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## BALANCE SHEET OF APPOINTED COUNSEL IN LOUISIANA CRIMINAL CASES

Under early Anglo-Saxon criminal law, the accused charged with a serious felony was expressly denied the aid of legal counsel.<sup>1</sup> The Bill of Rights of the United States Constitution rejected this harsh common law rule and guaranteed that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>2</sup> The constitutional right of an indigent defendant to the assistance of court appointed counsel was recognized by the United States Supreme Court in *Powell v. Alabama*<sup>3</sup> and expanded in *Gideon v. Wainwright*.<sup>4</sup> The most recent judicial interpretation of the right to counsel appears in *Argersinger v. Hamlin*,<sup>5</sup> which held that no person may be imprisoned for *any* offense, unless represented by counsel at his trial.<sup>6</sup>

The results of surveys vary,<sup>7</sup> but studies indicate that from 50%<sup>8</sup>

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1. 4 W. BLACKSTONE, COMMENTARIES \*355.

2. U.S. CONST. amend. VI; *accord*, LA. CONST. art. I, § 9. For an excellent history of the right to counsel, see NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, REPORT TO THE NATIONAL DEFENDERS CONFERENCE 1 (1969).

3. 287 U.S. 45 (1932).

4. 372 U.S. 335 (1963).

5. 407 U.S. 25 (1972).

6. The United States Supreme Court has long recognized that the right to appointed counsel should not be limited to the trial alone. *See, e.g.*, *Moore v. Michigan*, 355 U.S. 155 (1957). The point of attachment of the right to appointed counsel has been characterized as the crucial stage of the proceedings where substantial rights of the accused may be affected. *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961). *See Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary examination); *Johnson v. Avery*, 393 U.S. 483 (1969) (in prison); *Mempa v. Rhay*, 389 U.S. 128 (1967) (at probation violation hearing); *Gilbert v. California*, 388 U.S. 263 (1967) (at post indictment line up); *United States v. Wade*, 388 U.S. 218 (1967) (at post indictment line up); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation); *White v. Maryland*, 373 U.S. 59 (1963) (preliminary hearing). *But see Kirby v. Illinois*, 406 U.S. 682 (1972) (not at pre-indictment identification).

*Argersinger* has replaced the felony-misdemeanor dichotomy with a jail-fine distinction. At least one state has extended appointed counsel to *all* criminal prosecutions. *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888 (1967). *See FED. R. CRIM. P.* 44(a) (every defendant). *See also State v. Coody*, 275 So. 2d 773, 775 (La. 1973) where the Louisiana supreme court, in response to *Argersinger* stated: "[W]e must change our practice in respect to misdemeanors which *may* carry a prison sentence and must afford an accused charged with such a misdemeanor the same rights in regard to counsel afforded a defendant on trial for a felony." (Emphasis added.)

7. L. SILVERSTEIN, DEFENSE OF THE POOR 7-11 (1965) [hereinafter cited as DEFENSE OF THE POOR].

8. Note, 18 DE PAUL L. REV. 243, 249-50 (1968) [hereinafter cited as DE PAUL];

to 90%<sup>9</sup> of all *Argersinger* defendants will be financially unable to retain private counsel. The need for critical analysis of the socio-economic considerations which determine an "indigent"<sup>10</sup> and the paramount importance of proper determination of eligibility for court appointed counsel are apparent.

In virtually all Louisiana parishes, the trial court has no explicit criteria for determining a defendant's eligibility for court appointed counsel.<sup>11</sup> However, R.S. 15:142(N),<sup>12</sup> though applicable to only three

*cf.* Jacob & Sharma, *Justice After Trial: Prisoner's Need for Legal Services in the Criminal—Correctional Process*, 18 KAN. L. REV. 493, 509 (1970).

9. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 18 (1963) [hereinafter cited as MINN. REPORT].

10. The requirement of indigency is a throwback to the English poor law and connotes a *total* absence of financial resources. COMMITTEE ON THE JUDICIARY UNITED STATES SENATE SUB-COMMITTEE ON CONSTITUTIONAL RIGHTS, 90th Cong., 2d Sess., *THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS* 23 (Comm. Print 1969) [hereinafter cited OAKS REPORT]. "The term 'indigency' is avoided because of its implication that only an accused who is destitute may need appointed counsel or services." Letter of Transmittal from Attorney General Robert F. Kennedy to President John F. Kennedy, H.R. REP. No. 864, 88th Cong., 1st Sess. (1963). *See also* Hardy v. United States, 375 U.S. 277, 289 n.7 (1964) (concurring opinion).

