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## COMMENTS

### THE DEFINITION OF INDIGENCY: A MODERN-DAY LEGAL JABBERWOCKY?<sup>1</sup>

CHARLES E. EVANS

*"When I use a word", Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."*

*"The question is", said Alice, "whether you can make words mean so many different things."<sup>2</sup>*

"Indigency,"<sup>3</sup> as a standard<sup>4</sup> for the application of the right to court

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<sup>1</sup> L. CARROLL, *Through the Looking Glass and What Alice Found There*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 140 (1939). An adult-children's puzzle-poem by Lewis Carroll (Reverend Charles L. Dodgson), mathematician-author, 1832-1898. It had to be reflected in a mirror to be read; any attempt to decipher its meaning required one to analyze each of its words, many of which had ". . . two meanings packed into one word like a portmanteau. . . ." REV. C. DODGSON, *THE HUMOROUS VERSE OF LEWIS CARROLL* 268 (1933). Its true origin and meaning have never been agreed upon; and it remains a thought-provoking remnant of the mind of the man whose main preoccupation has been reported to have been ". . . the hope of making logic square with common sense. . . ." F. LENNON, *THE LIFE OF LEWIS CARROLL* 5 (1945).

<sup>2</sup> L. CARROLL, *Through the Looking Glass and What Alice Found There*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 196 (1939).

<sup>3</sup> The intent here is not to attempt to define legal indigency, but merely to suggest that just in the past few years this word has become transformed into a portmanteau word as far as the purposes of the law are concerned. It is vague precisely because it means too much; the emotions that it evokes are somehow out of place within the machinery of a legal standard. Even its strongest connotation, that of destitution or poverty, has become somewhat anachronistic in the development of American society: Where once in the not-too-distant past the longing was for a chicken in every pot, today the anticipation is a sizeable minimum annual income for all. "Poverty" used to mean "hungry"; now that word encompasses an endless myriad of connotations each of which falls somewhere within the general category of "not having enough."

<sup>4</sup> The determination of indigency ". . . is a prerequisite to the right to court-appointed counsel." *State v. Baca*, 477 P.2d 320, 324 (N.M. Ct. App. 1970). "[T]he judge . . . must go forward to determine whether or not the defendant is indigent and a needy person, and . . . upon making a determination that the defendant is a needy person, must appoint counsel for the defendant at public expense in any proceeding arising out of a criminal case, whether the offense charged is a misdemeanor or a felony." *State v. Heasley*, 180 N.W.2d 242, 249 (N.D. 1970). "There can be no valid criminal trial unless a defendant is represented by counsel if he desires counsel." *Fitzgerald v. State*, 257 N.E.2d 305, 310 (Ind. 1970) (court's emphasis). This standard has had two well-developed applications. Most familiar is the modern right based upon constitutional guarantee; and, frequently overlooked is that medieval charity extended to the poor in the ecclesiastical courts. In the secular common law, the right to learned counsel was recognized as early as the twelfth century. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 5 (1955). Only through constitutional and statutory alterations in the common law did that right become a guarantee, however. 41 AM. JUR. *Poor and Poor Laws* § 2 (1942). The United States Constitution and those of most states guarantee the fundamental right to counsel. U.S. CONST. amend. VI; 21 AM. JUR. 2d *Criminal Law* § 318 (1965). The United States Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), held that the sixth amendment guarantee was applicable to those financially unable to provide their own counsel in federal courts. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), extended it to state courts. The scope of the right was widened from felonies to mis-

appointed counsel presents just such a dilemma of definition.<sup>5</sup> In its legal function this single word represents a fine dividing line between the injustice of denying an indigent defendant his right to counsel,<sup>6</sup> and the injustice of expending public funds for one not really in need.<sup>7</sup>

demeanors by *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942). *State ex rel. Argersinger v. Hamlin*, 236 So. 2d 442 (Fla. 1970), *cert. granted*, 401 U.S. 908, 91 S. Ct. 887, 27 L. Ed.2d 805 (1971), potentially extends the right to counsel at public expense to such minor offenses as picking flowers in the park or merely failing to insert a single penny into a parking meter. *But see James v. Headley*, 410 F.2d 325, 334 (5th Cir. 1969). The ecclesiastical right to counsel was really not a right, but a charity of the Church. For example, Pope Honorius III (1216-1227), decreed that those unable to obtain their own counsel were to be given free counsel by the court. B. TIERNEY, *MEDIEVAL POOR LAW* 13 (1959). Later canonists held that even the expenses of providing witnesses needed by the poor should be absorbed by the Church. *Id.* at 14. Subsequently, an entire array of technical privileges developed to the benefit of the poor in ecclesiastical courts. *Id.* at 14. It eventually came to be accepted that when a man faced possible injustice because of his poverty, his case was preferably decided before an ecclesiastical court rather than before a secular one. *Id.* at 14. Although providing, in part, the roots for the whole system of equity jurisdiction, such "charitable rights" as free counsel in the Church courts were not transplanted directly into the secular courts when the medieval system of co-equal authority of Church and State became secularized in England in the sixteenth century. *Id.* at 127, 131. Consequently, the problem of poverty did not become a central theme in the development of the secular constitutional right to free counsel until well into the twentieth century when the impact of *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) came to be felt. Since 1938, it has become increasingly more difficult to understand and apply the standard. Is it a right based upon charity? Is it a charity enforced by constitutional guarantee?

