Washington and Lee Law Review

Volume 28 | Issue 1 Article 5

Spring 3-1-1971

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property owner for its decision—a taking by eminent domain. At least one writer has pointed out that:

> The basis for a more satisfactory approach to inverse condemnation lies in the thought, which appears in many of the cases, that the purpose behind both inverse and ordinary condemnation is to socialize the burden of loss—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society.[100]

A municipal policy permitting riot mobs to roam the streets at will, destroying selected private property, as a conscious effort to avert further damage to the community as a whole, is a policy which should be borne by society, rather than the individual property owner. Or, as the Supreme Court of the United States has said:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[101]

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JUDICIAL PROBLEMS IN ADMINISTERING COURT-APPOINTMENT OF COUNSEL FOR INDIGENTS

Under the mandates set forth by the Supreme Court in *Gideon v. Wainwright*[1] and *Miranda v. Arizona*,[2] it is required that every accused charged with a felony shall have the right to counsel regardless of his financial status. Unless the right to counsel at trial is "knowingly and intelligently"[3] waived, an indigent accused is entitled to court-appointed counsel. Although this constitutional right is assured by the sixth amendment and the Equal Protection Clause of the fourteenth amendment, there appears to be no uniform criterion for determining what constitutes "indigency." As a result of this lack of uniformity many problems of criminal justice administration have arisen. This is especially true in the state courts because of the different procedural systems of each state. The federal court system does have a uniform procedure,

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[100]Mandelker, *Inverse Condemnation, The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 8.

[101]Armstrong v. United States, 364 U.S. 40, 49 (1960).

[1]372 U.S. 335 (1963).

[2]384 U.S. 436 (1966).

[3]*Id.* at 475. *See also* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (competently and intelligently waived).

established by the Criminal Justice Act of 1964,[4] but in practice this procedure is also faced with administrative problems. In both state and federal courts the problems relating to court-appointment of counsel can be divided into three primary areas. First, there is no uniform definition of indigency employed by the courts. Secondly, some courts are failing to make an adequate inquiry into the financial status of the accused. Finally, there is confusion with respect to the obligation of a defendant to pay the expense of his court-appointed attorney in the form of court costs.

Initially, a definitional base must be established. Certainly, the dictionary definition[5] of indigence serves very little purpose in actual judicial practice. In fact, the dictionary definition requiring complete destitution is not viewed favorably by more progressive courts and authorities.[6] Although the Supreme Court has failed to come forth with any direct mandate defining indigency, there is language in several cases supporting the view that it does not necessarily mean complete destitution. In *Hardy v. United States*,[7] Justice Goldberg's concurring opinion acknowledged the concept put forth by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice that indigency is a term or concept of relativity.[8] The Attorney General's Committee recommended that the terms "indigent" and "indigency" should be excluded entirely because of their connotation of complete destitution and their association with welfare laws and regulations.[9] The Committee suggested that an accused defendant in a weak financial position should be classified as a person "financially unable to obtain adequate representation."[10]

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[4]18 U.S.C. § 3006A (1964), *as amended*, (Supp. V, 1965-69).

[5]BOUVIER'S LAW DICTIONARY 540 (Baldwin Cent. Ed. 1946) defining indigent as "the needy, the poor, those who are destitute of property and the means of comfortable subsistence"; BLACK'S LAW DICTIONARY 913 (Rev. 4th ed. 1968) defining indigent as "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."

[6]*See, e.g.*, Hardy v. United States, 375 U.S. 277, 289, n.7 (1964); United States v. Cohen, 419 F.2d 1124, 1127 (8th Cir. 1969); United States v. Coor, 213 F. Supp. 955 (D.D.C. 1963); *In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); State v. Harris, 5 Conn. Cir. 313, 250 A.2d 719 (Cir. Ct. App. Div. 1968); State v. Rutherford, 63 Wash.2d 949, 389 P.2d 895 (1964).

[7]375 U.S. 727 (1964).

[8]*Id.* at 289, n.7 *citing* ATT'Y GEN. COMM. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE, REP. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE pt. 2(a) at 8 (1963) (Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.").

[9]ATT'Y GEN. COMM. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE, REP. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE pt. 4(d) at 40-41 (1963).

[10]*Id.* at 41.