11. The prevailing attitude among trial judges is that they will know an indigent when they see one. "Judges and commissioners whom we interviewed almost uniformly declared that there was seldom any doubt as to whether or not an individual defendant qualified . . ." OAKS REPORT 26. *See also* Evans & Ross, *Legal Aid in New Zealand and Abroad*, 5 NEW ZEALAND U. L. REV. 1, 8-9 (1972) (trial judge appoints counsel "in the interest of justice").

There is generally no procedure to determine eligibility. "The strongest impression that emerges from a review of these data is that many of the sample counties have very little system at all." DEFENSE OF THE POOR 105. *Accord*, Letter from Donald K. Tsukiyana, Public Defender, State of Hawaii, to Criminal Justice Program, L.S.U. Law Center [hereinafter cited as CJP], July 11, 1972 (no guidelines); Letter from Jacob L. Safron, Asst. Att'y Gen., State of N.C., to CJP, July 11, 1972 (no guidelines or criteria). *Cf.* State v. Wright, 281 N.C. 38, 187 S.E.2d 721 (1972); Letter from Donald S. Young, Chief Asst. Att'y Gen., State of Utah, to CJP, Aug. 8, 1972 (no statutory criteria); Letter from Gary E. Wegner, Asst. Att'y Gen., State of Wash., to CJP, July 17, 1972 (no state wide criteria); Note, 47 TUL. L. REV. 446, 447 n.6 (1973): "At present there is no uniform method among the states for determining indigency. With the right to court-appointed counsel now expanded, it becomes even more imperative that a uniform definition of indigency be adopted and applied by the states . . ."

12. LA. R.S. 15:142(N) (Supp. 1972) (originally enacted as Act 616 of 1972):

(1) The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings. The public defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

(2) In proceedings for the determination of insolvency there shall be a presumption of solvency and the defendant shall have the burden of rebutting the presumption by

judicial districts,<sup>13</sup> does delineate express standards. It is the purpose of this Comment to set forth criteria for the appointment of counsel by detailed analysis of the Louisiana Act in light of the experience of other jurisdictions, and to offer suggestions for a state-wide implementation of some of the Act's provisions.

### *Definition of Indigency*

In Louisiana, a defendant who is financially unable to procure counsel is deemed "indigent"<sup>14</sup> for the purposes of court appointed legal counsel.<sup>15</sup> The defendant must declare under oath that he desires an attorney, but is unable to retain private counsel.<sup>16</sup> The court

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competent proof. The following facts shall be prima facie evidence of solvency:

(a) That the defendant has been released on bail in the amount of fifteen hundred dollars or more and said bill was deposited in cash or the defendant deposited a commercial bailbond.

(b) That the defendant has no dependents and his gross income exceeds seventy-five dollars per week; the income limit shall be increased by ten dollars per week for each of the first two dependents of the defendant and by five dollars per week for each dependent beyond the first two;

(c) That the defendant owns cash in excess of three hundred dollars.

(3) The court shall also consider the following additional circumstances in determining insolvency:

(a) The probable expense and burden of defending the case;

(b) The ownership of, or an equity, in any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant; and

(c) The amount of debts owed by defendant or debts that might be incurred by the defendant because of illness or other misfortunes with his family.

13. Act 616 of 1972 created the Office of Public Defender for the Seventh, Eighteenth and Twenty-Second Judicial Districts. The act provides detailed criteria to determine the eligibility of the accused for appointed counsel, some of which shall be prima facie evidence of solvency, while others shall be considered as additional circumstances in determining insolvency.

14. United States Supreme Court opinions have referred to "indigent" defendants without offering any concise definition, and very few state statutes have chosen to elaborate. Comment, 4 ST. MARY'S L.J. 34, 36 (1972). State judicial definition is infrequent and inconsistent. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 53 (app. draft 1968) [hereinafter cited as STANDARDS OF DEFENSE SERVICES]; accord, *People v. Morris*, 30 Mich. App. 169, 170, 186 N.W.2d 10, 11 (1971) (indigency impossible to define); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 7-8 (1963) [hereinafter cited as the ALLEN REPORT after its chairman, Dean Frances A. Allen] (indigency difficult to define).

15. LA. R.S. 15:141(F) (Supp. 1972); LA. CODE CRIM. P. art. 513.

16. LA. CODE CRIM. P. art. 513; LA. R.S. 15:141(F) (Supp. 1972); LA. R.S. 15:142(N) (Supp. 1972). See *State v. Blankenship*, 186 La. 238, 172 So. 4 (1937) (oath sufficient to assert inability to employ counsel). But mandatory counsel, without re-

shall then determine the defendant's eligibility for appointment.<sup>17</sup> In determining eligibility, there is a presumption of solvency and the accused has the burden of rebuttal.<sup>18</sup> However, this presumption is contrary to recognized economic reality, as documented evidence shows that the vast majority of defendants are *not* financially able to retain counsel.<sup>19</sup> The jurisprudence of other states holds that in marginal cases, doubt should be resolved in favor of appointed counsel for the defendant.<sup>20</sup> Since the issue is one of constitutional right to counsel, and not a mere gratuity, the presumption of solvency should not be strictly construed by the trial court.<sup>21</sup>

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gard to need, is provided where the defendant, charged with a capital offense appears at arraignment unrepresented by an attorney, or where the question of mental capacity of the accused is raised. LA. R.S. 15:141(F) (Supp. 1972). "Such assignment of counsel will be automatic. It will not be dependent upon indigency of the unrepresented defendant . . . ." LA. CODE CRIM. P. art. 512, comment (a).

