at 49–50. The court found the distinction between those convicted and those acquitted "wholly noninvidious." Id. at 49.
78. Id. at 54.
79. Id. at 51.
80. Id. at 53 (footnote omitted).
81. Id. at 53–54.
82. Id. at 50.
83. Id. at 51–53.
84. Id. at 53 n.12.
penalized the exercise of a constitutional right. Yet, as the next section will show, many jurisdictions read Fuller to allow the imposition of a recoupment debt with no finding of the ability to pay, as long as the debtor is never imprisoned for poverty alone. These jurisdictions seem to conflate the imposition of the debt with enforcement of the debt—a conflation that is not supported by Fuller. The Fuller court concluded that "Oregon’s legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship."

The Fuller Court did not give much discussion to the Oregon statute’s conditions for contempt or probation revocation when a defendant failed to make payment, although it noted that the defendant could not be imprisoned unless the default was intentional or in bad faith. Almost ten years later, however, in Bearden v. Georgia, the Court held that it was unconstitutional to imprison automatically a defendant who failed to pay a fine. The Court concluded, relying on the Due Process and Equal Protection Clauses, that the trial court could not revoke probation unless the trial court found that the defendant willfully refused to pay or did not make bona fide efforts to acquire the resources to pay. "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."

Bearden concerned the non-payment of a fine, not defense fees. The purpose of a fine is punishment, and so the Court went on to hold:

If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

85. Id. at 54.
86. Id. (emphasis added).
87. Id. at 46.
89. Id. at 672.
90. Id. at 672–73 (footnote omitted).
91. Id. at 672.
This reasoning underscores the punitive purpose of a fine, but it is inapplicable to recoupment. The state's interest in recoupment is not punishment, but simply a fiscal interest in recovering money expended and in discouraging fraudulent assertions of indigence. Thus, Bearden's due process requirement that the court make particular findings about the defendant's ability to pay before revoking probation are applicable to revocation for failure to pay recoupment costs, but the subsequent suggestion that the court consider alternative punishments is not relevant to recoupment. Neither James nor Fuller suggests that recoupment is punishment.

As the Fourth Circuit Court of Appeals has inferred, James, Fuller and Bearden together generate the following rule:

From the Supreme Court's pronouncements in James, Fuller, and Bearden, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.

These features have not been embraced by all jurisdictions. Not all courts and legislatures have recognized the constitutional

92. See James v. Strange, 407 U.S. 128, 141 (1972) (noting that the important state interests represented by recoupment laws include cost recovery and protection from fraud); see also Taylor v. Rhode Island, 101 F.3d 780, 783 (1st Cir. 1996) (holding statute imposing monthly fee on probationers was not punishment for Ex Post Facto purposes because statute's goal was reimbursement rather than retribution or deterrence).

requirements that emerge from a careful reading of the Supreme Court precedent. In a significant number of jurisdictions recoupment law has devolved into a punitive regime that penalizes indigents for having appointed counsel, regardless of their ability to pay.

IV. JURISDICTIONS HAVE DIVERGED IN THEIR INTERPRETATIONS OF FULLER

Over the last three decades, jurisdictions have interpreted Fuller differently depending on whether they see recoupment as another aspect of punishment or simply as cost collection from those who are able to pay. Some jurisdictions interpret Fuller as a green light to recover attorneys’ fees in the same way that any criminal fine may be recovered. Others recognize that recoupment must be carefully restricted to comply with due process, equal protection, and the Sixth Amendment.

A. NOT ALL JURISDICTIONS DETERMINE THE DEFENDANT’S ABILITY TO PAY BEFORE IMPOSING RECOUPMENT

One key way in which jurisdictions differ is in whether the trial court must make a finding of the defendant's ability to pay before imposing the obligation to repay either recoupment or contribution fees, or whether the court need only consider the defendant’s financial circumstances when enforcement of the judgment is sought. The Oregon statute at issue in Fuller required the court to make a pre-imposition determination of ability to pay and to consider the issue again if the defendant moved for remission or if the state sought to revoke probation for failure to pay.94 The pre-imposition determination of ability to pay was essential to the Court’s rejection of the constitutional challenges: “Oregon’s legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.”95

Requiring a pre-imposition determination of ability to pay prevents the guarantee of counsel at public expense for indigents from becoming no more than the guarantee of a loan of counsel

95. Id. at 54 (emphasis added).
fees at statutory interest rates.\textsuperscript{96} The automatic imposition of the repayment obligation on those who will never be able to repay does not serve a legitimate state interest, and demoralizes defendants.\textsuperscript{97}

The obligation alone, which usually is reduced to judgment, will have a real impact on defendants, even if it is never formally enforced. It will impair their credit, which may affect their ability to find housing and employment. In a number of jurisdictions, the convicted person cannot have his or her civil rights restored until all financial obligations arising from the conviction have been paid. The imposition of legal fees can thus become a barrier to regaining the right to vote and other civil rights.\textsuperscript{98} When this burden is imposed with no finding of ability to pay, destitute defendants suffer significant hardship.

Of course, "ability to pay" is a loose term, and is widely interpreted. The pre-imposition "ability to pay" may refer only to a present ability to pay\textsuperscript{99} or it may encompass the court's predictions about the defendant's job prospects, even prospects projected after a period of incarceration.\textsuperscript{100} Many jurisdictions refer vaguely to present or future ability to pay,\textsuperscript{101} some presume that anyone

\textsuperscript{96} In some jurisdictions, interest will continue to accrue during any incarceration period. Interest can be substantial. In Washington, for example, the statutory interest rate is 12\%. Wash. Rev. Code § 19.52.010 (2007). In one case, a defendant ordered to pay total costs of $1610 owed $1,895.69 after making regular payments for five years, due to the accrual of interest. Madison v. State, 163 P.3d 757, 762 (Wash. 2007). In a Ninth Circuit case, a defendant had served his time and paid $1,360 toward his financial obligations, but still owed the original judgment amount of $7,269.11 due to accumulating interest. United States v. Louck, 149 F.3d 1048, 1049 (9th Cir. 1998).


\textsuperscript{98} See Madison v. State, 163 P.3d 757, 763 (Wash. 2007) (upholding statute that requires all financial obligations in the sentence to be paid before voting rights can be reinstated).

\textsuperscript{99} United States v. Evans, 155 F.3d 245, 252 n.8 (3d Cir. 1998) (construing 18 U.S.C. § 3006A(c), (f) (2006)).

\textsuperscript{100} See State v. Mitchell, 617 P.2d 298, 301 (Or. Ct. App. 1980) (upholding recoupment order against defendant sentenced to twenty years in prison where finding of ability to pay based on fact that defendant was "able-bodied and has demonstrated an ability to make sufficient earnings.").

sentenced to prison does not have the ability to pay, and at least one jurisdiction restricts the court to assessing ability to pay for the six months following conviction. When a defendant has been sentenced to prison, a “finding” of ability to pay is more a guess than a factual finding. The requirement of a pre-imposition finding of ability to pay becomes almost meaningless if courts are permitted to make such speculative predictions. But despite the wide range in interpretation of ability to pay, the chance that the obligation will fall on the truly indigent is lessened where there is at least some factual determination before the obligation is imposed.

In a number of states, the recoupment statute specifically requires that the trial court make a finding of ability to pay before imposing a civil or criminal obligation. The federal statute, 18 U.S.C. § 3006A(f), requires a pre-imposition finding that “funds are available for payment,” and has been interpreted to require a finding of present ability to pay.

102. CAL. PENAL CODE § 987.8(g) (2007). According to the 1986 Spangenberg report, jurisdictions that require a pre-imposition determination of ability to pay do not impose recoupment on incarcerated defendants in practice. SPANGENBERG ET AL., supra note 11, at 36.

103. CAL. PENAL CODE § 987.8(g) (2007).


In other states, statutes appear to require a pre-imposition finding of ability to pay. See ALA. CODE § 15-12-25 (2007); CAL. PENAL CODE § 987.8(g) (2) (2007); GA. CODE ANN. § 17-12-51 (court may order repayment as a condition of probation if it does not pose a financial hardship); MO. REV. STAT. § 600.090 (2007); MONT. CODE ANN. § 46-8-113(3) (2007); N.H. REV. STAT. ANN. § 604-A:9 (2007); N.J. STAT. ANN. § 2B:24-12 (2007); OHIO REV. CODE ANN. § 120.05 (2007); OR. REV. STAT. § 151.505 (2007); S.D. CODIFIED LAWS § 23A-40-10 (2007); TENN. CODE ANN. § 40-14-202(e) (2007); W. VA. CODE § 29-21-16(g) (2007); WYO. STAT. ANN. § 7-6-106 (2008). Of course, the state courts could interpret such statutory language differently.

105. United States v. McGiffen, 267 F.3d 581, 589 (7th Cir. 2001); United States v. Evans, 155 F.3d 245, 252 (3d Cir. 1998); United States v. Fraza, 106 F.3d 1050 (1st Cir. 1997); United States v. Jimenez, 600 F.2d 1172, 1174 (5th Cir. 1979); United States v. Bracewell, 569 F.2d 1194 (2d Cir. 1978). "Such a finding must be based on the defendant’s current
Courts in other jurisdictions, relying on Fuller, have recognized that a pre-imposition finding of ability to pay is required by the Constitution. The Vermont Supreme Court, for example, held that the Sixth Amendment requires such a pre-imposition finding, and reversed a trial court's order that the indigent defendant repay $513 in defense attorney costs within 60 days of sentencing. Minnesota's highest court found that its statute requiring "co-payments" ranging from $50 to $200 from every public defense recipient was unconstitutional because it did not allow for judicial waiver, either before imposition or at enforcement. A Pennsylvania court found the constitutional requirement of a pre-imposition finding of indigency had been routinely violated in one of its counties. The court noted that the trial court's hostility toward indigent defendants could well chill the exercise of Sixth Amendment rights.

A federal court in Oregon actually held the state's post-Fuller recoupment statute unconstitutional as it no longer contained the safeguards found in the Fuller statute, including a pre-imposition determination of the defendant's ability to repay. The court further noted that, in actual practice, many counties required applicants for public defense to sign a form that included a promise to repay attorney's fees and costs, unconstitutionally chilling the Sixth Amendment right to counsel. Similarly, the Tenth Circuit Court of Appeals struck down a Kansas recoupment statute that provided for the automatic imposition of judgment in the amount of attorney's fees if not repaid within 60 days of receiving notice from the judicial administrator. The court noted that under Fuller and James v. Strange, a court should not order a convicted person to pay these expenses unless he is able to pay them or will be able to pay assets, not on his ability to fund payment from future earnings. United States v. Danielson, 325 F.3d 1054, 1077 (9th Cir. 2003).