<sup>5</sup> The dilemma of definition is ageless: "Of the subjects which have given rise to differences of opinion among political economists, the definition of wealth is not the least remarkable." T. MALTHUS, *PRINCIPLES OF POLITICAL ECONOMY* 21 (1951). In the Middle Ages, the Church struggled with the continuing problem of deciding who were the *miserabiles personae* or deserving poor. B. TIERNEY, *MEDIEVAL POOR LAW* 15 (1959). Today, the definition of legal indigency is merely one single strand in the twentieth century "Gordian Knot" of semantics. What words mean is now a problem daily touching the life of every man. How many American and Vietnamese lives have been altered by the "war that is not a war"? How many communist dictatorships are referred to as "democratic republics"? In the nuclear age has the opposite of war become abruptly changed from "peace" to "preparation"? Is not ours increasingly an "Alice-in-Wonderland" or, perhaps, a "Through-the-Looking-Glass" kind of chapter in human history?

<sup>6</sup> "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Conn. v. State*, 170 So. 2d 20, 22 (Miss. 1964). In *Perry v. State*, 170 S.E.2d 350 (Ga. Ct. App. 1969), where the illiterate defendant was refused appointment of counsel because the public defender assigned by the county commissioners and their funds had been withdrawn for services elsewhere, the appellate court remarked:

While the statement of the court in denying her request for counsel and forcing her to serve as her own counsel, that he intended to see to it that the State followed the rules of law and of evidence in presenting its case and that the defendant's rights would, to the best of his ability, be protected during the trial, evidenced a laudable intention, the fact remains that an impoverished defendant who is unable to employ or arrange for counsel must be afforded an attorney when he requests it in order to meet the constitutional guaranty and to afford due process.

*Id.* at 352. It has been estimated that, in this country as a whole, in state as well as in federal courts, about "sixty per cent of defendants in felony or serious criminal cases are financially unable to obtain counsel." Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 509 (1970).

<sup>7</sup> "The fact of indigency is only important when the accused desires counsel at public expense." *Commonwealth v. Murphy*, 233 A.2d 594, 596 (Pa. Super. 1967). "We know of few more appropriate occasions for use of a court's discretion than one in which a litigant, asking that the public pay costs of his litigation, either carelessly or wilfully and stub-

It symbolizes one of “. . . the central themes of jurisprudence, the perennial interplay of law and ethics.”<sup>8</sup> Although indigency means just what one chooses<sup>9</sup> it to mean, there are so many connotations to choose from that from jurisdiction to jurisdiction it may be looked upon either as “. . . a flexible standard which inherently is vague or a fixed standard which may seem arbitrary.”<sup>10</sup> Unfortunately, such vagueness can only

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bornly endeavors to saddle the public with wholly uncalled-for expense.” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 337, 69 S. Ct. 85, 88, 93 L. Ed. 43, 47 (1948). “The public is not obliged to provide free legal help for a defendant who is earning sufficient income to provide his own.” *Glenn v. United States*, 303 F.2d 536, 542 (5th Cir. 1962). “The cost to society of providing counsel for the indigent defendant has two aspects. The first of these is the dollars-and-cents expense to taxpayers of paying for such a program. The second cost is the indirect expense to society of allocating such a massive amount of its legal and judicial resources to this singular area of concern.” Note, 55 *IOWA L. REV.* 1249, 1259 (1970). “Indigency does not permit or require greater rights than those enjoyed by other persons in a similar situation who are able to afford the retention of private counsel . . . . Whether prince or pauper we conclude the same.” *State v. Toney*, 262 N.E.2d 419, 424 (Ohio Ct. App. 1970).

<sup>8</sup> B. TIERNEY, *MEDIEVAL POOR LAW* 2 (1959). The term “indigency” represents a dichotomy of connotation. Today, it displays a schizophrenic character which is applicable to either law or ethics, yet never quite both. In modern application to the law it can only straddle the semantic fence between legal right and moral charity. Consequently, its effectiveness as a legal standard is weakened; this is especially so when it must govern the application of a constitutional right which inherently applies not to all of the people, but only to a “socially defined” few.

Who is “poor” and thereby deserves special attention? Only somebody who is so impoverished as to be an object of pity rather than concern? This approach lands us right back in a charity context, removing representation from the category of “right” which is so central to our system of justice, human dignity and freedom. Without a feeling of right, there is no sound psychological basis for individual self-affirmation, self-advancement or initiative.

Pincus, *Programs to Supplement Law Offices for the Poor*, 41 *NOTRE DAME LAWYER* 843, 892 (1966). (The article was part of a symposium on *Legal Services Program of the Office of Economic Opportunity*).

<sup>9</sup> Very few states have chosen to spell out a narrative definition of “indigency” in statutory form. An indigent “. . . means any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.” *TENN. CODE ANN.* § 40-2014(a) (Supp. 1971); “. . . a person who does not have property or source of income to furnish him a living nor any one able to support him to whom he is entitled to look for support.” *R.I. GEN. LAWS* § 12-15-8 (1969); “. . . a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation . . . .” *N. C. GEN. STAT.* art. 36 § 7A-450(a) (1969); “. . . a person who is formally charged with the commission of an indictable offense, and who does not have the present financial ability to secure competent legal representation and to provide all other necessary expenses of representation.” *N.J. STAT. ANN.* § 2A: 158A-2 (1971). The Iowa Legislature stresses the accused’s financial responsibility to others: “[A]n indigent shall be any person who would be unable to retain [in] his behalf, legal counsel *without prejudicing his financial ability to provide economic necessities for himself or his family.*” *IOWA CODE ANN.* ch. 336 A.4 (Supp. 1971) (emphasis added). Wider variation in choices of meaning may be seen in the individual cases included in the text.

