Santa Clara University
School of Law

Santa Clara Law Review

Volume 10 | Number 2 Article 9

1-1-1970

# Does Parental Liability for Legal Fees Infringe Upon a Juvenile's Constitutional Rights

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# DOES PARENTAL LIABILITY FOR LEGAL FEES INFRINGE UPON A JUVENILE'S CONSTITUTIONAL RIGHTS?

From its inception, the juvenile court system has tolerated a wide range of differences between procedural rights afforded adults and those afforded juveniles. The underlying distinction arose because the early reformers were appalled by the application of adult criminal procedures to juvenile proceedings. They set about to create a system which would not be confined by the concept of justice alone. The role of this system was not to ascertain the guilt or innocence of the child but rather "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from his downward career."[1] These results were to be achieved by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*.[2]

The right of the state, as *parens patriae,* to deny to the child the rights available to adults was asserted on the grounds that a child, unlike an adult, has a right "not to liberty but to custody." For example, a child can be made to attorn to his parents and to go to school. If the parents default in their custodial functions the state might intervene. In so doing, it would not deprive the child of any rights, because he had none, but would merely provide the "custody" to which the child was entitled.[3] The constitutional and theoretical basis for this peculiar system is debatable, and in practice the results have not been entirely satisfactory.[4]

## A Change in Thought

Finally in 1967 the landmark case of *In re Gault*[5] was decided by the United States Supreme Court. The Court extended to juve-

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1 Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119-20 (1909).

2 *In re* Gault, 387 U.S. 1, 16 (1967). "Parens patriae—Father of his country; parent of the country. In England, the king. In the United States, the state, as a sovereign—referring to the sovereign power of guardianship over persons under disability." Black's Law Dictionary 1269 (4th ed. 1968).

3 "The basic right of a juvenile is not to liberty but to custody. He has a right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so." Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719, 720 (1962).

4 "There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: That he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966). *See also* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7.

5 387 U.S. 1 (1967).

niles constitutional rights and privileges which are afforded to adult criminals. "It would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[6] Among the rights which it extended to juveniles the Supreme Court especially noted the importance of the right to counsel. The Court stated that the juvenile needs the aid of counsel at every step in the proceedings to deal with the problems of law, to make inquiry into the facts, to ascertain whether the accused has a defense, and to prepare and submit the defense if any exists.[7] Moreover, a juvenile is entitled to counsel to act in his behalf in any matter before juvenile court, and where the child is indigent, counsel must be appointed.[8] The California Legislature has heeded this constitutional mandate by enacting section 634 of the Welfare and Institutions Code. This statute gives the court the power to appoint counsel for indigent minors. It also creates in the court a duty to appoint counsel if the minor appears at the hearing without one, whether he is indigent or not, unless he has intelligently waived this right.[9]

## THE DEVELOPMENT OF SECTIONS 634 AND 903.1

The appointment of counsel for an indigent minor raises the question whether or not the parents are liable for counsel fees.[10] Section 634 authorizes the court to determine the financial status of the parents and allows the court to assess a charge upon them for legal fees.

Rule 39 of the MODEL RULES FOR JUVENILE COURT[11] is strik-

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[6] *Id.* at 27-28.

[7] *Id.* at 36.

[8] *Id.* at 41; *In re* Dennis M., 70 A.C. 460, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[9] CAL. WELF. & INST'NS CODE § 634 (West Supp. 1970) provides:

> When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel. In any case in which the minor is alleged to be a person described in Section 601 or 602, he shall be represented by counsel and the court shall appoint counsel for the minor if the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, unless there is an intelligent waiver of the right of counsel by the minor.

[10] *Id.* § 634: "If the parent or guardian does not furnish counsel and the court determines that such parent or guardian has the ability to pay, the court shall appoint counsel at the expense of the parent or guardian."

