Penalizing Poverty: Making Indigent Criminal Defendants Pay for their Court-Appointed Counsel through Recoupment and Contribution

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ABSTRACT

Over 30 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 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 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.

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

by Helen A. Anderson

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 chance the state will require you to reimburse them for the attorney fees.

I. Introduction

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,

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1 Assistant Professor, University of Washington School of Law. The author would like to thank Katie Schmidt for her excellent research assistance, and Gary Manca for his volunteer research help. I would also like to thank Profs. Jackie McMurtrie and John Junker for their very helpful comments. Profs. Tom Cobb and Clark Lombardi also gave me useful suggestions on an earlier draft.

2 This was one detective’s comment on the Miranda warnings he read to the accused. Cummings v. Polk, 475 F.3d 230, 239(4th Cir. 2007) (rejecting habeas petition where petitioner claimed Miranda warnings were flawed).
even lawyers,\(^3\) 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.\(^4\)

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 $10.00 to $200.00 per case, and may or may not be credited toward recoupment.\(^5\) 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 30 years ago, the Court upheld an Oregon statute that allowed sentencing courts, with a number of important procedural safeguards, to impose on convicted indigent defendants the obligation to repay the cost of their court appointed attorneys.\(^6\) The practice of ordering recoupment or contribution is now widespread. However, the history of these practices since Fuller v. Oregon\(^7\) shows that such programs all too often lead to serious constitutional violations, as well as ethical problems in the representation. Recoupment and contribution are also poor policy, serving neither fiscal interests nor the purposes of punishment. Recoupment and contribution should be abandoned or, at the very least, sharply curtailed.

\(^3\) 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 25 years. This may be changing—very recently there have been a few articles focusing primarily on practices in particular states: Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’ Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 210-213 (2007); Lola Velazquez-Aguilu, *Not Poor Enough: Why Wisconsin’s System For Providing Indigent Defense Is Failing*, 2006 WIS. L. REV. 193, 214 (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).

\(^4\) If the practice persists, however, perhaps the familiar *Miranda* warnings should be revised. See Cummings v. Polk, 475 F.3d at 239. In that case, the detective crossed out the words ‘at no cost.’ See *infra* notes 148-151 and accompanying text.

\(^5\) See *infra* Part II.


\(^7\) *Id.*
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\textsuperscript{8}—
that counsel be provided to the indigent criminal defendant—is not undercut as long as
recovery is only sought from those who have the ability to pay.\textsuperscript{9} The state has a
legitimate interest in recovering funds from those with the means to pay without
substantial hardship.

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

Jurisdictions that do not follow a narrow reading of Fuller, and do not require a
pre-imposition finding of ability to pay, as well as notice and 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 fees can affect credit and job or housing searches. Such a judgment
becomes a penalty on the right to counsel for indigents. Furthermore, basic due process is
violated if the obligation is imposed without notice and opportunity to be heard on the
ability to pay or on 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 has
applied a blended due process and equal protection test to issues involving poverty and
access to the courts—programs without the safeguards of Fuller fail this test as well. In
addition, a separate equal protection violation results when indigent defendants are

\textsuperscript{8} 372 U.S. 335 (1963).
\textsuperscript{9} 417 U.S. 40 (1974).
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 all 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.

These persistent constitutional deficiencies with recoupment and contribution are exacerbated by professional ethics problems. Recoupment and contribution may create conflicts of interest with 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 proven to be bad policy. Programs that comply with due process requirements will not be cost-effective but merely add to the heavy load of fines and costs already imposed upon convicted offenders. This burden will fall only on those who determine 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 abandoned. 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

10 See MOD. R. PROF’L CONDUCT 1.5.
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 1970’s. Part IV describes how jurisdictions have diverged since these cases 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 in jurisdictions that do not provide the safeguards of a pre-imposition determination of ability to pay and notice and opportunity to be heard on the amount and ability to pay, recoupment violates the Sixth Amendment, Equal Protection and Due Process. 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 done 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 study of statutes, cases, and what reports exist. Such sources can give only part of the picture, however, since in practice recoupment can also be governed by county rules, the particular contract terms for public defense in an area, local practice and judicial

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11 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 p. 10.
discretion. Most jurisdictions do not keep good records on enforcement and collection of recoupment and contribution.

To understand recoupment, it is important to know something about the state’s obligation to provide counsel to the indigent. In *Gideon v. Wainwright*, the Supreme Court held that indigent criminal defendants charged with felonies in state courts are entitled under the Sixth Amendment to counsel at public expense. The Court had already ruled that federal defendants were entitled to counsel under the Sixth Amendment, as were state capital defendants. Until *Gideon*, however, the Court had resisted imposing the requirement of court-appointed counsel more broadly, recognizing no doubt that the expense to the states would be substantial. But since *Gideon*, the constitutional right to counsel has expanded to include defendants charged with certain misdemeanors, many of those facing probation revocation, minors charged in juvenile delinquency proceedings, convicted defendants appealing as of right, and more. In addition, many more indigents have a statutory right to court-appointed counsel.

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12 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 [http://www.spangenberggroup.com](http://www.spangenberggroup.com). A 1986 national report discussed expenditures and cost recovery for indigent defense, including recoupment programs. ROBERT L. SPANGENBERG, NATIONAL INSTITUTE OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES (1986) (hereinafter Spangenberg, Containing the Costs of Indigent Defense). In 2001, the group followed up with a report on contribution programs. THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE (2001) (hereinafter Spangenberg, 2001 Update), available at [http://www.spangenberggroup.com/pub_list.html](http://www.spangenberggroup.com/pub_list.html). In addition, the group has done studies for individual counties and states on public defense.


19 In re Gault, 387 U.S. 1 (1967).


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 done 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. 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 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 $200.00, and defendants who do not pay contribution at the outset can be ordered to pay it as a term of their sentence or condition of probation.

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 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 fees, but also investigative


23 Studies have repeatedly shown that indigent defense is underfunded throughout the country. See, e.g., American Bar Association Standing Committee on Legal Aid and Indigent Defense, GIDEON'S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS (2004); Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 ANN. SURV. AM. L. 783, 816-821 (1999). Even so, “combined state and county expenditures on indigent defense in fiscal year 2002 totaled approximately $2.8 billion nationwide.” ABA House of Delegates recommendation 110, attached report at 1.
and expert services. In 1986, thirty-six states had statutes that authorized recoupment, and the remaining states allowed cost recovery (which might include attorney 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, if there is a mistrial, or the case is reversed on appeal. In a few jurisdictions, statutes specify that payment shall go to the appointed attorney or public defender, while most schemes suggest that payment goes to an arm of the government.

