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Note

Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings

Andrea L. Martin*

Imagine a twelve-year-old child of average intelligence who is charged with a felony count of damage to private property. The child and parent arrive at the juvenile court on the day of arraignment and apply for court-appointed counsel for the child. The court administrator determines that the child qualifies for appointed counsel,¹ and informs the child’s parent that if the child accepts representation, the parent must pay a $100 fee. While waiting to meet with the appointed counsel, the parent tells the child that she refuses to pay the $100 fee and suggests that the child should consider waiving the right to counsel and pleading guilty. The child is torn as to what to do, but abides by the parent’s wishes. This intense conflict of interest between the parent and the child represents only one of the many problems with a co-payment statute that requires the parents of juvenile respondents to make a co-payment for court-appointed counsel.²

Under a recently invalidated Minnesota statute, both criminal defendants and juvenile respondents using court-appointed counsel faced a fee ranging from $50 to $200 depending on the severity of their charges.³ In an attempt to generate revenue to balance the ailing Minnesota budget,⁴ the state leg-

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1. See MINN. R. JUV. P. 3.02 (indicating that if the child cannot afford an attorney, one should be appointed for him or her).
2. See MINN. STAT. § 611.17(c) (Supp. 2003).
3. Id.
4. See id. As amended, the statute requires that the first $2,740,000 collected as a result of this fee be transferred to the state’s general revenue fund.
islature raised public defender co-payment fees from $28 for any service to $100 for juveniles and a maximum of $200 for adults with felony charges. The Minnesota Supreme Court invalidated this version of the co-payment statute in *State v. Tennin*, which dealt with an adult indigent defendant, because the statute failed to include an option for judges to waive the co-payment if it imposed a "manifest hardship" on the defendant. Unfortunately, commentators and courts, including the court in *Tennin*, have said little, if anything, about the impact of co-payment or reimbursement statutes on juveniles facing delinquency charges. The operation of a co-payment requirement on the right to counsel affects juveniles differently than adults for several reasons. Juveniles face a system lacking some of the procedural safeguards inherent in the adult criminal system, such as the right to a jury trial, in an increasingly punishment-oriented system; are susceptible to adult coercion; and may lack the capacity to make good legal decisions.

Part I of this Note describes the separate development of the right to counsel for adults versus children and depicts the current trends in the juvenile justice system. It further provides a background on various attempts to recover the costs of providing court-appointed counsel through reimbursement statutes, and concludes with a description of Minnesota's invalidated attempt to recover costs through co-payment. Part II gives a brief description of *State v. Tennin*, which invalidated the most recent Minnesota co-payment statute, and analyzes the court's assessment of the co-payment statute as applied separately to adults and juveniles. Part III examines why a co-payment statute implicating parental liability presents additional harms to juveniles from a policy standpoint. Finally, Part IV offers several alternatives that curb at least some of the negative impacts of a co-payment statute on juveniles. Additionally, this section provides suggestions to future courts on interpreting the holding in *State v. Tennin* in the event that the proposed alternatives are not adopted. This Note concludes

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6. MINN. STAT. § 611.17(c) (Supp. 2003) (providing tiered amounts for the co-payment, depending on the degree of the charge).
that the Minnesota Supreme Court erred in failing to analyze the co-payment’s application to juveniles separately, because even if the legislature follows the court’s guidance, a revised statute would still be unconstitutional as applied to juveniles. Further, even if a future court fails to recognize the constitutional defect of such a statute as applied to juveniles, the legislature should still reconsider the co-payment statute because it negatively impacts the juvenile’s right to counsel, and several superior alternatives exist.

I. THE RIGHT TO COUNSEL AND PAYMENT FOR THAT RIGHT

The right to counsel for adults has developed separately from the right to counsel for juveniles. This distinction is especially important in analyzing State v. Tennin, because the court in that case sweepingly invalidated the co-payment statute without acknowledging the differences in the juvenile right to counsel as compared to the adult right to counsel.

A. THE RIGHT TO COUNSEL FOR ADULTS

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” While some questions still exist concerning at which stage in a case the right to counsel attaches and whether certain charges require assistance of counsel, the adult right to counsel is fairly well established. As early as 1932, the Supreme Court recognized a fundamental right to effective appointment of counsel in capital cases.

10. U.S. CONST. amend. VI.

11. Compare United States v. Ash, 413 U.S. 300, 321 (1973) (holding no right to counsel for photo identification when the accused was not present), and Kirby v. Illinois, 406 U.S. 682, 690–91 (1972) (holding no right to counsel for show-up identification when accused had not been charged yet), with Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (holding a right to counsel for a preliminary hearing when determining whether to present the case to a grand jury), and United States v. Wade, 388 U.S. 218, 237 (1967) (holding that the Sixth Amendment right to counsel attaches when the prosecution is at a “critical stage”).


13. Powell v. Alabama, 287 U.S. 45, 73 (1932) (stating that “[t]he duty of the trial court to appoint counsel under such circumstances is clear,” after six
Shortly thereafter, the Court further expanded the right to counsel, stating that federal courts cannot deprive an accused of life or liberty unless the accused has counsel or has waived the assistance of counsel.\(^{14}\) A waiver of the right to counsel must be "an intentional relinquishment or abandonment of a known right" depending on the facts and circumstances involved in the case, "including the background, experience, and conduct of the accused."\(^{15}\) This means that the waiver must be knowing, intelligent, and voluntary.\(^{16}\)

The Court continued to expand and define the Sixth Amendment right to counsel up through the 1970s. The right grew to include the right to appointment of counsel for indigent defendants charged with felonies,\(^{17}\) and finally the right to assistance of court-appointed counsel for indigent criminal defendants sentenced to imprisonment, regardless of the classification of the offense.\(^{18}\) While the Court has never required states to provide counsel for defendants charged with misdemeanor offenses who are not sentenced to imprisonment, many states, including Minnesota,\(^{19}\) have voluntarily chosen to provide counsel in such circumstances.\(^{20}\) Despite its increased duty to provide representation to those unable to secure counsel, a state cannot require that the criminal defendant proceed with counsel if he or she has knowingly, intelligently, and voluntarily waived the right.\(^{21}\) In contrast to the development of the right to counsel enjoyed by adults, the juvenile right to counsel evolved through a unique social and case history.

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15. Id. at 464.
18. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").
19. MINN. STAT. § 611.14(1) (2002) (providing the right to representation by a public defender for "person[s] charged with a felony, gross misdemeanor, or misdemeanor").
20. Simpson, supra note 12, at 418–19 (indicating that thirty-five states and the District of Columbia require the appointment of counsel for more than just defendants charged with misdemeanors sentenced to jail).
21. Faretta v. California, 422 U.S. 806, 835–36 (1975) (holding that there is a constitutional right to pro se representation).
B. THE RIGHT TO COUNSEL FOR JUVENILES

1. The Special History of the Juvenile Court

Founded at the turn of the twentieth century, the juvenile court system is a relatively modern legal invention.22 Prior to the mid-nineteenth century, the justice system treated many juveniles no differently than adults.23 Starting in the mid-nineteenth century, however, two child welfare movements swept America.24 In the first movement, early reformers thought that new environments with strict discipline could change a wayward child's character.25 "Houses of Refuge," reformatories for children, sprang up in New York, Boston, and Philadelphia.26 These reformatories operated on a "parens patriae" concept where the state assumed the role of the parent.28 Typically, courts considered these reformatories as schools that served the therapeutic, vocational, and welfare needs of juveniles.29 By the 1860s it became clear that these institutions operated more like child prisons, yet the movement continued to grow to include six hundred such facilities by 1890.30

During the Progressive Era, spanning approximately 1880 to 1920, juvenile justice underwent a second movement of

22. ELLEN RYERSON, THE BEST LAID PLANS 4 (1978) (describing that in 1899, Illinois created a separate court to deal with the legal problems facing juveniles).

23. See id. at 36 (indicating that children were frequently incarcerated with adults and tried by adult proceedings). The age at which children could be held criminally accountable for their actions varied over time. This age ranged from seven in the Middle Ages to fourteen by the seventeenth century. See A.W.G. Kean, The History of the Criminal Liability of Children, 53 L.Q. REV. 364, 366, 369 (1937); see also Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104, 106 (1909) (indicating that United States common law age of criminal responsibility in many states was seven or ten).


