Financial Inability to Obtain an Adequate Defense

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"Giving practical application to a great ideal is one of man's most rewarding satisfactions."
William H. Timbers, Chief Judge, United States District Court, District of Connecticut**

I. INTRODUCTION

The factual necessity for the guiding hand of counsel at every step of a criminal proceeding is undisputed and well accepted by lawyers and laymen in our society. Perhaps the most eloquent statement of that necessity is Justice Sutherland's in Powell v. Alabama:¹

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.²

The fountainhead of the legal requirement for court appointed counsel is Powell, holding that the right to be provided counsel is under some circumstances part of due process that every state owes its citizens. Six years later, Johnson v. Zerbst³ defined the dimensions of this constitutional obligation for federal courts. Gideon v. Wainwright,⁴ a quarter of a century later, defined the dimensions of the constitutional obligation for the states. The history is a living one, and there are many questions, outside the scope of this study, which remain unanswered as to the right to appointed counsel.⁵ Taking the factual necessity and the legal require-

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¹ 287 U.S. 45 (1932).
² Id. at 68-69.
³ 304 U.S. 458 (1938).
⁵ For example, when does the constitutional right end—after appeal or only after certiorari is denied or the case determined by the Supreme Court? Under what circumstances does the right apply in post conviction proceedings? Does the right attach in a criminal proceeding such as a misdemeanor, or violation of a municipal ordinance? Should the right be extended to civil proceedings?
ments for a lawyer as established, this study focuses upon the duties of the court to appoint and of the taxpayers to pay for the defense of an accused in a criminal proceeding. What financial circumstances of an accused trigger these duties? A general approach to the determination of the issues is utilized as opposed to a state-by-state or purely federal analysis, although federal practice is emphasized.

Two philosophical points need to be stated concerning society's duty to pay. First, it is society as a whole, not the defendant individually, that has selected the modified adversary system under which we operate. Our choice of the mechanism for determining criminal responsibility, rather than some notion of benevolence or gratuity to the poor, requires that both sides have professional spokesmen who know the rules. Some suggest that it is appropriate to regard counsel for the defense as a part of the mechanism by which society operates the criminal process. Under the system in some Scandinavian countries every defendant is provided counsel at state expense regardless of his poverty or wealth, subject to his right to retain counsel privately if he prefers. Although this position might be reached ultimately, current priorities as well as contemporary ideas of fairness are best satisfied by a solution somewhere between a public defense bar completely supported by the state, like the prosecution, and a lawyer-only-if-defendant-can-afford-one concept.

Second, it is the duty of society, not just that of the bar, to bear the expense. No group or classification of persons should bear disproportionate economic loss in the operation of government. Those costs should be borne by all people equally and equitably. For far

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6 A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services—Tentative Draft 3 (1967). "No one can guarantee that the particular lawyer representing one side will be professionally the equal of the other; what is important is that the system for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution." Id. at 1.

7 Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 397 (1967). The extreme of this theory is undesirable and conceivably could raise issues of due process. The traditional lawyer-client relationship could be replaced by one between the client, advised by a lawyer, and the system. The extreme is reflected in the notion that when counsel is retained any lack of skill on his part is imputed to the client, whereas in assigned counsel cases the negligence or ineptitude is imputed to the state. See Polur, Retained Counsel, Assigned Counsel: Why the Dichotomy?, 55 A.B.A.J. 254 (1969).

too long the entire financial burden of defending poor persons and even of paying their expenses fell onto the shoulders of too small a segment of the population—namely the lawyers. The standard of compensation for appointed counsel is still lower than for retained counsel.

Why should we not adopt an “ask and you shall receive” standard? The position has been taken that any defendant who can afford his own lawyer will retain him, since he knows he will get better representation that way. If this premise were accurate, it would

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9 The government was not liable for the fees of counsel assigned to defend a capital case under 18 U.S.C. § 3005. Nabb v. United States, 1 Ct. Cl. 173 (1864). No provision was made for payment to counsel assigned to defend an accused in the federal courts until the Criminal Justice Act of 1964, 18 U.S.C. § 3006A [hereinafter cited as CJA]. There are still no provisions for compensation to counsel appointed in “civil” proceedings to represent a petitioner for habeas corpus or for relief under 28 U.S.C. § 2255 (post conviction relief in the nature of coram nobis). 18 U.S.C. § 3006A is set out in an appendix to this article.

In Dillon v. United States, 307 F.2d 445 (9th Cir. 1962), a prisoner convicted of armed robbery of a federally insured bank sought § 2255 relief on the ground that he had been induced by an assistant United States attorney to plead guilty. The district court had ordered a hearing, but denied Dillon’s request for appointment of counsel. The Circuit Court of Appeals for the Ninth Circuit reversed and remanded, holding that counsel was required in the “special circumstances” of the case, even though “the mandatory requirement of the Sixth Amendment regarding right to counsel does not apply to indigent movants under 28 U.S.C. § 2255.” Id. at 446.

District Judge East declared that the remand was “tantamount to a direct command to me to order a member of the bar of this court to represent Dillon throughout a rehearing of his § 2255 civil proceeding.” Dillon v. United States, 230 F. Supp. 487, 495 (D. Ore. 1964), rev’d, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966). The court appointed an attorney who so represented Dillon, and then, at the court’s suggestion, petitioned for reasonable compensation. The lawyer alleged that “his services, office, and out-of-pocket expense have been commandeered and taken by the government” and claimed just compensation under the fifth amendment. 230 F. Supp. at 490. Judge East, finding that the order to the attorney to represent the indigent prisoner was a “taking” for a public use and was compensable, entered judgment against the United States. This public burden “in all fairness and justice, should be borne by the public as a whole.” Dillon v. United States, 230 F. Supp. 487, 493 (D. Ore. 1964), rev’d, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966). See generally Annot., 21 A.L.R.3d 819 (1968).

10 CJA(d).

certainly make for an easily administered standard. But the premise rests on factual assumptions of doubtful probity and permanence.

Even before provision was made for some compensation to court appointed counsel, the most widely felt abuse of the assignment system was the false claim of indigency to obtain free counsel.\(^\text{12}\) False claims persist, as illustrated by the following examples.\(^\text{13}\) A South Dakota defendant for whom counsel had been appointed upon his affidavit showing no property was later found to have two homes, cattle, and ranch land that he had leased. A Connecticut defendant requested appointment of trial counsel even though he had about $6,000 in the bank, an unencumbered home worth at least $25,000, three automobiles, $6,000 in accounts receivable, and his wife had a mink coat worth $2,500. In a Chicago case, a defendant who had previously been found eligible asked his court appointed counsel to secure the court's permission for him to leave the jurisdiction for a trip to Europe. When the defendant was asked where he could get the money to travel to Europe if he could not afford counsel, he withdrew his request for the trip.

False claims of need occur for several reasons. Appointed counsel are generally as competent as, and often more competent than, counsel that the defendant could retain on his own,\(^\text{14}\) and many defendants are aware of this fact. The judge or commissioner is in a better position to select a good lawyer than the "layman" criminal who knows little about lawyers and their relative performances in court. As efforts progress to raise the quality of appointed counsel above that of the mediocre retained counsel, defendants can be relied upon less to screen themselves. There are indications that

\(^{12}\) E.g., Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 585-86 (1963). "In more than three-fourths of the districts, no investigation of indigency is conducted other than perfunctory questioning by an official, usually the judge presiding at the arraignment. If the defendant is without counsel and claims indigency he is generally believed and counsel is assigned. Most persons interviewed deplored false claims, but felt that any extensive investigation of indigency would cost more than it would be worth."


\(^{13}\) Oaks Report III at 28-29.

\(^{14}\) Interview with Carroll W. Brewster, United States Commissioner, in New Haven, Feb. 28, 1969. Accord, Oaks Report III at 37; Timbers, Judicial Perspectives on the Operation of the Criminal Justice Act of 1964, 42 N.Y.U.L. Rev. 55, 63-64 (1967); Kamisar & Choper, note 12 supra, at 19. Since the accused knew that appointed counsel would probably be from the same law firm as retained counsel, the attitude was "might as well let the county pay for it."
false claims of financial inability have occurred most often in those
districts where a small group of experienced criminal lawyers, the
elite of the defense bar, make up the panel from which counsel are
appointed. As defendants come to realize that the truth of their
representations is never investigated except when someone acci-
dentally learns of falsification, and rarely challenged even then, the
temptation to falsify may become irresistible.