108. State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004); see also State v. Jolicoeur, 742 A.2d 636 (N.J. Super. Ct. Law Div. 1999) (holding trial court violated right to counsel by refusing to consider indigency application unless defendant paid $50 application fee).
110. Opara, 362 A.2d at 311.
112. Id. at 276-77.
113. 407 U.S. 128 (1972)
them in the future considering his financial resources and the nature of the burden that payment will impose. If a person is unlikely to be able to pay, no requirement to pay is to be imposed.\footnote{Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979).}

The statute's failure to require a finding of ability to pay was one of several reasons the court invalidated the statute.\footnote{Id.}

In contrast, a significant number of jurisdictions have done away with a pre-imposition determination of ability to pay altogether, finding \textit{Bearden}'s restrictions on incarceration for non-payment to be sufficient protection for indigents. In these jurisdictions, the obligation to repay may be imposed on an indigent even if he or she has no prospects of being able to make payments. These jurisdictions erroneously believe that the Constitution is satisfied so long as the court does not order foreclosure, garnishment, or incarceration without finding that non-payment was willful and not simply the result of poverty.

For example, the Alaska Supreme Court found no Sixth Amendment or Equal Protection violation where an Alaska statute authorized the entry of a civil judgment for appointed counsel fees without a hearing or inquiry into the defendant's ability to pay, unless the defendant objected.\footnote{State v. Albert, 899 P.2d 103, 112 (Alaska 1995).}

A New Jersey statute that allowed the public defender to file a lien against the defendant's property for the value of services was also upheld against a challenge based on the failure to require a finding of ability to pay before the lien could be filed. The court found that it was enough that the defendant could object if the lien were enforced.\footnote{Stroinski v. Public Defender, 338 A.2d 202, 209 (N.J. Super. Ct. App. Div. 1975).} A Florida court ruled similarly with respect to a lien for attorneys fees,\footnote{Watrous v. State, 696 So. 2d 839 (Fla. Dist. Ct. App. 1997). The Florida court held that the trial court need not find an ability to pay, but must give the defendant the opportunity to challenge the amount of the lien.} as did a Pennsylvania court with respect to the imposition of costs and fees.\footnote{Commonwealth v. Hernandez, 917 A.2d 332 (Pa. Super. Ct. 2007).} In a decision recently upheld by the Kansas high court, an appellate court held that the trial court had no obligation to sua sponte address the defendant's ability to pay a $100 application fee.\footnote{State v. Hawkins, 152 P.3d 85 (Kan. Ct. App. 2007), aff'd, 176 P.3d 174 (Kan. 2008).}

In several states, courts allow imposition of the obligation to repay as a condition of probation or parole, without a finding of ability to pay. These courts reason that the defendant is sufficiently protected if inability to pay can be raised at a revocation hearing.
Thus, the North Dakota Supreme Court upheld the imposition of recoupment as a condition of probation without a hearing or determination of ability to pay. The court "cured" any constitutional problem "by requiring the court to find that a probationer is capable, but unwilling, to repay the costs of his defense before permitting a revocation of probation." A Texas appellate court used similar reasoning to uphold its recoupment scheme, noting that the inability to pay was an affirmative defense to probation revocation. The Florida Supreme Court has also held that no finding of ability to pay is required prior to ordering recoupment as part of a criminal sentence: "It is only when the state seeks to enforce the collection of costs that a court must determine if the defendant has the ability to pay."

A Washington court went so far as to hold that a defendant's objection that he had no ability to pay the reimbursement was not "ripe" until, and unless, the state sought to enforce the judgment. In Washington, fees for appointed counsel on appeal automatically become part of the judgment and sentence against the defendant if the defendant does not object to the state's cost bill. Even if the defendant objects, no pre-imposition determination of ability to pay is required: "common sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer." The Washington court's reasoning seems to turn Fuller on its head. The Fuller majority relied on the fact that an obligation would not be imposed on anyone who did not have the ability to pay; the Washington court seems concerned that the obligation not escape anyone who might someday be able to pay.

124. State v. Hargrove, Nos. 23433-9-III, 23434-7-III, 2006 WL 564177 (Wash. Ct. App. Mar. 9, 2006) (citing State v. Baldwin, 818 P.2d 1116 (Wash. Ct. App. 1991)). The defendant in Hargrove was sentenced to 660 months in prison and restitution over $110,000. It was unlikely that the state would ever seek to enforce the judgment of $800 for attorney's fees. Nevertheless, such a holding seems to fly in the face of Fuller's reliance on the defendant's ability to petition for remission at any time under the Oregon statute, as well as the language of Washington Revised Code § 10.73.160(4) (allowing defendant to petition court for remission at any time).
126. Id. at 1220.
Even more states have statutes that appear to allow imposition of the obligation to repay fees without a pre-imposition determination of ability to pay, but their courts have not yet addressed constitutional challenges to these provisions. Indeed, the practice of dispensing with a pre-imposition determination is probably more widespread and not necessarily reflected in statutes or caselaw. For example, in 1986, judges in Oregon and Virginia routinely ordered recoupment, regardless of the defendant’s financial situation. Wisconsin regulations require that the defendant be informed of the obligation to repay and of the right to seek a determination of ability to pay at appointment of counsel, but no such determination will be made without a request. If defense counsel has a conflict of interest with respect to recoupment, objections are unlikely.

Application fees and other forms of contribution raise interesting aspects of the ability to pay issue. With at least one exception, these fees may be waived. Presumably, such waivers would be based on the defendant’s financial circumstances, but generally no finding of ability to pay is required before assessing the fees. Moreover, when the fees are neither waived nor paid, they may become part of the defendant’s sentence, a condition of probation, or the subject of another order. Contribution debt may thus be imposed without an express finding of ability to pay having ever been made.

Finally, there are at least two states with statutes that permit the court to order the defendant to “work off” the cost of counsel if the defendant is unable to pay. In Delaware, for example, if a defendant fails or is unable to pay the $50 administrative fee, the court “shall” order the defendant to report to the Department of Corrections for work to “discharge the fine.” In Massachusetts, the court may order fifteen hours of community service in lieu of the $150 counsel fee. In other states, defendants may be ordered to work

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127. E.g., IOWA CODE § 815.9 (2007); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 11 (2007); VA. CODE ANN. § 19.2-163.4:1 (2007). Actual practice is not necessarily reflected in statutes or case law.

128. SPANGENBERG ET AL., supra note 11, at 34; see also Levine, supra note 2, at 210–13 (describing how some trial judges would not consider the defendant’s resources when imposing recoupment, and noting the attorney’s conflict of interest in contesting such practices).


130. See infra Part IV.

131. FLA. STAT. § 27.52(1)(b) (2007); Wright & Logan, supra note 2, at 2053.

132. Contribution may have been seen—erroneously—by many jurisdictions as a way around the Fuller requirements for recoupment.

133. DEL. CODE ANN. tit. 29, § 4607 (2007).

134. MASS. GEN. LAWS ANN. ch. 211D, § 2 1/2(g) (West 2005).
off the cost of counsel if such fees are subject to the court’s general authority to order community service in lieu of payment of fines, restitution and costs.\textsuperscript{135} The practice of ordering community service in lieu of payment may exist even where there is no express statutory authority.\textsuperscript{136} Other states have considered such “work off” schemes, but found that such schemes raise constitutional questions about involuntary servitude for debt under the Thirteenth Amendment.\textsuperscript{137}

\textbf{B. Not All Jurisdictions Provide Notice and a Hearing Before Ordering Recoupment or Contribution}

The provision of notice and a hearing before ordering recoupment or contribution is related to the pre-imposition determination of a defendant’s ability to pay. Jurisdictions that do not require the latter generally do not require a hearing, although they may allow the defendant to request a hearing or to object to the order. Courts do not always recognize that there are at least two issues that could be contested at a hearing: the defendant’s ability to pay as well as the amount of fees sought.

The Court did not address a due process challenge to the Oregon recoupment statute in \textit{Fuller}, but notice and hearing are implicit in the various factual findings required by the Oregon statute under review in that case. In addition, even entry of a civil judgment for recoupment requires compliance with procedural due process, which at the very least means notice and an opportunity to be heard.\textsuperscript{138} Similarly, notice and opportunity to be heard

\begin{footnotesize}
\textsuperscript{135} See, e.g., \textsc{Iowa Code} § 910.2 (2007).


\textsuperscript{137} See Opinion of the Justices, 431 A.2d 144, 151 (N.H. 1981). The court held that proposed legislation requiring defendant who could not pay recoupment to work off debt would violate the Thirteenth Amendment because the recoupment debt is a civil debt, not part of the punishment for the crime. But the court went on to hold that because probation was a privilege, such uncompensated labor could be ordered as a condition of probation to pay off the counsel fees. See also Informal Opinion No. 89-44, N.Y. Op. Att’y. Gen. 126 (1989), 1989 WL 435042 (Aug. 07, 1989) (“A court may not impose additional community service on an indigent defendant to repay a county for the cost of providing counsel.”).

\textsuperscript{138} Nelson v. Adams USA, Inc., 529 U.S. 460, 466 (2000) (finding due process violation when defendant received neither notice nor the opportunity to be heard before judgment was amended to make him personally liable for attorney’s fees). “The fundamental requisite of due process of law is the opportunity to be heard.” \textit{Grannis v. Ordean}, 234 U.S. 385, 394 (1914).
\end{footnotesize}
are part of the minimal due process accorded a defendant facing probation or parole revocation.\textsuperscript{139}

A number of courts have required notice and hearing, based on statute or court rule, prior to imposition of the order to repay.\textsuperscript{140} These statutory requirements are undoubtedly based on the constitutional requirements of due process and fundamental fairness. Other courts have invalidated statutes or procedures that do not give the defendant notice of the recoupment or the opportunity to contest the repayment order. A Pennsylvania appellate court reversed a recoupment order, in part, because the matter was raised by the trial court without notice and the trial court would not consider defendant's evidence of indigency.\textsuperscript{141} Due process was also found to be violated when public defense applicants were required to sign a promise to repay the full costs of counsel, without a hearing to contest the amount or ability to pay.\textsuperscript{142} In striking down a post-Fuller recoupment statute in Kansas, the Tenth Circuit Court of Appeals noted, "A further deficiency is its lack of proceedings which would determine the financial conditions of the accused and perhaps test the excessiveness of the attorney's fee (and these fees are not modest)."\textsuperscript{143} The sentencing hearing may provide adequate process, as long as the defendant has notice that recoupment will be considered and can contest the order.\textsuperscript{144}

However, at least four courts have held that no notice or hearing is required prior to entry of a recoupment obligation, either civil or criminal. A New Jersey court upheld a statute that allowed the public defender to file a lien for services without a hearing.\textsuperscript{145} The Washington Supreme Court upheld a statute that required the court to add the costs of counsel on appeal to the judgment and sentence based on the state's cost bill.\textsuperscript{146} The cost bill provided notice, but there was no provision for a hearing unless, and until, the state sought to enforce the judgment. Similarly, the North Dakota


\textsuperscript{143} Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979).