[11] COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, § 39 (1969) [hereinafter cited as MODEL RULE 39]:

> The parties may be represented by counsel retained by them in all proceedings. The court shall appoint counsel for the parties if it finds that they are indigent unless representation is completely and intelligently waived. Waiver by a child may be made only in the presence of his parents, guardian

ingly similar to section 634 and provides a good vehicle for a threshold inquiry into the legislative intent and policy considerations behind section 634. Rule 39 allows the court to appoint counsel upon its own motion or at the request of an indigent party, or where it deems this necessary to prevent a conflict of interest between parent and child.[12] In any event, if the parents have the financial ability to pay the legal fees they can be ordered to pay.[13] Commenting on Rule 39, the author of the MODEL RULES stated that requiring financially able parents to pay can be justified on the theory that counsel is a necessity of life which parents must provide.[14] The Council stated that legal services are as much a necessity of life as food, shelter, clothing and medical care, in which case counsel fees are better borne by the parents than by society.[15]

California Welfare and Institutions Code section 634 is the equivalent of Rule 39. Enacted in 1937, section 634 in its early form authorized the court to provide an indigent with an attorney if he was charged with misconduct which would amount to a felony if committed by an adult.[16] The 1967 amendment[17] eliminated the "equivalent of a felony" clause and added a provision requiring appointment of counsel both for children within the ambit of section 601[18] and section 602.[19] The 1968 amendment[20] added a clause allowing the court to determine whether the parents are financially able to pay for attorney's fees and to charge them with the fees if they are capable.

Section 903.1,[21] passed in 1965, remains in its original form. It

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or custodian.

Upon request or on its own motion the court shall appoint separate counsel to represent any indigent party other than the child if the interests of the child and those of the party appear to conflict. The court shall appoint counsel for the child if, in its opinion, the interests of the child and those of his parents conflict or if counsel is necessary to meet the requirements of a fair hearing.

Where the court appoints counsel under the provisions of this rule, it may, where appropriate, assess against the parents, guardian, or custodian, including any agent vested with the legal custody of the child, the costs of providing such counsel. Orders assessing the costs of counsel may be enforced through contempt proceedings. . . .

12 MODEL RULE 39, ¶ 2.

13 MODEL RULE 39, ¶ 3.

14 COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, at 83 (1969).

15 *Id.*

16 Cal. Stats. ch. 369 § 634, at 1025 (1937).

17 Cal. Stats. ch. 1355 § 4, at 3193 (1967). This was an obvious attempt to comply with the mandate of *In re Gault*.

18 CAL. WELF. & INST'NS CODE § 601 (West 1966) deals with children beyond the control of parents.

19 *Id.* § 602 deals with delinquent children.

20 Cal. Stats. ch. 1223 § 1, at 2332 (1968).

21 CAL. WELF. & INST'NS CODE § 903.1 (West 1966).

allows the county to charge relatives, liable for the support of a minor, with fees for legal services rendered to a minor by the public defender or a private attorney.[22] The combined meaning of sections 634 and 903.1 is unclear.[23] Presumably section 903.1 operates to give the county, independent of the juvenile court, authority to charge relatives for the fees. However, a prior determination by the court of the financial status of responsible relatives would be controlling on the county.

Parents' liability under sections 634 and 903.1 seems to arise from two principles:[24] First, California feels that legal services are a necessity of life to be provided by parents;[25] second, the cost to the state should be minimized whenever possible.[26] While such intents and purposes are commendable, they may cut across certain constitutional rights guaranteed to children facing the juvenile court.

In practice section 634 allows the court to appoint counsel if the child's parents are unable to afford one and also if for some other reason the parents do not obtain counsel for the child.[27] Furthermore, an inquiry is authorized to determine whether the parents are financially able to pay for an attorney.[28] If the parents are financially able, the county can charge them with the costs of legal services.[29]

Although these sections allow reimbursement, not all counties in California utilize them for the purpose of reimbursement. The Los Angeles County Public Defender's Office, the state's largest, does not utilize them, contending that sections 634 and 903.1 may violate constitutional rights.[30] Moreover, the Los Angeles office also

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[22] *Id.* "The father, mother, spouse, or other person liable for the support of a minor person . . . shall be liable for the cost to the county of legal services rendered to the minor by the public defender . . . or for the cost to the county for the legal services rendered to the minor by private attorney . . . ."

[23] CALIFORNIA CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 364 (1968).

[24] Comment, 3 CAL. WEST L. REV. 134, 139 (1967); *See* County of Alameda v. Espinoza, 243 Cal. App. 2d 534, 52 Cal. Rptr. 480 (1966). *See also* CAL. CIV. CODE § 196 (West 1954).