25. Id. at 16.

26. Id. at 15–18.


28. See Grossberg, supra note 24, at 18.

29. Id.

30. See id.
Reformers sought to disassociate juveniles from the stigma of the criminal system and move toward a model based more on social welfare. In 1899, to effectuate this separation, Illinois developed a distinct court system designated to handle only the problems of juveniles. Along with the new court system came a new vocabulary, including, for example, “delinquent” and “disposition” rather than “criminal” and “sentence.”

The first juvenile courts operated under a general lack of formal procedure. Many reformers perceived the new juvenile court as curative and a place to demonstrate care for children. The reformers considered the new juvenile process advantageous because the system avoided stigmatizing juveniles by separating them from adults and allowing only limited access to their proceedings and records. Because of the solicitous image of the juvenile court, the law only recognized the child’s right to custody, not to liberty, hence the lack of procedure. By the 1930s, critics observed that the informal approach in juvenile courts did little by means of justice, one critic suggesting that “[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts.” Despite harsh criti-

31. See id. at 31–32.
32. Id. at 46.
33. RYERSON, supra note 22, at 4.
35. Mack, supra note 23, at 117. Mack noted that “[t]he procedure and practice of the juvenile court is simple.” Id. For procedure, the court notified children and parents to appear, but refrained from any detention prior to the hearing unless the offense charged was serious, there was a likelihood of escape, or the home was completely unfit for the child. Id. Mack does not discuss provisions for deciding detention, nor any other procedural rights guaranteed to the child. See id. at 117–22 (describing what happened at a juvenile hearing).
36. See id. at 120. Mack artfully expresses the romantic ideal of the juvenile court lacking procedure and formality as follows:
The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.
Id.
37. BARRY C. FELD, JUSTICE FOR CHILDREN 16 (1993).
39. Roscoe Pound, Foreword to PAULINE V. YOUNG, SOCIAL TREATMENT IN
isms of the juvenile courts, change would not come for another thirty years.

2. Recognition of a Right to Counsel for Juveniles

In 1967, the Supreme Court addressed some of the inadequacies of the juvenile courts in *In re Gault*, which held that in delinquency adjudications, juveniles are entitled to due process under the Fourteenth Amendment. In *In re Gault*, an Arizona juvenile court committed fifteen-year-old Gerald Gault to the State Industrial School until the age of twenty-one for making "lewd remarks" over the telephone to a neighbor. Many modern parents probably would find the procedure employed in the Gault case appalling. No one notified Gerald's parents upon taking him into state custody, and the state served neither Gerald nor his parents with a petition. The next day, the judge held an informal hearing where the complainant was not present, no written account of the proceeding was recorded, and the judge questioned Gerald without an attorney. Because Arizona denied juveniles the right to appeal, the Gaults unsuccessfully pursued a writ of habeas corpus to the Arizona Supreme Court.

The United States Supreme Court, however, agreed to hear the case and found a right to counsel among many other procedural rights afforded to juveniles under the Fourteenth Amendment. The Court held that the right to counsel existed for delinquency proceedings in which the juvenile might be committed to an institution that limited the juvenile's freedom. As part of that right, the parents and the child must be notified of their right to counsel, and, if they cannot afford to retain counsel, the court should appoint representation.
bation officers, parents, and judges are not sufficient substitutes for counsel. Counsel is necessary to assist juveniles prepare and present a defense, question the facts, deal with the complexities of the law, and insist that proceedings are handled lawfully.

Most states have now codified the juvenile right to counsel. In fact, at the time of In re Gault, a few states already had statutes in place that at least allowed juveniles to appear with counsel. The Minnesota statute codifying the juvenile right to counsel in delinquency matters is very explicit, stating that a "child has the right to be represented by an attorney" and that the right attaches by the first court appearance. In a separate statute, Minnesota grants a right to representation by a public defender to juveniles aged ten or older, except for children charged with petty offenses. Interestingly, this statute states that "[t]he child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court." The statute further provides that if a child is a petty offender facing a third (or greater) alcohol or controlled substance charge that might carry an alternative disposition, the child is entitled to appointment of counsel. Whether or not juveniles exercise that right raises the issue of waiver.

49. See id. at 36. But see Fare v. Michael C., 442 U.S. 707, 728 (1979) (upholding a juvenile's waiver of counsel during a custodial police interrogation when he asked to talk to his probation officer).

50. In re Gault, 387 U.S. at 36.

51. See Tory J. Caeti et al., Juvenile Right to Counsel: A National Comparison of State Legal Codes, 23 AM. J. CRIM. L. 611, 622 (1996) (indicating that only Delaware, Hawaii, Michigan, Missouri, Mississippi, and New Hampshire do not have statutes concerning the juvenile's right to counsel).

52. 387 U.S. at 37-38 ("In at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these.").

53. MINN. R. JUV. P. 3.01 (indicating that the attorney for the child should first meet privately with the child, without parents, guardians, or custodians, and that the attorney is only counsel for the child).


55. MINN. STAT. § 260B.163 subd. 4(a) (2002).

56. Id. (emphasis added).

57. Id. Children who have a series of alcohol- or drug-related offenses must be evaluated for chemical dependency and can be ordered an alternative disposition to inpatient or outpatient chemical dependency treatment. MINN. STAT. § 260B.235 subd. 6 (2002).
3. Waiver of the Right to Counsel by Juveniles

Similar to adults, juveniles can waive their right to counsel. In *Fare v. Michael C.*, the Court held that a "totality-of-the-circumstances" approach is sufficient to determine whether a juvenile has waived his or her Miranda rights, but the Court has never specifically addressed waiver of the right to counsel in juvenile delinquency proceedings. Important factors under the "totality-of-the-circumstances" test for Miranda waiver include the juvenile's age, experience, background, intelligence, and capacity to understand warnings about rights, the nature of due process rights, and possible consequences of the waiver of Miranda rights. Despite the constitutional requirements of the juvenile right to counsel, many questions still exist about the use and application of waiver to the right to counsel.

Legal experts have conducted significant research regarding the effectiveness and application of waiver requirements. In 1989, Professor Barry Feld of the University of Minnesota published a thorough analysis of the right to counsel in Minnesota juvenile courts. In his study, Professor Feld examined the rates of representation of juveniles for all of Minnesota and its subsets. Using data collected by the Minnesota Supreme Court's Judicial Information System on delinquency and status offense cases in 1986, Professor Feld found an overall average representation rate of 45.3% for the state. The rates among the eighty-seven counties in Minnesota varied, however, from four counties with representation rates of 90% or greater to six counties with representation rates of 10% or less. Professor Feld found that the children in counties with much higher rates of representation were removed from their homes far less frequently than children in counties with much lower rates of rep-

59. Id. at 725.
60. Id.
62. Id. at 1209.
63. Id. at 1210.
64. Id. at 1214.
65. Id. Professor Feld revealed similar results when comparing rates of representation among the states of California, Minnesota, Nebraska, New York, North Dakota, and Pennsylvania, where New York had the highest rate of representation at 95.9% and North Dakota had the lowest at 37.5%. FELD, supra note 37, at 54–55.
representation.\textsuperscript{66} In his conclusions, Professor Feld strongly questioned the Minnesota standard that juvenile waiver be "knowing, intelligent, and voluntary."\textsuperscript{67} Further, Professor Feld suggested a requirement of mandatory, non-waivable counsel,\textsuperscript{68} or at least a waiver standard that requires juveniles to consult with an attorney before waiving the right.\textsuperscript{69}

Other studies have found similar inadequacies in the juvenile system. The General Accounting Office (GAO) conducted a study at the direction of Congress on juvenile representation in the mid-1990s, finding again that representation rates and the effectiveness of representation among states were very inconsistent.\textsuperscript{70} The GAO found that among delinquency adjudications, rates of unrepresented juveniles ranged from only 2.3% in California and 3.6% in Pennsylvania to about 38% in Nebraska.\textsuperscript{71} In 1993, the American Bar Association cited waiver as a cause of inadequate counsel for juveniles and many of the other problems that affect the juvenile system.\textsuperscript{72} The ABA recommended that the Department of Justice and the states collaborate to create waiver procedures that would make waiving counsel more difficult for children.\textsuperscript{73}