<sup>10</sup> Note, 22 *Sw. L.J.* 679, 686 (1968). “The assistant district attorney assigned to the case objected to proceeding in the absence of defense counsel, stating: ‘We *can’t* convict a man without an attorney.’” *State v. Johnson*, 184 N.W.2d 107, 108 (Wis. 1971) (emphasis added).

Q. 14. During the time this case was pending and you were in jail, where did you get this Five Hundred (\$500) Dollars? A. I accumulated it in jail, gambling and playing poker. Q. 15. You accumulated Five Hundred (\$500) Dollars gambling and playing poker and instead of saving money to pay an attorney fee, you used it to get yourself out of jail on bond? A. Yes, sir, to obtain my freedom. Court: Now this Court is not going to require attorneys, appointed by the Court, to defend men free

lead to abuse<sup>11</sup> by those who do not really need the protection of the right, and consequently, to an erosion of the guarantee of the right to those “. . . who do not know enough to request or who are otherwise unable to secure the same protections in a criminal law enforcement proceeding as those available to the learned and those with sufficient finances.”<sup>12</sup> Understandably, but tragically, the victims of this dilemma of definition may come to look upon the judge as being a “Humpty Dumpty” and upon counsel as just another “Alice in Wonderland.”

The generally accepted connotation of indigency includes “. . . one who is needy and poor, or one who has not sufficient property to furnish him a living nor anyone able to support him to whom he is entitled to look for support.”<sup>13</sup> However, in seeking a legal standard of indigency, scholars have differed widely in approaching the problem.<sup>14</sup> The single

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of charge who have Five Hundred (\$500) Dollars in cash to pay for bonding companies to release them on bond.

Sizemore v. Commonwealth, 450 S.W.2d 497, 498 (Ky. Ct. App. 1970).

<sup>11</sup> “[T]he record reveals responses by the appellant which indicate a stubborn determination to take advantage of what he may have considered a sort of socialized legal aid which would provide him with counsel if he found it inconvenient to pay for representation.” Sapio v. State, 223 So. 2d 759, 760 (Fla. Ct. App. 1969). In Deaton v. State, 227 So. 2d 827 (Miss. 1969), the appellant raised the issue of the lower court's failure to appoint counsel for his defense; the record revealed that he owned his own home on twenty acres of land and had \$300 in his pocket at the time of his arrest. “I think there is a reasonable limitation as to what extent a defendant may trifle with the court. In my opinion, this type of case makes the courts appear ridiculous and the laughing stock of the public. Here the trial judge extended the defendant every opportunity to secure counsel . . .” Fitzgerald v. State, 257 N.E.2d 305, 312 (Ind. 1970) (dissenting opinion).

<sup>12</sup> Note, 41 NOTRE DAME LAWYER 982 (1966).

<sup>13</sup> BLACK'S LAW DICTIONARY 913 (4th ed. 1968). This connotation has developed from a long heritage of poverty law. At common law the sovereign was under no legal obligation to care for the impoverished. 41 AM. JUR. *Poor and Poor Laws* § 2 (1942). “The poor of England, till the time of Henry VIII subsisted entirely upon private benevolence, and the charity of well-disposed Christians.” 1 W. BLACKSTONE, COMMENTARIES\* 359. Poor relief was a precept of Christian Charity and the Church made such protection of the poor a matter of ecclesiastical law. B. TIERNEY, *MEDIEVAL POOR LAW* 5 (1959). Such canon law came to be a universally recognized public authority paralleling that of the secular state, *Id.*, and the canonical system of poor relief never did break down, *Id.* at 128, but its vestiges survived to become a foundation for the poor law of the Tudors and eventually a direct public policy heritage to the antipoverty programs enacted in the United States in 1964. S. LEVITAN, *THE GREAT SOCIETY'S POOR LAW* 3 (1969).

<sup>14</sup> “The doctrine of right to counsel has dramatized the nexus between the lawyer and the due process norm in criminal justice.” Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 SW. L.J. 488, 523 (1969). The late Attorney General Robert F. Kennedy, in an address on Law Day, May 1, 1964, at the University of Chicago Law School, noted that, “[l]awyers must bear the responsibility for permitting the growth and continuance of two systems of law—one for the rich, one for the poor.” Excerpts quoted in Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1337 n.27 (1964). “It appears to this court that the burden on the legal profession is continuing to increase, and as to some of those members of the profession who are being called upon to bear the brunt of the load it may actually be amounting to a taking of property without compensation. One of the attorneys in the instant case states that he has been appointed to represent indigents at least 20 times in the last few months.” Jones v. Commonwealth, 457 S.W.2d 627, 631 (Ky. Ct. App. 1970). “[I]t is unfair to expect the legal profession to bear the burden of the legally declared obligation of society. Defense costs are a public expense which should be

point of agreement seems to be the implication that “[p]resent concepts of indigency are antiquated and not consistent with this modern society.”<sup>15</sup>

