Eligibility for Appointed Counsel in Criminal Cases: Proposed Standards and Determination Procedures

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LEGISLATION NOTE

ELIGIBILITY FOR APPOINTED COUNSEL IN CRIMINAL CASES: PROPOSED STANDARDS AND DETERMINATION PROCEDURES

Don't I think a poor man has a chanst in court? I've course he has. He has the same chanst there that he has outside. He has a splendid poor man's chanst.

Mr. Dooley in *The Choice of Law*

INTRODUCTION: THE SCOPE

The poor man Mr. Dooley refers to remains an elusive figure in the states' administration of criminal justice. Uniform and reliable methods are lacking to guide judicial officials and court officers in their determination of who is eligible for assigned counsel. Both objective, accurate standards and a workable, constitutionally sound procedure to determine eligibility are needed and are necessary to guarantee the constitutional right of counsel. The past five years have seen authoritative and definitive studies analyze and discuss the poor person's plight in criminal prosecutions. The Committee on Poverty and The Administration of Federal Criminal Justice recommended that:

Legislation should define persons eligible for appointment of counsel and other defense services at government expense as persons financially unable to obtain adequate representation.¹

The American Bar Foundation report recommended the establishment of a uniform, flexible, and objective system for eligibility guidelines in state courts.² Whereas the Committee's report bore fruition with the enactment of the Criminal Justice Act of 1964,³ the Foundation's report remained largely unheeded by state courts. The eligibility guidelines recommended by the reports of 1963 and 1965 need ever the more so to be concretely established in 1968. This comment attempts to waken the slumbering state administrators of criminal justice by analyzing and proposing eligibility standards and procedures to effectuate the poor person's constitutional guarantee of appointed counsel.


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Prior case rulings and legislative enactments employed the ambiguous standard of "indigency" to determine eligibility. These same courts and legislative bodies shied away from any definition or in depth analysis of "indigency." Consequently this lack of definitive guidelines led to several inadequate methods of determination. One approach employed stringent and somewhat arbitrary factors as a measure of who is eligible. Income level maximums and asset limitations were established whereby all persons above a certain income or in possession of certain assets would be conclusively ineligible. At the same time, certain factors were established which would automatically preclude appointment of counsel. A second approach defined indigency circularly by employing equally ambiguous terms, such as destitute, poor, needy and pauper. A third approach, the most common, simply allowed the judge to accept the defendant’s statement about his inability to afford counsel as determinative of the issue of eligibility.

Each approach led to the same result: a denial of the constitutional guarantee of appointed counsel to many unable to afford an attorney. The first denied counsel arbitrarily to many poor persons who were entitled to such right. The second method suffered from the constitutional infirmity of vagueness and uncertainty. Obscure and undefined terminology did not and does not effectively guarantee the appointment of counsel to eligible defendants. The third approach burdened the courts, public defenders, appointed lawyers, and the public by measuring eligibility too leniently. This leniency, while not intended to deny counsel to those entitled, in fact did so. Understaffed public defenders and underpaid appointed attorneys did not and cannot provide effective representation to masses of defendants. The right to an appointed attorney presently extends only to those unable to afford it and not to all defendants. To indeterminately extend such right obviates the constitutional guarantee of effective counsel to those in


6 AMERICAN BAR FOUNDATION, MEMORANDUM ON RULES GOVERNING ELIGIBILITY FOR LEGAL AID SERVICES (January 19, 1966).


fact eligible. Too-strict and too-lenient standards must be abolished and be replaced by balanced eligibility standards and fair selection procedures to vitiate present inequities in appointed counsel proceedings.

Accordingly, this comment will deal (1) with the constitutional basis of the poor person’s right to appointed counsel; (2) with a background inquiry into the problems and public policy of counsel systems; (3) with an analysis of past and present eligibility standards and methods; (4) and with practical proposals to guarantee effective appointed counsel to those eligible.

THE EXTENSION OF THE CONSTITUTIONAL BASIS FOR APPOINTED COUNSEL

The Constitutional and judicial basis for past and present concern over the poor man's right to appointed counsel evolved through a number of Supreme Court decisions. *Powell v. Alabama* first articulated that "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." Powell established that the right to appointed counsel is part and parcel of the due process guarantee to a fair hearing where the accused is unable to employ counsel. Subsequently, within a decade, *Johnson v. Zerbst* held that in federal criminal actions, the Sixth Amendment requires courts to provide counsel for those unable to afford an attorney where the life and liberty of the accused is at stake. Shortly thereafter, *Williams v. Kaiser* stated that the right to appointed counsel is equally fundamental where the accused is "unable to employ counsel to present his defense because he was without funds."

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10 287 U.S. 45, 72 (1932). Justice Sutherland speaking for the Powell Court further noted:

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

*Id.* at 73.

11 304 U.S. 458 (1938). The Court remarked:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious.

*Id.* at 462-463.

12 323 U.S. 471, 474 (1945).
Griffin v. Illinois settled that a state cannot deny appellate review to a poor person solely because of his poverty, but must afford equal justice to rich and poor alike.\(^\text{13}\) "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."\(^\text{14}\) Griffin placed a duty on the states to alleviate financial inequities of defendants in criminal prosecutions, inequities which the state did not cause or impose but which, if not remedied, would discriminate against poor persons. Following Griffin, Gideon v. Wainwright at last established that the right to retained and appointed counsel is a fundamental right essential to a fair hearing in a state criminal proceeding as guaranteed by the Fourteenth Amendment.\(^\text{15}\) The court stated:

\[
\ldots [I]n our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.\(^\text{16}\)
\]

In addition, recent Supreme Court decisions, particularly Escobedo v. Illinois\(^\text{17}\) and Miranda v. Arizona,\(^\text{18}\) have further extended the right to counsel and the right to appointed counsel at the request of eligible defendants to the initial stage of the accusatorial process.\(^\text{19}\) In summary, three constitutional doctrines coalesce to form the foundation of the poor person's

\(^\text{13}\) 351 U.S. 12 (1956).

\(^\text{14}\) Griffin v. Illinois, 351 U.S. 12, 17, 18 (1956). Justice Black commented:

Providing equal justice for poor and rich, weak and powerful, is an age old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of the Magna Carta: "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."

\textit{Id. at 16-17.}

\(^\text{15}\) Gideon v. Wainwright, \textit{supra} note 9.

\(^\text{16}\) Gideon v. Wainwright, \textit{supra} note 9, at 344.

\(^\text{17}\) 378 U.S. 478 (1964).


\(^\text{19}\) If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. Miranda v. Arizona, 384 U.S. 436, 472 (1966).
right to appointed counsel: due process, equal protection, and the right to counsel.