To address a number of problems in the juvenile system, Minnesota created an Advisory Task Force on the Juvenile Justice System in 1992.\textsuperscript{74} The Task Force studied the possibility of granting juveniles a non-waivable right to counsel.\textsuperscript{75} The state

\textsuperscript{66} Feld, \textit{supra} note 61, at 1239.
\textsuperscript{67} \textit{Id.} at 1323–24.
\textsuperscript{68} \textit{Id.} at 1325–26.
\textsuperscript{69} \textit{Id.} at 1329.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{See} \textsc{Presidential Working Group on the Unmet Legal Needs of Children and Their Families}, \textsc{ABA, America's Children at Risk: A National Agenda for Legal Action} 60 (1993).
\textsuperscript{73} \textit{Id.} at 61. Two years later, the ABA completed another report which questioned waiver standards again. \textsc{American Bar Association Juvenile Justice Center \textit{et al.}, A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings} 7–8 (1995).
\textsuperscript{75} \textit{Id.} at 986–87.
adopted the suggestions of the Task Force with little change.\footnote{76}{Id. at 1116–17.} Prior to the 1994 changes suggested by the Task Force, waiver in Minnesota only required that the juvenile's waiver be "an express waiver voluntarily and intelligently made."\footnote{77}{MINN. STAT. § 260.155 subd. 8 (1992) (repealed 1999).} The resulting, current court rule governing waiver in Minnesota still requires "knowing[, intelligent[, and voluntar[y"] waiver, but it also has a number of new, improved protections.\footnote{78}{MINN. R. JUV. P. 3.04.} Now the child must be "informed of the child's right to counsel and the disadvantages of self-representation by an in-person consultation with an attorney."\footnote{79}{Id.} Counsel must "appear with the child in court and inform the court that such consultation has occurred,"\footnote{80}{Id. at 288.} and if the child waives his or her right to representation, the statute requires court-appointed stand-by counsel for children facing felony charges, gross misdemeanor charges, or out-of-home placement.\footnote{81}{MINN. STAT. § 260B.163 subd. 4(b) (2002).} Despite these increased protections provided to juveniles in Minnesota in 1994, the most recent developments in juvenile justice have moved away from ensuring the rights of juveniles to seeking retribution for the actions of juveniles.

4. The Modern Move Towards Retributivism

Modern notions of juvenile justice are increasingly based on punishment rather than the rehabilitative ideals of the Progressive Era.\footnote{82}{Reppucci, supra note 82, at 313–14.} Recently, the public seems to believe that the juvenile justice system has not been hard enough on delinquent juveniles and that offenders should suffer more punishment.\footnote{83}{BARRY C. FELD, BAD KIDS 287 (1999).} Current crime policy and ever-ailing budgets prevent legislators from allocating more resources to expensive rehabilitative programs for juvenile delinquents.\footnote{84}{Id. at 288.} A number of newer policies and laws to get tough on juvenile crime reflect a movement away from the rehabilitative ideals of the Progressive Era to a just deserts model.\footnote{85}{Id. at 288.} For example, in the early 1990s, many

\begin{itemize}
\item \footnote{76}{Id. at 1116–17.}
\item \footnote{77}{MINN. STAT. § 260.155 subd. 8 (1992) (repealed 1999).}
\item \footnote{78}{MINN. R. JUV. P. 3.04.}
\item \footnote{79}{Id.}
\item \footnote{80}{Id.}
\item \footnote{81}{MINN. STAT. § 260B.163 subd. 4(b) (2002).}
\item \footnote{82}{N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 AM. J. COMMUNITY PSYCHOL. 307, 313–14 (1999).}
\item \footnote{83}{BARRY C. FELD, BAD KIDS 287 (1999).}
\item \footnote{84}{Id. at 288.}
\item \footnote{85}{Reppucci, supra note 82, at 313–14.}
\end{itemize}
states changed their jurisdictional laws governing the juvenile court, making it easier to transfer juveniles to adult court. In 1989, the Supreme Court held the application of capital punishment to sixteen- and seventeen-year-olds constitutional under the Eighth Amendment. Under the rehabilitative model, the juvenile courts used an indeterminate sentencing policy, basing the disposition on the time needed for rehabilitation. Now, however, one-third of the states use the juvenile's offense record in dispositional decisions through statutory minimum sentencing guidelines or other administrative guidelines. Finally, while the government supposedly seals juveniles' records for their protection, the public now has greater access to such records, and adult criminal sentencing refers to them.

The requirement that states provide representation for many adult and juvenile defendants means that the states must also find funding for this representation. States have repeatedly expressed interest in seeking funding for representation from the defendants themselves.

C. RECOUPMENT THROUGH REIMBURSEMENT STATUTES

States have shown interest in recovering money spent on court-appointed counsel for over thirty years. Every state in the country, as well as the federal government, has statutes providing for the recovery of funds spent on court-appointed representation. While the statutes vary from state to state,

86. David P. Farrington & Rolf Loeber, Serious and Violent Juvenile Offenders, in A CENTURY OF JUVENILE JUSTICE, supra note 24, at 207.
88. Feld, supra note 74, at 1083–84.
89. Id. Despite the use of informal guidelines by many Minnesota courts, Minnesota has explicitly rejected statewide guidelines in juvenile court. Id. at 1085, 1091.
90. See Reppucci, supra note 82, at 314.
91. Berkheiser, supra note 38, at 646; see also MINN. SENTENCING GUIDELINES § II.B (2003) (indicating that juvenile offenses are considered in sentencing decisions as part of the criminal history of an adult offender).
93. Wayne D. Holly, Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?, 64 BROOK. L. REV. 181, 218 (1998). For example, Minnesota's reimbursement statute is codified at MINN. STAT. § 611.35 (2002), and requires that defendants represented by public defenders or court-appointed counsel reimburse the government for the services if they are able to pay. Minnesota also has a separate reimbursement statute for juveniles codified at MINN. STAT. § 260B.331 subd. 5 (2002) (original ver-
they generally require criminal defendants to repay the costs of representation if the defendants were indigent at the time the court appointed counsel, but have later become able to pay.\textsuperscript{94} On two occasions, the Supreme Court has ruled on the validity of reimbursement statutes and generally accepted them. The first case, \textit{James v. Strange}, involved a Kansas statute that made indigent defendants liable for the amount the state spent on their behalf.\textsuperscript{95} If the debtor was unable to pay, the debt attached to the debtor's real property as a lien.\textsuperscript{96} The Court held the Kansas statute unconstitutional on equal protection grounds,\textsuperscript{97} but chose not to determine whether the statute impermissibly chilled defendants' exercise of their Sixth Amendment right to counsel.\textsuperscript{98} While appearing to have no problem making the indigent defendant a debtor to the state, the Court found that civil judgment debtors had greater statutory protections, creating an equal protection problem.\textsuperscript{99} Despite the invalidation of this statute, the Court noted in dicta that reimbursement statutes do serve legitimate state interests.\textsuperscript{100}

The second case, \textit{Fuller v. Oregon}, involved a reimbursement statute through which the court could order a convicted defendant to repay the costs of his defense if able to pay, unless the defendant showed that payment would "impose manifest hardship on the defendant or his immediate family."\textsuperscript{101} The Court held that this statute did not embody the type of equal protection violation present in \textit{James v. Strange}.\textsuperscript{102} While the statute did include a distinction between convicted and acquitted defendants, the Court held this distinction permissible.\textsuperscript{103} Most importantly, the Court held that reimbursement statutes do not infringe on indigent defendants' exercise of their Sixth

\textsuperscript{94} See Holly, \textit{supra} note 93, at 218.
\textsuperscript{95} 407 U.S. at 129–30.
\textsuperscript{96} \textit{Id.} at 131.
\textsuperscript{97} \textit{Id.} at 140–41.
\textsuperscript{98} \textit{Id.} at 134.
\textsuperscript{99} \textit{Id.} at 140–42.
\textsuperscript{100} \textit{Id.} at 141.
\textsuperscript{101} 417 U.S. 40, 43 n.5 (1974).
\textsuperscript{102} \textit{Id.} at 46–48.
\textsuperscript{103} \textit{Id.} at 48–50.
Amendment right to counsel. The Court reasoned that the state provided free counsel during all stages of the criminal proceedings as required by *Gideon v. Wainwright*. The Court also held that the knowledge of possible future liability for the costs of representation does not affect eligibility to obtain counsel, and noted that the Oregon statute only applies to people who actually become able to repay the state.