In *Adkins v. E. I. Dupont de Nemours Co.*,[11] the Supreme Court, speaking of eligibility for an appeal *in forma pauperis*[12] in a civil proceeding, stated that one need not "be absolutely destitute to enjoy the benefit of the statute."[13] The Court stressed the unsatisfactory result which would occur if the beneficiaries of the statute were required to contribute their last dollar toward payment or security for costs. This would lead to the undesirable practice of putting the statute's beneficiaries into the category of public charges.[14]

In order to provide a uniform federal procedure for court-appointment of counsel for indigents, Congress passed the Criminal Justice Act of 1964.[15] The history of this enactment reveals that the bill as originally introduced was entitled the Indigent Defendants Act of 1963,[16] but the legislation in its final form completely eliminated the words "indigent" and "indigency."[17] Instead, the Act speaks in terms of financial inability to retain counsel.[18] Unfortunately, this legislation only establishes a uniform procedure and does not provide definite

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[11]335 U.S. 331 (1948).

[12]28 U.S.C. § 1915 (1964) which provides for appeals *in forma pauperis*, applies to criminal and civil cases alike. Section 1915(a) reads in part as follows:

> (a) Any court in the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay costs or give security therefor.

[13]Mr. Justice Black in *Adkins* expresses the financial status which the Court felt was appropriate for an appeal *in forma pauperis* as follows:

> We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for costs... and still be able to provide" himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges.

335 U.S. at 339.

[14]*Id.*

[15]18 U.S.C. § 3006A (1964), *as amended*, (Supp. V, 1965-69).

[16]*See* 1964 U.S. CODE CONG. & ADMIN. NEWS 2992; Carter & Hauser, *The Criminal Justice Act of 1964*, 36 F.R.D. 68-69 (1964).

[17]*See* Letter of transmittal from Att'y Gen. Robert F. Kennedy to President John F. Kennedy, March 6, 1963, 1964 U.S. CODE CONG. & ADMIN. NEWS 2994, 2995.

[18]*E.g.*, Sec. 3006A (b) involving the appointment process which reads in part as follows:

> Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is *financially unable* to obtain counsel, shall appoint counsel to represent him.

18 U.S.C. § 3006A(b) (1964), *as amended*, (Supp. V, 1965-69) (emphasis added).

criteria for the determination of financial inability. However, when read in conjunction with its legislative history, the Act can be said to imply strongly that financial inability does not mean complete destitution.[19] In practice this would mean that a defendant need not be penniless in order to qualify for court-appointed counsel.

Although the foregoing suggests that an inquiry into the defendant's financial condition is necessary, the *extent* to which such examination must proceed remains unsettled. In *Wood v. United States*,[20] the accused had filed an affidavit requesting court-appointed counsel. The district court denied his request, and he appealed to the Court of Appeals for the Fifth Circuit which affirmed.[21] The Supreme Court, in a *per curiam* decision, remanded the case for reconsideration because the record did not "convincingly show" that an adequate inquiry was made into the accused's financial ability.[22] Since *Wood* involved prosecution for a federal offense and therefore was subject to the relevant criteria of the Criminal Justice Act, it is doubtful that the *Wood* requirement of adequate inquiry applies to state prosecutions. Nevertheless, at least one state, in the absence of established state procedure and direction from the Supreme Court, has voluntarily looked to the Criminal Justice Act as a procedural guideline.[23] But the establishment of a single standardized inquiry might not satisfy the requirement of adequacy, since the circumstances in each case differ. What seems to be required in *Wood* is that on the particular circumstances of each case, an adequate inquiry should be conducted in order to determine the accused's true financial abilities. Such an inquiry would prevent problems like those illustrated by the following case.

In *Davis v. Ziem*,[24] appellant had been arrested and charged with breaking and entering. In accordance with arrest procedures, the sheriff seized all property in appellant's possession, which included approximately two hundred and nine dollars in cash. Shortly after his

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[19]*See* ATT'Y GEN. COMM. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE, REP. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE (1963); Letter of Transmittal from Att'y Gen. Robert F. Kennedy to President John F. Kennedy, March 6, 1963, 1964 U.S. CODE CONG. & ADMIN. NEWS 2994; Letter of transmittal from President John F. Kennedy to Hon. John W. McCormick, March 8, 1963, 1964 U.S. CODE CONG. & ADMIN. NEWS 2993.

[20]389 U.S. 20 (1967).

[21]373 F.2d 894 (5th Cir. 1967).

[22]389 U.S. at 20; *accord* United States v. Cohen, 419 F.2d 1124 (8th Cir. 1969).