But the right to appointed counsel remains a meaningless gesture unless an adequate and reliable inquiry and investigation is made into the question of the defendant's economic status. The denial of the right to counsel in the absence of a sufficient check into the defendant's economic condition violates constitutional guarantees of the Sixth and Fourteenth Amendments, the respective provisions of state constitutions and, where promulgated, state statutes. The United States Supreme Court rulings cited above and state supreme court decisions discussed below have well established by constitutional bases the importance, if not the near necessity, of determining the right to counsel, retained or appointed, within a fair hearing. Accordingly, such constitutionally sound decisions can only be enforced where the determination of the inability to afford counsel proceeds by an examination of the defendant's financial status and a subsequent investigation into the accused's financial statement.

Denial of an adequate hearing to decide eligibility vitiates the defendant's right to a fair hearing. Where the right to appointed counsel exists, the failure of the court to make an effective appointment is a denial of due process.\(^{20}\) It is the duty of the trial court to ascertain, after a full and fair hearing on the defendant's financial status, the accused's qualification for free counsel.\(^{21}\) Whether the defendant possesses the financial means to afford counsel is a factual question, which factual query cannot be resolved without resorting to an adequate hearing on the facts.\(^{22}\)

Courts have reversed and remanded decisions of appeal and have granted writs of mandamus and prohibition where the trial judge acted arbitrarily and capriciously in a determination of eligibility or where the examination was at best a cursory questioning.\(^{23}\) But the same and other courts have not pronounced guidelines as to how an adequate hearing should proceed and what an effective hearing should cover. Nevertheless, where any court fails to accurately ascertain the accused's economic status with regard to


\(^{21}\) Rice v. Olson, 324 U.S. 786 (1945); Blanton v. State, 229 Ind. 701, 702, 98 N.E.2d 185, 187 (1951); People v. Loftus, 400 Ill. 432, 433, 81 N.E.2d 495, 497 (1948).

\(^{22}\) State v. Annaya, 76 N.M. 572, 573, 417 P.2d 58, 60 (1966).

\(^{23}\) Kraft v. United States, 238 F.2d 794 (8th Cir. 1956); State v. Borst, 154 N.W.2d 888 (Wis. 1967); Schmidt v. Uhlenhopp, 258 Iowa 989, 140 N.W.2d 118 (1966); Eliot v. District Court in and for the City and County of Denver, 157 Col. 229, 404 P.2d 65 (1965); State v. Burke, 128 N.W.2d 422 (Wis. 1964); Petition of George Jones, 143 Mont. 309, 387 P.2d 712 (1963); In Re Patterson's Petition, 132 Col. 401, 317 P.2d 1041 (1957); Hendryx v. State, 130 Ind. 265, 29 N.E. 1131 (1892).
appointed counsel, that court transgresses the defendant's due process guarantee of counsel.²⁴

In addition to the due process infirmity, lack of an adequate uniform hearing to determine eligibility denies equal protection to the accused. Various surveys point up that within the same state, and even within the same county, one defendant may be found eligible for counsel in one district but not in another.²⁵ The disparity in intrastate proceedings violates the poor person's right to the uniform application of the constitutional guarantee of counsel.²⁶

In addition to the constitutional infirmities, a number of states have enacted statutes providing for appointed counsel where the defendant is "indigent" or "insolvent" or "unable to afford counsel."²⁷ Several state supreme courts have addressed themselves to a proper determination of eligibility and have held that the applicable statutes have imposed on the courts the affirmative obligation of ascertaining that eligibility by a thorough inquiry and investigation.²⁸ Any failure in the court's duty would result in a breach of the statutory provision and in "an improper deprivation of the right to counsel."²⁹ Thus where legislatures have effectuated by enactment the right to appointed counsel, an inadequate inquiry violates constitutional rights and statutory guarantees.

As a corollary concern of the appellate courts in regard to a serviceable eligibility examination, the practical problem of a sufficient record on ap-

²⁴ To ask and demand a thorough examination into eligibility for counsel is in keeping with other constitutionally guaranteed procedures. Due process requires the determination of waiver of counsel to be accompanied by an in depth questioning. "A judge can make certain that an accused's professed waiver of counsel is understandably and wisely made only from a penetrating and comprehensive examination of all the circumstances. . . ." Von Moltke v. Gillies, 332 U.S. 708, 724 (1948). "The trial judge before whom an accused, charged with a felony, appears without counsel, must make a thorough inquiry to determine whether there is an understanding and intelligent waiver of counsel. He must investigate to the end that there can be no question about the waiver. . . ." Shawan v. Cox, 350 F.2d 909, 912 (10th Cir. 1965). To this end, the eligibility inquiry should be no less thorough and decisive.

²⁵ Infra note 54.

²⁶ See Richardson, Reardon, and Simeone, Legal Aid to Indigents, J. Mo. B. 525 (1963).


²⁸ Keur v. State, 160 So. 2d 546 (Fla. 1963); Bogart v. Superior Court of Los Angeles County Court, 34 Cal. Rptr. 850, 386 P.2d 474 (1963); People v. Loftus, 400 Ill. 432, 81 N.E.2d 495 (1948).

²⁹ Bogart v. Superior Court of Los Angeles County Court, supra note 28, at 851, 386 P.2d at 475.
peal or on a writ presents itself. If the record is not clear as to the method of determination or as to the reasons the judge denied counsel, the defendant may lose the appeal for failure to raise a reviewable question. A uniform and thorough inquiry would also effectively afford the defendant a sufficient record on appeal.

Further, the constitutional right to counsel as now interpreted by the United States Supreme Court, extends to felony defendants at the initial stage of the accusatory process to and including probation hearings and to juvenile defendants at incarceration proceedings. The same constitutional right may some day extend to misdemeanor defendants and to other hearings such as criminal psychopath proceedings, mental determination hearings, and drug addiction investigations. Presently, courts and legislatures have already extended the right of counsel to less than felony cases and other than trial hearings.

As the right encompasses different phases of the administration of criminal justice, many more defendants, accused, and petitioners will demand appointed counsel. In light of the absence of uniform and adequate procedures to determine eligibility this challenge cannot be met. In the end, the right to appointed counsel must be guaranteed to those unable to afford counsel. The determination to comply with constitutional safeguards cannot occur in a vacuum or in a haphazard manner. Due process, equal protection, and practical concerns demand a thorough investigation into eligibility.

A BACKGROUND INQUIRY INTO THE PROBLEMS AND PUBLIC POLICY OF THE COUNSEL SYSTEM

Statistics conclude that a majority of criminal defendants are financially unable to secure retained counsel and, hence, are eligible for appointed counsel. The results of surveys vary. Percentage conclusions range from a low of 50% to a high of 75% of defendants economically unable to procure.

