Cornell Law Review

Volume 60
Issue 4 *April 1975*

Article 6

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Recommended Citation
Paul K. Stecker, *Equal Protection-Indigent Criminal Defendants-Right to Counsel-Recoupment of Defense Costs from Those Found Able to Pay After Sentencing* , 60 Cornell L. Rev. 670 (1975)
Available at: http://scholarship.law.cornell.edu/clr/vol60/iss4/6

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RECENT DEVELOPMENT

Equal Protection—INDIGENT CRIMINAL DEFENDANTS—RIGHT TO COUNSEL—RECOUPMENT OF DEFENSE COSTS FROM THOSE FOUND ABLE TO PAY AFTER SENTENCING

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

Among the most important achievements of the United States Supreme Court in the last two decades has been its success in making meaningful to indigent state court defendants the sixth amendment's guarantee of assistance of counsel in all criminal prosecutions.[1] Credit for this achievement must not be bestowed upon the Supreme Court alone, for its mandate would have gone unfulfilled had it not been for the states' responsiveness in organizing appointed counsel and public defender systems.[2]

Like all large-scale governmental ventures, defense programs are costly.[3] In a time of heightening fiscal burdens, it is only natural that many states have established plans to recoup their expenditures from tbose indigent defendants who later become solvent.[4] In *Fuller v. Oregon*,[5] the Supreme Court upheld against challenge on sixth amendment and equal protection grounds Ore-

[1] When used with respect to the right to appointed counsel, "indigent" refers to a defendant who cannot afford to pay for defense against the prosecution's charges. Thus, indigency turns not only on the defendant's resources, but also on the fee schedule of local defense attorneys for the type of case involved. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 53 (1967).

[2] For a comprehensive study of state appointed counsel and public defender systems see 2-3 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).

[3] Comprehensive statistics on the cost of defending the indigent tend not to be of recent origin, but they do give a sense of the magnitude of the effort demanded. In the last ten months of fiscal year 1966, counsel were appointed for 38% of the federal court defendants against whom criminal charges were brought. With 80% of the attorneys already paid, disbursements totaled $1,649,045, or an average of $131 per defendant. D. OAKS, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS 5-6 (1969). In 1965 the number of indigent felony defendants in state courts was estimated to be 150,000 per year. Using 1962 rates for assigned counsel the total cost of nation-wide representation was estimated as at least $25 million per year. 1 L. SILVERSTEIN, *supra* note 2, at 7, 10.

[4] Provisions for recoupment of various kinds of state-bestowed henefits from recipients who later acquire assets are not uncommon. For example, in Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd mem.*, 393 U.S. 323 (1969), a three-judge district court upheld the New York public assistance recoupment statute. A vigorous dissenting opinion was filed in that case by Judge Kaufman. 281 F. Supp. at 869.

[5] 417 U.S. 40 (1974).

gon's carefully-tailored recoupment statute.[6] This Note will analyze, in terms of important sixth amendment and equal protection precedent, the Court's disposition of the arguments which were before it in *Fuller*. From the perspective of the *Fuller* holding, it will then sketch the currently prevailing approach of the Supreme Court in right to counsel cases.

I

GENEALOGY OF THE ARGUMENTS BEFORE THE COURT IN *Fuller v. Oregon*

In the landmark case of *Gideon v. Wainwright*,[7] the Supreme Court reversed the conviction of an indigent defendant for whom a Florida court had refused to appoint counsel. Florida law at the time provided for appointment of counsel only in capital cases, and Gideon was charged with a noncapital felony.[8] Although the assistance of counsel clause[9] had much earlier been construed to mean that indigent criminal defendants in federal courts were entitled to appointed counsel,[10] prior to *Gideon* the same right had been extended to state court defendants only in capital cases[11] or in "special circumstances."[12] In *Gideon*, the Court, in an opinion by Justice Black, unequivocally declared that the right of indigent criminal defendants to appointed counsel is a fundamental right

[6] ORE. REV. STAT. §§ 161.665-.685 (1973).

The Supreme Court's tolerant attitude toward defense cost recoupment statutes derives in part from the Justices' recognition that they themselves are responsible for imposing on the states the burden of defending the indigent. *See* James v. Strange, 407 U.S. 128, 141 (1972).

[7] 372 U.S. 335 (1963).

[8] *Id.* at 337.

[9] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. One authority explains:

> History leaves no doubt that the assistance of counsel clause was aimed at the practice that had grown up in England, whereby defendants charged with felonies other than treason could not have the aid of retained counsel at their trials with respect to issues of fact. . . . [N]o one was thinking of the assignment of counsel, although some colonies did have statutes providing for their appointment in certain types of trials.

Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 943-44 (1965) (footnotes omitted).

[10] Johnson v. Zerbst, 304 U.S. 458 (1938).

[11] Powell v. Alabama, 287 U.S. 45 (1932).

[12] Betts v. Brady, 316 U.S. 455 (1942). These "special circumstances" have been found where there was danger of prejudice because of a codefendant's guilty plea, Hudson v. North Carolina, 363 U.S. 697 (1960); where a youthful defendant was kept ignorant of his rights, DeMeerleer v. Michigan, 329 U.S. 663 (1947); and where the charge involved complex legal issues, Tompkins v. Missouri, 323 U.S. 485 (1945).

essential to a fair trial.[13] As such, the right is enforceable against the states through the due process clause of the fourteenth amendment.[14] Since *Gideon,* the right to appointed counsel has been held to be fundamental in all but a few classes of cases[15] and in most stages of prosecution.[16]

