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Reimbursement of Defense Costs as a Condition of Probation for Indigents

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COMMENTS

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I. INTRODUCTION

In order that "the kind of trial a man gets . . . [will not depend] . . . on the amount of money he has,"[1] the Supreme Court in a series of landmark decisions[2] has required the states to accord indigent defendants in criminal cases many of the rights theretofore available only to those who could afford to assert them. As a result, the states have joined the federal government[3] in bearing the financial burden of providing, at their own expense, an increasing number of legal services for indigent defendants.

In an effort to recoup a portion of the public monies so expended, some state and federal courts have required convicted indigents to reimburse the government for the cost of the legal services provided. One method of recoupment requires the unsuccessful indigent to make reimbursement of costs as a condition of probation.[4] Typically, the probationer must reimburse the government in the form of small weekly or monthly installments. Payment may include the cost of court-appointed counsel, free transcripts, filing fees, and other government-provided legal assistance.

It is extremely difficult to obtain precise information concerning the prevalence of this practice. There is only one reported case on the subject,[5] and empirical evidence is almost wholly lacking because of the wide discretion granted sentencing courts in imposing probation conditions, and because of the reluctance of appellate courts to review the exercise of that discretion.[6] However, courts have frequently imposed costs on nonindigent probationers,[7] and in

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

2. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). The scope of these and other decisions concerning legal assistance for indigents is discussed in the text accompanying notes 11-37, *infra*.

3. Many of these rights have been guaranteed in federal courts for a number of years, either by virtue of court decisions, *see, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938), or by virtue of legislative action, *see, e.g.*, The Criminal Justice Act of 1964, 18 U.S.C. § 3006 A (1964).

4. *See* D. OAKS, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 58-59 (Comm. Print 1969).

5. On June 19, 1969, while this Comment was in the final stages of printing, the Supreme Court of California held that the imposition of such a reimbursement condition was unconstitutional since it violated the defendant's free exercise of his sixth amendment right to counsel. *In re* Jennifer Grey Allen, Crim. No. 12,718 (Cal., filed June 19, 1969); L.A. Times, June 21, 1969, pt. 2, at 1, col. 4.

6. *See* text accompanying notes 44-65 *infra*. *But see* note 5 *supra*.

7. *See, e.g.*, People v. Marks, 340 Mich. 495, 65 N.W.2d 698 (1964); *Ex parte* Sethers, 151 Tex. Crim. 553, 209 S.W.2d 358 (1948). *See also* Comment, *Conditions of Probation Imposed on Wisconsin Felons: Costs of Prosecution and Restitution*, 1962 WIS. L. REV. 672.

many jurisdictions the statutes which authorize such a probation condition with respect to solvent probationers seem broad enough to include indigents as well.[8] Moreover, two recent studies[9] have unearthed specific data which verify that the condition is, in fact, being imposed on unsuccessful indigent defendants in a number of jurisdictions, both federal and state.[10] Clearly, then, at least some courts have required reimbursement by indigent defendants as a condition of probation. The purpose of this Comment is to examine the constitutional validity and practical wisdom of imposing such a condition.

II. Scope of State Responsibility to Indigent Defendants

Before considering the legal and practical problems presented by the mandatory reimbursement of costs as a condition of probation, it is important to examine the scope of state and federal responsibility to provide free services to the indigent. By far the most expansive and probably the most expensive right which the courts must now afford indigents is the right to counsel. Court-provided counsel is required, unless the right to it is waived, at all felony trials[11] and at all other stages of a felony prosecution which are deemed "critical" to the determination of guilt or innocence, or to the assurance of a fair trial.[12] Thus, counsel may be required not only at trial, but also at in-custody interrogations,[13] arraignments,[14]

In some cases the amount of reimbursement has been based on the total cost of the litigation or a fraction thereof. *See, e.g.*, Commonwealth v. Keenan, 178 Pa. Super. 461, 116 A.2d 314 (1955). In other cases the probationer has been required to reimburse the state for only a specific part of its expenses. *See, e.g.*, State v. Welkos, 14 Wis. 2d 186, 109 N.W.2d 889 (1961); State v. Hardin, 183 N.C. 815, 212 S.E. 593 (1922). The court also may prescribe payment in terms of a specific amount unrelated to the total costs or any specific expense. Quality Egg Shippers v. United States, 212 F.2d 417 (8th Cir. 1954); State v. Barnett, 110 Vt. 221, 3 A.2d 521 (1939).

8. In some states the imposition of costs is specifically authorized as a condition of probation. *See, e.g.*, Colo. Rev. Stat. Ann. § 39-16-7 (1963); Wis. Stat. § 57.01(1) (1961); W. Va. Code Ann. § 62-12-9 (1966). In other jurisdictions, statutes generally providing for probation conditions are broad enough to encompass imposition of costs. *See, e.g.*, statutes cited in note 44 *infra*.

9. *See* D. Oaks, *supra* note 4, at 58-59; Kamisar & Choper, *The Rights to Counsel in Minnesota—Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 23-27 (1963).

10. A few courts have required solvent probationers to reimburse the state for expenses incurred by the prosecution. *See, e.g.*, State v. Welkos, 14 Wis. 2d 186, 109 N.W.2d 889 (1961) (cost of utilizing a private prosecutor); Commonwealth v. Keenan, 178 Pa. Super. 461, 116 A.2d 314 (1955) (one half of the prosecution costs). Apparently, however, reimbursement by indigent probationers has been limited to the cost of their defense.