False claims occur also because some defendants attempt to
manipulate the system, or more objectively, they attempt to obtain
reversal of convictions. One example is the numerous allegations
of ineffectiveness of appointed counsel, the claim of which is prac-
tically unavailable where counsel is retained. Further, any request
for appointed counsel that is denied naturally provides grist for
appeal.

The desirability of preventing abuse from false claims of finan-
cial need relies on considerations other than the amount to be saved
in any one case, the "public treasury" aspect of the problem. Were
that aspect the only concern, then the comment that "any investi-
gation of need would cost more than it would be worth" would be
valid, at least in the short run. What is at stake is perjury or false
swearing in the course of judicial business. These crimes are a
poison to respect for law and public trust in the judicial process,
and if ignored, they can quickly pollute the stream of justice.

15 OAKS REPORT III at 32-33.
16 As the CJA is now administered, the criminal penalties for false
swearing or submission of false claims are paper dragons. "We know
of no prosecutions involving CJA affidavits." Id. at 38-39.
17 See e.g., Polhr, note 7 supra.
18 In the overwhelming majority of cases where the defendant claimed
he could not afford counsel, and the court found that he could, the
defendant was "playing games." E.g., United States v. Tremont, 351
F.2d 144 (6th Cir. 1965), cert. denied, 383 U.S. 944 (1966); United
States v. White, 344 F.2d 92 (4th Cir. 1965) (the official reporters
showed that defendant had always had counsel on appeal. He had
a total of three trials, including his § 2255 hearing); Glenn v. United
States, 303 F.2d 536 (5th Cir. 1962), cert. denied, 372 U.S. 920 (1963);
Whether the defendant has sufficient funds or not, he may play the
game of saying he will retain his own lawyer, then showing up with-
out one, even rejecting the court's offer to appoint counsel, and cry
"denial of the right to counsel" on appeal. E.g., United States ex rel.
Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S.
958 (1968), in which Judge Leibowitz tried tenaciously, but finally
lost the game to the wily defendant and his brother.
19 The comment might well be accurate, and undoubtedly accounts for
the willingness to accept a defendant's word at face value. But it
addresses itself only to the "public treasury" aspect of the problem.
Kaminsar and Choper, note 12 supra, at 21-22.
20 OAKS REPORT III at 45-46.
Moreover, "the impact upon the court of undue imposition upon appointed counsel,\textsuperscript{21} as well as of favoring an accused who well knows he is not entitled to such counsel, is an unhealthy one—to say nothing of its undermining the salutary congressional purpose at the heart of the [Criminal Justice Act]."\textsuperscript{22} For these reasons it is important that the furnishing of defense services be confined to cases of those who cannot privately afford them.

II. THE BROAD CRITERIA

A. The Criminal Justice Act of 1964

When President Kennedy transmitted the proposed legislation that became the Criminal Justice Act of 1964 to Congress, he stated that the purpose of the bill was "to assure effective legal representation for every man whose limited means would otherwise deprive him of an adequate defense against criminal charges."\textsuperscript{23} Under the CJA counsel must be appointed to represent defendants charged with felonies or misdemeanors (other than petty offenses as defined in 18 U.S.C. § 1) "who are financially unable to obtain an adequate defense."\textsuperscript{24} Many considerations may be necessary to unlock the meaning of these simple words; the key is "adequate."

Each district court was required to place into operation a plan for the representation of defendants financially unable to obtain an adequate defense. And each of the judicial circuits was required to supplement the district plans with provisions for the representation on appeal of defendants "financially unable to obtain representation."\textsuperscript{25} No special importance is to be attached to the omission of the word "adequate" in reference to representation on appeal. Indeed, the same lawyer generally should represent a defendant throughout the proceedings "from his initial appearance before the United States commissioner or court through appeal."\textsuperscript{26} However, there is significance in the difference in wording between the CJA and the Federal Rules of Criminal Procedure. Neither Rule 44(a), providing for assigned counsel, nor Rule 5(b), providing for advice of the right to counsel, uses the term "financial." Both rules refer to the right of a defendant "who is unable to obtain counsel." One

\textsuperscript{21} Some of the complaints about cheating are grounded on the fact that some defendants who are held eligible are financially able to pay more than the amount paid under court appointment. Id. at 31.

\textsuperscript{22} Timbers, note 14 supra, at 57.


\textsuperscript{24} CJA (a).

\textsuperscript{25} Id.

may therefore conclude that the right referred to in the rules is broader than that in the CJA. The rules extend to defendants unable to obtain counsel for reasons other than financial. For example, if a financially able defendant were unable to retain counsel because of the unpopularity of his cause, the court could appoint counsel and the defendant, rather than the government, could pay him. The CJA deals with the duty created by financial inability.

B. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE. STANDARDS RELATING TO PROVIDING DEFENSE SERVICES

The fundamental premise of the standards recommended by the American Bar Association is that representation by counsel is desirable in criminal cases from the viewpoints of the defendant and of society. At the point at which a defendant's payment of a fee to retain counsel could inflict substantial hardship, society's obligation to provide counsel arises.

The standard relating to eligibility is as follows:

Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond.

Here again the broad criterion is financial inability to obtain representation, i.e., an adequate defense, to which is added "without substantial hardship to himself or his family." The drafters added that phrase to emphasize that eligibility should not require an accused to exhaust every financial resource that might be needed for other vital personal or family necessities such as food, shelter.

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27 Senator Roman Hruska (R. Neb.) in 1962 introduced a bill to apply to defendants who were financially able to retain counsel but could not hire a lawyer because of the unpopularity of their cause. Kutak, The Criminal Justice Act of 1964, 44 Neb. L. Rev. 703, 714 (1965). The legislative provision now is unnecessary, in view of the rule. See 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 732 (1969).


29 ABA PROJECT—DEFENSE SERVICES 10, 53.

30 An adequate defense might be thought to encompass more than adequate representation by counsel. Other factors included in the former concept, such as investigative and expert services, are discussed infra.
or medicine. The commentary also points out that no dollar standard of income or assets can be established that will serve the purpose.

C. Uniform Defense of Needy Persons Act (Model) 1966

The Uniform Law Commissioners' Defense of Needy Persons Act provides that a needy person is entitled:

- to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and, to be provided with the necessary services and facilities of representation (including investigation and other preparation).

The attorney, services and facilities, and court costs are to be provided at public expense to the extent that the person, at the time his need is determined, is unable to provide for their payment without undue hardship. Section 4 sets forth some specific factors that the court may consider in determining the extent of financial need: income, property owned, outstanding obligations, and the number and ages of the defendant's dependents.

The three broad criteria with which we are dealing, then, are substantially the same: financial inability to obtain an adequate defense (CJA), financial inability to obtain adequate representation without substantial hardship to defendant or his family (ABA Project—Defense Services), and "needy person" as one who is unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation (Uniform Act § 1 (3)).

To make these abstractions meaningful, a traditional examination of decisions will be made initially. To project policy, some considerations from experiences under the CJA shall then be presented.

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31 ABA PROJECT—DEFENSE SERVICES 54.
32 Id. at 53. The resources of friends or relatives and the posting of bail are factors considered infra.
33 Quoted in full at Appendix E, ABA PROJECT—DEFENSE SERVICES 78 [hereinafter UNIFORM ACT]. The Uniform Act has not been adopted by any jurisdiction. Its value for present purposes is merely for comparison of broad definitions.
34 UNIFORM ACT § 2.
35 Experience refers mainly to that in the United States District Courts for the District of Connecticut and for the Southern District of Florida. The author was law clerk to Senior Judge Emett C. Choate in the Southern District of Florida from 1966-68. Information concerning the District of Connecticut was gleaned from interviews with Chief Judge William H. Timbers and United States Commissioner Carroll W. Brewster, and from attending preliminary proceedings conducted by the latter, during the months of February and March, 1969.
III. INDIGENCY

A. STRICTLY CONSTRUED

In the nineteenth and first half of the twentieth centuries public financial aid was extended under statutes generally couched in terms of poor or indigent persons. Those terms were technically construed as practically synonymous with destitute, denoting extreme want and helplessness. The word indigent meant "the needy, the poor, those who are destitute of property and the means of comfortable subsistence," or "that class of persons who are so destitute and helpless as to be dependent for their support upon public charity."