In remedying the untoward influences of poverty on the criminal justice system, the *Gideon*-due process line of cases has been complemented by a line of equal protection cases of earlier origin. In *Griffin v. Illinois,*[17] the Supreme Court held that a state may not deny an indigent the right to appellate review of his conviction simply because his indigency makes it impossible for him to purchase a required trial transcript. Writing for a four-Justice plurality, Justice Black identified as "the central aim of our entire judicial system" the sweeping principle that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' "[18] The Court first applied this principle to the right to appointed counsel in *Douglas v. California,*[19] where it was held that a state may not condition appointment of counsel for an indigent defendant making a first appeal of right upon a preliminary finding that counsel would be of some value to the defendant or the court. The Supreme Court concluded that requiring indigent defendants seeking counsel to have the merits of their cases prejudged amounted

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[13] 372 U.S. at 342-45. Studies have indicated that the need for appointed counsel is no less important where the defendant chooses to plead guilty rather than go to trial:

> [T]he great majority of unrepresented defendants pleaded guilty, and most other cases were terminated by dismissals. Only a few cases went to trial. Of those who pleaded guilty, the overwhelming majority pleaded to the principal offense rather than to a lesser offense. This suggests the possibility that a defendant without counsel is in a poor position to bargain with the prosecutor for a plea to a lesser offense.

1 L. SILVERSTEIN, *supra* note 2, at 91-93.

[14] 372 U.S. at 340-41.

[15] In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that appointed counsel must be made available whenever the defendant faces possible imprisonment of any duration. The Court apparently has not reached as yet the issue of the right to appointed counsel in trials for petty or misdemeanor offenses where imprisonment is not a possibility.

[16] Among the "critical stages" to which the sixth amendment guarantee has been held to apply are preliminary hearings prior to indictment, Coleman v. Alabama, 399 U.S. 1 (1970); post-indictment lineups, United States v. Wade, 388 U.S. 218 (1967); and secret interrogations, Miranda v. Arizona, 384 U.S. 436 (1966). Counsel must be provided for convicts at parole and probation revocation proceedings, Mempa v. Rhay, 389 U.S. 128 (1967), and the first appeal of right, Douglas v. California, 372 U.S. 353 (1963).

[17] 351 U.S. 12 (1956).

[18] *Id.* at 17, *quoting* Chambers v. Florida, 309 U.S. 227, 241 (1940).

[19] 372 U.S. 353 (1963).

to the kind of "discrimination against the indigent" prohibited by *Griffin.*[20]

Surprisingly, there has been little interplay between the *Gideon*-due process and the *Douglas*-equal protection lines of cases. As a rule, the Supreme Court has employed due process analysis in dealing with practices which totally deprived indigent defendants of the right to appointed counsel.[21] It has employed equal protection analysis where challenged practices amounted only to arguable infringement—*i.e.*, partial deprivation—of this right.[22]

The Supreme Court's failure to bring the rationale of the *Gideon*-due process line of cases to bear on infringement fact situations means that it has not treated the right to counsel, unquestionably fundamental for due process purposes, as likewise fundamental for equal protection purposes. The Court's use of equal protection principles in right to appointed counsel cases has taken the form of traditional, two-pronged equal protection analysis: the Court has sought to determine *(1)* whether the challenged classification bears a rational relation to a legitimate state objective and (2) whether the serving of the state objective out-

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[20] *Id.* at 355.

[21] *See, e.g., In re* Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

[22] *See* Fuller v. Oregon, 417 U.S. 40 (1974); James v. Strange, 407 U.S. 128 (1972); Douglas v. California, 372 U.S. 353 (1963).

The reason for the existence of two lines of analysis in the right to counsel area has not been satisfactorily explained. Prior to *Gideon*, it was expected that any overruling of the "special circumstances" rule propounded in Betts v. Brady, 316 U.S. 455 (1942), would be accomplished on equal protection grounds. Indeed, Justice Black in his *Betts* dissent (316 U.S. at 474) had already advanced what one writer calls "the notion . . . that equal protection of the law demanded equipping impoverished defendants with counsel." Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure,* 56 J. CRIM. L.C. & P.S. 143, 150 (1965).

Professor Dowling supports tbe view that "the new look on the sixth amendment came via the due process clause of the fourteenth" because "due process of law is a more regulable doctrine than equal protection; it can be cut off where the *a priori* deductions of equal protection cannot." *Id.* at 150.

Professor Israel recoguizes that an equal protection case overruling *Betts* might bave lacked "limiting principles," but he concludes that the Court did not ensure a "regulable doctrine" in right to counsel cases by deciding *Gideon* the way it did because on the very same day that it decided *Gideon,* the Court in *Douglas*

> found no difference between the state's refusal to give the indigent a transcript in *Griffin* and its refusal to provide counsel on appeal. . . . Once the Court has found that *Griffin* requires equality in the *quality* as well as the right of appeal, it necessarily follows that the same type of equality is required at the trial level. As [dissenting Justice Harlan] in *Douglas* noted, the Court's decision in that case made the *Gideon* analysis of the right to appointed counsel under the Due Process Clause "wholly unnecessary."

Israel, *Gideon v. Wainwright: The "Art" of Overruling,* 1963 SUP. CT. REV. 211, 247-48 (emphasis in original) (footnotes omitted).

weighs any harm caused by the classification.[23] The appropriateness of the use of traditional equal protection analysis in right to appointed counsel cases is questionable, however, since in recent years the Court has used a more stringent test where provisions affecting fundamental rights or creating suspect classifications have been involved.[24] Such provisions have been analyzed with strict scrutiny and have been upheld only where found to serve compelling state interests.[25]

A second and related result of the Supreme Court's failure to emphasize the fundamental nature of the right to counsel in dealing with infringement cases has been its refusal to apply the doctrine of "unconstitutional chill" in such cases.[26] Briefly stated, the chill doctrine holds unconstitutional those laws which, while not denying fundamental rights, unnecessarily discourage the exercise of such rights. The doctrine, which is not often utilized by the Supreme Court,[27] was first outlined in detail in *United States .v.*

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[23] In an excellent overview of the Court's use of equal protection principles in the area of indigent defendants' rights, a student writer makes the following comments about the Court's use of a "traditional" test involving a "balancing" component:

> [A]lthough the majority opinion was void of any discussion of what "test" was being used, *Griffin* seems to have found that the interests of a state in conserving its funds are far *outweighed* by the harm of depriving an indigent of an appeal. Likewise, in *Douglas* the inequality between "rich" and "poor" that results when the latter is not furnished counsel on his first appeal as of right, was found to be "a discrimination at least as invidious as that condemned in *Griffin* . . . ." More illustrative of the rationale employed in reaching the result in *Douglas* is its limitation to first appeal. The implication is that appeals and collateral proceedings at other levels might not survive the weight of the economic considerations of the state. Indeed, the Court carefully established that "absolute equality is not required; lines can be and are drawn and we often sustain them."