\textsuperscript{144} State v. Webb, 591 S.E.2d 505, 513 (N.C. 2004).

\textsuperscript{145} Stroumski v. Office of Pub. Defender, 338 A.2d 202 (N.J. Super. Ct. App. Div. 1975). The court also held that defendants were not misled when told at arraignment that counsel would be provided without cost. \textit{Id.} at 211.

\textsuperscript{146} State v. Blank, 930 P.2d 1213 (Wash. 1997).
Penalizing Poverty

Supreme Court found its state's recoupment statute did not violate due process because a hearing would be required before probation could be revoked.147 These courts reasoned that the notice and hearing required to execute a judgment or to revoke probation is sufficient, even though such notice comes long after the judgment has been entered. These courts seem to conflate the due process required to enforce a judgment with the due process required to enter a judgment. They also fail to consider how difficult it will be at the time of enforcement for the defendant to contest how the fee was calculated. Enforcement may occur years after entry of the judgment and, at that point, the attorney may be long gone and records may be lost.

A Georgia court simply concluded that notice and hearing were unnecessary because the defense attorney discussed his fee at sentencing, and the trial court had information about the defendant's financial status in his application for appointed counsel.148 This court failed to see that the purpose of notice and hearing is to give a defendant the opportunity to consider the issue and develop relevant evidence. Moreover, the defendant cannot be expected to contest, on the spot, his attorney's assertion about the amount of fees.

In addition to the issue of notice of recoupment proceedings, recoupment raises the question of whether defendants should be given notice of possible recoupment debt prior to accepting appointed counsel. While some states require notice of potential liability, such notice does not appear to be a uniform requirement, nor one whose absence will invalidate a recoupment order. Some statutes explicitly require that defendants be given notice of possible recoupment debt prior to accepting appointed counsel.149 But in other jurisdictions, courts have held that such notice is not required, and that failure to provide notice of possible recoupment debt is not unconstitutional.150

Notice of possible recoupment debt can be double-edged. Defendants' awareness of their potential liability for fees might contribute to the chilling effect of recoupment and cause more defendants to attempt to go pro se. On the other hand, it is unfair not to warn defendants that their "free" lawyer is not free, and it violates basic rules of professional conduct. In any other context, a client is entitled "before or within a reasonable time of commencement of the representation" to a clear statement of the attorney's scope of representation, and the basis or rate of fee and expenses. In no other type of legal representation is it deemed proper for the client to learn only at the conclusion of representation that the client must pay for the legal services, and on what terms.

C. The Amount of the Obligation May Exceed the Actual Cost of Defense

Calculation of recoupment or contribution can also determine whether the obligation is another aspect of punishment, or whether it is carefully computed to be no more than the actual cost of defense. In too many instances, the amount appears arbitrary.

The amount of recoupment may be based on the actual bill of defense counsel or it may be taken from a schedule of fees set by the legislature or other authority. Recoupment based on the actual hourly bill is arguably fairer to individual defendants, but requires more administrative effort. A simpler method is to charge a flat fee for certain types of cases, which may vary with the type of proceedings involved. These fees may reflect the actual cost to the government where the public defense contract is based on a flat fee per case.

However, flat fee amounts may or may not be fair to the majority of indigent defendants. If the contract fee is an effort to approxi-
mate the average cost per case, then any defendant whose case requires less time than average is paying to subsidize more complex cases.\textsuperscript{157} For example, a Florida court reversed a recoupment order of $4,200, based on a flat fee of $600 per case, where seven cases had been brought against the defendant. The appellate court noted that

by accepting the $600 per case contract billing, the trial court did not consider the value of services provided by appellant's appointed attorney. Appellant pled no contest and agreed to the sentences imposed. The value of his attorney's services for negotiating the plea agreement on the combined cases may have been considerably less than the amount awarded.\textsuperscript{158}

The range of effort put into a class of cases may vary substantially: a guilty plea may be entered after twenty minutes discussion, or after weeks of investigation, consultation and negotiation; a trial may take a few hours or several weeks. Such schedule fees could well run afoul of the Model Rules of Professional Conduct prohibition against unreasonable fees.\textsuperscript{159} On the other hand, an effort to recoup for hours actually spent would also be unreasonable if it resulted in a bill larger than the flat fee paid by the government under a flat fee contract.

A few decisions have reversed recoupment orders where the fee was deemed arbitrary or unsupported.\textsuperscript{160} In most cases, however, the amount is not challenged. As one court pointed out, "within limits it was [defense counsel] who would determine the amount

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  \item \textsuperscript{157} See State v. Albert, 899 P.2d 103, 125–26 (Alaska 1995) (Bryner, J., dissenting). Judge Bryner's dissent contains an extended discussion of why flat fee schedules can be unfair to defendants.
  \item \textsuperscript{158} Dees v. State, 692 So. 2d 1010, 1011 (Fla. Dist. Ct. App. 1997).
  \item \textsuperscript{159} See MODEL RULES OF PROF' L CONDUCT R. 1.5(a) (2008). Similarly, a flat fee may exceed the actual cost of representation to the state. For example, a Texas statute provides that recoupment should be "for compensation paid to appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(11) (2007). If the appointment fee exceeds the cost to the state of staffing the public defender office for this representation, arguably the defendant represented by a public defender would be overcharged.
\end{itemize}
of the attorney fees.161 Where defense counsel presents the recoupment bill, he or she will not object to the amount. For this reason, it is troubling when courts hold any objections to recoupment or the recoupment process are waived by trial counsel's inaction.162 These courts do not see the inherent conflict in holding trial counsel responsible for objecting to his or her own fees.163 It is probably because of this conflict that recoupment issues are not raised more widely.164

Even fees collected as contribution, through "application fees" or "co-pays," could result in overpayment for services. Such fees are usually based on a schedule and, according to a 2001 study, range from $10 to $200.165 A law student recounted how she had a case dismissed prior to trial and was shocked when the trial court imposed the Massachusetts "counsel fee" of $150.166 On a smaller scale, in one Minnesota case the attorney spent one-half hour on representation, and her hourly rate was $40. The trial court ordered the defendant to pay the application fee of $28 in addition to $20 recoupment. The appellate court ordered the recoupment order stricken, holding that the application fee must be credited toward recoupment.167 The court did not seem to notice that the defendant had still overpaid by $8.00.

163. A more realistic view is reflected in the following: "Although the defendant's attorney did not request a hearing, he had no reason or incentive to do so; within limits it was he who would determine the amount of the attorney fees." State v. Stock, 643 P.2d 877, 877 (Or. Ct. App. 1982).
164. But see Wright & Logan, supra note 2. The authors observe that public defense administrators and leaders often favor contribution as a budgetary tool, while ground-level defenders in large defender organizations identify with their clients and oppose such measures. These observations ring true, but seem inapplicable to appointed counsel or defenders who are not employees of a large defender organization, and who may benefit directly from recoupment or contribution.
165. Dowling, supra note 11, at 2.
166. Levine, supra note 2. The student believed that a competent lawyer could have obtained the same result with twenty minutes of work. The student did not say whether she or her employer was paid for her services. It is quite likely that she was an unpaid intern or that, if she was paid, it was at a very low rate.
167. State v. Cunningham, 665 N.W.2d 7, 13 (Minn. Ct. App. 2003). The Minnesota co-payment statute was held unconstitutional one year later in State v. Tennin, 674 N.W.2d 403 (Minn. 2004). The amended statute at issue in Tennin required co-payments of $50 to $200.
As one judge noted with respect to fee schedules, there seems to be an assumption that most "application fees" or co-pays are benevolent because they are much less than what it would cost to hire a private attorney. The correct basis for comparison, however, is to the actual cost of the public defender, not to private counsel fees. The government's cost of providing a defender will almost always be less than what it would cost a defendant to hire a private attorney. Regardless of private attorney rates, if schedule fees exceed the government's actual cost, defendants are overpaying.

Recoupment based on a fee schedule and contribution based on set "application fees" are cost efficient, but only because they circumvent calculations of actual cost. Unless such schedules are limited to trivial amounts, or modified in individual cases to reflect lower actual costs, there is a risk that defendants will be overcharged. Even fees at the very low end of the range can result in overpayment for those who plead quickly.

The desire for efficiency should not trump the requirements of due process, and yet that is precisely what has been allowed to happen in a number of jurisdictions.

