



PAYING FOR JUSTICE

The Human Cost of Public Defender Fees

Fans of crime television shows are familiar with the standard *Miranda* warning: “You have the right to an attorney...If you cannot afford an attorney, one will be appointed to you by the [government] at no expense.”¹

This bedrock constitutional protection for indigent defendants—the right to an attorney at no expense—was first recognized by the Supreme Court in *Gideon v. Wainwright* more than 50 years ago.² Yet today in California, a “free” public defense often comes with costs. In many California counties, defendants are required to pay a \$50 upfront “registration fee” to be represented by a public defender.³ At the end of proceedings, judges are also allowed to bill defendants for the time public defenders spent on their case.⁴

For the poorest defendants, upfront registration fees are especially troubling. These fees discourage some defendants from exercising their right to a lawyer and can frustrate a

public defender’s attempts to build trust with clients. For low-income defendants and their families, the fees also add to a mountain of criminal justice debt that makes it increasingly difficult for people to successfully reintegrate into society.

As states across the country, including California, have moved to address criminal justice practices that disproportionately burden the poor, California and its counties should cease to impose these registration fees to better realize *Gideon’s* promise of legal representation for defendants who cannot afford an attorney.

LEGAL BACKGROUND

Public defender registration fees are flat fees that indigent defendants are told to pay in order to obtain the services of a public defender. Registration fees are incurred at the beginning of representation and are typically assessed by the public defender’s office. The fees supplement the

more traditional practice of recoupment (also known as reimbursement) in which defendants pay back some or all of the cost of representation by a public defender after the termination of criminal proceedings upon an independent judicial finding that defendants have the financial resources to contribute to their defense.⁵

California state law provides counties the discretion to implement registration fees.⁶ The California legislature first authorized counties to impose a public defender registration fee in 1996, when it was initially capped at \$25 for both adult and juvenile cases.⁷ The fee is only operative in a county upon “the adoption of a resolution or ordinance by the board of supervisors electing to establish the registration fee and setting forth the manner in which the funds shall be collected and distributed.”⁸ In 2009, the legislature passed an amendment to increase the maximum amount to \$50 in adult cases.⁹ A 2011 amendment raised the fee to the same amount in juvenile cases.¹⁰ The statute authorizing registration fees provides that “no fee shall be required of any defendant that is financially unable to pay the fee,”¹¹ but as discussed in more detail below, this requirement is routinely ignored.

Forty-three states use some form of cost-recovery for public defenders, and 27 of these charge upfront registration fees.

California is not alone in charging these types of fees. Public defender registration fees emerged in the 1990s as a method for state and local governments to recover part of the cost of providing counsel.¹² Forty-three states use some form of cost-recovery for public defenders,¹³ and 27 of these charge upfront registration fees.¹⁴ Though the maximum amount in California is \$50, fees range from \$10 up to \$480 in other states.¹⁵

MANY CALIFORNIA COUNTIES REQUIRE DEFENDANTS TO PAY A REGISTRATION FEE FOR A PUBLIC DEFENDER

In courthouses across California, it is a familiar scene: a homeless or indigent defendant appears for a minor crime, such as sleeping in a public structure without permission.¹⁶ The judge tells these defendants to go speak with a public defender. The public defender greets the defendants and immediately hands them a form stating that they must send a check for \$50 to a private collections agency to “register” for their public defender. The fee is due in five days, and the

form doesn’t say anything about what defendants can do if they can’t afford to pay it.

“I am essentially required to say: ‘Hi, if you pay \$50, I can work with you.’”

– Deputy Public Defender (anonymous), Los Angeles

This is how registration fees are often administered throughout California.¹⁷ While practices vary by county (and even among public defenders in the same office), defendants are often not informed that they can seek a waiver of the fee if they can’t afford it, nor that they have the right to a public defender regardless of their ability to pay. In a recent case in San Bernardino, for example, a judge told indigent defendants that they would need to pay \$157 in total for the services of the public defender, with \$50 to be paid within the month. The judge did not inform defendants that they still had the right to counsel regardless of whether or not they could afford to pay the \$50 on time or that they would not have to pay any fee if they could not afford it.