Comment, *New Vistas in Protecting the Indigent: Rewriting Griffin and Douglas*, 4 SUFFOLK U. L. REV. 485, 500-01 (1970) (emphasis in original) (footnotes omitted).

[24] One such classification, long held suspect for obvious reason, is race. *See* Korematsu v. United States, 323 U.S. 214 (1944).

[25] But "the *Griffin-Douglas* rationale has yet to be applied to the full extent required by *current* equal protection standards . . . ." Comment, *supra* note 23, at 503 (emphasis in original). The writer continues:

> Applying this more stringent test that has evolved since *Griffin* and *Douglas* and their progeny, it is dubious whether the limitations placed on their holdings would still be upheld today. For example, the *Douglas* limitation of the right of an indigent to be furnished with council [*sic*] only on the *first appeal granted as a matter of right* appears to be the results [*sic*] of the Court's considering subsequent appeals or collateral attacks less meritorious than first appeals as of right when *balanced* against the state interest of monetary conservation. However, in view of the compelling interest standard that appears to he required, a mere showing that appointment of counsel at different judicial levels would be relatively costly to the state, would not seem to absolve that body from that responsibility.

Id. at 502 (emphasis in original) (footnote omitted). *But see* text accompanying note 107 *infra.*

[26] *See* Fuller v. Oregon, 417 U.S. 40 (1974); James v. Strange, 407 U.S. 128 (1972).

[27] Application of the chill doctrine has generally been limited to cases in which state or local governments have attempted to condition the contintuation of public employment

Jackson.[28] In that case the Court struck down a provision of the Federal Kidnapping Act[29] which provided for imposition of the death penalty only in cases tried before a jury, thus forcing the defendant who exercised his constitutional right to a jury trial to do so at the risk of his life. Because other means of assuring that the death penalty is never imposed unless the case has been tried before a jury were clearly available, the Court invalidated the Kidnapping Act's accomplishing that purpose by conditioning the right to a jury trial.[30]

A case which confirms some of the above observations about the Court's approach in cases involving the rights of indigent criminal defendants is *Rinaldi v. Yeager.*[31] A New Jersey statute enacted in the wake of *Griffin* required prisoners who perfected unsuccessful appeals to repay the state out of their prison pay for the cost of transcripts required in preparing their appeals.[32] Writing for the Court, Justice Stewart refused to reach petitioner's argument that the statute discouraged him from exercising—*i.e.*, chilled—the "indigent's freedom to appeal" purportedly guaranteed by *Griffin.*[33] Instead, the case was disposed of on the narrower basis that "no defensible interest" in the legitimate end of recoupment was served by requiring repayment from prisoners, but not from other classes of unsuccessful indigent appellants, such as those given suspended sentences, fines, or probation.[34]

In oft-cited dicta, the *Rinaldi* Court emphasized that "a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures."[35] By the time the Court first dealt with a defense

upon waiver of constitutional rights. *See* Uniformed Sanitation Men v. Comm'r, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Shelton v. Tucker, 364 U.S. 479 (1960).

[28] 390 U.S. 570 (1968).

[29] 18 U.S.C. § 1201(a) (1964).

[30] 390 U.S. at 581-83. "In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt is determined." *Id.* at 582 (emphasis in original).

[31] 384 U.S. 305 (1966).

[32] N.J. STAT. ANN. § 2A:152-18 (Cum. Supp. 1964).

[33] 384 U.S. at 307.

[34] *Id.* at 309. A decision on chill grounds would have cast doubt on the states' ability to place any condition at all on exercise of the indigent's rights. Equal protection seems to have been a "narrower" ground of decision because, as Justice Jackson once wrote, invalidation of state action on equal protection grounds "does not disable any governmental hody from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact." Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (concurring opinion).

[35] 384 U.S. at 309.

cost recoupment statute in *James v. Strange*,[36] a variety of such statutes were in force in nearly a third of the states.[37] On the federal level, Congress had made provision in the Criminal Justice Act of 1964[38] for recoupment from federal court defendants with available funds.[39] Moreover, some state courts made a practice, in the absence of any specific recoupment statute,[40] of ordering repayment as a condition of probation.[41]

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[36] 407 U.S. 128 (1972).

[37] A number of the statutes in effect at the time of the *Strange* decision are cited in the Court's opinion. *Id.* at 133 n.8. A New Hampshire recoupment provision was declared violative of that state's constitution in Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969).

[38] 18 U.S.C. §§ 3006A(a)-A(i) (1970).

[39] The federal provision reads, in relevant part, as follows:

> Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney . . . or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section.

Id. § 3006A(f). The Criminal Justice Act is a comprehensive plan to provide representation and other services to federal criminal defendants otherwise unable to obtain an adequate defense. Although § 3006A(f) is often called a recoupment provision, its primary purpose is not to recover past expenditures, but to compel a defendant who is "marginally eligible" under the Act to pay part of the costs of his defense, presumably in advance. *See* COMMITEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964, REPORT, 36 F.R.D. 277, 290 (1965); Oaks, *Improving the Criminal Justice Act*, 55 A.B.A.J. 217, 219 (1969). *But see* United States v. Durka, 490 F.2d 478 (7th Cir. 1973) (repayment ordered from defendant found financially able to make repayment within reasonable time of his acquittal).