17. Many trial judges are reluctant to deny defendant's request for appointed counsel, in a good faith effort to administer equal justice to all. Other judges will seldom deny requested counsel because they are overly sensitive of their "track record" at the appellate bench.

Although trial court determination is the usual procedure throughout the country, "[i]t is suggested, however, that in any system it is generally not necessary for a judicial officer to go through the tedium of ascertaining all the information required before appointment takes place." NATIONAL DEFENDER PROJECT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, REPORT TO THE NATIONAL DEFENDER CONFERENCE 40 (1969). Administrative determination might be made a regular part of the booking process, subject to judicial review and confirmation. See OAKS REPORT 26; STANDARDS OF DEFENSE SERVICES 56. *But see* Mathis, *Financial Inability to Obtain an Adequate Defense*, 49 NEB. L. REV. 37, 61 (1969) [hereinafter cited as 49 NEB. L. REV.] (delegation of determination unwise). A magistrate, an agent of the court who evaluates for release on recognizance, or a public defender could be integrated into the initial processing of a defendant after his arrest and could easily make an initial recommendation where appropriate. At any rate, "it is imperative that a means be provided to make a determination of eligibility as soon as possible after a person is taken into custody." STANDARDS OF DEFENSE SERVICES 56. See, e.g., MINN. STAT. ANN. § 611.17 (Supp. 1965); 49 NEB. L. REV. at 61 (magistrate); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE § 5.1 (app. draft 1968) [hereinafter cited as STANDARDS OF PRETRIAL RELEASE] (R.o.R. agent); ALASKA STAT. § 18.85.120(b) (Supp. 1969); CAL. GOV'T CODE § 27707 (Supp. 1969) (public defender to defend denial of counsel); COLO. REV. STAT. ANN. § 39-21-3(3) (1963); NEB. REV. STAT. § 29-1804(3) (Supp. 1972).

18. LA. R.S. 15:142(N)(2) (Supp. 1972). *Cf.* FLA. STAT. ANN. § 27.52(2)(a) (Supp. 1971).

This writer was unable to verify the exact source of LA. R.S. 15:142(N), but the similarity to FLA. STAT. ANN. § 27.52 (Supp. 1971) is noted.

19. See text at note 8 *supra*.

20. See *State v. Allen*, 105 Ariz. 267, 463 P.2d 65 (1969) (presumption of indigency in marginal cases); *Hooks v. State*, 253 So. 2d 424 (Fla. 1971) (doubt of indigency resolved in favor of accused), *cert. denied*, 405 U.S. 1044 (1972).

21. It is suggested that a needy defendant who at the time of determination is

*Assets of the Defendant**Bail*

The Louisiana Act, following the majority approach,<sup>22</sup> provides that an accused is prima facie solvent if he has been released on bail in the amount of fifteen hundred dollars or more.<sup>23</sup> However, the utilization of bail as an element of determination places the defendant in the questionable dilemma of having to choose between legal representation or liberty pending trial.<sup>24</sup> Since the defendant's pre-trial liberty may be essential to trial preparations, the quandary may be a denial of his right to an effective defense.

In order to avoid this dilemma, courts should not consider the defendant's posting of a commercial bond as definitive. In such a case, even upon punctual appearance at trial, the bond fee is lost as an asset to the accused. On the other hand, where the defendant posts a cash bond, this bond should be considered an asset of the accused

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unable, without substantial hardship to himself or his family, to provide for payment of an attorney and all other necessary expenses is eligible for appointed counsel. UNIFORM LAW COMMISSIONERS' MODEL DEFENSE OF NEEDY PERSONS ACT § 1(3) [hereinafter cited as NEEDY PERSONS ACT]; VT. STAT. ANN. tit. 13, § 5236 (Supp. 1971). See also STANDARDS OF DEFENSE SERVICES § 6.1 at 10; cf. ALASKA STAT. § 18.85.170(40) (Supp. 1969); MINN. REPORT 21.

