NOTES

THE GUIDING HAND OF COUNSEL, FOR A PRICE: JUVENILE PUBLIC DEFENDER FEES AND THEIR EFFECTS

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INTRODUCTION

When he was thirteen, Jonathan, a teenager from New Hampshire, was charged with simple assault after a fight with his father.[1] During his hearing in juvenile court, his father refused to pay the $275 New Hampshire public defender fee, and Jonathan—unable to afford the price of counsel—waived his right to an attorney.[2] He was placed on probation and struggled to meet his probation requirements, resulting in his arrest for probation violations.[3] Because the court was deciding whether to detain Jonathan, Jonathan was appointed a juvenile defender.[4] The attorney brought Jonathan's unstable home life to the judge's attention, and the judge dismissed the case.[5] While Jonathan was ultimately fortunate, his story illustrates how public defender fees destabilize children's[6] lives and leave them unrepresented at critical points during delinquency proceedings.[7]

In 1967, the Supreme Court extended the right to counsel to juveniles during delinquency proceedings through the Due Process Clause of the Fourteenth Amendment, holding that a "juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[8] Since then, every state has guaranteed juveniles the right to counsel, which juveniles can usually waive if their waiver is knowing and voluntary.[9] However, states still erect

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1. NAT'L JUV. DEF. CTR., ACCESS DENIED 21 (2017), https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [https://perma.cc/GGX7-WL8J].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. This Note uses the terms "juveniles," "children," and "youths" to refer to those who are under age eighteen facing adjudication in the juvenile justice system.

7. *See id.*; *see also* Mary Ann Scali, *Meeting of the Mandates of* Gault*: Automatic Appointment of Counsel in Juvenile Delinquency Proceedings*, 70 JUV. & FAM. CT. J. 7, 11-12 (2019) (discussing the importance of appointing counsel significantly before juvenile detention hearings to ensure effective assistance of counsel).

8. *In re* Gault, 387 U.S. 1, 36 (1967) (footnote omitted).

9. LINDA A. SZYMANSKI, NAT'L CTR. FOR JUV. JUST., JUVENILE DELINQUENT'S RIGHT TO COUNSEL AND WAIVER OF THAT RIGHT (2008 UPDATE) (Aug. 2008), http://www.ncjj.org/PDF/

barriers to juveniles' access to public defenders and court-appointed counsel by imposing public defender fees.[10] Some public defender fees impose costs on the front end of juveniles' involvement in the juvenile court system by charging juveniles and their families a fee or a co-pay to apply for a public defender.[11] Some states, in addition to or instead of such fees, require children and their parents to reimburse the state or county for the total or partial cost of representation.[12] Twelve states and the District of Columbia do not charge juveniles or their families for the cost of a public defender.[13]

This Note seeks to examine public defender fees from a national viewpoint, situate them in the context of the juvenile justice system and its history, understand their deleterious impact on juveniles and their families, and suggest alternatives. Part I of this Note provides background on the development of the juvenile justice system and the juvenile right to counsel. Part II describes the Supreme Court precedents that are key to understanding public defender fee systems. It also discusses the different statutory schemes states use to impose and collect public defender fees in the juvenile system. Part III discusses the problems that public defender fees pose from doctrinal and practical standpoints. Finally, Part IV identifies various ways in which states could prevent public defender fees from chilling juveniles' right to counsel. These include either minimizing parental influence on children's decisions to waive counsel or eliminating public defender fees entirely.

Snapshots/2008/vol13_no8_waiverofcounsel.pdf [https://perma.cc/7JFL-BVBJ].

10. *See generally* JESSICA FEIERMAN, NADIA MOZAFFAR, NAOMI GOLDSTEIN & EMILY HANEY-CARON, JUV. L. CTR., THE PRICE OF JUSTICE (2018), https://jlc.org/sites/default/files/attachments/2018-07/Paying-For-Justice-2018FINAL.pdf [https://perma.cc/Z833-25UQ]. Some states and counties utilize court-appointed counsel instead of public defenders. *See, e.g.*, *Virginia*, NAT'L JUV. DEF. CTR. (July 2018), https://njdc.info/practice-policy-resources/state-profiles/virginia/ [https://perma.cc/MJ8T-BS53]. This Note refers to the fees that states charge children and their families as "public defender fees."

11. FEIERMAN ET AL., *supra* note 10, at 7; NAT'L JUV. DEF. CTR., *supra* note 1, at 22-23.

12. FEIERMAN ET AL., *supra* note 10, at 7; NAT'L JUV. DEF. CTR., *supra* note 1, at 22.

13. *Debtors' Prison for Kids*, JUV. L. CTR., https://debtorsprison.jlc.org/#!/map [https://perma.cc/P4LS-XTLJ] (under the map titled "Fees Established by State Law," click on the dropbox menu titled "Type of Fee"; then uncheck all of the boxes except "Cost of Counsel"; then click "x" in the top right corner of the dropbox menu).

I. THE JUVENILE JUSTICE SYSTEM AND THE RIGHT TO COUNSEL

Understanding the development of the juvenile justice system and juveniles' right to counsel is key to appreciating the importance of counsel for juveniles and the effects of public defender fees. This Part delves into the juvenile justice system's rehabilitative purpose and how the right to counsel squares with this aim.

A. The Development of the Juvenile Justice System

The juvenile justice system developed during the late nineteenth and early twentieth centuries as part of the Progressive Era, beginning with the first juvenile court statute in Illinois in 1899.[14] The reformers who instigated the development of the juvenile justice system believed children were "essentially good."[15] Consequently, reformers sought to do away with the concepts of guilt and innocence within the system.[16] They instead promoted rehabilitation and treatment.[17] These developments emphasized the role of the State as the parens patriae, or a parental entity that would intervene to care for children when their parents had presumably failed to control them.[18] However, this emphasis on "social control" meant that children received fewer due process protections than adults, and judges exercised extensive and arbitrary power over the adjudication and outcome of juvenile cases.[19]

Today, the structure and terminology of the juvenile system continue to reflect this primary focus on rehabilitation rather than punishment. For example, in *McKeiver v. Pennsylvania*, the Court held juveniles do not have the right to a jury trial because the use of juries in the juvenile system would impose the adversarial structure of the adult system on the juvenile system's "intimate,

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14. *In re* Gault, 387 U.S. 1, 14-15 (1967).
15. *Id.* at 15.
16. *Id.* at 15-16.
17. *Id.*
18. *Id.* at 16.
19. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 587 (2002).

informal protective proceeding[s]."[20] Additionally, juvenile delinquency adjudication[21] is a civil—not a criminal—process.[22] The names of the stages in juvenile proceedings lack the punitive connotations of their counterparts in the adult system. For example, the "adjudicatory phase" refers to what would be the trial phase in the adult system and the "disposition phase" refers to sentencing.[23]

B. The History and Development of the Right to Counsel for Juveniles

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."[24] By the 1960s, the Court began to reckon with the limited rights the juvenile justice system afforded to youth. During this decade, the Court incorporated the Sixth Amendment right to counsel for indigent defendants charged with felonies in state court in *Gideon v. Wainwright*.[25] Just four years later in *In re Gault*, the Court unequivocally rejected the notion of the State as parens patriae and held that juveniles were entitled to counsel.[26]

In *In re Gault*, fifteen-year-old Gerard Gault had been adjudicated delinquent and sentenced to custody until age twenty-one after making lewd phone calls to a neighbor.[27] No one notified Gault's parents that he had been arrested.[28] His parents did not see the petition for Gault's arrest until a habeas hearing two months

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20. 403 U.S. 528, 545 (1971).

21. An adjudication of delinquency is similar to a criminal conviction. *Juvenile Court Terminology*, NAT'L JUV. DEF. CTR., https://njdc.info/juvenile-court-terminology/ [https://perma.cc/HU25-PRWG]. Such an adjudication occurs when a juvenile court judge finds whether a juvenile has committed the delinquent act with which she is charged. *Id.*

22. Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 184 (2007).

23. *Id.* at 180.

24. U.S. CONST. amend. VI.

25. 372 U.S. 335, 339-40, 342 (1963). The Court later expanded the right to counsel to all criminal defendants at risk of imprisonment, regardless of the kind of offense with which they were charged. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

26. 387 U.S. 1, 41 (1967); Berkheiser, *supra* note 19, at 595-96.

27. *In re Gault*, 387 U.S. at 4.