[23]In *State ex rel. Plutshack v. State Dep't. of Health and Social Serv.*, 37 Wis.2d 713, 155 N.W.2d 549 (1968), the Supreme Court of Wisconsin looked to the Criminal Justice Act as a guideline in determining whether counsel should be appointed for an indigent defendant who was charged with three misdemeanors.

[24]383 Mich. 717, 178 N.W.2d 920 (1970).

arrest, the accused was arraigned and the judge, after a brief examination of appellant's financial status,[25] ordered appointment of counsel, stating that Davis was "without pecuniary means to employ counsel to conduct his defense."[26]

About eight months after his conviction, Davis petitioned for a writ of mandamus ordering the return of the money which had been seized at the time of his arrest.[27] The circuit court judge[28] denied the petition and subsequently ordered that the cash be paid to the county terasurer as partial reimbursement of the fee paid by the county to Davis' court-appointed attorney. On appeal, the denial was affirmed by the court of appeals and the Supreme Court of Michigan.[29]

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[25]The examination by the judge of the accused is reported as follows:

"The Court: Do you have an attorney, Mr. Davis?

"The Respondent: I do not, sir.

"The Court: Do you realize that if you are financially unable to obtain an attorney by yourself that the court will appoint one for you at county expense?

"The Respondent: Yes, * * *.

"The Court: * * * Now, do you wish to have the court appoint an attorney for you?

"The Respondent: Yes.

"The Court: Are you employed, Mr. Davis?

"The Respondent: I am—

"The Court: Where, sir?

"The Respondent: Was, rather.

"The Court: Where were you working?

"The Respondent: I was working with my brother. * * *

"The Court: What kind of work were you doing?

"The Respondent: We were contracting.

"The Court: Do you have any bank accounts?

"The Respondent: At this moment, sir, my finances seem to have vanished into thin air, disappeared so to speak or used up.

"The Court: Do you have a car?

"The Respondent: I had one.

"The Court: Do you still have it?

"The Respondent: No, sir. * * *

"The Court: Do you own any real estate?

"The Respondent: No sir.

"The Court: Very well, the court will appoint counsel for the defendant."

178 N.W.2d at 921.

[26]*Id.*

[27]Davis' petition correctly alleged that the cash was never utilized or needed as evidence against him in the breaking and entering prosecution. There was no question at any time but that the money was Davis' property. *See* 178 N.W.2d at 921.

[28]The circuit court judge hearing Davis' mandamus petition had presided at Davis' criminal trial. 178 N.W.2d at 921.

[29]178 N.W.2d at 920. The court of appeals treated the appeal as one of superintendence and the supreme court held that this was proper. Superintendence is the act of overseeing with the power of direction. BLACK'S LAW DICTIONARY 1606 (Rev. 4th Ed. 1968).

In *Davis,* analysis of the facts reveals that the arraigning judge appeared to adopt the relative concept of indigency established by the Attorney General's Committee and acknowledged in Justice Goldberg's concurring opinion in *Hardy.*[30] Further examination reveals, however, that his inquiry was only oriented toward the assets of the accused.[31] No inquiry was made into his possible liabilities.[32] Neither did the judge inquire into the defendant's familial status.[33] Had the judge made these additional inquiries into the accused's financial status, he then could have weighed this information against the cost of retained counsel in the locality involved and made a relevant determination of the accused's financial ability.[34]

The Supreme Court of Michigan reasoned that had the defendant disclosed the fact that the sheriff was in possession of the cash to the arraigning judge, he "properly would have directed its application" in partial reimpursement of the county's payment of the court-appointed counsel.[35] Since the arraigning judge could have proceeded in this manner, the court reasoned that the judge hearing the petition could do so. The court did not consider the adequacy of the financial examination involved. Its decision rested solely on the discretionary power of the judge. In spite of the fact that the appellant's money was, on the record, his only worldly possession, the court saw no impropriety in requiring reimbursement of the entire amount and leaving the petitioner destitute.

It is true that the determination of the defendant's eligibility is

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[30]The arraigning judge used the phrases "financially unable to obtain an attorney by yourself" and "without pecuniary means to employ counsel." 178 N.W.2d at 921.

[31]For a discussion of the factors involvd in determining who is an "indigent" see generally L. SILVERSTEIN, DEFENSE OF THE POOR (1965); ABA COMM. ON PROSECUTION AND DEFENSE FUNCTIONS, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (app. draft 1968); Oaks, *Improving the Criminal Justice Act,* 55 A.B.A.J. 217 (1969); Stifler, *Determining the Financial Status of the Accused,* 54 ILL. B.J. 868 (1966).