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

12. *See* United States v. Wade, 388 U.S. 218 (1967); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

13. Miranda v. Arizona, 384 U.S. 436 (1966).

14. Hamilton v. Alabama, 368 U.S. 52 (1961).

preliminary examinations,[15] police line-ups,[16] and other pretrial stages of the prosecution.[17] After trial, counsel must be provided for the purpose of making a direct appeal from a felony conviction,[18] and probably for the purpose of mounting a collateral attack through a habeas corpus petition.[19] In addition, counsel is required at certain post-sentencing proceedings which are part of the correctional process, notably at probation and parole revocation hearings.[20]

It is unlikely that the list of judicial proceedings in which the indigent is entitled to assigned counsel has been exhausted. For example, counsel may be required at an increasing number of juvenile proceedings,[21] and there is growing support from commentators[22] and courts[23] for the recognition of a constitutional right to appointed counsel at all misdemeanor prosecutions. As one important study concludes, "Indigent persons may find that they . . . have been awarded absolute rights to assigned counsel . . . *everywhere* a rich man may appear with counsel."[24] Because of the high percentage of indigent criminal defendants,[25] the assertion of their

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

16. United States v. Wade, 388 U.S. 218 (1967).

17. For a general discussion of right to counsel prior to arraignment, *see* Annot., 5 A.L.R.3d 1269 (1966).

18. Douglas v. California, 372 U.S. 353 (1963). Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961), Gerard, *The Right to Counsel on Appeal in Missouri: A Limited Inquiry into the Factual and Theoretical Underpinnings of Douglas v. California*, 1965 WASH. U. L.Q. 463.

19. Johnson v. Avery, 37 U.S.L.W. 4128 (U.S. Feb. 24, 1969); Ashworth v. United States, 391 F.2d 245 (1968). *See also* Boskey, *supra* note 18, at 799-801.

20. Mempa v. Rhay, 389 U.S. 128 (1967). See also Cohen *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961); Note, *Parole Revocation in the Federal Systems*, 56 GEO. L.J. 705, 721-23 (1968). *But see* Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Lawson v. Coiner, 291 F. Supp. 79 (N.D. W. Va. 1968); Wingo v. Lyons, 432 S.W.2d 821 (Ky. 1968).

21. The Supreme Court has upheld the right to counsel in juvenile proceedings which could lead to confinement. *In re* Gault, 387 U.S. 1 (1967).

22. *See, e.g.*, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968). *See also* Address of Dean Francis Allen of the University of Michigan Law School, at the University of Virginia Law School, April 11, 1969.

23. *See, e.g.*, James v. Headley, 37 U.S.L.W. 2611 (5th Cir. April 9, 1969); Boyer v. City of Orlando, 402 F.2d 1966 (5th Cir. 1968); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); State v. Borst, 378 Minn. 388, 154 N.W.2d 888 (1967).

24. Kamisar and Choper, *supra* note 9, at 7.

25. An estimated thirty to sixty per cent (depending on the jurisdiction) of all those charged with felonies cannot afford to employ counsel. *See, e.g.*, E. BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951); SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 80, 134-35 (1959); Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE COURTS 152, 154 (1967) (app. D) (estimating a median figure of 58% for all the states). For

rights would impose a great financial burden on the state and federal governments.

Furthermore, legal assistance to indigents is not limited to providing counsel. Even before expanding the state responsibility for providing counsel, the Supreme Court moved to compel the provision of other kinds of services needed to obtain "equal justice" for indigents. In *Griffin v. Illinois*,[26] the Court recognized that indigents are entitled to means of obtaining appellate review of criminal convictions on an equal basis with nonindigents. Specifically, the Court held that if transcripts of trial proceedings are needed to obtain review, the state must provide indigents with those transcripts free of charge. Subsequent decisions by the Supreme Court expanded the scope of *Griffin*'s equal protection principle. For example, the Court has held that courts may not limit the indigent's access to appellate review or post-conviction relief by requiring the payment of a filing fee,[27] or by conditioning the provision of a free transcript on a "nonfrivolous" allegation that grave or prejudicial errors had occurred at trial.[28] In addition, the Court has extended the right to a free transcript to include transcripts of coram nobis hearings,[29] habeas corpus hearings,[30] evidentiary hearings,[31] and preliminary hearings.[32]

While these decisions have greatly expanded the scope of state and federal responsibility, their potential impact is even greater.[33] If the quality of a man's defense is not to rest on the amount of money he has, a broad range of collateral assistance to indigents becomes necessary. In fact, without certain kinds of collateral assistance, court-appointed counsel and the waiver of various fees and costs will often become empty promises of equal justice. For example, payment of expert witness fees and reimbursement of investigatory expenses could be even more critical to the defense of an indigent than court-appointed counsel.[34] Recent develop-

the estimated number of indigent misdemeanor defendants, *see* Junker, *supra* note 22, at 716.

26. 351 U.S. 12 (1956).

27. *See* Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

28. *See* Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington State Board, 357 U.S. 214 (1958) (per curiam). *See also* Hardy v. United States, 375 U.S. 277 (1964).

29. Lane v. Brown, 372 U.S. 477 (1963).

30. Long v. District Court of Iowa, 385 U.S. 192 (1966).

31. Gardner v. California, 393 U.S. 367 (1969).

32. Roberts v. LaVallee, 389 U.S. 40 (1967).

33. For analyses of the potential impact on the Court's decisions in this area, *see* Kamisar and Choper, *supra* note 9; Simeone and Richardson, *The Indigent and His Right to Legal Assistance in Criminal Cases*, 8 ST. LOUIS U. L.J. 15 (1963); Willcox and Bloustein, *The Griffin Case—Poverty and Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963).