How destitute must a defendant be to be classified poor or indigent? "Less than $25 worth" was the answer of one court. In a 1936 case co-appellants filed affidavits seeking to be declared "poor persons" so they could obtain a free transcript. One was held not to qualify because he owned an automobile worth $25, which would have been enough to compensate the court stenographer. The other appellant stated in his affidavit that he had no money or other property with which to pay the reporter, "which language construed against him might be held to mean that he did have money or property for other purposes." Moreover, the appellate court assumed that the two lawyers who represented the appellants had been paid, since there was no showing that the trial court had been requested to furnish counsel.

If appellants chose to pay counsel rather than to pay for the recording of the evidence, which they now say was so essential to a proper presentation of the appeal, ... they should not now be heard to complain that their rights have been prejudiced by the court's action.

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37 City of Lynchburg v. Slaughter, 75 Va. 57, 62 (1880). See also Weeks v. Mansfield, 84 Conn. 544, 549, 80 A. 784, 786 (1911) [distinguishing between insane indigents (defined as above) and insane paupers (public charges) in interpreting a will and a statute].
38 This phrase is from Risner v. State ex rel. Martin, 55 Ohio App. 151, 157, 9 N.E.2d 151, 154 (1936), wherein the engrossing story is told of Mexico Shepherd, his wife, their eight children, and his wife's brother. The statute being interpreted was Ohio Gen. Code § 2555, providing a penalty of $50 against anyone who brings an indigent person into a township. A similar statute is still (or again) on the books. Ohio Rev. Code Ann. § 5155.29 (Page 1968 Supp.).
39 Shipman v. Commonwealth, 264 Ky. 15, 94 S.W.2d 32 (1936). It also appeared from "certain statements in brief...that [appellant] had real property to the extent of $1,000." Id. at 18, 94 S.W.2d at 34.
40 Id. at 19, 94 S.W.2d at 34.
41 Id. A man earning $110 to $115 per month in 1938 had no right to prosecute a civil action before a jury without prepaying jury fees...
B. Liberally Construed

There were some notable exceptions to this type of strict or technical interpretation of indigency. Well in advance of the CJA and the other broad criteria here being considered, some cases pointed out that a litigant need not be absolutely destitute to enjoy the benefit of statutes authorizing citizens to prosecute or defend actions in forma pauperis.

In Adkins v. E. I. DuPont de Nemours & Company, an affidavit was held sufficient that stated that the applicant could not pay the costs of appeal and still be able to provide himself and dependents with the necessities of life. Justice Black pointed out that the beneficiaries of the statute need not be in the category of public charges.

Some state courts recognized that indigency-type statutes cannot require absolute destitution. Florida has a rather strictly worded statute for forma pauperis appeals. It provides that the county shall pay the costs of appeal for a defendant “utterly unable to pay the costs of the cause” who establishes that he has “no property or other means of payment.” A defendant together with his wife owned a $1900 house, with a $600 mortgage with $25 monthly payments; owned a $25 car; earned $25 a week and his wife earned $25 a week; paid a finance company $22 a month; and had three dependent children. His son-in-law had paid his attorney fees. The court, ordering the costs of appeal to be paid by the county, held that the defendant, though not absolutely penniless, was nevertheless unable to pay the costs of appeal.

The idea that those unable to pay their way are thereby deprived of a hearing in this court so offends our sense of justice, that we must take care that we do not reach such a result in close cases by an overly strict requirement of proof under the statute.

Another Florida case under the same statute, which was “to be liberally construed so as to accomplish the legislative intent and not to complicate or impair the constitutional and statutory right

under a California forma pauperis statute. He was not “destitute of property” and therefore not an indigent person. Alexander v. Superior Court, 29 Cal. App. 2d 538, 84 P.2d 1061 (1939). This result was not unfair, for in 1938 a $110 monthly income was adequate for this purpose.

335 U.S. 331 (1948).

Id. at 339, referring to the statute providing for proceedings in forma pauperis, now 28 U.S.C. § 1915.


Loy v. State, 74 So. 2d 650, 651 (Fla. 1954), rev'd on other grounds, 87 So. 2d 501 (Fla. 1958).
of appeal."\textsuperscript{46} held that the head of a family is not required to subject the homestead or the reasonable furnishings of a family home to sale or pledge to provide the costs of appeal.\textsuperscript{47}

Determination of indigency as used in connection with the indigent insane has been more liberal than in the legal assistance area. "To be indigent does not mean that a person must be a pauper. An insane person with insufficient estate to pay for his maintenance in the Hospital for the Insane, after providing for those who could claim his support, is indigent within the terms of the [applicable statutes]."\textsuperscript{48}

C. Indigency Rejected

These notable examples of flexible or liberal interpretations of indigency were, as previously stated, exceptional. The more usual, strict definitions resulted in a rejection of that term in drafting the CJA and the other criteria here under study. In a letter to the President transmitting the bill, Attorney General Kennedy stated that "[t]he term 'indigency' is avoided because of its implication that only an accused who is destitute may need appointed counsel or services."\textsuperscript{49} The Attorney General's Committee found the concept wanting also because it tends to confuse the question of the right to be provided counsel with other issues about eligibility for receipt of public welfare assistance, and because it suggests a rigid standard for every defendant without regard to the cost of obtaining legal services for a particular case.\textsuperscript{50} The Report of the Attorney General's Committee had an impact on eligibility for public legal

\begin{thebibliography}{9}
\item Gaston v. State, 106 So. 2d 622, 623 (Fla. 1st Dist. 1958), paraphrasing from State ex. rel Chency v. Rowe, 152 Fla. 316, 321, 11 So. 2d 585, 587 (1943).
\item Gaston v. State, 106 So. 2d 622 (Fla. 1st Dist. 1958). The court also held that it must assume, "however incongruous it may seem," that defendant derived no income from the lottery activity he was convicted of having engaged in, since it was that conviction he was seeking to test on appeal. \textit{Id.} at 623.
\item Depue v. District of Columbia, 45 App. D.C. 54, 59 (1916); accord, Weeks v. Mansfield, 84 Conn. 544, 549, 80 A. 784, 786 (1911); Goodall v. Brite, 11 Cal. App. 2d 540, 549-50, 54 P.2d 510, 515 (1936) (citing several cases regarding the indigent insane and applying the same definition to "indigent" where used in connection with admissions to county hospitals).
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assistance, even before the enactment of the CJA,\textsuperscript{51} which was drafted for the most part by the Committee.\textsuperscript{52}

In \textit{Hardy v. United States},\textsuperscript{53} Justice Goldberg said in a concurring opinion:

Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." Attorney General's Report, at 8. An accused must be deemed indigent when "at any stage of the proceedings [his] lack of means... substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right." \textit{Ibid}. Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.\textsuperscript{54}

\textit{State v. Rutherford}\textsuperscript{55} shows a similar influence from the Attorney General's Report. The court there said:

Indigence is a relative term, and must be considered and measured in each case by reference to the need or service to be met or furnished.... [T]he term does not and cannot, in keeping with the concept of equal justice to every man, mean absolute destitution or total insolvency. Rather, it connotes a state of impoverishment or lack of resources on the part of a defendant which, when realistically viewed in the light of everyday practicalities, substantially and effectually impairs or prevents his procurement of an adequate statement of facts and transcript necessary to a complete appellate review of his claims of error.\textsuperscript{56}

Thus the content of the word indigent has evolved in keeping with changing concepts about equal protection. The word itself is now to be abandoned as it concerns eligibility for publicly financed legal assistance, and other phrases will contain the evolving mean-

\textsuperscript{51} The CJA was enacted Aug. 20, 1964. Its effective date was, at maximum, one year thereafter, within which time district courts and courts of appeals were required to place their plans into operation. Pub. L. No. 88-455, § 3, 78 Stat. 552, 554.

\textsuperscript{52} \textit{Compare The Criminal Justice Bill: Text and Commentary, Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 145 (1963) with the CJA.}

\textsuperscript{53} 375 U.S. 277 (1964) (establishing the right to a free transcript of the entire trial proceedings to aid defendant's counsel in obtaining leave to appeal in forma pauperis).