22. In states that consider bail as a factor: (1) Bail renders accused ineligible for appointed counsel (21 counties in 11 states); (2) Bail was primary test of eligibility (40 counties in 25 states); (3) Bail a factor, but not dominant (181 counties in 41 states). DEFENSE OF THE POOR 107. A few jurisdictions do not consider bail as a factor. See *People v. Eggers*, 27 Ill. 2d 85, 188 N.E.2d 30 (1963); GA. CODE ANN. § 27-3001 to -3003 (Supp. 1968); ARIZONA STATE BAR COMMITTEE ON CRIMINAL LAW, PROPOSED RULES OF CRIM. P. § 6.4, comment at 21 (1972) [hereinafter cited as PROPOSED ARIZ. RULES]; NEEDY PERSONS ACT § 4(b); DEFENSE OF THE POOR 107 (release on bail not considered at all in 31 counties in 15 states). But see MINN. REPORT 31: "Obviously, a person who has raised bail is less likely to be indigent than one who has not. It hardly follows, however, that all persons out on bail are non-indigent."

23. LA. R.S. 15:142(N)(2)(a) (Supp. 1972): "That the defendant has been released on bail in the amount of fifteen hundred dollars or more and said bail was deposited in cash or the defendant deposited a commercial bailbond." But see FLA. STAT. ANN. § 27.52(b)(1) (Supp. 1971) (makes no mention of commercial bond).

24. STANDARDS OF DEFENSE SERVICES § 6.1, comment c, at 55. The institution of bail as a facet of the criminal justice system has been much criticized and its function as a factor in determining eligibility for appointed counsel is suspect. See generally OAKS REPORT 28-29; STANDARDS OF PRETRIAL RELEASE; J. FREED & P. WALD, BAIL IN THE UNITED STATES (prepared as a working paper for the National Conference on Bail and Criminal Justice in Washington, D.C., 1964); R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL (1966); Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEXAS L. REV. 319 (1965); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125 (1965).

since it will be returned *in toto* upon appearance at trial.<sup>25</sup> However, this should be only one factor in the total determination of eligibility.

### *Income*

The Act further provides that a defendant with a gross income exceeding seventy-five dollars per week is *prima facie* solvent.<sup>26</sup> The income limit is increased ten dollars per week for each of the first two dependants, and five dollars for each additional dependant. The income limit has been criticized,<sup>27</sup> because "no dollar standard of income or assets can be established which will serve the purpose."<sup>28</sup> At least one court has expressly rejected a higher fixed scale income level (\$85.00 per week with no dependants) as inadequate and the trend is toward a more dynamic approach to income evaluation, taking into consideration such volatile factors as inflation and rural-urban cost of living differences.<sup>29</sup> As a result, one state has wisely proposed the federal minimum hourly wage as a criteria.<sup>30</sup> Finally, current income should be considered only to the extent that it will continue, notwithstanding the defendant's arrest and pre-trial confinement, and then only as one factor in the eligibility determination.

Although the statute provides a *gross* income figure, the impropriety of charging toward the defendant's ability to employ counsel mandatory deductions such as income tax and union dues, is obvious. A better position would be to consider only *net* income, and then only in a relative view toward the entire economic picture of the accused.

### *Cash*

The Act finally provides that a defendant who owns cash in

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25. However, friends, relatives or employers may be willing to post a cash bond, being confident the accused will appear at court, but be unwilling or unable to finance attorney fees. Since this cash is not at the disposal of the defendant upon his appearance, it should not be considered an asset.

26. LA. R.S. 15:142(N)(2)(b) (Supp. 1972).

27. "Standards that allow determination of financial eligibility solely on a fixed scale of specific income levels . . . should not be established." NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, HANDBOOK OF STANDARDS FOR LEGAL AID AND DEFENDER OFFICES 4 (1970) [hereinafter cited as DEFENDER HANDBOOK]. See OAKS REPORT 63 (prior earning level considered only if retained as net asset available for defense expenditures); Comment, 4 ST. MARY'S L.J. 40 n.35 (1972): "In the long run, such factors lead to the human tendency to bureaucratize the whole process of analysis."

28. STANDARDS OF DEFENSE SERVICES § 6.1, comment a, at 53.

29. Samuel v. United States, 420 F.2d 371 (5th Cir. 1969) (defendant with weekly salary of \$85.00-\$90.00 per week, no dependents, no property or money was indigent).