28. *Id.* at 5.

after it occurred.[29] The day after his arrest, Gault was adjudicated delinquent and sentenced to custody in an informal, unrecorded hearing, during which the judge questioned him without an attorney.[30] His parents then filed a habeas writ, which the Superior Court of Arizona dismissed.[31] The Arizona Supreme Court affirmed the dismissal of the writ.[32]

The U.S. Supreme Court reversed this decision.[33] In *In re Gault*, the Court extended the right to counsel to juveniles through the Due Process Clause of the Fourteenth Amendment.[34] Specifically, the Court held that in any proceeding in which a child may be sentenced to custody in an institution, counsel should appear on behalf of the child and his parents.[35] Further, if the child's parents cannot afford to pay for an attorney, the Court instructed that courts should appoint one.[36] The Court highlighted that had Gault been an adult, he would have been "entitled to clear advice that he could be represented by counsel, and ... if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it."[37] Further, the Court spelled out in detail why, under the Fourteenth Amendment, juveniles are entitled to counsel: "[J]uvenile[s] need[ ] the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and ... submit it."[38] In the decades after *In re Gault*, every state codified juveniles' right to counsel.[39]

C. Juveniles and Waiver of the Right to Counsel

The *In re Gault* Court extended the right to counsel to juveniles but did not squarely address the issue of juvenile waiver of the right

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29. *Id.*
30. *Id.* at 5-6.
31. *Id.* at 8-9.
32. *Id.* at 10.
33. *Id.* at 41, 58.
34. *Id.* at 41.
35. *Id.*
36. *Id.*
37. *Id.* at 29.
38. *Id.* at 36 (footnote omitted).
39. SZYMANSKI, *supra* note 9.

to counsel.[40] Rather, the Court held that Gault's mother did not waive her or her son's right to counsel when she appeared without counsel at the delinquency hearing despite knowing that counsel could have represented her and Gault at that hearing.[41]

In the adult criminal justice system, the Supreme Court defines a waiver as "ordinarily an intentional relinquishment or abandonment of a known right or privilege."[42] The Supreme Court views criminal defendants' waivers of their constitutional rights skeptically.[43] The Court encourages lower courts to "indulge every reasonable presumption against" the waiver of these rights.[44]

The Court has not definitively held whether juveniles can waive the right to counsel during formal proceedings, but it has addressed juvenile waiver in other contexts. Twelve years after *In re Gault*, the Court held that a juvenile may waive his right to counsel at a custodial police interrogation if he does so "knowingly and intelligently" in light of the totality of the circumstances surrounding the interrogation.[45] The Court highlighted "the juvenile's age, experience, education, background, and intelligence, and ... [his] capacity to understand the warnings [regarding his rights to remain silent and have counsel present during an interrogation] given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" as pertinent factors in the totality-of-the-circumstances test.[46]

Since the development of the juvenile right to counsel, states have taken a variety of statutory approaches to juvenile waiver in formal proceedings. Only Illinois has completely banned juvenile waiver of counsel.[47] Some states prohibit waiver when "conditions related to age, type of offense, competency, and the possibility of confinement" warrant the appointment of nonwaivable counsel.[48] Other states are more lenient and permit waiver when a court finds that the

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40. *See In re Gault*, 387 U.S. at 41.
41. *See id.* at 41-42.
42. Johnson v. Zerbst, 304 U.S. 458, 464 (1937).
43. *See id.*
44. *Id.* (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).
45. Fare v. Michael C., 442 U.S. 707, 725-26 (1979).
46. *Id.* at 725.
47. NAT'L JUV. DEF. CTR., *supra* note 1, at 27 n.83.
48. *Id.* at 27.

juvenile has knowingly and voluntarily waived this right.[49] Forty-three states permit juveniles to waive their right to an attorney without first consulting a lawyer about their decision.[50] Eight states require children to consult with an attorney before waiving their right to counsel in all cases.[51] Others require consultation only under specific circumstances.[52]

In the interrogation context, the *Fare* Court stressed that the totality-of-the-circumstances test for waiver protects juveniles from coercion and provides the police and lower courts with flexibility in dealing with older juveniles who have experience in the system and may understand their rights better than younger children.[53] Research has revealed that the flexibility surrounding the waiver standard for juveniles has translated into a "culture of waiver" within some juvenile courts during formal delinquency proceedings.[54]

In certain juvenile courts, waiver is the norm rather than the exception. The rate of waiver varies by county in some states. For example, in Arizona, juveniles are guaranteed the right to counsel at every stage of delinquency proceedings.[55] Juvenile judges reported that in some counties, children were not allowed to waive counsel and all children were represented.[56] In others, less than 25 percent of children had counsel during probation revocation hearings, and "almost no children were represented by counsel at the detention or advisory hearing."[57] In other states, waiver of counsel is a universal problem. In Colorado, stakeholders in the

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49. *See* NEV. REV. STAT. § 62D.030(4)(b) (2019).
50. NAT'L JUV. DEF. CTR., *supra* note 1, at 7.
51. *Id.* at 26.
52. *Id.* at 26-27.
53. Fare v. Michael C., 442 U.S. 707, 725 (1979).
54. Berkheiser, *supra* note 19, at 601. *But see* MARY ANN SCALI, JI SEON SONG WITH PATRICIA PURITZ, NAT'L JUV. DEF. CTR., SOUTH CAROLINA: JUVENILE INDIGENT DEFENSE 48 (2010), https://njdc.info/wp-content/uploads/2013/10/Final-South-Carolina-Assessment-Report.pdf [https://perma.cc/ACU4-SGJG] (reporting that no child is allowed to waive counsel in a delinquency hearing in South Carolina).
55. AMANDA J. POWELL, NAT'L JUV. DEF. CTR., ARIZONA: BRINGING *GAULT* HOME 24 (2018), https://njdc.info/wp-content/uploads/2018/09/Arizona-Assessment-NJDC.pdf [https://perma.cc/F8SV-7PKE].
56. *Id.*
57. *Id.*

juvenile system reported that 75-90 percent of children waived their right to counsel across the state.[58]

A study of almost one hundred cases involving juvenile waiver of the right to counsel during official proceedings found that juvenile judges had not "conducted a thorough inquiry into the circumstances to determine whether the juvenile's waiver was knowing, voluntary, and intelligent, and few courts acknowledged that they were bound by a legal standard."[59] The appellate courts upheld a juvenile's decision to waive counsel in nineteen cases.[60] These courts approved trial courts' acceptance of waivers from children as young as nine and affirmed cases in which lower courts overlooked children's "age, intellectual ability, educational level, emotional or mental problems, and prior experience with the court system" when allowing children to waive their right to counsel.[61]

Thus, since the 1960s, states have provided juveniles with at least nominal access to counsel—though reality tells a different story in certain jurisdictions. The next Part explains how states fund their indigent defense systems and describes the Supreme Court precedent delineating the constitutional limits on these systems.

II. CHARGING FOR "FREE" REPRESENTATION: AN OVERVIEW OF PUBLIC DEFENDER FEE LAWS AND RELEVANT CONSTITUTIONAL PRECEDENTS

Children and their families can be charged for the cost of court-appointed counsel and public defenders in thirty-eight states.[62] States use two methods to collect these costs: contribution and recoupment.[63] First, contribution constitutes an up-front, "fixed

58. PATRICIA PURITZ, NAT'L JUV. DEF. CTR., COLORADO: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS 40 (2012), https://njdc.info/wp-content/uploads/2013/11/Colorado_Assessment.pdf [https://perma.cc/HZL6-7JSN].

59. Berkheiser, *supra* note 19, at 611.

60. *Id.* at 615.

61. *Id.* at 613.

62. *See Debtors' Prison for Kids*, *supra* note 13.

63. Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 327-40 (2009) (providing an overview of contribution and recoupment and discussing the constitutional limitations on both).

sum" payment.[64] It is sometimes "referred to as 'application fees,' 'co-pays,' 'user fees,' 'administrative fees,' or 'registration fees.'"[65] As of 2018, ten states imposed contribution fees in juvenile cases, using methods such as a fee charged for filing an indigency determination application, which can range from ten dollars to fifty dollars, user fees, which range from ten dollars to four hundred dollars, and other administrative fees.[66] These fees can sometimes be waived upon a finding that children and their families lack the financial resources to pay.[67]

Second, recoupment statutes require juveniles and their families to partially or fully reimburse the government if the juvenile or her family is deemed eligible for counsel but able to contribute to the cost of representation.[68] A 2018 report found that thirty states require reimbursement whenever counsel is appointed; four states require reimbursement only when parents who are able to pay do not provide their child with counsel; and three states require reimbursement when juveniles do not win their case.[69]

States vary in the methods they use for determining when children are eligible for counsel. In a few states, children are presumed indigent and are automatically entitled to an attorney, regardless of their or their families' financial resources.[70] This presumption does not always guarantee no-cost counsel, however. Some states will still seek recoupment of the cost of counsel after representation has ended. For example, in Pennsylvania, the

64. *Id.* at 333.

65. *Id.*

66. FEIERMAN ET AL., *supra* note 10, at 8.

67. *See, e.g.*, TENN. CODE. ANN. § 37-1-126(c)(2) (2019).

68. FEIERMAN ET AL., *supra* note 10, at 9.

69. *Id.*; *see, e.g.*, ALA. CODE § 12-15-109 (2019) (requiring the court to collect full or partial reimbursement from parents); COLO. REV. STAT. § 19-2-706(2)(b)(I)-(II) (2019) (requiring nonindigent parents, guardians, or legal custodians to reimburse the court for the cost of representation unless the court waives the reimbursement requirement for good cause, or if a conflict of interest exists between the juveniles and their parent, guardian, or legal custodian, requiring the juvenile to reimburse the court when financially able); CONN. GEN. STAT. §§ 51-296(a)-(b), -298(b) (2019) (authorizing courts to charge juveniles "for the reasonable value of services rendered to" them if they become capable of paying the fees "within ten years from the last date on which any services were rendered"); W. VA. CODE § 29-21-16(g) (2019) (permitting courts to require parents or custodians to pay the cost of counsel if they are able to without undue hardship and the juvenile is adjudicated delinquent).

70. A 2017 report found a total of eleven states presume indigence. NAT'L JUV. DEF. CTR., *supra* note 1, at 10 n.17.

presumption of indigence can "be rebutted if the court ascertains that the child has the financial resources to retain counsel of his choice at his own expense."[71] Other states also charge contribution costs despite the indigence presumption. In Delaware, anyone under eighteen "arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services."[72] But juveniles in that state may be charged a one hundred dollar administrative fee when a public defender appears on their behalf.[73]

Most states do not presume juveniles to be indigent.[74] These states instead require a pre-appointment assessment of the child's or the parents' finances to determine eligibility for appointed counsel on a case-by-case basis.[75] In these jurisdictions, juveniles or their parents must provide their financial information to the public defender, the court, or another public agency.[76] The public defender, court, or agency then determines whether the juveniles or their parents have the ability to pay for an attorney.[77] If a parent refuses to hire an attorney, or if there is a conflict of interest between the parent and child, the state may require courts to appoint one.[78] Then, the state or county will recoup the full or partial cost of representation from the parent or child.[79] Courts and public defender offices usually deem juveniles whose family income falls at or below 125 percent of the federal poverty line to be indigent and eligible for a public defender or appointed counsel.[80]

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71. 42 PA. CONS. STAT. § 6337.1(b)(1) (2019).