Similarly, in *Hanson v. Passer*, the Eighth Circuit found Minnesota’s recoupment statute, which required defendants to repay the costs of their defenses as they are able, constitutional. For a recoupment statute to be valid, the court interpreted *Fuller* to require exemption from enforcement for those people truly unable to pay.

The Supreme Court has never determined to whom the state can extend liability for the costs of court-appointed counsel, although a few lower courts, including the Minnesota Court of Appeals, have addressed the issue. In *United States v. O'Neill*, a federal district court held a defendant’s wife liable for the costs of her husband’s defense. The court reasoned that even though the husband committed the crime before the couple married, the debt incurred during the marriage was for “necessaries,” like medical expenses, food, and shelter, for which the wife was held liable. One other federal district court has adopted this view, along with a number of state courts.

In another case, the federal government tried to render a private attorney, retained after the defendant had received services from a public defender, liable for the costs of the court-

104. *Id.* at 51–54.
105. *Id.* at 52–53; *see also* *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).
107. 13 F.3d 275, 279 (8th Cir. 1994).
108. *Id.*
109. *See infra* notes 120–21 and accompanying text.
111. *Id.* at 855.
112. *Id.* at 854–55.
appointed counsel.\textsuperscript{115} Shortly before the trial, the adult defendant's mother paid a substantial amount to obtain private counsel for the defendant after he had been utilizing the services of a court-appointed attorney due to indigence.\textsuperscript{116} The government argued that the defendant had access to the large amount of money used to retain the private attorney at the time the court appointed counsel.\textsuperscript{117} As such, the government asserted that the private attorney should reimburse the government for the costs of providing court-appointed counsel.\textsuperscript{118} Ultimately, however, the Second Circuit found that the defendant never had control of the money used to retain the private counsel, and therefore did not hold the private attorney liable for the costs of the court-appointed defense.\textsuperscript{119}

In a Minnesota case, \textit{In re Welfare of M.S.M.}, the district court ordered the juvenile faced with delinquency proceedings and/or his parents to reimburse the county $3191 for costs of the juvenile's representation.\textsuperscript{120} The appellate court affirmed, noting that both of the juvenile's parents were gainfully employed, allowing them to contribute to the cost of the representation, and that the parents had a reasonable opportunity to be heard by the court concerning their ability to pay.\textsuperscript{121}

The judicially validated reimbursement statutes applied in the above cases constitute one tool to recover the expense of court-appointed counsel from defendants. Another tool is the co-payment statute.

\section*{D. Recoupment Through Co-Payment Statutes}

In June 2003, the Minnesota State Legislature passed significant amendments to a statute that had required a $28 co-payment for public defender services unless a judge waived such payment.\textsuperscript{122} As amended, this recently invalidated statute eliminated the judicial waiver provision and provided a new

\begin{itemize}
\item \textsuperscript{115} United States v. Crosby, 602 F.2d 24, 24 (2d Cir. 1979).
\item \textsuperscript{116} Id. at 25.
\item \textsuperscript{117} Id. at 27.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 28–30.
\item \textsuperscript{120} 387 N.W.2d 194, 196 (Minn. Ct. App. 1986).
\item \textsuperscript{121} Id. at 199–200.
\item \textsuperscript{122} MINN. STAT. § 611.17(c) (2002) (amended 2003). This statute read: "Upon disposition of the case, an individual who has received public defender services shall pay to the court a $28 co-payment for representation provided by a public defender, unless the co-payment is, or has been, waived by the court." Id.
\end{itemize}
tiered schedule for the amount of the co-payment.\textsuperscript{123} The amount of the required payment depended on the severity of the charge and the jurisdiction of the court.\textsuperscript{124} The statute required an adult defendant to pay $200 if charged with a felony, $100 for a gross misdemeanor, or $50 for a misdemeanor.\textsuperscript{125} If the respondent was a juvenile with appointed counsel for a delinquency hearing, the parents of the child were required to pay a $100 co-payment, regardless of the charge.\textsuperscript{126} This requirement that parents pay on behalf of their children is considerably different from the prior co-payment statute, which merely required payment from "an individual who has received public defender services."\textsuperscript{127} If defendants could not pay the co-payment at the time of the appointment, the amendments gave the state authority to collect the co-payment under Minnesota's Revenue Recapture Act.\textsuperscript{128} The amended statute allowed representation regardless of defendants' ability to pay immediately.\textsuperscript{129} Under both the old statute and the amendments, judges could not make the co-payment part of an offender's sentence or probation.\textsuperscript{130} Furthermore, the amended statute required the Public Defenders' Office to transfer the first $2,740,000 collected from the co-payments to the State of Minnesota's general fund.\textsuperscript{131}

In September 2002, the plaintiff in \textit{State v. Cunningham} challenged the constitutionality of the prior version of the Minnesota co-payment statute.\textsuperscript{132} The court held that the statute withstood constitutional scrutiny because it protected the indigent and did not place a burden on the exercise of the defendant's right to counsel.\textsuperscript{133}

\begin{itemize}
  \item[123.] MINN. STAT. § 611.17(c) (Supp. 2003).
  \item[124.] \textit{Id.}
  \item[125.] \textit{Id.}
  \item[126.] \textit{Id.}
  \item[127.] \textit{Id.}
  \item[128.] \textit{Id.}
  \item[129.] MINN. STAT. § 611.17(c) (2002) (amended 2003).
  \item[130.] See \textit{id.}; MINN. STAT. § 611.17(c) (Supp. 2003).
  \item[131.] See MINN. STAT. § 611.17(c) (Supp. 2003).
  \item[132.] 663 N.W.2d 7, 9 (Minn. Ct. App. 2003).
  \item[133.] \textit{Id.} at 11. The court, however, did find error in the lower court's application of both the co-payment statute and Minnesota's reimbursement statute. \textit{Id.} at 13. The trial court had ordered the defendants to pay both the co-payment and an additional $20 in reimbursement. \textit{Id.}
In early September 2003, an adult challenged the constitutionality of the amendments to the co-payment statute for the first time. A Minnesota district judge ruled the statute unconstitutional because the statute did not allow judges to waive the fee. Minnesota's Fourth Judicial District refused to collect the co-payment from adult defendants until the matter was decided on appeal. The Minnesota Supreme Court granted accelerated review of the statute in *State v. Tennin*, and in February 2004 held the amended co-payment statute unconstitutional.

II. *STATE v. TENNIN*: THE CONSTITUTIONALITY OF CO-PAYMENTS

A. THE MINNESOTA SUPREME COURT'S HOLDING IN *STATE v. TENNIN*

In September 2003, Shawnatee Tennin faced misdemeanor prostitution charges and qualified for public defender services. When the administrator notified her of the $50 co-payment required under the new statute, Tennin initially refused representation because she could not afford the co-payment. After consideration, however, Tennin decided she did need counsel and paid the $50 co-payment. At the district court, Tennin challenged the constitutionality of the co-payment statute. Finding her position persuasive, the district court judge declared the co-payment statute unconstitutional, and certified the question to the appellate level.