30 Conn. v. State, 251 Miss. 488, 170 So. 2d 20 (1964) ; Petition of George Jones, supra note 23; People v. Loftus, supra note 28.
33 In Re Gault, 387 U.S. 1 (1967).
34 Supra note 26, at 532.
an attorney. A realistic eligibility estimate would be 60%. In any event, from any perspective, "The vast majority of our criminal defendants are indigent [in need of appointed counsel] by any reasonable definition..."

An eligibility system of standards and procedures must be uniform, workable, and just. Variations in local standards of living naturally make it impossible to propose nationwide uniform standards of eligibility measured in dollars and cents. National guidelines cannot adequately accommodate necessary adjustments in local economic and social conditions. And likewise, in a majority of states, state-wide guidelines could not realistically compensate for the variance among divergent living standards between rural and urban areas. Nevertheless, the test for eligibility should be carefully formulated by state wide rule. While facts and figures on income levels and expenditure rates may differ in several sections of a state, a uniform procedure of determining eligibility may be adaptable to different economic and population areas and would provide a state with one fair standard method of determining those in financial need of counsel.

A system of determining eligibility must be viable. The method must be efficient and effective, not cumbersome or too costly. Objective standards must be employed, yet such a method must also be flexible so as to afford discretionary power to the court official who determines eligibility. Furthermore, the guidelines must be reliable, not hunches or opinions based on hearsay.

The attorney appointment system must be just. The right to appointed counsel extends not only to the destitute or penniless but also to others, in less unfortunate situations who nevertheless are financially unable to obtain counsel. Insolvency of the defendant is not a condition precedent. The con-

36 Silverstein, supra note 2, at 7 (50%); Oaks and Lehman, The Criminal Process of Cook County and the Indigent Defendant, 1966 U. ILL. L. F. 584, 660 (50-60%); Lombard, The Adequacy of Lawyers Now in Criminal Practice, 47 J. AM. JUD. SOC'Y 176, 177 (1964) (75%). Also see Stifer, supra note 5, at 870; and Dowling and Yantis, Defense of the Poor in Illinois, 47 CHI. B. REC. 216 (1966).

37 Supra note 1, at 16.


39 NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, A GUIDE TO ELIGIBILITY STANDARDS FOR LEGAL AID SOCIETIES 1 (1965).

40 See AMERICAN BAR ASSOCIATION, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 5 (1964).

41 The determination procedure should take a minimal amount of time, reducing the risk of adding another long delay to the growing bureaucratic administration of criminal trials and appeals. The cost of the investigatory procedure should be as low as possible, freeing funds for other costs of representation.
stitutional guarantee of counsel envelops the indigent and the "borderline indigent." Accordingly, counsel must be appointed on request to:

A person who at the time need is determined is not financially able to secure adequate counsel for his defense out of present resources.

This standard encompasses not only persons without any money but also those persons who do have some money or some equity. These latter persons, if required to pay for counsel, would endure economic hardship. Not to provide counsel for the "borderline indigent" would be to afford justice to the penniless and to impose injustice on those with a few pennies. Appointed counsel must serve those unable to afford adequate representation, and that can only be determined after an evaluation of the economic status of the defendant and of the legal representation necessary to defend against the particular crime alleged to have been committed.

Other factors affect the criteria of eligibility: The amount of funds available, the existence of other legal aid agencies, the ability of staff personnel, the social decision of where to draw the "poverty" level line, and the constitutional issue of when and to whom appointed counsel is available, all contribute to the formation of financial guidelines. The determination of financial eligibility cannot be divorced from these myriad factors. Proposed rules require the most careful consideration of the needs of the total community including the clients to be served and the attorneys to serve them.

In the main, four programs exist from which counsel to be appointed may be selected: public defender, private defender, assigned counsel, and public-private defender systems. The scope of this comment does not en-

42 The "borderline indigent" is that defendant who has some funds but not sufficient to hire adequate representation. Moore, The Right to Counsel for Indigents in Oregon, 44 Ore. L. Rev. 255, 263 (1965).

43 A person eligible for appointed counsel has been descriptively defined as: "... a person who is financially unable to afford adequate representation at any critical stage of the proceedings without regard to that point at which financial incapacity may occur or appear," supra note 26, at 531; "... a person who at the time need is determined is unable without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation," Uniform Law Commission's Model Defense of Needy Persons Act § 1(3) (1964); "[a]ny person who . . . is not financially able to secure counsel out of present or reasonably anticipated resources, considering the special circumstances of the case," Brownell, Legal Aid in the United States 128 (1931); "... a defendant possessing no money or so little that he clearly meets the standards by which the court determines those to whom counsel will be assigned," Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 580 (1963).

44 See Silverstein, Eligibility for Free Legal Services in Civil Cases, 44 J. Urban L. 550 (1967).

45 Supra note 26, at 540.
compass any discussion of the advantages and disadvantages of each system; a legion of material and articles have been published analyzing the four methods.\textsuperscript{48} However, the proposed eligibility procedures outlined in this comment can be employed in conjunction with any of these systems.

Any test to gauge financial eligibility must initially answer negatively the question: would a private attorney be interested in the defendant's case?\textsuperscript{47} The appointed counsel system is not intended to and it should not compete with private attorneys who may be willing to handle a defendant's case for whatever fee defendant may afford.

In brief, the difficulties facing an effective and efficient economic eligibility method are primarily practical. To verify the defendant's financial status, to make the final determination of eligibility, to predict the cost of a particular representation,\textsuperscript{48} these and other procedural matters are fraught with practical difficulties. Nonetheless, appointed counsel, a constitutional guarantee to the poor, must serve all applicants whose income level and financial status prohibit retention of private counsel.\textsuperscript{49}

\begin{center}
AN ANALYSIS OF PAST AND PRESENT METHODS OF DETERMINING ELIGIBILITY
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There are three basic approaches to the determination of financial eligibility.\textsuperscript{50} One test employs specific, objective factors indicative of income, assets, and other established economic criteria of the defendant. A second method relies on subjective, impressionistic judgments made by the interviewer as to the person's economic status. A third merges these two ap-


\textsuperscript{47}See Brownel, Legal Aid in the United States 71 (1931).


\textsuperscript{49}The American Bar Association's standards for an adequate defense counsel system include: Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor or other charge where there is a possibility of a jail sentence. Provide standards of eligibility that do not extend assistance to one having sufficient funds or resources to secure competent counsel, but, at the same time, are not so stringent as to create a class of unrepresented accused. American Bar Association, Standards for Defender System (1966).