D. Some Jurisdictions Justify Recoupment and Contribution as Serving the Goals of Punishment

Punishment can be understood as "the imposition of hard treatment" as part of the "blaming" for an offense. While an all-purpose definition of punishment is difficult, and beyond the scope of this article, there is a rich literature on the four classical

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169. Id.
171. In the context of particular legal issues, for example, punishment is defined in various ways. For example, in evaluating statutory challenges based on the Ex Post Facto Clause, the Court will not find a scheme punishment where the stated legislative purpose is civil unless the clearest proof contradicts that stated intent or shows a punitive effect. Smith v. Doc, 538 U.S. 84, 92 (2003) (rejecting Ex Post Facto challenge to Alaska Sex Offender Registration Act); see also Hudson v. United States, 522 U.S. 93 (1997) (discussing a similar standard for evaluating whether a sanction constitutes criminal punishment for double jeopardy purposes). These various definitions pertain to the purposes of these constitutional provisions. The point of this section of this article is not to show that recoupment or contribution meets any particular definition of punishment, but only to demonstrate that punitive justifications sometimes creep into recoupment and contribution cases.
justifications of punishment: retribution, deterrence, rehabilitation and incapacitation.172 James v. Strange 173 and Fuller v. Oregon 174 did not justify recoupment as punishment, but only recognized the state’s interest in recovering the costs of public defense from those defendants who can afford it.175 In fact, the Strange court decried the “elements of punitiveness” apparent in the Kansas statute.176 Since these decisions, some courts have stated clearly that recoupment is not punitive, but merely cost collection. However, others rely expressly on punitive justifications.177

Some courts have recognized explicitly that recoupment is not part of the punishment. The Virginia Supreme Court found that, as an item of costs assessed against a convicted defendant, attorney’s fees are “no part of the sentence of the court, and constitute[] no part of the penalty or punishment prescribed for the offense . . . . The right to enforce payment is a mere . . . incident to the conviction . . . .”178 Similarly, a Georgia appellate court stated that recoupment “is not required as part of the punishment philosophy but rather to restore to government coffers some of the expense incurred for the one whose behavior is responsible for it.”179 The New Hampshire Supreme Court also noted that repayment of the cost of legal counsel is not part of the punishment for the crime, and concluded, therefore, that requiring some defendants to “work off” the debt through public service would violate the Thirteenth Amendment prohibition against involuntary servitude.180


175. See supra Part III.

176. Strange, 407 U.S. at 142.

177. Of course, the classical purposes of punishment can also be used at times in service of civil remedies. Steiker, supra note 170. Punitive damages, for example, and civil remedies in general, rely on a deterrence model to some extent. “All civil penalties have some deterrent effect.” Hudson v. United States, 522 U.S. 93, 102 (1997).


180. Opinion of the Justices, 431 A.2d 144, 150–51 (N.H. 1981). The court was commenting on proposed amendments to the recoupment law. The court also noted, however, that because probation is a privilege rather than a right, the sentencing court could properly condition probation upon the indigent defendant working off the attorney’s fees. Id. at 151–52. The court’s two conclusions—that requiring the defendant to work off the debt violates
Federal circuits are split as to whether recoupment can be made a condition of supervised release or probation, and the reasoning turns on whether recoupment is seen as part of the punishment for the crime. All circuits acknowledge that recoupment is authorized by 18 U.S.C. § 3006A(f), but they disagree as to whether it may be a condition of probation or supervised release. Federal statute requires that conditions of probation or supervised release be "reasonably related" to the "nature and circumstances of the offense" and serve certain purposes: to promote deterrence, to protect the public from future crimes, and to provide the defendant with training or treatment.\footnote{See 18 U.S.C. §§ 3583(d), 3563(b), 3553(a) (2006).} As already noted, these purposes are the classic purposes of punishment: retribution, general deterrence, specific deterrence, and rehabilitation.\footnote{See supra note 172.} In addition, the probation condition should involve "no greater deprivation of liberty than is reasonably necessary."\footnote{18 U.S.C. § 3583(d) (2).}

Several circuits have found that recoupment is not a proper condition of probation or supervised release.\footnote{See, e.g., United States v. Evans, 155 F.3d 245, 248–49 (3d Cir. 1998) (citing 18 U.S.C. §§ 3583(d), 3553(a)); United States v. Eyler, 67 F.3d 1586, 1593–94 (9th Cir. 1995); United States v. Lorenzini, 71 F.3d 1489, 1493 (9th Cir. 1995) (holding similarly with respect to probation); United States v. Turner, 628 F.2d 461, 466–67 (5th Cir. 1980) (reaching a similar conclusion, but under pre-guidelines sentencing statutes).} The Third Circuit court held that the profitable nature of an offense was not enough to render it "reasonably related" to recoupment, and that "repayment of counsel fees incurred in defending a prosecution would not likely deter crime, protect the public, or serve any rehabilitative function."\footnote{Evans, 155 F.3d at 250.} The Ninth Circuit stated:

The repayment of fees bears no reasonable connection to the need for a sentence to 'reflect the seriousness of the offense' because the repayment is simply not punitive in nature. Requiring defendants who can do so to pay for the costs of their defense is an elementary part of the way the criminal justice system operates in this nation. The government bears the cost only when the defendant is unable to do so. The purpose of requiring repayment when it turns out that the defendant has the necessary funds available is to implement that basic principle . . . . It follows from what we have said that an order to
repay attorney's fees is also not reasonably related to the goal of 'provid[ing] just punishment' for the offense.\textsuperscript{186}

The court went on to point out other, less drastic, measures available to the government to collect the debt.\textsuperscript{187}

On the other hand, the First Circuit allows recoupment as a condition of probation or supervised release because it finds that repayment of counsel costs does serve the statutory punitive purposes. The First Circuit noted that, as with any financial sanction, an order to pay is a deterrent to crime and therefore will protect the public from additional crimes by the defendant.\textsuperscript{188} "That monetary payments deter crime is the notion that underlines the elaborate code of fines reflected in the Federal Criminal Code and the Sentencing Guidelines."\textsuperscript{189} The court thus justified the use of recoupment as part of the punishment for the offense.

Several states have also explicitly used the rationales of punishment to justify recoupment. The Iowa Supreme Court upheld its recoupment statute, noting, "The purpose of the legislation goes beyond revenue recovery; it is designed to instill responsibility in criminal offenders . . . . [Recoupment is based on] rehabilitation of the criminal defendant."\textsuperscript{190} An Ohio court upheld recoupment as a condition of probation for similar reasons. It held that recoupment promotes acceptance of responsibility and that the experience of economic independence will enhance the probationer's self-esteem and thereby promote rehabilitation.\textsuperscript{191} The North Dakota Supreme Court similarly concluded that recoupment would further rehabilitation, enhance deterrence, and be an incentive for employment.\textsuperscript{192}

The Fuller decision opened the door to treating recoupment as punishment when it approved recoupment as a condition of probation and as part of the criminal sentence.\textsuperscript{193} Once recoupment became part of the criminal proceedings, rather than a civil obligation, it was inevitable that the line between this essentially civil debt and other financial penalties would blur. Procedures for the collection of fines are applied to recoupment as it is lumped in with

\begin{footnotesize}
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\item[186.] Lorenzini, 71 F. 3d at 1493.
\item[187.] Id.
\item[188.] United States v. Merric, 166 F.3d 406, 410 (1st Cir. 1999).
\item[189.] Id. The Seventh Circuit has also allowed recoupment as a condition of probation, but for reasons unrelated to the purposes of punishment. See United States v. Gurtunca, 836 F.2d 283, 288–89 (7th Cir. 1987). The decision dealt with pre-guidelines sentencing.
\item[190.] State v. Haines, 360 N.W.2d 791, 795 (Iowa 1985).
\item[192.] State v. Kottenbroch, 319 N.W.2d 465, 474 (N.D. 1982).
\item[193.] See 417 U.S. 40, 49–50 (1974).
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other penalties arising from conviction. The language of punishment used by some courts in addressing recoupment and contribution illustrates how easy it is for courts to view the obligation as a penalty when it is imposed as part of the sentence.

V. Recoupment and Contribution without the Safeguards of Fuller Are Unconstitutional

Although Fuller may have opened the door for punitive recoupment, a close reading of that case suggests the constitutional limits of a recoupment or contribution program. The preceding section shows that a significant number of jurisdictions do not observe those limits. For purposes of challenging the programs in such jurisdictions, it should be enough to show that they are in violation of the limitations in Fuller. But it is also possible to show, as Fuller implied, that when jurisdictions disregard those limits, indigent defendants are penalized for exercising their Sixth Amendment right to counsel, the right to counsel is chilled, and the Due Process and Equal Protection Clauses are violated. The essence of the problem is procedural: recoupment is unconstitutional where there is no finding of ability to pay, fee awards are not supported, or there is no notice and opportunity to be heard on these issues. When these procedural safeguards are absent, recoupment debts will be imposed on the truly destitute, and will often be in excessive amounts.

194. See, e.g., State v. Tennin, 674 N.W.2d 403, 407-08 (Minn. 2004) (invalidating Minnesota co-pay statute because it did not contain the judicial waiver provisions of the statute reviewed in Fuller).

195. There are a number of potential arguments based on independent state constitutional grounds, too. States may interpret parallel state provisions to provide greater protection to defendants than do their federal counterparts. See Stewart F. Hancock, The State Constitution, A Criminal Lawyer's First Line of Defense, 57 ALB. L. REV. 271 (1993). The North Carolina Supreme Court found that a statute imposing appointment of counsel fees on defendants "regardless of the outcome" of the case violated that state's constitutional prohibition against imposing "costs" against defendants not found guilty. State v. Webb, 591 S.E.2d 505, 508 (N.C. 2004). In addition, many states have constitutional provisions against imprisonment for debt. See, e.g., ALA. CONST. art. 1, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; CAL. CONST. art I, § 10; COLO. CONST. art. II, § 12; FLA. CONST. art I, § 11; GA. CONST. art I, § 1 para. XXIII; HAW. CONST. art. I, § 19; ILL. CONST. art I, § 14; IOWA CONST. art I, § 19; OR. CONST. art I, § 19, cited in Fuller v. Oregon, 417 U.S. 40, 48 n.9 (1974).
A. Penalty on the Exercise of the Sixth Amendment Right to Counsel

In a number of cases, the Supreme Court has struck down statutes that penalize the exercise of a constitutional right. A seminal case in criminal law, United States v. Jackson, invalidated the Federal Kidnapping Act because it only allowed imposition of the death penalty if the defendant had a jury trial. The Court stated, "The inevitable effect ... is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." The Court found this to be an "impermissible burden" on the exercise of the right to jury trial, although it acknowledged that not every burden on a constitutional right would be unconstitutional.

The Court in Fuller held that the Oregon recoupment statute did not penalize the exercise of a constitutional right because "Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so." The Court did not see Oregon's recoupment scheme as punishment and thus only gave the penalty argument a passing glance. But when jurisdictions do not observe the limits

197. Id. at 581 (footnote omitted).
198. See Chaffin v. Stynchcombe, 412 U.S. 17, 24-25 (1973) (finding no unconstitutional burden on right to appeal where even if defendant prevailed on appeal, defendant might receive harsher sentence from jury on retrial). The Court distinguished North Carolina v. Pearce, 395 U.S. 711 (1969), in which it found a constitutional violation where a harsher sentence was imposed on retrial for clearly vindictive reasons.