72. DEL. CODE ANN. tit. 29, § 4602(c) (2020).

73. *Id.* § 4607(a). The Delaware statute explicitly provides that failure to pay the one hundred dollars will not result in the revocation of appointed counsel. *Id.* § 4607(c).

74. NAT'L JUV. DEF. CTR., *supra* note 1, at 6.

75. *Juvenile Defense: Indigency Requirements 2013*, JUV. JUST.: GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/juvenile-defense#indigency-requirements [https://perma.cc/KF9W-SQM5]. States may carve out exceptions to this case-by-case approach. For example, Virginia presumes children facing immediate custody to be eligible for counsel if they do not have counsel already. VA. CODE ANN. § 16.1-266(B) (2020).

76. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 11.

77. *Id.*

78. FEIERMAN ET AL., *supra* note 10, at 6.

79. *Id.*

80. NAT'L JUV. DEF. CTR., *supra* note 1, at 11. The 2019 federal poverty guidelines for the forty-eight contiguous states and D.C. indicated that, for a family of four, the poverty guideline is $25,750. *2019 Poverty Guidelines*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, https://aspe.hhs.gov/2019-poverty-guidelines [https://perma.cc/L7SA-XDBN].

The Supreme Court has not yet evaluated the constitutionality of these contribution and recoupment schemes in the juvenile setting. However, in a series of precedents from the 1970s, the Court considered various adult public defender fee statutes in light of the Due Process and Equal Protection Clauses.

First, in *James v. Strange*, the Court held that a Kansas recoupment statute violated the Equal Protection Clause.[81] The statute in that case required indigent defendants to reimburse the state for the cost of representation within sixty days, or a judgment for the cost would be filed against them.[82] The judgment would become a lien on their property and could be collected by garnishment or other methods allowed under the state's code of civil procedure.[83] In contrast, criminal defendants were not entitled to the same protections that the code of civil procedure provided to civil debtors.[84] Consequently, the statute's "elements of punitiveness and discrimination" violated the Equal Protection Clause, and the Court struck it down.[85]

Second, *Fuller v. Oregon* involved a challenge to Oregon's recoupment statute, which required convicted defendants to repay the cost of their representation by court-appointed counsel if the cost did not "impose manifest hardship on the defendant or his immediate family."[86] The Court held that the recoupment law did not violate the Equal Protection Clause because it afforded the same protections to criminal and civil debtors.[87] Further, the delineation between defendants who had been convicted and those who had not or those whose convictions were overturned on appeal was "non-invidious."[88] Additionally, the Court found that the recoupment law did not substantially "chill" the defendants' Sixth Amendment right to counsel.[89] The Court held that an indigent defendant's knowledge that he might have to repay the cost of counsel when he could do so

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81. 407 U.S. 128, 141-42 (1972).
82. *Id.* at 129.
83. *Id.* at 131.
84. *Id.*
85. *Id.* at 141-42.
86. 417 U.S. 40, 45-46 (1974) (quoting OR. REV. STAT. § 161.665(4) (1973)).
87. *Id.* at 47-48.
88. *Id.* at 49.
89. *Id.* at 51-52.

would not deter him from accepting court-appointed counsel.[90] The legislature had "designed [the law] to insure that only those who actually become capable of repaying the State will ever be obliged to do so."[91] The relationship between these precedents and public defender fee statutes in the juvenile system is discussed in Part III.A.

III. PROBLEMS POSED BY JUVENILE PUBLIC DEFENDER FEE STATUTES

Understanding public defender fees in the context of the juvenile justice system is necessary to comprehend their chilling effects and how they starkly contradict the system's original rehabilitative goals. Public defender fee statutes engender serious negative consequences for youth and lack adequate due process protections for both children and their families. These laws chill juveniles' right to counsel.

A. Public Defender Fees Reinforce the Shift from Rehabilitation to Punishment in Juvenile Justice

When assessing the constitutionality of recoupment schemes, the Court has inquired into whether a law has the purpose or effect of penalizing individuals seeking to exercise their right to counsel[92] and struck down laws that demonstrate "elements of punitiveness."[93] Any "elements of punitiveness" in the purpose or effects of juvenile public defender fee laws should be viewed skeptically and minimized.[94] Although the Court rejected the notion of the State as parens patriae and expanded juveniles' rights in *In re Gault*, the Court has long sought to preserve the juvenile justice system's focus on rehabilitation.[95] For example, in *McKeiver*, the Court declined to extend the right to a jury trial to juveniles on the grounds that the

90. *Id.* at 53.
91. *Id.*
92. *Id.* at 54.
93. James v. Strange, 407 U.S. 128, 142 (1972).
94. *See id.* at 141-42.
95. *In re* Gault, 387 U.S. 1, 16-20 (1967).

juvenile system is meant to be an "informal protective proceeding,"[96] in which any resulting "[s]upervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties."[97]

Yet, over time, the juvenile justice system has become increasingly punitive rather than rehabilitative. Although many states maintain that the system's purpose is to protect the best interests of court-involved youth, in practice, states have instead advanced the competing goals of public safety and punishment.[98] For example, during the 1990s, concern about violent youth offenders grew.[99] Consequently, states passed laws providing courts with increased discretion to transfer juveniles to the adult system or requiring automatic transfer in some cases.[100]

Additionally, youths and their families must pay a growing number of fees and fines outside of public defender fees.[101] These other costs include fees for probation and supervision, diversion programs, health evaluations, the cost of care, as well as record expungement and sealing.[102] Families are also responsible for court costs, fines, and restitution.[103] Failure to pay these charges could result in extended incarceration, a civil or criminal contempt charge, or a probation violation for youths.[104] When parents do not pay the fees for which they are liable, they may also be held in civil or criminal contempt.[105]

Juvenile public defender fees reinforce this underlying shift in focus from rehabilitation to punishment. In some jurisdictions, failure to reimburse the state for the costs of counsel could be

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96. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

97. *Id.* at 552 (White, J., concurring).

98. *See* Linda F. Giardino, Note, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 275-76 (1996).

99. *Id.* at 257-58.

100. *See id.* at 258-74 (discussing laws passed in Michigan, Massachusetts, California, New Jersey, and New York designed to punish rather than rehabilitate violent juvenile offenders).

101. JESSICA FEIERMAN WITH NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAMES FAIRFAX COLUMBO, JUV. L. CTR., DEBTORS' PRISON FOR KIDS? 3 (2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf [https://perma.cc/6ZX9-F9PV].

102. *Id.* at 10-16, 20-21.

103. *Id.* at 17-18, 21-22.

104. *Id.* at 23.

105. *Id.*

assessed against the youth themselves,[106] or result in an order against the parents or other individuals responsible for the juvenile.[107] In others, nonpayment of counsel costs may result in a civil judgment against the parent.[108]

Notably, in Oregon, the punitive nature of the public defender fees law manifests more clearly. When determining whether to order youths to pay for the cost of determining their eligibility for appointed counsel, the statute allows a court both to "consider the reformative effect of having the youth pay" and to "order that a portion of any moneys earned by the youth in juvenile work projects be used to pay costs" of counsel.[109] This statute explicitly links the state's chosen method of cost collection to the sanctions that a court has imposed on a juvenile.[110]

Even in states in which the legislature has not explicitly characterized public defender fees as a sanction, these fees still contribute to the trend toward punitiveness within the juvenile justice system. For instance, the indigency application process "can be fraught with delays," leaving a child without counsel for an extended period of time.[111] This process also raises the possibilities that children will remain in detention or their cases will stay open for longer than necessary.[112]

Moreover, public defender fees may lead parents to pressure their children to waive their right to counsel.[113] Without counsel, children are placed in a precarious position. Proceedings in juvenile court are much less formal, and judges have great discretion in their decision-

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106. *See, e.g.*, KAN. STAT. ANN. § 38-2306 (2019).

107. *See, e.g.*, IDAHO CODE § 20-514(7)-(8) (2020) (permitting the prosecuting attorney of each county to recover payment or reimbursement from the person or estate liable for the juvenile's counsel costs within five years of the appointment of counsel); KY. REV. STAT. ANN. §§ 31.125, 610.060(4) (West 2020) (permitting the court to order parents to pay for their child's representation if found able to pay).

108. *See, e.g.*, ALA. CODE § 12-15-109 (2020); ALA. R. JUV. P. 31(B).

109. OR. REV. STAT. § 419C.203(4) (2019).

110. *See id.*

111. Kenneth J. King, Patricia Puritz & David A. Shapiro, *The Importance of Early Appointment of Counsel in Juvenile Court*, *in* TRENDS IN STATE COURTS 13, 14-15 (Carol R. Flango et al. eds., 2014), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2078 [https:// perma.cc/EE7E-K4FB].

112. *Id.* at 15.

113. *See infra* Part III.C.4.

making.[114] Consequently, "aggressive and well-organized"[115] juvenile public defenders play a crucial role in protecting juveniles' due process rights.[116] Their role is all the more important because of the enduring harmful effects of an adjudication of delinquency. State and federal sentencing guidelines permit courts to enhance adult sentences if an offender has a juvenile record.[117] Additionally, youths with prior juvenile adjudications can be transferred to adult court if they are charged with any crime in the future.[118] A juvenile record can limit youths' ability to join the military, go to college, and apply for jobs.[119] For immigrant youth, transferal to the adult system can lead to deportation.[120] By reducing children's access to an attorney through delays and causing waivers of counsel grounded in fear and family pressures, public defender fees undermine the juvenile system's rehabilitative purpose.