\textsuperscript{54} \textit{Id.} at 289 & n.7 (concurring opinion).

\textsuperscript{55} 63 Wash. 2d 949, 389 P.2d 895 (1964) (decided Mar. 5).

The various CJA plans adopted by the district courts and courts of appeals do not set any more detailed standards than "financial inability to obtain counsel," but many of them specifically reject indigency.

IV. ARE GUIDELINES NECESSARY?

There is some disagreement as to whether the plans, or the practices within different localities, should be governed by narrower standards. Although recognizing the variation in conditions and facilities that exist among the numerous federal districts, the committee to implement the CJA found that the determination of financial inability should be treated uniformly on a national basis. The Judicial Conference has rulemaking authority under CJA (g), but declined to use it initially, awaiting a demonstration of need for some express or general direction resulting from the operation of the various plans.

Perhaps because some suggest that the correlate of indigency is charity, it may be presently considered a faux pas in some circles to use indigency interchangeably with financial inability. Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 397 (1967).

"Indigent" is nonetheless used in informal reference to defendants under the CJA. The legislative history of the CJA sketched in 1964 U.S. Code Cong. & Ad. News 2390-91, shows the persistence of the word "indigent," even though "financially unable to retain counsel" is the standard.

For example: Nebraska—"The term 'financial inability,' as considered for the purposes of this plan, does not mean indigency." Kutak, The Criminal Justice Act of 1964, 44 Neb. L. Rev. 703, 743-45 (1965). The plan for the Southern District of Florida and that of the Southern District of California state: "Financial inability to secure counsel shall be determined by a judge or U.S. Commissioner in a judicial inquiry. The defendant's representation shall be under oath. Indigency is not the test." Report of the Judicial Conference of the United States on the Criminal Justice Act, 36 F.R.D. 277, 354 (1965) [hereinafter, Report, 36 F.R.D.]. The proposed plans for the Southern District of California, the Southern District of New York, the Eastern District of Louisiana, the District of Maryland, the Western District of Texas, and the Eastern District of Michigan, are found in appendix 2 to Report, 36 F.R.D. at 350.


The Wall Street Journal, Aug. 18, 1964, p. 10, col. 4-5, criticized the CJA's failure to define closely those persons eligible for help. See also Stifler, Determining the Financial Status of an Accused, 54 Ill. B.J. 868, 869 (1966): "Proper resolution of [the definition of indigency]
Professor Dallin H. Oaks, chairman of a committee of the Judicial Conference of the United States and the Justice Department to recommend amendments to the CJA, concluded that nine guidelines with suggested commentary, set forth in his report, should be promulgated. Illustrative of the guidelines is the following elaborate definition of financial inability:

A defendant is "financially unable to obtain counsel ... investigative, expert or other services necessary to an adequate defense" when the value of his present net assets and the value of his income expected prior to the anticipated date of the trial (or filing of appellate briefs, if the determination is for purposes of appeal) are insufficient, after he has provided himself and his dependents with the necessities of life, to permit him to retain a qualified lawyer, obtain release on bond, and pay the other expenses necessary for an adequate defense at the prevailing rates for the charged offense in that district.  

Subsection (g) of the CJA provides that the Judicial Conference may issue rules "governing the operation of plans." It is likely that, like Internal Revenue regulations, guidelines might come to be rigidly applied despite the variety of factual circumstances of cases and the variety of economic differences across our country. No particularized standard to be mechanically applied should replace the sound judgment of an experienced trial judge. However, a new Judicial Conference subcommittee has been appointed "to prepare suggested guidelines in the Administration of the Act for the use of judges, clerks of court and commissioners." If they are adopted, it is hoped that they will not be in such form as to "govern" inflexibly. The broad tests were intentionally formulated to allow latitude; this policy should not be sacrificed in the name of nationwide uniformity.

V. SPECIFIC FACTORS TO BE CONSIDERED

There are several elements and recurring circumstances about which some general policies can be recommended toward achieving the broad criteria.

seems indispensable to an effective implementation of the constitutional mandates of the Supreme Court." Stiffer points out that practices for determining indigency vary even within counties in a single state. Id. at 870.

60 OAKS REPORT III at 89.

61 Of course scholars and textwriters can and should criticize, point out repercussions of decisions, and highlight considerations to be given weight by the courts in applying the broad standards.

FINANCIAL INABILITY

A. CRIME CHARGED AND USUAL FEES IN LOCALITY

The theoretical standards of eligibility must in every case be tied to the costs of a defense for the crime charged, which varies substantially from district to district or from city to city. A defendant might require financial assistance in a kidnapping or bank robbery case, where counsel may be quite expensive, but be able to finance his own defense in a "routine" automobile theft charge. The judge or commissioner should be and generally is familiar with the fees customarily charged by counsel who are qualified to conduct a defense to the particular charges. In all cases, the anticipated cost of defense should be the cost of a trial. A defendant should not be denied appointment of counsel and an opportunity to have assistance at trial on the ground that he has enough resources to finance his own guilty plea.63

B. INCOME, CASH, AND DEPENDENTS

Although there is disagreement about the difficulty in general in determining the ability of an accused to afford counsel,64 the information most easily obtained concerns defendant's income, his cash on hand, and the number and special circumstances of his dependents, which includes such items as medical requirements. These factors are readily within the knowledge of the accused65 and easily evaluated by a judge or commissioner who lives in the area, knows its economic realities, and is familiar with the fees usually charged by lawyers in cases similar to that of the defendant.

63 See generally OAKS REPORT III at 6, 90-91. If a defendant with appointed counsel does plead guilty, and is able to pay the consequently lower compensation due the attorney, an excellent opportunity is presented for the utilization of the redetermination and part payment provisions of CJA (c) and (f), or other applicable statutes.

64 Timbers, note 14 supra. For example, Charles H. Carr, District Judge, U.S. Dist. Ct., Cent. Dist. Calif., said: "The appointment of counsel for indigent defendants does not present substantial problems since the act is usually liberally construed and, where there is any doubt, a defendant is supplied counsel." Id. at 67. Robert A. Ainsworth, Circuit Judge, U.S. Ct. App., 5th Cir., formerly District Judge, U.S. Dist. Ct., E. Dist. La. is in accord. Id. at 69. But William H. Timbers, Chief Judge, U.S. Dist. Ct., D. Conn., finds difficulty resulting from the ex parte disclosure of the facts by the accused, and from the speed with which the determination must be made at the critical early stage of the proceedings. Id. at 56.

65 Questions concerning salary or number of dependents are more easily resolved, possibly by a telephone call, than some others. For this reason the accused is likely to be truthful.

A recommendation concerning upgrading the reliability of this information is discussed infra.
The amount and regularity of income or salary are, of course, major considerations. An analysis, supplied by the Administrative Office of the United States Courts, of 52,992 financial affidavits of defendants for whom counsel were appointed shows that 32 per cent or 16,846 of them were employed. Most (13,789) of these defendants had weekly earnings of less than $100, but 113 earned $200 or more a week.66

A $200-a-week income may not preclude a determination of financial inability, but the salary of an internal revenue agent might show his request for assigned counsel unjustified.67 Carroll W. Brewster, United States Commissioner, commented that if an accused's income exceeded Brewster's own, he would find against financial inability to retain counsel.68

Twenty-five per cent of the defendants for whom counsel were appointed under the CJA had cash on hand or in banks. Most (10,651 out of 13,035) of these defendants had less than $100.69 About one-half of the defendants for whom counsel were appointed had dependents; the average number was three.70

Obviously, these factors are relative and should be weighted along with other circumstances. They are especially important, however, in determining whether a defendant should be required to defray part of his legal expenses, under CJA, section (f).

C. REAL AND PERSONAL PROPERTY71

The major problem here, over and above the sparsity of accurate data as to the accused's interest in real or personal property, is the

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66 The unpublished analysis was supplied by the Administrative Office in a letter from Edward V. Garabedian, Budget Officer, to the author, Feb. 24, 1969. The percentages published for 1968 (in the Annual Report), based on 10,986 financial affidavits (apparently a sampling) showed a corresponding 68 per cent unemployed. The same correspondence in percentages carries through with cash on hand or in banks, and real or personal property. Administrative Office of United States Courts, Annual Report of the Director I-13, 14 (1968). 25,334 orders appointing counsel under the CJA were received by the Administrative Office during fiscal 1968, compared with 24,132 during fiscal 1967. Id. at I-12.