30. Letter from Gerald Grieman, Spec. Asst. Att'y Gen., State of Minnesota, to CJP, Aug. 16, 1972.

excess of three hundred dollars is prima facie solvent.<sup>31</sup> Should a defendant with cash assets in excess of three hundred dollars, but *in fact* unable to employ retained counsel because of the unpopularity of his cause, or the gravity of the offense be considered eligible for appointed counsel? Reason would certainly support appointment.<sup>32</sup> The three hundred dollars figure appears to suffer the same defect of rigidity as does a fixed level of income.<sup>33</sup>

### *Property*

The Act also provides as an additional factor in determining insolvency "[t]he ownership of, or an equity, in any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant . . . ."<sup>34</sup> Generally, personal movable property encompasses all individual and household possessions of the defendant.<sup>35</sup> Since such property is usually a necessary adjunct to family existence, personal assets should not normally be considered as a fee source. Furthermore, most personal property is not the object of active commercial transactions, thus being difficult to assess and possessing a nominal resale value.<sup>36</sup> However, personal luxury items could reasonably be ordered sold.<sup>37</sup>

Immovable property of the defendant should generally not be considered as a fee source where the property involved is the mortgaged residence.<sup>38</sup> A mortgaged house usually has little convertible equity, and payments approximate rent, being a legitimate necessary family expense.<sup>39</sup> However, where the immovable property in ques-

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31. LA. R.S. 15:142(N)(2)(c) (Supp. 1972). Cf. FLA. STAT. ANN. § 27.52(3) (Supp. 1971).

32. Counsel, appointed to represent an unpopular, but not needy, defendant should be allowed a reasonable fee commensurate with the services provided, and not paid according to an indigency fee schedule. See OAKS REPORT 45.

33. See note 27 *supra*.

34. LA. R.S. 15:142(N)(3)(b) (Supp. 1972). Cf. FLA. STAT. ANN. § 27.52(3)(C)(2) (Supp. 1971).

35. See DE PAUL at 258.

36. How does the trial judge appraise the value of thirty-six coon hounds? Unfortunately, the defendant had to give the dogs away before the decision was rendered because he could no longer afford to feed them. See generally 49 NEB. L. REV. at 53 (1969); Timber, *Judicial Perspectives on the Operation of the Criminal Justice Act of 1964*, 42 N.Y.U.L. REV. 55, 58-59 (1967).

37. See *State v. Bernal*, 474 P.2d 864 (Ariz. Ct. App. 1970) (refusal to sell late model car was voluntary and intentional waiver of counsel).

38. See DE PAUL at 258.

39. Cf. *Rast v. State*, 77 Fla. 225, 81 So. 523 (1919) (accused owned real property valued at \$18,000 but was unable to realize money by loan or mortgage); *People v.*



tion is not a residence, the property should be considered as a convertible asset unless it is low in value and the defendant relies on the property as his sole means of income.<sup>40</sup>

Automobiles have caused courts in other jurisdictions more difficulty than any other single item of property.<sup>41</sup> Since an auto sale is a common business transaction, and the market value is easily ascertainable, a luxury car certainly should be subject to court ordered sale for the purpose of retaining counsel. However, a different answer should result where the auto in question is a modest type, or is the business vehicle of the accused. This car should be classified as a necessity, not a liquid asset, and not subject to ordered sale.

Finally, the Louisiana statute provides that "the expectancy of an interest in any such property by the defendant"<sup>42</sup> is to be considered as a factor in determining insolvency. However, courts should recognize the fact that few lawyers will accept employment in exchange for the speculative asset of an uncertain hope.<sup>43</sup> "[I]ncome or resources obtained after these events . . . is a separate question that ought not to affect the defendant's eligibility for counsel or services which he presently needs but has no means of providing."<sup>44</sup>

#### *Collateral Assets of the Defendant*

The Act makes no mention of the impact on eligibility of collateral assets of either the spouse or parents of the accused. There is a split of authority in other jurisdictions as to whether the resources of the defendant's spouse should be considered as an asset for the purpose of determining eligibility for appointed counsel. "For the most part, resources of the spouse are considered a disqualification . . . only if the resources are community property."<sup>45</sup> The spouse's separate assets should not be included where the court determines that because of marital estrangement or other reason, the spouse's separate assets will not *in fact* be available for providing defendant's

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Griffin, 22 Mich. App. 101, 177 N.W.2d 213 (1970) (defendant lost equity in divorce settlement).

40. A classic example would be a defendant who operates a T.V. repair shop with assets being the lease on the small shop and the repair equipment and tools. Liquidation of this business would be unwise and unjust.

41. See, e.g., United States *ex rel.* Beard v. Rundle, 434 F.2d 588 (3d Cir. 1970) (finding of indigency clearly erroneous where defendant had two cars and no showing of debt).