B. Juvenile Public Defender Fees Lack Procedural Due Process Protections

Juvenile recoupment laws sometimes lack important due process protections, indicating that they "go[ ] beyond legitimate cost recovery and penalize[ ] a fundamental right."[121] In the adult criminal justice system, some jurisdictions have treated public defender fees like other criminal fines.[122] These states categorize public defender fees as punishment rather than as a form of revenue collection and impose them regardless of an individual's ability to pay.[123] Other jurisdictions have implemented stronger due process protections.[124] These states impose public defender fees on only those who are capable of paying and require adequate notice and a

114. Aaron Kupchik & Angela Harvey, *Court Context and Discrimination: Exploring Biases Across Juvenile and Criminal Courts*, 50 SOC. PERSPS. 417, 435-36 (2008).

115. *Id.* at 431.

116. *Id.* at 435-36.

117. *See* Berkheiser, *supra* note 19, at 646-47.

118. *Id.* at 647.

119. *Id.* at 648-49.

120. *Id.* at 649.

121. Anderson, *supra* note 63, at 326.

122. *Id.* at 340.

123. *See id.* at 340-47.

124. *See id.* at 339.

meaningful opportunity to contest the imposition of these fees.[125] Given the rehabilitative purpose of the juvenile justice system, public defender fees should provide for stringent due process protections to best protect children from waiving their right to counsel because of their or their parents' inability to pay. Such safeguards would ensure that fee statutes serve only economic—not punitive—purposes.

Scholars have argued that, in the adult system, several safeguards should be implemented to ensure that public defender fees are not arbitrarily imposed in violation of defendants' due process rights.[126] In *Fuller*, the Court upheld the recoupment statute at issue because it provided for a "pre-imposition determination of ability to pay, notice [of the possibility of recoupment], and the opportunity to be heard."[127] Likewise, by reviewing Supreme Court precedent on the constitutionality of fines and fees, one scholar has identified nine such procedural due process factors:

> (1) timely and adequate notice of the obligation; (2) an opportunity to appear personally before the decision maker; (3) an opportunity to present evidence; (4) an opportunity to cross-examine; (5) representation by counsel; (6) a decision based upon the evidence presented in accordance with the law; (7) an impartial decision maker; (8) a reasoned decision reflecting the record; and (9) appellate review.[128]

Similarly, the Fourth Circuit has held that for a recoupment program to be constitutional, it must provide a defendant with "notice of the contemplated action and a meaningful opportunity to be heard," among other requirements.[129]

Juvenile public defender fee statutes do not always furnish these due process protections. For instance, Florida does not provide for a pre-imposition determination of the ability to pay and instead automatically creates a lien on the property of parents whose child

125. *See* Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984); *see also* Anderson, *supra* note 63, at 339.

126. *See* Anderson, *supra* note 63, at 364; David A. Leen, Fuller v. Oregon*: The Cost of a Constitutional Right*, 55 OR. L. REV. 99, 112 (1976).

127. Anderson, *supra* note 63, at 367.

128. Leen, *supra* note 126, at 111-12 (footnotes omitted).

129. *Alexander*, 742 F.2d at 124.

is adjudicated delinquent.[130] The statute provides that the parent should receive "adequate notice" of the lien and an "opportunity to be heard and offer objection to the determination, and to be represented by counsel."[131] However, the statute requires a lien to be placed on the property of all parents whose children relied on a public defender—not just those with the ability to pay.[132] This statute requires parents to affirmatively contest recoupment but provides no clear standard to demonstrate their inability to pay, thereby harming indigent parents who may lack the resources to petition the court for relief.[133]

Florida is an outlier in this regard, as juvenile public defender fee laws usually require a calculation of a parent or child's ability to pay prior to the imposition of recoupment.[134] Nevertheless, these statutes may not include provisions requiring a hearing on the ability to pay prior to the imposition of obligations.[135] Relevant juvenile court rules may not provide for such a hearing, either.[136] For example, Idaho permits courts to impose recoupment on anyone liable for the support of a juvenile—even if they are indigent—unless such a payment "would impose a manifest hardship on" them.[137] Arizona similarly authorizes courts to collect full or partial reimbursement from indigent and partially indigent juveniles or their parents if such a payment would not cause the family "substantial hardship."[138] Neither these states' public defender fee statutes nor their juvenile court rules provide parents or guardians with a procedural mechanism, such as a hearing prior to the imposition of the obligation, for demonstrating manifest hardship besides the initial indigency determination.[139]

Similarly, Washington provides for an up-front determination of juveniles' and their families' ability to pay but no hearing

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130. *See* FLA. STAT. § 938.29(1)(a), (2)(a)(2) (2019).
131. *Id.* § 938.29(5).
132. *See id.* § 938.29(2)(a)(2).
133. *See id.*
134. FEIERMAN ET AL., *supra* note 10, at 6.
135. *But see* IOWA CODE § 232.11(3)(a), (3)(c), (5) (2020).
136. *See*, *e.g.*, IDAHO JUV. R. 9(b), (d).
137. IDAHO CODE § 20-514(7) (2020).
138. ARIZ. REV. STAT. ANN. § 8-221(G) (2020).
139. *See* ARIZ. JUV. CT. R. P. 10(B); IDAHO JUV. R. 9(b), (d).

before recoupment is collected.[140] The Washington public defender fee statute requires juveniles, if found indigent but able to contribute, to execute a promissory note when counsel is appointed for them.[141] However, the determination of indigency occurs during the juvenile's "initial contact with the court or at the earliest time circumstances permit," and the statute does not provide a mechanism for updating the juvenile's financial status.[142] Consequently, it appears that if juveniles are taken into custody and they or their family lose their income, they may have no opportunity to demonstrate that they are no longer able to pay.[143]

In the adult system, some state courts have found that a hearing prior to the entry of a judgment to collect recoupment costs would be unnecessary, instead finding that a hearing should be required only after the judgment is executed.[144] Nevertheless "[t]hese courts seem to conflate the due process required to enforce a judgment with the due process required to enter a judgment."[145] In fact, *Fuller* suggests that states should impose the obligation of repayment on only those who have the "foreseeable ability" to repay it.[146] Simply put, due process requirements apply not just during the enforcement of a judgment but also before its imposition.[147] Such robust protection ensures that fees are imposed on only those with the ability to pay.[148]

Concededly, statutes that impose liability for the payment of public defender fees on parents at least facially do not seem to punish children. But empirical research has shown that the difficulties of paying the cost of counsel "often keep a child under supervision until they're paid ... even if all other court sanctions have been satisfied."[149] Thus, in reality, even public defender fee obligations imposed solely on parents have the effect of indirectly

140. *See* WASH. REV. CODE §§ 10.101.020; 13.40.140(2) (2019).
141. *Id.* § 10.101.020(5).
142. *See id.* § 10.101.020(3).
143. *See id.* § 10.101.020(5).
144. Anderson, *supra* note 63, at 348-49.
145. *Id.* at 349.
146. *Id.* at 338 (quoting Fuller v. Oregon, 417 U.S. 40, 54 (1974)).
147. *See id.*
148. *See id.*
149. FEIERMAN ET AL., *supra* note 10, at 10; *see also supra* notes 1-6 and accompanying text.

punishing court-involved children for their parents' inability or unwillingness to fulfill their financial duties.[150]

Moreover, inadequate due process protections in recoupment programs that seek payment from only parents or guardians also indirectly penalize children for exercising their right to counsel. Without adequate procedural protections, public defender fee programs chill adults' right to counsel by imposing "the threat of an impossible debt."[151] Likewise, when parents cannot pay the cost of counsel and have no opportunity to contest the imposition of recoupment, children may waive their right to counsel due to the financial pressure on their families.[152] Part III.C elaborates on the chilling effects of public defender fee laws and how they pose unique harms to children.

C. Public Defender Fees Unduly Pressure Children to Waive Their Right to Counsel

Juveniles occupy a unique place within the justice system because the law has recognized that juveniles are not as cognitively and emotionally developed as adults.[153] In *Fuller*, the Court held that recoupment statutes in the adult criminal justice system with appropriate due process protections do not unconstitutionally chill the right to counsel.[154] However, juveniles' relative immaturity and fear of authority exacerbate the chilling effect of public defender fees.

1. Children Receive Special Treatment in Supreme Court Jurisprudence

The Supreme Court has consistently treated children and adults differently in its jurisprudence.[155] The *In re Gault* Court recognized that courts must take special care to protect juveniles from making

150. *See* FEIERMAN ET AL., *supra* note 10, at 10.
151. Anderson, *supra* note 63, at 360.
152. *Cf. id.* (describing the chilling effects in adult indigent defendants).
153. *See* Levick & Desai, *supra* note 22, at 200.
154. Fuller v. Oregon, 417 U.S. 40, 54 (1974).
155. *See* Levick & Desai, *supra* note 22, at 200-03.

self-incriminating admissions.[156] That is, when a juvenile makes a self-incriminating admission to the police without counsel present, juvenile courts should not just inquire into whether the confession was "coerced or suggested, but also that [the confession] was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[157] The Court has also reasoned that the law cannot treat children "as miniature adults."[158]

The issues of childhood immaturity and irrationality have consistently appeared in cases involving police interrogations of juveniles and juveniles' waiver of their rights against self-incrimination and to counsel.[159] Even before *In re Gault*, the Court recognized in *Haley v. Ohio* that juveniles are not as mature as adults, holding that the teenage years are "a tender and difficult age" due to the "great instability which the crisis of adolescence produces."[160] These traits, the Court held, render juveniles more susceptible to police coercion and thus more vulnerable to involuntary confessions than their adult counterparts.[161] Additionally, in *Moore v. Michigan*, the Court suggested that an individual's age and level of education are factors in the totality of the circumstances when determining if an individual knowingly and intelligently waived the right to counsel before pleading guilty.[162]

The Court echoed this reasoning in *Fare*, in which the Court held that the totality-of-the-circumstances analysis for waivers of the right to counsel during police interrogation must include an appraisal of a child's age, experience, and education to account for children's "limited experience[,] education[,] and ... immature judgment."[163] Recently, in *J.D.B. v. North Carolina*, the Court drew on "commonsense conclusions about behavior and perception" to

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156. 387 U.S. 1, 54, 56 (1967).

