Chicago-Kent Law Review

Volume 48 | Issue 1 Article 6

April 1971

Proposed Standards for Defining Indigence in Criminal and Civil Cases in Illinois

Lyle B. Haskin

PROPOSED STANDARDS FOR DEFINING INDIGENCE IN CRIMINAL AND CIVIL CASES IN ILLINOIS

I. Introduction

Concern for the rights of minority group members and the growth of poverty law are both manifestations of the recent emphasis in law on the larger problem of adequate representation of all persons. This concern may well indicate the continuing growth and adaptation of jurisprudence to social needs, particularly in two areas: (a) inadequate representation of indigent criminal defendants who cannot afford counsel and (b) inability of indigent civil litigants to sue or defend because of insufficient money to pay court costs and attorneys' fees. Neither of the above areas of law is new, however. The historical sections of this discussion will detail the developments of the right to adequate counsel of indigent criminal defendants and indigent civil litigants. For the moment, it is sufficient to say that the former found expression in the sixth amendment to the United States Constitution and that the latter was first embodied in the common law of England. Throughout the development of these concepts, however, the courts have failed to define indigence concretely. This article proposes two model statutes: one for defining indigence of criminal defendants and one for defining indigence of civil litigants.

II. The Indigent Criminal Defendant

A. *Historical Development of the Right to Counsel*

1. *Before 1932*

The right to be represented by counsel in a criminal action did not exist at common law. A British subject indicted for treason or other felony was barred from obtaining counsel to plead the general issue of not guilty. This rigidity of rule was ameliorated somewhat by the practice of British judges in permitting a defendant to consult counsel about the conduct of the case. The accused felon was allowed to have legal representation on issues collateral to the felony. The defendant was excluded, however, from representation on questions of law arising from the felony. This rule persisted until 1695. During the reign of William and Mary, statutory provisions were made for legal representation of an accused traitor. The earlier rule remained in force for all other accused felons, however, until 1836.[1]

This anomalous rule which denied a defendant legal counsel when he was tried for a heinous crime was rejected by twelve of the thirteen original colonies before adoption of the federal Constitution.[2] The sixth amendment to the United States Constitution was adopted in 1791. With its ratification came the right of the accused to be represented by counsel in all federal criminal prose-

[1] Powell v. Alabama, 287 U.S. 45, 60 (1932).
[2] *Id.* at 61-64.

cutions.[3] One writer thinks, however, that the sixth amendment was generally interpreted as meaning that a defendant in a criminal action was entitled only to engage private counsel and that this privilege did not include the right to court-appointed representation.[4]

2. *After 1932*

The Supreme Court of the United States decided *Powell v. Alabama*[5] in 1932. The defendants, illiterate, non-resident Negroes, were convicted of rape and sentenced to death. The trial court did not appoint counsel. The Supreme Court held that the defendants had been denied due process under the sixth amendment, but limited its holding to the specific facts of the case. The court did not apply the holding to all state criminal prosecutions.

In 1938, the Court declared in *Johnson v. Zerbst*[6] that a federal court's jurisdiction depended upon that court's compliance with the sixth amendment's guarantee of the right of a criminal defendant to counsel. The petitioner had pleaded not guilty and had appeared without counsel because he was unable financially to retain a lawyer. The Supreme Court held that an indigent criminal defendant who appears *pro se* has the right to appointed counsel. The trial court's obligations were to advise the defendant that he had the right to counsel and to be certain that a waiver of the sixth amendment right was made, if at all, intelligently and knowingly. The implication was clear: a criminal defendant who is unaware of his right to counsel cannot intelligently and knowingly waive that right. Subsequent decisions extended the sixth amendment guarantee to a defendant who pleaded guilty while unaware of his right to counsel[7] and to a defendant who was forced by the trial court to be represented, over his objections, by a codefendant's lawyer.[8]

A significantly different question arose in *Betts v. Brady*[9] in 1942. Betts appealed to the Supreme Court on the ground that he had been denied the sixth amendment's guarantee because a state trial court had refused to appoint counsel upon Betts' declaration that he was indigent and, therefore, unable to employ a lawyer. The court refused to appoint counsel on the ground that Betts, who had been indicted for robbery, was ineligible for appointed counsel under the local practice of appointing counsel in murder or rape cases only. Betts was convicted. His argument to the Supreme Court was tripartite: (a) he had insufficient money to retain counsel; (b) the sixth amendment guaranteed his right to be represented by counsel, notwithstanding the local practice; (c) the sixth amendment

[3] Johnson v. Zerbst, 304 U.S. 458 (1938); Bute v. Illinois, 333 U.S. 640 (1948); Gideon v. Wainwright, 372 U.S. 335 (1963).

[4] Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L.Q. Rev. 1 (1944).

[5] 287 U.S. 45 (1932).

[6] 304 U.S. 458 (1938).

[7] Walker v. Johnston, 312 U.S. 275 (1941).

[8] Glasser v. United States, 315 U.S. 60 (1942).

[9] 316 U.S. 455 (1942).

was mandatory upon the states by operation of the fourteenth amendment. The Supreme Court disagreed, holding that:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[10]

Thus, Betts' situation failed under the test.

Twenty-one years later, the Court overruled *Betts*. In *Gideon v. Wainwright*[11] the Court addressed itself again to the question presented in Betts: Does the fourteenth amendment require the state courts to appoint counsel in consonance with the federal rule under the sixth amendment? The Court held it does. Gideon had been accused in a Florida court of breaking and entering with intent to commit a misdemeanor. The offense was a felony in Florida. Gideon requested appointed counsel because of indigence; his request was denied on the ground that Florida law permitted appointment of counsel in capital cases only. Gideon's argument on appeal was virtually identical to Betts'. Noting its holding in *Johnson*,[12] the Court said:

> The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.[13]

The Court then specifically overruled *Betts*. The fourteenth amendment, said the Court, does extend the sixth amendment guarantees to the states:

> [R]eason and reflection require us to recognize that in 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.[14]

Thus state courts were directed to appoint counsel for a criminal defendant who is financially unable to retain private counsel.