Many legal scholars believe that there is a pressing need for improved methods for ascertaining indigency.<sup>16</sup> Eligibility standards could, for example, be established in terms of actual income for each person, with appropriate adjustments for each dependent.<sup>17</sup> Such financial eligibility standards could take a rather precise statutory form similar to present income limits used for determining public housing eligibility.<sup>18</sup> What is involved, then, is some type of “. . . uniform eligibility test for assignment of counsel.”<sup>19</sup>

A premise in opposition is that it is unlikely that a uniform and workable standard of indigency will ever be attained. In this regard, the United States Supreme Court is not expected to “. . . be able to establish a workable rule to assist the states on this question.”<sup>20</sup> This whole line of reasoning stems from the very crux of the definition problem:

The problem lies in drawing up a set of conditions which clearly, fairly, and accurately determines what constitutes need. Obviously, it is impossible to frame a standard of eligibility that could be applied uniformly in all parts of the country at any one time.<sup>21</sup>

A third undercurrent of legal thinking illustrates the concern that the right to court appointed counsel should not be denied those not actually indigent in the traditional sense, yet not rich either.<sup>22</sup> The predominant hope in this regard is that whatever standards are used, they should not overlook those defendants of moderate means. “If the state does nothing to help those people in the middle group, they will forego the privilege.”<sup>23</sup> Everyone, rich and poor alike, is potentially vulnerable

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borne by the public as a whole and not by members of the bar alone.” Carlson, *Appointed Counsel in Criminal Prosecution: A Study of Indigent Defense*, 50 IOWA L. REV. 1073, 1077 (1965). “If courts have the inherent power to direct a lawyer to defend an indigent criminal then those same courts have the inherent power to direct the state treasurer to pay the lawyer. If the furnishing of counsel is the obligation of the state then it is the obligation of all the people collectively and should be paid out of the common treasury. How did the burden of society get shifted to the shoulders of the lawyers alone?” Sizemore v. Commonwealth, 450 S.W.2d 497, 501 (Ky. Ct. App. 1970) (dissenting opinion).

<sup>15</sup> Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 562 (1970).

<sup>16</sup> See Note, 13 STAN. L. REV. 522, 547 (1961).

<sup>17</sup> Bamberger, *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAWYER 843, 849 (1966).

<sup>18</sup> Note, 81 HARV. L. REV. 435, 444 (1967).

<sup>19</sup> Bayh, *Poverty and Justice*, 41 NOTRE DAME LAWYER 853, 855 (1966).

<sup>20</sup> 37 ST. JOHN'S L. REV. 358, 365 (1963).

<sup>21</sup> A. BLAUSTEIN & C. PORTER, *THE AMERICAN LAWYER* 73 (1954). *Accord*, State v. Harris, 250 A.2d 719, 720 (Conn. Ct. App. 1968).

<sup>22</sup> Note, 81 HARV. L. REV. 435, 445 (1967).

<sup>23</sup> *Id.* at 445.

to the need for legal counsel, and “[n]o system built to serve only the poor can sustain the public support necessary to guarantee quality service.”<sup>24</sup> What must be consciously avoided, then, is the unintentional creation of a “middle-class poverty of legal services.”<sup>25</sup>

Tying legal assistance to near-poverty does not take into consideration the realities of the cost of litigation. Improving the quality and quantity of legal assistance available to those people who fit within the present concept of indigency creates inconsistencies not unknown to the American experience. It would mean that people with the lowest and highest incomes could count on adequate legal assistance; the vast majority of Americans in the “middle classes” could not.<sup>26</sup>

Diversity of view leads to inconsistency of application. The noticeable trend in cases and in legal writing has been to treat the definition of “indigency” indirectly.<sup>27</sup> For example, the Criminal Justice Act of 1964<sup>28</sup> “. . . purposely avoids use of the term indigent,”<sup>29</sup> substituting instead the phrase “financially unable to employ counsel.”<sup>30</sup> The reasoning underlying this usage has been analyzed to be twofold in purpose: First, to include within the statute certain defendants who may have some limited means of employing counsel,<sup>31</sup> and, secondly, to provide legislative expression to the premise that “. . . the constitutional right to an attorney is not based on destitution but on lack of sufficient resources to retain counsel.”<sup>32</sup>

This measure is effective in that it at least attempts to escape some of the more traditional connotations<sup>33</sup> associated with the word “indigency” and, as it were, reduce the number of meanings contained within the standard. However, the phrase “unable to employ counsel”

<sup>24</sup> Pincus, *Programs to Supplement Law Offices for the Poor*, 41 NOTRE DAME LAWYER 843, 892 (1966).

<sup>25</sup> Persons with limited means, but possibly able to afford counsel, would be placed at a greater disadvantage than even the most destitute.

<sup>26</sup> Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 562 (1970).

<sup>27</sup> Most deal indirectly with procedural matters and do not attempt to discuss directly what is meant by “indigency” as a legal standard.

<sup>28</sup> 18 U.S.C. § 3006A (1970). This act has been referred to as “. . . the most far-reaching present-day statute, state or federal, dealing with the resourceless criminal defendant.” Note, 41 NOTRE DAME LAWYER 996 (1966).

<sup>29</sup> Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. CRIM. L. & POLICE SCIENCE 73, 80 (1968).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> “Indigency” has long connoted an economic status of poverty or destitution. It is applied most often to those suffering general want rather than the specific inability to employ counsel.

is, itself, “. . . a vague one, and seldom defined by the courts.”<sup>34</sup> Furthermore, those connotations which had been eliminated by the substitution of a phrase for the single word, seem to have resulted in an increased emphasis on creating long lists of “factors”<sup>35</sup> which must be resorted to in determining whether or not a person is able or unable to employ counsel.