157. *Id.* at 55.

158. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011).

159. *See* Levick & Desai, *supra* note 22, at 201.

160. 332 U.S. 596, 599 (1948).

161. *Id.* at 599-600.

162. 355 U.S. 155, 164-65 (1957).

163. Fare v. Michael C., 442 U.S. 707, 725 (1979). *Miranda* requires law enforcement to inform criminal suspects who are in custody and subject to interrogation that they have the right to remain silent, that anything they say will be used against them, that they have the right to an attorney, and that if they cannot afford one, an attorney will be appointed to them. Miranda v. Arizona, 386 U.S. 436, 444 (1966).

conclude that if an officer knew or should have known a child's age during police questioning, then that factor must be considered when determining if the child was in custody and should have received the *Miranda* warning.[164]

The Court has also considered juvenile cognitive development and emotional maturity in contexts outside of the Fifth and Sixth Amendments. In *Roper v. Simmons*, the Court held that, under the Eighth Amendment, the death penalty does not apply to individuals who committed capital crimes when they were younger than eighteen.[165] The Court reasoned that the death penalty is a disproportionate punishment for children for three reasons. First, juveniles are immature and irresponsible as compared to adults.[166] They make irrational and impulsive decisions.[167] Consequently, they are less likely than adults to consider the costs—including the possibility of execution—of criminal behavior, which decreases the deterrent effect of the death penalty.[168] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," than adults.[169] Third, juveniles' personalities and character traits are more fluid and amenable to rehabilitation than those of adults.[170] Juveniles do not understand the nature and consequences of their crimes to the extent adults do and, therefore, are not as blameworthy as adult offenders.[171]

Similarly, in *Graham v. Florida*, the Court held that the Eighth Amendment forbids the imposition of a life sentence without the possibility of parole on juveniles for nonhomicide crimes.[172] The Court noted that life without parole, like the death penalty, does not serve the goals of deterrence or retribution because of juveniles' relative immaturity and irrationality.[173] These decisions

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164. 564 U.S. 261, 272 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).
165. 543 U.S. 551, 578-79 (2005).
166. *Id.* at 569.
167. *Id.*
168. *Id.* at 571-72.
169. *Id.* at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
170. *Id.* at 570.
171. *See id.*
172. 560 U.S. 48, 82 (2010).
173. *Id.* at 71-72.

demonstrate the Court's recognition that juveniles are unique and merit special treatment within the justice system.

2. Social Science on Juvenile Development and the Justice System Demonstrates Children's Immaturity

The Court's "commonsense" assumptions about the relationship between juveniles' immaturity and irrationality and their Fifth, Sixth, and Eighth Amendment rights are borne out by social science research.[174] Children and adolescents are particularly susceptible to peer influence; they strive for conformity, underestimate the riskiness of their behavior, and focus most heavily on the short-term (rather than the long-term) consequences of their decisions.[175] Moreover, children are socialized to obey authority figures, including their parents and officials.[176] Although children may understand that they have rights within the criminal justice system, they often are unable to articulate exactly which rights they possess, and they believe they lack power to assert them.[177]

Social science suggests that in the police interrogation context, younger juveniles do not understand their *Miranda* rights or the consequences of waiving them.[178] For example, one study found that about one-third of juveniles believed either that attorneys adjudicated their clients' cases or that attorneys were required to report

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174. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011).

175. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160-64 (1997).

176. *See* Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 715 (1992); *cf.* Barry Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 510-11 (2017) (noting that juveniles are more willing to waive the right to silence in police interrogations because "they believe they should obey authority").

177. *See* Christine Goodwin-De Faria & Voula Marinos, *Youth Understanding & Assertion of Legal Rights: Examining the Roles of Age and Power*, 20 INT'L J. CHILD.'S RTS. 343, 350-56 (2012).

178. *See* Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 8, 12, 18 (2013) (observing that in a sample of 307 juvenile cases, 92.8 percent of youths waived their *Miranda* rights—a rate 10 percent higher than the rate at which adults waive); Jessica Owen-Kostelnik, N. Dickon Reppucci & Jessica R. Meyer, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCH. 286, 293 (2006) (summarizing social science research on juveniles' comprehension of their *Miranda* rights and waiver).

their clients' wrongdoing to the court.[179] In comparison, only 6 percent of adults held these beliefs.[180] Juveniles also were about three times more likely than adults to believe a court could punish them for invoking their right to remain silent.[181] Juveniles younger than fifteen were significantly less likely than adults to understand the meaning or the function of their *Miranda* rights.[182] These findings indicate that younger juveniles cannot knowingly and voluntarily waive their *Miranda* rights.[183] Further, although older adolescents (fifteen- and sixteen-year-olds) understood their rights as well as young adults with comparable IQ scores, they could still lack the emotional intelligence and maturity to validly waive their rights.[184] Altogether, these observations suggest that children may not understand the importance of their right to counsel during formal proceedings and may be vulnerable to waiving it in response to financial or familial pressure.

3. States Have Enacted Additional Safeguards to Protect the Rights of Children

States have also recognized that juveniles are prone to imprudent decision-making and have responded by enacting laws governing juveniles' waiver of their *Miranda* rights and their right to counsel during formal proceedings. About twelve states require a parent or other "interested adult" to be present during a child's police interrogation for the child to validly waive their *Miranda*

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179. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1158 & n.91 (1980).

180. *Id.* at 1158.

181. *Id.*

182. *Id.* at 1143-46, 1159-60 (explaining the methodology and results of the study).

183. *Id.* at 1166. Older adolescents in the study also demonstrated significant gaps in their understanding of their Fifth Amendment rights. Older adolescents with an IQ score below eighty demonstrated poor understanding of the *Miranda* warnings when compared to an absolute standard for adequate comprehension and when compared to the adult subjects. *Id.* at 1160. One-third to one-half of older adolescents with an IQ score above eighty demonstrated an inadequate understanding of their *Miranda* rights using an absolute criterion. *Id.* That is, they displayed an "inadequate understanding of the wording or the significance of any *Miranda* statement," but their understanding was no worse than their adult counterparts. *See id.* at 1151, 1160.

184. *See id.* at 1157, 1165-66.

rights.[185] Other states presume that juveniles younger than either fourteen or sixteen are always incompetent to waive their *Miranda* rights and therefore require parental presence during interrogations of all juveniles in that age range.[186] In these states, there is also a rebuttable presumption that juveniles older than fourteen or sixteen are incompetent to waive their rights.[187]

Beyond the context of police interrogations, eight states always require juveniles to meet with an attorney before waiving their right to counsel during delinquency proceedings, and others "require consultation under specific circumstances."[188] These safeguards demonstrate states' concern that juveniles are not "miniature adults"[189]—they lack the cognitive and emotional capacity to understand and waive their rights.

4. Juveniles' Relative Immaturity Renders Them Vulnerable to Waiving the Right to Counsel in Response to Public Defender Fees

Social science, state laws, juvenile justice jurisprudence, and the high rate of waiver in many juvenile courts indicate that courts and legislatures should be wary of the chilling effects of public defender fees on children's right to counsel.[190] The particular effects of public defender fees on children and their decision to waive counsel should be considered when amending or striking down these schemes.

Indeed, public defender statutes typically place the onus of contribution or reimbursement on parents, not court-involved youths themselves.[191] The *Fuller* Court held that recoupment statutes do not chill adults' right to counsel because the distant prospect of repayment does not unduly punish adult offenders for exercising their

185. Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 36 (2006) (quoting Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983)).

186. *Id.* at 37.

187. *Id.*

188. NAT'L JUV. DEF. CTR., *supra* note 1, at 26.

189. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (citing Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)).

190. *See supra* Parts III.C.1-3.

191. *See* FEIERMAN ET AL., *supra* note 10, at 9.

right to counsel.[192] Nevertheless, the *In re Gault* Court treated the parent and child as a unit when considering an indigent child's right to counsel, reasoning that "the child and his parents must be notified of the child's right to ... counsel retained by them, or if *they* are unable to afford counsel, that counsel will be appointed to represent the child."[193] In doing so, the Court recognized that children's financial status—and thus their access to counsel—is linked to that of their family.[194]

Implicit in this acknowledgment is that a child and her parents must discuss whether the child wants to waive counsel or whether to apply for an indigency determination and have her family pay the requisite contribution or recoupment costs.[195] Thus, courts and legislatures cannot isolate the effect of recoupment and contribution statutes on a child's parents even if public defender fee statutes require parents alone to pay the cost of counsel.

In fact, as Part III.C.3 notes, certain states have explicitly recognized this parent-child dynamic in their juvenile waiver laws. Some states permit children to waive their right to counsel only after consulting with a parent or an attorney.[196] Other states minimize or eliminate parental interference in the child-attorney relationship: some prohibit waiver of counsel entirely or under specific circumstances[197] or require children to meet with an attorney before waiving their right to counsel.[198] These rules demonstrate some states' acknowledgment that financial strain or other factors may prevent parents from acting in the best interest of their children.

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192. Fuller v. Oregon, 417 U.S. 40, 54 (1974); *see also* Andrea L. Martin, Note, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1670 (2004) (explaining how the Eighth Circuit upheld Minnesota's reimbursement statute as applied to adults, and the Minnesota Supreme Court upheld the state's recoupment statute as applied to parents of juveniles because the delay of payment minimized coercion).