34. *See* United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963), holding that the

ments indicate that the state may be called upon to defray the cost of obtaining assistance from psychiatrists,[35] handwriting experts,[36] and accountants.[37] Indeed, in terms of practical effect, the payment of a wide range of general expenses and discovery costs seems just as vital to the indigent's defense as is the assistance of counsel. Consequently those expenses are equally appropriate objects of governmental assistance. It is clear, then, that current decisions have a substantial impact on the state and federal treasuries. However, it is questionable whether or not requiring the unsuccessful indigent to reimburse the state as a condition of probation is either a permissible or a practical means of dealing with this problem.

III. Constitutionality of Requiring Reimbursement of Costs As a Condition of Probation

A. *The Difficulty of Obtaining Review: A Threshold Issue*

Probation is a widely used sentencing technique.[38] As an alternative to imprisonment, it places primary emphasis on rehabilitation of the convicted criminal through a concept of "individualized justice."[39] The probation system is designed to promote rehabilitation by adapting flexible correctional devices to individual cases. At the same time, it affords society a measure of retribution without subjecting the convicted defendant to the frequently corrupting influence of institutional imprisonment.[40] One of the fundamental elements of this flexible approach to rehabilitation is the imposition of probation conditions by the supervising court.[41] These conditions

sixth amendment guarantee of effective assistance of counsel demands the provision for indigent defendants of reasonable attorney's fees for travel and interview of witnesses. These investigative expenses are now available to indigents in federal courts under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) (1964).

35. *See* Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965); *cf.* Greer v. Beto, 379 F.2d 923 (5th Cir. 1967).

36. *See* People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966); *cf.* State v. Hancock, 164 N.W.2d 330 (1969).

37. *See* Note, *supra* note 33, at 1055.

38. Detailed statistical data concerning the extent to which probation is employed as a sentencing device is not available in most jurisdictions. However, a few sample reports indicate that probation is frequently used. Federal reports show that on June 30, 1966, there were 38,659 persons under the supervision of the Federal Probation System. Administrative Office of the United States Courts, Persons Under the Supervision of the Federal Probation System—Fiscal Year 1966, ix (1967). Statistics for California indicate that during 1964, 13,348 persons, fifty-five per cent of those sentenced, were granted probation. California Bureau of Criminal Statistics, Delinquency and Probation in California 164-65 (1964). The Model Penal Code contemplates that probation will be the ordinary disposition of convicted defendants and that imprisonment will be the exception. Model Penal Code § 7.01 (Proposed Official Draft 1962).

39. Probation and Criminal Justice 225 (Glueck ed. 1933).

40. D. Dressler, Probation and Parole 7 (1951).

41. For a detailed study of probation conditions, *see* Best & Birzon, *Conditions of Probation: An Analysis*, 51 Geo. L.J. 809 (1963).

are intended to serve two basic purposes: They attempt to aid in rehabilitation by directing the probationer's conduct toward socially acceptable norms,[42] and they afford society a limited amount of protection from potential harm by regulating the probationer's behavior and assisting the court in its supervisory capacity.[43] By virtue of statutory authority, sentencing courts generally exercise wide discretion in determining the type of conditions to be applied in individual cases.[44] Accordingly, courts have imposed a wide variety of probation conditions. For example, they have required convicted criminals to report periodically to their probation officers,[45] to support their dependents,[46] to make restitution to the victims of their crimes,[47] to join the Navy,[48] to disclose the names of their criminal associates,[49] and to submit to sterilization.[50]

Appellate courts have generally upheld the validity of these conditions unless the trial court has grossly abused its discretion.[51]

42. J. RUMNEY & J. MURPHY, PROBATION AND SOCIAL ADJUSTMENT 89 (1952).

43. Best & Birzon, *supra* note 41, at 810.

44. In a few jurisdictions the statutes make it mandatory that the court impose a number of specific conditions in certain types of cases, but most of these statutes also grant the court discretion to impose additional conditions. *See, e.g.*, ILL. REV. STAT. ch. 38, § 117-2 (1965); W. VA. CODE ANN. § 62-12-9 (1966). In other jurisdictions the statutes specificially enumerate all conditions that may be imposed, but grant the court wide discretion in deciding whether to apply the conditions. *See, e.g.*, CAL. PENAL CODE § 1203.1 (West Supp. 1968); N.J. REV. STAT. § 2A: 168-2 (1953); TEX. CODE CRIM. PROC. art. 42.12 (1966). Finally, in a large number of jurisdictions the statutes confer broad power on the trial court to impose any condition it deems reasonable. *See, e.g.*, 18 U.S.C. § 3651 (1964) ("such terms and conditions as the court deems best"); COLO. REV. STAT. ANN. § 39-16-6 (1963) (conditions determined by the court "as it may deem best"); IDAHO CODE ANN. § 19-2601 (Supp. 1967) (conditions "as the court in its sound discretion deems necessary and expedient"); MD. ANN CODE art. 41, § 107(f) (1957) (conditions "determined solely by the judge"); MASS. GEN. LAWS ANN. ch. 276 § 87 (1968) ("such conditions as [the court] deems proper").

The Model Penal Code would authorize conditions "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." MODEL PENAL CODE § 301.1(2)(1) (Proposed Official Draft, 1962). By contrast, a few states have delegated to administrative agencies the task of formulating probation conditions. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4333 (Supp. 1966); KAN. STAT. ANN. § 62-2241 (1964); MONT. REV. CODES ANN. § 94-9830 (Supp. 1967).

45. In some states this condition is specifically authorized by statute. *See, e.g.*, ILL. REV. STAT. ch. 38 § 117-2(3) (1965); VT. STAT. ANN. tit. 28, § 1015 (1959).