42. LA. R.S. 15:142(N)(3)(b) (Supp. 1972).

43. See LA. CIV. CODE art. 2451.

44. OAKS REPORT 63.

45. STANDARDS OF DEFENSE SERVICES 54, as quoted from DEFENSE OF THE POOR 109.

defense.<sup>46</sup> Moreover, in the analogous determination of eligibility for appeal *in forma pauperis*, most of the recent cases have held that the separate resources of the spouse or relative should not be considered.<sup>47</sup> The better approach is to consider only the defendant's patrimony since

the question in inquiries as to insolvency is not whether the defendant's supposed friends or *spouse* or relatives have the ability or readiness or willingness to provide the funds, but whether the defendant *personally* has the means, or property which can be converted to the means, to employ an attorney to represent him.<sup>48</sup>

Since parents are generally not responsible for the crimes of their children,<sup>49</sup> judges usually ignore the income or resources of parents in determining the eligibility of juveniles brought before them.<sup>50</sup> The "privileged pauper"<sup>51</sup> college student will often claim to be indigent for appointed counsel. One recent Illinois case has held that counsel should not be denied a college student on the basis that parents, with whom the student lived during the summer and provided full support for the education, could easily have afforded defense costs, but refused.<sup>52</sup> The Louisiana courts ought to reach the same result. Since the Louisiana Act conspicuously dropped the parental responsibility provision of the Florida statute while enacting the remainder verbatim, it appears that the intent of the Louisiana legislature was to consider *only* the defendant's assets, not the parent's.

### *Liabilities of the Accused*

#### *Debts*

Under the Act, the court shall consider "[t]he amount of debts

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46. See OAKS REPORT 31.

47. STANDARDS OF DEFENSE SERVICES 54; *accord*, State v. Owen, 97 Ariz. 250, 399 P.2d 660 (1965); State v. Vallejos, 87 Ariz. 119, 348 P.2d 554 (1960); Lawrence v. State, 76 So. 2d 271 (Fla. 1954); Gaston v. State, 106 So. 2d 622 (Fla. Ct. App. 1958).

48. Keur v. State, 160 So. 2d 546, 549 (Fla. Ct. App. 1964) (Emphasis added.); *accord*, Swilley v. State, 76 Fla. 173, 79 So. 715 (1918).

49. W. PROSSER, TORTS § 123, at 869 (4th ed. 1971).

50. OAKS REPORT 29-30. See PROPOSED ARIZ. RULES 21. *But see* State *ex rel.* Butler v. Allen Cir. Ct., 241 Ind. 627, 170 N.E.2d 663 (1961) (parents have duty to provide counsel for child).

51. Comment, 4 ST. MARY'S L.J. 45 (1972).

52. People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517 (1971). A possible abuse of this position was reported where a prominent attorney refused to fund his son's defense in a criminal case. However, his refusal was upheld by the court. OAKS REPORT 29.

owed by the defendant or debts that might be incurred by the defendant because of illness or other misfortunes within his family."<sup>53</sup> The latter clause appears to take into consideration the normal economic reversals that are often a by-product of an arrest (*i.e.*, loss of job), and represents a recognition of the familial responsibility which will persist during the pre-trial period.<sup>54</sup>

The Act does not expressly provide for inclusion, as a liability, of vital personal and family expenses such as food, shelter, or medicine.<sup>55</sup> The court should interpret "debt" to also include familial obligations of support, and rightfully add this important consideration to the defendant's liabilities.<sup>56</sup>

### *Defense Cost*

"The probable expense and burden of defending the case" shall also be considered by the trial court.<sup>57</sup> The estimated fee must take into account the gravity of the offense charged.

If a man faces a charge of robbery, rape, or first degree murder, and is looking at substantial attorneys' fees for his defense even though he has a good job, he may well be indigent as opposed to a man who faces a charge of careless driving or an illegal left turn, or petty theft . . .<sup>58</sup>

The actual cost of retained counsel will vary from city to city, depending upon the prevailing rate at the bar.<sup>59</sup> This provision should be interpreted to guarantee an adequate defense,<sup>60</sup> always presuming

53. LA. R.S. 15:142(N)(3)(c) (Supp. 1972). *Cf.* FLA. STAT. ANN. § 27.52(3)(C)(3) (Supp. 1971).

54. For three cases where debts were the crucial factor in determination of eligibility, see *Grimes v. State*, 278 N.E.2d 271 (Ind. 1972); *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972); *State v. Right*, 281 N.C. 38, 187 S.E.2d 761 (1972).

55. *But see* STANDARDS OF DEFENSE SERVICES 54.

56. *See* *Anderson v. Stae*, 85 So. 2d 123 (Fla. 1956) (defendant with income barely able to support family eligible).

57. LA. R.S. 15:142(N)(3)(a) (Supp. 1972). *Cf.* FLA. STAT. ANN. § 27.52(3)(C)(1) (Supp. 1971). See the interesting situation in *Baker v. State*, 42 So. 2d 768 (Fla. 1949) where the defendant sold property valued at \$8,000.00, paid bond, retained seven lawyers, but was held indigent on appeal.