\textsuperscript{50}Supra note 6.
proaches and uses specific criteria as a guide to a discretionary determination of eligibility. The first method offers an objective, uniform basis for determination, but all too often is based on unrealistic and unreliable figures and factors. The second test offers a flexible, discretionary procedure, but frequently it leads to arbitrary and whimsical judgments. The third method attempts to combine the virtues of the first two while eliminating their respective defects. An analysis of past and present procedures of states and of legal aid organizations to determine eligibility best elaborates on the above approaches and on variations of the three methods.

Lee Silverstein, in his definitive work on the criminal poor, concluded: (1) many counties have no system at all to determine eligibility; (2) in most counties, judges are the sole determiner of whether the defendant is eligible, relying on one or more factors listed below; (3) tests for eligibility differ among counties in the same state and among judges in the same county; and (4) a considerable number of prosecuting and defense attorneys feel eligibility determination procedures to be too lenient. A follow-up survey of eligibility standards and methods taken as a basis for this comment supports the above three conclusions and three additional propositions. One, that the population of a county or a state greatly determines the eligibility system employed. In rural counties and less populated states, the determination is made by a judge based on his own personal knowledge of the defendant or based on the personal familiarity of the attorneys or other court officials with the financial situation of the defendant. Two, that a large number of counties have adopted the affidavit or oath system of deciding financial qualification by requiring the defendant to sign an affidavit stating that he is too poor to afford counsel and by relying on such affidavit as conclusive evidence of eligibility. Three, that in the majority of jurisdictions, the underlying decision as to appointment of counsel to those defendants in need has hinged on the question of whether defendant has funds sufficient to interest a competent private attorney in the community to handle his case. In many courts the trend in eligibility systems has shifted from a subjective, haphazard method of determination to an objective, orderly procedure to decide eligibility. In other jurisdictions, court officials have become aware that a standard method of appointment of counsel is now necessary in light of constitutional and practical considerations.

A number of surveys have uncovered a list of factors and standards which a majority of judges consider in their determination of eligibility.

51 Silverstein, supra note 2.
52 Silverstein, supra note 2, at 105, 106, 109.
53 Infra note 54.
54 National Legal Aid and Defender Association conducted a definitive nationwide
A list of such factors, with commentary and recommendations, include the following:

**Income:** Initially, income may be classified into salary types and sources. As to types, three may be distinguished: gross, net, and take-home. Gross income is the total amount of earnings while net is the full amount minus withholding taxes. Take-home pay is the gross amount less taxes and all miscellaneous deductions such as union dues, credit union deposits, bills, etc. Consequently, there may exist a large disparity between gross and take-home income. Net income most accurately reflects true income because the net amount is all the available money the wage earner has available to pay for expenses. Gross income, on the other hand, paints a brighter financial picture than is real, while take-home income distorts wage earnings because all deductions other than taxes are disbursements into asset accounts or are payments of living expenses, which ordinarily come out of the funds brought home.

As to sources, the wage earner accused must make his salary available. In addition, some courts and agencies look to other family members' incomes; if the defendant is an adult, to the wife, if the defendant is a minor, to the parents. However, such recourse to third parties for sources of funds to reimburse counsel is, practically speaking, burdensome and of questionable constitutionality. In many cases the accused may be the primary wage earner, the spouse working to supplement the family income. To garnish the spouse's wages after the accused is incarcerated leaves the family with no continuing income. In addition, in criminal cases, the extraction of attorney's fees from spouses and parents may illegally deprive

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survey of all facets of the administration of criminal justice for the poor, including eligibility determinations. Lee Silverstein edited the findings of the individual state investigators in volumes 2 and 3 of *Defense of the Poor* and summarized the findings in one volume, *supra* note 2. The International Legal Aid Association (London, England) compiled a listing of criminal legal aid agencies and procedures in the United States in the *Directory of Legal Aid and Advice Facilities Throughout the World*, Vol. 2 (1966). With the cooperation of United Charities (Chicago, Illinois), a survey was taken of 120 public defender offices located in 40 states, the District of Columbia, Puerto Rico, and Canada, to supplement and to update past surveys of eligibility determination procedures.

The follow-up survey asked two questions concerning eligibility determination for appointment of counsel: (1) What, if any, standards and procedure does your office use in determining who is an indigent? (2) If your office does not make such a determination, who does? Briefly describe the standards, if any, they employ.

The conclusions and statements of this comment are in large part based on the findings of such surveys, particularly the follow-up survey, and on the observations of the agencies and attorneys responding.

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56 Silverstein, Defense of the Poor 109 (1965).
them of property. One court noted, "While a moral obligation may require relatives to assist one another in such cases [appointment of counsel], we know of no legal rule requiring it. . . ." And regarding juveniles, the parents likewise have no legal obligation to provide their children with counsel. Due process requires the public to provide counsel where the accused is unable to; neither due process nor any other constitutional tenet can require the defendant's relatives to provide counsel.

A number of courts and agencies employ "poverty" income guidelines established by various governmental organizations. Should a defendant have an income over and above an established poverty income level (relative to the number of members in the family), that defendant becomes automatically ineligible for appointed counsel.

Such a system suffers from two defects. First, the reliance on income as the conclusive factor of eligibility avoids the financial realities of actual living expenses and budgets. Cognizance should be taken of other factors, as analyzed below, which add further evidence to the financial picture of an individual and a family. Secondly, it is highly questionable that the poverty income levels established are accurate reflections of average budgetary conditions.

Several public agencies publish figures which define the state of "poverty." As an example, for an urban family of two adults and two children, the Office of Economic Opportunity established the income level of $3200, below which the family would be considered living in poverty. The Social Security Administration developed a poverty yardstick of $3335 for the same hypothetical family. A state body serving poor people set the family

57 The criminal law places the responsibility for the commission of a crime on the person or persons who participate in one manner or another in the act. Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L.J. 644 (1917). Conversely, no responsibility can be placed on individuals not a party to the criminal act, i.e., spouses or parents. Familial obligations should not be seized by the administrators of criminal justice as a source for monetary liability where a member of a family individually breaks a law of society.

58 State v. Wright, 111 Iowa 621, 624 (1900); cited in Schmidt v. Uhlenhopp, supra note 23. The question in regard to solvency is not whether the relatives have funds to pay for counsel, but whether the defendant personally possesses the resources. Keur v. State, supra note 28, at 549.

59 Parents are not generally liable in tort for their children's negligence, nor are parents generally responsible for their children's criminal acts. Prosser, Torts 117 (3d ed. 1964). This lack of responsibility extends not only to the act itself, but also to the defense cost of the act.