46. *See, e.g.*, Popham v. Spears, 204 Ga. 759, 51 S.E.2d (1949); Commonwealth v. Gross, 324 Mass. 123, 85 N.E.2d 249 (1949); State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946); *In re* McClane, 129 Kan. 739 284 P. 365 (1930); City of New York v. Kreigel, 124 Misc. 67, 207 N.Y.S. 646 (Sup. Ct. 1924).

47. *See, e.g.*, Maurier v. State, 112 Ga. App. 297, 144 S.E.2d 918 (1965). *See also* Best & Birzon, *supra* note 41, at 826.

48. People v. Patrich, 118 Cal. 332, 50 P. 425 (1897).

49. United States v. Worcester, 190 F. Supp. 548 (D.C. Mass. 1961).

50. People v. Blankenship, 16 Cal. App. 2d 606, 61 P.2d 352 (Dist. Ct. App. 1936). The defendant in this case understandably declined probation. A similar condition was held to be an abuse of discretion in *In re* Hernandez, No. 76,757 (Cal. Super. Ct., Santa Barbara County, June 8, 1966).

51. *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181 (1967). *See also* Best and Birzon, *supra* note 41, at 811; Hink, *The Application of*

This deference to the trial court can be partially explained by the broad power conferred on the sentencing court by the probation statutes and by the very fact that the defendant was convicted.[52] However, neither of these explanations can account fully for the extreme reluctance of appellate courts to apply minimal standards of review, particularly constitutional standards,[53] to probation conditions.

In an effort to explain this reluctance further, appellate courts have traditionally relied on various theories concerning the basic nature of probation. The "act of grace" theory, for example, views probation as a privilege granted by the trial court. This theory apparently originated with *Escoe v. Zerbst*,[54] in which the Supreme Court held that a hearing was not constitutionally required before probation could be revoked; it stated: "We do not accept the . . . contention that the privilege has a basis in the Constitution . . . . Probation . . . comes as an act of grace . . . and may be coupled with such conditions in respect of its duration as Congress may impose."[55] Since *Escoe*, a number of courts have relied on the "act of grace" theory to support the proposition that a probationer may not challenge the validity of probation conditions[56] and to deny the application of constitutional standards of review. The argument is simply that any sentence less than the maximum is an act of "charity from a forgiving sovereign,"[57] and that the convicted defendant must either accept without question whatever conditions are imposed or else decline probation altogether.[58]

On practical grounds, however, the "act of grace" theory is simply not descriptive of the probation system as it exists today. The grant of probation is not a personal act of grace by the court, but an almost mechanical function of a highly institutionalized

Constitutional Standards of Protection to Probation, 29 U. CHI. L. REV. 484 (1962); Note, *A Trial Judge's Freedom and Responsibility in Administering Probation*, 71 YALE L.J. 553 (1962).

52. *See* Note, *Judicial Review of Probation Conditions*, *supra* note 51, at 202.

53. For an example of judicial reluctance to apply constitutional standards to the review of probation conditions, *see* Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945). Exceptions to this general pattern, however, are People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957) and *In re* Jennifer Grey Allen, Crim. No. 12, 718 (Cal., filed June 19, 1969).

54. 295 U.S. 490 (1935). *Cf.* Burns v. United States, 287 U.S. 216 (1932).

55. 295 U.S. at 492-93.

56. *See, e.g.*, People v. Osslo, 50 Cal. 2d 75, 323 P.2d 397, *cert. denied*, 357 U.S. 907 (1958); People v. Blankenship, 16 Cal. App. 2d 606, 61 P.2d 352 (Dist. Ct. App. 1936); State v. Giraud, 68 Wash. 2d 176, 412 P.2d 104 (1966); *cf.* Springer v. United States, 148 F.2d 411 (9th Cir. 1945).

57. Kadish, *supra* note 20, at 826.

58. "The granting of probation is entirely within the sound discretion of the trial court; a defendant has no right to probation; he does have a right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence." People v. Osslo, 50 Cal. 2d 75, 103, 323 P.2d 397, 413 (1958).

and somewhat impersonal system which administers to thousands of offenders each year.[59] The systematic grant of probation to large numbers of convicted criminals over a period of many years has removed from the process all aspects of charity.[60] Indeed, our criminal system may have reached the point at which the convicted criminal is virtually entitled to probation or to some other rehabilitative disposition rather than to incarceration for the maximum term. Moreover, whatever validity the "act of grace" theory may have as a descriptive term, it should not serve to preclude legal analysis of probation conditions according to traditional *constitutional* standards. Even if probation can to some extent be viewed as a privilege, it is now settled that the state cannot condition the grant of a privilege on illegal or unconstitutional restrictions, nor on an uninformed waiver of constitutional rights.[61] Therefore, even if courts continue to look upon probation as an "act of grace," they should apply constitutional standards in reviewing the validity of probation conditions.[62]

A second major theory advanced by trial and appellate courts to limit the application of normal standards of review is the "contract" theory. According to this theory, probation is no more than a contract by which the state promises to forgo imprisonment in return for the defendant's promise to abide by certain conditions.[63] Once the prisoner accepts probation, the argument runs, he has no right to challenge the validity of the conditions since they form his part of the "agreement."[64] The contract theory, however, should not prohibit constitutional challenges to the validity of probation conditions. As several commentators have noted,[65] probation is obviously not a mutual agreement, since the probationer is hardly in an equal position to bargain for restrictions on his behavior in return for limited freedom. The contract theory, then, relies on an

59. *See* the statistics cited in note 38 *supra*. *See also* Kadish, *supra* note 20, at 826.