“I saw the judge repeatedly tell defendants they would have to pay \$157 for a public attorney and that \$50 of it had to be paid upfront. The judge did not ask them if they had the ability to pay the fee. I was surprised because this doesn’t seem like the way the system is supposed to work.”

– Sam Sueoka, University of Redlands student court observer (San Bernardino County)

In numerous counties, defendants are routinely required to pay a \$50 registration fee to obtain public defender services. In Los Angeles, public defenders have typically solicited the \$50 fee during their first consultation with a prospective client. In Ventura, the “Frequently Asked Questions” section of the public defender’s office’s website answers the question, “Will I have to pay for the Public Defender?” with a straightforward “Yes. All clients must pay at least \$50.”¹⁸ The website goes on to explain that after the initial \$50, fees will depend on the client’s ability to pay, but the answer is unequivocal in telling defendants that the \$50 is required for everyone, regardless of whether they have the money.

Some counties, including San Francisco, have elected not to impose public defender registration fees, citing concerns about the barrier that a fee poses for the poorest defendants. Other counties authorized a \$25 registration fee after the initial legislation passed, but have not increased it to \$50.¹⁹ A few counties have stopped collecting public defender fees altogether, in part due to concerns that these upfront fees discourage defendants from exercising their constitutional right to a lawyer in criminal cases. For example, a report by the American Bar Association noted that Santa Barbara

discontinued its use of the upfront registration fee in part because the fee was “found to have a chilling effect in some cases.”²⁰ In the majority of counties that we have investigated, however, the board of supervisors has authorized a \$50 registration fee.²¹

THE HUMAN COST OF PUBLIC DEFENDER REGISTRATION FEES

A. Registration fees interfere with the right to counsel and hurt California’s most vulnerable people

California counties’ practice of requiring a registration fee to obtain a public defender—in particular, the automatic assessment of these fees without consideration of ability to pay—interferes with defendants’ constitutionally protected right to counsel and violates state law.

The United States Supreme Court has long recognized that the Sixth Amendment guarantees a lawyer, free of cost, to indigent defendants.²² To preserve this right, the Court has made clear that a state cannot condition the right to a lawyer on the defendant’s payment of fees that he lacks the ability to pay.²³ Applying this precedent, the Minnesota Supreme Court has invalidated a state statute that assessed a public defender registration fee without regard to ability to pay.²⁴ The court found that the statute violated both the Minnesota constitution and the Sixth Amendment of the federal constitution. Similarly, California counties’ automatic assessment of registration fees without regard to ability to pay interferes with indigent defendants’ Sixth Amendment right to a lawyer.

California state law provides that “[n]o defendant shall be denied the assistance of appointed counsel due solely to a failure to pay the registration fee.”²⁵ Moreover, “no fee shall be required of any defendant that is financially unable to pay the fee.”²⁶

As outlined above, however, courts and public defenders’ offices do not always abide by these elements of the statute. Thus, even if the statutory scheme for public defender fees in California protects low-income defendants *as written*, it falls woefully short in practice.

Public defender registration fees further undermine the Sixth Amendment right to counsel by interfering with public defenders’ ability to build the trust needed to effectively represent their clients. Many clients distrust their appointed public defender from the start, either because they assume the quality of representation will be poor or because they doubt that a government-provided attorney would truly

be on their side. Requiring public defenders to hand their clients a fee form—usually during their first face-to-face interaction—undermines public defenders’ efforts to build trust and rapport with clients. This makes it more difficult for public defenders to effectively represent their clients and may ultimately jeopardize the quality of representation.

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By undermining the right to counsel and effective representation, public defender registration fees can have especially serious consequences for certain vulnerable classes of defendants. Fifty dollars can be a significant sum for the poorest defendants, including homeless individuals, disabled individuals, and very low-income families. Moreover, people with limited literacy or English proficiency may be less aware of their constitutional right to an attorney at no expense or less comfortable asserting this right, and therefore more likely to be burdened with fees they cannot afford.

“The fundamental right to a lawyer cannot be compromised by requiring the poor accused to pay a fee in order to have access to justice.”