B. *Appointed Counsel in Illinois*

Illinois courts are obligated to provide counsel for indigent criminal defendants under the *Gideon* doctrine and under the statutes of the state.[15] The

[10] *Id.* at 462.
[11] 372 U.S. 335 (1963).
[12] 304 U.S. 457 (1938).
[13] 372 U.S. at 339.
[14] 372 U.S. at 335.
[15] Ill. Rev. Stat. ch. 38, § 113-3 (b) (1969): "In all cases except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. If there is no Public Defender in the county or if the defendant requests counsel other than the Public Defender, the court may appoint as counsel a licensed attorney at law of this State, except that in a county having a population of 1,000,000 or more the Public Defender shall be appointed as counsel in all misdemeanor

requirement has been recognized in a large number of cases.[16] Unanswered, however, in both *Gideon* and the Illinois statutes is how the trial court should seek to determine indigence. At present no guide exists beyond the court's discretion.[17]

The Illinois Code of Criminal Procedure requires the judge to inform an arrestee of his right to counsel at the time of arraignment.[18] If the defendant has not obtained counsel because he is indigent, he is required to give oral testimony concerning his financial status if he applies for appointed counsel. Usually this testimony consists of the judge asking the defendant whether he has a lawyer and the defendant answering that he has no lawyer and no money.[19] The presiding judge must then seek enough specific information from the defendant to find as a matter of fact that defendant is indigent and, therefore, eligible for appointed counsel. No statutes exist to which the judge may refer to find what financial information is relevant. The questions propounded must come from his experience. As a result of this uncertainty the judge may inadvertently abuse his discretion. The following cases exemplify the point:

1. *People v. Cole*[20]

The defendant was arrested on a charge of resisting a peace officer. At the arraignment the judge asked defendant if he had an attorney. Cole replied he was not financially able to engage counsel. Asked if he was employed, the defendant said he was and that he earned $2.53 per hour. The presiding judge then denied Cole's request for appointed counsel. Defendant protested that he

---

cases where the defendant is indigent and desires counsel unless the case involves multiple defendants, in which case the court may appoint counsel other than the Public Defender for the additional defendants."

[16] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954); People v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); People v. Eggers, 27 Ill. 2d 85, 188 N.E.2d 30 (1963); People v. Rebenstorf, 37 Ill. 2d 572, 229 N.E.2d 483 (1967); People v. Manikas, 87 Ill. App. 2d 227, 230 N.E.2d 577 (1967); People v. Cole, 97 Ill. App. 2d 22, 239 N.E.2d 455 (1968).

[17] In civil cases where the alleged indigent seeks to proceed in forma pauperis there is the statutory requirement of an affidavit. Ill. Rev. Stat. ch. 110A, § 298 (1969) provides:

". . . (a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant . . . stating:
(1) the applicant's occupation or means of subsistence;
(2) the applicant's income for the year preceding the application;
(3) the source and amount of any income expected by the applicant;
(4) the nature and value of any property, real or personal, owned by the applicant;
(5) the particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding the application;
(6) that the applicant is unable to pay the costs of the suit; and
(7) that the applicant has a meritorious claim or defense."

The second division of this discussion addresses itself to the need for revision of the above standard.

[18] Ill. Rev. Stat. ch. 38, § 109-1 (b) (2) (1969): ". . . (b) The judge [presiding at the arraignment] shall: . . . (1) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this state to represent him in accordance with the provisions of Section 113-3 of this code. . . ." *See also* Ill. Rev. Stat. ch. 38, § 113-3 (b) (1969) supra, n.15.

[19] 304 U.S. 458 (1938).

[20] 97 Ill. App. 2d 22, 239 N.E.2d 455 (1968).

had injured his leg five weeks earlier and had been receiving only $42.00 per week unemployment insurance. Cole said he had attempted to employ a lawyer but had been unable to do so because the attorney had requested a $100.00 retainer, which he was unable to pay. The judge again denied defendant's request. Cole acted as his own lawyer at the trial and was found guilty.

The conviction was reversed and the case remanded by the Fifth District Appellate Court. The appellate court reviewed the previous statutory standard for ascertaining indigence and compared it to the new standard found in Ill. Rev. Stat. chap. 38, section 113-3. The court said:

> Formerly, our courts were required to provide counsel for a criminal defendant upon his request and his oath that he was unable to procure counsel (a condition that would have been fulfilled in the instant case.) [Citations omitted.] Having now entrusted the determination of indigency to the discretion of the courts, the law nonetheless requires a high degree of care and the punctilio of discretion.[21]

The appellate court then held that the trial court had abused its discretion in denying defendant's request for appointed counsel. The appellate court recognized that the discretionary power vested in the trial court replaced a more specific standard. The appellate court held, nonetheless, that inquiry into specific facts of defendant's financial condition would have been appropriate. The court said:

> Despite defendant's specific request for appointment of counsel the court decided that he was employed and refused his request conducting no further inquiry as to the size of defendant's family, the number of dependents he was supporting with the $42.00 per week insurance payment or the possibility of other income.[22]

Clearly, the appellate court sought some standard of a more objective nature than "the court's discretion."