60 American Bar Foundation, Memorandum on Rules Governing Eligibility for Legal Aid Services (Jan. 19, 1966).


of four budget level at $3396. Such figures, even lower for farm families, make no adjustments for different sections of the nation or state. Further, such figures are unrealistic. The Bureau of Labor Statistics, after studying a number of metropolitan living patterns throughout the United States, constructed "moderate" urban family budgets. The budgetary figures established in every instance were, at the minimum, double the amount of the poverty guideline figures cited above. As an example, the total annual budget estimated for Chicago, Illinois was $9190 for a four member rental family. That figure is nearly triple other corresponding governmental poverty figures.

The chasm between the two sets of standards may be further highlighted by an analysis of the allocation of expenses in a liveable budget for a normal family. The cost distribution percentages below were transposed into figures based on the OEO poverty guidelines of $3200.

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In addition to the story told by the figures, the use of income level standards runs contrary to the public theory behind appointed counsel. Appoint-

See also Orshansky, Counting the Poor: Another Look at the Poverty Profile, 28 SOCIAL SECURITY BULLETIN, no. 1 (January, 1965) at pp. 3-29; and Who's Who Among the Poor: A Demographic View of Poverty, 28 SOCIAL SECURITY BULLETIN, no. 7 (July, 1965) at pp. 3-32.


As distinguished from a family who owns a home whose budget was estimated at $10,174. Webb, supra note 63, at 4.

The items and percentage allocations were derived from Webb, supra note 63, at 6, citing City Worker's Family Budget for a Moderate Living Standard, supra note 64.
ment of counsel should be looked upon not as a grant of public assistance but as the providing of a constitutional right. Those eligible to receive free counsel should not have to be destitute. As discussed above, some defendants may have some funds available for fees but in an amount insufficient to hire adequate representation.

In the last analysis, caution must be observed in establishing an eligibility "income level." Too high a figure may well over-burden present counsel appointment systems. Too low a figure will deny counsel to those eligible. Either too high or too low a figure will obviate the constitutional guarantee of effective appointed counsel to those unable to afford an attorney.

To avoid the harsh results of employing set income levels as sole eligibility criteria, the determination of eligibility should be made by deducting the defendant’s expenses (including family expenses) from the resources available to the defendant. Such a system uncovers the actual amount of funds available for counsel fees. The determination can then be made by deciding whether the funds available are sufficient to afford the accused an adequate representation. Analyzed in the following section and appended to this comment is a financial eligibility form structured to allow the determiner of eligibility to obtain a true picture of the actual financial status of the defendant.

Assets: Assets include sources of funds excluding income, such as financial accounts, personal property and real property. Assets which may be available for counsel costs must be easily convertible and not necessary to adequate family living, as private attorneys do not generally accept

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67 What may be considered a poverty income for public assistance grant may not be a poverty guideline for legal aid. Pye, The Role of Legal Services in the Antipoverty Program, 31 L. & CONTEMP. PROB. 211, 218 (1966). Legal Aid services more nearly parallel medical clinics where no fixed scale of eligibility is employed, rather the amount of free medical services is related to the amount of funds the patient has available after necessary living expenses have been deducted. See, Meeman and Long, Aid for the Medically Indigent, 16 VAND. L. REV. 173 (1962).

68 "The terms 'indigent' or 'indigency' should be avoided . . . [T]hey suggest, not financial inability to obtain some essential defense service, but a total absence of resources." 1963 Att'y GEN. REP. Poverty and the Administration of Federal Criminal Justice 41 (1963). The concept of indigency confuses the question of right to counsel with the issue of eligibility for receipt of public welfare assistance. Such terminology should be avoided because of its implication of destitution—being completely without funds. The phrases "not financially able," "unable to afford," "inability to employ," more properly mean a test of need which recognizes the relative costs of defense in relation to the particular circumstances of the accused’s case. Mazor, The Right to be Provided Counsel: Variations on a Familiar Theme, 9 UTAH L. REV. 50 (1964).

69 The equation stated: disposable funds—expenditures = resources available for counsel fees.

70 See Appendix.

71 Supra note 55, at 18.
credit and many require a cash retainer with a reasonable certitude of future payments in full.\textsuperscript{72}

Financial accounts include bank assets, stocks, bonds, life insurance and other investments. These resources are accumulated in excess of funds needed for living and family expenses and are, in most instances, easily available for attorney fees.

Personal property encompasses all personal and household possessions of the family. Such property generally is a necessary adjunct to family living, and any resale value is normally nominal. Thus, such assets should not in most instances be considered as sources of fees. In some cases however, the value of the family automobile should be listed as an available asset, such as where the automobile is relatively new, since the high value automobile, determined by its year and model, is not a necessity to the family living pattern.\textsuperscript{73}

Real property should not be considered as a fee fund where the property involved is the mortgaged residence of the defendant. The mortgaged house has little convertible equity, and the mortgage payments approximate rent payments, legitimate and necessary family expenses. To demand of the defendant the acquisition of a second mortgage may seriously jeopardize the accused's financial situation. Where the real property involved is not a residence, the property should be considered as a convertible asset unless the property is low valued and the defendant relies on the property as a source for his sole income, or unless other unusual circumstances exist.\textsuperscript{74}

Certain assets which are not necessary and easily convertible should be exempted from available sources for attorney's fees. A specific sum should be protected for unexpected family emergencies. The right to appointed counsel systems should not attempt to siphon off all available asset funds.\textsuperscript{75}

Consideration should be given to probable family emergencies, to the size, health, and condition of the defendant's family, and to the age of the defendant. These expectancies should be provided for or compensated for by deducting $300 for the family and $100 for each unemancipated child under the age of twenty-one or other dependents. These amounts should be deducted from the total money amount of convertible assets available for fees.

\textit{Expenses}: Living expenses comprise numerous factors. While rent and mortgage payments, actual housing expenses, can be readily determined, no cor-


\textsuperscript{73} \textit{Supra} note 55, at 18.

\textsuperscript{74} \textit{Supra} note 39.

respondingly accurate figure is available for the other costs of normal, moderate living. However, reliable, realistic estimates of such costs do exist. Governmental and private agencies in metropolitan areas, after making studies of patterns of living, have established budgetary standards for family expenses. Such guidelines should be employed in the expenses-resources method of determining eligibility proposed above and analyzed in the following section. These standards are subject to defects similar to those of set poverty income levels, discussed above, but by a thorough examination and study of normal, moderate living patterns by governmental and private agencies in states and in counties, reliable and realistic figures can be established and employed as guidelines for family expenses. Periodic review of such standards will further assure their reliability and accuracy.