- Jeff Adachi, San Francisco Public Defender

For those who decline to retain a public defender or fail to establish trust with an attorney due to the fees, the consequences can be dire. Defendants typically need the assistance of competent, trusted counsel to help them navigate their cases and mount an effective defense. This is particularly true for noncitizen defendants, who need the assistance of counsel to determine the possible immigration consequences of the resolution of their criminal cases.

Seemingly innocuous misdemeanor convictions can carry the possibility of deportation for noncitizen defendants—even for lawful permanent residents or individuals with other legal status.²⁷ With competent representation, noncitizen defendants can seek alternate pleas that avoid devastating immigration consequences. A noncitizen who chooses to represent herself could end up pleading guilty to a crime without realizing that doing so could mean permanent exile from the United States and separation from her family.²⁸

B. Registration fees add to the mounting criminal justice debt that hurts Californians and their families

Registration fees are part of a growing wave of “user fees” that state and local governments charge to defendants in order to fund cash-strapped court systems and fill budget shortfalls. Such fees have ballooned in recent years, both in California and throughout the country.²⁹ For example, when a California driver receives a traffic ticket with a \$100 base fine—the intended punishment for the traffic violation—the driver must pay an additional \$390 in fees and surcharges, for a total of \$490 on a \$100 ticket.³⁰ If a person misses the initial deadline to pay, the amount grows to \$815.³¹ These fees have been steadily increasing since the 1990s. According to a study by the California Research Bureau, the state has steadily increased fines and surcharges and, as of 2006, has developed “over 269 dedicated funding streams for court fines, fees, forfeitures, surcharges and penalty assessments that may be levied on offenders and violators.”³²

This trend is not unique to California. According to a Brennan Center report on criminal justice debt in the 15 states with the largest prison populations, “most of [these states] have increased both the number and dollar value of criminal justice fees, sometimes significantly” in recent years.³³ Unfortunately, criminal justice debt is a major barrier to successful reentry for individuals involved in the criminal justice system. The same report concluded that “user fees,” such as public defender fees, significantly hinder the chances of success for those leaving prison. The report found that “criminal justice debt wreaks havoc on individuals’ credit scores, and with it, their housing and employment prospects.”³⁴

Moreover, registration fees adversely affect not only those convicted of crimes but also those who are never convicted or even tried. Because the fee is assessed even when a person is ultimately acquitted by a jury or when a prosecutor decides to drop the charges, it is also a tax on the falsely accused. In *Nelson v. Colorado*, the United States Supreme Court recently recognized that fees imposed on wrongly convicted individuals can violate a defendant’s right to due process under certain circumstances.³⁵

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In short, registration fees punish defendants for exercising their Sixth Amendment right to counsel and for their poverty.

C. Private debt collection companies profit from these fees at the expense of low-income defendants

Registration fees were initially proposed as a way to raise revenue for underfunded public defenders’ offices. In reality, however, revenue from registration fees has fallen far short of proponents’ expectations, all while exacting a serious toll on indigent defendants. In an early report on registration fees, the American Bar Association found that of 28 jurisdictions studied nationwide, “those programs which had data on fee collection rates reported collection rates from 6 to 20%.”³⁶ The report, therefore, warned that “[a]pplication fees should not be implemented with the expectation that the revenue they produce will be a panacea for indigent defense under-funding problems.”³⁷

To alleviate the administrative burden of collecting these fees, some counties have opted to contract with private collections companies, both to collect the fees upfront and to pursue nonpayers whose debt has become delinquent. These private companies then take a percentage of the fees recovered from indigent defendants. In Los Angeles, for example, the county contracts with a private company called GC Services to collect registration fees and other court debt. Under the terms of the GC Services contract with the county, if defendants fail to pay the fee within fifteen days, GC Services refers the debt to its comprehensive collections program.³⁸ GC Services then uses debt collection methods including “wage and bank account garnishments,” referral to the tax authority for garnishment of tax refunds, and the use of skip tracing and DMV record checks “to locate delinquent debtors.”³⁹

“My client, a domestic violence survivor, had failed to appear in court because her abuser forbid her from leaving the house. After the court referred her case to GC Services, GC Services refused to consider her circumstances, told her there was nothing to be done and instructed her that she would have to pay in full. Had I not intervened on her behalf with the court, my client would have been saddled with unpayable debt and at the mercy of GC Service’s debt collection techniques, preventing her from her getting back on her feet and starting a new life apart from her abuser.”