The Minnesota Supreme Court granted accelerated review, specifically to address the question "Does Minn. Stat. § 611.17, subd. 1(c), as amended, violate the right to counsel under the United States and Minnesota Constitutions?" In a brief opin-
ion, the court answered this question in the affirmative.\textsuperscript{144} Despite the State's arguments to the contrary, the court determined that the statute did not grant the judiciary express or implied authority to waive the co-payment,\textsuperscript{145} and that the Revenue Recapture Act did not protect the indigent and "those for whom repayment would cause a manifest hardship."\textsuperscript{146} Ultimately, the court relied exclusively on the United States Supreme Court's holding in Fuller, which upheld an Oregon reimbursement statute.\textsuperscript{147} The court in Tennin reasoned that the Oregon statute contained two waiver components: (1) defendants can only be ordered to repay legal expenses if they have the ability to pay; and (2) the repayment costs may be remitted "if payment 'will impose manifest hardship on the defendant or his immediate family.'"\textsuperscript{148} After comparing the Minnesota co-payment statute to the reimbursement statute in Fuller, the court found that "the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship."\textsuperscript{149} Thus, the court invalidated the entire statute as amended, meaning it could no longer be enforced in any jurisdiction in the state.\textsuperscript{150}

Although the Minnesota Supreme Court came to the absolutely correct conclusion, the analysis and support for that conclusion are incomplete and provide little guidance for a legislature set on recovering lost legal expenses. The decision fails to address the statute's unique application to juveniles and the inherent differences between the juvenile right to counsel and the adult right to counsel. Although this Note primarily analyzes the impact of the recent decision and co-payments in general on juveniles, the court's analysis concerning the constitutionality of the statute as applied to adults first requires consideration. The importance of this analysis lies in the United States Supreme Court's previous use of comparisons between the treatment of adults and the respective treatment of children.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{144} Id. at 410–11.
\item \textsuperscript{145} Id. at 409.
\item \textsuperscript{146} Id. at 409–10.
\item \textsuperscript{147} See Fuller v. Oregon, 417 U.S. 40, 46–50, 51–54; see also supra notes 101–06 and accompanying text.
\item \textsuperscript{148} See Tennin, 674 N.W.2d at 408 (quoting Fuller, 417 U.S. at 45–46).
\item \textsuperscript{149} Id. at 410.
\item \textsuperscript{150} Id. at 410–11.
\item \textsuperscript{151} See, e.g., In re Gault, 387 U.S. 1, 12–31 (1967) (discussing the differences in procedural rights for children and adults).
\end{itemize}
B. CONSTITUTIONALITY OF THE CO-PAYMENT STATUTE AS APPLIED TO ADULTS

The constitutionality of reimbursement and co-payment statutes has thus far hinged on whether or not the statute grants the court judicial discretion. In State v. Tennin, the court correctly held that the Minnesota co-payment statute as amended did not conform with the requirement implicitly set out in Fuller, that courts must have discretion in determining whether to apply the co-payment and whether to enforce its application. This decision is consistent with the other precedent available on reimbursement statutes and co-payment statutes. The amended Minnesota co-payment statute did not resemble the reimbursement statute upheld by the Eighth Circuit in Hanson v. Passer, or the first Minnesota co-payment statute at issue in State v. Cunningham, because both of those statutes contained opportunities for judicial discretion.

Thus, if one is only concerned with the adult right to counsel, it appears that the co-payment statute could be easily remedied by adding a clause which allows for judicial discretion. It is interesting to note, however, that despite the fact that the court made a sweeping invalidation of Minnesota Statute section 611.17, subdivision 1(c) (the entire co-payment provision) using the Sixth Amendment, the court failed to address its basis for finding the co-payment unconstitutional as applied to juveniles. Given the distinct and independent development of the juvenile right to counsel, further analysis is required.

C. CONSTITUTIONALITY OF THE CO-PAYMENT STATUTE AS APPLIED TO JUVENILES

While correct in eliminating the statute’s application to juveniles and adults, the decision in State v. Tennin made no mention of the portion of the co-payment statute that applied explicitly to juveniles and their parents. The court failed to

152. See Hanson v. Passer, 13 F.3d 275, 279 (8th Cir. 1994); State v. Cunningham, 663 N.W.2d 7, 11 (Minn. Ct. App. 2003).
153. See Hanson, 13 F.3d at 279; Cunningham, 663 N.W.2d at 11.
154. 13 F.3d at 279.
155. 663 N.W.2d at 11.
156. See State v. Tennin, 674 N.W.2d 403, 407 (Minn. 2004) (quoting the language of Minnesota Statute section 611.17, subdivision 1(c), but using an ellipsis to exclude the portion of the statute as it applied to juveniles and their parents). The court explained three ways that the amended co-payment stat-
recognize that the statute applied slightly differently to juveniles than it did to adults in two ways. First, the juvenile right to counsel is based on the Fourteenth Amendment, rather than the Sixth Amendment. Since the Sixth Amendment only applies to adults, an invalidation of a statute applied to juveniles must rest on a different constitutional basis. Next, because the statute actually required that the juvenile's parents pay the $100 co-payment, some additional legal questions arise about imputing liability for the juvenile's constitutional rights to the parent. Only fairly weak precedent exists on requiring third parties to bear the cost of reimbursement, much less the cost of a co-payment, but the court overlooked these weighty constitutional issues.

1. Application of the Co-Payment Statute to the Parents of Juvenile Respondents

Legally, the doctrine of necessaries and other situations involving parental liability for their children support the application of a co-payment to parents. While the co-payment statute invalidated in Tennin would have presented due process problems for parents, revising the statute to provide for judicial discretion as prescribed by Tennin would probably resolve this particular problem.

In Minnesota, as in every other state, parents have both a legal and moral duty to provide necessaries for their children. Certainly, necessaries include things such as food, clothing, shelter, and even medical care, but some problems do arise in classifying legal expenses as necessaries. Similar to the situation of the wife held liable for the defense expenses of her husband in O'Neill, liability for the defense expenses of children could extend to their parents.

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157. Compare supra notes 10–21 and accompanying text (discussing the right to counsel for adults), with supra notes 40–57 and accompanying text (explaining the right to counsel for juveniles).

158. See supra notes 109–21 and accompanying text.

159. See Lufkin v. Harvey, 154 N.W. 1097, 1097 (Minn. 1915) (establishing that parents have a responsibility to provide the necessaries of life for their minor children).

160. See id. (discussing medical care as a necessary).


Even if the common law doctrine of necessaries does not include legal expenses, statutorily imposed parental liability for juveniles’ torts and restitution orders has generally survived constitutional challenge. 163 Courts that have held parents liable for their children’s tort and restitution expenses have emphasized the importance of (1) notice to the parents that restitution or damages were being sought, and (2) a hearing that allowed the parents to present argument, cross-examine witnesses, and object as a part of due process. 164 The Minnesota co-payment statute invalidated in Tennin did not afford parents either of these opportunities. 165 Rather, the statute imputed absolute liability on the parents, 166 which probably violated the parents’ rights to due process. Thus, revising the co-payment statute to allow courts to hear the parents and consider their ability to pay the co-payment is probably sufficient to fulfill the due process rights of parents.

2. Application of the Co-Payment Statute to Juveniles

Even though adding a judicial waiver provision would cure the statute’s application to adults and to parents, a judicial waiver provision would not cure the constitutional problem of the statute as applied to juveniles. In Tennin, the court failed to acknowledge two critical elements of the statute as applied to juveniles: (1) that the juvenile’s right to counsel is based on the Fourteenth Amendment’s Due Process Clause, 167 rather than the Sixth Amendment, on which Fuller v. Oregon is based, 168 and (2) that the co-payment statute applied to the parents of the juveniles, rather than the juveniles themselves. Had the United States Supreme Court intended the juvenile’s right to counsel to be the same as an adult’s right, the Court probably would have based In re Gault on the Sixth Amendment, rather than the Fourteenth. 169

163. E.g., In re B.D., 720 So. 2d 476, 479 (Miss. 1998) (en banc) (holding that extending liability to parents for the actions of their children is within the legitimate police powers of the state).
164. E.g., id.
165. See MINN. STAT. § 611.17(c) (Supp. 2003).
166. See id.
While little precedent exists to distinguish what protections the Fourteenth Amendment affords juveniles, at a minimum the Fourteenth Amendment requires counsel as "part of a fair hearing required by due process." In Minnesota, the right to counsel belongs to the juvenile, not the parents. The co-payment imposes a hurdle to this component of due process for the juvenile by implicating parental liability. The co-payment statute frustrates the juvenile's straightforward due process right to counsel by making a parent, whose interests may conflict with the juvenile's interests, responsible for paying for the juvenile's right to counsel. Even with the possibility of judicial waiver, this statute creates a financial incentive for parents to coerce their children into waiving counsel. Judicial waiver under this type of statute would do more to protect the parent's due process rights than to protect the juvenile's right to counsel. Because co-payment statutes implicating parents, even with judicial waiver as required in Tennin, compromise a juvenile's right to counsel, the co-payment statute violates the Fourteenth Amendment when applied to juveniles. Thus, the Minnesota co-payment statute will continue to suffer constitutional problems under the Fourteenth Amendment even if the invalidated statute is reformed to include the judicial waiver provision that Tennin seems to require.