2. *People v. Eggers*[23]

Defendant was indicted for burglary. Bail was set at $3500.00. Having paid $350.00 for a surety bond, Eggers was released. He appeared before the court five days later to plead not guilty, but the court refused to accept the plea because defendant was not accompanied by counsel. One week later defendant appeared with his attorney and entered a plea of not guilty. Trial was set for three weeks later. On that date defendant appeared without counsel. Defendant informed the court that his attorney had withdrawn because he had no money for a retainer. The trial date was reset for one week later, and the court instructed defendant to return with a lawyer. On that occasion Eggers again appeared without counsel and stated he could not afford a lawyer. The court advised him that it could not appoint counsel because defendant had paid the

[21] *Id.* at 25-6, 239 N.E.2d at 457-58.
[22] *Id.* at 26, 239 N.E.2d at 458.
[23] 27 Ill. 2d 85, 188 N.E.2d 30 (1963).

premium on the surety bond. Eggers was convicted. At the time this case arose, the statutory rule in Illinois[24] was that an indigent defendant was required to give sworn testimony of his indigence. Defendant had not done so. On appeal the Illinois Supreme Court held the trial court had committed reversible error in denying appointment of counsel solely on the fact that Eggers had paid his bail bond:

> It is apparent from the record that the trial court's refusal to appoint counsel for the defendant was not based upon defendant's failure to state under oath that he was indigent. . . . It is clear that an attorney was not appointed . . . solely because the defendant had spent $350.00 for a bail bond.[25]

3. *People v. Manikas*[26]

Manikas was arrested for speeding and driving while his operator's license was revoked. When defendant appeared, the trial court asked him whether he had an attorney or whether he wished to represent himself. Manikas replied, "I am here myself."[27] No further mention was made of defendant's right to counsel or of his right to have appointed counsel if he could not afford an attorney. Defendant's conviction was reversed. The appellate court reviewed the cases which held that a criminal defendant is entitled to counsel unless he has waived the right "intelligently and understandingly." The court then quoted the Illinois Supreme Court in *People v. Bush*[28] where that court held that more than a routine inquiry by the court is required in order to determine whether defendant understands his right to counsel.

The above cited abuses have occurred despite the recognition more than twenty years ago by the Illinois Supreme Court in *People v. Price*[29] that:

> The purpose of the Fourteenth Amendment and of the section of the Illinois statute is to protect the right of defendants charged with crime. . . .[30]

The three cases above manifest the foremost problem in a trial court's attempt to determine indigency: a lack of a concrete, objective standard to rule on the defendant's request for appointed counsel. The abuses are, no doubt, inadvertent. To the defendant, however, the denial of his right to counsel is equally damaging whether the refusal of the trial court is inadvertent or intentional.

Cole, Eggers and *Manikas* are in sharp contrast with another Illinois case in which the trial court abused its discretion by being too generous—*People v. Rebenstorf*.[31] There the trial court did not wait for the defendant to declare that

[24] Ill. Rev. Stat. ch. 38, § 730 (1961).
[25] 27 Ill. 2d at 87-8, 188 N.E.2d at 31-2.
[26] 87 Ill. App. 2d 227, 230 N.E.2d 577 (1967).
[27] *Id.* at 229, 230 N.E.2d at 580.
[28] 32 Ill. 2d 484, 207 N.E.2d 446 (1965).
[29] 397 Ill. 613, 74 N.E.2d 794 (1947).
[30] *Id.* at 617-18, 74 N.E.2d at 797.
[31] 37 Ill. 2d 572, 229 N.E.2d 483 (1967).

he was without sufficient money to engage counsel. Having been informed of his right to counsel, Rebenstorf was evaluating his financial resources to determine whether he could afford to hire a lawyer. The trial court, however, made the appointment on its own motion, against the defendant's will. On appeal, Rebenstorf assigned the appointment as error. The Illinois Supreme Court agreed that unrequested appointment of counsel was error but that it was harmless. Holding that the hearing to determine indigency is not an adversary proceeding, the court affirmed the conviction with the statement, "[T]he action of the court here in appointing an attorney for the defendant served to insure protection of his rights. . . ."[32] It seems more than slightly incongruous that in three courts in Illinois defendants who wanted appointed counsel could not convince the court of their need, while in another court in the same state a defendant who did not request appointed counsel was assigned an attorney. This result again suggests the need for a standardized criterion.

In 1943 the Appellate Court in the First District recognized that "in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel."[33] If that situation existed in 1943, what is the extent of the problem today? The following inquiry seems necessary: (a) What would the result have been had these defendants not appealed their convictions? (b) How many times have convicted defendants not appealed from similar holdings? (c) Is the protection of individual rights to be left to the discretion of trial courts, subject to corrective appellate review? (d) Does a more certain criterion for protecting the right to counsel than the trial court's discretion not exist?

When indigency is not a factor in the protection of a person's right to counsel the inconsistencies seem to vanish. The Supreme Court of the United States discussed defendant's intelligence as a criterion for appointment of counsel in *Powell v. Alabama*.[34] The Court then found that high intelligence and extensive formal education are no bar to appointment of counsel.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 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 proceeding 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. If that may be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[35]

[32] *Id.* at 575, 229 N.E.2d at 485.
[33] People v. Gibson, 320 Ill. App. 54, 49 N.E.2d 793 (1943).
[34] 287 U.S. 45 (1932).
[35] *Id.* at 69.

This passage seems extremely poignant when one realizes that if even the intelligent person, who usually can afford counsel, needs the "guiding hand of counsel at every step of the proceeding against him" despite his generally higher educational level, the indigent person who typically lacks extensive formal education is at a tremendous disadvantage without counsel. And what of the person who, because he is employed, is not technically indigent as defined in the cursory view of some courts?

Appointment of counsel seems to depend upon indigence as it is now defined. However, the Appellate Court in the Second District noted in *People v. Manikas*:

> The right to the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 9, Article II of the Illinois Constitution, S.H.A., is not based upon whether the defendant is rich or poor. It is a right with which we are all endowed.[36]

C. *A New Standard*

1. *The Need*

How poor is poor? Although total poverty is easily recognized, problems arise regarding those defendants who have small amounts of money.

Is the defendant who has $350.00 for a bail bond poor? Is the temporarily unemployed defendant who receives $42.00 per week poor? These defendants were forced to appeal convictions obtained against them after being denied their sixth amendment and fourteenth amendment rights. These abuses of discretion seem to be the inadvertant result of an illusory standard. No cases suggest a complete standard to assist trial courts in determining indigence. Only the incomplete standard of judicially reviewable error exists in the trial court.