[25] *Id.*

[26] *Id.*

[27] CAL. WELF. & INST'NS CODE § 634 (West Supp. 1970): "When it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel. . . . If the parent or guardian does not furnish counsel . . . the court shall appoint counsel . . . ."

[28] *Id.* § 634: "If the parent or guardian does not furnish counsel and the court determines that such parent or guardian has the ability to pay, the court shall appoint counsel at the expense of the parent or guardian."

[29] CAL. WELF. & INST'NS CODE § 903.1 (West 1966).

[30] Telephone interview with Kathryn J. McDonald, Head Deputy Public Defender of the Juvenile Court for Los Angeles County Public Defender's Office, Feb. 20, 1970.

reasons that the above sections are in conflict with California Government Code section 27706,[31] which specifies the duties of a public defender. The Los Angeles Public Defender's Office reasons that the person being defended is the *juvenile,* not his parents. Therefore, unless he has his own funds, the court and the Public Defender's Office will not pursue any course of action to gain reimbursement.[32] In contrast to Los Angeles County, Santa Clara County applies and utilizes sections 634 and 903.1 to impose a fee, even though minimal.[33]

In counties where the sections are utilized instances have arisen where juveniles have refused the aid of the public defender solely on the grounds that their parents would have to pay for the legal fees.[34] Public Defender interviews also reveal that juveniles refuse counsel out of fear of parental reprisal[35] as well as the apprehension that they themselves would be forced to pay the costs.[36]

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[31] CAL. GOV'T CODE § 27706 (West 1968) provides: "The public defender shall perform the following duties: (a) Upon request of the defendant or upon the order of the court, he shall defend, without expense to the defendant, any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior, municipal or justice courts at all stages of the proceedings, including the preliminary examination.

. . . .

"(e) Upon request of the court, he shall represent any person who is entitled to be represented by counsel but is not financially able to employ counsel in proceedings under chapter 2 (commencing with section 500) of part 1 of Division 2 of the Welfare and Institutions Code when such proceedings are concerned with a person alleged to be or who has been found to be within the description of Sections 601 or 602 of the Welfare and Institutions Code."

[32] Telephone interview with Kathryn J. McDonald, Head Deputy Public Defender of the Juvenile Court for the Los Angeles County Public Defender's Office, Feb. 20, 1970.

[33] Telephone interview with Frank Katz, Deputy Public Defender for Santa Clara County, Feb. 19, 1970, revealed that when a Public Defender is appointed to a juvenile, at the close of the hearing the Public Defender submits a recommendation whether the parents should be charged or not. The fee is based upon a set scale established by the Public Defender's Office in accordance with the average time required for such cases. The fee for an uncontested case is about $38.00. The fee for a contested case is about $55.00 plus an hourly rate for every hour over the average time.

[34] *In re* R. D. H., 1 Crim. no. 14091 (Cal. Sup. Ct. Mar. 4, 1970); telephone interviews with Frank Katz and James King, Feb. 19, 1970.

[35] See note 33 *supra.* Mr. Katz related at least two instances where juveniles refused his assistance because they feared that their parents would be overburdened and angered.

[36] Interview with James M. King, interviewer for the Santa Clara County Public Defender's Office, Feb. 21, 1970, in which Mr. King related an incident wherein a juvenile was reluctant to accept his services. The juvenile had been in trouble before and his parents were forced to pay detention costs. He was forced to work for his parents without pay until he had reimbursed them for their expenditures. The child feared this same exaction of recompense if he exercised his right to an attorney.

Mr. King also supported Mr. Katz with a similar account of a juvenile who refused assistance solely on the grounds of fear of parental reprisal.

The following questions will be discussed within the scope of this comment: First, do sections 634 and 903.1 constitute an impediment to the free exercise by an indigent minor of the sixth amendment right to counsel? Second, do sections 634 and 903.1 deny the minor equal protection of the law, since they burden him and his class without any corresponding burden on the indigent adult who receives the aid of a public defender? Third, is a juvenile's voluntary waiver of his right to counsel affected by the interaction of 634 and 903.1?[37]

## PROBLEMS PRESENTED

### *Impediment to the Free Exercise of a Constitutional Right*

In certain situations, a problem of impediment to a juvenile's free exercise of the right to counsel may arise. When a child is confronted with the choice of having an attorney represent him or not, even the slightest amount of outside influence can be determinative. The effects of sections 634 and 903.1 of the Welfare and Institutions Code may create just this type of influence.