58. Letter from Rollie R. Rogers, Colo. State Public Defender, to CJP, July 14, 1972.

59. Average retainer would range from a high of over \$5,000.00 for serious felonies to a low under \$100.00 for a minor crime.

60. *Competent* defense, and its exact definition is the subject of present debate. As yet, there is no agreement as to difference between a Homeric nod of counsel, and incompetent defense. *See* Note, 33 LA. L. REV. 740 (1973).

that any charge will go fully to trial, and not anticipate a possible guilty plea.<sup>61</sup> Finally, a court may properly consider whether the trial is to be before a judge alone, or a jury, as this fact will have a bearing on the retainer demanded by private counsel.<sup>62</sup>

The cost of supporting legal services<sup>63</sup> should also be considered in estimating, the "probable expense and burden of defending the case."<sup>64</sup> Although most courts have held that there is no constitutional obligation to provide an indigent defendant with supporting services,<sup>65</sup> the Louisiana Act should be construed to include this assistance.<sup>66</sup> If so construed, the trial court could utilize pre-trial discovery procedures to eliminate expensive duplication of effort.<sup>67</sup>

### *Part Payment of Appointed Counsel*

If the defendant is financially able to afford counsel, the trial court informs him that he is ineligible and advises him to retain a private lawyer.<sup>68</sup> Thus the Louisiana Act presents an "all or nothing" approach to eligibility. The better view is that defendant's ability to pay *part* of the cost of his defense should not preclude state assistance. Louisiana should follow the lead of other jurisdictions which have enacted a part payment scheme in order to protect the constitu-

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61. See OAKS REPORT 25.

62. See 49 NEB. L. REV. at 51.

63. The crucial importance of adequate supporting defense services is emphasized in NEDDY PERSONS ACT § 2(a). See 18 U.S.C. § 3006A(e) (1970); OAKS REPORT 55; STANDARDS OF DEFENSE SERVICES § 1.5 at 7, 22-24.

64. LA. R.S. 15:142(N)(3)(a) (Supp. 1972).

65. STANDARDS OF DEFENSE SERVICES 23. See, e.g., State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960). But see State ex rel. Marshall v. Eighth Jud. Dist. Ct., 80 Nev. 478, 396 P.2d 680 (1964). Trial lawyers uniformly stress the crucial importance of adequate investigation, expert witnesses, examination and testing. See Note, 47 MINN. L. REV. 1054, 1060-61 (1963). The quality of representation at trial may be excellent, yet valueless if the defense requires supporting services and none are available. STANDARDS OF DEFENSE SERVICES 23. Several states have provided supporting services to indigents by statute. See, e.g., FLA. STAT. ANN. § 914.06 (Supp. 1970); ILL. REV. STAT. ch. 38, § 113-3(e) (1969); N.Y. CODE CRIM. PRO. § 308 (1958); PA. STAT. ANN. tit. 19, § 784 (1964).

66. It can be stated that one of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense.

67. See ADVISORY COMMITTEE—CONTINUOUS REVISION OF [LA.] CODE OF CRIMINAL PROCEDURE AND CRIMINAL CODE, PROPOSED DISCOVERY PROCEDURE, March 30, 1973.

68. A practical test to determine whether defendant is able to afford retained counsel would be whether he can do so when he is informed of being ineligible. A strong argument can be made that if the defendant is *in fact* unable to retain counsel, his eligibility should be reconsidered for possible appointment.

tional right to counsel of the defendant and conserve the state's limited financial resources.<sup>69</sup>

### *Procedural Safeguards*

"[T]he most widely felt abuse of the assignment system is the false claim of indigency to obtain free counsel."<sup>70</sup> It would appear that greater confidence in the ability of retained counsel, coupled with general suspicion of all court appointed lawyers as mere instruments of the state, would check fraudulent claims; however, the opposite has often been shown to be the case.<sup>71</sup> The Louisiana Act does not prescribe a uniform procedure implementing its stated criteria. Authorities suggest three steps to not only reduce false claims, but also insure that adequate reliable information is provided uniformly to all trial judges. First, there should be a complete financial disclosure under oath on a standard questionnaire.<sup>72</sup> Second, each claim should be investigated.<sup>73</sup> Although it has been contended that extensive in-

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69. DEFENSE OF THE POOR 112. See, e.g., GA. CODE ANN. § 27-309 (Supp. 1968).

70. Note, 76 HARV. L. REV. 579, 585 (1963); accord, OAKS REPORT 33: "Many members of the bar and U.S. attorneys felt that a significant proportion of defendants are guilty of cheating on the eligibility standards."