Is it necessary and within the spirit of the sixth and fourteenth amendments to require that a criminal defendant exhaust his financial resources before he can have appointed counsel? If not, at what level of indigence will counsel be appointed? Must the man with five children, numerous debts and an income which barely covers his financial needs be without appointed counsel merely because he earns enough money to put him above the "poverty line"? Although the point of the criminal trial is to determine the truth of the allegations, an innocent defendant who is barely subsisting from paycheck to paycheck may be financially ruined if he is required to pay for the defense of only one criminal charge. This defendant is ineligible to receive public assistance in his defense and is unable to afford competent counsel.

The present incomplete standard apparently leaves the courts and the defendants in an uncertain position. The courts have merely contradictory case law upon which to rely in determining indigency of a defendant. The power to create a new standard of indigency seems to be within the "inherent power of

[36] 87 Ill. App. 2d 227, 233, 230 N.E.2d 577, 580 (1967).

the judiciary to regulate the practice of law and conduct the orderly administration of justice."[37]

2. *The Standard*

The proposal suggested herein is presented in the form of an affidavit. The trial courts should continue to follow the present constitutional requirements of: (a) giving defendant notices of his right to representation and (b) advising defendant that he may be eligible for appointed counsel. If defendant elects to apply for appointed counsel, the proceedings should be continued until such time as the affidavit has been completed and reviewed. The court should appoint a competent officer of the court to assist the applicant.[38]

The following is suggested:

APPLICATION FOR APPOINTED COUNSEL

(a) Contents. An application for representation by appointed counsel in any criminal proceeding shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by the affidavit of some other person having knowledge of the facts, stating:

(b) Assets.

(1) Applicant's occupation, if any:

(2) Applicant's net income as reported to Internal Revenue Service in the three years immediately preceding this petition:

(3) Source and amount of any money owed to applicant:

(4) Nature of debt due in (3):

(5) Nature and value of real property owned by applicant:

(6) Nature and value of personal property owned by applicant, *excluding* household furnishings and clothing:

(7) Nature and value of revocable trusts of which applicant is settlor and of trusts of which applicant is beneficiary, *except* future interests in property which will not become present interests within one year of the date of this application:

(8) Amount of applicant's income or other means of subsistence in the year in which this application is filed:

(9) Amount of money in savings and checking accounts which bear applicant's name singly or as joint tenant or as tenant in common or as trustee or as beneficiary:

(10) Value of stocks, bonds or other intangible personal property which bears applicant's name singly or in joint ownership or as trustee or beneficiary:

[37] People v. Randolph, 35 Ill. 2d 24, 28, 219 N.E.2d 337, 340 (1966).

[38] Although this procedure may require some expense, it is far less costly than an appeal from a conviction on a criminal charge. If the conviction should be reversed and the cause remanded, the costs to counties will be large sums.

(11) The particulars of all applications for appointed counsel made by the applicant or on his behalf during the year preceding this application:

(c) Liabilities.

(1) Names and ages of persons dependent upon applicant for support:

(2) Names and ages of dependents listed on Income Tax returns filed with the Internal Revenue Service in the three years immediately preceding this application:

(3) Amount of money expended for dependents listed in (1) and (2) in the three years immediately preceding this application:

(4) Nature and amounts of all debts owed by applicant:

(d) Computation.

The net amount of money available to applicant after deducting total liabilities from total assets should be computed against a cost of living factor available from the United States government. The surplusage shall be considered the amount of money available to applicant for engaging counsel.

(e) Ruling.

(1) If the amount of money computed in (d) is insufficient for the applicant to engage competent counsel, the court shall appoint counsel. Upon granting the applicant's request, the court shall enter an order to that effect and retain the application and order in the case file.

(2) If the amount of money computed in (d) is sufficient for the applicant to pay a portion of the costs of counsel fees, the court shall appoint counsel and instruct applicant to pay to the County Treasurer that portion of the fee applicant can afford to pay. Payment by applicant shall not be made until a verified copy of the costs of defense is filed with the Clerk of the Court for transmittal to the County Treasurer. Applicant shall receive one copy of such verified statement from the Clerk of the Court. Upon granting the applicant's request in accordance with this sub-section, the court shall enter an order to that effect and retain the application and order in the case file.

(3) If the amount of money computed in (d) is sufficient for applicant to retain private counsel, the court shall deny this application. Upon denying the applicant's request, the court shall enter an order to that effect and retain the application and order in the case file.

D. *Conclusion*

> The right to the assistance of counsel . . . is not based upon whether the defendant is rich or poor. It is a right with which we are all endowed.[39]

This right is the guarantee of the sixth amendment. The question is, does

[39] People v. Manikas, 87 Ill. App. 2d 227, 233, 230 N.E.2d 577, 580 (1967).

this guarantee extend to all persons when the law is practiced? Those who can afford to retain counsel are usually adequately represented. Those who cannot afford counsel, the truly indigent members of society, are also likely to be adequately represented by application of *Gideon v. Wainwright*.[40] But what of the criminal defendant who is neither financially secure nor totally indigent? How shall the sixth amendment affect the criminal defendant whose liabilities far exceed his assets? He is financially unable to afford counsel, but he is not legally indigent. He is, therefore, the person most likely to be inadequately represented. His position before the bar is as yet undefined. However, a trend is developing towards recognition of the rights of the person in this anomalous position. Nonetheless, no standard has been established to guarantee adequate representation of this class of criminal defendants. Thus, the need exists for the affirmative criterion suggested herein.