*In re R. D. H.*[38] is an excellent example of the adverse effect of these statutes on a juvenile's exercise of his right to counsel. The petitioner in this case was arrested for burglary. He was informed of his rights and told that if he desired counsel his parents might be charged with legal fees under sections 634 and 903.1. His parents were already indebted to the county because of his prior detentions at juvenile hall and the county rehabilitation facility. He waived his right to counsel in light of the statute. The trial court accepted this waiver, found the petitioner guilty and committed him to the California Youth Authority facility in Stockton. While these statutes did not infringe *directly* upon the child's right to counsel, this authority for billing the parents coupled with the fear of parental reprisal impinged upon the exercise of that right.

The argument proposed by the petitioner, R. D. H., is that sections 634 and 903.1 have a "chilling effect" on the exercise of the right to counsel. The law is not without precedent on this point. In *United States v. Jackson*,[39] the Supreme Court struck down the Federal Kidnapping Act provision permitting assessment of the death penalty where a plea of not guilty was tried by a jury. The Court stated that the objectives of Congress "cannot be pursued by

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[37] *See generally* brief for Petitioner, *In re* R. D. H., 1 Crim. no. 14091 (Cal. Sup. Ct. Mar. 4, 1970).

[38] *In re* R. D. H., 1 Crim. no. 14091 (Cal. Sup. Ct. Mar. 4, 1970).

[39] 390 U.S. 570 (1968).

means which needlessly chill the exercise of a basic constitutional right."[40] The question is not whether the chilling effect is

> "incidental" rather than "intentional"; the question is whether the effect is unnecessary and therefore excessive. . . .
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> . . .
>
> [T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them![41]

This language implies a position that a statute need not be inherently coercive to render it an impermissible burden on the exercise of a constitutional right. Sections 634 and 903.1 seem to meet this classification of statutes which do not blatantly coerce a waiver of counsel but do encourage the waiver.

*In re Allen*,[42] a case decided by the California Supreme Court, expresses a similar view. In *Allen* the petitioner was placed on probation following her plea of guilty to possession of dangerous drugs. Reimbursement to the county for the cost of court-appointed counsel was a condition of that probation. In a unanimous decision the court held that this condition had a "chilling effect" on the free exercise of the sixth amendment right to counsel. Even though she was defended by counsel, the court was concerned about the effect of such conditions upon others who may need counsel. Other defendants might refuse counsel if they knew there was a possibility that they would have to pay for legal fees as a condition of probation.[43]

Clearly, while sections 634 and 903.1 do not directly inhibit the child's free exercise of the right to counsel, they do *indirectly* but *substantially chill* free exercise of that right. Opponents of this view could argue that the rationale of *Jackson* and *Allen* is not applicable to sections 634 and 903.1. Both cases involve adult offenders and, thus, the fact situations would be distinguishable. In *Allen* the petitioner was directly burdened with reimbursing the county. Under sections 634 and 903.1 there would be no direct burden placed upon the child; rather the burden would be directly on the parents. This liability would be applicable only when the

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[40] *Id.* at 582.

[41] *Id.* at 582-83; *accord,* Pope v. United States, 392 U.S. 651 (1968); Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

[42] 71 A.C. 409, 455 P.2d 143, 78 Cal. Rptr. 207 (1969).

[43] *Id.* at 411, 455 P.2d at 144, 78 Cal. Rptr. at 208.

"Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact she requested and received counsel, neither does the record show that she was forewarned of the possibility that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her and could well deter others, gives rise to our concern. . . ." *Id.*

parents would be able to pay.[44] Therefore, since there would be no direct burden on the child, the statutes would not interfere with his exercise of the right to counsel.[45]

Parental attitude and behavior are predominant motives for the actions of the child. This influence may so affect the child that he will waive his constitutional right to counsel. By charging the parents under sections 634 and 903.1, the government is penalizing the exercise of a constitutional right. The government is without authority to create such a burden.[46]

*Denial of Equal Protection*

*A. The Child*: Sections 634 and 903.1 of the Welfare and Institutions Code classify children according to family wealth. A child from a poor family is afforded counsel under 634 at no charge to the parents. Obviously, if the parents are not going to be charged, then no obstacle impedes the child in his exercise of the right to counsel. Similarly, if the child comes from a family with substantial means, in most cases the parents will retain private counsel or simply pay the court assessed fees for appointed counsel. Not so happy, however, are the children from families whose wealth is marginal. Such families can technically "afford" appointed counsel, but the charge imposes a financial hardship. Here the economic pressure to waive counsel mounts and children from this class are likely to succumb to this pressure. It is this class into which the Santa Clara County cases and instances[47] fall which clearly establish that sections 634 and 903.1 do in fact classify children on the basis of family wealth.

A state can, consistent with the fourteenth amendment, provide for differences so long as this does not amount to a denial of due process or an "invidious discrimination."[48] "Absolute equality is not required; lines can be and are drawn."[49] However, a monetary

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[44] CAL. WELF. & INST'NS CODE § 700 (West Supp. 1970).

[45] *But see In re* Gault, 387 U.S. 1, 45 (1967), *citing* Haley v. Ohio, 332 U.S. 596, 599 (1947), wherein the court states:

"[W]hen as here, a mere child—an easy victim of the law—is before us, special care . . . must be used. . . . He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of instability which the crisis of adolescence produces."

[46] *See* Gardner v. Broderick, 392 U.S. 273 (1968); United States v. Jackson, 390 U.S. 570 (1968).

[47] See notes 29-31 & 33 *supra*.

[48] Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[49] Douglas v. California, 372 U.S. 353, 357 (1963).

basis of distinction has long been held inadequate to justify discrimination.[50]

An argument may be made to the effect that monetary discrimination has normally been restricted to cases where the poor have been denied equal treatment under the law. Under section 634 it is the class that is too wealthy to be poor but too poor to be financially independent that is discriminated against. The underlying policy of freedom from impediments on basic constitutional rights should still be applicable. That, in this instance, it is this lower middle income group and not the poor that is effected is immaterial.

Section 634 violates the equal protection clause of the fourteenth amendment in another way. Adult criminals are given free counsel if the court finds that they are indigent. In so doing, the court looks only to the financial status of the defendant. A juvenile's right to free appointment, however, is effectively conditioned upon the financial status of his parents under 634 and 903.1. With respect to this right, juveniles are classified apart from adults when the court charges the parents for appointed counsel.

*In re L. G. T.*[51] is a Florida case in which a fourteen-year-old was denied the benefit of an insolvency statute and was required to pay the cost of his appeal on the grounds that his parents had the financial ability to pay. On appeal the court held that a juvenile, destitute in his own right, may not be denied benefit of an insolvency statute because of the financial status of his parents.[52] In reaching its decision the court recognized the principles mandated in the *Gault* case. It stated that *Gault* protected the constitutional rights of a juvenile "notwithstanding the non-criminal nature of the proceedings."[53]

In California, contrary to the law of Florida,[54] legal fees appear to be a necessity of life which must be provided by the parents.[55] While such a common law or statutory duty may exist, it cannot deny to juveniles their basic constitutional rights.

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[50] *Id. See also* Griffin v. Illinois, 351 U.S. 12 (1956).

[51] 216 So. 2d 54 (Fla. App. 1968).

[52] *Id.* at 56.

"As is made clear by our decisions, the test on an inquiry of insolvency is not what the prisoner's friends or relatives have the ability to do in paying costs, or their readiness or willingness to pay them. The test is whether the defendant, himself, has the ability to pay the costs or to secure their payment." *Id.*

[53] *Id.* at 55.

[54] *Id.* at 56.

"[P]arents' common law duty to furnish necessities to minor children does not extend to the furnishing of legal services and costs incident to an appeal." *Id.*

[55] See note 24 *supra*.