[32]*See In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 187, 58 Cal. Rptr. 579, 587 (1967); State v. Harris, 5 Conn. Cir. 313, 250 A.2d 719, 721 (Cir. Ct. App. Div. 1968); Bolds v. Bennett, — Iowa —, 159 N.W.2d 425 (1968); State v. Rutherford, 63 Wash. 2d 949, 389 P.2d 895, 899-900 (1964).

[33]*See* Adkins v. E. I. Dupont de Memours Co., 335 U.S. 331, 339 (1948); United States v. Coor, 213 F. Supp. 955, 956 (D.D.C. 1963); *In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 187, 58 Cal. Rptr. 579, 587 (1967); State v. Harris, 5 Conn. Cir. 313, 250 A.2d 719, 721 (Cir. Ct. App. Div. 1968); Bolds v. Bennett, — Iowa —, 159 N.W.2d 425, 428 (1968).

[34]*See In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 187, 58 Cal. Rptr. 579, 587 (1967). *See generally, Hearings on S. 1461 Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess., pt. 3 at 99 (1969).

[35]178 N.W.2d at 922.

properly within the discretion of the judge. Nonetheless, it has been held that such a finding cannot be "blindly accepted" when a constitutional right relating to fair and equitable administration of criminal justice is involved.[36] In *Davis* the Michigan court emphasized that the civil action of mandamus was involved, not a criminal or quasi-criminal proceeding. Accordingly, the attendant civil principles of equity, justice, discretion and the rules of estoppel were applied.[37] The court found no absolute legal right in the petitioner, but did indicate that the result might be inequitable.[38]

If the authority of the judge hearing the mandamus action is to be equated to that of the judge presiding at the arraignment, as the Michigan supreme court did in *Davis,* it would follow that the former must consider the criminal procedure aspects in making his subsequent order. However, there was no consideration given to the question of whether or not an adequate inquiry had been conducted into the accused's financial ability, as was required by the Supreme Court in *Wood.* Instead, the *Davis* decision rested upon speculation as to what the assaigning judge would have done had he known of the petitioner's money. This seems inconsistent with the rationale of another court that "[m]ere innuendo, suspicion or conjecture" that a defendant may be able to advance costs is insufficient.[39] It would appear that an examination by the supreme court in *Davis* would have disclosed that a proper inquiry had not been conducted. Assuming that an adequate inquiry is conducted initially,[40] the arraigning judge may or may not find the accused financially unable to retain counsel. Alternatively, he may find that the accused was able to pay part of the expense.[41]

As previously stated, the financial examination of the accused conducted by the arraigning judge was directed only toward the defendant's assets. By appointing counsel for the accused, the arraigning judge did fulfill his *Gideon* obligation. In light of this fact, it was not

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[36]State v. Rutherford, 63 Wash. 2d 949, 389 P.2d 895, 899 (1964); *accord,* State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, 759-60 (Cir. Ct. App. Div.), *appeal denied,* 220 A.2d 771, *cert. denied,* 385 U.S. 982 (1966).

[37]178 N.W.2d at 922.

[38]*Id.*

[39]State v. Rutherford, 63 Wash. 2d 949, 389 P.2d 895, 899 (1964).

[40]If an adequate inquiry was not made by the arraigning judge, the judge making the reimbursement order would not appear to inherit the power at a later time, to deny the petition and make his order. Furthermore, the first judge's examination of Davis' financial position proceeded no further than discovery of the two hundred and nine dollars. Therefore, the judge making the reimbursement order, like the arraigning judge, would have had information only related to the accused's assets.

[41]*See, e.g.,* Wood v. United States, 389 U.S. 20 (1967).

absolutely necessary for the judge to conduct a complete financial inquiry. Nonetheless, such an examination certainly would have benefitted the judge making the subsequent order for reimbursement since the latter judge would have had a more complete record on which to base his decision. The unusual facts in *Davis* therefore reveal further confusion in the court-appointment procedure—the possibility of two proceedings.

The first proceeding in *Davis* was the arraigning judge's original examination of the accused's financial ability which resulted in appointment of counsel for the defendant, satisfying the *Gideon* sixth amendment right to counsel. The second proceeding in *Davis* would appear to have been the second judge's reimbursement order, rather than the mandamus action, although the supreme court apparently considered the reimbursement order part of the mandamus action.[42] It is not denied that mandamus is a civil action to which the attendant civil principles apply. However, instead of being part of the mandamus action it would seem that the judge's decision on reimbursement would be analagous to that of the arraigning judge determining the financial ability of a criminal defendant.[43] In other words the indigency question has been divided. The arraigning judge, instead of deciding the complete question, only decided that counsel would be appointed. Since the first judge only decided the eligibility issue, the judge making the reimbursement order was in fact deciding the cost issue. That is, the question before him was whether the accused should be required to make contribution towards the expense of his appointed attorney.