– Attorney (anonymous), Los Angeles

These collections practices are aggressive and intrusive

and, as explained above, can interfere with an indigent defendant's attempts to overcome a criminal charge and reintegrate into society. Because California "affirmatively report[s] delinquent defendants to credit agencies," these debts can even hinder a defendant's ability to secure housing, a car, or financing for other necessities.⁴⁰

Ultimately, registration fees raise little revenue for the state and local governments while causing severe hardship to defendants and their families.

RECOMMENDATIONS

Public defender registration fees hurt low-income defendants and their families. Below, we outline two key steps that lawmakers can take to end the harmful practice of collecting these fees and to eliminate this barrier to legal representation.

A. Counties should revoke authorization for public defender registration fees

Public defender registration fees may be collected in a county "only upon the adoption of a resolution or ordinance by the board of supervisors electing to establish the registration fee."⁴¹ Counties that have previously authorized registration fees should withdraw their authorization and instruct courts and public defenders' offices to cease collecting the fees.

B. The California state legislature should repeal the state statutes authorizing registration fees

The state should pass legislation to repeal Penal Code section 987.6, which authorizes registration fees for adults, and Welfare and Institutions Code section 903.15, which allows the registration fee to be charged to parents in juvenile cases. Repealing these statutes would end the collection of public defender fees statewide and protect access to justice for low-income defendants throughout California.

ENDNOTES

¹ D. Christopher Dearborn, "You Have the Right to an Attorney," but Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article Xii of the Massachusetts Declaration of Rights, 44 SUFFOLK U. L. REV. 359, 414 (2011). This excerpt is from the standard *Miranda* warning given in Quincy, Massachusetts but is typical of these warnings given nationally.

² 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment's guarantee of the right to counsel in criminal cases applies to the

states).

³ CAL. PENAL CODE § 987.5(A) ("Every defendant shall be assessed a registration fee not to exceed fifty dollars (\$50) when represented by appointed counsel. Notwithstanding this subdivision, no fee shall be required of any defendant that is financially unable to pay the fee.").

⁴ CAL. GOV'T CODE § 27712(A) ("In any case in which a party is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the proceedings, or upon the withdrawal of the public defender or private counsel, after a hearing on the matter, the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance.").

⁵ See *id.*

⁶ CAL. PENAL CODE § 987.5(e) ("This section shall be operative in a county only upon the adoption of a resolution or ordinance by the board of supervisors electing to establish the registration fee and setting forth the manner in which the funds shall be collected and distributed. Collection procedures, accounting measures, and the distribution of the funds received pursuant to this section shall be within the discretion of the board of supervisors.").

⁷ Stats. 1996, c. 389 (S.B. 251), § 1, eff. Aug. 19, 1996.

⁸ CAL. PENAL CODE § 987.5(e).

⁹ Stats. 2009, c. 606 (S.B. 676), § 4.

¹⁰ Stats. 2011, c. 402 (A.B.1053), § 7.

¹¹ CAL. PENAL CODE § 987.5(a).

¹² See ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *Public Defender Application Fees: 2001 Update*, at 2 (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/pdapplicationfees2001_narrative.authcheckdam.pdf.

¹³ *State-by-State Court Fees*, NATIONAL PUBLIC RADIO (MAY 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

¹⁴ Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052 (2006).

¹⁵ *Id.* at 2052-53.

¹⁶ See CAL. PENAL CODE § 647(e).

¹⁷ For example, this is how the fee was typically administered by the Los Angeles County Public Defender until the Board of Supervisors revoked authorization for the fee.

¹⁸ Law Offices of the Public Defender - County of Ventura, *FAQs*, <https://pubdef.countyofventura.org/page36.html> (last visited May 18, 2017).