*B. The Parents.* Since parents are the ones named to bear the costs of legal fees, the issue of the effects on their constitutional rights is important. Rehabilitation is the main function of the juvenile court system.[56] A secondary function, the protection of society from delinquents, is also served. Since appointment of counsel is an important part of this system, every member of society should share equally in the costs of appointment of an attorney for an indigent juvenile, just as they do for indigent adults.[57]

Two leading cases, *Department of Mental Hygiene v. Hawley*[58] and *Department of Mental Hygiene v. Kirchner,*[59] support the argument that to charge a specified class of people for costs of services which benefit society denies equal protection under the law. The statute attacked was based on consanguinity. This statute[60] imposed an obligation upon the relatives to pay the costs of maintenance of a mentally ill person committed to a state hospital. In both cases the defendants claimed that the statute denied them equal protection under the law. The California Supreme Court accepted this defense and overturned the statute on grounds of denial of equal protection.[61] Although these cases should support the unconstitutionality of sections 634 and 903.1, two later cases, *County of Alameda v. Espinoza*[62] and *In re Shaieb*[63] distinguish them. They dealt with parents who were charged for costs of maintenance and support pursuant to section 903.1 of the Welfare and Institutions Code. The facts were similar in both cases. A child was sent to a county rehabilitation center pursuant to an order from the juvenile court. The parents relied upon *Hawley* and *Kirchner* and claimed section 903.1 denied them equal protection under the law. The court in *Espinoza* held that there is a rational basis for charging parents with the costs of detention pursuant to juvenile court order.[64] *In re Shaieb*, agreeing with *Espinoza*, held *Hawley* and *Kirchner* do not apply to juvenile court situations.[65]

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56 TASK FORCE REPORT, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 85 (1967).

57 *Cf.* Wheeler v. Montgomery, 38 U.S.L.W. 4230 (U.S. Mar. 23, 1970).

58 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963).

59 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).

60 Cal. Stats. ch. 1667 § 36.5, at 4107 (1967).

61 Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963).

"The mere fact that innocent persons are relatives of an accused or convicted person does not deprive them of their fundamental rights or constitute a lawful basis for a statute or judgment whereby their property may be taken to pay costs of prosecuting, detaining, or otherwise treating the accused." *Id.* at 256, 379 P.2d at 28, 28 Cal. Rptr. at 724.

62 243 Cal. App. 2d 534, 52 Cal. Rptr. 480 (1966).

63 250 Cal. App. 2d 553, 58 Cal. Rptr. 631 (1967).

64 County of Alameda v. Espinoza, 243 Cal. App. 2d 534, 549, 52 Cal. Rptr. 480, 489-90 (1966).

65 *In re* Shaieb, 250 Cal. App. 2d 553, 557, 58 Cal. Rptr. 631, 633 (1967).

Arguably, under *Espinoza* and *Shaieb* there is a rational basis for imposing juvenile detention costs on parents without discrimination. The basis can be extended to the imposition of appointed counsel fees as well. Even though sections 634 and 903.1 may be constitutional as applied to parents, the fact that they are constitutional as to parents cannot serve to justify violating the basic rights of the child.[66]

*Effect on Voluntary Waiver*

The final issue presented by sections 634 and 903.1 of the Welfare and Institutions Code concerns an aspect of the voluntary waiver of the right to counsel. A valid waiver must be voluntary, intelligent and knowing.[67] In a juvenile hearing the waiver of counsel can be made only if the juvenile has an intelligent understanding of its consequences.[68] Seemingly, there is much support for the proposition that a minor is incapable of competently and intelligently waiving his constitutional rights.[69] In *People v. Lara*,[70] the California Supreme Court gave an exhaustive discourse on the subject of the intelligibility of a minor's waiver of counsel. The *Lara* concept of "totality of circumstances" has been accepted and expounded upon in later cases.[71] In *In re H. L. R.*[72] a minor was taken into custody, with the consent of his father, for appearing to be under the influence of drugs. The boy was questioned by a friend of the family, who happened to be a deputy probation officer. The boy waived his rights and talked with his "friend." In addition to being under the influence of drugs the boy was exhausted. Despite the officer's appraisal that the boy understood his rights, the court held that the waiver given was not an intelligent one under the "totality of circumstances" existent.[73]

Since the "totality of circumstances" is the proper test, it follows that the problem must be handled on a case-by-case basis.

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66 *See* Comment, 3 CAL. WEST. L. REV., 134 (1967), for further treatment of the parents' equal protection argument. *See also* Department of Mental Hygiene v. Bank of America N.T. & S.A., 3 Cal. App. 3d 543, 83 Cal. Rptr. 559 (1969).