**Bail:** Whether or not the payment of bail affects eligibility determination depends on the judge and the jurisdiction. Either: one, counsel is never appointed where the defendant is out on bail; two, counsel is rarely appointed where the accused is free; three, courts consider the payment of bail as one factor among others indicative of non-eligibility; or, four, courts disregard bail as determinative of any showing. The last alternative reflects the best approach. In recent years the entire bail procedure has been questioned and experimented with. Rather than require a cash deposit or a surety bond, many courts have released prisoners on recognizance bonds or on a cash deposit of ten percent of the bail. In many instances, defendants regain their freedom pending trial without depositing any or much money for bail. It is in these cases where bail should no longer be considered a factor of eligibility.

On the other hand, where courts set bail for defendants, such bail, if paid, should not automatically preclude appointment of counsel. Inquiry should be made into the amount and source of the funds. In a large number of instances, the bail may be posted by one not legally bound to render payments; and from a constitutional standpoint, the use of the bail standard places the defendant in a position to choose between counsel or free-

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76 Supra note 55, at 8.
77 Supra note 69, and infra text between footnotes 95 and 97. On the eligibility form in Appendix B, the estimated expense would be listed as “Family Expenditure Figure.”
78 Silverstein, supra note 56, at 107.
81 See Mazor, supra note 68, at 79.
82 American Bar Association, Providing Defense Services 55 (1967) [handbook].
dom. Such a dilemma may deny the defendant the right to an effective defense.83

Extenuating Circumstances: In addition to the stark objective factors outlined above, an inquiry into any unusual circumstances of the defendant's financial status permits a flexible and discretionary method of determining eligibility. A definitive listing of such factors is not practical nor possible because each accused has a unique economic set-up. Nevertheless, the factors discussed below indicate some common extenuating circumstances. Any outstanding debts incurred by the defendant or his family, past or present periods of unemployment, geographical proximity of relatives and friends, the number of dependents, whether the accused receives social security or pension payments, whether the defendant or the defendant's family receives public assistance, these and other matters, if present, should be taken into consideration to effectively determine eligibility.

Summary. The surveys point up that a majority of judges question the defendant as to one or more of the above factors.85 But at the same time, few judges question as to all of the matters, and thus, the incomplete inquiry turns out to be inexact and constitutionally unsound. To objectively determine eligibility, the interviewer should question the defendant regarding all the factors above and whatever else may be pertinent.

Further, many judges employ certain precluding factors, such as bail and income, which automatically render the accused ineligible.86 Such standards should be eliminated. Eligibility should not be based on one sole factor but on the totality of factors.

Distinct from the objective criteria above, a large variety of procedural methods are employed by different judges and counties. Such procedures range from affidavit signings to in-depth investigations. Seemingly every practical approach has been attempted and experimented with in the jurisdictions surveyed. Rather than attempt a detailed analysis of the approaches, proposals follow in the next section, which are in large part a coalescence of the many reported procedures.

83 Id.; Moore, Right to Counsel for Indigents in Oregon, 44 Ore. L. Rev. 255, 264 (1965).
84 Studies published by various agencies suggest that children under the age of six cost $3 to $4 less per week to support than children between the ages of 6-12, while children over the age of 12 cost about $4 to $5 more per week to support than those in the 6-12 age group. Duane and Keane, supra note 55, at 17. Such figures could be considered in estimating the “Family Expenditure Figure,” discussed supra text between footnotes 75 and 77 inclusive.
85 Supra note 55.
86 Silverstein, supra note 56, at 108.
PROPOSALS FOR THE DETERMINATION OF ELIGIBILITY

Recommendations for a constitutionally sound procedure to guarantee appointed counsel to the eligible should contain the following guidelines:

**Objective Standards.** Specific standards should be employed as flexible and discretionary guidelines.

Initially, such standards should be objective yet flexible, accurately reflective of the defendant's financial condition, yet not burdensome to obtain or verify. No one factor should automatically make the accused eligible, nor should any one factor preclude appointment of counsel. In the last analysis, all factors, common and extenuating, should be considered. The foregoing list of past and present criteria with recommended changes, outlined in the preceding section, indicate the type of economic yardstick that should be considered.

**Uniform Questionnaire.** To accurately ascertain the objective factors, the defendant requesting counsel should be required to complete a written questionnaire.

A uniform mode of employing the same flexible standards would effectively guarantee the right of appointed counsel to those eligible. The written questionnaire, would best implement that mode. The written inquiry completed by the defendant affords uniformity to eligibility determination and a degree of certainty to findings. The state-wide use of a model questionnaire would eliminate constitutional infirmities of equal protection. Appended to this comment in Appendix A is a model questionnaire listing the common factors indicative of the defendant's financial status.

Due process requires counsel to be appointed at the initial stage of the accusatory process where the accused requests it. The model questionnaire should be submitted to the accused at the time of defendant's request to ascertain his eligibility. The questionnaire may thus have to be submitted at the police detention center where the police intend to interrogate the accused; such submittance may become part of the "booking" process or a separate step, depending on police practices. Or the questionnaire may have to be given to the defendant before or at the time of his appearance before the magistrate or judge. In any event, whenever the defendant requests ap-

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87 The recommendations herewith are proposals compiled from an analysis and interpretation of the many procedures reported in the surveys, supra note 54, and enacted in many state statutes.

88 Supra note 31.

89 Supra note 82, at 63.
pointed counsel and due process concurrently requires counsel to be present, the questionnaire should be submitted and completed. In many instances, the defendant will need help in filling out the questionnaire. To better assure a correctly completed form, the party who hands the defendant the questionnaire could also act as an interviewer and explainer and should act when the defendant does not understand the questionnaire due to ignorance, illiteracy, or other reasons.

_Thorough Investigation. To verify the defendant's answer and to discover new facts, an investigation should be made by some third party._

A follow-up investigation of the information supplied on the questionnaire would eliminate nearly all doubt as to the defendant's financial status by verifying the accused's approximations and by uncovering any other facts. Such investigations would further establish a sufficient record upon which the defendant could appeal.

Investigations need not be made of the defendant's questionnaire completed in the police station. To demand or propose an investigation at this stage would be impractical. Where the police want to interrogate the accused, the defendant's request, completion of the questionnaire, and statement of inability to afford counsel are sufficient evidence of eligibility, and counsel should be appointed. The cost of counsel appointed to an ineligible defendant is nominal at this stage, whereas the constitutional price of non-appointment to an eligible defendant is great.