24 The order in Fuller v. Oregon included fees for a defense investigator. 417 U.S. at 42. 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).
26 Spangenberg, Containing the Costs of Indigent Defense, supra note 11, at 33.
29 People v. Bramlett, 455 N.E.2d 1092 (Ill. App. 1983) (upholding recoupment of fees incurred during mistrial); State v. Hill, 682 N.W.2d 82 (Iowa App. 2004) (unpublished) (upholding award of recoupment for fees incurred during mistrial); State v. Johnson, 662 N.W.2d 370 (Iowa App. 2003) (unpublished) (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 fees for first trial and successful appeal as well as second trial) overruled on other grounds, State v. Hendricks, 75 P.3d 1268, 1270 (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.
30 See 18 U.S.C. § 3006A(f); MO. REV. STAT. § 600.090 (2007) (directing public defender to file notice of lien); MONT. CODE ANN. § 46-8-114 (2007) (payments to be made to the office of the state public
**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.\(^\text{32}\) Some jurisdictions specifically allow contempt proceedings for non-payment, while others disallow it.\(^\text{33}\) 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.\(^\text{34}\) And a few jurisdictions authorize ordering the defendant to “work off” a recoupment debt through public service.\(^\text{35}\)

**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.\(^\text{36}\) Other jurisdictions set a schedule of flat fees for various types of cases.\(^\text{37}\)
Some courts are given great discretion in setting the recoupment amount,\(^\text{38}\) others are required to base the amount on clear evidence.\(^\text{39}\) Trial courts generally have authority to waive all or part of the fee.\(^\text{40}\)

Despite the enthusiasm for recoupment in state and local governments, such programs have never been proven cost-effective. A Justice Department study in 1984 showed that less than 10 percent of recoupment orders were collected.\(^\text{41}\) 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.\(^\text{42}\) The recoupment program reviewed by the Supreme Court in a 1972 case spent $400,000 collecting $17,000 over two years.\(^\text{43}\)

Since that case, recoupment has become just one of an ever-growing number of financial obligations imposed on convicted criminal defendants, making repayment even less likely.\(^\text{44}\) 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.\(^\text{45}\)

**Contribution**

With the realization that recoupment was not always sound fiscal policy, states began to turn to another method of cost recovery: contribution. Contribution can take

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\(^{38}\) E.g., People v. Brown, 506 N.E.2d 1059 (Ill. App. 1987) (record that trial took four days was sufficient to justify reimbursement award of $500).

\(^{39}\) E.g., Fitch v. Belshaw, 581 F. Supp. 273, (D.C. Or. 1984) (Minimum due process requires written records of the attorney’s time, among other things); People v. Poindexter, 210 Cal. App. 3d 803, 810-811 (1989) (court must review “evidence of the actual costs” before setting recoupment amount);


\(^{41}\) Richard J. Wilson, Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy, Bad Law, 3-Fall Crim. Just. 16, 43 (1988).

\(^{42}\) Spangenberg, Containing the Costs of Public Defense, supra note 11, at 33-35.


\(^{45}\) Id. at 7-8.
many forms and may be referred to as “application fees,” “co-pays,” “user fees,” “administrative fees,” or “registration fees.” Contribution usually refers to a fixed sum imposed at the time of appointment. Amounts set by statute can range from $10.00 to $200 and are usually tied to the offense charged. Contribution might also be imposed at the county level, regardless of whether there is a fee set by the state. In almost every jurisdiction, the court may waive the fee. If the defendant does not make the payment, counsel will not usually be denied, but courts might order future payment enforced through probation revocation, garnishment, or other coercive methods. 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. In some jurisdictions the contribution amount is credited toward any recoupment order, but in others it is viewed as a separate charge. Many states authorize both contribution and recoupment, but do not specify whether contribution should be credited toward recoupment.

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. Information about rates of collection is mixed. Only 6 to 20 percent of contribution is

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47 See Wright & Logan, 47 Wm & Mary L. Rev. at 2052 and n.20 (listing statutes authorizing contribution fees).
49 Florida statute apparently does not permit the court to waive the $40.00 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).
50 Wright & Logan, 47 Wm. & Mary L. Rev. at 2053-2054.
51 Wright & Logan, 47 Wm. & Mary L. Rev. at 2065.
52 For example, the following statutes specify that the contribution fee is in addition to recoupment: FLA. STAT. § 938.29 (1)(c) (2007); N.C. GEN. STAT. § 7A-455.1 (2007); N.D. CENT. CODE § 29-07-01.1 (2007). Other statutes make clear that contribution is to be credited toward reimbursement: e.g., CAL. PENAL CODE § 987.5; VT. STAT. ANN. tit. 13, § 5238 (2007).
collected, according to one study.\textsuperscript{54} Yet other studies suggest some jurisdictions are getting better at collecting fees of all kinds.\textsuperscript{55} Because appointment of counsel may not constitutionally be conditioned on payment,\textsuperscript{56} payment at the time of appointment is essentially voluntary, although indigents may not always realize this. Jurisdictions that collect the contribution fee before proceedings, rather than at the conclusion of the case, have a greater collection rate.\textsuperscript{57}

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.\textsuperscript{58} These defendants may be ordered to sign a promissory note for part of the cost.\textsuperscript{59} Or they may simply be ordered to make partial payment at the time of appointment or shortly after.\textsuperscript{60} (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 can be 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?

\textsuperscript{54} Spangenberg, 2001 Update, supra note 11at 29. Yet the same report notes that 90% of defendants in Pima County paid the $25.00 application fee. Id. at 20
\textsuperscript{55} 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). “Jurisdictions 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.
\textsuperscript{56} Hanson v. Passer, 13 F.3d 275 (8th Cir. 1994).
\textsuperscript{57} Spangenberg, 2001 Update, supra note 11at 28.
\textsuperscript{58} 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).
\textsuperscript{59} See Spangenberg, Containing the Costs of Indigent Defense, supra note 11, at 52; WASH. REV. CODE § 10.101.020 (2007).
\textsuperscript{60} Spangenberg, Containing the Costs of Indigent Defense, supra note 11, at 49.
III. Constitutional Limits of Recoupment and Contribution: James, Fuller and Bearden

In a series of decisions several decades ago, the Supreme Court upheld recoupment but made clear some of 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.\(^6\) Further, 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.\(^7\) 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.\(^8\)

In 1972, the Court struck down a Kansas recoupment statute on equal protection grounds in *James v. Strange*.\(^9\) Under the statute, the cost of defense was ordered to be paid within 60 days of the defendant 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.\(^10\)

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.\(^11\) Thus, any recoupment statute that relies on enforcement of civil judgments must not discriminate against recoupment debtors.

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\(^10\) Id. at 131, n. 3, quoting former KAN. STAT. ANN. § 22-4513
\(^11\) Id. at 141-142.
The *James* court did not endorse recoupment as a policy, and noted, “Misguided laws may nonetheless be constitutional.”\(^{67}\) The Court was struck by the harshness of the law, which removed limits on garnishment and exemptions for severe personal and family illness.\(^{68}\) The Court acknowledged the state’s legitimate interests 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.”\(^{69}\)

Two years later, in *Fuller v. Oregon*,\(^{70}\) the Court upheld an Oregon recoupment statute against various constitutional challenges. *Fuller* is 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 stated the issue before it 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.”\(^{71}\) 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 may not order repayment unless it finds the defendant “is or will be able to repay;”\(^{72}\) (3) a convicted person ordered to repay may at any time petition the court for remission if payment will impose manifest hardship on the defendant or his immediate family;\(^{73}\) 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.\(^{74}\)

\(^{67}\) *Id.* at 133.

\(^{68}\) *Id.* at 135.

\(^{69}\) *Id.* at 141-142.


\(^{71}\) *Id.* at 41.

\(^{72}\) *Id.* at 44.

\(^{73}\) *Id.* at 45.