[40] Although courts have no implied or inherent power to award costs in either civil or criminal cases, state statutes provide for the award of costs in a wide range of situations. *See, e.g.*, N.Y. CIV. PRAC. LAW §§ 8101-10 (McKinney 1963).

[41] The leading case attacking this practice is *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969). The California Supreme Court declared such conditioning of probation an impediment to the free exercise of sixth amendment rights, even where procedural safeguards are employed:

> [W]e believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon* [v. Wainwright, 372 U.S. 335 (1963)].

71 Cal. 2d at 391, 455 P.2d at 144, 78 Cal. Rptr. at 208. "*Miranda* [v. Arizona, 384 U.S. 436, 491 (1966)] made clear that where 'rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.' " 71 Cal. 2d at 393, 455 P.2d at 146, 78 Cal. Rptr. at 210.

The California court's approach was rejected in State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972), *overruled on other grounds*, State v. Young, 21 N.C. App. 316, 204 S.E.2d 188 (1974). *Allen* was followed in State v. Eide, 83 Wash. 2d 676, 521 P.2d 706 (1974), perhaps the last pre-*Fuller* recoupment case in the high courts of the states.

Strange involved a Kansas statute which required indigent criminal defendants to reimburse the state for expenditures made in providing them with counsel and other defense services.[42] If a defendant defaulted on his obligation, the debt was entered on the docket as a judgment against him.[43] Furthermore, with the exception of the homestead exemption,[44] all of the exemptions normally afforded civil judgment debtors in Kansas were denied to a defendant indebted to the state under the recoupment statute.[45]

In a forceful opinion, a three-judge federal district court unanimously struck down the Kansas recoupment statute.[46] When *Strange* reached the Supreme Court, the Justices, not surprisingly in light of *Rinaldi,* refused to rule on whether the statute had a chilling effect upon the exercise of the right to appointed counsel.[47] The ruling of the court below was affirmed on the narrower ground that the statute was violative of equal protection. In his opinion for a unanimous Court, Justice Powell focused on the statute's unequal treatment of indigent criminal defendants as compared with other civil judgment debtors.[48] Under Kansas law, one in debt to an attorney whom he had retained could not be threatened with unrestricted garnishment or attachment should he fail to pay his bill, while one in debt to the state for the services of his appointed attorney could be so threatened.[49] Citing *Rinaldi* for

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[42] KAN. STAT. ANN. § 22-4513 (Supp. 1971). The statute provided for notice to the defendant of the amount owed within 30 days of disposition of his case. He was given 60 days in which to make repayment. Interest accrued on the debt at the rate of six percent per year. *Id.*

[43] *Id.* § 22-4513(a).

[44] *Id.* §§ 60-2301 to -2303 (1964 & Supp. 1971).

[45] The normal exemptions included restrictions on the amount of garnishment, exemption of personal clothing and tools of trade from attachment, and so forth. *Id.* §§ 60-2304 to -2311.

[46] Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971). Citing *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969), and United States v. Jackson, 390 U.S. 570 (1968), the court held that the provision unnecessarily chilled the indigent defendant's exercise of his right to appointed counsel:

> What can be more unnecessary than trying to recoup costs of counsel from an indvidual already adjudged to be an indigent and by definition unable to stand the very expense in question? . . .
>
> . . . .
>
> . . . Unquestionably the reasoning and decision in Gideon would be hollow verbiage if an indigent accused could be offered or "provided" counsel in such a way as to assure that he will reject court appointed counsel.

323 F. Supp. at 1233; *see* notes 28-30 & 41 and accompanying text *supra.* For discussion of *Strange v. James* see 20 KAN. L. REV. 344 (1972).

[47] 407 U.S. at 134.

[48] *Id.* at 135-37.

[49] *Id.* at 136-37.

the principle that the equal protection clause " 'imposes a requirement of some rationality in the nature of the class singled out,' "[50] the Court held that "[t]his requirement is lacking where . . . the State has subjected indigent defendants to such discriminatory conditions of repayment."[51]

II

Fuller v. Oregon

From the perspective of *Rinaldi* and *Strange,* decisions in which the Supreme Court evaded the chill doctrine in right to appointed counsel cases while adopting an apparently traditional test of equal protection, *Fuller v. Oregon*[52] comes as no surprise. In 1972, Prince Eric Fuller pleaded guilty in an Oregon circuit court to a reduced charge of third-degree sodomy. Upon his representation that he was unable to afford retained counsel, an attorney had been appointed to defend him. Fuller was sentenced to five years of probation. One of the conditions of his probation was that he reimburse the county for the expense of his attorney and of an investigator hired by his attorney to gather information for his defense.[53]

The sentencing court imposed this condition on Fuller's probation under the authority of a recoupment statute enacted by the Oregon legislature in 1971.[54] The carefully-tailored statute outlined a limited set of circumstances in which repayment could be ordered. First, only costs "specially incurred by the state in prosecuting the defendant" could be the subject of recoupment.[55] Second, no repayment could be had from an acquitted defendant.[56] Third, no repayment could be had unless at the time of sentencing the defendant was or would be able to pay.[57] Fourth,

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[50] *Id.* at 140, *quoting* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

[51] 407 U.S. at 140.

[52] 417 U.S. 40 (1974).

[53] *Id.* at 42. The amount of the attorney's fee is not stated in either the Oregon court or Supreme Court opinion. The investigator's fee was $375. State v. Fuller, 12 Ore. App. 152, 164, 504 P.2d 1393, 1399 n.2 (1973) (dissenting opinion).

[54] ORE. REV. STAT. §§ 161.665-.685 (1973).