For other examples of unconstitutional penalties on the exercise of a constitutional right, see Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 283-84 (1968) (employees could not be fired for asserting their Fifth Amendment rights not to incriminate themselves); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (state could not deny welfare benefits to recent immigrants who had exercised their right to travel between states). The Shapiro Court held that moving within the United States is "a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." 394 U.S. at 634.

But see Daniel Givelber, Punishing Protestations of Innocence: Denying Responsibility and its Consequences, 37 AM. CRIM. L. REV. 1363 (2000) (arguing that Jackson is no longer good law in light of sentencing guidelines that penalize defendants for exercising their right to go to trial).

200. The Court distinguished its precedents where statutory provisions were found unconstitutional, stating that in those cases "the provisions 'had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them.'" Id. (citing United States v. Jackson, 390 U.S. 570, 581 (1968)). This quotation from Jackson is a little disingenuous: the full quote is, "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." 390 U.S. at 581. The Court in Jackson ultimately held the death penalty provision of the Federal Kidnapping Act unconstitutional even though penalizing a constitutional right was not its sole—or indeed at all an intended—purpose. See id. at 582-85. The Court in Fuller also distinguished two other cases:
emphasized in *Fuller*, recoupment can become punishment for poverty and for the exercise of a constitutional right.

Jurisdictions that do not require a pre-imposition determination of ability to pay can impose repayment obligations on all indigents, including the destitute, on the grounds that ability to pay is only relevant at enforcement. It is then up to the defendant to bring a challenge to the obligation, yet some courts will not hear such challenges unless, and until, the state seeks to enforce the judgment or to revoke probation for non-payment. The obligation itself, even if it is not formally enforced, has significant impact on the defendant’s ability to obtain credit, employment or housing. When this burden falls on indigents who have no ability to repay, it is excessive and therefore penalizes the right to counsel.

Similarly, when jurisdictions impose the repayment obligation without notice or a hearing to determine ability to pay and the appropriate amount, the obligation may be imposed on those who are unable to pay and the amount may be excessive even for those able to pay. Defendants will have no opportunity to contest the amount, and there will be no assurance of factual support for the bill. Any resulting overcharge is obviously a penalty on the right to counsel.

B. A “Chill” on the Exercise of the Sixth Amendment Right to Counsel

*Fuller* held that the Oregon statute under review did not chill the exercise of the right to counsel because it merely provided that an indigent who became capable of repayment could be ordered to repay. But when jurisdictions authorize imposition of the obligation without any determination of ability to pay, and when they do so without notice or hearing to dispute the amount and ability to pay, the potential chilling effect becomes substantially greater and therefore unconstitutional.
As the Fuller majority noted, there is no reason that indigents should be completely protected from the financial considerations that affect non-indigents charged with a crime. But at some point, the threat of an impossible debt—one the indigent can never hope to repay—is likely to cause indigents to waive counsel. The chill is a matter of degree. The fact that the Fuller court found no unconstitutional chill from the narrowly tailored Oregon statute at issue in that case does not mean that no recoupment statute will cause an unconstitutional chill. This was the reasoning of the Pennsylvania court when it struck down a reimbursement order:

The possibility of being subjected at the close of trial to an arbitrary determination as to ability to pay for the services of appointed counsel, without any of the protections afforded by a hearing comporting with due process, may lead persons truly indigent and therefore eligible for free counsel to choose to forego counsel initially. While it is true that the Supreme Court in Fuller . . . rejected the 'chill' rationale . . . it did so in the context of a case in which it was dealing with a reimbursement statute ‘carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.’

Most of the discussion about chilling effects is speculative, based on anecdotal evidence about the likely behavior of rational actors. There is a dearth of empirical evidence about the actual effects of different recoupment and contribution schemes on waiver rates. Imposition and enforcement of recoupment can vary substantially, even within states, so that generalization is difficult. Nevertheless, as the Jackson court noted, it is not necessary that every defendant subject to the penalty be unconstitutionally affected. “[T]he ques-
tion is whether that [chilling] effect is unnecessary and therefore excessive.\textsuperscript{211}

Recoupment schemes that do not include a pre-imposition determination of ability to pay, notice, and an opportunity to be heard not only have a greater chilling effect on indigents, because of the inevitable debt and the defendant's lack of control over the debt amount, but this chilling effect is entirely unnecessary as the state has no legitimate interest in imposing a possibly excessive debt on those who can never hope to repay.

C. Recoupment Violates Equal Protection and Due Process

Punitive recoupment violates not only the Sixth Amendment right to counsel, but also the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments. Arguments under these clauses are closely related. This section examines recoupment under the blended due process and equal protection test often applied to challenges based on poverty, and also looks at separate procedural due process and equal protection analyses.

1. The Blended Equal Protection and Due Process Test

The Supreme Court has developed a blended due process and equal protection approach to cases involving poverty and access to the courts.\textsuperscript{212} "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs," while "[t]he due process concern homes

\textsuperscript{211} United States v. Jackson, 390 U.S. 570, 582 (1968). The dearth of empirical evidence about waiver and actual chilling effect is the result of state and municipal record-keeping failures, yet some courts lay failure at the feet of defendants, holding that they have "failed" to establish a chilling effect. See State v. Albert, 899 P.2d 103, 130-31 (Alaska 1995) (Bryner, J., dissenting). Obviously, no defendant who faces a recoupment order has waived counsel, and thus no such defendant has personally been sufficiently "chilled" in the exercise of the right to counsel. Arguably, the chill argument is more properly made in another context by a defendant who has refused counsel. See \textit{Fuller}, 417 U.S. at 61 (Marshall, J., dissenting) (suggesting that the chill argument might be better raised by a defendant challenging a waiver of counsel as not voluntary).

\textsuperscript{212} See \textit{Bearden} v. \textit{Georgia}, 461 U.S. 660, 665 (1983); \textit{see also} Smith v. Robbins, 528 U.S. 259, 276 (2000) (noting that Equal Protection and Due Process Clauses converge to require "adequate and effective appellate review to indigent defendants"). The Court has retained a "blended" equal protection and due process analysis of issues involving indigents and access to the courts. \textit{see also} Sundee Kothari, \textit{Comment, And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents With Meaningful Access to the Courts}, 72 Tul. L. Rev. 2159, 2200-02 (1998).
in on the essential fairness of the state-ordered proceedings.\(^2\)\(^3\)\(^4\)

Alaskan Judge Bryner, in dissent, applied this blended test to the recoupment law at issue in *State v. Albert*:

Given the fundamental nature of the right to counsel and the liberty interest implicated by the needless discouragement of the exercise of the right to counsel, a constitutional challenge to a recoupment plan essentially calls into question the basic fairness of the challenged provision. In this situation, regardless of whether the challenge asserts a violation of equal protection or a direct violation of the right to counsel, "the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as the 'nature of the individual interest affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose[.]'"\(^5\)\(^6\)

Recoupment without the *Fuller* safeguards fails this fairness test. First, multiple individual interests are affected, including the fundamental right to counsel, the defendant's financial interests, and, if payment is a condition of probation, the defendant's liberty interest. The extent to which those interests can be affected is great: the defendant's right to counsel may be chilled; the financial obligation may be small or large but it will not necessarily be affordable; and probation revocation, parole revocation, or revocation of suspended sentence can result in significant incarceration. Second, the rationality of the connection between legislative means and purpose is strained. The legislature's only legitimate purpose is to replenish its coffers from those who benefited from assigned counsel and who can afford to repay. To impose repayment on even those who cannot repay does not serve this purpose, and may even be a waste of resources. Most evidence shows that recoupment programs are not cost-effective and revocation of probation for failure to pay only adds the state expense of incarceration. Finally, alternative means for effectuating the legislative purpose exist, but they admittedly may be politically unpopular.\(^7\)


\(^2\)\(^1\)\(^5\) For example, states could impose higher taxes on all citizens or those who use the courts. States could also tighten indigency requirements and screening, to prevent assignment of counsel to those who are not truly indigent.
The fairness test used by Judge Bryner is drawn from a line of cases addressing financial barriers to appellate review that begins with *Griffin v. Illinois*. In *Griffin*, the Court held that a state may not require an indigent defendant to pay for the trial transcript as a condition of appealing a conviction. In subsequent decisions, the Court extended the *Griffin* holding to misdemeanor appeals and to habeas proceedings. In addition, the Supreme Court held that state courts may not condition an indigent's appeal upon a finding that the appeal is not frivolous. In *M.L.B. v. S.L.J.*, the Court struck down state statutes that required an indigent parent appealing the termination of her parental rights to pay record preparation fees in advance, emphasizing the convergence of due process and equal protection principles. More recently, the Court used this fairness approach to hold that a defendant was entitled to appointed counsel in an appeal from the denial of a motion to withdraw a plea of nolo contendere. Using the same blended test, however, the Court also held that states need not provide counsel to indigents for discretionary appeals from state convictions.

It is not clear that the issue of punitive recoupment falls under this line of cases, even though the blended fairness test can address most of the problems with recoupment and contribution programs. Unlike the practices addressed in *Griffin* and most of its progeny, recoupment is not a barrier to appellate review, but rather a consequence of being poor and accepting a public defender. Moreover, the essence of the problem with many recoupment and contribution programs is procedural: the constitutionality of recoupment depends on a pre-imposition finding of ability to pay and the opportunity to contest the order. If procedures ensure that the defendant can pay, and the amount is reasonable, the right to counsel is not violated. Thus, an analysis that emphasizes due process seems appropriate: "The due process

221. See id. at 120–21.
2. Procedural Due Process

Where jurisdictions do not require a pre-imposition determination of ability to pay, or notice and opportunity to be heard before the debt is imposed, basic due process is violated. At a minimum, due process requires notice and an opportunity to be heard before an obligation is imposed. As Judge Bryner wrote, dissenting from the court's rejection of a challenge to Alaska's process for imposing a civil recoupment debt:

In no other area of Alaska law that I am aware of is a private or public debtor virtually stripped of the right to a trial—or even the right to a hearing—and subjected upon ten days' notice to the automatic entry of a final civil judgment—all without even the courtesy of a request or demand for payment . . . . Moreover, in no other area of Alaska law does a recipient of state-provided professional services become automatically liable to pay a charge based on an inflexible schedule of arguably arbitrary predetermined fees, without regard to the professional services actually rendered in the specific case.

Without any determination of ability to pay, or an opportunity to challenge the amount of the fees, recoupment orders become arbitrary—the antithesis of due process.