\(^{74}\) *Id.* at 46.
The Court found the Oregon statute did not run afoul of the Equal Protection Clause under *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.\(^75\) While the dissent argued that equal protection was violated by using the threat of imprisonment through probation revocation—a threat that could not be used against convicted persons who *hired* an attorney but failed to pay—\(^76\) the majority and concurring justice found that argument not properly raised.\(^77\) 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.”\(^78\)

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. 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.\(^81\)

\(^75\) *Id.* at 47.
\(^76\) *Id.* at 60-61 (Marshall, J., dissenting).
\(^77\) *Id.* at 48, n.9; *Id.* at 57 (Douglas, J., concurring).
\(^78\) *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. The court found the distinction between those convicted and those acquitted “wholly noninvidious.” *Id.* at 49.
\(^79\) *Id.* at 51.
\(^80\) *Id.* at 53.
\(^81\) *Id.* at 53-54.
Throughout the decision, the Fuller majority relied on the Oregon statute’s limitations 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,\(^8\) the “chilling” of the right to counsel argument,\(^8\) and an argument that the statute discriminated unconstitutionally based on wealth,\(^8\) and an argument that the statute penalized the exercise of a constitutional right.\(^8\) 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, “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.”\(^8\)

The Fuller court did not give much discussion to the 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 if the default was not intentional or not in bad faith.\(^8\) Almost ten years later, however, in Bearden v. Georgia,\(^8\) the Court held that it was unconstitutional to automatically imprison a defendant who failed to pay a fine. The Court held, relying on the Due Process and Equal Protection Clauses, that for revocation of probation, the trial court must find that the defendant willfully refused to pay or did not make bona fide efforts to acquire the resources to pay.\(^8\) “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.”\(^9\)

\(^8\) Id. at 50.
\(^8\) Id. at 50-53.
\(^8\) Id. at 53, n. 12.
\(^8\) Id. at 54.
\(^8\) Id. at 54 (emphasis added).
\(^8\) Id. at 46.
\(^8\) 461 U.S. 660 (1983).
\(^9\) Id. at 672.
\(^9\) Id. at 672-673.
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, “[i]f 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.” 91 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. 92 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 suggest 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

91 Id., at 672.
92 James v. Strange, 407 U.S. at 141(noting 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).
extinguish his debt as long as his default is attributable to his poverty, not
his contumacy.93

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

Since Fuller, jurisdictions have split along several lines, and these splits seem to
stem from whether recoupment is seen as another aspect of punishment or simply
collection from those who are able to pay. Some jurisdictions see Fuller as giving a
green light to recovering attorney 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 diverge 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 it is sufficient if the court considers
the defendant’s financial circumstances when the judgment is sought to be enforced. 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

94 417 U.S. at 45.
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.\textsuperscript{95}

The requirement that the trial court make 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 fees at statutory interest rates.\textsuperscript{96} The automatic imposition of the repayment obligation on those who will never be able to repay serves no legitimate state interest, and demoralizes defendants.\textsuperscript{97}

The obligation alone, which usually is reduced to judgment, will have real impacts 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 then 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 thus 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

\textsuperscript{95} 417 U.S. at 54 (emphasis added).
\textsuperscript{96} In some jurisdictions, interest will continue to accrue during any incarceration period. Interest can be substantial. In Washington state, for example, the statutory interest rate is 12%. Wash. Rev. Code § 19.52.010. In one case, a defendant ordered to pay total costs of $1610 owed $1895.69 after making regular payments for five years, due to the accrual of interest. Madison v. State, 163 P.3d 757, 762 (Wash. 2007). In another, a defendant had served his time and paid $1,360 toward his financial obligations, but still owed the original judgment amount of $7269.11 due to accumulating interest. United States v. Louck, 149 F.3d 1048 (9th Cir. 1998).

\textsuperscript{97} See James v. Strange, 407 U.S. at 139.
\textsuperscript{98} See Madison v. State, 163 P.3d 757, 762 (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)).
\textsuperscript{100} See State v. Mitchell, 617 P.2d 298, 301 (Or. 1980) (upholding recoupment order against defendant sentenced to twenty years in prison where finding of ability to pay based on fact that defendant is “able-bodied and has demonstrated an ability to make sufficient earnings.”).
future ability to pay, some incorporate a presumption that anyone 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. A “finding” of ability to pay when the defendant has been sentenced to prison 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, where there is at least some factual determination before the obligation is imposed, the chance is lessened that the obligation will fall on the truly indigent.

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

101 E.g., ALA. CODE § 15-12-25 (2007) (“is or will be able to pay”); ARIZ. REV. STAT. ANN. § 11-584 (C) (2007) (“court shall take into account the financial resources of the defendant”); COLO. REV. STAT. § 21-1-106 (2007) (“is able to repay all or part”); IND. CODE § 35-33-7-6 (2007) (“is able to pay part”); MO. REV. STAT. § 600.090 (2007) (contribution if “no substantial hardship”, reimbursement if “becomes financially able to meet all or some part”); MONT. CODE ANN. § 46-8-113(3) (2007) (“is or will be able to pay”); N.H. REV. STAT. ANN. § 604-A:9 (2007) (“consistent with defendant’s present or future ability to pay”); N.J. STAT. ANN. § 2B:24-12 (2007) (“has or reasonably expects to have means to meet some but not all of the costs”); OHIO REV. CODE ANN. § 120.05 (2007) (“has or may reasonably be expected to have the means to meet some part of the cost”); OR. REV. STAT. § 151.505 (2007) (“is or may be able to pay”); S.D. CODIFIED LAWS § 23A-40-10 (2007) (“funds are available”); TENN. CODE ANN. § 40-14-202 (e) (2007) (“able to defray a portion or all of the cost”).

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, Containing the Costs of Indigent Defense, 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) (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. 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. Of course, the state courts could interpret such statutory language differently.
are available for payment,” which language has been interpreted to require a finding of present ability to pay. 105

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 required such a pre-imposition finding, and reversed the trial court’s order that the indigent defendant repay $513 in defense attorney costs within 60 days of sentencing. 106 Minnesota’s highest court found that its statute requiring “co-payments” ranging from $50 to $200.00 from every public defense recipient was unconstitutional because it did not allow for judicial waiver either before imposition or at enforcement. 107 A Pennsylvania court found the same constitutional requirement had been routinely violated in one of its counties, in addition to the fact that there was no statutory authority for recoupment of defense counsel fees. 108 The court noted that the trial court’s hostility toward indigent defendants could well chill the exercise of Sixth Amendment rights. 109 A federal court in Oregon held that state’s post-Fuller recoupment statute unconstitutional as it no longer contained the safeguards in the Fuller statute, including a pre-imposition determination of the defendant’s ability to repay. 110 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 fees and costs, leading to an unconstitutional chilling of the Sixth Amendment right to counsel. 111 Similarly, the Tenth Circuit Court of Appeals struck down a Kansas recoupment statute that provided for the automatic imposition of judgment in the amount

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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. Bracell, 569 F.2d 1194 (2d Cir. 1978); United States v. Jimenez, 600 F.2d 1172, 1174 (5th Cir. 1979). “Such a finding must be based on the defendant’s current assets, not on his ability to fund payment from future earnings.” United States v. Danielson, 325 F.3d 1054, 1077 (9th Cir. 2003).
107 State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004). See also State v. Jolicoeur, 742 A.2d 636 (N.J. Sup. Ct. 1999) (holding trial court violated right to counsel by refusing to consider indigency application unless defendant paid $50.00 application fee).
111 Id., at 276-277.
of attorney 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 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.112

The statute’s failure to require a finding of ability to pay was one of several reasons the court invalidated the statute.113

In contrast, a significant number of jurisdictions have dispensed with a pre-imposition determination of ability to pay altogether, finding that Bearden’s restrictions on incarceration for non-payment are 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 as long 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 the 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.114 A New Jersey statute which 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.115 A Florida court ruled similarly with respect to a lien for attorneys fees,116 as did a Pennsylvania court with respect to the imposition of costs and fees.117 In a decision currently under review by the Kansas high court, an appellate court

112 Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979).
113 Id.
116 Watrous v. State, 696 So.2d 839 (Fla. 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.
ruled that the trial court had no obligation to sua sponte address the defendant’s ability to pay a $100.00 application fee.\footnote{State v. Hawkins, 152 P.3d 85 (Kan. App. 2007) \textit{rev. granted}.}