III. The Indigent Civil Litigant

The second major area of concern in this discussion is the right of indigent civil litigants to sue or defend in forma pauperis. The Constitution contains no reference to indigent plaintiffs or defendants in civil suits. Provisions for poor persons who are parties to civil suits have been left to the states; thus, no uniform guarantee exists among the states that a civil litigant who cannot afford to hire a lawyer will receive assigned counsel who is compensated by the state or county. Thus, the right to sue or defend as a poor person, in forma pauperis, is a statutory right granted by the state. Typically in forma pauperis statutes leave the determination of whether one is poor enough to sue as an indigent to the discretion of the trial court. One person, therefore, may be found to qualify for appointed counsel under the in forma pauperis statute; but another person similarly situated, except for venue, may not be declared not indigent. The lack of an adequate objective standard seems to present the opportunity for inadvertent abuse of discretion in trial courts hearing applications for leave to sue or defend in forma pauperis. A need for an affirmative, uniform, objective criterion for determining those persons eligible to sue or defend in forma pauperis seems to be manifest in Illinois.

A. *Historical Development of Forma Pauperis*

The privilege of suing or defending as a poor person was granted by English law as early as 1475. A dispute exists regarding whether the privilege existed by virtue of precedent or by statute. In *Brunt v. Wardle*[41] the court reasoned that the concept of in forma pauperis arose at common law. The court noted that the privilege was statutory in 11 Hen. VII chap. 12. The court further observed that the statute adopted the common law. It said:

> In the learned report of the Serjeants's [sic] case by my brother Manning, p. 41, note (d), a case is referred to that occurred in the 15 Edw.

[40] 372 U.S. 335 (1963).
[41] 3 Mann. & G. 534, 133 Eng. Reprint 1254 (1841).

> IV., twenty years before the passing of that act, from which it appears that at common law if a party would swear that he could not pay for entering his pleadings, the officer was bound to enter them gratis; and that in this court there was a presignator pur les poers.[42]

The opposite view was expressed in *Oldfield v. Cobbett*.[43] "The right to sue in forma pauperis," said the court, "originated in the statute of Hen. VII."

In either event, the right to sue or defend as a poor person existed in English law by the year 1475, some 300 years prior to ratification of the United States Constitution.

B. *In Forma Pauperis in Illinois*

The Illinois General Assembly adopted a statute in 1874 which granted the privilege of suing in forma pauperis.[44] The statute was not amended until 1933.[45] One of the earliest cases construing the statute was *Tracy v. Bible*,[46] wherein the Illinois Supreme Court quoted the statute:

> If any court shall, before or after commencement of any suit, be satisfied that the plaintiff is a poor person, and unable to prosecute his suit and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence and prosecute his action as a poor person.[47]

The court noted that the requisites of suit in forma pauperis in 1899 were: (1) the court's satisfaction that plaintiff was indigent; and (2) the court's discretionary grant of permission to sue or defend as a poor person; that is, without paying court costs and service of process fees.

The current Illinois statute granting the privilege to proceed in forma pauperis is found in Ill. Rev. Stat. chap. 33, par. 5 (1969):

> If any court shall, before or after the commencement of any suit, be satisfied that the plaintiff or defendant is a poor person, and unable to prosecute or defend suit and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence and prosecute his action, or defend suit, as a poor person; and thereupon such person shall have all the necessary writs, process, appearances and proceedings, as in other cases, without fees or charges. The court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without any fees, charge or reward. If judgment be entered for the plaintiff or defendant there shall be judgment for his costs; which costs shall be collected for the use of the officers. If the suit is settled without entry of judgment, the party who has thus been permitted to sue or defend as a poor person shall nevertheless be under the duty of paying forthwith to the Clerk of the

[42] *Id.* at 534.
[43] 1 Phill. Ch. 613, 41 Eng. Reprint 765 (1845).
[44] Law of Feb. 11, 1847, p. 297, § 5, now Ill. Rev. Stat. ch. 33, § 5 (1969).
[45] S.H.A. ch. 33, § 5 (1960).
[46] 181 Ill. 331, 54 N.E. 960 (1899).
[47] *Id.* at 332, 54 N.E. at 960.

> Court moneys or property received by him or on his account as the proceeds of any such settlement, the amount of all fees and charges which but for the leave given to sue or defend as a poor person, such party would have been required to advance to such officers respectively.

The elements listed in the modern statute are substantially the same as the elements found in the 1874 statute. Under both, the applicant must conform to the requirements of (1) satisfying the court of his indigence, and (2) convincing the court to exercise its discretionary authority to permit the applicant to sue or defend in forma pauperis. The statute of 1969, however, also grants to poor persons the right to court-appointed counsel. Chapter 33, sections 5, 5a and 6[48] assure that court costs and attorneys' fees shall be paid from any judgment or settlement in favor of plaintiff.[49] The statutory right to sue or defend as a poor person exists independently of another rule with which an applicant must comply, Illinois Supreme Court Rule 298.[50] That rule, adopted pursuant to Ill. Rev. Stat. chap. 110, § 2 (1969),[51] requires applicant's declaration of indigence:

> (a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by some other person having knowledge of the facts, stating:
>
> (1) the applicant's occupation or means of subsistence;
>
> (2) the applicant's income for the year preceding the application;

[48] Ill. Rev. Stat. ch. 33, §§ 5, 5a, 6 (1969).

[49] Ill. Rev. Stat. ch. 33, § 5a (1969):

> Where any person has been permitted by any court to commence and prosecute or to defend any suit as a poor person without the payment of costs and expenses, the Clerk of the Court and the Sheriff shall each have a lien upon every claim or demand, including every claim for unliquidated damages, asserted in such suit by the party who has thus been permitted to sue or defend as a poor person, and upon the proceeds thereof, for the amount of all fees and charges, becoming due such officer under the provisions of Section 5 of this Act, and remaining unpaid. Of the existence of such lien the order of court permitting the party to proceed as a poor person shall be sufficient notice to all other parties in the cause, as well as to any insurer or other third party in anywise liable for payment of any such claim or demand or portion thereof, who shall have been called upon to defend against the same or otherwise notified of the commencement of such suit and the assertion of such claim or demand.
>
> On petition filed in the court in which the suit has been commenced, the court shall, on not less than 5 days' notice to all parties concerned, adjudicate the rights of the petitioning officer or officers and enforce the lien or liens by all appropriate means.