60. *See* Kadish, *supra* note 20, at 827.

61. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Educ., 350 U.S. 551 (1956); Wiemann v. Updegraff, 344 U.S. 183, 191-92 (1952).

62. *See* Rose v. Haskins, 388 F.2d 91, 98-102 (1968) (Judge Celebrezze, dissenting); Best & Birzon, *supra* note 41, at 832-33; Hink, *supra* note 51; Kadish, *supra* note 20, at 826-28; Note, *Judicial Review of Probation Conditions*, *supra* note 51, at 188-91.

63. *See, e.g.*, McGrew v. Commonwealth, 308 Ky. 838, 215 S.W.2d 996 (1948); Commonwealth v. Gross, 324 Mass. 123, 85 N.E. 2d 249 (1949); State v. Collins, 247 N.C. 248, 100 S.E.2d 492 (1957); State v. Smith, 233 N.C. 68, 62 S.E.2d 495 (1950); State v. Shepherd, 187 N.C. 609, 122 S.E. 467 (1924); Glenn v. State, 168 Tex. Crim. 312, 327 S.W.2d 763 (1959).

64. "The relationship existing between the court and one granted probation under . . . [law] . . . is contractual in nature in that the court agrees with the accused the clemency by way of probation will be extended if he will perform certain requirements and conditions, the violation of which will authorize revocation of probation." Glenn v. State, 168 Tex. Crim. 312, 314, 327 S.W.2d 763, 764-65 (1959).

65. *See, e.g.*, Best and Birzon, *supra* note 41, at 832-33; Kadish, *supra* note 20, at 826-28; Note, *Judicial Review of Probation Conditions*, *supra* note 51, at 191-93. *See also*, Rose v. Haskins, 388 F.2d 91, 99-100 (6th Cir. 1968) (Judge Celebrezze, dissenting).

analogy which is inapposite to the situation at hand, and thus it cannot absolve the court from examining the constitutionality of probation conditions.

B. *Rinaldi v. Yeager*

Although there are no Supreme Court decisions dealing specifically with the constitutionality of a probation condition which imposes costs on indigent defendants,[66] the Court discussed such a condition indirectly in the recent case of *Rinaldi v. Yeager*.[67] In that case, the Court held unconstitutional a New Jersey statute which allowed the state to withhold prison wages from unsuccessful indigent defendants in order to pay for state-provided transcripts used on appeal. Because the statute did not impose a similar burden on indigents who were convicted but not imprisoned, the Court found that it constituted an arbitrary classification violative of the equal protection clause of the fourteenth amendment. In denying the state's argument that the classification could be justified on the basis of administrative convenience, since it would be difficult to demand repayment from indigents who had not been imprisoned, the Court noted that "repayment could easily be made a condition of probation or parole . . . ."[68] It cited as support a detailed study[69] which indicated that some judges in one jurisdiction "require, as a condition of probation, that the convicted indigent repay the county's expenditure for his lawyer."[70] The persuasiveness of the Court's statement, however, is undercut not only by the lack of analysis, but also by the fact that the study cited in support of that statement expressed grave doubts both as to the constitutionality and as to the wisdom of requiring reimbursement as a condition of probation.[71] Moreover, even if the dictum in *Rinaldi* could be interpreted as approval of such a condition, the fact that the constitutional validity of the condition was not at issue in that case suggests that the question is still open. The Court may have seized upon the equal protection rationale in order to avoid the difficult questions raised by the petitioner's alternative argument—that the

66. The Supreme Court of California, however, has struck down such a condition as unconstitutional. *In re* Jennifer Grey Allen, Crim. No. 12, 718 (Cal., filed June 19, 1969). *See* note 5 *supra*. Moreover, in United States v. Taylor, 305 F.2d 183 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962), the court dealt with an analogous problem on nonconstitutional grounds. Revocation of an indigent's probation had been ordered by the lower court when the defendant allegedly violated a condition of probation by failing to pay a fine. In reversing the order, the court held that revocation of probation under the Federal Probation Act, 18 U.S.C. § 3651 (1964), must take into account the probationer's indigency when the alleged violation is failure to pay a fine.

67. 384 U.S. 305 (1966).

68. 384 U.S. at 310.

69. Kamisar & Choper, *supra* note 9.

70. 384 U.S. at 310 note 5.

71. Kamisar and Choper, *supra* note 9, at 25-26.

statute in question represented an unconstitutional limitation on his right to appeal.[72] In any event, the Court in *Rinaldi* did not consider the many constitutional difficulties attendant upon the imposition of conditions.

C. *Potential Chilling Effects and the Problem of Waiver*

If convicted indigents are required to reimburse the court for the cost of their defense, they may choose to forgo counsel and other legal assistance in the first instance in order to avoid the potential burden of repayment. Such a requirement exerts what the Supreme Court has characterized in other contexts as a "chilling effect" on the defendant's freedom to exercise his constitutional rights.[73] In *United States v. Jackson*,[74] the Court held unconstitutional a section of the Federal Kidnapping Act[75] which provided that the death penalty for kidnapping could be imposed only by jury verdict. Since a defendant faced the possibility of death with a jury trial but not with trial before a judge, the Court found that the statute violated the due process clause of the fifth amendment because it discouraged unnecessarily the defendant's exercise of the sixth amendment right to trial by jury and his fifth amendment right to plead not guilty. Similarly, the requirement that an indigent defendant reimburse the state for the cost of his defense exerts a chilling effect on the exercise of his constitutional rights.[76]

For these purposes, however, the term "indigent" should be taken to refer only to one who cannot afford to pay for such assistance either at the time of arraignment and trial or during the period of probation. If a defendant is indigent merely at the time of arraignment and trial and later becomes solvent or partially solvent, and if the court adjusts the reimbursement condition of probation to the amount of payments that the probation can afford,

72. 384 U.S. at 307-08:

> Rinaldi attacked the constitutionality of this statute on the basis of our decisions defining the duty of a State, under the Equal Protection Clause and the Due Process Clause, not to limit the opportunity of an appeal in a criminal case because of the appellant's poverty. . . . A logical extension of . . . [our] . . . decisions, the appellant contends, would prohibit a State from discouraging an indigent's freedom to appeal by saddling him with the obligation of paying for the cost of a transcript in the event his appeal is unsuccessful. We do not reach this contention, however, because we find the statute constitutionally deficient upon a different ground.