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 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.”\footnote{State v. Kottenbroch, 319 N.W.2d 465, 473 (N.D. 1982).} The Texas court used similar reasoning to uphold its recoupment scheme, noting that the inability to pay was an affirmative defense to probation revocation.\footnote{Basaldua v. State, 558 S.W.2d 2, 7 (Tex. Crim. App. 1977). The current Texas statute retains this affirmative defense provision. Tex. Code Crim. Proc. Ann. art. 42.12 § 21(c) (2007).} The Florida 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.”\footnote{State v. Beasley, 580 So.2d 139, 142 (Fla. 1991).}

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.\footnote{State v. Hargrove, 2006 WL 564177 (Wash. Ct. App. 2006) (unpublished) \textit{citing} State v. Baldwin, 818 P.2d 1116 (Wash. App. 1991). The defendant in Hargrove was sentenced to 660 months in prison and restitution over $110,000.00. It was unlikely that the state would ever seek to enforce the judgment of $800.00 for attorney 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, 417 U.S. at 45, as well as the language of WASH. REV. CODE § 10.73.160(4) (allowing defendant to petition court for remission at any time).} 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.\footnote{State v. Blank, 930 P.2d 1213 (Wash. 1997).} 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."¹²⁴ 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—while the Washington court seems concerned that the obligation not escape anyone who might someday be able to pay.

Additional states have statutes that appear to allow imposition of the obligation to repay fees without a pre-imposition determination of ability to pay, although their courts have not addressed constitutional challenges to these provisions.¹²⁵ Moreover, 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.¹²⁶ Wisconsin regulations require that the defendant be informed at appointment of the obligation to repay, and of the defendant’s right to seek a determination of ability to pay, but no such determination will be made without a request.¹²⁷ If defense counsel has a conflict of interest with respect to recoupment, objections are unlikely.¹²⁸

Application fees and other forms of contribution raise interesting aspects of the ability to pay issue. With at least one exception,¹²⁹ 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.¹³⁰ Moreover, when the fees are neither waived nor paid, they may become part of the defendant’s sentence, condition of probation, or other order. These orders may thus be imposed without an express finding of ability to pay having ever been made.

¹²⁴ Id. at 1220.
¹²⁵ 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 caselaw.
¹²⁶ Spangenberg, Containing the Costs of Indigent Defense, supra note 11, at 34. See also, Kate Levine, If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’ Reimbursement Statute, 42 Harv. Civil Rights-Civil Liberties L. Rev. 191, 210-213 (2007) (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).
¹²⁸ See Part VI, infra.
¹²⁹ FLA. STAT. § 27.52 (b); Wright & Logan, supra note 2, at 2053.
¹³⁰ Contribution may have been seen—erroneously—by many jurisdictions as a way around the Fuller requirements for recoupment.
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 $50.00 administrative fee, the court “shall” order the defendant to report to the Department of Corrections for work to “discharge the fine.”131 In Massachusetts, the court may order 15 hours of community service in lieu of the $150 counsel fee.132 In other states, defendants may be ordered to work 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.133 Other states have considered such “work off” schemes, but they raise constitutional questions about involuntary servitude for debt under the Thirteenth Amendment.134 The practice of ordering community service in lieu of payment may exist even where there is no express statutory authority.135

B. Not all jurisdictions provide notice and a hearing before ordering recoupment or contribution

The provision of notice and hearing before ordering recoupment or contribution is related to the pre-imposition determination of ability to pay. Jurisdictions that do not require the latter generally do not require a hearing, either—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 in Fuller did not address a due process challenge to the Oregon recoupment statute, 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

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131 [DELAWARE CODE ANN. tit. 29 § 4607 (2007).]
132 [MASS. GEN. LAWS ch. 211D, § 2 ½ (g)(2007)].
133 See, e.g., [IOWA CODE § 910.2 (2007)].
134 See Opinion of the Justices, 431 A.2d 144, 151 (N.H. 1981) The court held proposed legislation requiring defendant who could not pay recoupment to work off debt would violate U.S. Const. Amend. XIII 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 1989 N.Y. Op. Atty. Gen. (Inf.) 126, 1989 WL 435042, (N.Y.A.G.), August 07, 1989, Informal Opinion No. 89-44 (“A court may not impose additional community service on an indigent defendant to repay a county for the cost of providing counsel.”).
judgment for recoupment requires compliance with procedural due process, which at the very least means notice and an opportunity to be heard. 136 Similarly, notice and opportunity to be heard are part of the minimal due process accorded a defendant facing probation or parole revocation. 137

A number of courts have required notice and hearing, based on statute or court rule, prior to imposition of the order to repay. 138 These statutory requirements are no doubt based on the constitutional requirements of due process and fundamental fairness.

Some 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. 139 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, and no hearing was provided to contest the amount or ability to pay. 140 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).” 141 The sentencing hearing may provide adequate process, as long as the defendant has notice that recoupment will be considered and can contest the order. 142

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

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136 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 fees). “The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385 (1914).


141 Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979).

statute that allowed the public defender to file a lien for services with no hearing.\textsuperscript{143} 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{144} 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 court found its state’s recoupment statute did not violate due process because a hearing would be required before probation could be revoked. These courts reasoned that the notice and hearing required to execute on 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, which may be years later, for the defendant to contest how the fee was calculated. At that point, the attorney may be long gone and records may be lost.

A Georgia court simply reasoned that notice and hearing were unnecessary because at sentencing the defense attorney discussed his fee, and the trial court had information about the defendant’s financial status in his application for appointed counsel.\textsuperscript{145} 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.

For this reason, it is troubling when courts hold any objections to recoupment or the recoupment process are waived by trial counsel’s inaction.\textsuperscript{146} These courts do not see the inherent conflict in holding trial counsel responsible for objecting to his or her own

\textsuperscript{143} Stroinski v. Office of Public Defender, 338 A.2d 202 (N.J.Super. Ct. 1975). The court also held that defendants were not misled when told at arraignment that counsel would be provided without cost. 338 A.2d at 211.

\textsuperscript{144} State v. Blank, 930 P.2d 1213 (1997).


fees.\footnote{147} It is probably because of this conflict that recoupment issues are not raised more widely.\footnote{148}

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, it 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.\footnote{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.\footnote{150}

Such notice can be double-edged. When defendants learn of their potential liability for fees, it 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,\footnote{151} 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.\footnote{152}

\footnote{147}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).
\footnote{148}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.

Of course, where recoupment is paid to a branch of government other than the public defender, and according to a fee schedule rather than counsel’s bill, there is less likelihood of a conflict of interest. \textit{See infra} Part VI.
\footnote{149}\textit{See} CAL. PENAL CODE § 987.8(f) (2007); KAN. STAT. ANN. § 22-4504(c) (2007); N.H. REV. STAT. § 604-A:9 (II); ALASKA CRIM. R. 39 (b)(2). The notice mandated in these provisions is limited. While these statutes require notice of potential recoupment, they do not specify how the fees will be calculated.
\footnote{151}\textit{See} Cummings v. Polk, 475 F.3d 230 (4th Cir. 2007) (rejecting habeas petition where petitioner claimed Miranda warnings were flawed because the interviewing officer added that petitioner might have to reimburse legal fees if found guilty).
\footnote{152}MODEL RULE OF PROF’L CONDUCT 1.5 (b).
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

The way in which recoupment or contribution is calculated 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.\textsuperscript{153} Recoupment based on the actual hourly bill is arguably fairer to individual defendants,\textsuperscript{154} but requires more administrative effort.\textsuperscript{155} A simpler method is to charge a flat fee for certain types of cases, which may vary with the type of proceedings involved.\textsuperscript{156} 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 approximate the average cost per case, then any defendant whose case requires less time than average is paying more 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