193. *In re* Gault, 387 U.S. 1, 41-42 (1967) (emphasis added).

194. *See id.*

195. *See id.*

196. *See, e.g.*, ARK. CODE ANN. § 9-27-317(a)(3) (2020).

197. *See, e.g.*, ALASKA STAT. § 47.12.090(a) (2020) (prohibiting waiver without consultation with an attorney when it has been alleged that the "minor has committed an act that would be a felony if committed by an adult").

198. *See, e.g.*, FLA. R. JUV. P. 8.165(a).

5. Juveniles' Particular Characteristics Heighten the Need for Legal Protections Against Waiver

Because juveniles are susceptible to parental influence, special care should be taken to prevent them from waiving their right to counsel due to public defender fees. As the Supreme Court did in *Fuller*, courts should consider whether public defender fee schemes chill the juvenile right to counsel.[199]

Admittedly, the exact scope of the juvenile right to counsel is not entirely clear.[200] In *In re Gault*, the Court based its decision to extend the right to counsel to juveniles on the Fourteenth Amendment, not the Sixth Amendment.[201] However, Justice Black asserted in his concurrence that the majority decision actually extended the Sixth Amendment right to juveniles through the Fourteenth Amendment.[202] In the Sixth Amendment context, the Court has looked to whether public defender fees chill defendants' right to counsel.[203] Therefore, if the scope of the juvenile right tracks with the Sixth Amendment right in the adult system, then courts should apply the chilling effects test. Given *In re Gault*'s broad, policy-focused analysis,[204] the more malleable chilling effects test may still be applicable.

The analysis may be different if a court approaches public defender fee schemes' effects on juvenile waiver and potential procedural safeguards from a Fourteenth Amendment perspective. When deciding whether due process requires a particular procedural safeguard in the civil context, the Court engages in a due process balancing test under *Mathews v. Eldridge*.[205] This Note considers

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199. Fuller v. Oregon, 417 U.S. 40, 51-52 (1974).

200. *Compare* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2191 (2014) (referring to the juvenile right to counsel as a pure Fourteenth Amendment right), *with* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 160-67 (2007) (discussing the juvenile counsel right as a Sixth Amendment right).

201. *In re* Gault, 387 U.S. 1, 41 (1967).

202. *Id.* at 64 (Black, J., concurring).

203. *Fuller*, 417 U.S. at 53-54.

204. *In re Gault*, 387 U.S. at 41.

205. Mathews v. Eldridge, 424 U.S. 319 (1976).

both the chilling effects analysis and the more modern *Mathews* test in turn.

a. Chilling Effects Analysis

The Court has not provided a bright-line rule or multifactor standard for assessing when public defender fee statutes chill the exercise of this right. Still, it has found laws that apply only to defendants who are able to pay and those that provide criminal debtors with the same protections as civil debtors do not chill the right to counsel.[206] *United States v. Jackson* delineated the contours of the standard for determining when a statute impermissibly chills a constitutional right:

> 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.... The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.[207]

In *Jackson*, the Court invalidated a provision of the Federal Kidnapping Act that permitted only juries to impose the death penalty in federal kidnapping cases.[208] The Court reasoned that this provision placed "an impermissible burden upon the exercise of [the] constitutional right" to jury trial by unduly pressuring defendants to plead guilty to avoid the death penalty.[209] The Court reasoned that the problem with the selective death penalty provision was not that it coerced individuals to plead guilty and waive their right to trial, "but simply that it needlessly *encourage[d]* them."[210] The existence of alternate methods of ensuring that a jury decided the issue of punishment was key to this analysis.[211] For example, certain states always required a jury to decide between life imprisonment

206. *Fuller*, 417 U.S. at 53-54; James v. Strange, 407 U.S. 128, 138-42 (1972).
207. 390 U.S. 570, 581-82 (1968).
208. *Id.* at 571-72.
209. *Id.* at 572.
210. *Id.* at 583.
211. *See id.* at 582-83.

or capital punishment, regardless of whether guilt was decided by jury or plea.[212]

Courts have applied this chilling effect analysis to juvenile public defender fee statutes.[213] During the 1970s, two California state courts considered the chilling effects of the state's erstwhile recoupment statute.[214] In *In re Ricky H.*, the California Supreme Court declined to strike down California's reimbursement statute on the ground that it unconstitutionally chilled a juvenile's right to counsel.[215] Instead, it held only that juvenile waivers of the right to "counsel made to avoid or reduce parental pressure or displeasure" were "neither intelligent nor voluntary" and thus invalid.[216]

In *In re Elizabeth S.*, the California Court of Appeal considered whether imposing a fifty-dollar fee for the cost of a public defender on a juvenile as a condition for her release from custody chilled her right to counsel.[217] The court struck down this reimbursement requirement, relying on state case law that had previously prohibited imposing reimbursement costs as a condition of probation because of this practice's chilling effect on the right to counsel.[218] Essentially, when a public defender fee resembled a sanction, the California courts held that it chilled the right to counsel. When these fees were implemented for purely economic purposes, they were permitted.

New factual and legal developments over the past few decades have undermined the California courts' "economic purpose" rationale. First, the Juvenile Law Center, a national juvenile justice advocacy and research organization, has reported that the cost of counsel, in fact, causes juveniles to waive their right to counsel.[219] The Center surveyed stakeholders in the juvenile justice system, such as attorneys, court-involved youth and their families, and

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212. *Id.*

213. *See In re* Ricky H., 468 P.2d 204, 210 (Cal. 1970); *In re* Elizabeth S., 188 Cal. Rptr. 2, 4 (Ct. App. 1982). Scholars have also engaged in a chilling effects analysis. *See* Martin N. Lettunich, *Does Parental Liability for Legal Fees Infringe upon a Juvenile's Constitutional Rights*, 10 SANTA CLARA L. REV. 347, 352-53 (1970); Martin, *supra* note 192, at 1660.

214. *See In re Ricky H.*, 468 P.2d at 210; *In re Elizabeth S.*, 188 Cal. Rptr. at 4.

215. *In re Ricky H.*, 468 P.2d at 209-11.

216. *Id.* at 211.

217. *See In re Elizabeth S.*, 188 Cal. Rptr. at 3-5.

218. *Id.* at 4-5.

219. FEIERMAN ET AL., *supra* note 10, at 11.

judges, about the impact of public defender fees.[220] Over one-third of the stakeholders who reported that public defender fees negatively impact juveniles and their families also reported that these fees cause juveniles to waive their right to counsel.[221] This finding probably underestimates the scope of the problem, as attorneys are unlikely to discover that a juvenile waived the right to counsel specifically because of public defender fees.[222] These observations ultimately highlight that juvenile waiver resulting from public defender fees is common and harmful, even if the fees' purpose is ostensibly economic.

Moreover, the California courts' approach to the relationship between juvenile public defender fees and waiver has been undermined by subsequent Supreme Court jurisprudence in the Fifth and Sixth Amendment contexts. The California courts held that courts could invalidate a child's waiver of the right to counsel if the juvenile had waived in response to parental pressure.[223] However, in *Colorado v. Connelly*, the Court held that "coercive government misconduct" must be present for a confession to be involuntary and thus inadmissible in evidence.[224] Consequently, even "[t]he most outrageous behavior by a private party" would not be unconstitutionally coercive under the Due Process Clause of the Fourteenth Amendment, and a confession produced by such behavior would still be admissible.[225] The Court reasoned that without government coercion, there is no state action, which is required for a Due Process violation.[226] Two years later, in *Patterson v. Illinois*, the Court clarified that a "more searching or formal inquiry" must be made into the knowingness and voluntariness of a defendant's decision to waive the Sixth Amendment right to counsel at trial as opposed to during post-indictment interrogation.[227] The Court reasoned that "the full 'dangers and disadvantages of self-representation'" are greater during trial than during

220. *Id.* at 15.
221. *Id.* at 11.
222. *Id.* at 19 n.58.
223. *In re* Ricky H., 468 P.2d 204, 211 (Cal. 1970).
224. 479 U.S. 157, 163-64 (1986).
225. *Id.* at 166.
226. *Id.* at 165.
227. 487 U.S. 285, 299 (1988).

interrogation, which warrants a more thorough evaluation of the waiver's validity.[228]

The likely upshot of these two decisions is that although courts must thoroughly investigate the circumstances surrounding a juvenile's waiver of the right to counsel during formal proceedings, government coercion must have occurred for such a waiver to violate the Due Process Clause.[229] Indeed, courts could consider the creation of a conflict of interest between juveniles and their parents government coercion.[230] It is more likely that courts would instead hold that juvenile waivers of the right to counsel induced by parental pressure are the result of merely private action.[231]

Thus, courts can conduct a "searching or formal inquiry" into the effect of a juvenile's age, educational background, and experience with the juvenile justice system on waiver.[232] However, courts can assess these factors only to the extent that they render a juvenile susceptible to direct coercion by government actors, such as the police, but not by private parties, such as their parents and guardians. Additionally, as a practical manner, courts in some areas are reluctant to inquire into the circumstances of a waiver and are quite willing to accept them.[233] Unless they are required by court rules or by law, juvenile courts may have little incentive to investigate whether children are waiving their right to counsel because of parental pressure resulting from defender fees.[234] Simply put, considering whether a juvenile's waiver was knowing and intelligent cannot cure the chilling effects of public defender fees.

Thus, under the *Jackson* chilling effect test, public defender fee statutes penalize children for exercising their right to counsel by

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228. *Id.* (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

229. *See id.*; *Connelly*, 479 U.S. at 165.