73. United States v. Jackson, 390 U.S. 570, 582 (1968); *cf.* United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

74. 390 U.S. 570 (1968).

75. 18 U.S.C. § 1201(a) (1964).

76. This was apparently the basis for the California supreme court's holding that such a requirement was unconstitutional. *In re* Jennifer Grey Allen, Crim. No. 12,718 (Cal., filed June 19, 1969); L.A. Times, June 21, 1969, pt. 2, at 1, col. 4. *See* note 5 *supra*. Although the reimbursement condition may also chill the prisoner's decision to accept probation, the chilling effect rendered impermissible by the due process clause has to date been limited to the chilling of constitutional rights.

consistent with his earning capacity and family obligations,[77] then that condition would appear to be constitutionally permissible. It would not chill the free exercise of his rights so long as he knows at the time those rights arise that he must reimburse the state only to the extent that he could reasonably afford to do so.[78] While this knowledge might still have some inhibitory effect on his willingness to exercise his rights, that effect would be the same as that which a nonindigent defendant faces when he must decide whether or not to hire an attorney or to incur other defense costs.[79] In both cases, the defendant knows that he will have to pay some money but realizes that he will be able to do so without undue hardship.[80]

Since the reimbursement-of-costs requirement, when unadjusted to the defendant's ability to pay, chills the free exercise of his right to counsel and to other forms of legal assistance,[81] the question becomes whether or not that chilling effect makes the condition *per se* unconstitutional. In *Jackson* the Court stated that "the question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[82] Thus, the constitutionality of the reimbursement condition depends on whether or not it is in any sense necessary. Because the state could presumably cover the cost of services to indigents by the traditional means of increased taxation or reallocation of general revenues,[83] it does not appear that required

77. In making this adjustment, the court would not only have to make an initial determination, when imposing the condition, of what the probationer could prospectively afford, but it would also have to review that determination continually throughout the probation period in order to discover whether or not the probationer could in fact continue to pay the original amount. If it found at any time that the probationer is unable in good faith to continue payments on the schedule initially imposed, the court, in order to prevent an unconstitutional chilling effect, would be required to terminate the condition, to modify it, or to suspend it until he could resume payments.

78. The court must take pains to make this fact very clear to the indigent at the time his rights arise. If it tells him merely that he will have to repay the state for the costs of his defense without also carefully explaining that the amount and schedule of payments will be adjusted to what he can reasonably afford, the condition will have the same chilling effect as it would if it were imposed on all indigents without adjustment.

79. Thus the imposition of a court-adjusted condition would not seem to violate the equal protection clause. *See* text accompanying notes 96-99 *infra*.

80. Even if the adjusted reimbursements condition is constitutional, however, it is questionable whether or not it is wise as a practical matter. Since the primary purpose of repayment conditions is to raise revenue for the state (*see* text accompanying note 4 and following note 37 *supra*), the amount the state would receive by imposing a court-adjusted condition on an indigent should be weighed against the potential cost of administering that condition. If, for example, the cost of determining how much a probationer can afford both initially and throughout the probation period (*see* note 77 *supra*) would be quite large, and if the periodic amounts that he will be able to repay appear to be relatively small, it might not be worthwhile for the court to impose the condition.

81. *See* text accompanying notes 76 *supra*.

82. 390 U.S. at 582.

83. In this regard, it should be noted that some courts have imposed the condition

reimbursement is necessary for the state to pay its costs. Thus, the argument for necessity must be made with respect to the effect of the condition on the indigent himself. In this regard, it might be suggested that required reimbursement is necessary for effective rehabilitation. However, whatever the practical rehabilitative merits of required reimbursement,[84] the gamut of other rehabilitative devices and conditions available[85] and the fact that rehabilitation of nonindigent probationers has traditionally been possible without requiring payment of any kind indicate that the reimbursement condition is not necessary to the rehabilitation process.

It might be argued, however, that although required reimbursement of costs is not generally necessary, it is necessary in the case of indigents in order to deter false claims of indigency[86] and frivolous defenses and appeals. Repayment as a condition of probation would undoubtedly have the desired deterrent effect; persons with spurious claims of indigency would be deterred from asking for counsel and other legal assistance. Such a deterrent, however, would not operate selectively on those defendants with false claims. True indigents with meritorious defenses would also be deterred from asserting their constitutional rights. Moreover, if it is in fact necessary to deter as many false and frivolous claims as possible, it does not follow that mandatory reimbursement is the most appropriate method. Several other techniques, including the straightforward proposal for extensive investigation of each claim at the time it is presented, would seem to be more efficient.[87] Thus, it appears that the chilling effect of the mandatory reimbursement condition on an indigent's free exercise of his constitutional rights cannot be justified on the basis of necessity.