\textsuperscript{153} Spangenberg, Containing the Costs of Indigent Defense, \textit{supra} note 11, at 37-39.
\textsuperscript{154} But hourly fees can add up to enormous amounts. One of the most astonishing recoupment stories is told in a Louisiana case where the defendant was ordered to pay attorney fees and defense costs in the amount of $127,905.45, after having been tried 4 times and having served 44 years in prison, some on death row. He was ultimately convicted of manslaughter, and the recoupment order was reversed for lack of statutory authority. State v. Rideau, 943 So. 2d 559 (La. Ct. App. 2006).
\textsuperscript{155} \textit{See} Spangenberg, Containing the Costs of Indigent Defense, \textit{supra} note 11, at pp. 37-39.
\textsuperscript{156} \textit{Id}. For example, there may be a flat fee for felonies that go to trial, and a lower fee for felonies that are disposed of without a trial.
\textsuperscript{157} \textit{See} State v. Albert, 899 P.2d 103, 125-126 (Alaska 1995) (Bryner, J., dissenting) Judge Brynor’s dissent contains an extended discussion of why flat fee schedules can be unfair to defendants.
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. At some point, 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 of the attorney fees.”\textsuperscript{161} Where defense counsel presents the recoupment bill, he or she will not object to the amount.

Fees collected as contribution through “application fees” or “co-pays” are usually based on a schedule. In 2001, such fees ranged from $10.00 to $200.00.\textsuperscript{162} Even these fees could result in overpayment for services. For example, 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 $150.00.\textsuperscript{163} On a smaller scale, in one Minnesota case

\textsuperscript{158}Dees v. State, 692 So.2d 1010, 1011 (Fla. Ct. App. 1997)
\textsuperscript{159}See MODEL RULE OF PROF’L CONDUCT 1.5(a). 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). 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.
\textsuperscript{160}See, Fitch v. Belshaw, 581 F. Supp. at 278 (“summary assessments”); People v. Poindexter, 210 Cal. App. 3d 803, 810-811 (1989) (requiring evidence of actual costs to support recoupment order of $600.00); Commonwealth v. Opara, 362 A.2d 305, 312 (Pa. Super. Ct. 1976) (“There is no indication in the record that the basis for the lower court’s decision as to the amount to be reimbursed was anything but arbitrary.”).
\textsuperscript{163}Kate Levine, If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’s Reimbursement Statute, 42 HARV. C.R.-C.L.L. REV. 191 (2007). The student believed that a competent lawyer could have obtained the same result with twenty minutes of work. The student did not say whether
the attorney spent one-half hour on representation, and her hourly rate was $40.00. The
trial court ordered the defendant to pay the application fee of $28.00 in addition to $20.00
recoupment. The appellate court ordered the recoupment order stricken, holding that the
application fee must be credited toward recoupment. The court did not seem to notice
that the defendant had still overpaid by $8.00.

As one judge noted with respect to fee schedules, there seems to be as 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 comparison, however, is not
to private counsel fees but to the actual cost of the public defender. Yet even fees at the
very low end of the range can result in overpayment for those who plead quickly.

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. 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
“blaming” for an offense. An all-purpose definition of punishment is difficult, and
beyond the scope of this article. There is a rich literature on the justifications of

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164 State v. Cunningham, 663 N.W.2d 7, 13 (Minn. Ct. App. 2003). The Minnesota copayment statute was
held unconstitutional one year later in State v. Tennin, 674 N.W.2d 403 (2004). The amended statute at
issue in Tennin required co-payments of $50.00 to $200.00.
166 Id.
167 Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Civil-Criminal Procedural
Divide, 85 GEO L. J. 775, 806 (1997). This article discusses some of the debate and difficulty in agreeing on
a definition of punishment. See Celia Rumann, Tortured History: Finding Our Way Back to the Eighth
Amendment, 31 PEPPERDINE L. REV. 661 (2004) (arguing that for Eighth Amendment purposes,
punishment should not be confined to post-conviction penalties).
168 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. Doe, 538 U.S. 84, 92 (2003) (rejecting Ex Post Facto
punishment, beginning with the four classical justifications: retribution, deterrence, rehabilitation and incapacitation.¹⁶⁹ James v. Strange and Fuller v. Oregon 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.¹⁷⁰ In fact, the Strange court decried the “elements of punitiveness” apparent in the Kansas statute.¹⁷¹ Since these decisions, some courts have stated clearly that recoupment is not punitive, but merely cost collection. Others expressly rely on punitive justifications.¹⁷²

Some courts have explicitly recognized that recoupment is not part of the punishment. The Virginia Supreme Court, for example, found that as an item of costs assessed against a convicted defendant, attorney fees are “no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense . . . The right to enforce payment is a mere incident to the conviction.”¹⁷³ 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.”¹⁷⁴ 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 therefore requiring those unable to pay to “work off” the debt through public 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.

¹⁶⁹ “A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 30-36 (1986) (explaining theories of punishment).” Ewing v. California, 538 U.S. 11, 25 (2003). These are the purposes of punishment reflected in federal sentencing law. See 18 U.S.C. § 3553. See also Albin Eser, The Nature and Rationale of Punishment, 28 Cardozo L. Rev. 2427 (2007)

¹⁷⁰ See infra Part III.

¹⁷¹ 407 U.S. at 142.

¹⁷² Of course, the classical purposes of punishment can also be used at times in service of civil remedies. Steiker, supra note 167. 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).


service would violate the Thirteenth Amendment prohibition against involuntary servitude.\textsuperscript{175}

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.\textsuperscript{176} As already noted, these purposes are the classic purposes of punishment: retribution, general deterrence, specific deterrence, and rehabilitation.\textsuperscript{177} In addition, the probation condition should involve “no greater deprivation of liberty than is reasonably necessary.”\textsuperscript{178}

Several circuits have found that recoupment is not a proper condition of probation or supervised release.\textsuperscript{179} The Third Circuit court reasoned 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.”\textsuperscript{180} 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 they 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

\textsuperscript{175} Opinion of the Justices, 431 A.2d 144, 151 (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, not a right, the sentencing court could properly condition probation upon the indigent defendant working off the attorney fees. The court’s two conclusions—that requiring the defendant to work off the debt violates the thirteenth amendment, but not if such a requirement is a condition of probation—seem contradictory. The court’s opinion may not have had the benefit of advocacy, however, as it is an advisory opinion about possible legislation.

\textsuperscript{176} See 18 U.S.C. § § 3583(d), 3563(b), 3553(a).

\textsuperscript{177} See supra note 169.

\textsuperscript{178} 18 U.S.C. §3583(d).

\textsuperscript{179} 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. Lorenzini, 71 F. 3d 1489, 1493 (9th Cir. 1995) (holding similarly with respect to probation); United States v. Eyler, 67 F.3d 1386, 1393-94 (9th Cir. 1995). See United States v. Turner, 628 F.2d 461, 466-67 (5th Cir. 1980) (reaching similar conclusion, but under pre-guidelines sentencing statutes).