Ill. Rev. Stat. ch. 33, § 6 (1969):

> If, prior to the commencement of any suit in a court of record, a person desiring to commence such suit in such court, shall file with the clerk thereof an affidavit, stating that he is a poor person and unable to pay the costs, and that his cause of action is meritorious, such clerk shall issue, and the sheriff shall serve, all necessary process without requiring costs: Provided, if judgment shall be entered against such plaintiff, it shall be for costs, unless the court shall otherwise order.

[50] Ill. Rev. Stat. ch. 110A, § 298 (1969).

[51] "Power of courts to make rules. (1) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration to justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in respect to small claims, including service of process therewith. . . ."

(3) the source and amount of any income expected by the applicant;

(4) the nature and value of any property, real or personal, owned by the applicant;

(5) the particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding the application;

(6) that the applicant is unable to pay the costs of the suit; and

(7) that the applicant has a meritorious claim or defense.

(b) Ruling. If the application is denied, the court shall endorse the fact of denial on the application. If the application is granted, the court shall enter an order allowing the applicant to sue or defend as a poor person.

Procedurally, a poor person seeking to sue or defend in forma pauperis must do the following: (1) file suit; (2) petition the trial court for permission to be exempted from court costs and service of process fees; (3) present to the court an affidavit in form and content complying with Supreme Court Rule 298. The court then has discretion to grant or deny the petition.

When the 1874 statute, quoted in the *Bible* case, is compared with the 1969 statute, the two do not seem significantly different. The following discussion is based upon the writer's inference that cases on appeal prior to 1937, when the 1969 statute was first promulgated in its present form, are applicable to 1971. The inference is based on the fact that the two stautes are substantially similar, on the fact that prior to 1937 many litigants appealed from denials by trial courts of applications to proceed in forma pauperis, and on the additional fact that since 1937, only two litigants have appealed.[52] The fact that only two appeals have been protested suggests that trial courts generally consider this area of the law to have been well settled before 1937.

C. *Judicial Interpretation in Illinois from 1881 to Present*

None of the statutes cited above contains a paradigm of what a trial court should consider when it exercises its discretion in passing on a Chapter 33 petition. The only "standard" is the court's discretion.[53] This standard like that of the criminal law discussed above, seems to be another incomplete standard. It is not affirmative; it is not negative; it is not directory for other courts; it is not a clear, concise reference point for trial courts which must decide whether a party to a suit qualifies as a poor person.

[52] Comstock v. Morgan Park Trust and Savings Bank, 367 Ill. 276, 11 N.E.2d 394 (1937); Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970).

[53] It could be argued that Supreme Court Rule 298 is the standard for trial courts to follow. The most obvious fallacy in that argument is that the Illinois Supreme Court is free to amend or revoke Rule 298 at anytime. The second difficulty is that Rule 298 is addressed only to the applicant's assets; there is no consideration of the applicant's liabilities. The danger in not balancing assets against liabilities is developed in section III C, herein.

1. *The Elements*

a. The Court's Discretion

Whether one is poor enough to sue or defend in forma pauperis is within the trial court's discretion. In *City of Rockford v. Russell*[54] the court said:

> This [granting or refusing the plaintiff's petition to sue in forma pauperis] is a matter that must be left in great measure to the discretion of the trial court, and with which an appellate court will not interfere unless such discretion has been greatly abused.[55]

The same holding appears in a long line of cases.[56] The trial court must exercise its discretion in granting or refusing plaintiff's petition. The trial court's ruling will be reversed only where such discretion has been "greatly abused." The most important question is left unanswered: that is, upon what facts is the discretionary judgment to be made? The cases on appeal are silent on this point. This obscurity by silence is not corrected by reference to any appellate cases because only three of the cases on appeal contain references to the petitioner's trial court application for permission to appear in forma pauperis.

(1) *Tracy v. Bible*[57]

The affiant swore that she was a poor person; that she had a meritorious claim; that she was unable to pay the costs of suit; that she had no property exempt from execution; and that her husband had no property exempt from execution.[58] The trial court denied plaintiff's petition on the ground that petitioner had failed to allege she owned no property. The appellate court affirmed. The inference for a trial court using *Tracy* as a reference in attempting to decide such a petition is that poor persons who *imply* that they own *some* property cannot sue in forma pauperis.

(2) *Stelzer v. Warder, Bushnell & Glessner Co.*[59]

Plaintiff, a minor, sued by his mother and next friend. Affiant swore he had a meritorious claim; that he had no property; that he could not pay the costs of suit; that he could not obtain sureties; that his father had absented himself from the state and contributed nothing to petitioner's support. Petitioner's mother filed a similar affidavit. The trial court refused the petition to sue in forma pauperis. The appellate court reversed and remanded with this comment:

[54] 9 Ill. App. 229 (1881).

[55] *Id.* at 232.

[56] Tracy v. Bible, 181 Ill. 331, 54 N.E. 960 (1899); Comstock v. Morgan Park Trust and Savings Bank, 367 Ill. 276, 11 N.E.2d 394 (1937); Chicago and I.R.R. v. Lane, 30 Ill. App. 437 (1888), aff'd, 130 Ill. 116, 22 N.E. 513 (1889); Wetz v. Greffe, 71 Ill. App. 313 (1897); Behrman v. Livingston, 83 Ill. App. 51 (1898), Roberts v. Brunz, 92 Ill. App. 479 (1900); Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970).

[57] 181 Ill. 331, 54 N.E. 960 (1899).

[58] It should be noted that by stating she had "no property exempt from execution," petitioner implied that she did own some property.

[59] 109 Ill. App. 137 (1902).