A closely related constitutional objection is that an indigent defendant cannot make a valid waiver of his right to legal assistance after he has been advised of the possibility of mandatory reimbursement. Generally, a valid waiver of the right to counsel, and presumably of the right to other types of legal assistance, must involve an intelligent and competent decision.[88] Because of the

on a theory of restitution. (*See* D. OAKS *supra* note 4, at 58-59). Courts have frequently imposed conditions of probation which require the convicted defendant to make restitution to the victims of his crime. *See, e.g.*, Karrell v. United States, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950); People v. Marin, 147 Cal. App. 2d 625, 305 P.2d 659 (1957). However, "the implicit analogy to the return of stolen property is not apposite in the area of legal defense services, which, it should be remembered, are constitutionally required." D. OAKS, *supra* note 4, at 59.

84. *See* text accompanying notes 108-14 *infra*.

85. *See, e.g.*, text accompanying notes 44-50 *supra*.

86. A recent study indicates that false claims of indigency are the most common abuse of the system for appointing counsel. See Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579 (1963).

87. Note, *supra* note 86.

88. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at

strong presumption against the waiver of constitutional rights, the decision to forgo counsel and other assistance must be clearly voluntary and knowledgeable.[89] Accordingly, an indigent defendant's unwillingness to undertake the obligation of repayment may so color his decision to waive his rights that the waiver could not be considered valid. Even if a court tried to keep the repayment condition secret until after appointment of counsel in an effort to remove it as a factor in the defendant's decision, repeated use of the condition will make it a matter of public knowledge. Moreover, any attempt to keep the practice secret would remove one of the primary reasons offered for its use—the deterrence of false claims of indigency.

D. *Objections Based on the Equal Protection Clause*

In recent years, the Supreme Court has focused on the equal protection clause as a bar to discrimination on the basis of economic status.[90] *Griffin,* for example, stated that "a State can no more discriminate on account of poverty than on account of religion, race, or color."[91] In this regard, imposing reimbursement as a condition of probation may result in unconstitutional discrimination against the convicted indigent.[92]

The trial court should not constitutionally be permitted to base its initial decision to grant probation solely on the indigent defendant's prospective ability to pay.[93] The convicted indigent defendant is typically an unskilled and unemployable person and his prospects for obtaining worthwhile employment at the time of his conviction may be minimal. If he is qualified for probation on all other grounds, he should not be denied the rehabilitative advantages of probation merely because of his prospective inability to

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stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

89. United States v. McGee, 355 U.S. 17 (1957) (per curiam); Von Moltke v. Gillies, 332 U.S. 708 (1948). *See also* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("courts indulge every reasonable presumption against waiver" of fundamental rights); Hodges v. Easton, 106 U.S. 408, 412 (1882).

90. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

91. 351 U.S. at 17.

92. One state court has suggested that imposition of costs on indigent defendants constitutes a denial of equal protection. *Ex parte* Banks, 74 Okla. Crim. 1, 6, 122 P.2d 181, 184 (1942) (dictum). Presumably, equal protection arguments will apply to the federal government as well as to the states, either through the due process clause of the fifth amendment, or by virtue of the Supreme Court's suprvisory power over the federal judiciary. *See, e.g.,* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("discrimination by the [federal government] may be so unjustifiable as to be violative of due process.")

93. For an analysis of the various factors which may enter into the trial judge's decision to grant probation, *see* Comment, *Probation in Philadelphia: Judicial Decision and Constitutional Norms,* 117 U. PA. L. REV. 323 (1968).

reimburse the state; to deny probation for such a reason clearly discriminates against the indigent on account of his poverty.

Similarly, once probation is granted, it should not be revoked solely because the indigent probationer is unable to make reimbursement.[94] Since such a probationer may have difficulty in obtaining steady employment,[95] he may at some point be unable to make installment payments to the state in spite of a good-faith effort. If the condition is strictly applied in these circumstances, the court will revoke probation and reinstate a prison sentence. Such a revocation is a violation of the equal protection clause since it represents an arbitrary discrimination based on the probationer's economic status.

Here against the term "indigent" should not be taken to refer to one who has become solvent at the time of probation.[96] Thus, if the court, in administering the reimbursement condition, adjusts the amount and the schedule of payments to ones which the probationer can reasonably meet,[97] and if revocation is reserved for those who refuse to make bona fide efforts to fulfill their obligations, the condition would not violate the equal protection clause.[98] In this case, the indigent is being treated in the same way as a nonindigent —he must pay for the cost of his defense but only because he can afford to do so.[99]

In connection with the equal protection argument, it is not suggested that every prisoner must be offered probation on precisely the same terms, but rather that differences in probation conditions should be justified on grounds that bear a reasonable relationship to the goals of probation, principally, rehabilitation.[100] If it is countered that the payment of money to the court has a rehabilitative purpose,[101] it is fair to ask whether or not nonindigents are being required to pay part of their earnings into a court savings account to be returned to them upon completion of probation in order to teach them financial responsibility.[102] If not, it can be concluded that the payment has no reasonable relationship to

94. Violation of a probation condition usually results in revocation of probation and reinstatement of the suspended prison sentence. *See generally* Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959).

95. *See* text following note 94 *supra*.

96. *See* text preceding note 77 *supra*.

97. *See* note 77 *supra* and accompanying text.

98. Here again, however, the practical wisdom of imposing an adjusted reimbursement condition on a probationer is dubious. *See* note 80 *supra*.

99. *See* text accompanying notes 79-80 *supra*.

100. The equal protection clause requires that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111 (1966); Carrington v. Rash, 380 U.S. 89, 93 (1965); Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

101. *See* text accompanying notes 108-14 *infra*.