230. Martin, *supra* note 192, at 1664 n.205.

231. *Id.* at 1663-64 n.205 ("*Connelly* closes the door on constitutional claims of involuntariness based on parental coercion." (citing *Connelly*, 479 U.S. at 170-71)).

232. *Patterson*, 487 U.S. at 299.

233. *See supra* notes 56-61 and accompanying text (discussing juvenile courts' willingness to accept juvenile waivers without inquiring into the circumstances of those waivers).

234. *See Connelly*, 479 U.S. at 165-66. Since the juvenile right to counsel is grounded in the Fourteenth Amendment, children may not have the same right to self-representation that adults possess under the Sixth Amendment. Berkheiser, *supra* note 19, at 639. Courts therefore have greater flexibility to reject children's waivers of their right to counsel. Still, without any clarification from the Court, juvenile courts may continue to accept waivers without adequately considering the circumstances of those waivers.

conditioning their access to counsel on their families' resources.[235] This burden falls most heavily on children whose families are indigent or those whose families are just above the threshold of indigency.[236] These children are already the most vulnerable to the negative impacts of fees and fines within the juvenile system, such as financial instability and prolonged probation.[237]

Furthermore, the penalties these fees place on the right to counsel are unnecessary. In enacting public defender fee schemes, states may have the legitimate goal of collecting revenue.[238] Nevertheless, the lack of procedural safeguards exacerbates these fees' effects on waiver and indicates that alternative methods could reduce the unnecessary chilling effect on juveniles' right to counsel.[239]

For example, states could ban or severely restrict juvenile waiver or require that children meet with an attorney before waiving their right to counsel.[240] States that require children to consult with an attorney before waiving their right to counsel often have lower rates of juvenile waiver than those that do not.[241] These discrepancies in waiver rates suggest that without appropriate safeguards, public defender fee laws needlessly encourage children to forgo their right to counsel. In light of these effects, states should also end the practice of collecting these fees entirely.[242]

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235. Lettunich, *supra* note 213, at 354.

236. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 85-87 (2012).

237. FEIERMAN ET AL., *supra* note 101, at 6-8.

238. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046-47 (2006).

239. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 25-29.

240. *See supra* notes 47-52 and accompanying text.

241. NAT'L JUV. DEF. CTR., *supra* note 1, at 27. For example, before the creation of Florida Rule of Juvenile Procedure 8.165(a), which requires juveniles to meet with counsel before deciding to waive counsel, juveniles were required only to meet with a parent before waiving this right. *See* FLA. R. JUV. P. 8.165(a); PATRICIA PURITZ & CATHRYN CRAWFORD, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 20, 105 n.85 (2006), https://njdc.info/wp-content/uploads/2013/11/Florida-Assessment1.pdf [https://perma.cc/3TWD-J2X6]. The National Juvenile Defender Center found that this prior rule was "routinely flouted" and was an inadequate safeguard against waiver. *Id.* at 2.

242. *See infra* Part IV.B.

The fact that these laws indirectly affect juvenile waivers through children's parents is immaterial to this analysis.[243] As the Court noted in *Jackson*, the determination of whether a law penalizes the exercise of a constitutional right hinges on the law's "unnecessary and ... excessive" effects.[244] Therefore, because public defender fees likely cause unnecessary and excessive waivers, they violate the right to counsel.

b. Mathews *Analysis*

Alternatively, if the juvenile right to counsel is considered a purely due process right, courts may use a due process balancing test to consider whether public defender fee schemes are fundamentally fair under the Fourteenth Amendment.[245] If courts encounter a challenge to juvenile public defender fee laws, they may consider additional procedural safeguards to prevent unnecessary waivers under the *Mathews* test rather than the chilling effects test. *Mathews* provides a balancing test to determine what procedural protections due process requires.[246] Under *Mathews*, courts consider (1) the private interest at stake, (2) "the risk of an erroneous deprivation of such interest ... and probable value ... of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens" that would result from implementation of the proposed procedural safeguard.[247] The outcome of the analysis would therefore depend upon the specific procedural safeguard being proposed.[248]

First, the private interest at stake would be juveniles' interest in their physical liberty. Ample research has shown that children

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243. *See* United States v. Jackson, 390 U.S. 570, 582 (1968).

244. *Id.*

245. Quinn, *supra* note 200, at 2188 (discussing how the Court appeared to decide *In re Gault* on fundamental fairness grounds).

246. Jennifer K. Pokempner, Riya Saha Shah, Mark F. Houldin, Michael J. Dale & Robert G. Schwartz, *Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 541 (2012).

247. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

248. *See id.*

waive their right to counsel because of their and their families' inability to pay for public defender fees.[249] Access to counsel significantly improves children's ability to avoid detention, negotiate fairer probation conditions, and assert their rights.[250] Some empirical research demonstrates that juveniles who are represented by counsel may actually receive harsher treatment from juvenile court judges.[251] This may result from "[j]uvenile court judges' resistance to and even resentment of, defense lawyers."[252] Nevertheless, improved or universal access to counsel would mitigate this result: "if all children receive representation by counsel, judges will [not] be able to penalize ... everyone."[253]

Second, the risk of erroneous deprivation of children's liberty without additional procedural protections for the right to counsel is high, as discussed above.[254] One Missouri judge summarized the problem succinctly: when asked whether children understood what waiving the right to counsel meant, he responded, "[N]o, they don't.... [K]ids are trying to avoid additional expenses for their parents."[255] Improvements to the process of appointment counsel, such as presuming indigence, and modifications to juvenile waiver, such as requiring juveniles to meet with an attorney before waiving counsel or banning waiver outright, would each reduce or eliminate the possibility that juveniles would waive counsel in response to public defender fees.[256]

Third, courts would need to consider the government interests in cost minimization and administrative efficiency when determining whether to implement any additional safeguards.[257] Safeguards that increase children's access to counsel would come with financial and

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249. Scali, *supra* note 7, at 12-13.

250. Pokempner et al., *supra* note 246, at 564-65.

251. Barry C. Feld, *Criminalizing the American Juvenile Court*, *in* 17 CRIME AND JUSTICE: A REVIEW OF RESEARCH 197, 225-27 (Michael Tonry ed., 1993).

252. Berkheiser, *supra* note 19, at 642.

253. *Id.*

254. *See supra* Part I.C. (discussing findings demonstrating a high rate of waiver among juveniles).

255. NAT'L JUV. DEF. CTR, MISSOURI: JUSTICE RATIONED: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS 39 (2013), https://njdc.info/wp-content/uploads/2013/11/Missouri-Assessment.pdf [https://perma.cc/B3JU-B24Z].

256. *See infra* Part IV.A.

257. *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

administrative burdens. Nonetheless, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."[258] Moreover, by ensuring that youth receive access to counsel early, these safeguards would likely allow the juvenile justice system to function more efficiently and cost-effectively, as explained below.[259] Part IV discusses the feasibility of these proposals but ultimately advocates for ending the practice of imposing juvenile public defender fees.

IV. SOLUTIONS: CURBING AND ELIMINATING THE CHILLING EFFECT

In order to prevent public defender fees from chilling juveniles' right to counsel, states could take two paths. First, they could improve the waiver process itself to insulate children from the pressures of their family's financial circumstances. Second, they could eliminate the use of public defender fees entirely. Part IV addresses both of these solutions and counterarguments against them in turn.

A. Reducing Parental Influence on the Juvenile Right to Counsel

One method to reduce the likelihood that children will waive their right to counsel due to public defender fees would be to constrain the influence that parents have on their children's decisions regarding counsel. This Part lays out various suggestions of how to insulate children from their family's financial circumstances so that they do not or cannot waive their right to counsel.

1. Methods of Minimizing Parental Influence

States could minimize parental involvement in the relationship between juveniles and their counsel in several ways. First, they could require juveniles to meet with an attorney before they decide whether to waive counsel.[260] Notably, states that require children to

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258. *Id.*
259. *See infra* Part IV.A.
260. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 27.

consult with an attorney before waiving counsel have the lowest rates of waiver.[261] States could also presume that children are indigent for the purpose of appointing counsel so that counsel is automatically appointed.[262] Alternatively, states could ban waiver outright.[263] All of these safeguards have the added benefit of ensuring juveniles' access to counsel early in the delinquency process, which allows children to be better informed about their rights and options.[264]

If a state chooses to require pre-waiver meetings, it should not allow parents to substitute for attorneys in these meetings.[265] For example, New Hampshire requires children to meet with a nonhostile parent (but not counsel) before waiving their right to a lawyer.[266] Such a solution still leaves open the possibility that parents could pressure their children into refusing an attorney.[267] Consequently, this solution would not sufficiently eliminate public defender fees' chilling effect on the right to counsel.

2. Addressing Counterarguments to These Solutions

A lack of resources and personnel may pose logistical obstacles if a state requires meetings between children and their counsel, automatically appoints counsel, bans waiver, or implements a combination of these solutions.[268] States may not possess the financial resources and personnel to facilitate more meetings early in the delinquency process or provide counsel for every child.[269] Nonetheless, stakeholders in the juvenile justice system have recognized that these kinds of reforms are not only much needed but also cost-effective.