\textsuperscript{180} United States v. Evans, 155 F.3d at 250.
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{181}

The court went on to note other, less drastic, measures available to the government to collect the debt.\textsuperscript{182}

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 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{183} “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{184} 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 court upheld its recoupment statute, noting, “The purpose of the legislation goes beyond revenue recovery; it is designed to instill responsibility in criminal offenders. . .[and is based on] rehabilitation of the criminal defendant.”\textsuperscript{185} 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{186} The North Dakota court similarly reasoned that recoupment would further rehabilitation, enhance deterrence, and be an incentive for employment.\textsuperscript{187}

\textsuperscript{181} United States v. Lorenzini, 71 F. 3d at 1493.
\textsuperscript{182} Id.
\textsuperscript{183} United States v. Merric, 166 F.3d 406, 410 (1st Cir. 1999).
\textsuperscript{184} Id. The Seventh Circuit has also allowed recoupment as a condition of probation, but for reasons unrelated to the purposes of punishment. United States v. Gurtunca, 836 F.2d 283, 288-89 (7th Cir. 1987). The decision dealt with pre-guidelines sentencing.
\textsuperscript{185} State v. Haines, 360 N.W.2d 791, 795 (Iowa 1985).
\textsuperscript{187} State v. Kottenbroch, 319 N.W.2d 465, 474 (N.D. 1982).
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. 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 would be applied to recoupment as it was lumped in with other penalties arising from conviction. The language of punishment used by some courts in dealing with recoupment or contribution shows 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 to 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.\textsuperscript{188} But it is also possible to show what 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.\textsuperscript{189} 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.

\textsuperscript{188} See, e.g., State v. Tennin, 674 N.W. 2d 403 (Minn. 2004) (invalidating Minnesota co-pay statute because it did not contain the judicial waiver provisions of the statute reviewed in Fuller).
\textsuperscript{189} 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. [cites] The North Carolina court found that a statute imposing appointment of counsel fees on defendants “regardless of outcome of case” violated that state’s constitutional prohibition against imposing “costs” against defendants not found guilty. State v. Webb, 591 S.E. 2d 505 (2004). In addition, many states have constitutional provisions against imprisonment for debt,( see Fuller) recouping costs of prosecution [research other bases].
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 is *United States v. Jackson*, which 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 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 gave the penalty argument only a passing glance, and did not see Oregon’s recoupment scheme as punishment. But when jurisdictions do not observe

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191 390 U.S. at 581.
192 See Chaffin v. Stynchcombe, 412 U.S. 17 (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.

Other examples of unconstitutional penalties on the exercise of a constitutional right are, *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (employees could not be fired for asserting their Fifth Amendment rights not to incriminate themselves); *Shapiro v. Thompson*, 394 U.S. 618 (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 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 Giveber, *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).
193 417 U.S. at 54.
194 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 Federal Kidnapping Act unconstitutional even though penalizing a constitutional right was not its sole—or indeed at all an intended—purpose. The Court in *Fuller* also distinguished two other cases, *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*, 392 U.S.
the limits 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 may impose repayment obligations on all indigents, including the destitute, on the grounds that ability to pay is only relevant at enforcement.\textsuperscript{195} It will then be 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.\textsuperscript{196} The obligation itself, even if it is not formally enforced, has significant impacts on the defendant’s ability to obtain credit, employment or housing.\textsuperscript{197} 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, not only is the obligation imposed on those who may not have the ability to pay, but the amount may be excessive. Defendants will have no opportunity to contest the amount, and there is no assurance of factual support for the bill. Any resulting overcharge is obviously a penalty on the right to counsel.\textsuperscript{198}

\textbf{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.\textsuperscript{199} 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 becomes unconstitutional.

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\item 280 (1968) and \textit{Gardern v. Broderick}, 392 U.S. 273 (1968), which held that city employees could not be dismissed for refusing to waive their Fifth Amendment right against self-incrimination. 417 U.S. at 54.
\item See supra Part IV (A).
\item See infra notes 257-264 and accompanying text.
\item These penalties for exercising the right to counsel are amplified when excessive or unjustified recoupment is ordered as a condition of probation, parole or supervised release. Now the threat of incarceration is added.
\item 417 U.S. at 53.
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As the Fuller majority noted, there is no reason that indigents should be completely protected from the financial considerations that affect non-indigents who are charged with a crime.\textsuperscript{200} 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 there does not mean that all recoupment statutes will not cause an unconstitutional chill.\textsuperscript{201} This was the reasoning of the Pennsylvania court when it struck 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.’\textsuperscript{202}

Most of the discussion about chilling effects is speculative, based on anecdotal evidence and reasoning about 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.\textsuperscript{203} Imposition and enforcement of recoupment can vary substantially even within states, so that generalization is difficult.\textsuperscript{204} Nevertheless, as the Jackson court noted, it is not necessary that every defendant subject to the penalty be

\textsuperscript{200} 417 U.S. at 53-54.
\textsuperscript{201} 3 Fall Crim. Just. 16, 19 (Noting that the “chill” argument is much more “compelling” when flat contribution fees are imposed on all defendants without a determination of ability to pay).
\textsuperscript{203} 47 William & Mary at 2076-2085. This article discusses some limited evidence about waiver rates following the introduction of contribution schemes. The authors conclude that waiver rates are highly influenced by the “trial actors”: judges and defense attorneys.
\textsuperscript{204} Trial judges may have very different approaches to granting waivers of fees, and court personnel or other persons charged with collection may approach their task with varying levels of determination. See, 42 Harv. C.R.-C.L. L. Rev. at 212-213. (noting that judges at one court, Roxbury District Court, have “vastly different ways of interpreting the [reimbursement] statute.”).

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unconstitutionally affected. “[The] question is whether that [chilling] effect is unnecessary and therefore excessive.”

Recoupment schemes that dispense with pre-imposition determinations of ability to pay and with notice and an opportunity to be heard not only have a greater chilling effect on indigents because the debt appears inevitable and defendants have no control over the amount, but the additional chill of such schemes is entirely unnecessary: the state has no legitimate interest in imposing a possibly excessive debt on those who can never hope to repay.

C. The “Blended” Equal Protection and Due Process Test

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. The Supreme Court has developed a blended equal protection and due process approach to cases involving poverty and access to the courts. 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 in on the essential fairness of the state-ordered proceedings.’” 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

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205 United States v. Jackson, 390 U.S. at 582. 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. State v. Albert, 899 P.2d at 130-131 (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. Fuller v. Oregon, 390 U.S. at 61, n. 2 (Marshall, J., dissenting) (suggesting chill argument better raised by a defendant challenging a waiver of counsel as not voluntary).


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.’”

Recoupment without the Fuller safeguards fails this fairness test. The individual interests affected are multiple: the fundamental right to counsel, the defendant’s financial interests, and—if 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. The rationality of the connection between legislative means and purpose is limited: 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. The evidence is that recoupment programs are not cost-effective. Revocation of probation for failure to pay results in the additional state expense of incarceration. Alternative means for effectuating the legislative purpose exist, although they may be politically unpopular.

D. Procedural Due Process

The fairness test used by Judge Bryner comes from a line of cases that begins with Griffin v. Illinois. These cases (with the exception of Bearden) involve financial barriers to appellate review. 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

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209 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.

appeals,\textsuperscript{211} and to habeas proceedings.\textsuperscript{212} In addition, state courts may not condition an indigent’s appeal upon a finding that the appeal is not frivolous.\textsuperscript{213} In \textit{M.L.B. v. S.L.J.},\textsuperscript{214} 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, and emphasized the convergence of due process and equal protection principles.\textsuperscript{215} More recently, the Court used this approach in holding that a defendant was entitled to appointed counsel in an appeal from the denial of a motion to withdraw a plea of nolo contendere.\textsuperscript{216} Using the same blended test, however, the Court also held that states need not provide counsel to indigents for discretionary appeals from state convictions.\textsuperscript{217}

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 \textit{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 preimposition 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.\textsuperscript{218} Thus, an analysis that emphasizes due process seems appropriate: “The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.”\textsuperscript{219}

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.