¹⁹ Imperial County, for example, falls within this category. See Imperial County Ordinance 2.60.070 (Public defender fees), available at https://www.municode.com/library/ca/imperial_county/codes/code_of_ordinances?nodeId=TIT2AD_CH2.60PUDE_2.60.070PUDEFE.

²⁰ ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 12, at 22.

²¹ See, e.g., San Diego Board of Supervisors, Ordinance No. 10227 (N.S.) (Oct. 9, 2012), available at http://www.sandiegocounty.gov/content/sdc/cob/ordinances/ord_2012.html; San Joaquin County Board of Supervisors, Resolution R-10-95 (March 9, 2010), available at https://www.sjgov.org/board/board%20meetings/minutes/mg68007/as68014/ai75308/do75309/do_75309.pdf; Fresno County Board of Supervisors Resolution No. 14-092 (March 11, 2014), available at http://www2.co.fresno.ca.us/0110a/Questys_Agenda/MG209714/AS209715/AS209732/AI209788/DO210202/DO_210202.PDF.

²² U.S. CONST. amend VI; *Gideon*, 372 U.S. at 344 (holding that the Sixth Amendment’s guarantee of the right to counsel in criminal cases applies to the states).

²³ In *Fuller v. Oregon*, 417 U.S. 40, 52-53 (1974), the Supreme Court held that Oregon’s statute authorizing back-end recoupment of public defender costs was constitutional, but its holding was premised on the fact that “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.”

²⁴ *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004).

²⁵ CAL. PENAL CODE § 987.5(c).

²⁶ *Id.* § 987.5(a).

²⁷ For example, a lawful permanent resident can be subject to deportation for relatively minor convictions that qualify as crimes involving moral turpitude (CIMTs). See INA § 237(a)(2)(A)(i) (noncitizen is deportable for a single conviction of a CIMT if the qualifying offense was committed within five years of admission and has a possible sentence of at least 365 days); INA § 237(a)(2)(A)(ii) (noncitizen is deportable for two or more CIMTs at any time after admission). Defendants are regularly charged with minor crimes that qualify as CIMTs, such as misdemeanor vandalism under California Penal Code section 594. With competent representation, immigrant defendants will be advised that this misdemeanor conviction may create issues and a possible finding of CIMT in immigration court, and therefore seek alternate pleas that are clearly not CIMTs—offenses such as Penal Code Section 602(m) (Trespass) or Penal Code Section 647(h) (Prowling).

²⁸ As the Supreme Court has noted, “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)).

²⁹ See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 27 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

³⁰ BACK ON THE ROAD COAL., NOT JUST A FERGUSON PROBLEM 10 (2015), available at <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf>.

³¹ *Id.*

³² Marcus Nieto, CALIFORNIA RESEARCH BUREAU, *Who Pays For Penalty Assessment Programs in California* (Feb. 2006), at 7, available at <https://www.library.ca.gov/crb/06/03/06-003.pdf>.

³³ BANNON ET AL., *supra* note 29, at 7.

³⁴ *Id.* at 27.

³⁵ *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). The Court held that a statutory scheme in Colorado that required defendants with overturned convictions to prove their innocence by clear and convincing evidence before they could receive a refund of fees and costs violated due process.

³⁶ ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 12, at 29.

³⁷ *Id.*

³⁸ See COL 009, Notice of Assessment of Appointed Counsel Registration Fee (Penal Code Section 987.5) (Rev. 9/13) (on file with author) (stating that the fee is due within five days); *Statement of Work, in Contract By and Between County of Los Angeles for the Superior Court of Los Angeles County and GC Services Limited Partnership For Revenue Enhancement Services*, exhibit A at 2 (approved by Board of Supervisors Nov. 2011), available at <http://file.lacounty.gov/bos/supdocs/65076.pdf> (stating that registration fees delinquent for ten days would be referred for collection activity).

³⁹ *Id.* at 4.

⁴⁰ BANNON ET AL., *supra* note 29, at 27-28, 59 n.198.

⁴¹ CAL. PENAL CODE § 987.5(e) (adults); CAL. WELF. & INST. CODE § 903.15 (juveniles).

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