68 Interview in New Haven, Feb. 28, 1969.
69 Unpublished analysis cited note 66 supra.
70 Id.
71 The analysis of 52,922 financial affidavits of defendants for whom counsel were appointed showed that 8,429 or 16 per cent of them had real or personal property (automobile, furniture, etc.) or both. Note 66 supra.
FINANCIAL INABILITY

difficulty of assessing its worth in terms of ability to pay counsel. How, for instance, should a judge or commissioner evaluate a defendant's ownership of: thirty-six coonhounds, one of which, according to the defendant, was a triple champion that could be worth between $5,000 and $8,000; a Cadillac automobile; a business car; real property other than his home; "part of a lot partly paid for which was worth about $1,500 and which was subject to a debt of about $500"?

Assuming the practical accuracy of the data concerning real and personal properties, the commissioner or court should consider their liquidity and necessity to meet the basic needs of the defendant and his family. Securities with a readily available market should be classified almost like cash. If the asset is a luxury item it would be reasonable for the defendant to be required to sell it to meet all or part of his legal expenses.

D. RESOURCES OF ACCUSED'S FRIENDS OR FAMILY

As the Supreme Court of Florida pointed out in 1918, the proper inquiry is not "what the prisoner's supposed friends have the ability to do in paying said costs, or their readiness or willingness to pay them, but has the defendant himself personally the financial or property ability to pay them or secure their payment." Some states, however, require that a convicted person show not only that he is lacking in funds, but also that his friends and relatives are

72 United States v. Bradwell, 295 F. Supp. 958 (D. Conn. 1968), aff'd, 388 F.2d 619 (2d Cir. 1968), the story of which is told in some humorous detail by Chief Judge Timbers, note 14 supra, at 58, 59. The defendant's counsel later said that Bradwell gave the $8,000 assets away between the time of the district court proceedings and his motion before the court of appeals for leave to proceed in forma pauperis, because he could no longer afford to feed them. Id. at 59 & n.9.

73 Judge Ainsworth reported that the only case in five years as a district judge in which he experienced much doubt as to a defendant's inability to obtain counsel was where the defendant owned a Cadillac. He found, however, that the vehicle was heavily mortgaged and that the defendant had no other assets, so counsel was appointed. Timbers, note 14 supra, at 69.

74 Senior Judge Choate indicated that he would not turn down a request for counsel on the basis that the defendant owned a car used in business, but would weigh defendant's ownership of real property other than his home against a claim of financial inability. Letter from Senior Judge Choate to Taylor Mattis, Mar. 6, 1969.

75 A determination, without obtaining more information than this, that the defendant was not a pauper for the purposes of assignment of counsel, was erroneous. State ex rel. Barth v. Burke, 24 Wis. 2d 82, 128 N.W.2d 422 (1964).

unable to finance an appeal. The problem will rarely come up if friends or relatives are indeed willing and able to pay an accused's attorney fees or other legal expenses. The accused will simply tell the judge or commissioner that he has made his own arrangements. The issue is raised when a showing is required that no friends or relatives are able and willing to pay. The view expressed by the Florida court is much preferred, and generally prevails.

The judge or commissioner should inquire as to the resources and willingness of parents, where a minor is the accused, however, and of a husband, where a wife is the accused. These classes of relatives are singled out, not on any basis of legal obligation to the accused, but because the authority relationship is likely to be much closer within them. Parents must be notified when a minor is charged with crime, and they may wish to select counsel for the child. Moreover, parents might recognize their moral obligation if encouraged by a judge to do so. The same is true, albeit to a lesser extent, with husbands and wives. Of course, if these relatives refuse to pay, or when other circumstances indicate, counsel should be appointed even though they are financially able, if the accused himself is financially unable.

An instance of circumstances other than parental ability or willingness to pay occurred before Commissioner Brewster when a twenty-year-old college student was arrested in New Haven for a draft violation pursuant to a warrant issued out of the Southern District of California, the boy's home. The boy at first said his parents had retained or would retain counsel in California. He then said he did not need a lawyer anyway. Upon gentle but persuasive advice that he did, he said he wished to have local counsel fur-

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78 The American Bar Foundation's survey found that resources of friends and relatives are usually considered only if the defendant is a minor, ABA Project—Defense Services 54, and then some courts recognize that the parents have no legal obligation to provide a lawyer. Rastralli v. State, 76 So. 2d 270 (Fla. 1954); Lawrence v. State, 76 So. 2d 271 (Fla. 1954). Contra, State v. Hill, 230 Iowa 675, 32 N.W.2d 398 (1948) (involving transcript on appeal), and other Iowa and Indiana cases cited by Stifler, note 77 supra, at 875 & n.39.

79 Among other decisions, the accused had to choose whether to plead guilty in New Haven, or to return to California for arraignment, since only in California could he plead not guilty.
nished. He had a guitar, and a $150 check that he was to use to fly home for the Spring holidays. The commissioner said he would assign counsel to assist the accused locally. The "other circumstances," distance from his parents, need for immediate, competent legal advice, since there were indications that the boy had been following advice of doubtful quality from a non-legal source, and the obvious confusion of the superficially suave accused, made the offer to furnish local counsel judicious, regardless of the minor defendant's parents' financial responsibility. However, even in these "special circumstances" the assets of the parents should later be called upon for the purpose of reimbursement "on behalf of" the minor.

E. Bail

The reaction to defendant's ability to raise bail has varied from those courts who dismissed it as irrelevant to those who view it as decisive. The withholding of assignment of counsel to all persons who raise bail certainly is an easily administered device, and at the same time it deters false claims of indigency. However, arguments that the posting of bail is not conclusive against the claim of financial inability are more persuasive. The bond premium may have been provided by friends, relatives, or employers who are unwilling or unable to pay for counsel. Under the Bail Reform Act of 1966 many defendants are now released on their personal recognizance or upon the execution of an unsecured appearance bond. Use of the accused's own funds for bail may have rendered him financially unable to retain counsel. The chief objection is that the rigid bail

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80 Accord, Oaks Report III at 17-18: "Because of the special problem of the non-resident juvenile and the delays and administrative difficulty entailed in determining the income and resources of parents and trying to force them to furnish counsel where they are obligated by state law to do so, we recommend that in determining the eligibility of a juvenile, the court or commissioner look only to the juvenile's own income and resources, and ignore, for the present, the income and resources of his parents or other persons who are obligated to support him."

81 CJA (f). See generally Oaks Report III at 16-19, 85-86, 98-100. The same applies to a husband's assets where the original determination of a wife's eligibility was on the basis that the husband's assets were not readily available for the wife's defense.

82 Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 18, 28-33 (1963). The middle ground is taken in the Uniform Act § 4 (b): "Release on bail does not necessarily prevent him from being a needy person."

test places the defendant in the dilemma of choosing between having counsel and being at liberty pending trial. Arguably, placing him in this dilemma constitutes a denial of his right to an effective defense.84

Whereas the inflexible test is properly deplored by most critics, the defendant's payment of a premium to a bondsman or otherwise raising bail is relevant.85 The posting of bail should at least be treated as a signal for a more searching inquiry into the defendant's resources.86 One who has raised bail is more likely to be financially able to obtain counsel than one who has not. This is true even if the defendant is released on his own recognizance, for then he may be able to maintain his job.

Moreover, if a defendant has posted a cash bond from his own resources, the amount of the bond should be counted as part of his property in determining eligibility because the deposit will be returned upon the performance of the conditions of release.87 Thus, it is a resource upon which a lawyer could, and likely would, rely for his fee. If counsel is appointed, or other services are furnished, such a bail fund should be viewed as a source of reimbursement for or contribution toward financing the defense.88

F. A Practical Test for Eligibility

Commissioner Brewster suggests that where the defendant wishes to retain counsel, but doubt exists as to his ability to do so, the defendant should be allowed to try and see how he comes out. Often attorneys are willing to accept real or personal property as security for a fee where the client has no ready cash. After the defendant contacts several lawyers, if he finds none who will repre-

84 ABA Project—Defense Services 55; People v. Eggers, 27 Ill. 2d 85, 188 N.E.2d 30 (1963), wherein failure to appoint a public defender solely because the defendant had spent $350 for a bail bond was erroneous.