Facially, imposing a parental co-payment requirement with judicial discretion may seem rather similar to applying a reimbursement statute to a parent, such as in In re Welfare of M.S.M. However, the temporal difference in the application of these statutes provides a significant distinction. The imminence of a co-payment is considerably greater than the remote possibility of reimbursement. The co-payment is an obligation established at the onset of representation, whereas a reimbursement generally is not determined until representation has commenced (and usually finished) and the State has brought a separate proceeding to recoup the cost of that representation.

170. Id. at 38-40 (quoting CHILDREN'S BUREAU OF THE U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 57 (1966)).
171. MINN. R. JUV. P. 3.01.
172. See MINN. STAT. § 611.17(c) (Supp. 2003).
175. See MINN. STAT. § 611.17(c) (Supp. 2003).
176. See MINN. STAT. § 611.35 (2002).
This difference stands out against the holding in Fuller, which indicated that knowledge of possible reimbursement in the future does not chill the exercise of the right to counsel.\textsuperscript{177} Because the co-payment is determined at the time of representation, the possibility of co-payment motivating a parent to interfere with his or her child's representation is much greater than the more remote possibility of reimbursement motivating such interference.

Additionally, as society moves further away from the original rehabilitative purposes of the juvenile court,\textsuperscript{178} the due process requirement of the right to counsel should not be compromised or frustrated. Juveniles already face a system that denies them the full array of procedural protections afforded to adults.\textsuperscript{179} When juveniles face increasing risks of punishment and long-term consequences,\textsuperscript{180} the due process requirement of the right to counsel is a necessary safeguard to ensure that juveniles are treated fairly under the law.\textsuperscript{181} The co-payment statute alters the operation of the juvenile right to counsel, and exposes juveniles to additional risks of unfair treatment by making it less likely that counsel is present. Additional risks of unfair treatment seem especially inappropriate if the possible consequences of a juvenile delinquency adjudication are also enhanced.

Thus, while the Minnesota Supreme Court in essence found the Minnesota co-payment statute unconstitutional as applied to juveniles by invalidating the entire statute, the court failed to differentiate between the adult and juvenile rights to counsel. Further, the court neglected to recognize the statute's unique application to juveniles and their parents. Simply adding a provision to the statute granting judges discretion to waive the application and enforcement of the statute only remedies the constitutional problems of the statute as applied to adults and the parents of juveniles, but not as applied to juveniles.

\textsuperscript{178} See supra notes 22–39 and accompanying text.
\textsuperscript{179} See, e.g., McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding there is no right to jury trials for juveniles).
\textsuperscript{180} See supra notes 82–91 and accompanying text.
\textsuperscript{181} See In re Gault, 387 U.S. 1, 39 (1967).
III. POLICY IMPLICATIONS OF THE MINNESOTA
CO-PAYMENT STATUTE AS APPLIED TO JUVENILES

Even if the courts wrongfully validate a Minnesota co-
payment statute that is merely amended to include judicial dis-
cretion, the legislature should still reconsider a co-payment
statute's application to juveniles' parents for three reasons. A
statute applying to "the parents of the child" does not account
for adolescents' diminished decision-making ability and suscep-
tibility to parental coercion, potential statutory conflicts with
the waiver statute, and absurd results which occur when apply-
ning the statute in certain situations.

A. JUVENILES LACK ADULT CAPACITY TO MAKE INDEPENDENT
RATIONAL DECISIONS

Social scientists question whether juveniles can truly make
informed, intelligent legal decisions. There is evidence that
adolescents do not have a fundamental understanding of what
it means for something to be a "right." While older juveniles
aged sixteen to nineteen have fairly good comprehension and
understanding of Miranda warnings, younger juveniles do not
exhibit the same level of understanding. Additionally, even if
juveniles understand rights, this does not mean that they are
as able as adults to assert those rights. Frequently, juveniles
have misconceptions about legal counsel, including that an at-
torney can disclose attorney-client privileged information to the
judge, and that attorneys are dishonest. While many older
adolescents have acquired problem-solving and reasoning skills
similar to adults, their judgment in making decisions is quite
dissimilar to adults. Juveniles use information differently
than adults and assign different values to outcomes than

182. See Thomas Grisso, What We Know About Youth's Capacities as Trial
Defendants, in YOUTH ON TRIAL 139 (Thomas Grisso & Robert G. Schwartz
eds., 2000).
183. Id. at 148-49. Grisso indicates that when asked "what should happen'
if a judge at a hearing discovers that a youth 'wouldn't talk to the police,'"somewhere between 50% and 66% of the adolescents thought that person
could be penalized for exercising the right against self-incrimination. Id. at
149.
184. Id. at 149.
185. Reppucci, supra note 82, at 317.
186. Grisso, supra note 182, at 154-55.
187. Id. at 159.
188. Id. at 163.
For example, juveniles value risk less than adults by weighing possible positive outcomes more than possible negative outcomes, and they discount the impact of their decisions on the future more than adults. Additionally, researcher Elizabeth Scott believes that juveniles are subject to the influence of their parents, and therefore generally make less independent decisions. Although juveniles attain a greater degree of autonomy by adolescence, they are still subject to significant parental influence.

Because of juveniles' relatively undeveloped decision-making ability, their susceptibility to parental coercion, and the nature of juvenile waiver of the right to counsel, a co-payment statute increases the possibility of juveniles making poor choices about the exercise of their Fourteenth Amendment right to counsel.

Consider the following hypothetical situation: A juvenile and her parent arrive at the juvenile court and fill out the application for court-appointed counsel. The administrator suggests that the juvenile qualifies for a public defender, based on the juvenile's assets, and explains that the parent will have to pay $100 for the juvenile's representation. Because of the operation of the Minnesota waiver statute, the juvenile must meet with the attorney regardless of whether the juvenile accepts representation. While the parent and juvenile wait for the juvenile's opportunity to meet with the attorney, the parent tells the juvenile that the parent does not want to pay the $100, and that the juvenile should think about refusing representation. Although the public defender has an opportunity to discuss the drawbacks of declining representation, the juvenile still knows that her parent does not want to pay the fee. The juvenile thinks about the risks of declining, decides that the risks are not that significant, and declines. The juvenile steps into court with the attorney, waives her right to representation, and the attorney acknowledges that he or she discussed the

190. Grisso, supra note 182, at 161–63.
191. Scott, supra note 189, at 229.
192. Id. at 230.
193. See MINN. R. JUV. P. 3.02.
194. See MINN. R. JUV. P. 3.01.
195. See id.
196. See supra notes 182–92 and accompanying text.
ramifications of making this decision. This juvenile, being susceptible to parental coercion (unlike an adult), discounts the risks of waiving the right to counsel (more so than adults) and waives a constitutional right because of the operation of the co-payment statute. The likelihood of this scenario occurring demonstrates that the statute does not compensate adequately for the juvenile's undeveloped decision-making ability and susceptibility to parental coercion that increase the possibility of juveniles relinquishing constitutional rights.

B. THE STATUTE COMPROMISES STATUTORY WAIVER PROGRESS

In addition, introducing parents into the representation process reverses some of the progress made by the 1994 amendments to the waiver procedure. Recall the drastic improvements made by the 1994 amendments, which included requiring juveniles to meet with an attorney before waiving the right to counsel and requiring the attorney to appear in court with the juvenile to acknowledge the juvenile's awareness of such a decision. Unfortunately, applying the co-payment statute to the parents of juveniles reintroduces the problem of coercive parents, which the amendments sought to resolve. As enacted, the juvenile waiver statute effectively avoided possible parental influence on the juvenile's decision to accept or decline counsel by removing parents from the process. Consider again the hypothetical presented earlier, in which a parent suggests that a juvenile waive the right to counsel in light of the co-payment and the juvenile does just that. The Minnesota juvenile waiver statute and the adult constitutional test require that a waiver of the right to counsel be knowing, intelligent, and voluntary. In the hypothetical, the child made a

197. See MINN. R. JUV. P. 3.01.
199. See supra notes 182–92 and accompanying text.
200. See supra notes 74–81 and accompanying text.
201. See supra notes 74–81 and accompanying text.
202. Cf. MINN. R. JUV. P. 3.04 cmt. (emphasizing that juveniles should meet with the attorney outside of the presence of their parents).
203. See MINN. R. JUV. P. 3.04.
204. See supra notes 193–99 and accompanying text.
205. See supra notes 193–200 and accompanying text. But see Colorado v. Connelly, 479 U.S. 157, 170–71 (1986) (holding that on the question of voluntariness, only coercive actions by the government should be considered). When considering the juvenile-parent situation, an issue of fairness may exist, but
waiver of counsel that was possibly knowing and intelligent, but was only questionably voluntary. Application of a co-payment statute to the parents of juveniles creates a new conflict of interest between the financial interests of the parent and the legal best interests of the juvenile, which the waiver statute was not designed to address. Therefore, a co-payment statute applying to parents conflicts with an underlying purpose of existing state law regarding waiver of the right to counsel for juveniles, compromising the progress of the 1994 waiver amendments.