In evaluating an accused person's ability to employ counsel, consideration must be given to such factors as the seriousness of the charge, prevailing and applicable bar association fee schedules, the availability and convertibility of any personal or real property owned, outstanding debts and liabilities, the accused's past and present history, earning capacity and living expenses, his credit standing in the community, his family and dependents, and any other circumstances which may impair or enhance the ability to advance or secure such attorney's fees as would ordinarily be required to retain competent counsel.<sup>36</sup>

These listings of factors vary considerably, as they must, in attempting to prescribe the very tenuous meaning of “ability to employ counsel.” For example, another listing in a different jurisdiction might give additional consideration to “. . . the effort and skill required to gather pertinent information, render advice, conduct trial or render other legal services. . . .”<sup>37</sup> Yet a third jurisdiction may consider “. . . if the accused

<sup>34</sup> Note, 13 STAN. L. REV. 522, 545 (1961). “Ability to employ counsel fairly implies ability to pay him reasonable compensation.” *Schmidt v. Uhlenhopp*, 140 N.W.2d 118, 121 (Iowa 1966).

<sup>35</sup> N.J. STAT. ANN. § 2A-158A-14 (Supp. 1971). “[A] determination of indigency is to be made on the basis of as complete a financial picture as it is feasible to obtain in the circumstances.” *In re Smiley*, 427 P.2d 179, 187 (Cal. 1967). See *Bramlett v. Peterson*, 307 F. Supp. 1311, 1323 (M.D. Fla. 1969); *Morgan v. Rhay*, 470 P.2d 180, 183 (Wash. 1970). Such tools of analysis, in the short run, are helpful in the face of vagueness in the meaning of the legal standard of indigency, and are increasingly resorted to by state legislatures. Where there is no legal cut-off “indigency,” there must be an economic one:

(b) The following facts shall be prima facie evidence of solvency:

1. If the defendant has been released on bail in the amount of fifteen hundred dollars (\$1500) or more;
2. If the defendant has no dependents and his gross income exceeds seventy-five dollars (\$75) per week; the income limit shall be increased by ten dollars (\$10) per week for each of the first two (2) dependents of the defendant and by five dollars (\$5) per week for each dependent beyond the first two (2) . . . .”

FLA. STAT. ANN. § 27.52 (Supp. 1971). In the long run, such factors lead to the human tendency to bureaucratize the whole process of analysis. Such a trend could endanger the role of the courts in applying the right to court appointed counsel for the needy. For example, in *Ingram v. Justice Court*, 447 P.2d 650, 653 (Cal. 1968), the question was whether the trial court had the power to review a public defender's determination that one was “not financially able to employ counsel.” The California Supreme Court held that the court had no such power; such a determination was not subject to judicial, but rather, political review.

<sup>36</sup> *Morgan v. Rhay*, 470 P.2d 180, 182 (Wash. 1970).

<sup>37</sup> N.J. STAT. ANN. § 2A-158A-14 (1971).



is presently employed or is on welfare, whether he has income while he is in custody. . . ."<sup>38</sup>

*"And who are these?" said the Queen, pointing to the three gardeners who were lying round the rosetree; for, you see, as they were lying on their faces, and the pattern on their backs was the same as the rest of the pack, she could not tell whether they were gardeners, or soldiers, or courtiers, or three of her own children.*<sup>39</sup>

This fictional problem is not unlike that very real dilemma of definition which faces the trial judge. Who is indigent and who is not? Which definitions or factors of economic analysis must be applied? The only certainty is that the lower court must be the focal point for the application of definition to actual fact.<sup>40</sup> "Whether defendant has the financial means to procure counsel is a factual question."<sup>41</sup> "Trial judges are in the best position administratively to decide that question."<sup>42</sup> "[T]he fact finder is left the task of determining financial eligibility."<sup>43</sup> "[T]he issue of court determination of indigency is a delicate matter and must be delicately decided, always with an eye toward protection of the rights of the accused from any possible impairment."<sup>44</sup> "[T]he so-called 'discretion test' is used to determine the fact of insolvency. This test contemplates broad discretionary power."<sup>45</sup>

It must be noted that appellate courts are particularly sensitive to possible abuse of this discretionary power:

Great weight will be attached to the trial court's findings of fact upon the issue of indigency, yet, because a basic constitutional right relating to the fair and equal administration of criminal justice is involved, we cannot blindly accept such findings. We are compelled to make our own determination, upon the record before us, as to whether there has been a denial of due process of law.<sup>46</sup>

<sup>38</sup> *Bramlett v. Peterson*, 307 F. Supp. 1311, 1323 (M.D. Fla. 1969).

<sup>39</sup> L. CARROLL, *Alice's Adventures in Wonderland*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 80 (1939).

<sup>40</sup> "What 'indigent' means under particular facts is apparently left to the courts." Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. CRIM. L. & POLICE SCIENCE 73, 80 (1968). "The courts, more than any other agency of government, are charged with the duty of implementing that guarantee." *Ingram v. Justice Court*, 447 P. 2d 650, 654 (Cal. 1968).

<sup>41</sup> *State v. Anaya*, 417 P.2d 58, 60 (N.M. 1966).