[55] *Id.* § 161.665(2). This provision excludes "expenses inherent in providing a constitutionally guaranteed jury trial . . . ." *Id.*

[56] *Id.* § 161.665(1).

[57] In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Id. § 161.665 (3). In *Fuller*, repayment was actually made by the defendant's fatber, who

any defendant not in "contumacious default" could have the order remitted or modified so as to avoid "manifest hardship" to himself and his immediate family.[58] Finally, defaults in payment could be collected only by the means prescribed by law for the collection of other judgments.[59]

Fuller appealed from his sentence. His argument took the form of the familiar dual attack in right to appointed counsel cases—*i.e.*, that the law had a chilling effect on fundamental rights and that it denied equal protection to indigent defendants. Fuller's sentence was affirmed by the Oregon Court of Appeals in January 1973.[60] The United States Supreme Court granted certiorari,[61] and in May 1974 it affirmed the judgment of the Oregon court.[62]

A. *The Chill on Fundamental Rights Argument*

In upholding the Oregon statute, the Supreme Court was forced to confront the chill on fundamental rights argument which it had been able to avoid in *Rinaldi* and *Strange*. It is difficult, however, to conclude that the *Fuller* Court in fact came to terms with this argument. Justice Stewart's language in the Court's opinion suggests that the Court was not disposed to recognize as unconstitutional anything less than a total denial of the right to appointed counsel:

> Oregon's system for providing counsel quite clearly does not *deprive* any defendant of the legal assistance necessary to meet [*Gideon*'s demands]. As the State Court of Appeals observed in this case, an indigent is *entitled* to free counsel "when he needs it"—that is, during every stage of the criminal proceedings against him. . . . The fact that an indigent who accepts state-

agreed to advance funds to his son after the sentencing court commented, "I don't think the taxpayers of Multnomah County should be saddled with this responsibility where there are family resources." 12 Ore. App. at 164-65 n.2, 504 P.2d at 1399 n.2 (dissenting opinion). *See* notes 77-78 and accompanying text *infra*.

[58] ORE. REV. STAT. § 161.665 (4) (1973).

[59] *Id.* § 161.685 (6).

[60] The state court dismissed both of Fuller's arguments. Chill on constitutional rights was rejected because of the statute's "substantial limitations" on the power of the sentencing court. 12 Ore. App. at 159-60, 504 P.2d at 1397. The decision on equal protection grounds in *Strange* was said to have had as its "sole basis" Kansas' denial of basic debtor exemptions to indigent defendants. *Id.* at 155, 504 P.2d at 1395. In his dissent, Judge Fort followed *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969). *See* note 41 *supra*. He also contended that conditioning probation upon repayment in effect allowed imprisonment for a debt owed the state, contrary to the Oregon constitution, because failure to repay would be a parole violation, thus raising the possibility of imprisonment if parole were revoked. 12 Ore. App. at 163, 504 P.2d at 1399; *see* notes 80-83 and accompanying text *infra*.

[61] 414 U.S. 1111 (1973).

[62] 417 U.S. 40 (1974).

> appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his *eligibility* to obtain counsel.[63]

This language cannot be reconciled with the chill doctrine as posited in *Jackson*. Under *Jackson* the appropriate test for a chilling effect is not whether the challenged practice deprives anyone of a fundamental right, or even coerces waiver of a right; it is simply whether the challenged practice unnecessarily *encourages* waiver of the right in question.[64] The Court did not sufficiently consider Fuller's argument because it failed to articulate the issue of chill in the terms set forth in *Jackson*.[65] Furthermore, there was particular

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[63] *Id.* at 52-53 (emphasis added) (citation omitted).

[64] In his opinion for the *Jackson* Court, Justice Stewart wrote:

> The inevitable effect of any such provision, is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. . . .
>
> . . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. . . . Given the availability of . . . other alternatives, it is clear that the selective death penalty provision of the Federal Kidnapping Act cannot be justified . . . .
>
> . . . For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply tbat it needlessly *encourages* them.

390 U.S. at 581-83 (emphasis in original).

There is a temptation to paraphrase Justice Stewart's language in *Fuller* (*see* text accompanying note 63 *supra*) and to comment that the death penalty provision struck down in *Jackson* did not *deprive* any defendant of the right to a jury trial; it did nothing to affect his *eligibility* for that to which he was *entitled.*

Jackson states that chill is unconstitutional when it is "unnecessary." In light of the small amounts of revenue recovered by recoupment plans, it is difficult to conclude that they are "necessary." *See* notes 90-95 and accompanying text *infra*. Moreover, there is an alternative means by which states could conserve expenditures for defense services, namely, a restructuring of the system by which the initial determination of eligibility is made. *See* note 92 *infra.*

[65] Further evidence of the confusion underlying the *Fuller* Court's treatment of *Jackson* is found in the following excerpt from Justice Stewart's opinion:

> This case is fundamentally different from our decisions relied on by the petitioner which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. . . . Unlike the statutes found invalid in those cases, where the provisions "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," *United States v. Jackson*, . . . [390 U.S.] at 581, Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so.