Initially, the investigation should proceed after the defendant has completed the questionnaire, and either before or after the judge apprises the defendant of his constitutional rights. An investigation beforehand would speed up the courtroom procedures at the initial hearing. However, where the defendant did not fill out a questionnaire at the police station and where the defendant is free on bail, the first opportunity for the court officer to interview the defendant arises at the arraignment. Accordingly, where the defendant is free on bail, after he appears before the judge and requests appointed counsel, a recess in the proceedings should follow during which time the defendant can complete the questionnaire and the investigation can be made. The length of the recess would depend on the time a thorough investigation would take, and that, in turn, would depend on the mode of the procedural investigation. Where the defendant is incarcerated pending the first hearing, a court official could interview the defendant in jail and

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90 At later stages of the prosecuting process when more time is available, a more thorough investigation can be made.

91 ILL. REV. STAT. ch. 38 § 113-3 (1967).
investigate the information received.\textsuperscript{92} Where the defendant has completed a questionnaire at the police station, an investigation could verify the information before the time for the arraignment.

No one single investigatory procedure can be proposed. Just as no nationwide system of eligibility can be effectively implemented, no single state-wide system can be established. The volume of criminal law proceedings and the population of the counties affect the type of investigation employed.\textsuperscript{93}

Accordingly, in counties where the population is below 150,000, primarily rural areas where the volume of criminal prosecution is low, the clerk of the court should handle the investigation. In less densely populated counties, most residents know or know about each other, and much of the questionnaire information can be verified by personal knowledge about the accused by court officials or the judge.\textsuperscript{94} Where the defendant is not well known or is a transient, further investigation by means of telephone calls or letters to relatives, friends, employers, will yield the needed verification. In some instances, still further investigations may be necessary, and again this should be handled by the clerk of the court.

In jurisdictions where the population runs between 150,000 and 500,000, primarily medium size population centers where the volume of criminal hearings is moderate to large, the investigatory work, too burdensome for the clerk of the court to handle, should be handled by other court officials, or by separate public welfare agencies, or by a special part-time or full-time court investigator.\textsuperscript{95} Whoever the interviewers are, the means employed to substantiate the questionnaire's figures and to garner new facts, would be similar. Again, telephone calls, personal interviews, and other probe methods, should be employed to accurately corroborate the written inquiry information.

In counties where the population exceeds 500,000, primarily urban areas where the volume of criminal proceedings is great, several full-time special court investigators should carry on investigations. Again, these investigators would employ telephone calls, letters and visitations to thoroughly investigate. These same investigators could interview the defendants initially concerning the questionnaire and continue with the investigation to substantiate the inquiry. The price of the additional court officials would be minimal in relation to attorney's and court's time saved and in light of the constitutional right to counsel guarantee.


\textsuperscript{93} SILVERSTEIN, supra note 56, at 116-119.

\textsuperscript{94} Moore, supra note 83, at 259.

\textsuperscript{95} Supra note 60.
Eligibility Determination Form. To interpret the economic facts and figures, the investigator should complete the "Eligibility Determination Form."

As proposed in the preceding section, the determination of eligibility should be based on the amount of funds the defendant has available after an analysis of his income, assets, expenses, bail, and extenuating circumstances. The questionnaire provides the facts, the interrogation verifies the information, and the "eligibility determination form" interprets such facts in a uniform and reliable manner and puts the defendant's financial status in perspective. The eligibility form shows the resources the defendant has available after expenditures have been deducted from the accused's income and assets and after any extenuating circumstances have been noted.\(^9\)

The investigator, after completing the examination, should fill in the respective figures in the corresponding spaces on the form from all the information available. Some of the information will be subject to the investigator's discretion and interpretation, particularly cases of extenuating circumstances, but the objective factors and standards themselves afford a nearly exact financial picture of the accused's status. Such compilation acts both as a guide to a more certain determination of eligibility and as a recommendation to the judge who makes the final decision.

Determination. Before the first judicial hearing, the determination should be made by a law enforcement or court official on the basis of the questionnaire. After arraignment, the determination should be made by a judge or magistrate on the basis of the questionnaire, the investigation, and the eligibility form.\(^9\)

At any stage prior to the first judicial hearing, where due process requires and the accused demands counsel, a preliminary determination of eligibility for appointed counsel should be made by a law enforcement official or court officer based on the completed questionnaire and the accused's statement that he cannot afford counsel.

At the first judicial hearing, the final determination should be made by the judge on the basis of the facts of the questionnaire, of any further information obtained by the investigation, and by the recommendations of the eligibility determination form. The judge should rely on the facts and figures to guide him, should check the eligibility determination form for accuracy and completeness, and should question the defendant to clear up any ambiguity. In the end, the judge should make certain that the defendant has sufficient funds for hired counsel before refusing to appoint counsel.

\(^9\) See Appendix B.

\(^9\) Supra note 82, at 63.
Referral Committee. If the judge is not certain whether the defendant is eligible, he should refer the accused to a committee of private attorneys who would then decide eligibility.

Not all eligibility determinations will be black and white; a large number will be gray. Where the judge is not certain as to the accused's eligibility, the judge should refer the accused to private attorneys who would then determine whether the defendant has sufficient funds to hire adequate counsel. In metropolitan areas the private attorneys could be organized by local bar associations into three member committees who would interview the defendant and review the questionnaire and eligibility form. If the committee should decide the defendant has sufficient funds to hire counsel, one of the three attorneys should take the case for a fee or refer him to an attorney who will. On the other hand, if the committee should decide the defendant is without sufficient funds, the committee should refer the defendant back to the judge for appointment of counsel. If the committee discovers the defendant to have some funds available but not an adequate amount to obtain representation, the committee should refer the defendant back to the judge and recommend that counsel be appointed and that the accused pay to the court a specific amount of money.

In rural areas, the committee set-up may not be feasible because of geographical distance or too few attorneys. In these cases, the judge should refer the defendant to three private attorneys from a list of attorneys compiled by the local bar association or by the judge.

In the end, the judge should make certain the defendant, if he desires, has counsel, appointed or hired.

91 Each defendant should contribute to the cost of his defense in proportion to his means. The committee would determine the defendant's funds available for defense costs based on disposable income less living expenses and then set the actual amount of the contribution and the mode of payment. See Utton, The British Legal Aid System, 76 Yale L.J. 371, 373 (1966).
92 Supra note 100.
93 One observer listed a number of alternative procedures which judges have taken after determining the defendant to be non-eligible for appointed counsel: one, merely tell the defendant that he is not eligible; two, tell the defendant he may retain his own lawyer if he wishes; three, if the defendant wants, appoint an attorney who arranges his fee with the accused; four, refer the defendant to the local bar association or lawyer referral service; five, hand the defendant a list of available private attorneys; and, six, appoint counsel regardless of the defendant's financial standing. Gerard, A Preliminary Report on the Defense of Indigents in Missouri, 1964 Wash. U.L.Q. 270, 303 (1964).
If after the private attorneys refer the defendant back to the judge recommending appointment of counsel, the judge refuses to do so, one of the attorneys should appeal the decision by an appeal or by a writ of mandamus or prohibition. Lawyers, as well as judges, have a responsibility to see to it that the administration of criminal justice is fair and orderly.