C. ABSURD RESULTS WHEN APPLIED TO SOME FAMILIES AND SITUATIONS

Finally, the application of this statute produces absurd results in two regularly occurring situations in juvenile court. First, the statute is difficult to apply to families in the child protection system, where the child commits a crime while in the custody of the state. The second situation arises when the parent is a victim of the child’s criminal behavior.

Because the statute does not define “parents,” liability for the co-payment could potentially extend to a number of parties, some of them probably unintended.\(^{206}\) This problem becomes especially apparent when considering the application of the statute to families whose structures fall outside of the stereotypical two-parent family. Consider the following possibility: A county removes a child from the home of her single mother through a child protection action.\(^{207}\) Because the father’s parentage is not legally established, the court places the child in foster care. After the child commits a crime, the state charges the child under the applicable delinquency statutes that would qualify the juvenile for court-appointed counsel. Who pays the co-payment?

In this hypothetical, depending on the interpretation of “parents,” a number of people could be required to pay the co-payment. The definition of “parent” could include the biological

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\(^{206}\) Connelly closes the door on constitutional claims of involuntariness based on parental coercion. However, given that the government is requiring the parent to make the co-payment, the subsequent parent-child conflict of interest regarding waiver could very well be characterized as governmental coercion.

\(^{207}\) See Minn. Stat. § 611.17(c) (Supp. 2003).

\(^{207}\) See generally Minn. Stat. § 260C.201 subd. 1(a)(2)(ii) (2002) (outlining how “best interests” can lead to removal to an appropriate social services agency).
parent, legal guardian, or custodial parent. First, the statute could require the biological mother, who lost custody of the child, to pay. The mother is the "parent" of the juvenile, which cuts in favor of her liability. However, if the mother's parental responsibility to care for the child has been taken away, then perhaps her responsibility to pay the co-payment is absolved as well. Alternatively, the father is also a "parent" of the child. If the court does not formally recognize his rights to the child, however, it is probably improper to require him to pay. In still another option, the foster parent could be required to pay the co-payment. The foster parent is the legal guardian of the child, but requiring the foster parent to pay would seem especially inappropriate given the generosity of the foster parent in caring for the child. Finally—the most absurd result—the county or social service agency could pay the state, because in this situation the county or social service agency would have custody of the child. The hypothetical represents a distinctly plausible scenario. As none of these alternatives seems especially appropriate, the legislature should reconsider the operation of the statute.

Another plausible but absurd application of the statute manifests when the parent is the victim of the juvenile's misconduct. Consider another hypothetical situation, in which a child assaults his parent, resulting in a delinquency petition against the child. The statute requires the victimized parent to pay for the defense of his or her assailant. This situation pre-

208. The co-payment statute did not offer a definition of "parent." See MINN. STAT. § 611.17 (Supp. 2003). The delinquency and child protection sections of Minnesota statutory law provide that a parent is "the birth or adoptive parent of a minor." MINN. STAT. §§ 260B.007 subd. 10, 260C.007 subd. 25 (2002). Applying this narrow definition to the co-payment statute would seem to conflict with Minnesota Rule of Juvenile Procedure 3.07, which grants a right to counsel to the parent, legal guardian, or legal custodian once the allegations of a delinquency petition have been proven. See MINN. R. JUV. P. 3.07.

209. See MINN. STAT. § 260B.331 subd. 1(c) (2002) (requiring parents to contribute to the cost of care under most circumstances).

210. See MINN. STAT. §§ 260B.007 subd. 10, 260C.007 subd. 25.

211. See id.

212. See MINN. STAT. § 260C.201 subd. 1(a)(2)(ii).

sents an enormous conflict of interest and unfair burden for the parent.

In consideration of these detrimental and serious policy implications, legislative action changing the operation of the co-payment statute is necessary.

IV. ALTERNATIVES

Assuming that the legislature amends the co-payment statute to include judicial waiver, there are three ways that such a co-payment statute or the juvenile waiver statute could be further amended or reformed to make the operation of a co-payment statute more fair as applied to juveniles. Viable alternatives include (1) making counsel mandatory/non-waivable for juveniles facing delinquency hearings, (2) amending the co-payment statute to apply directly to juveniles rather than to their parents, or (3) not applying a co-payment statute to juveniles entirely. Optimally, the legislature should eliminate the application of the co-payment statute to juveniles. Ultimately, however, if the courts validate a co-payment statute that imposes liability on parents for their children's co-payments and the legislature refuses to eliminate that parental role from the statute, future courts should broadly construe the application of *Tennin*\(^{214}\) in favor of juveniles.

A. MAKE COUNSEL NON-WAIVABLE FOR JUVENILES

The legislature could amend the juvenile waiver statute to make representation by counsel mandatory, prohibiting juveniles from waiving their right to counsel.\(^{215}\) Juvenile justice experts continue to vigorously proffer mandatory counsel as a solution to due process shortcomings in the juvenile system.\(^{216}\)

A mandatory representation rule would benefit juveniles and the system in four ways. First, it would eliminate the Fourteenth Amendment problem.\(^{217}\) Even though parents would still be implicated through the co-payment statute, the juvenile's right to counsel under this option would be absolute, without any opportunity for interference. Mandatory counsel would eliminate the possibility of parents coercing their children into waiving their right to counsel by eliminating the choice to

215. *See Feld*, *supra* note 37, at 244–45.
216. *See Berkheiser, supra* note 38, at 640; *Feld, supra* note 61, at 1325.
217. *See supra* notes 40–41, 46 and accompanying text.
waive that right to counsel.\textsuperscript{218} Furthermore, this option would offset the impact of juveniles' undeveloped decision-making capacity.\textsuperscript{219} Next, a system that ensures a fair procedure would increase the political legitimacy of the system.\textsuperscript{220} Similarly, juveniles participating in a system that they perceive as fair will respond more positively to their experience with the juvenile system.\textsuperscript{221}

Requiring mandatory counsel has two drawbacks. Mandatory counsel could violate juveniles' right to counsel by denying them the opportunity to appear pro se and could dramatically increase administration costs. First, while the Supreme Court has not ruled on this issue specifically as to juveniles, in \textit{Faretta v. California} the Supreme Court held that inherent in the right to counsel is a right to appear without counsel.\textsuperscript{222} Minnesota carefully considered this ruling when drafting the 1994 amendments to the juvenile waiver statute.\textsuperscript{223} By not allowing juveniles to waive counsel, a mandatory counsel statute could violate the juvenile's right to appear without counsel.

Second, requiring mandatory counsel would demand more from Minnesota public defenders. Professor Barry Feld indicated that in 1994, one year after Minnesota amended the juvenile waiver statute to require consultation with counsel prior to waiver, the case loads of the public defenders in Minnesota's Third Judicial District increased 146\%.\textsuperscript{224} Presumably, making the requirements of representation even stricter would prove even more costly. Unfortunately, the costs of representation and budget shortfalls caused the legislature to step in the direction of co-payments initially, so it is doubtful that they would expand the demands on the public defender offices further.\textsuperscript{225} Even with the co-payment statute and the reimbursement statute, it is doubtful that the state could afford this option.