417 U.S. at 54 (citations omitted). In this excerpt the Court suggested that a statute with an ostensibly valid purpose which incidentally chills the exercise of a constitutional right should be upheld. The *Jackson* Court had unequivocally rejected such a position. 390 U.S. at 581-83; *see* note 64 *supra*. In *Jackson* the Court merely stated that "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." 390 U.S. at 581. Chilling laws are not "patently unconstitutional": the objectives which they purport to serve are permissible. Notwithstanding these objectives, such laws should be struck down if the chilling effect is "unnecessary." *See* note 64 *supra*.

reason for the Court to have given this petitioner every "benefit of the doubt" in testing for chill. In affirming the fundamental character of the right to appointed counsel, *Gideon* mandates that the Court be an uncompromising protector of that right.[66] The *Gideon* line of cases also serves to underline the long-established rule that the Court will indulge every reasonable presumption against waiver of fundamental rights.[67]

Can it fairly be said, in light of the strong presumption against waiver of fundamental rights, that the Oregon statute does not encourage waiver of the indigent's right to counsel?[68] One writer suggests that a recoupment provision which is consistent with notions of fair notice *must* be inconsistent with the principle of knowing and voluntary waiver:

> If, when counsel is offered, the defendant is told that he may later be required to pay the fee, it may discourage him from accepting the offer, especially if he is already ignorant or dubious about the value of having counsel. It is questionable, however, that a waiver can be completely voluntary when a defendant who accepts counsel knows that he may be charged with a fee *the amount and terms of which are to be fixed at a later time*. . . . On the other hand, if the defendant is not told of the collection system at the time counsel is first offered, he may feel that the court played a trick on him by persuading him to accept the offer when he would have declined it had he known about the possible expense.[69]

Thus, even a carefully-tailored recoupment scheme thrusts the indigent criminal defendant into a state of considerable uncertainty. Concurring in the *Fuller* Court's opinion, Justice Douglas considered this uncertainty to be no different from that which a

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[66] [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Gideon v. Wainright, 372 U.S. 335, 344 (1963).

[67] *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1937).

[68] Justice Marshall, in his dissent, found it unnecessary to reach Fuller's chill argument, pointing out that

> such a claim could more appropriately be considered by this Court in the context of an actual case involving a defendant who, unlike petitioner, had refused appointed counsel and contended that his refusal was not a knowing and voluntary waiver of his Sixth Amendment rights because it was based upon his fear of bearing the burden of a debt for appointed counsel or upon his failure to understand the limitations the State imposes on such a debt.

417 U.S. at 61 n.2. The fact that the Court went out of its way to reject Fuller's chill argument underlines the importance of *Fuller* as an indicator of the Court's currently prevailing approach to right to counsel cases.

[69] 1 L. SILVERSTEIN, *supra* note 2, at 113 (emphasis added).

nonindigent defendant faces in deciding whether or not to retain counsel.[70] But the analogy fails for two reasons. First, it does not acknowledge that the indigent defendant's apprehension is accentuated by his likely ignorance of financial and legal matters.[71] Second, it presumes equal degrees of uncertainty. In practice, the nonindigent defendant may intelligently predict the financial consequences of his retaining counsel: he hires the lawyer in the first instance, negotiates the fee, and approves expenditures for ancillary services. The indigent defendant, on the other hand, is not privy to the transactions in which the extent of his potential liability is determined. When he chooses to have counsel he in effect signs a "blank check." The knowledge that the "check" will be "cashed" only if it is later determined that he is able to pay does little to dispel the indigent defendant's apprehension.[72]

It is difficult to distinguish an order to repay defense costs from a fine,[73] especially where the state compels repayment, as does Oregon, only from defendants found guilty.[74] By refusing to waive appointed counsel, the indigent defendant runs the risk of incurring additional punishment,[75] in the form of a repayment order, should he be convicted.[76]

Very often, counsel is appointed to defend an indigent defendant whose relatives possess some resources. The relatives may have been unwilling to come forward,[77] or the defendant may be

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[70] 417 U.S. at 56 (Douglas, J., concurring).

[71] "As a practical matter . . . most indigent defendants may not be in a position to know adequately the consequences of waiver." Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 27 (1963) (footnote omitted).

[72] Recoupment schemes generally afford the defendant no hearing on the matter of repayment prior to entry of the repayment order. In United States v. Durka, 490 F.2d 478 (7th Cir. 1973), it was held that failure to afford a hearing before entry of a repayment order does not constitute a violation of due process. In order to assert his defenses, a defendant must disobey the order and assert them at the resulting contempt or parole revocation proceeding. *Id.* at 480. In choosing this course of action, a defendant thus takes a substantial risk of receiving additional punishment.

The *Fuller* Court did not have to consider notice and hearing claims because they apparently were not raised in the state court. 417 U.S. at 50 n.11. It noted "in passing," however, that Oregon provided hearings before levying of execution or revocation of probation. *Id.* This appears to be tacit approval of the holding in *Durka*.

[73] Indeed, the Oregon recoupment provision is found in the state criminal code.

[74] The Court itself made the comparison of costs to a fine when it reiterated its prior belief that there is no " 'constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.' " 417 U.S. at 53 n.12, *quoting* Tate v. Short, 401 U.S. 395, 400 (1971).

[75] Moreover, the additional punishment falls unequally. *See* text accompanying note 92 *infra*.

[76] *Cf.* United States v. Jackson, 390 U.S. 570, 584 (1968).

[77] There is no legal obligation for relatives to come forward in this situation, other than

reluctant to seek or to accept their help. The knowledge that, if he chooses to have counsel, pressure might later be exerted on family members to "lend" him funds with which to repay the costs of his defense certainly encourages such a defendant to waive his rights.[78]

B. *The Equal Protection Argument*

In passing on Fuller's equal protection claims, the Supreme Court compared Oregon's treatment of indigent criminal defendants ordered to repay defense costs with its treatment of other civil judgment debtors and of indigent criminal defendants not ordered to repay. It distinguished *Strange* on the ground that Oregon did not explicitly deprive defendants like Fuller of normal debtor exemptions.[79] In his dissenting opinion, in which Justice Brennan joined, Justice Marshall accused the majority of obfuscating the equal protection issue by focusing solely on the matter of civil debtor exemptions. He argued that Oregon's treatment of indigent criminal defendants ordered to repay was unequal in a more fundamental respect. Although the Oregon constitution forbids the imprisonment of recalcitrant civil debtors,[80] the recoupment statute's authorization of probation contingent upon repayment means that indigent defendants in debt to the state for defense costs may be threatened with imprisonment.[81]

under the rule that, insofar as legal services are "necessaries," a father is liable for expenses incurred by his child, Gerston v. Stousland, 186 Misc. 201, 60 N.Y.S.2d 118 (Sup. Ct. 1946), and a husband is liable for expenses incurred by his wife, Elder v. Rosenwasser, 238 N.Y. 427, 144 N.E. 669 (1924).