> While the trial court is clothed with a discretion in allowing or denying such a motion, yet we think that it appeared that the appellant is a minor, and his next friend and mother and himself are poor. . . . The trial court should have allowed [the petition]. . . .[60]

A trial court referring to the *Stelzer* case may infer very little about what facts are important in considering a petition to proceed in forma pauperis. No guide is provided here except the implication that the trial court may within its discretion, accept a petitioner's affidavit at face value.

(3) *Dear v. Locke*[61]

Petitioner's only source of income was support payments from her former husband, one of the parties defending this suit. In the year preceding the suit, petitioner had received $5350.00 for herself and her two children. The trial court denied her petition to proceed in forma pauperis. The appellate court affirmed. The only inference to be drawn from this case is that $5350.00 per year for three persons to live on bars the granting of a petition to sue or defend in forma pauperis.

These three cases lead to the conclusion that "the court's discretion" is a hollow phrase: (1) it is nebulous and difficult to define in these cases; and (2) not enough facts are given in the appellate decisions to guide trial courts. The implication is that trial courts are not considering facts when they are faced with a in forma pauperis petition. They appear, rather, to be making decisions on whether to permit or deny a petition solely on discretion.

Another inconsistency is that although Chapter 33, section 5 permits suit or defense in forma pauperis, no appellate cases exist in which the poor person appears as defendant. This situation suggests that (a) no one sues poor persons, (b) poor persons who apply to defend suits in forma pauperis are always granted the statutory right, or (c) poor persons whose applications to defend are denied do not appeal. Thus, meager guidance appears for other courts which must decide whether to grant or deny such a petition.

b. The Poor Person Need Not Be a Pauper

The plaintiff in *People ex. rel. Barnes v. Chytraus*[62] petitioned to sue in forma pauperis. Plaintiff's affidavit conformed to the statutory requirements. It did not, however, conform to the special rule promulgated by the trial court. For this nonconformity, the trial court refused plaintiff's petition. The Illinois Supreme Court reversed the trial court, saying:

> We are also of the opinion that it is unnecessary that either the applicant's attorney or the court should be satisfied that the applicant is a pauper. Many persons who are not paupers may rightfully be permitted by the courts to commence and prosecute actions as poor persons.[63]

[60] *Id.* at 138.
[61] 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970).
[62] 228 Ill. 194, 81 N.E. 844 (1907).
[63] *Id.* at 200, 81 N.E. at 846.

That statement seems to be direct and concrete; "it is unnecessary that . . . the applicant is a pauper." But what is a pauper? The court did not define the term. And how poor is poor? On what should the court base its ruling that a petitioner is not a pauper but is poor enough to proceed in forma pauperis? Is a poor person unemployed? Does he have a mortgage on a house? What if he owns a car? Must all his material possessions be disposed of before his petition can be granted? For all these questions there are no answers.

The *Barnes* case is 65 years old. Perhaps the courts have established a more concrete standard. The latest appellate decision is *Dear v. Locke.*[64] What standard did the court propose? It held:

> It has long been established in this state that leave to prosecute an action as a poor person . . . is within the sound discretion of the trial court, subject to reversal when such discretion has been abused. . . . While it is not necessary that one be a pauper to be granted to plead as a poor person (see, The People v. Chytraus, 228 Ill. 194, 195, 200, 81 N.E. 844 (1907), the trial court, in the case at bar, could have reasonably concluded that plaintiff was not a poor person. . . .[65]

Thus, the 1971 standard seems to be precisely the same as the 1907 standard: one need not be a pauper to plead in forma pauperis; one need merely satisfy the trial court that one is poor.

2. *Conclusion about the Elements*

The cases cited provide little guidance for trial courts considering the petitions of indigents. The cases do not seem to aid the courts in determining level of poverty, short of pauperism, which will permit suit in forma pauperis. Thus, the rights of indigents may be denied through inadvertent abuse of discretion in trial courts.

In the *Barnes* case trial courts are told that the petitioner need not be a pauper. In *Dear* that holding is repeated. Yet in *Tracy* an allegedly poor person whose affidavit merely implies ownership of property is denied the privilege of suing in forma pauperis. Although most courts have repeatedly held that one need not be a pauper in order to plead in forma pauperis, some courts have also held, either directly or by implication, that a petition in forma pauperis will be denied where petitioner's affidavit merely implies ownership of land and where a divorcee supports her two children and herself on $5300.00 per year in support payments from the very person whom she is suing. On the other hand, only one case at the appellate level reversed the trial court's refusal to grant the petition. In that case, the applicant and his mother recited facts which showed them to be *paupers*—a condition which need not be met by one petitioning for leave to plead in forma pauperis.

This situation seems contradictory. Supreme Court Rule 298 is of little

[64] 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970).
[65] *Id.* at 356, 262 N.E.2d at 30.

assistance in attempting to resolve this confusion. As noted above, the supreme court rule recites merely that the court should inquire into an applicant's assets. This fact implies simply that a trial court will review the applicant's affidavit in which only assets are listed. The court will then know nothing more than the amount of money the petitioner has and the value of the petitioner's property. No consideration seems to be given to whether the petitioner is supporting a large family or whether he has recently incurred large medical bills or any other fact which would tend to indicate that at the instant of suit the petitioner, while not a pauper, is poor. Yet, case law specifically permits granting a petition where the applicant is merely "poor" but not a pauper. Would it not be simpler, more efficacious and more in conformity with judicial policy to modify Supreme Court Rule 298 and decisional law to include a standard more concrete and objective than the court's discretion and a consideration of only assets? Would not the judicial intent to give poor persons a day in court, notwithstanding their inability to pay fees and costs, be more equitably applied by having a less subjective standard?

D. *New Standard*

The writer suggests the following standard to balance both assets and liabilities. It attempts to consider the two so as to reach a sound conclusion about an applicant's true ability to pay for his suit. It bears marked similarities to the suggested statute in Part II of this article. The two proposed applications are, however, significantly different because of the fact that a civil suit can end in a money judgment for an indigent plaintiff from whom costs and fees could be obtained, while a criminal defendant, of course, cannot recover a judgment or costs. Furthermore, the right to appointed counsel for a criminal defendant is guaranteed by the United States Constitution while the privilege to proceed in forma pauperis is granted by statute.