\textsuperscript{218} See Feld, \textit{supra} note 37, at 244–45.
\textsuperscript{219} See Feld, \textit{supra} note 83, at 136.
\textsuperscript{220} Berkheiser, \textit{supra} note 38, at 641.
\textsuperscript{221} \textit{Id.} at 643.
\textsuperscript{222} 422 U.S. 806, 834, 836 (1975).
\textsuperscript{223} See Minn. R. Juv. P. 3.01 cmt.
\textsuperscript{224} Feld, \textit{supra} note 74, at 1121.
\textsuperscript{225} See Mayron, \textit{supra} note 4.
B. REMOVE THE PARENTAL BURDEN

Alternatively, the state could apply a co-payment statute with judicial waiver directly to juveniles by removing the parental burden. These changes would essentially restore the co-payment statute to its pre-amendment status, only with increased co-payment amounts.\footnote{226}{See supra notes 122–31 and accompanying text.} Under the proposed changes, the co-payment would only apply to those juveniles financially able to pay, thus eliminating possible parental influence on juveniles' decisions about counsel.\footnote{227}{See supra Part III.A.} Eliminating parents from the co-payment process would solve the Fourteenth Amendment problem by eliminating the conflict of interest between the juvenile and the financial interest of the parent.\footnote{228}{See supra notes 167–81 and accompanying text.} Furthermore, this alternative would protect the 1994 waiver amendments, preserving the juvenile's ability to waive counsel under the totality of the circumstances.\footnote{229}{See MINN. R. JUV. P. 3.04.} This kind of co-payment statute has already been validated by the Minnesota Court of Appeals.\footnote{230}{See State v. Cunningham, 663 N.W.2d 7, 11 (Minn. Ct. App. 2003).} Legally, this option would probably be constitutional under \textit{Fuller v. Oregon}\footnote{231}{417 U.S. 40, 52–53 (1974).} and \textit{State v. Tennin}\footnote{232}{See 674 N.W.2d 403, 410–11 (Minn. 2004).} because the amended statute allows for judicial discretion.

For juveniles who could afford the co-payment, however, this option is nearly as bad as the option presented to juveniles under the invalid co-payment statute. Because of juveniles' diminished decision-making ability,\footnote{233}{See supra Part III.A.} some juveniles may discount the long-term value of representation to avoid the immediate cost of the co-payment. Additionally, probably few juveniles can afford such a large co-payment, so practically the state would recover little from applying the co-payment statute directly to juveniles. Also, identifying juvenile assets apart from parental assets may prove especially problematic in some, if not many, situations. While the state may recover slightly more money under this option, a financial incentive for making a poor decision still remains for some juveniles, and a better alternative exists.
C. **Do Not Apply the Co-Payment Requirement to Juveniles**

Finally, while the other proffered solutions are all plausible, eliminating the co-payment's application to juveniles and relying entirely on the reimbursement statute would most likely serve as the most effective option. Under this option, the legislature, in rewriting the invalid statute, would omit the portion of the co-payment statute as it pertains to juveniles. This option is especially effective because it provides juveniles the most protection from poor decision making and parental coercion without tremendous additional administrative costs. Furthermore, it safeguards the 1994 amendments to the waiver statute.

Removing parents from the process corrects the Fourteenth Amendment constitutional problem by ensuring that juveniles will enjoy a right to counsel that is unhampered by a conflict of interest. Similarly, this option would eliminate a good portion of coercion by parents and would not implicate the diminished decision-making ability of juveniles by fully eliminating parents from the process and by preventing the application of the co-payment statute directly to juveniles. Eliminating parents would likewise make certain that the juvenile waiver statute protects juveniles as the state had intended in the 1994 amendments.

The drawback to this solution is the lost revenue from eliminating the co-payment statute's application to juveniles. Considering the additional judicial resources required to evaluate juveniles' financial positions, the likelihood that many juveniles could not afford a co-payment, and the dramatic expense of mandatory counsel, this solution is not significantly more expensive than the other solutions.

Additionally, if the parents of juvenile respondents are truly able to contribute to the cost of the juvenile's defense, the state could use the existing reimbursement statute to recover the costs or partial costs of the defense. Relying on the reim-

234. See supra Part III.A.
236. Cf. supra notes 167–81 and accompanying text.
237. See supra Part III.A.
238. See supra Part III.B.
239. Cf. supra notes 224–25 and accompanying text.
240. See MINN. STAT. § 611.35 (2002); see also MINN. STAT. § 260B.311 subd. 5 (2002) (allowing courts to charge parents for their child's attorney
bursement statute is legally rational, considering that the Eighth Circuit has already found Minnesota's reimbursement statute constitutional as applied to adults, and the Minnesota Court of Appeals has upheld the use of the reimbursement statute as applied to the parents of juveniles. While the threat of repayment may still operate on these parents when the state or court determines that they can afford repayment, because of the temporal difference between when the co-payment and the reimbursement statutes are assessed, the potential for parental coercion is diminished, making this the best available alternative.

D. A COMMENT TO FUTURE COURTS

In the event that the legislature does adopt a co-payment statute with judicial waiver, but which places responsibility for the co-payment statute on parents, and courts refuse to invalidate such a statute as applied to juveniles on Fourteenth Amendment grounds, future courts should cautiously apply such a statute. The court in State v. Tennin cautions that a co-payment requirement should not be enforced if it imposes "manifest hardship" on the defendant. The court, however, does not provide a clear definition of what a co-payment must do to impose "manifest hardship" on a defendant. While the court does not explicitly say that "manifest hardship" refers only to financial hardship, this is the logical inference from the court's use of the phrase. Presumably, in the context of the adult right to counsel, "manifest hardship" would most likely be financial hardship. However, "manifest hardship" for a juvenile and the juvenile's parent may include contexts outside of the financial realm, and thus such a statute should be liberally construed so as to include such hardships. This would be most applicable in the situations that produce absurd results when the statute is applied, such as the victimized parent situation or the juvenile in foster care situation. Although all those fees).

241. See Hanson v. Passer, 13 F.3d 275, 279 (8th Cir. 1994).
243. See supra notes 173–77 and accompanying text.
244. State v. Tennin, 674 N.W.2d 403, 408–11 (Minn. 2004).
245. See generally id.
246. See id. at 407, 410–11.
247. See supra Part III.C.
parties may have the financial wherewithal to afford the co-payment, payment would impose a manifest hardship and should not be applied. Furthermore, the court could view the application of such a statute to juveniles as "manifest hardship" generally because it compromises their independent decision to employ counsel and jeopardizes the protections of the juvenile waiver statute. Carefully assessing individual juveniles' situations and applying a liberal understanding of "manifest hardship" could provide additional protection to juveniles facing a co-payment statute.

CONCLUSION

The Minnesota legislature should proceed with caution in redrafting the co-payment statute. If the legislature strictly adheres to the guidance given by the court in *State v. Tennin,* the resulting statute would still violate juveniles' right to counsel under the Fourteenth Amendment. Even if later courts found such a revised statute constitutional, juveniles face certain challenges that adults do not encounter, and thus the legislature should reconsider applying a co-payment statute to juveniles and their parents.

Co-payment statutes have a number of negative implications for juveniles facing delinquency charges. Juveniles are naturally immature in their decision-making processes as compared to adults. Juveniles' lack of experiences as compared to adults leads juveniles to discount possible risks and consequences more than adults. Unlike adults, juveniles also face parental influence that can be potentially coercive, especially considering that juveniles do not make decisions as independently as adults. Introducing additional external pressures that the waiver statute designers did not anticipate compromises the progress made by the 1994 waiver amendments. Furthermore, assuring full compliance with due process for juveniles is increasingly important as society becomes more interested in punishing juveniles, rather than pursuing the rehabilitative ideals of an earlier time. Finally, co-payment statutes implicating parental liability also present some absurd results when applied to the less than perfect family circumstance.

Eliminating an amended statute's applicability to juveniles and relying on the reimbursement statute would resolve these problems most effectively. Other, perhaps less effective or more costly options also exist, such as making counsel mandatory for juveniles or making a co-payment waivable while eliminating a
parental burden. In the event that the legislature reenacts the co-payment statute with parental liability, future courts may be able to curb some of the absurd results of applying such a statute by interpreting "manifest hardship" broadly. However, many negative impacts on juveniles would remain. Not subjecting juveniles to co-payment statutes is the only foolproof way to avoid the negative impacts of such a statute on juveniles, and perhaps the value of fairness in the system is worth the financial cost to the state.