The following excerpt suggests another aspect of the problem:

> It would seem that . . . there is a certain unfairness in placing pressures on parents or relatives to retain counsel. The result might well be that the defendant whose relatives were "callous" would be represented by a better lawyer than the defendant whose relatives were sympathetic and conscientious. And the better lawyer will be provided at state expense.

Kamisar & Choper, *supra* note 71, at 20 n.94.

[78] The circumstances under which Fuller's father "lent" his son the funds for repayment have already been described. *See* note 57 *supra*. The dissenting judge in the Oregon court felt that the statutory scheme exerted "inhibiting" pressures on family members. 12 Ore. App. at 163-64, 504 P.2d at 1399 (Fort J., dissenting). The elder Fuller did not come forward with funds at any time before his son's sentencing. Would his son, faced with a sodomy charge, have elected counsel had he known that his father might later be called upon to repay the cost?

[79] 417 U.S. at 47-48.

[80] ORE. CONST. art. I, § 19.

[81] 417 U.S. at 59-61. Justice Marshall, dissenting, observed:

> Article I § 19 of the Oregon Constitution is representative of a fundamental state policy consistent with the modern rejection of the practice of imprisonment for debt as unnecessarily cruel and essentially counterproductive. Since Oregon chooses not to provide imprisonment for debt for well-heeled defendants who do not pay their

The majority perceived the imprisonment for debt issue not as one of equal protection, but as an issue of state law not before the Court.[82] Nevertheless, it went out of its way to countenance the practice by approving Oregon's contention that "revocation of probation is not a collection device used by the State to enforce debts to it, but a sanction imposed for 'an intentional refusal to obey the order of the Court.' "[83]

Oregon demanded no repayment from indigent criminal defendants found not guilty,[84] nor from those who were convicted and sentenced to imprisonment.[85] The "traditional" character of the equal protection test employed by the *Fuller* Court is apparent in the Court's discussion of these classifications. Citing *Rinaldi,* the Court stated that its task was "merely to determine whether there is 'some rationality in the nature of the class singled out' " as potential debtors.[86] Its conclusion was that "Oregon could surely decide with objective rationality" that indigent defendants who are convicted must repay, while those indigent defendants who similarly benefit from state expenditures but are acquitted need not.[87]

Even conceding the appropriateness of the use in *Fuller* of a "traditional" equal protection test, it may be argued that the Court's conclusion that the Oregon statute is not violative of equal protection was unsound. The "traditional" test of equal protection, as set forth in *Rinaldi,* relates not to abstract or hypothetical notions of rationality, but to the rationality of the challenged classification *in relation to* the legislative object involved.[88]

Insofar as the legitimate end of recoupment statutes is the replenishment of the treasury "from the pockets of those who have directly benefitted" from public expenditures,[89] and not the heaping of additional punishment upon convicted indigents, the rationality of a distinction between convicted and acquitted indigent

retained counsel, I do not believe it can, consistent with the Equal Protection Clause, imprison an indigent defendant for his failure to pay the costs of his appointed counsel.

Id. at 60-61.

[82] *Id.* at 48 n.9.

[83] *Id., quoting* ORE. REV. STAT. § 161.685(2) (1973).

[84] *See* note 56 and accompanying text *supra.*

[85] Presumably, it is only the convict sentenced to probation who has any earning capacity with which to make repayment. D. OAKS, *supra* note 3, at 58. Prison pay might suffice for a transcript, as in Rinaldi v. Yeager, 384 U.S. 305 (1966), but it could scarcely pay a lawyer's fee.

[86] 417 U.S. at 49, *quoting* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

[87] 417 U.S. at 50.

[88] *See* text accompanying note 34 *supra.*

[89] *See* text accompanying note 35 *supra.*

defendants must be questioned. Quite apart from this point, it is difficult to conclude that recoupment statutes actually accomplish the end of fiscal replenishment. Nearly all of the defendants who are found to be indigent at the time counsel is appointed but are later found able to make repayment may be placed in one of the following three groups: (*1*) those who acquired assets during the criminal proceeding through gift, inheritance, loan, or other sources; (*2*) those who were initially found to be indigent because of their concealment of resources which were later discovered; and (*3*) those "marginally eligible" defendants whose finances remained stable, but who were determined to be below the indigency line for purposes of appointment of counsel, and later determined to be above it for purposes of repayment.

Studies of various legal defense programs yield several observations about these three groups. The first group appears to be so small as to be insignificant.[90] The second is also small. Concealment of assets is less common than might be supposed, and under the present system of determining eligibility, those who do conceal assets usually go undetected.[91] The burden of the recoupment scheme thus falls almost entirely on the "marginally eligible" defendants who comprise the third group.[92] But this group is not large either,[93] and its members are the one group of criminal

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[90] D. OAKS, *supra* note 3, at 58.

[91] There are two reasons why concealment usually goes undetected. First, investigation would require "huge time and expense." *Id.* at 40. Second, the one officer of the court who is in a position to know of the concealment, namely the appointed attorney himself, may, because of the attorney-client privilege, be reluctant to reveal this information. *Id.* at 7, 47.

Insofar as catching those who misrepresent eligibility is a goal of recoupment statutes, this goal goes unmet. A solution to the problem awaits an overhauling of the system for determining eligibility in the first instance. *See* note 92 *infra*.