The dilemma is similar to the one created by the Kentucky court in Shipman v. Commonwealth, note 39 supra and accompanying text. 85 It is considered a relevant factor in Senior Judge Choate's division, Southern District of Florida. In Davidson v. State, 429 P.2d 1017 (Ct. Crim. App. Okla. 1967), a defendant charged with reckless driving and leaving the scene of an accident, who, inter alia, had "employed a professional bondsman" at a cost of $500 could not be considered a "pauper."


sent him within his means, he reports to the commissioner who then assigns counsel.\footnote{Interview, note 68 \textit{supra}. Similar procedure is utilized in the Southern District of Florida. Oaks cites examples of its use in the Southern District of California. \textit{Oaks Report III} at 23-24, 13, 14.}

If this practical test for eligibility is utilized only where the defendant states that he wants time to retain his own lawyer, and no further proceedings are held pending his efforts, then no \textit{Miranda}-infringing delay would occur. If the test is applied by telling the defendant that he is not entitled to court appointed counsel, to give him incentive to try to retain a lawyer, the delay could be detrimental in some cases.\footnote{In People v. Ferry, 47 Cal. Rptr. 324, 330, 237 Cal. App. 2d 880, 887 (Dist. Ct. App. 1965), the defendant's eligibility for a public defender was shown by what occurred when the defendant attempted to retain counsel. His property consisted of land subject to probate, and he had eleven children. One attorney did not want to take a mortgage on the land in view of the number of defendant's children, a second attorney refused the case, and a third attorney asked for cash in advance. This "try and see" procedure can be utilized quickly and informally, even by telephone calls for the most part, without giving a sincere defendant the "run around."

Chief Judge Timbers points out that care should be taken not to foster what the CJA is intended to head off—that is, the complex examination of the defendant similar to that of a judgment debtor. And, the actual determination of whether the defendant is financially able is to be made by the commissioner or judge, not counsel. \textit{Oaks Report III} at 23.}

The relevant guideline proposed by Professor Oaks for the latter, incentive-giving situation is:

Prior to appointing counsel in a case where the defendant's eligibility is doubtful and failure to have counsel immediately will not work to his detriment, the appointing officer may wish to deny the defendant's eligibility on a provisional basis and for a few days during which the defendant should seek to retain counsel with the resources at his command. In such a case, the defendant should be advised that if he is unable to retain counsel within this period of time, counsel will be appointed for him but that he will be required, so far as he is able, to contribute to the expense of his defense.\footnote{\textit{Oaks Report III} at 94-95. The comment following the guideline cautions that this practice should not be followed when the severity of the charges or the need for immediate assistance of counsel is such that the defendant is likely to be prejudiced by delay in appointment.}

\textbf{VI. PARTIAL INABILITY—THE BORDERLINE CASE}

\textbf{A. ELIGIBILITY PROVISIONS}

One of the most important, and operatively most neglected,\footnote{Oaks, note 62 \textit{supra}, at 219.} provisions of the CJA deals with the defendant's duty to pay part of the costs of his defense when he is able to do so. "Whenever the
court finds that funds are available for payment from or on behalf of a defendant, the court may authorize or direct that such funds be paid toward the furnishing of defense services. This provision is a corollary of the CJA's purpose to limit its benefits to persons financially unable to obtain an adequate defense.

Experience demonstrates that many persons have resources sufficient to defray part but not all of the expenses of their defense. In order that representation may be furnished to the extent of each defendant's need, we have proposed that partial payments may be required and that the statute shall become operative at whatever stage of the proceedings the accused is found financially unable to obtain counsel or services necessary to an adequate defense.

The American Bar Association likewise recommends provision for partial eligibility:

The ability to pay part of the cost of adequate representation should not preclude eligibility. The provision of counsel may be made on the condition that the funds available for the purpose be contributed to the system pursuant to an established method of collection.

Similarly, the Uniform Act states that the court may order a needy defendant to provide, to the extent that he is able, for payment for an attorney and other necessary services and facilities of representation. Judicial use of the marginal eligibility or part payment provision can avoid a result of high quality representation to those closer to the extremes of wealth and poverty while those of moderate means are ignored.

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93 CJA (f) (emphasis added). In Wood v. United States, 389 U.S. 20 (1967), on remand, 387 F.2d 353 (5th Cir. 1967), defendant's request for appointed counsel had been disapproved and he had stood trial without counsel. Although the trial court had questioned him and the defendant had filed an affidavit concerning his financial abilities, the record did not convincingly show that there was adequate inquiry in that "the trial court should have explored the possibility that petition may afford only partial payment for the services of trial counsel and that counsel be appointed on that basis as the Criminal Justice Act permits." 389 U.S. at 21. The cause was remanded for further inquiry.


95 ABA PROJECT—DEFENSE SERVICES 55.

96 UNIFORM ACT § 4(c).

97 This result in the analogous area of medical services has received much adverse comment. ABA PROJECT—DEFENSE SERVICES 55, 56. Accord, Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. REV. 1, 23 (1963). See the contrasting opinions of Judge Waterman in United States ex rel. Davis v. McMann, 386 F.2d 611, 619 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968), and Judge Moore, dissenting, 386 F.2d at 621, 628, concerning the "slim pocketbook of the wage earner" and the retention of a lawyer.
FINANCIAL INABILITY

B. DUTY OF COUNSEL

Appointed counsel should have the duty of reporting to the court any situation coming to his attention where a defendant appears to be able to finance a portion of his defense. A study of the representation of indigent criminal defendants in federal courts, before there was any method for compensation, reported that usually when an assigned lawyer discovered that the defendant had funds, he informed the judge, who would authorize him to charge a reasonable fee, or discharge him and advise the defendant to retain him or other counsel of his choice.

An ethical problem is seen by Professor Oaks where counsel discovers income or assets that the defendant had fraudulently concealed when he signed the CJA eligibility form. If no criminal prosecution is initiated on the strength of the lawyer's report, the problem is ameliorated. Moreover, because the appointed lawyer is entwined, albeit unwittingly, in the defendant's fraud, he is bound to report the matter to the court and ask for instructions.

The Nebraska plan provides:

If any information should come to counsel indicating that the defendant can make payment, in whole or in part, for legal services or for services other than counsel furnished under this plan, it shall be his duty to report such information to the Court, so that appropriate action may be taken.

C. CONTROL BY THE COURT

Whenever any payment is made to court appointed counsel by or on behalf of a defendant, the arrangements should be closely under the control of the court. Subsection (f) of the CJA specifies that except as authorized or directed by the court, no person may request or accept any payment or promise of payment for assisting in the representation of a defendant. A major purpose for strict enforcement of this provision is ethical. A court appointed lawyer should not obtain fees from the public till and at the same time pressure a defendant or his family for more. Direct payment from

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98 Report, 36 F.R.D. at 290. The plan for the Southern District of Florida so provides, as does that of the Southern District of California. Id. at 350, 358.
100 Oaks Report III at 47-49.
101 Kutak, note 27 supra, at 749.
102 Id. at 748, 749 reiterates this requirement.
private sources is likely to arouse imputations that the appointed lawyer is receiving double compensation for his services.\textsuperscript{103}

VII. DETERMINATION AND REDETERMINATION OF DEFENDANT'S FINANCIAL ABILITY

A. PROVISIONS

One of the advantages in each of the three standards being studied is the provision for redetermination during the proceedings.\textsuperscript{104} If the defendant's complete or partial financial ability is not revealed until after counsel is assigned, the court has several choices under subsections (c) and (f) of the CJA. The choices include authorizing part payment by or on behalf of the defendant to the appointed counsel, or terminating the appointment and leaving the defendant free to retain his choice of counsel, including the one originally appointed by the court. If appointed counsel has already been paid by the United States when the defendant's financial ability is discovered, the court might order the defendant to pay sums to the court for deposit into the Treasury as a reimbursement.\textsuperscript{105}

\textsuperscript{103} Accord, ABA PROJECT—DEFENSE SERVICES 56. The Judicial Conference Committee to Implement the CJA views the purpose of the provision as preventing total compensation to court appointed counsel from exceeding the maximum permitted by the act. Report, 36 F.R.D. at 290. But see Oaks, Improving the Criminal Justice Act, 54 A.B.A.J. 217, 220 (1969), suggesting some limited situations where the total compensation that counsel would receive from the defendant and from the Treasury should exceed the CJA maximum (although the amount from the Treasury could not exceed the statutory maximum). This author favors Oaks' suggested means of requiring defendants to contribute; the method was rejected by the Judicial Conference. Id.