Since the right of contribution in *Davis* involved the appropriation of the money in possession of the sheriff, the reimbursement order involved a taking of the accused's property. It would follow that any proceeding concerning an accused's duty to make contribution involves more than the *Gideon* right to counsel. The due process requirements set forth by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*[44] would appear to be equally applicable. In *Mullane* the Court proclaimed the minimum requirement under the Due Process Clause to be that any deprivation of property by adjudication must be "preceded by notice and opportunity for hearing appropri-

[42]*See* 178 N.W.2d at 921-22.

[43]The Michigan court seems to contradict itself on this point, on the one hand stating that this was not a criminal proceeding while on the other hand holding that the judge hearing the mandamus acted validly because the arraigning judge had the authority to proceed. *See* 178 N.W.2d at 922.

[44]339 U. S. 306 (1950).

ate to the nature of the case."[45] In *Davis* it would seem that these requirements have not been met. Since the mandamus petition was instigated by Davis' own action it could be argued that he was aware that his property might be taken since his petition had been denied. It is doubtful, however, that this awareness was sufficient to meet the notice requirement in *Mullane* for the reason that the "taking" occurred after denial of the mandamus and concerned the question of contribution by an accused for his court-appointed counsel.

As to the *Mullane* hearing requirement, it would seem that there could be no question that this right had not been afforded to Davis in the second proceeding. Here, the "adequate inquiry" requirement of *Wood* would appear to be the only satisfactory criterion "appropriate to the nature of the case." Since the arraigning judge's inquiry concerned the question of whether to appoint counsel, the judge making the reimbursement order could not rely on that hearing for any more than the information as to the accused's assets. Yet examination of assets alone is not sufficient to constitute an adequate inquiry.[46] In order for the judge to have met the *Mullane* hearing requirement he would have had to conduct a more thorough investigation of the accused's financial ability.[47]

While the adequate inquiry requirement in *Wood* has not been directly applied to the states, reason would see mto dictate that such inquiry into the financial status of the accused is a necessary incident for protecting the "fundamental right" to counsel guaranteed by *Gideon*.[48] The right to appointed counsel in federal felony cases was

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[45]339 U.S. at 313.

[46]Note 31 *supra*.

[47]Underlying the discussion of these two proceedings is the consideration that there are also two different standards involved. The first standard would involve ascertaining a financial status which the accused must be below if counsel is to be appointed; if the accused's position is above that status, then appointment should be denied. Secondly, assuming that counsel is appointed, there would be another financial standard for determining whether the entire cost of the appointment will be borne by the government or whether some contribution by the accused would be in order. If contribution is ordered, a comparative set of standards would be necessary in determining the degree of contribution to be made. It would seem that in deciding the question of eligibility under the first standard a complete financial examination would not be required in every case. However, on the question of contribution a complete financial inquiry would be a necessity for the judge to make a fair decision.

[48]In *Gideon*, Mr. Justice Black explained the fundamental nature of the right to counsel as follows:

> We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was

established in *Johnson v. Zerbst*;[49] however, it was not until after the Supreme Court decided *Gideon* that Congress provided a satisfactory federal procedure for administration of these court appointments. The primary purpose of the Criminal Justice Act of 1964 was to protect every accused's sixth amendment right to counsel in federal criminal cases regardless of his financial status.[50] The legislative history of the Act reveals that Congress was directly concerned with the *Johnson* and *Gideon* decisions.[51] Congressional recognition of these cases is important in that it indicates what this body deemed necessary to comply with the Supreme Court's sixth amendment holdings. Although congressional interpretation is by no means binding on state courts, it may provide a significant indicator of the nature of future decisions, since the Supreme Court could hardly ignore the interpretation and application by Congress.

Even in light of the Criminal Justice Act, there are still instances in federal cases where the proper meaning of financial inability has been confused. In *United States v. Cohen*[52] the Court of Appeals for the Eighth Circuit reversed and remanded on the ground that the district court had not met the adequate inquiry requirement of *Wood*.[53] In the district court, the financial examination of the accused proceeded no further than discovering that he had an undetermined equity in land.[54] On appeal, Cohen, still claiming indigency, filed an affidavit

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> wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

372 U.S. at 342.

[49]304 U.S. 458 (1938).