\textsuperscript{211} Mayer v. Chicago, 404 U.S. 189 (1971).
\textsuperscript{214} 519 U.S. 102 (1996).
\textsuperscript{215} 519 U.S. at 120.
\textsuperscript{216} Halbert v. Michigan, 545 U.S. 605, 610 (2005).
\textsuperscript{218} Fuller
\textsuperscript{219} M.L.B., 519 U.S. at 120.
before an obligation is imposed. As Judge Bryner wrote, in 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 becomes very real 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 without preimposition findings of ability to pay and without notice and 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 imposed without a determination of ability to pay will certainly fall on many who cannot pay without substantial hardship. And where there is no notice or opportunity to contest the fee amount, excessive awards are bound to occur.

E. 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. Such an argument is unlikely to obtain heightened scrutiny: economic status

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220 See supra Part III (D).
221 899 P.2d at 124 (Bryner, J., dissenting).
223 See WAYNE R. LAFAVE, CRIMINAL PROCEDURE (2d ed. 1999) 482-489.
is not a suspect class for equal protection purposes,\textsuperscript{224} although the right to counsel is a fundamental right.\textsuperscript{225} Lower courts have not applied strict scrutiny to any recoupment challenges based on the Equal Protection or Due Process clauses. Instead, following the lead of Fuller, they have used a rational basis analysis.\textsuperscript{226}

Nevertheless, it is worth looking carefully at the equal protection problems with recoupment. The Fuller court dispensed with 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{227} These holdings provide limited support for additional arguments. The 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{228} James v. Strange continues to support equal protection challenges where recoupment is a civil debt with fewer protections than other civil debts, but has little impact where recoupment is made a criminal penalty.\textsuperscript{229}

At least one additional equal protection argument seems to have some merit, based on the dissent in 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 defendant in Oregon, like the indigent defendant in James v. Strange, is treated quite differently from other civil judgment

\textsuperscript{224} 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.”).


\textsuperscript{226} See, e.g., State v. Haines, 360 N.W.2d 791, 794-795 (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 (Mont. 2007) (rejecting challenge to recoupment under both state and federal equal protection clauses); State v. Haas, 927 A.2d 1209 (N.H. 2007) (reasoning that recoupment does not affect a fundamental right for substantive due process purposes).

\textsuperscript{227} See supra Part III.

\textsuperscript{228} If the state’s interest in recoupment is cost recovery rather than punishment, recoupment could logically apply to the acquitted and convicted alike. See also State v. Haas, 927 A.2d 1209 (N.H. 2007) (rejecting equal protection challenge to recoupment statute that applied to acquitted and convicted defendants).

\textsuperscript{229} See supra note 226 and cases cited therein.
debtors... [T]he nonindigent defendant in a criminal case in Oregon 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.  

Justice Marshall’s argument is thus that equal protection is violated when an indigent, partially indigent, or even formerly indigent, defendant is threatened with imprisonment for non-payment, while a nonindigent 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 and discriminatory terms” that do not apply to a defendant who owes a debt to a private attorney.

Justice Marshall’s equal protection argument becomes much stronger when used against recoupment schemes that do not observe the safeguards of the statute at issue in Fuller: pre-imposition determination of ability to pay and notice and opportunity to be heard. As already noted, schemes that do not provide these safeguards do not pass even 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 especially stark and unjustifiable.

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230 417 U.S. at 60 (Marshall, J., dissenting).
231 417 U.S. at 60 (Marshall, J., dissenting).
232 Strangely, some courts have use the very procedures of probation and revocation or suspended sentence to reject equal protection challenges to recoupment as a condition of probation. See, e.g., State v. Haines, 360 N.W.2d 791, 794-795 (Iowa 1985); State v. Ellis, 167 P.3d 896, 900 (Mont. 2007).
VI. Constitutional Problems are Exacerbated by Legal Representation that Violates Professional Ethics Rules.

The preceding section shows that recoupment and contribution are punitive and violate the constitution when not done with the safeguards that follow from a close reading of Fuller. Some common ethical problems may contribute to the constitutional violations. Recoupment and contribution can compromise the attorney-client relationship by creating conflicts of interest and interfering with the defendant’s right to counsel of choice. The rules for attorney fees are violated when defendants do not know at the beginning of the representation that they will be responsible for the fees or 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 is less than what is required by the professional codes, and may well contribute to some of the problems already noted.

Conflicts of interest. Because of the role that defense attorneys must often play in recoupment, conflicts of interest can arise. In some jurisdictions, 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 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 proceedings in which they also represent those clients.

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.” Most appointed counsel who submit fee statements to the court for recoupment probably do not recognize any conflict,

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233 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).

234 If a private lawyer decides to seek an attorneys fees lien, or sue a client for unpaid fees, the lawyer’s representation of the client ends. See MODEL R. PROF’L CONDUCT 1.7, comments 8.

235 MODEL R. PROF’L CONDUCT 1.7 (b). Most states have a similar provision.
believing that they are simply complying with court rules or statute.\textsuperscript{236} 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 and who have a sense of “mission” on behalf of the indigent that may conflict with the economic interests of their employers.\textsuperscript{237} On the whole, however, it is unrealistic to expect defense attorneys to always put their client’s interests before their own.\textsuperscript{238} The rules of professional conduct are built on the assumption that clients must be protected from the risk of harm in such situations.\textsuperscript{239}

Yet, where recoupment is made a part of the criminal proceeding—rather than imposed as a separate civil obligation—defense attorneys frequently labor under this conflict. They represent the 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.\textsuperscript{240} 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.\textsuperscript{241} 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” just 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

\textsuperscript{236} Conflicts with one’s self-interest are the most difficult to recognize. Helen A. Anderson, Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”? 111 Penn State L. Rev. 1, 33 (2006).
\textsuperscript{237} Ronald F. Wright & Wayne A. Logan, The Political Economy of Application Fees for Indigent Criminal Defense, 47 William & Mary L. Rev. 2045, 2055-2060 (2006) (discussing the schism between the leadership of defense groups, who tended to favor contribution proposals, and the courtroom defenders, who opposed them).
\textsuperscript{238} Kate Levine, If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’ Reimbursement Statute, 42 Harv. C.R.-C.L. L. Rev. 191, 210. (discussing the conflict of interest that inhibits Massachusetts public defenders from challenging the lack of due process in the imposition of attorneys fees).
\textsuperscript{240} See supra notes , and accompanying text.
\textsuperscript{241} Rule 1.7, comment 10; Rule 1.8.
fee and where counsel does not stand to benefit from the recoupment order, can a conflict of interest be avoided.

Contribution programs, especially if they are administered by public defender agencies, can lead to conflicts of interest, too. “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].”242 Where fees become an important part of the indigent defense budget, counsel will have an incentive not to challenge them.243

The conflict of interest can 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.244

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.245

Attorney Fees. Some of the due process problems with recoupment and contribution could be avoided if courts complied with the professional rules for attorney 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 . . .”246

Imposing fees at the conclusion of representation, with no prior warning of potential

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242 Logan and Wright, 47 WM & MARY L. REV. 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.
243 Id.; Levine, 42 HARV. C.R.-C.L. L. REV. at 210 (reporting that public defender agency sought increase in contribution amount to bolster public defense budget).
244 Spangenberg, Containing the Costs of Indigent Defense, supra note 11 at 71-72; Spangenberg, 2001 Update, supra note 11 at 28; NLADA standards, infra note ___.
246 MODEL R. PROF’L CONDUCT 1.5(b).
liability, violates the Model Rules. Yet, as we have seen, lack of notice to the defendant of potential liability is no bar to recoupment.

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 a 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 defendants who require counsel to be appointed for them.” A criminal defendant may not “insist on representation by an attorney he cannot afford.”