The purpose of procedural due process is to protect persons from the mistaken or unjustified deprivation of life, liberty or property. The risk of erroneous or unjustified recoupment orders is great when the safeguards of the statute in Fuller are not present. In fact, it is fair to say that erroneous or unjustified orders are certain to occur when there is no pre-imposition determination of ability to pay and no notice or hearing on the issues of ability to pay and the amount of fees. As a class, indigent criminal defendants who qualified for public defense are likely still indigent at the conclusion of representation. Thus, recoupment orders im-
posed without a determination of ability to pay will certainly fall on many who cannot pay without substantial hardship. Moreover, where there is no notice or opportunity to contest the fee amount, excessive awards are bound to occur.

3. Equal Protection

It is unclear whether a separate argument based only on the Equal Protection Clause adds anything to a constitutional challenge based on poverty and the right to counsel.\textsuperscript{229} Such an argument is unlikely to receive heightened scrutiny because economic status is not a suspect class for equal protection purposes,\textsuperscript{230} although the right to counsel is a fundamental right.\textsuperscript{231} Lower courts have not applied strict scrutiny to any recoupment challenges based on the Equal Protection clause or the Due Process clause. Instead, following the lead of Fuller, they have used a rational basis analysis.\textsuperscript{232}

Nevertheless, it is worth looking carefully at the equal protection problems with recoupment. The Fuller court addressed two equal protection arguments: one based on the distinction between defendants who were convicted and those who were acquitted, and one based on James v. Strange and the distinction between protections offered defendants under the recoupment statute and those offered other judgment debtors.\textsuperscript{233} These holdings provide limited support for additional arguments. The Fuller Court's conclusion that a distinction between acquitted and convicted defendants is non-invidious seems sound, but that does not mean recoupment laws must make such distinctions.\textsuperscript{234} James v. Strange continues to

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\item [229.] See Wayne R. LaFave, Criminal Procedure 482–89 (2d ed. 1999).
\item [230.] See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."); see also Maher v. Roe, 432 U.S. 464, 474 (1977) (stating that the Court "has never held that financial need alone identifies a suspect class for equal protection purposes").
\item [232.] See, e.g., State v. Haines, 360 N.W.2d 791, 794–95 (Iowa 1985) (rejecting equal protection challenge to state recoupment statute, applying what appears to be rational basis scrutiny); State v. Ellis, 167 P.3d 896, 900–01 (Mont. 2007) (rejecting challenge to recoupment under both state and federal equal protection clauses); State v. Haas, 927 A.2d 1209, 1210 (N.H. 2007) (reasoning that recoupment does not affect a fundamental right for substantive due process purposes).
\item [233.] See supra Part III.
\item [234.] If the state's interest in recoupment is cost recovery rather than punishment, recoupment could logically apply to the acquitted and convicted alike. See Haas, 927 A.2d 1209 (rejecting equal protection challenge to recoupment statute that applied to acquitted and convicted defendants).
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support equal protection challenges where recoupment is a civil
debt with fewer protections than other civil debts, but has little im-
pact where recoupment is made a criminal penalty.\textsuperscript{235}

At least one additional equal protection argument seems to have
some merit, based on the dissent in \textit{Fuller}. Justice Marshall pointed
out:

The important fact which the majority ignores is that under
Oregon law, the repayment of the indigent defendant's debt
to the State can be made a condition of his probation, as it
was in this case. Petitioner's failure to pay his debt can result
in his being sent to prison. In this respect the indigent defen-
dant in Oregon, like the indigent defendant in \textit{James v. Strange}, is treated quite differently from other civil judgment
debtors.

\ldots [T]he nonindigent defendant in a criminal case in Ore-
gon who does not pay his privately retained counsel, even
after he obtains the means to do so, cannot be imprisoned for
such failure. The lawyer in that instance must enforce his
judgment through the normal routes available to a creditor—
by attachment, lien, garnishment, or the like. Petitioner, on
the other hand, faces five years behind bars if he fails to pay
his 'debt' arising out of the appointment of counsel.\textsuperscript{236}

Justice Marshall's argument is thus that equal protection is vi-
oleted when an indigent, partially indigent, or even formerly
indigent defendant is threatened with imprisonment for non-
payment, while a non-indigent who refuses to pay retained counsel
can never be sent to prison for failure to pay the civil debt. The
majority's response seems to be that there is no equal protection
problem as long as imprisonment only results from a willful failure
to pay, not from poverty. Yet the fact remains that a defendant with
a recoupment order as a condition of probation always remains
under a threat of imprisonment, and may have to defend against
allegations of willful non-payment. These are "unduly harsh or dis-
criminatory terms,"\textsuperscript{237} that do not apply to a defendant who owes a
debt to a private attorney.\textsuperscript{238}

\textsuperscript{235} See supra note 232 and cases cited therein.
\textsuperscript{237} Id. at 61 (Marshall, J., dissenting).
\textsuperscript{238} Strangely, some courts have used the very procedures of probation and revocation
or suspended sentence to reject equal protection challenges to recoupment as a condition
Justice Marshall's equal protection argument is especially strong when applied to recoupment schemes that do not observe the safeguards of the statute at issue in Fuller, namely pre-imposition determination of ability to pay, notice, and the opportunity to be heard. As already noted, schemes that do not provide these safeguards do not even pass a rational basis test since the state has no legitimate or rational interest in penalizing indigents who have no prospect of being able to pay for an attorney, and it has no legitimate interest in imposing excessive or unfounded fee debts. Where debts are imposed without these safeguards and then made a condition of probation or suspended sentence, the disparity in treatment of the civil debtor and the consumer of public defense becomes stark and unjustifiable.

VI. CONSTITUTIONAL PROBLEMS ARE EXACERBATED BY LEGAL REPRESENTATION THAT VIOLATES PROFESSIONAL ETHICS RULES

The preceding section demonstrates that recoupment and contribution are punitive and violate the Constitution when not accompanied by the safeguards required by a close reading of Fuller. Common ethical problems may also contribute to the constitutional violations. Recoupment and contribution can compromise the attorney-client relationship by creating a conflict of interest and interfering with the defendant's right to counsel of choice. Attorney fee rules are violated when defendants do not know at the beginning of the representation that they will be responsible for the fees and what those fees will be. In any other context, it would be clear that these practices do not meet professional standards. Even if these defects do not violate the constitution, they result in representation that falls below the requirements of professional codes, and may well contribute to some of the problems already noted. 239

A. Conflicts of Interest

Conflicts of interest can arise because of the role that defense attorneys must often play in recoupment. In some jurisdictions,

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239. But see Powers v. Hamilton County Public Defender Commission, 501 F.3d 592 (6th Cir. 2007) (Public Defender may be civilly liable for not requesting indigency hearings in probation revocation for failure to pay fines).
attorneys are responsible both for submitting the bill to the court and objecting to it on behalf of their clients. They may be the direct beneficiaries of the payment and yet they are expected to argue their client's inability to pay. All lawyers have a potentially adversarial position with their clients when it comes to their fees, but in no other context are lawyers expected to help secure court orders against their clients in the same proceedings where they represent those clients.240

The Model Rules of Professional Conduct prohibit a lawyer from representing a client "if the representation may be materially limited ... by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."241 Most appointed counsel who submit fee statements to the court for recoupment probably do not recognize any conflict, believing that they are simply complying with court rules or statute.242 In fact, there are many instances where attorneys have acted against their own or their employer's self-interest and argued against recoupment. For the most part, these are public defenders employed by larger agencies—defenders who have a sense of "mission" on behalf of the indigent that may conflict with the economic interests of their employers.243 On the whole, however, it is unrealistic to expect defense attorneys to always put their client's interests before their own.244 The rules of professional conduct are built on the assumption that clients must be protected from the risk of harm in such situations.245

Yet, where recoupment is incorporated into the criminal proceeding, rather than imposed as a separate civil obligation, defense attorneys frequently labor under this conflict. They represent the

240. If a private lawyer decides to seek an attorney's fees lien or sue a client for unpaid fees, the lawyer's representation of the client ends. See Model Rules of Prof'l Conduct R. 1.7 cmt. 8 (2007).

241. Model Rules of Prof'l Conduct R. 1.7(b) (2007). Most states have a similar provision.

242. Conflicts with one's self-interest are the most difficult to recognize. Helen A. Anderson, Legal Doublespeak and the Concern with Positional Conflicts: A "Foolish Consistency"?, 111 Penn St. L. Rev. 1, 33 (2006).

243. Wright & Logan, supra note 2, at 2055-60 (discussing the schism between the leadership of defense groups, who tended to favor contribution proposals, and the courtroom defenders, who opposed them).

244. See Levine, supra note 2, at 210 (discussing the conflict of interest that inhibits Massachusetts public defenders from challenging the lack of due process in the imposition of attorneys' fees).

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defendant as the court imposes recoupment, and are held responsible for raising objections to the amount imposed, any lack of due process, or the defendant’s ability to pay. Where defense counsel or their employers benefit directly from the recoupment order, it is difficult to see a way around this conflict. Defendants could be given elaborate disclosures and asked to waive the conflict, but this kind of conflict is probably not waivable. Where defense counsel is responsible for submitting the bill, counsel has an unavoidable conflict with respect to challenging the amount of recoupment. Defendants could be assigned “conflict counsel,” solely for the purpose of post-conviction proceedings to impose recoupment, but such a program would be prohibitively expensive. Only where defense counsel has nothing to do with setting the amount of the fee and where counsel does not stand to benefit from the recoupment order can a conflict of interest be avoided.

Contribution programs, too, can lead to conflicts of interest, especially if administered by public defender agencies. “Defenders face the temptation of using the fee to control a burdensome caseload by stressing the costs of representation to defendants already sitting on the fence [considering a waiver of counsel].” Where fees become an important part of the indigent defense budget, counsel will have an incentive not to challenge them. The conflict of interest can even extend through collection procedures if the public defender is responsible for collection. Thus, studies of recoupment and contribution have recommended that collection not be carried out by a defender agency.

Finally, some jurisdictions have required defense counsel to inform the court of any change in the defendant’s indigent status. The ethical basis for this requirement is tenuous, and can also pit the attorney against the client.