67 Miranda v. Arizona, 384 U.S. 436 (1966).

68 *In re* Butterfield, 253 Cal. App. 2d 794, 61 Cal. Rptr. 874 (1967).

69 Comment, 56 CALIF. L. REV. 1711 (1968); Comment, 19 HASTINGS L. REV. 223, 227-28 (1967); Comment, 7 SANTA CLARA LAW. 114, 127 (1966); Comment, 40 WASH. L. REV. 189, 200-01 (1965).

70 67 Cal. 2d 365, 423 P.2d 202 (1967).

71 *In re* H. L. R., 269 Cal. App. 2d 610, 75 Cal. Rptr. 308 (1969); *In re* Dennis M., 70 A.C. 460, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

72 269 Cal. App. 2d 610, 75 Cal. Rptr. 308 (1969).

73 *See generally In re* Dennis M., 70 A.C. 460, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

A minor cannot be judged by adult standards.[74] Because of the effect of sections 634 and 903.1, instances have arisen where parents have made threats or reprimands to keep their children from burdening them with legal fees.[75] With this in mind, the child must make a choice to accept or waive counsel. Under such circumstances the waiver is not freely given.

The test presented in the above cases concerns the intelligiblity of waiver and not the voluntariness of waiver. However, the same test must be applied to voluntariness since this concept is so closely related to intelligibility of waiver.

## CONCLUSION

The juvenile is a constitutionally privileged member of society.[76] The rights extended by *Gault* are as important to minors as they are to adults. The financial responsibility provisions of sections 634 and 903.1 are a burden upon these rights and should be considered as impediments to our progress in the protection of juveniles. The effects of these sections read together violate due process and deny equal protection.

Impediments which chill the free exercise of a basic constitutional right are impermissible burdens.[77] Sections 634 and 903.1 produce a "chilling effect" on the exercise of the right to counsel. These sections, therefore, are unconstitutional burdens upon the minor's right to counsel.

Statutes which cause a discriminatory classification are unconstitutional.[78] Sections 634 and 903.1 produce an arbitrary and discriminatory classification based upon financial status of the minor's parents. Plainly, the effects of sections 634 and 903.1 deny equal protection of the law to the child and should be carefully scrutinized.

Although there is a rational basis for imposing liability upon the parents, this basis can only protect the statutes from being attacked as a denial of equal protection to the parents. This rational basis cannot justify the violation of a juvenile's basic constitutional right to counsel.

Finally, waiver of a constitutional right by a minor must be

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[74] See note 45 *supra*.

[75] See notes 29-31 & 33 *supra*.

[76] *In re* Gault, 387 U.S. 1 (1967).

[77] United States v. Jackson, 390 U.S. 570, 582-83 (1968).

[78] *See* Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

considered within the "totality of circumstances" test.[79] Considering all circumstances the waiver must be voluntary, intelligent and knowing.[80] Otherwise, it is not a valid waiver. When a child waives a right, not for his own interest but for the interest of his parents, it is not a voluntary waiver. Sections 634 and 903.1 produce this effect and must not be allowed to continue in this fashion.

All these factors when considered together throw deep suspicion on the constitutional validity of sections 634 and 903.1 of the Welfare and Institutions Code. While the legislature's desire to shift the burden of remunerating court-appointed counsel from society to the parents is commendable, it cannot be justified so long as it acts as an impedient on a juvenile's free exercise of the right to counsel. The Supreme Court of California should review these sections in an appropriate case and curtail the enforcement of them when they manifestly jeopardize the rights of the very children the juvenile court system attempts to protect.[81]

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[79] County of Alameda v. Espinoza, 243 Cal. App. 2d 534, 549, 52 Cal. Rptr. 480, 489-90 (1966).

[80] Miranda v. Arizona, 384 U.S. 436 (1966).

[81] On May 5, 1970, the California Supreme Court upheld the lower court ruling in the case of *In re R. D. H.*, 1 Crim. no. 14091 (Cal. Sup. Ct. Mar. 4, 1970). See text at 352, *supra*. The court apparently also upheld the constitutionality of these sections, but at the time this issue went to press the full opinion was not available. Sacramento Legal Press, May 5, 1970, at 1, col. 1.