102. *See* text accompanying notes 110-13 *infra*.

rehabilitation and thus results in unconstitutional discrimination against the indigent.

It can be argued on several other grounds that the reimbursement condition represents a classification which is unreasonable or arbitrary and therefore violative of the equal protection clause.[103] For example, a reverse application of the Court's rationale in *Rinaldi* indicates that it may be unconstitutional to require reimbursement from indigents on probation while not requiring it from those in prison. It has also been suggested that the probation condition is unconstitutional because it requires reimbursement from convicted defendants without also compelling repayment from those who were acquitted.[104] However, it seems that at least the distinction between convicted and acquitted defendants can be justified on rational grounds. The acquitted indigent defendant has been forced by the state to defend himself against a charge which has been proved to be without merit, and consequently he should not be required to contribute his future earnings to repay the court for the cost of his defense.

E. *Thirteenth Amendment Questions*

A final constitutional objection to the required reimbursement condition can be drawn from the recent case of *Wright v. Matthews*.[105] In that case, the Supreme Court of Appeals of Virginia reversed a lower court decree sentencing a convicted indigent to a period of imprisonment plus " 'such [further] time as may be required to pay the costs herein, unless such costs are sooner paid.' "[106] The court held that costs assessed against a convicted indigent cannot be made part of his punishment, and that the decree of the lower court imposed an involuntary servitude proscribed by the thirteenth amendment.[107] A similar analysis might be made in the situation in which the court revokes probation for failure to meet the repayment schedule. Although this situation can be distinguished from *Wright* because revocation of probation is merely a reinstatement of a suspended sentence rather than a part of the original sentence,[108] the fact remains that additional punishment is being imposed solely for nonpayment of costs. Thus, under the rationale

103. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Rinaldi v. Yeager, 384 U.S. 305 (1966); Baxstrom v. Herold, 383 U.S. 107 (1966); Reynolds v. Sims, 377 U.S. 535 (1942).

104. *See* D. OAKS, *supra* note 4 at 58.

105. 209 Va. 246, 163 S.E.2d 158 (1968).

106. 163 S.E.2d at 159.

107. For a discussion of involuntary servitude and peonage under the thirteenth amendment, see Brodie, *The Federally-Secured Right to be Free from Bondage*, 40 GEO. L.J. 367 (1952); Shapiro, *Involuntary Servitude*, 19 RUTGERS L. REV. 65 (1964).

108. *See* note 99 *supra*.

of the court in *Wright,* the revocation of probation for failure to reimburse the state might well be a violation of the thirteenth amendment.

IV. Practical Rehabilitative Merits of Requiring Reimbursement of Costs As a Condition of Probation for Indigents

Even if the constitutional objections to the required reimbursement condition are unfounded, the condition is still impermissible if it has no practical justification as a means of promoting rehabilitation.[109] Several arguments have been advanced to justify payment to the court as an aid in the rehabilitation of the probationer. It is argued, for example, that such a requirement constantly reminds the probationer of his wrongdoing and awakens his sense of obligation to society.[110] Furthermore, mandatory reimbursement is said to promote rehabilitation by directing the probationer's conduct toward socially acceptable norms, by teaching him financial responsibility, and by encouraging payment of debts.[111]

One experienced state judge has proposed a mandatory "work, earn, and save" program for an analogous situation.[112] Under this program, the financially irresponsible probationer is required to pay into court that portion of his weekly or monthly earnings which exceeds the subsistence level for himself or his family; these periodic payments go into a savings account which is paid over to the defendant at the expiration of his probation. The program is designed to help rehabilitate the probationer by teaching him the virtues of financial responsibility.[113] Perhaps a similar effect is obtained when an indigent probationer pays for the cost of his unsuccessful defense. Even though the direct financial benefit accrues to the state instead of to the probationer himself, it could be argued that the rehabilitative effects are the same: the probationer might be motivated to obtain employment, to save his earnings, to provide for his dependents, and to lead a more useful life.

Whether or not the required reimbursement condition would indeed have these salutary effects is largely a matter of speculation, since empirical data is wholly lacking. It appears, however, that the desired results would not be achieved. Unlike the "work, earn, and save" program, the probation requirement for reimbursement of

109. In theory, at least, any condition of probation must be capable of justification on the ground that it promotes rehabilitation. *See generally* J. Rumney & J. Murphy, *supra* note 42.

110. *See* Best & Birzon, *supra* note 41, at 819.

111. *Id.*

112. A. Gwynn, Work, Earn, and Save (1963) (Allen H. Gwynn is a judge of the Superior Court of North Carolina).

113. *Id.*

costs does not refund the probationer's money at the end of his term. Thus, while the "work, earn, and save" program provides positive incentive to participate, it is hardly likely that the indigent probationer would be encouraged by the knowledge that his payments will inure to the state. Moreover, the probationer will recognize that the state's real objective is to recoup whatever losses it can while he is still in its custody. Far from kindling enthusiasm to work hard and to earn money in a socially acceptable manner, then, the reimbursement condition may embitter him further, rob his incentive, and dim his enthusiasm. In this regard, one commentator has noted that probation conditions which there is no incentive to fulfill nearly always work to the detriment of the probationer.[114] Consequently, it appears highly unrealistic to expect that an indigent probationer will be in any way rehabilitated by the requirement that he repay the state for the right to assert his constitutional rights. While one might sympathize with the courts' efforts to reduce public spending in this area, it seems at least highly unwise, if not unconstitutional, to use the probation condition for that purpose.

114. Doyle, *Conditions of Probation: Their Imposition and Application*, 17 FED. PROB. 18, 20 (Sept. 1953).