<sup>42</sup> *State v. Harris*, 250 A.2d 719, 721 (Conn. Cir. Ct., App. Div. 1968).

<sup>43</sup> Note, 81 HARV. L. REV. 435, 445 (1967).

<sup>44</sup> *People v. Cole*, 239 N.E.2d 455, 457 (Ill. App. Ct. 1968).

<sup>45</sup> *Keur v. State*, 160 So. 2d 546, 549 (Fla. Ct. App. 1963).

<sup>46</sup> *State v. Rutherford*, 389 P.2d 895, 899 (Wash. 1964).

"It is not within the province of an appellate court . . . to lay down specific and intricate rules defining standards of indigency in each case."<sup>47</sup> However, they do rigorously review each set of facts from the record to ensure that no question of indigency remains. "The trial court's inquiry into . . . indigency [sic] was at best cursory. . . ."<sup>48</sup> "[T]he record does not convincingly show that there was adequate inquiry into the question of petitioner's financial ability to retain counsel. . . ."<sup>49</sup>

Comment upon error at the appellate level has acted to "connect the dots," as in a child's coloring book, thus providing at least a sketchy delineation of what the case-law definition might be. For example, error has been found where the trial court refused to appoint counsel based on the fact that the accused had spent \$350 for bond.<sup>50</sup> In another instance, it was held that counsel should have been appointed for a truck driver who had no property, although he was employed for \$85-\$90 per week.<sup>51</sup> A state prisoner, having only \$100 with which to hire an attorney, should have been classified as indigent.<sup>52</sup> A defendant who, with her husband, owned a fifty-thousand dollar ranch, should not be considered indigent merely because she could not raise the three thousand dollar fee for the lawyer of her choice.<sup>53</sup> However, a defendant who had a weekly pay of \$164 and an eighteen thousand dollar home prior to his incarceration should have had counsel appointed.<sup>54</sup> The appellate court reasoned that he had become indigent while incarcerated, because during that period he had lost his job, and his wife had been awarded the home in a divorce decree.

Indigence is a relative term, and must be considered and measured in each case by reference to the need or service to be met or furnished. In connection with the constitutional right to counsel, it properly connotes a state of impoverishment or lack of resources which, when realistically viewed in the light of everyday practicalities, effectively *impairs* or *prevents* the employment and retention of competent counsel.<sup>55</sup>

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<sup>47</sup> *People v. Chism*, 169 N.W.2d 192, 194 (Mich. Ct. App. 1969). "[I]t remains impractical for an appellate court to prescribe a specific maximum amount of net liquid assets a defendant will be allowed to possess and still claim indigency for the purpose of court appointment of counsel . . . ." *In re Smiley*, 427 P.2d 179, 187 (Cal. 1967).

<sup>48</sup> *State ex rel. Barth v. Burke*, 128 N.W.2d 422, 424 (Wis. 1964).

<sup>49</sup> *Wood v. United States*, 389 U.S. 20, 20, 88 S. Ct. 3, 4, 19 L. Ed.2d 20, 21 (1967).

<sup>50</sup> *People v. Eggers*, 188 N.E.2d 30, 32 (Ill. 1963).

<sup>51</sup> *Samuel v. United States*, 420 F.2d 371, 372 (5th Cir. 1969).

<sup>52</sup> *Application of Trevithick*, 260 F. Supp. 852 (D.S.D. 1966).

<sup>53</sup> *State v. Sands*, 469 P.2d 795, 797 (Ore. Ct. App. 1970).

<sup>54</sup> *People v. Griffin*, 177 N.W.2d 213 (Mich. Ct. App. 1970).

<sup>55</sup> *Morgan v. Rhay*, 470 P.2d 180, 182 (Wash. 1970) (emphasis added).

An indigent “. . . only has funds enough for a bare, or mere subsistence, but not enough to permit him to hire counsel to help him defend against the possible imposition of a fine.”<sup>56</sup> “The right to have counsel appointed . . . does not extend to cases in which the defendant has financial means and is not *otherwise* disabled from retaining counsel.”<sup>57</sup> “But it is not necessary that one be destitute or on public relief to qualify for appointment of counsel.”<sup>58</sup> “The factual question is not whether the accused *ought* to be able to employ counsel but whether he is, in fact, *able* to do so.”<sup>59</sup>

The question in inquiries as to insolvency is not whether the defendant's supposed friends or spouse or relations 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>60</sup>

Even “. . . the financial abilities of a defendant's relatives have no bearing on the question of the defendant's solvency.”<sup>61</sup>

*“When I make a word do a lot of work like that”, said Humpty Dumpty, “I always pay it extra.”*<sup>62</sup>

What appears to emerge from even a cursory review of case law dealing with the problem of definition and meaning of the legal standard of indigency is a vague image of what the modern concept of that standard is thought to be. Accordingly, indigency, for the purpose of having counsel appointed at public expense for criminal defense, *may*, depending on circumstances and varying from case to case, now include not only the hungry, but the satiated as well. It may be stretched to encompass the temporarily fund-less in addition to the already permanently-poor. Most interesting, however, is the feasible extension of indigency status to those whose relatives *cannot* provide funds for counsel, as well as to those whose family *could*, but will not because the law itself now poten-

<sup>56</sup> Comment, *Continuing Echoes of Gideon's Trumpet—The Indigent Defendant and the Misdemeanor; A New Crisis Involving the Assistance of Counsel in “A Criminal Trial,”* 10 S. TEX. L.J. 222, 267 (1968).