CONCLUSION: THE BEGINNING

The constitutional administration of criminal justice cannot survive without uniformity and order. The preceding recommendations attempt to provide such a framework for the doctrine of appointed counsel. To make accessible that particular right to the poor, standards, objective and flexible, and procedures, practical and viable, should be established by Supreme Court rule or statutory legislation in every state. Such enactments can be structured on the model proposed in this comment.

The standards and procedures adopted in any state will depend on a myriad of factors. The preceding recommendations may not all be applicable to a particular state's criminal administration procedure. The questionnaire may be more succinct, the investigation less thorough, the eligibility determination form eliminated, the referral system expanded; the realities and the structure of each state's counsel appointment system will guide the formation of eligibility determination.

The proposals set forth do not alleviate all the problems inherent in the administration of court appointed or retained counsel. The means of reimbursement of counsel, the source of such funds, the feasibility of combining release on recognizance bonds with the determination of eligibility, the decision of who is to pay for the poor person's court costs in addition to

104 See cases supra note 23.

105 Many states and counties have enacted Public Defender Acts or other legislation dealing with counsel appointment procedures and eligibility determination. In addition, a number of courts have adopted similar provisions by court rule. MD. CT. APP. R. 719; and N.M. S. CR. R. 92.

108 Some observers in a number of states have noted that the states' present method of determining eligibility is highly accurate and reliable, and any investigatory procedure would be expensive and cause additional delay in criminal prosecution. Manson, The Indigent in Virginia, 51 Va. L. Rev. 163, 168 (1965); Remington, Defense of the Indigent in Wisconsin, Wis. B. Bull. (February, 1964) 40, 43; Moore, supra note 83, at 259. Further studies in these areas may be necessary to determine whether current procedures are just and reliable. But statistics must not cloud over the fact that the constitutional right to counsel extends to all defendants without sufficient funds to hire an attorney, and that any eligibility procedure must aim to appoint counsel to all eligible and not just to most defendants. In the majority of cases, defendant's eligibility for counsel will be black or white. However, where the accused's financial picture is grey the judge will need to turn to other sources of reliable and accurate information—to the questionnaire, or the investigation, or the referral committee, or any combination of the three.
attorney's fees, such as filing, witness, and miscellaneous costs, all remain for local governments, courts, and bar associations to resolve.

The poor man deprived of his freedom in any significant manner is entitled to the same rights and privileges as a wealthy person. Equality of representation may not be possible. Nevertheless, invidious discrimination which infringes on the poor person's constitutional rights must be eliminated.\textsuperscript{107} When the Supreme Court announced that poverty was "constitutionally an irrelevance," the Court for all time removed the economic stigma from constitutional rights and liberties, including the right to counsel.\textsuperscript{108} In the last analysis, "inequalities in economic status should not preclude the attainment of equal justice for the poor."\textsuperscript{109} Rather, the appointed counsel system must serve those who are unable because of poverty to procure legal aid elsewhere.

\textbf{APPENDIX A}

\textbf{FINANCIAL ELIGIBILITY QUESTIONAIRE}

People of the State of__________________________

\hspace{1cm} vs. \hspace{1cm} Case No. __________

I. General Information
a) Name ________________________________

b) Street Address________________________ Zip Code__________
City __________________________ State ________________

c) Age____ Social Security No.___________ Phone No.__________

d) Marital Status: Single___ Married___ Separated___ Divorced___

e) Dependents:
Wife___ Children, No.__ Others, No.__ Relationship____

f) If under the age of 21, list your parents' names and addresses:

II. Employment
a) Presently employed____ Presently Unemployed____

b) Name of Present Employer________________________
Street Address________________________ City______________
State____________________ Zip Code_______ Phone No._______

c) Net Income: Weekly $_________ Monthly $_________


\textsuperscript{109} \textit{R. H. Smith, Justice and the Poor} 211 (1919).
d) Description of Job

e) Length of time employed

f) Last Prior Employer

III. Financial Status

1. Owner of Real Property
   a) Description

   b) Address

   c) In whose name listed?

   d) Estimated value

   e) Annual income from property

   f) Debt on Property:
      Owed to

2. Owner of Other Property
   a) Automobile: Make Year
      In whose name registered?
      Present Estimated value

   b) Cash on Hand

   c) Cash in Bank:
      Savings Account
      Checking Account
      Names and addresses of Banks and Savings Associations:

   d) Other investments (stocks, bonds, life insurance, other):

   e) Other sources of income (pension fund, social security benefits,
      public assistance, unemployment compensation, alimony, other):

IV. Expenditures

   a) Housing:
      Monthly house or apartment rent
      Monthly mortgage payment

   b) Other debts:
To Whom Owed  | Amount Owed
-------------|-------------
              | $           
              | $           
              | $           
              | $           
              | $           

Monthly Debt payments ................ $________

V. Present Status
a) In custody_____   b) Free on Recognizance bond____
c) Free on bail in amount of $________, put up by________
   ____________, and secured by _____________.
   The bondsman is ________________________, who was paid $__________.

VI. Summary Questions
a) Are you able to obtain financial help to raise funds for your
   defense costs? Yes____ No____
   If yes, who or what is the source? ____________________________
   ____________________________

b) Have you ever been represented by court appointed counsel in
   the past? Yes____ No____
   If yes, what was the city and state? ____________________________
   ____________________________

c) Do you wish the Court to appoint an attorney? Yes____
   No____

VII. References
List below the names and addresses of three people who are familiar
with your financial condition.
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________

Date ____________________________
Signature _________________________

Administrative Information
Interviewer __________________________________________
Investigator __________________________________________
Judge ________________________________________________
Eligible____ Not Eligible____ Referred to Committee____
## People of the State of ____________________________

vs.

Case No. ____________

### I. Funds Available

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Total Income Available $_______

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Assets Available $_______

Total Funds Available $_______

### II. Expenditures

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<td>Special Circumstances</td>
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Total Expenditures $_______

### III. Available Funds for Defense Costs

$_______

### IV. Other Considerations

Defendant's Funds Applied Towards Bail $_______

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<tr>
<td>Estimation of Other Defense Costs</td>
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</tr>
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**Administrative Information**

Form Completed By ____________________________
Counsel Appointed_____ Counsel Not Appointed_____
Referred to Committee_____