246. See supra notes 161–164 and accompanying text.
247. MODEL RULES OF PROF’L CONDUCT RR. 1.7 cmt. 10, 1.8 (2008).
248. Wright & Logan, supra note 2, at 2066. In addition, having to discuss fees and collection at the start of the attorney-client relationship can damage the representation by creating distrust. Id.
249. Id.; Levine, supra note 2, at 210 (reporting that public defender agency sought increase in contribution amount to bolster public defense budget).
B. Attorneys’ Fees

Some of the due process problems with recoupment and contribution could be avoided if courts complied with the professional rules for attorney’s fees. Model Rule 1.5 sets out the requirements for fees, how to assess their reasonableness, and the client’s right to prior notice of the basis of the fee and expenses. The rule provides in part: “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated, preferably in writing, before or within a reasonable time after commencing the representation.” Imposing fees at the conclusion of representation, with no prior warning of potential liability, violates the Model Rules. Yet, as we have seen, lack of notice to the defendant of potential liability is no bar to recoupment.

C. Right to Counsel of Choice

The Rules of Professional Conduct give the client the right to hire and fire the attorney. This right is denied indigents who accept appointed counsel. Moreover, those who can afford to pay for an attorney have a Sixth Amendment right to an attorney of their choosing. Where that right is violated, for example through erroneous disqualification of counsel, the violation is so serious that the defendant need not even show prejudice or the lack of harmless error on appeal from the conviction. However, where a defendant is indigent, there is no right to demand a particular attorney. “The right to counsel of choice does not extend to

253. Some might argue that where the basis for the fee is established by statute or other rule, the defendant has constructive notice of the potential fee and how it will be calculated. But such constructive notice does not seem to comply with the spirit of the Model Rules, which stress disclosure and communication by the attorney. See Model Rules of Prof’l Conduct R. 1.5 cmt. 2 (2008). “Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.” Id.
254. See supra note 150 and accompanying text.
defendants who require counsel to be appointed for them.\textsuperscript{258} A criminal defendant may not "insist on representation by an attorney he cannot afford."\textsuperscript{259}

But if defendants are held financially responsible for the cost of appointed counsel, can the limitation on the constitutional or professional code right to counsel of choice be maintained? A defendant who complies with an order to repay the entire cost of counsel will have paid for an attorney not of his or her choosing. One response is that courts will have no way to know who is likely to repay when ruling on requests for change of counsel,\textsuperscript{260} and that very few defendants actually pay off their recoupment debts in any case. But, as the right to counsel at public expense evolves into a loan rather than a gift, withholding the right to counsel of choice appears more and more untenable. And what of a defendant who pays a significant up-front contribution fee? Should that defendant be entitled to at least a limited right to counsel of choice, or is that right dependant on payment in full before trial?\textsuperscript{261}

Even if there is no constitutional violation in denying indigent defendants a choice of lawyers, defendants may be resentful of having to pay for an attorney who was foisted upon them. This resentment could impede rehabilitation. Resentment could also poison the attorney-client relationship where the recoupment obligation is imposed before trial, as with contribution. Defendants will be especially bitter if they are aware that those who can afford to hire a private attorney have not only a constitutional right to choose their lawyer, but also the authority to hire and fire their attorney under the Model Rules of Professional Conduct.\textsuperscript{262}

VII. RECOUPMENT AND CONTRIBUTION ARE BAD POLICY

Recoupment and contribution are not good policy. As the preceding analysis shows, too often programs devolve into punishment that violates the Constitution in a number of ways, and

\textsuperscript{258} Id. at 151; see also Holly, supra note 256, at 182 n.7.

\textsuperscript{259} Wheat v. United States, 486 U.S. 153, 159 (1988). The Fourth Circuit Court of Appeals has gone so far as to find that indigent defendants do not even have the right to choose an attorney willing to represent them \textit{pro bono}. Miller v. Smith, 115 F.3d 1136 (4th Cir. 1997) (en banc) (holding no constitutional violation where Maryland provided free trial transcript to indigent criminal appellants only where indigents were represented by the state public defender, but not when represented by \textit{pro bono} counsel).

\textsuperscript{260} Holly, supra note 256, at 221.

\textsuperscript{261} See id. (arguing that reimbursement laws bolster an already strong argument for extending the right to counsel of choice to indigents).

\textsuperscript{262} See MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008).
recoupment may compromise legal representation by causing ethical violations. In addition, recoupment is rarely cost-effective, and not worth the chilling effect on the right to counsel. Recoupment adds to the already extraordinary financial burdens put upon those convicted of crimes, weighing most heavily on precisely those defendants who wish to turn away from a life of crime but having no effect on hardened recidivists who have no intention of paying their debts. Finally, recoupment and contribution do not serve any of the legitimate goals of punishment.

Recoupment and contribution are just one more line item on a growing list of defendant obligations creating a crushing financial burden. The trend in recent years has been to charge those convicted of felonies for numerous consequences of conviction.263 “Criminal justice agencies are increasingly fee-driven.”264 In addition to the traditional fines and restitution, many jurisdictions charge for the costs of incarceration, costs of probation, costs of DNA testing, costs of electronic detention, costs of counseling, costs of drug and alcohol testing, and impose special assessments for particular programs.265 These costs quickly add up, even for relatively minor crimes.266 When the total obligation becomes unmanageable, compliance is more difficult and offenders may lose the motivation to “go straight.”267 A recent study found that “[f]inancial pressures and paycheck garnishment resulting from


264. McLEAN & THOMPSON, supra note 43, at 8. “[A]dministrative assessments on citations fund nearly all of the Administrative Office of the Court’s budget in Nevada. In Texas, probation fees made up 46 percent of the Travis County Probation Department’s $18.3 million budget in 2006.” Id.


266. For example, one case study of a New York defendant convicted of driving while intoxicated showed total financial obligations of $8,795 that he would have to pay over five years of probation, in addition to $26,000 worth of child support he would owe during that period. McLEAN & THOMPSON, supra note 43, at 14.

267. See Barry R. Ruback et al., Perception and Payment of Economic Sanctions: A Survey of Offenders, 70 FED. PROBATION 26 (2006) (researching reasons for widespread non-payment of sanctions, the authors found that economic difficulty was a significant reason, along with confusion about the purpose of the sanctions and a perception of unfairness). But see Olson & Ramker, supra note 54, at 43 (finding in a study of Illinois probationers that an increase in the total amount of fees and fines imposed increased the likelihood that the probationer would make payments). The Olsen and Ramker study also found, however, that courts were more likely to impose fees on those who were employed and likely to be able to pay. Id. at 33–34.
unpaid debt can increase participation in the underground economy and discourage legitimate employment.\footnote{268}

By definition, indigent defendants are among the poorest of society. An arrest record, and especially a conviction, will make it difficult to find work and move out of this economic bracket.\footnote{269} Most incarcerated people are parents of minor children who continue to accrue large child support obligations, and who leave prison or jail with thousands of dollars of child support debt.\footnote{270} It makes little sense to place an additional financial obstacle before those trying to rehabilitate, when there are already other significant debts, and when that additional obligation is so closely tied to the exercise of a constitutional right.

There is also a strong argument that the criminal defense attorney serves not only the defendant's interests, but also the state's interest in reliable and fair determinations of guilt or innocence.\footnote{271} Such reliability and fairness are essential to the legitimacy of the criminal justice system. Given the defense attorney's important role in ensuring this legitimacy, it makes sense for the state to continue to bear the costs of defense for the indigent, just as it bears the costs of the court system for rich and poor alike.

Finally, even if recoupment and contribution are seen as properly part of the punishment for the offense, they make poor penalties because they do not serve any of the purposes of punishment: deterrence, rehabilitation, retribution or incapacitation.\footnote{272} Deterrence is served by recoupment only to the extent one believes that any monetary penalty is a deterrent to crime.\footnote{273} The

\begin{itemize}
\item \footnote{268} McLean & Thompson, supra note 43, at 8.
\item \footnote{269} Id. at 7.
\item \footnote{270} Id. at 7, 25.
\item \footnote{271} As one early and influential report put it:
\begin{quote}
It is not only the interests of accused persons that require attention be given to the problems of poverty in criminal law administration. Other and broader social interests are involved. We believe that the problems considered in this report [representation of the poor in criminal courts] concern no less than the proper functioning of the rule of law in the criminal area and that therefore, the interests and welfare of all citizens are in issue . . . . The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions.
\end{quote}
\item \footnote{272} These are the four classic justifications for punishment. See Ewing v. California, 538 U.S. 11, 25 (2003); see also 18 U.S.C. § 3553 (2006); Eser, supra note 172.
\item \footnote{273} See United States v. Merric, 166 F.3d 406, 410 (1st Cir. 1999) ("That monetary payments deter crime is the notion that underlines the elaborate code of fines reflected in the Federal Criminal Code and the Sentencing Guidelines.").
\end{itemize}
marginal deterrent value of recoupment, considering the other costs, fines and assessments imposed on many criminal defendants, is questionable. If recoupment deters anything, it deters accepting an appointed lawyer—which only supports the argument that recoupment chills the exercise of Sixth Amendment rights. Deterrence arguments, then, might prove too much by underscoring how reluctant defendants may become to accept appointed counsel in the future. Thus, the justification of deterrence is weak.

Rehabilitation is not served by recoupment, although it is a commonly asserted justification. Some argue that indigent defendants will learn responsibility, independence, and even gain self-esteem through repayment. No empirical evidence supports this assertion. It is more likely that a repayment obligation will impede rehabilitation by adding to already overwhelming financial obligations, which may include fines, restitution, costs, housing, and child support. In jurisdictions that allow interest to accrue on the defendant's legal financial obligations, even dutiful defendants may find it difficult to keep up with interest by making what small payments they can afford.

Increasingly, states impose "user fees" on defendants. Prisoners pay the cost of incarceration, probationers pay the cost of probation, sex offenders often pay the cost of mandated therapy. Recoupment and contribution can be seen as part of the general trend toward privatization. It is difficult, however, to see how the additional obligation of repaying the cost of an attorney, who was not chosen and who did not prevail, will enhance rehabilitation. It could just as well "embitter[] the probationer who views this use of probation as extortion or threatened imprisonment for debt." A large debt may remove the incentive to get a job, rather than motivate employment and it may drive defendants into the underground economy. Because the amount of fees has little to

275. See supra notes 190–192 and accompanying text.
276. Leen, supra note 274, at 114 & n.118.
278. See, e.g., Madison v. State, 163 P.3d 757 (Wash. 2007) (noting that one plaintiff in this voting rights case paid $10 per month and was unable to keep up with the accruing interest on her debt to the state).
280. Wright & Logan, supra note 2, at 2051–52.
do with the crime and is not tied to the severity of the defendant's conduct, but rather to the complexity of proceedings, the defendant may not feel the fees are fair, which could also promote embitterment. The rehabilitative justification thus is dubious.