<sup>57</sup> *United States v. Sampson*, 161 F. Supp. 216, 217 (D.D.C. 1958) (emphasis added).

<sup>58</sup> *McCraw v. State*, 476 P.2d 370, 372 (Okla. Crim. App. 1970).

<sup>59</sup> *State v. Cowart*, 162 S.E.2d 535, 537 (S.C. 1968) (emphasis added); “[N]either the ability nor the inability to borrow money is the sole criterion.” *State v. Anaya*, 417 P.2d 58, 61 (N.M. 1966).

<sup>60</sup> *Keur v. State*, 160 So. 2d 546, 549 (Fla. Ct. App. 1963) (emphasis added).

<sup>61</sup> *Sapio v. State*, 223 So. 2d 759, 761 (Fla. Ct. App. 1969).

<sup>62</sup> L. CARROLL, *Through the Looking Glass and What Alice Found There*, in THE COMPLETE WORKS OF LEWIS CARROLL 197 (1939).

tially makes it unnecessary to do so. It is a concept or a definition or a standard which suffers the strain between a tradition-laden past and the unpredictable future;<sup>63</sup> its evolution in the law increasingly challenges the gullibility of the lay public,<sup>64</sup> and more and more, brow-beats the common sense of judges.<sup>65</sup>

The future of the concept will be largely determined by the factual circumstances of new cases coming into the courts, such as encountered in *People v. Gustavson*.<sup>66</sup> The defendants, Glenn A. Gustavson, age 19, and Walter Gibe, age 20, both students at Western Illinois University,

<sup>63</sup> Two distinct avenues of strain run through the fabric of indigency as a legal standard. First, it is difficult to relate present meaning to past usage in the face of chronic change: It is one thing to live in a primitive society that is changing because "Western" technology has undermined its established ways; it is another to live, like Alexander's Macedonians, in a society changing by virtue of unprecedented conquests; it is another to live amidst the changes that followed the Black Plague in the Middle Ages; and it is still another to live in a society like our own, where change results from a self-stimulating technological process.

K. KENISTON, *THE UNCOMMITTED: ALIENATED YOUTH IN AMERICAN SOCIETY* 241 (1965).

Secondly, the legal profession quietly and subtly endures the growing trend toward socialized legal aid. Like a tortured Picasso-figure, it stands silently dreading what we all fear—the future:

Our visions of the future have shifted from images of hope to vistas of despair; Utopias have become warnings, not beacons. Huxley's *Brave New World*, Orwell's *1984* and *Animal Farm*, Young's *The Rise of the Meritocracy*, and ironically even Skinner's *Walden Two*—the vast majority of our serious visions of the future are negative visions, extensions of the most pernicious trends of the present.

*Id.* at 327.

<sup>64</sup> "That the increased complexity of the law puts it beyond the comprehension of the general public contributes to the crisis of confidence in the social order. One can support on faith what one does not understand, but not for long." A. ELSON, *GENERAL EDUCATION IN LAW FOR NON-LAWYERS* 184 (1968). "If a savage tormentor were attempting to devise an instrument for mental cruelty, he could scarcely improve on the device of leaving simple human beings in severe doubt, for years on end, as to the practical consequences of the normal affairs of life." J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 13 (1969).

All is not well in the house of the law. One can have great respect for the *rule* of law at the same time he is filled with profound apprehension about specific *rules* of law. . . . The basic judicial process is sound but it is too cumbersome, too expensive and too slow. Law does not adequately serve people of moderate means to say nothing of the neglect of the legitimate needs of the citizens of the 'other America.'

Cribbet, *What the Trial Bar Can Expect From the New Crop of Lawyers*, 17 *STUDENT LAWYER JOURNAL* 9 (Feb. 1972).

<sup>65</sup> "Common sense" is here intended to reflect that attitude popular in mid-eighteenth century England as expressed by Blackstone in his *COMMENTARIES* when ". . . he appealed from the 'artificial' reasoning of philosophers to the natural good sense of mankind." D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 119 (1958). Thomas Paine mirrored its essence, when, in the introduction to his pamphlet, *COMMON SENSE*, he observed: "A long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*. . . . Time makes more converts than reason." Holmes fathomed its impact upon the law: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." O. HOLMES, JR., *THE COMMON LAW* 1 (1951). In essence, the meaning desired here is that attribute embodied in the man of common sense who is not easily lost in an arabesque of logic divorced from reality, and about whom it has been said: "[H]e insisted on not being led to conclusions which violated his deepest feelings." D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 118 (1958).

<sup>66</sup> *People v. Gustavson*, 269 N.E.2d 517 (Ill. Ct. App. 1971).

were charged with the theft of property of less than \$150 in value. Both defendants requested appointment of counsel, relying on the fact that they were college students and unemployed and had no money with which to pay for the services of an attorney. The parents of the defendant, Gibe, paid most of his college expenses; they indicated that they *would not* provide an attorney for him. Defendant Gustavson's parent was his widowed mother. She paid a part of his expense of attending college and relied upon the impression that the court would appoint counsel for him.

The trial judge asserted that their parents, with whom the boys lived when they were not in college, were charged with the responsibility of paying for the legal services required by the defendants and he therefore denied appointment of counsel for their defense. The defendants subsequently entered pleas of guilty while without counsel.