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

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247 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 R. PROF’L CONDUCT 1.5, comment 2: “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.”

248 See supra note 151.

249 MODEL R. PROF’L CONDUCT 1.16(a)(3).


252 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 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 pro bono counsel).
and that very few defendants actually pay off their recoupment debts in any case. As the right to counsel at public expense becomes 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 or 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?255

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 poison the attorney-client relationship where the obligation is imposed before trial, as with contribution. And this resentment could impede rehabilitation where the defendant is ordered to pay a large sum in recoupment, often with interest accruing. The defendants will be especially bitter if they know that those who can afford to hire an attorney at the start have not only a constitutional right to choose their lawyer, but they are also given the authority to hire and fire their attorney under the Model Rules of Professional Conduct.256

VII. Recoupment and Contribution are Bad Policy

Recoupment and Contribution are not good policy choices. As the preceding analysis shows, too often programs devolve into punishment that violates the constitution in a number of ways, and 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. It adds to the already extraordinary financial burdens put upon those convicted of crimes. It falls most heavily on precisely those defendants who wish to turn from a life of crime and has no effect whatsoever 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.

254 Holly, 64 BROOKLYN L. REV. at 221.
255 See Holly, supra, (arguing that reimbursement laws bolster an already strong argument for extending the right to counsel of choice to indigents).
256 See MODEL R. PROF’L CONDUCT 1.16.
Adding to an already crushing financial burden. Recoupment and contribution are just one more line item on a growing list of defendant obligations. The trend in recent years has been to charge those convicted of felonies for numerous consequences of conviction. 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. These costs quickly add up, even for relatively minor crimes.

When the total obligation becomes unmanageable, compliance becomes more difficult and offenders may lose the motivation to “go straight.”

A recent study found that “financial pressures and paycheck garnishment resulting from unpaid debt can increase participation in the underground economy and discourage legitimate employment.”

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. Most incarcerated people are parents of minor children who continue to accrue large child support obligations, and who leave prison or jail with

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258 Repaying Debts, at 8. “Administrative assessments on citations fund nearly all of the Administrative Office of the Court’s budget in Nevada. In Texas, probation fees made up 46 % of the Travis County Probation Department’s $18.3 million budget in 2006.” Id.


260 For example, one case study of a New York defendant convicted of driving while intoxicated showed total financial obligations of $8,795.00 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. Repaying Debts, at 14.

261 See Ruback, Hoskins, Cares and Feldmeyer, Perception and Payment of Economic Sanctions: A Survey of Offenders, 70 DEC 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 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, 43 (2001) (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 & 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.

262 Repaying Debts at 8.

263 Repaying Debts at 7.
thousands of dollars of child support debt. The low rates of repayment demonstrate that not only is recoupment a poor fiscal policy, but the burden will fall only on those who are determined to rehabilitate themselves. It does not make sense to place an additional financial obstacle before them, 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 a strong argument, too, 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. 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 offence, they make poor penalties because they do not serve any of the purposes of punishment.

Deterrence is served by recoupment only to the extent one believes that any monetary penalty is a deterrent to crime. The 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,

\[264\] *Repaying Debts* at 7, 25.
\[265\] cite—Gideon? Allen report.
\[266\] The four classic justifications for punishment are deterrence, rehabilitation, retribution and incapacitation. *Supra*, note 168.
\[267\] 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.”).
independence and even gain self-esteem through repayment. No empirical evidence supports this assertion. It is more likely that a repayment obligation would 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 for whatever aspect of the criminal justice system they are involved with. 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 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 of threatened imprisonment for debt.” A large debt could remove the incentive to get a job, rather than motivate employment. It may drive defendants into the underground economy. Because the amount of fees has little to 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.

Rehabilitative justification seems thin.

_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

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269 See supra notes 183-185 and accompanying text.
270 55 OR L. REV. at 114 (1976).
272 See, e.g., Madison v. State (Wash. 2007) (noting that one plaintiff in this voting rights case paid $10.00 per month and was unable to keep up with the accruing interest on her debt to the state).
273 Heller, 13 GEO. J. ON POVERTY L. & POL’y at 227.
274 47 WM & MARY L. REV. at 2051.
277 Repaying Debts at 8.
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.

_Incapacitation_, the last of the classic justifications of punishment, is not served at all by recoupment and contribution. The obligation to pay attorney fees does nothing to incapacitate the defendant from committing additional crimes.

**VII. Recommendations**

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

**The ABA and NLADA positions**

The American Bar Association 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.

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.

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279 AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES STANDARD 5-7.2(a) (3d ed. 1992)
280 Id., cmt. at 91.
281 Id.
282 Id., cmt. at 91.
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.\textsuperscript{283} 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.\textsuperscript{284} The report that accompanied the guidelines noted the rise of public defender “application fees” that were applied to all indigents, regardless of ability to pay, and stated that the purpose of the new guidelines was to apply the safeguards of Fuller v. Oregon to contribution programs.\textsuperscript{285}

The National Legal Aid and Defender Association issued guidelines in 1976 that approve of the defendant making a “limited cash contribution” to the cost of defense if it will not impose “a substantial financial hardship upon himself or his dependents.”\textsuperscript{286} The NLADA also recommended a pre-imposition determination of ability to pay any

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.

\textsuperscript{283} 47 William & Mary L. Rev. at 2064-2065.
\textsuperscript{284} Am. Bar Ass’n Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases, adopted by ABA House of Delegates August 9, 2004, as Recommendation No. 110. 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.
\textsuperscript{285} www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf
contribution, and that payment not be made directly to counsel. Finally, the NLADA recommended a formula to ensure that contribution remained limited:

. . . the 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.

Both the ABA and the NLADA take the position that non-payment of contribution should never be a ground for incarceration. These organizations’ policy positions are supported by the way in which recoupment and contribution have operated in the last thirty years. This history also shows the need for some additional recommendations, in the event governments do not accept the primary recommendation to do away with recoupment.

Proposed Guidelines to Protect the Right to Counsel for Indigents

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

(b) Jurisdictions that do require payment by eligible persons of some portion 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 counsel 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 collection of payment.

(d) Payment toward the costs of representation by assigned counsel shall never be made a condition of probation or other sentence-related supervision.


289 NLADA Standards for the Administration of Assigned Counsel Systems, Standard 2.4, supra note 287, (payment of contribution should never be a condition of probation or other sentence-related provision); Am. Bar Ass’n, Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases, guideline 4: “Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.”
The following recommendations are based on the ABA and NLADA positions, as well as recommendations in the 1986 Spangenberg study,\textsuperscript{290} and the preceding study of caselaw and statutes since 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{291}

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 recoupment 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.\textsuperscript{292}

\textsuperscript{290} Spangenberg, (1986) 70-73; NLADA and ABA standards, supra;
\textsuperscript{291} 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 supra note 239.
\textsuperscript{292} Such notice will not be enough to cure the conflict, but at least the defendant will be informed and have the opportunity to object.
The court imposing the obligation must make a pre-imposition determination of ability to pay. The defendant must be given notice and opportunity to be heard on the issue of ability to pay. The court must have authority to waive all or part of the obligation. The defendant must be given notice and opportunity to be heard on the amount of the obligation. Actual records of counsel’s efforts and other defense expenses must support any obligation. 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.

VIX. Conclusion

The idea that indigent criminals should have to pay for the costs of their defense has great appeal to many. After all, as the Fuller court noted, non-indigents have to struggle with the high cost of legal representation. Moreover, at least with those who are convicted, in the minds of many it is the indigents’ own wrongdoing 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 many struggling state and local governments?

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

Moreover, 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 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.