[92] Ironically, it was a goal of the federal recoupment statute and perhaps of others to extend assistance to "marginally eligible" defendants. *See* note 39 *supra*. It seems that such defendants are either being held ineligible or being granted aid subject to burdensome conditions of repayment. This problem suggests that the cursory character of the intitial determination of eligibility is the cause of many of the defects in indigent defense systems. The following observation is typical:

> The determination is made either by a magistrate at the first appearance before him or by the district judge at the arraignment stage, the only difference of . . . note being that some magistrates do not put the accused under oath.
>
> All judges question the accused in open court—and that is about all.

Kamisar & Choper, *supra* note 71, at 19-20. Like the initial determination of eligibility, the determination of who shall repay and in what amount is based upon a procedure so irregular and discretionary as to raise questions of due process.

[93] Professor Oaks concluded from his study that in federal courts the determination of eligibility in most cases is easy: "As a statistical matter, the typical defendant who seeks assistance under the act is unemployed and has no cash or other property." D. OAKS, *supra* note 3, at 27.

defendants for whom the threat of potential future liability is most intimidating. Moreover, because of their financial conditions, the amounts which may ultimately be recovered from them are not great.[94]

Weighing heavily against the slight value of recoupment schemes as a means of recovering public expenditures is their undesirable influence on indigent defendants and on the entire rehabilitative process.[95] Under a "traditional" equal protection test, therefore, one element of which is a "balancing" of interests,[96] the rationality of the Oregon system's relation to the goal of fiscal replenishment seems tenuous.[97] Under "strict scrutiny" analysis, which arguably is called for in defense cost recoupment cases because of the nature of the right involved and the class affected, the case against the Oregon system is an even clearer one.

III

Fuller v. Oregon AND THE CURRENTLY-PREVAILING APPROACH IN RIGHT TO COUNSEL CASES

The tendency to read too much into a case of recent vintage should be avoided. This caveat is especially applicable to a case like *Fuller*, where the statute involved is highly specific[98] and the petitioner is not the "ideal" challenger of the state practice.[99]

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[94] 1 L. SILVERSTEIN, *supra* note 2, at 115. The author argues that

> it is more importaut for society to defray the cost of providing an adequate defense in criminal cases (a constitutional obligation) than to subsidize the civil court system by charging only nominal fees to litigants.

Id.

[95] The effects of recoupment systems on the efficiency of the probation apparatus have been the subject of considerable study:

> Although the stringent requirements of compulsive repayment might constantly remind [the probationer] of his past mistake and thus "make a better man of him," it might well be that the financial hardship imposed would affect adversely rehabilitation by, for example, embittering the probationer who views this use of probation as extortion or threatened imprisonment for deht.

Kamisar & Choper, *supra* note 71, at 26.

"It has been reported that, in Michigan, the use of this system *in all cases* has produced the result 'that the rehabilitative aspects of their probation program have badly deteriorated, with the probation officers becoming mere collection agents.' 22 CAL. ASSEMBLY INTERIM COMM. REP. 103 (1961)." Kamisar & Choper, *supra* note 71, at 26 n.114 (emphasis in original).

[96] *See* note 23 and accompanying text *supra*.

[97] Contrary to the insistence of the Court in Rinaldi v. Yeager, 384 U.S. 305 (1966), that the efficiency of a recoupment scheme has no bearing on its constitutionality, the failure of such a scheme to fulfill its goal surely has bearing on the issue of its rational relation to the legitimate end involved. *See* note 23 and accompanying text *supra*.

[98] *See* notes 54-59 and accompanying text *supra*.

[99] *See* note 68 *supra*.

Nevertheless, the importance of *Fuller* as an indicator of current trends is unmistakable, for it signifies what *Rinaldi* and *Strange* presaged: the Court's refusal to apply, whether by means of the chill doctrine or through "strict scrutiny" equal protection, an analysis of current right to counsel issues which would emphasize the fundamental nature of the right involved.

Support for the conclusions drawn from *Fuller* can be found in a case decided by the Supreme Court less than one month after the *Fuller* decision. In *Ross v. Moffit,*[100] the Court reversed a unanimous decision of the Fourth Circuit[101] and held that the right of indigent criminal defendants to appointed counsel does not extend to discretionary appeals at the state level or to applications for review by the United States Supreme Court. Justice Rehnquist, writing for the Court, distinguished *Gideon* and its fundamental rights rationale on the ground that the appellate process, unlike the trial stage, is initiated by the defendant, rather than by the state.[102] He further asserted that no fundamental right of the individual vis-à-vis the state was involved in *Moffitt* because "[u]nfairness results only if indigents are singled out by the State and *denied* meaningful access to the appellate system because of their poverty."[103] Thus, concluded Justice Rehnquist, the issue in *Moffitt* "is more profitably considered under an equal protection analysis."[104]

In his opinion for the court of appeals, Chief Judge Haynsworth had written that there is "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel."[105] But the Supreme Court took a different view of the equal protection issue in *Moffitt*. Given the "last resort" nature of discretionary appeal and the availability of counsel at intermediate appellate levels,[106] the Court held that it is reasonable for a state to find that "other claims for public funds . . . preclude the implementation" of a system to provide counsel for indigent criminal defendants seeking discretionary review of their convictions.[107]

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[100] 417 U.S. 600 (1974).
[101] 483 F.2d 650 (4th Cir. 1973).
[102] 417 U.S. at 610.
[103] *Id.* at 611 (emphasis added).
[104] *Id.*
[105] 483 F.2d at 653.
[106] 417 U.S. at 613-15.
[107] *Id.* at 618.

CONCLUSION

In right to appointed counsel cases the pendulum has clearly swung away from expansionism. Although the Supreme Court seems to have stifled the egalitarian spirit of the landmark right to counsel cases of the 1960's, it shows no sign of a willingness to retreat from the rules of law established therein. The gains won by indigent criminal defendants will be lost not in the Supreme Court, but in the state legislatures. Future legislation affecting the right to appointed counsel will, as did the *Fuller* recoupment provision, come before a Court which holds a tolerant attitude toward legislative choices in this area.

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