Upon reviewing the record, the appellate court reversed the decision of the trial court, stating in part:

[T]he court apparently refused to appoint counsel for defendants on the premise that the parents of defendants may have had funds with which to hire an attorney, even though the record, as established in the cause, indicated that the defendants were without funds.<sup>67</sup>

The case is interesting because of the seeming incongruity in the fact that two college students were, in effect, extended the rights of indigency status as a result of parental refusal to obtain counsel for them. These facts pose several timely questions. Can college students logically be considered indigents for legal purposes? Is the definition of indigency to be expanded to include a new class of individuals who might ostensibly be identified as "privileged paupers,"<sup>68</sup> such as those who enjoy

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<sup>67</sup> *Id.* at 519.

<sup>68</sup> "Privileged pauper" is intended here to refer to a member of the growing class of Americans who, during the college-age years and into the early thirties, is granted a moratorium on adulthood. Such a person, as long as he remains in college, is permitted by society to subsist honorably on a minimal income similar to that of one who is actually impoverished. The rationale underlying this American phenomenon is that education is an investment in future earning power. This is a well-defined cultural development even to the point of expecting the young ". . . to experiment and experience, to live in the present, to be irresponsible and carefree, to value and create color and excitement, to be physically daring and sexually attractive." K. KENISTON, *THE UNCOMMITTED: ALIENATED YOUTH IN AMERICAN SOCIETY* 403 (1965). Interestingly, this class of individuals stands to become to twentieth century law what the *pauperes christi* were to ninth century ethics: "[T]he phrase *pauperes christi*, the poor of Christ, was used to describe monks who had *chosen* a life of voluntary poverty and who, accordingly, were regarded as worthy recipients of ecclesiastical charity." B. TIERNEY, *MEDIEVAL POOR LAW* 69 (1959). Cf. "The proper sphere of charity is in relieving those suffering from 'unmerited calamities' and unforeseen misfortunes." D. OWEN, *ENGLISH PHILANTHROPY, 1660-1960*, at 98 (1964) (emphasis added).

a low income life style *by choice*<sup>69</sup> in order to pursue aesthetic<sup>70</sup> or educational goals? May parents reap the benefits of court appointed counsel for their wayward offspring at public expense simply by refusing to obtain counsel for their defense?

*People v. Gustavson*<sup>71</sup> stopped short of providing answers to these hypothetical questions. No comment was provided as to what a court should do in the event that the parents persist in not providing counsel for the defendants. The trial court here was taken to task for making “. . . no effort to continue the matter so that both the parents and defendants could confer and clearly understand the status of defendants. . . .”<sup>72</sup> Somewhat typically, then, another judge fell victim to the dilemma of definition of modern-day indigency.

#### CONCLUSION

When we say “indigent”, do we mean *indigent*? Or, when we mean “indigent”, do we say *indigent*?

The many connotations of indigency more often than not have served to dull its effectiveness as a legal standard for the court appointment of counsel to assist the needy in criminal prosecutions. The right to such assistance must be protected, and its availability to those in actual need assured; the legal standard necessary to accurately identify those who need the right must be so incisive as to also detect those who can afford to abuse it. That indigency may mean destitution when used by one to refer to college students, or connote college students when one is really speaking of destitution, is some indication that it may have lost its incisiveness as a legal tool.

The time is appropriate for legal scholars to review the intentions of all jurisdictions, and to attempt to spell out just what is meant by “indigency” as a legal standard. If a less connotative alternative is determined to be unfeasible, then let the present term, “indigency,” as Humpty Dumpty would say, be given a raise in pay.<sup>73</sup> If, on the other

<sup>69</sup> In the Middle Ages “[i]t was well understood that the experience of poverty, like the experience of pain, might bring spiritual enrichment to a man who was capable of accepting it *voluntarily*, but also that, in itself, poverty was an unpleasant affliction which might produce quite opposite effects.” B. TIERNEY, *MEDIEVAL POOR LAW* 11 (1959) (emphasis added).

<sup>70</sup> *But cf.* “In common discourse, wealth is always expressed in money.” J. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 3 (1921). “[C]onversely, every theory of poor relief implies a theory of property.” B. TIERNEY, *MEDIEVAL POOR LAW* 23 (1959).

<sup>71</sup> *People v. Gustavson*, 269 N.E.2d 517 (Ill. Ct. App. 1971).

<sup>72</sup> *Id.* at 519.

<sup>73</sup> Pay it more attention; arrive at a general understanding that the term means something other than destitution or poverty as it is used in the law. Time and economic changes have joined forces to cloud the legal definition of “indigency.”

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COMMENTS

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hand, some alternative could be possible, then let it be sought—and, hopefully, based upon two tenets which arise from the experience of the past:

Poverty is not a kind of crime.<sup>74</sup>

[J]ustice is swiftly violated with gold.<sup>75</sup>

Regardless of what is decided, however, let the significance of the *JABBERWOCKY*<sup>76</sup> not be forgotten—as well as Alice's reaction to it:

*“Somehow it seems to fill my head with ideas—  
—only I don't exactly know what they are.”*<sup>77</sup>

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<sup>74</sup> B. TIERNEY, *MEDIEVAL POOR LAW* 13 (1959).

<sup>75</sup> *Id.* at 120.

<sup>76</sup> L. CARROLL, *Through the Looking Glass and What Alice Found There*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 197 (1939).

<sup>77</sup> *Id.* at 142 (emphasis added).