In particular, the National Council of Juvenile and Family Court Judges (NCJFCJ) recommended that appointing counsel early in the

261. *See id.*
262. *See id.* at 10.
263. *See id.* at 27.
264. *See generally* King et al., *supra* note 111.
265. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 27-28.
266. N.H. REV. STAT. ANN. § 169-B:12(II)(a)-(b) (2020).
267. PURITZ & CRAWFORD, *supra* note 241, at 2.
268. *See* SCALI ET AL., *supra* note 54, at 25 (discussing how "lack of resources and time" delayed initial interviews with clients).
269. *See id.*

juvenile process and having children meet with their attorney in advance of their initial hearing would help the juvenile system operate more efficiently.[270] The NCJFCJ reasoned "that providing counsel facilitates earlier resolution of cases," thereby saving money and time.[271]

Presuming children to be indigent ensures that children are quickly appointed counsel.[272] Further, requiring children to meet with their attorneys to discuss their waiver decision decreases the rate of waiver and ensures more children are represented.[273] Such early, unimpeded access to counsel would have tangible positive benefits. When children are represented by counsel, their cases are resolved faster.[274] As the NCJFCJ reports, early access to counsel would allow courts to avoid having "to continue a case for arraignment or first appearance of counsel."[275] Juveniles will instead be more likely to resolve their case at the initial hearing.[276] In fact, a study from a juvenile court in Ohio found that when children had access to counsel at their initial hearing, "78% of cases were resolved at that hearing."[277] Ultimately, the NCJFCJ guidelines suggest that requiring early consultation between children and attorneys and presuming indigence would not only curb the chilling effect of public defender fees on the right to counsel but also would save courts and defenders substantial resources.[278]

Additionally, entirely banning juvenile waiver would likely not pose substantial legal or logistical problems.[279] First, like presuming

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270. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES ch. III at 23-25 (2018), https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf [https://perma.cc/WH4Y-PXPH].

271. *Id.* at 24.

272. King et al., *supra* note 111, at 17.

273. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 27.

274. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 270, ch. III, at 25.

275. *Id.* ch. XII, at 25.

276. *See id.*

277. *Id.* ch. III, at 33 n.28 (citing JUV. DIV. OF THE LUCAS CNTY. CT. OF COMMON PLEAS, 2001 ANNUAL REPORT 4 (2001)). The NCJFCJ also suggests other methods that courts could use to save resources and free up public defenders' time, such as using court information management systems to organize docket time more efficiently and consolidating petitions to decrease the number of hearings that courts must hold. *Id.* ch. XII, at 24.

278. *See id.* at 23-25.

279. *See* NAT'L JUV. DEF. CTR., *supra* note 1, at 27 (noting that three states already ban waiver in most circumstances). Banning waiver of counsel would obviate the need for juveniles and attorneys to meet specifically to discuss juveniles' waiver decisions. Even so,

indigence and requiring meetings between juveniles and counsel, this approach ensures that all children are represented and facilitates the efficient operation of juvenile justice.[280] Moreover, judges across the country routinely refuse to accept juvenile waivers of counsel as a matter of practice or state law, indicating that formalizing such a ban would not overburden juvenile courts and defenders.[281]

Second, juveniles may not possess the right to self-representation like adults do under *Faretta v. California*.[282] *Faretta* held that adults have the right to self-representation in state proceedings and may waive counsel even when they have been advised against it.[283] The Court decided this case "based on the express language of the Sixth Amendment."[284] In contrast, the juvenile right to counsel appears to be grounded in the Due Process Clause of the Fourteenth Amendment.[285] While the exact scope of the juvenile right to counsel remains unsettled, *Faretta*'s holding may not extend to minors.[286] It is unlikely that minors possess the right to self-representation.

B. Ending the Practice of Imposing Juvenile Defender Fees

Of course, the best method of reducing the chilling effect of juvenile public defender fees would be to eliminate them entirely.[287] This method serves the juvenile justice system's rehabilitative goals by uncoupling juveniles' access to counsel from their parents'

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requiring meetings between juveniles and their attorneys prior to the first court appearance would still best protect juveniles' rights by allowing them to adequately prepare for this hearing. *See supra* notes 272-78 and accompanying text. This consequence would also help the juvenile justice system run more efficiently. *See supra* notes 269-79 and accompanying text.

280. *See supra* notes 268-78 and accompanying text.

281. *See, e.g.*, GABRIELLA CELESTE & PATRICIA PURITZ, NAT'L JUV. DEF. CTR., THE CHILDREN LEFT BEHIND 62 (2001), https://njdc.info/wp-content/uploads/2013/11/Final-Louisana-Assessment-Report.pdf [https://perma.cc/CU5Z-D5CV].

282. *See* 422 U.S. 806, 834, 836 (1975); *see also* Martin, *supra* note 192, at 1667.

283. *Faretta*, 422 U.S. at 818.

284. Berkheiser, *supra* note 19, at 639.

285. *Id.*

286. *See id.*

287. California ended the practice of collecting juvenile public defender fees in 2018. *See* S.B. 190, 2017-2018 Reg. Sess. (Cal. 2017). Such a solution would also prevent absurd results should a state enact a bar on juvenile waiver. Prohibiting waiver of counsel but also requiring the payment of public defender fees would put families who could not afford these fees in the difficult position of being forced to pay them.

financial resources.[288] In doing so, this solution allows juveniles to consult with counsel and learn about rehabilitative court diversion programs early in the adjudicatory process.[289]

The main difficulty with enacting such a law would be making up for lost revenue. Public defender agencies are notoriously underfunded and may oppose repealing public defender fees.[290] In fact, these agencies themselves have supported public defender fees as a politically acceptable method of financing their work.[291] Further, the solution could also pose a legal quandary. At common law, parents were required to pay for their children's necessaries, including the cost of counsel.[292] This doctrine lends legal support to these laws because it suggests that parents should be responsible for funding their children's representation.[293] In response to these arguments, some have proposed that states could remove any upfront contribution costs but permit recoupment, which could attenuate any effects on the right to counsel.[294]

However, the legal and cost-related arguments against ending public defender fees are outweighed by the risk these laws pose to the juvenile right to counsel. First, ending contribution but maintaining recoupment would be an inadequate solution: recoupment poses an equal threat to the right to counsel because it raises the possibility of long-standing debts.[295] In a Juvenile Law Center survey, 42.3 percent of the juvenile justice system stakeholders who reported that public defender fees negatively impact youths also reported that nonpayment of fees "resulted in a civil judgment ... that carried into adulthood."[296] Further, recoupment schemes in the juvenile system do not provide parents or children with adequate due process protections.[297] This lack of procedural safeguards

288. *See supra* Part I.A.

289. King et al., *supra* note 111, at 16.

290. NAT'L JUV. DEF. CTR., DEFEND CHILDREN 30 (2016), https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf [https://perma.cc/N44Z-RUS2].

291. Wright & Logan, *supra* note 238, at 2047.

292. Martin, *supra* note 192, at 1657-58.

293. *Id.*

294. *Id.* at 1669-70.

295. *See* Wright & Logan, *supra* note 238, at 2065.

296. FEIERMAN ET AL., *supra* note 10, at 11.

297. *See supra* Part III.B.

threatens children and families with debts that they may not be able to contest or repay, engendering an immediate and direct chilling effect.[298] Moreover, children are shortsighted and deferential to authority figures, such as their parents.[299] Even if recoupment's effects are more attenuated than contribution's, children may be more sensitive to the possibility of repayment than adults.[300] They may be more likely than adult offenders to waive their rights in response to their own fears of going into debt or pressure from their family's financial difficulties.[301]

Second, ending public defender fees is in fact cost-effective because it ensures early access to counsel and cuts down collection costs.[302] As Part IV.A.2 argues, facilitating the early appointment of counsel actually saves resources because counsel are able to assist juveniles in resolving their cases more quickly. Ending recoupment would also save the administrative costs of monitoring the financial resources of juveniles and their families to determine if they have become able to pay for the cost of counsel.[303] In fact, research suggests that counties earn little revenue from collecting juvenile administrative fees, such as public defender fees.[304] Further, the revenue that is collected is spent on collection activity, not support for court-involved youth.[305] As a Massachusetts juvenile court judge stated, "There's a better way to do business [than imposing fees]."[306] Eliminating juvenile public defender fees would enable the juvenile justice system to run more smoothly, ensure judicial resources are spent efficiently, and most importantly, safeguard children's rights.

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298. *See supra* Part III.B.

299. *See supra* Part III.C.2.

300. *See supra* Part III.C.4.

301. *See supra* Part III.C.2.

302. *See supra* Part IV.A.2.

303. *See supra* notes 74-79 and accompanying text (discussing the methods states use to determine if a child or her family have adequate financial resources to pay for counsel).

304. BERKELEY L. UNIV. OF CAL. POL'Y ADVOC. CLINIC, MAKING FAMILIES PAY 17-19 (2017).

305. *Id.*

306. Teresa Wiltz, *Movement Against Juvenile Court Fees Runs into Resistance*, PEW (Jan. 17, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/17/movement-against-juvenile-court-fees-runs-into-resistance [https://perma.cc/94XN-3A37].

CONCLUSION

The practice of collecting juvenile public defender fees through contribution and recoupment threatens the juvenile right to counsel. These laws undermine the rehabilitative purpose of the juvenile justice system by delaying youth's access to counsel or depriving them of that right entirely, heightening the risk that they will be adjudicated delinquent and face serious collateral consequences. Jurisprudence on the unique position of juveniles within the justice system suggests that even when the burden of paying public defender fees falls on parents, juveniles' right to counsel will still be chilled. Under pressure from their parents and lacking adequate legal safeguards, juveniles may waive their right to counsel and face the juvenile system without effective guidance.

To prevent these outcomes, states could work to remove the effect of parents on the child-counsel dynamic, such as by presuming children to be indigent, banning waiver, and mandating that children consult with counsel before waiving their right to an attorney. These safeguards would help the juvenile justice system run more efficiently and better protect children's rights. Nonetheless, banning the collection of juvenile defender fees entirely would be the most apt solution. It would provide the strongest protection of juveniles' right to counsel and promote the central tenets of *In re Gault*. This safeguard would facilitate early access to counsel, allowing juvenile cases to be resolved sooner, and would save state and local governments the expense of collecting fees, which has been shown to cost more than the revenue that these fees bring in. Public defender fees are simply not worth the cost to children and families.

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