Retribution is poorly served by recoupment because the amount imposed bears no relation to the severity of the crime, but rather is determined by the complexity of the case and the attorney's efforts. The amount may also be driven by the prosecution: if the prosecutor causes a mistrial, the defense fees go up. If the defendant prevails on appeal and wins a new trial, the defense fees are doubled. There is thus no proportionality—the hallmark of retribution—between the crime and the amount of recoupment.

Finally, incapacitation, the fourth classic justification of punishment, is not served at all by recoupment and contribution. The obligation to pay attorney's fees does nothing to incapacitate the defendant from committing additional crimes.

VIII. Recommendations

The American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have taken positions against recoupment in general, and specifically against recoupment as a condition of probation or parole. Their recommendations are a start, but the preceding sections of this article demonstrate the acute need for additional guidelines.

A. The ABA and NLADA Positions

The ABA has taken a position against recoupment, "except on the ground of fraud in obtaining the determination of eligibility." However, it has approved contribution, defined as "payment at the time counsel is provided or during the course of proceedings." The full black letter standard provides:

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.
(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(C) Contribution should not be imposed unless satisfactory procedural safeguards are provided. 287

Although the black letter standard clearly opposes reimbursement, the comments set forth alternative procedural safeguards to be used in recoupment programs if the primary recommendation is not followed. 288

The ABA’s conditional approval of contribution was based on the assumption that contribution was a less onerous alternative to recoupment; an assumption that turned out to be unwarranted. 289

In 2004, the ABA House of Delegates adopted “Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases,” elaborating on the “procedural safeguards” referred to in subsection (c) of the black letter standard. 290 The report that accompanied the guidelines noted the rise of public defender “application fees” that were

287. Id.
288. Id.

When recoupment is practiced, even though not recommended here, appropriate procedural safeguards should be created. The most significant of these safeguards, as gleaned from the cases and statutes, are:

- the right to notice of the potential obligation;
- the right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings;
- the right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs;
- the right to all civil judgment debtor protection;
- the right to petition for remission of fees, in the event of future inability to pay;
- notice that failure to pay will not result in imprisonment, unless willful;
- notice of a limit, statutory or otherwise, on time for the recovery of fees;
- adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs;
- where any of these rights are relinquished, the execution of a voluntary, knowing and intelligent written waiver, as is required in any instance concerning the constitutional right to counsel.

Id.

289. Wright & Logan, supra note 2, at 2064–65.
290. Am. Bar Ass’n, Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases (Aug. 2004) (adopted by ABA House of Delegates as Recommendation No. 110), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf. The guidelines urge a pre-imposition determination of ability to pay, giving the defendant the opportunity to present information and witnesses on the determination, that counsel should not be responsible for collection, that the defendant should be able to petition for a waiver, and that defendants should be given notice of the potential contribution obligation prior to assignment of counsel.
applied to all indigents, regardless of ability to pay, and stated that
the purpose of the new guidelines was to apply the safeguards of
Frank v. Oregon to contribution programs.291

The NLADA issued guidelines in 1976 that approve of the de-
fendant making a "limited cash contribution" to the cost of
defense if it will not impose "a substantial financial hardship upon
himself or his dependents."292 The NLADA also recommended a
pre-imposition determination of ability to pay any contribution,
and that payment not be made directly to counsel.293 Finally, the
NLADA recommended a formula to ensure that contribution is
limited:

[T]he contribution should not exceed the lesser of (1) ten
(10) percent of the total maximum amount which would be
payable for the representation in question under the assigned
counsel fee schedule, where such a schedule is used in the
particular jurisdiction, or (2) a sum equal to the fee generally
paid to an assigned counsel for one trial day in a comparable
case.294

Both the ABA and the NLADA take the position that non-
payment of contribution should never be a ground for

291. Id. at 3-7.
292. NAT'L STUDY COMM. ON DEF. SERVS., NAT'L LEGAL AID & DEFENDER ASS'N,
GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, SUMMARY OF RECOMMEN-
DATIONS, Guideline 1.7 (1976) [hereinafter NLADA GUIDELINES], http://www.nlada.org/
293. NLADA STANDARDS, supra note 250, Standard 2.4 (1989), http://www.nlada.org/
Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel:

(a) Persons eligible for representation by assigned counsel (Standard 2.3)
    shall not be asked to contribute toward, nor to reimburse the jurisdic-
tion for, the cost of assigned counsel.

(b) Jurisdictions that do require payment by eligible persons of some por-
tion of the cost of assigned counsel shall establish a procedure for
determining the amount of contribution to be paid. This procedure
shall be implemented prior to or early in representation by assigned
counsel, and shall include a hearing on the ability of person to pay.

(c) Any payment by or on behalf of a person represented by assigned coun-
sel toward the cost of representation shall be made to a fund or
through a mechanism established for that purpose, and not directly to
assigned counsel. Assigned counsel shall not be responsible for collec-
tion of payment.

(d) Payment toward the costs of representation by assigned counsel shall
never be made a condition of probation or other sentence-related su-
294. NLADA GUIDELINES, supra note 292, Guideline 1.7(b).
incarceration.\textsuperscript{295} These organizations' policy statements are supported by the way in which recoupment and contribution have operated during the last thirty years. This history also underscores the need for some additional recommendations, in the event governments do not accept the primary recommendation to do away with recoupment.

\textit{B. Proposed Guidelines to Protect the Right to Counsel for Indigents}

The following recommendations are based on the ABA and NLADA positions, as well as recommendations in the 1986 Spangenberg study,\textsuperscript{296} and the preceding study of caselaw and statutes since \textit{Fuller}.

First, recoupment should be abandoned. Defendants should not be penalized for being poor and exercising a constitutional right.

Second, contribution should only be in nominal amounts that defendants can pay at the time of assignment or shortly thereafter, upon a judicial finding of financial ability. The defendant should be clearly informed that, if indigent, contribution cannot be required as a condition of appointment of counsel. Contribution should not become a loan or long-term obligation.\textsuperscript{297}

Alternatively, if recoupment is not abandoned, it should be a purely civil obligation. It should not be part of the criminal sentence because it can too easily be lumped together with other penalties and fees that attach to conviction. It should be enforced just as any other civil obligation, and the defendant should never be subject to incarceration for non-payment.

If contribution is imposed as a debt, then it must only be done with all the procedural safeguards of recoupment. (See below.)

If recoupment is not abandoned, the following procedural safeguards should be observed:

- The defendant must be notified, at the time he or she applies for counsel, of the potential recoup-

\textsuperscript{295} NLADA \textit{STANDARDS}, supra note 250 (stating payment of contribution should never be a condition of probation or other sentence-related provision); Am. Bar Ass'n, \textit{supra} note 290, at 4 ("Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.").

\textsuperscript{296} \textit{SPANGENBERG ET AL.}, supra note 11, at 70–73; NLADA \textit{STANDARDS}, supra note 250; Criminal Justice Standards Comm., Am. Bar Ass'n, \textit{supra} note 285, at 5-7.2(a).

\textsuperscript{297} Another possible reform would be to simply provide credit to the accused to hire counsel of choice on reasonable terms—a kind of guaranteed loan. Given the problems that have arisen when private attorneys compete for public defense contracts, and the clear benefits of professional public defense offices, such a policy seems unwise. See \textit{supra} note 245 and sources cited therein.
ment obligation as well as the proper procedure for imposing the obligation. This notice should include the basis on which the fee will be calculated.

- The defendant must be notified of the conflict of interest with defense counsel on this issue if defense counsel will be responsible for determining the amount of the obligation or if defense counsel has a financial interest in a recoupment order.

- The court imposing the obligation must make a pre-imposition determination of ability to pay. The defendant must be given notice and an opportunity to be heard on the issue of ability to pay. The court must have the authority to waive all or part of the obligation.

- The defendant must be given notice and an opportunity to be heard on the amount of the obligation. Actual records of counsel's efforts and other defense expenses must support any obligation ordered.

- The defendant must be allowed to petition the court at any time for remission of the obligation. Payment of recoupment should never be a condition of probation or parole.

IX. CONCLUSION

The idea that indigent criminals should have to pay for the costs of their defense greatly appeals to many. After all, as the Fuller court noted, non-indigents have to struggle with the high cost of legal representation. Moreover, many people believe that it is the wrongdoing of the convicted that creates the necessity for the expense in the first place. Even though defense counsel's presence ensures the legitimacy of the criminal justice system, and thereby protects all of us, many still ask: why should the community as a whole bear this entire burden, a burden that makes up a large part of the budget of struggling state and local governments?

The past thirty years have proven the appeal of recoupment to be false. For the most part, constitutionally implemented contribution and recoupment programs are not cost-effective.

298. Such notice will not be enough to cure the conflict, but at least the defendant will be informed and have the opportunity to object.
Furthermore, there has been a tendency in many jurisdictions for the programs to become punitive. Defendants are paying a penalty for being poor and choosing to exercise their Sixth Amendment right to counsel. Recoupment obligations are being imposed without basic due process protections, and many defendants make payments under threat of incarceration. Moreover, recoupment is just one of a large number of financial obligations imposed upon a group little able to bear those obligations.

The Supreme Court set the stage for this devolution into punishment when it approved the Oregon recoupment statute in Fuller in 1974. Although the statute at issue there had a number of safeguards for defendants, it allowed recoupment to be made part of the sentence and to be enforced as a condition of probation. As a result, many jurisdictions treat recoupment more like a fine than the recovery of what is essentially a civil obligation. The state's only legitimate interest in recoupment is the recovery of the cost of counsel from those who have the ability to pay. This interest does not justify treating recoupment as a penalty, especially as it is a penalty on the exercise of a constitutional right.

Ultimately, recoupment is bad policy. It does not bring in sufficient revenue to justify the problems it creates, such as conflicts of interest with defense counsel, and it adds to an increasingly overwhelming financial burden on convicted defendants. It is time to give up on the idea that those deemed too poor to afford an attorney should qualify for a loan. The promise of Gideon, that a poor person accused of a crime will be provided counsel by the state, cannot be financed by the poor.