71. Where an established public defender office has a reputation of trust in the community, or where it is generally known that appointments usually come from a select criminal bar, highly experienced and greatly respected, defendant would be tempted to cheat on claims, not wanting the inferior counsel that his meager means could provide. Finally, the bare economic advantage to the defendant of receiving *gratis* counsel cannot be overlooked. See generally OAKS REPORT at 37.

72. The Louisiana supreme court, in the absence of legislative initiative, could promulgate a standard application questionnaire for appointment of counsel. This step would assure that uniform information is provided all judges throughout the state, while retaining appointing authority at the trial level. See DEFENSE OF THE POOR 116. Note the Supreme Court of Pennsylvania has promulgated an application form for assignment of counsel. See GA. CODE ANN. § 27-3209 (Supp. 1968) (Superior court may prescribe questionnaire to be used by all courts within the county) Defendant's refusal to provide information is generally held to be a waiver of counsel. See *Quilivan v. State*, 94 Idaho 334, 487 P.2d 928 (1971).

73. The type of investigation would depend largely upon the size and resources of the community. See STANDARDS OF DEFENSE SERVICES 58. In smaller cities, the clerk of court or the sheriff could verify the information provided by the defendant in his application for counsel. See, e.g., ALA. CODE tit. 15, § 318(8) (Supp. 1971) (Judge may order sheriff to investigate defendant's financial condition.) In larger communities, the judge could utilize the services of the welfare agency, or department of probation and parole. See *Martin, Legal Aid in Ontario*, 10 CANADIAN B.J. 473, 480 (1967) (application of defendant investigated by welfare officer); Letter from Howard J. Camuso, Asst. Att'y Gen., State of Mass., to CJP, July 10, 1972. Depending upon the case load, part-time investigators may best serve a moderate size community, whereas in the larger cities, full time investigators would entail minimal cost in comparison to the resulting benefits. See DE PAUL at 263.

vestigation would cost more than it would be worth,<sup>74</sup> the value of investigating all claims is twofold: the deterrent force would discourage potential defrauders who would then regard detection as a real possibility, and those who oppose appointed counsel for indigents would be more receptive if they knew all claims were being verified. Thirdly, there should be prosecution and reimbursement of misrepresentation by defendants.

The Louisiana Act provides that if within one year after determination of insolvency, the trial court shall adjudge that an accused was *erroneously* or *improperly* determined to be insolvent, the district attorney may proceed against such accused for the reasonable value of said services.<sup>75</sup> One authority would not require reimbursement to the state for services except on the ground of *fraud* in obtaining appointment.<sup>76</sup> This latter approach is commendable, as it does not attempt to charge a defendant for an admitted error by the state in determining eligibility.<sup>77</sup>

### Conclusion

A good system to determine eligibility of a defendant for court appointed counsel has recognizable characteristics. The criteria should be *uniformly* applied to all defendants throughout the state, thus avoiding a possible equal protection infirmity. The system should provide a thorough *investigation* of each case in order to minimize appointment to defendants who could afford retained counsel, yet maximize the availability of counsel to all eligible defendants. The criteria should be *flexible* enough to consider the individual circumstances of each case, and avoid the harsh results of static determination. The system must consider the *whole picture* of each case, and avoid single factor determination. Finally the system should provide a *part payment* provision to ensure adequate legal representation to all defendants, not just the very rich, or the very poor.

The general factors considered in determining indigency should be analogized to the components in a mathematical equation. The liquid assets of the defendant, actually available at the time of arrest,

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74. Note, 76 HARV. L. REV. 579, 586 (1963).

75. LA. R.S. 15:142(N)(4) (Supp. 1972) Cf. FLA. STAT. ANN. § 27.52(3) (1963), as amended by Fla. Laws 1970, c.70-57, § 1. The one year provision represents a lengthy term, contrasted with the 90 day period for reimbursement recommended by the Needy Persons Act. See NEEDY PERSONS ACT § 8(a).

76. OAKS REPORT 57.

77. However, this argument would be contrary to the policy of the Internal Revenue Service, where a taxpayer may be charged for an error of the service. See *American Auto Assoc. v. United States*, 367 U.S. 687 (1961).

should be totaled and from this sum subtracted all debts, expenses and other obligations. The remainder would be an estimate of the resources of the defendant available to retain private counsel.

The new Louisiana Act represents an attempt by the legislature to provide a criteria for determining eligibility of an accused for court appointed counsel. However it only applies to three judicial districts of the state, and encourages rigid single factor decisions, without requiring a thorough analysis of each case. Until revision and state-wide re-enactment of the Act can be undertaken by the legislature, Louisiana trial courts should make a thorough evaluation of each case, basing judgment of indigency upon the total socio-economic status of the accused, considered in the context of the nature of the charge, and not deciding on the basis of a sole compartmentalized factor. The suggested approach will provide a good and fair system, protecting the respective interests of both the state and the accused.

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