\textsuperscript{104} ABA PROJECT—DEFENSE SERVICES 56; UNIFORM ACT §§ 2(c), 3(b), 4(a); CJA (c). See also plans for Nebraska, Kutak, note 27 supra, at 746; W. Dist. of Texas, Report, 36 F.R.D. 341, 343; So. Dist. of Fla., So. Dist. of Calif., Report, 36 F.R.D. 350, 357.

\textsuperscript{105} The ABA PROJECT—DEFENSE SERVICES 58, 59, recommends against requiring reimbursement by the defendant, except on the ground of fraud in obtaining the determination of eligibility. In contrast the UNIFORM ACT § 8(a) provides for suit to recover from a defendant for receipt of legal assistance to which he was not entitled. Professor Oaks' view of the defendant's obligation to reimburse, in which this writer concurs, falls between the ABA proposal (no obligation if the defendant originally was eligible) and the Uniform Act (obligation if resources acquired within three years). He advocates a policy that the court, in proper circumstances, should require reimbursement up to a short time after the case is finally disposed of, in the trial court, or on direct appeal if an appeal is taken. Thereafter, no income or assets acquired by the defendant should be subject to an obligation to reimburse the Treasury. OAKS REPORT III at 81.
FINANCIAL INABILITY

If at any stage of the proceedings, including on appeal, the court finds the defendant financially unable to pay counsel whom he had retained, the court may appoint counsel and authorize payment by the United States. The court could appoint the lawyer originally retained by the defendant, or allow him to withdraw and assign another counsel. In some circumstances, for example if the defendant is in fact attempting to obtain an unwarranted continuance, the court might do neither, but rather refuse retained counsel's request to withdraw.

B. WHO DECIDES

There is almost total agreement that the determination of eligibility should be made by a judicial officer. Under the CJA (b) the court or a United States Commissioner appoints counsel if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel. Certainly, the decision for or against eligibility should not be made by the lawyer to be assigned if eligibility is found. Counsel should be out of the determination picture, unless he finds out through representation of the assigned client that he is financially able to pay, in which case he should report the fact to the judge.

C. MECHANICS OF DECISION

Typically in federal courts, the first step in this ongoing process is that the accused and the arresting agent appear, almost immediately following arrest, before the United States Commissioner. In addition to notifying the accused of the pending charge, advising him of his right to remain silent and his right to a preliminary hearing, and to the setting of bond, the commissioner advises the accused fully of his right to counsel. The determination of need for appointment of counsel is made on the basis of defendant's sworn

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106 CJA (c).
107 Kutak, note 27 supra, at 746. The court should not appoint the retained lawyer who too often discovers that his clients are financially unable to pay their agreed fee. The CJA should not be used as a reimbursement device for bad debts. Moreover, to allow such abuse would frustrate the CJA's policy that the court, not defendant, chooses assigned counsel.
108 ABA PROJECT—DEFENSE SERVICES 56. However, Professor Oaks thinks that the court should be able to delegate the determination of eligibility to some responsible non-judicial court official, such as a clerk or administrative assistant. OAKS REPORT III at 8, 9, 36, 87. The author is in disagreement with Oaks because delegation of this function (which would require an amendment of the CJA) is not in keeping with the importance of the decision.
statement as to his financial status, supplemented by an inquiry of the defendant by the commissioner or the court as appropriate.\textsuperscript{110} The initial decision as to financial ability may be resolved much more liberally in favor of the accused who requests appointment of counsel as the decision is by no means final.\textsuperscript{111} This procedure has the virtue of permitting a case to proceed expeditiously without getting bogged down in a collateral proceeding akin to an examination of the accused as a judgment debtor.\textsuperscript{112}

Reexamination of the accused's need should be made at any time if the court believes defendant may be financially able to retain counsel or to make partial payment for representation.\textsuperscript{113} Typically reexamination occurs upon defendant's first appearance before the court and, in the event of conviction, at the time of sentencing, when a presentence report is available, showing assets and source of income.\textsuperscript{114} This solution, partially at least, meets the criticism that claims of need are honored too lightly.\textsuperscript{115}

In the United States District Court, Southern District of Florida, the Clerk of the Court has provided complete instructions for procedure by commissioners under the CJA. A defendant appearing without an attorney is given several options, among which is to request assignment of counsel and to continue the hearing until counsel is present. If after full inquiry the commissioner finds that the defendant is financially able, he informs the defendant that he may, at any time, request the district judge to redetermine the issue. If the commissioner finds defendant partially able, he may certify that defendant now has or can secure a certain sum to apply on his attorney's fee.

If the defendant elects to proceed before the commissioner, but is uncertain as to whether he is financially able to employ an attorney in the proceedings thereafter, the commissioner gives him an affidavit form with instructions to complete it if he later decides to request appointment of counsel. The defendant then may mail it to the clerk who transmits it to the judge for appropriate order. Thus the defendant's initial position vis-à-vis counsel is explicitly not a final one. So that the record is clear, the commissioner files a certificate, as to each defendant individually, that he has given defendant all the required information, advice, and warnings.

\textsuperscript{110} Timbers, \textit{The Criminal Justice Act: A Lawyer's Call to Duty}, 39 CONN. B.J. 427, 432 (1965). The arresting agent should contribute any information he has.

\textsuperscript{111} Id. at 433; Timbers, note 14 \textit{supra}, at 56.

\textsuperscript{112} Timbers, note 14 \textit{supra}, at 57.

\textsuperscript{113} Timbers, note 110 \textit{supra}, at 444; Kutak, note 27 \textit{supra}, at 746.

\textsuperscript{114} Timbers, note 14 \textit{supra}.

\textsuperscript{115} OAKS REPORT III at 36.
D. FORMS

Standard forms prepared by the Administrative Office are widely if not uniformly used by the district courts in the administration of the CJA. The extent of necessary inquiry varies with the obviousness or doubt as to the defendant’s financial status. It is optional with the commissioner or the court whether to require the defendant to swear to a brief form of affidavit or to use the much more detailed statement on which defendant answers questions as to his marital status, residence, employment, ownership of real property (its estimated value, annual income), ownership of other property such as automobile, debts, stocks, savings bonds, interest in trusts, and so on. Except where clearly inapplicable, use of the longer form is more prudent. Even if it shows the defendant eligible for appointment of counsel, funds available for part payment of compensation or expenses might thereby be revealed.

E. SUGGESTIONS ON IMPROVING THE RELIABILITY OF THE INFORMATION OBTAINED

(1) Pre-Appointment Investigations

Some difficulty has been experienced because of the ex parte nature of the disclosures on which decision makers must rely. Chief Judge Timbers recommends the solution of requiring the government to furnish the commissioner or the court, at the defendant’s first appearance, with a written statement of all pertinent information regarding the accused’s financial status. Such information is readily available to the investigating agency (FBI, IRS, SEC) and could be set forth as a standard part of the agency’s criminal reference reports which go to the United States Attorneys.

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116 They will be referred to hereinafter as, e.g., CJA Form 1. A complete set of these forms is reproduced in Report, 36 F.R.D. 277, 296-315.

117 CJA Form 1, on which the defendant fills in short blanks as to whether he is employed, his weekly wages or income, his cash on hand and in banks, number of dependents, and “property owned.” The same sheet is utilized for the commissioner’s (CJA Form 1) or the court’s (CJA Form 2) finding of financial inability and the order appointing counsel.