The writer recommends that the new standard should be in the form of an affidavit. It should appear as a revision of Ill. Rev. Stat. chap. 33, par. 5 (1969) or be adopted by the Illinois Supreme Court to replace Supreme Court Rule 298.[66] The following form is suggested:

APPLICATION TO SUE IN FORMA PAUPERIS

(a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by the affidavit of some other person having knowledge of the facts, stating:

(b) Assets.

(1) Applicant's occupation, if any:

[66] The power to create a new criterion is clearly within the authority of the Illinois General Assembly. It is also within the authority of the Illinois Supreme Court under Ill. Rev. Stat. ch. 110, § 2 (1969) and the "inherent power of the judiciary to regulate the practice of law and conduct the orderly administration of justice." People v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

(2) Applicant's net income reported to the Internal Revenue Service in the three years immediately preceding this petition:

(3) Source and amount of money owed to applicant:

(4) Nature of the debt due in (3):

(5) Nature and value of real propetry owned by applicant:

(6) Nature and value of personal property owned by applicant, *excluding* household furnishings and clothing:

(7) Nature and value of revocable trusts of which applicant is settlor and of trusts of which applicant is beneficiary, *except* future interests in property which will not become present interests within one year from the date of this affidavit:

(8) Amount of applicant's income or other means of subsistence in the year in which this petition is filed:

(9) Total amount of money in savings and checking accounts which bear applicant's name singly or as joint tenant or as tenant in common or as trustee or as beneficiary:

(10) The particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding this application:

(11) That the applicant is unable to pay the costs and fees of this suit:

(c) Liabilities.

(1) Names and ages of persons dependant upon applicant for support:

(2) Names and ages of dependants listed on Income Tax returns filed with the Internal Revenue Service in the three years immediately preceding this application:

(3) Amount of money expended for dependents listed in (1) and (2) in the three years immediately preceding this application:

(4) Nature and amounts of all debts owed by applicants:

(d) Computation.

The net amount of money available to applicant after deducting total liabilities from total assets should be computed against a cost of living factor available from the United States Government. The surplusage shall be considered the amount of money available to applicant for the costs and fees of suit.

(e) Ruling.

(1) If the amount of money computed in (d) is insufficient to permit applicant to pay the costs of the suit and counsel fees, the court shall grant the applicant's petition and appoint counsel, if so requested by applicant.

(2) If the amount of money in (d) is sufficient to pay a portion of the costs of the suit and counsel fees, the court shall grant the applicant's pay that amount of money deemed to the surplusage in (d).

(3) If the amount of money computed in (d) is sufficient for applicant to pay court costs, service of process fees and counsel fees, the court shall deny the applicant's petition.

(4) If judgment be entered for the plaintiff or defendant suing as a poor person there shall be judgment for his costs; such costs shall be collected by the plaintiff or defendant suing as a poor person for the use of the officers of the court. If the suit is settled without entry of judgment, the party who has thus been permitted to sue or defend as a poor person shall be under the duty of paying forthwith to the Clerk of the Court and the Sheriff respectively, out of any moneys or property received by him or on his account as the proceeds of any such settlement, the amount of all fees and charges which but for the leave given to sue or defend as a poor person, such party would have been required to advance to such officers respectively.[67]

(5) If the application is denied, the court shall endorse the fact of denial on the application and state the specific facts considered by the court. If the application is granted, the court shall enter an order allowing the applicant to sue or defend as a poor person and state the specific facts considered by the court.

F. Conclusion

The legislative intent expressed in Chapter 33, § 5 and implied in Supreme Court Rule 298 is that poor persons should not be barred from civil litigation merely because they cannot afford to pay court costs or attorney's fees. A trial court attempting to decide whether a petitioner qualifies to plead in forma pauperis has no guide for its decision except Supreme Court Rule 298 and decisional law. Each of these guides is incomplete. Rule 298 considers only assets. This incompleteness may lead to inadvertent abuse. For example, petitioner may be a creditor of the defendant, but because the defendant has refused to pay the debt upon which plaintiff now sues, plaintiff/petitioner is without funds to sue. To deny the petition leaves plaintiff without a remedy, but to grant the petition amounts merely to a loan to the plaintiff. The court costs and attorneys' fees could be levied against plaintiff's recovery, if any. But if the trial court follows Supreme Court Rule 298, only the assets are considered, and such a plaintiff could appear not to be a poor person because of the debt owing to him. Upon denial of his petition he would be left with nothing more than a costly appeal.

The case law does not offer much more of a guide than does Supreme Court Rule 298. What concrete guides are there for trial courts? One need not be a pauper. Yet, the definition of pauper is never given. The trial court should exercise its sound discretion in passing on the merits of a petition to plead in forma pauperis. Yet no paradigm appears in the cases.

The rights of human beings are in the balance. The costs of implementing and executing the systems proposed in both Parts II and III of this paper may

[67] This statement appears verbatim at Ill. Rev. Stat. ch. 110A, § 298 (1969).

be high, but it seems appropriate to ask whether the monetary cost to the state can ever be prohibitive where the rights of its citizens are in question? What's the answer for a society which prides itself on being a nation of laws and not men?

IV. Summary Statement

The commitment of the law to safeguard the rights of citizens to have their day in court, regardless of financial circumstances, is a strong one, steeped in a long and honorable heritage. At the time of the initial commitment, the law had done all that was socially acceptable and, perhaps, socially necessary. The United States has since developed complexities which demand change; the law responded by extending the rights of indigent criminal defendants and indigent civil litigants. Those extensions were necessary. They were socially acceptable. The social complexities are greater now, and the need to further extend and refine treatment of poor persons is manifest.

Lyle B. Haskin