118 CJA Form 3a.

119 See CJA Form 7, Authorization for Distribution of Available Private Funds.

120 See note 64 supra.

121 Interview with Chief Judge Timbers in New Haven, March 5, 1969. Judge Timbers’ recommendation is set forth in Timbers, note 14 supra, at 57, 58.
The United States Attorney's office in the District of Connecticut apparently has no objection to furnishing the information, which is sometimes required by the court for other decisions as well, such as fixing bail, especially in high bail cases, and at sentencing where a fine may be contemplated.

The time consuming and expensive nature of pre-appointment investigations is a drawback to their use in every case. Moreover, where the arrest is not anticipated until soon before it is made, there would be no time for the investigation. However, the United States Attorney should ordinarily make available to the appointing authority any information that he has relevant to the defendant's eligibility. Also, the arresting officer may acquire some knowledge on the subject and he should informally report it to the commissioner or court.

(2) More Efficient Use of CJA Forms

Professor Oaks suggests a modest measure that might have some effect in deterring concealment of assets or income. Add, just above the place for the defendant's signature on the appropriate CJA forms, a recital to inform the defendant that he is signing under the penalties of perjury, and cause him to certify his understanding that false statements will subject him to criminal prosecution.122

A further easily attainable measure would be to furnish the probation officer with a copy of every convicted defendant's CJA affidavit, where a pre-sentence investigation is being made. A mere cross-check of the affidavit against the usually thorough investigation by the probation officer could reveal many inaccuracies.

A spot check by the Justice Department of a certain number of CJA affidavits, together with a policy of well-publicized prosecutions for false affidavits that are located, on a principle somewhat the same as that the Internal Revenue Service uses in auditing a predetermined number of tax returns, would have a salutary effect on the care and honesty with which persons execute CJA forms.123

VIII. SERVICES OTHER THAN COUNSEL—
THE ADEQUATE DEFENSE

One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the

122 OAKS REPORT III at 44, 87. Before changes are made, the possibility of coordinating the CJA eligibility forms with the financial information that is requested from the defendant on the Bail Reform Act Forms should be pursued. Id.

123 Id. at 39, 87.
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conduct of a proper defense. Accordingly, counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case (and this includes a client who has retained as well as one who has appointed counsel) may request them under the CJA.124 Similar provisions for supporting services are found in the ABA Project—Defense Services125 and the Uniform Act.126 However, there are fewer standards for determining when these services should be authorized than for when counsel should be appointed.127 The CJA provision is used infrequently, apparently because lawyers are unaware of it.128

The services required to assist counsel are primarily those of experts in such matters as medicine, psychiatry, accounting, ballistics, bloodstains, fingerprints, translations, and the like. In the District of Connecticut authorization is routinely granted upon proper application to have an accused examined by a physician or psychiatrist and to have the expert testify at the trial upon the issue of the accused's capacity for criminal intent.129 Handwriting experts in forgery cases are authorized as a matter of course.130

In one case, after the defendant had pleaded guilty and had been sentenced, counsel filed a form131 applying for authorization to incur expenses, inter alia, for investigative services to interview the defendant and his parents. Obviously his application not only was untimely,132 but also related to part of counsel's duties. The court said:

125 ABA PROJECT—DEFENSE SERVICES § 1.5 at 7, 22-24.
126 UNIFORM ACT §§ 1(2), 2(a)(2).
127 Timbers, note 14 supra, at 60.
128 Applications for services other than counsel have been submitted to the Administrative Office for less than two per cent of the defendants for whom counsel have been appointed. Oaks, Improving the Criminal Justice Act, 55 A.B.A.J. 217, 219 (1969).
129 Timbers, note 14 supra.
130 Id. In United States v. Tremont, 351 F.2d 144 (6th Cir. 1965), cert. denied, 383 U.S. 944 (1966), decided before the CJA was effective, the defendant's request for appointment of a handwriting expert at government expense was denied. The defendant, charged with interstate transportation of a stolen motor vehicle, failed "to show his claimed indigency." 351 F.2d at 146. On the other hand, there was evidence that he had flown from New Jersey to Memphis at least twice to prepare for trial, that his wife had made plane reservations for one of his witnesses, that the defendant was purchasing a home for $15,500 and had refused an offer of $25,000 for it.
131 CJA Form 8.
132 CJA (e) requires prior authorization by the court, except upon a finding that timely procurement of necessary services could not await prior authorization, in which case the court, in the interest of justice, may ratify such services after they have been obtained.
[F]or the future guidance of members of the bar appointed as counsel for indigent defendants under the CJA, absent a showing of special circumstances which make it unreasonable for counsel himself to handle these...items, I will not approve similar requests in any future applications.\textsuperscript{133}

Where investigative or other services are needed, defense counsel should usually make efforts to obtain from the prosecution the desired information or evidence, including admissions or stipulations to establish the facts sought to be proved.\textsuperscript{134}

CONCLUSION

The law has developed criteria of financial inability to obtain an adequate defense that are flexible and workable. Further definitions by statutes or rules are unnecessary and could have a negative effect if applied rigidly. The courts are considering circumstances such as the crime with which the defendant is charged and the usual fees in diverse localities, the income, cash and dependents of the defendant, his real and personal property, the resources of his parents or spouse in appropriate situations, and whether he has been able to be freed on bail. More extensive use should be made of provisions for part payment of legal costs by or on behalf of the defendant and for the reexamination by the court of the defendant's ability as the case proceeds. The right to the assistance of counsel and to other services necessary to an adequate defense is a great ideal toward which society is making considerable progress.

\textsuperscript{133} United States v. Matthews, 249 F. Supp. 592, 593 (D. Mass. 1966); accord, Timbers, note 14 supra, at 61. Of course, under CJA (d), court appointed counsel himself is entitled to compensation for time spent in interviews and reasonable expenses incurred, if any.

\textsuperscript{134} The plans for the District of Nebraska, Kutak, note 27 supra, at 747; the District of Connecticut, the Southern District of Florida, and the Southern District of California, quoted in Report, 36 F.R.D. at 361, provide for inquiry regarding such stipulations. This is an expense-saving device the use of which should be encouraged.
AN ACT

To promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Justice Act of 1964."

Sec. 2 Title 18 of the United States Code is amended by adding immediately after section 3006 the following new section:
§ 3006A. Adequate representation of defendants

(a) Choice of Plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors, other than petty offenses as defined in section 1 of this title, who are financially unable to obtain an adequate defense. Representation under each plan shall include counsel and investigative, expert, and other services necessary to an adequate defense. The provision for counsel under each plan shall conform to one of the following:

1. Representation by private attorneys;
2. Representation by attorneys furnished by a bar association or a legal aid agency; or
3. Representation according to a plan containing a combination of the foregoing.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for the representation on appeal of defendants financially unable to obtain representation. Consistent with the provisions of this section, the district court may modify a plan at any time with the approval of the judicial council of the circuit; it shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of modifications in its plan.

(b) Appointment of Counsel.—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

(c) Duration and Substitution of Appointments.—A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner or court through appeal. If at any time after the appointment of counsel
the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, he may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he had retained, the court may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States commissioner or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for Representation.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States commissioner or that court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States commissioner or court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney, bar association or legal aid agency. For representation of a defendant before the United States commissioner and the district court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the chief judge of the circuit. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall in no event exceed $500 in a felony case and $300 in a case involving only misdemeanors.

(e) Services Other Than Counsel.—Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such service rendered by him to a defendant under this
subsection, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred.

(f) Receipt of Other Payments.—Whenever the court finds that funds are available for payment from or on behalf of a defendant, the court may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency which made the attorney available for appointment, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for assisting in the representation of a defendant.

(g) Rules and Reports.—Each district court and judicial council of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(h) Appropriations.—There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(i) Districts Included.—The term 'district court' as used in this section includes the District Court of the Virgin Islands, the District Court of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code.

Sec. 3. Each district court shall within six months from the date of this enactment submit to the judicial council of the circuit a plan formulated in accordance with section 2 and any rules and regulations issued thereunder by the Judicial Conference of the United States. Each judicial council shall within nine months from the date of this enactment approve and transmit to the Administrative Office of the United States Courts a plan for each district in its circuit. Each district court and court of appeals shall place its approved plan in operation within one year from the date of this enactment.

Sec. 4. The table of sections at the head of chapter 201 of title 18 of the United States Code is amended by adding immediately after item 3006 the following:

3006A. Adequate representation of defendants.

Approved August 20, 1964.