[50]*See* 1964 U.S. CODE CONG. & ADMIN. NEWS 2991, which states that the purpose of the bill is to "provide legal assistance for indigent defendants in criminal cases in the courts of the United States." *See also* 109 CONG. REC. 14,222 (1963), in which Senator Hruska, speaking for the Judiciary Committee, states that "no effort was spared to develop and devise a very effective piece of legislation so as to meet the requirements of the sixth amendment...."

[51]*See* Letter of transmittal from Att'y Gen. Robert F. Kennedy to President John F. Kennerdy, March 6, 1963, 1964 U.S. CODE CONG. & ADMIN. NEWS 2994; 1964 U.S. CODE CONG. & ADMIN. NEWS 2999 (Separate views of Representative John V. Lindsay). *See also* 109 CONG. REC. 14,222 (1963) (remarks of Senator Hruska).

[52]419 F.2d 1124 (8th Cir. 1969).

[53]*Id.* at 1127.

[54]The examination of the accused in the district court is reported as follows:

> "Q. [By Mr. Nelson, Assistant United States Attorney] All right. Now before proceeding any further we note you are appearing in Court without an attorney. Do you have an attorney to represent you in this case?
>
> A.[By appellant] No.
>
> Q. Do you have money with which to hire an attorney if you desired one?
>
> ..

of financial status seeking appointment of counsel, and the appellate court appointed counsel for him.

The appellate decision contains two points of interest. First, since Cohen sought court-appointed counsel for his appeal, the case includes a report of the determination made by the appellate court of the accused's financial ability.[55] As such, the case is an excellent illustration of the concept that possession of assets alone does not automatically disqualify an accused from eligibility for court-appointed counsel. The court of appeals made a comprehensive examination of the value of the accused's assets by reviewing the incumbrances and liens on them and the extent of the accused's other liabilities. After examining apparently the same facts with which the district court had been faced, the court appointed an attorney to represent the accused on his appeal. Secondly, *Cohen* gives a critique of the lower court's financial inquiry which not only indicates the errors in that court's examination, but

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A. Well, not that hasn't been committed.

Q. [By the District Court] What do you mean by that? I don't understand it.

A. Well, I am buying some land, and I put up all my belongings for security.

Q. But you do have some land?

A. Yes.

Q. How much?

A. More than 160 acres.

Q. How much more?

A. 1,520 acres.

Q. And located where, Hayes County or Lincoln County—?

A. Lincoln and Hayes County; and Colorado.

Q. Well then the fact of the matter is you have got money enough to hire a lawyer.

A. I wouldn't say that, your Honor.

* * * * * *

Q. * * * I think you should consider the question of whether you shouldn't hire counsel. And I have a notion, having been raised in the adjoining county of the counties you have mentioned that if you have as much land as you have there you could hire counsel if you wanted to.

A. Well, I wouldn't—I don't think it would be very wise to be lying to you, your honor if I had the money I have this committed.

* * *."

419 F.2d at 1125.

[55]In *Cohen,* the appellate court found, on the basis of an uncontested affidavit, that the appellant had an indefinite 'equity' in 1,520 acres of which he was not presently the owner but might have a cause of action against the titled owner. The court also discovered that the appellant had a disputed interest in ASCS 'wheat certificates' with a face value of $4,100. Furthermore, the defendant's homesite worth $500-$750 was encumbered by a tax lien for $560. His 1964 automobile was mortgaged for an outstanding bank loan in excess of $1,000. The court also established that the appellant had other liabilities of $10,750 and that he only had $200 cash on hand. 419 F.2d at 1126.

also provides, by implication, an explanation of the concepts and policies underlying its own determination. The appellate opinion stated that the district court had failed to fulfill its duty to make further inquiry to determine whether the defendant's apparent asset of an unspecified interest in real estate so exceeded his outstanding liabilities that he could *in fact* afford to employ an attorney.[56] The court emphasized that the assumption of adequate liquidity from the appellant's statement that he was buying some land, coupled with the district court judge's personal knowledge of the land value in the area, was not sufficient to ensure the appellant's sixth amendment right to counsel.[57] The concept of relative indigency was followed and the point was stressed that indigency is not necessarily equatable with destitution.[58]

Assuming that an adequate inquiry is conducted in light of the relative concept of financial inability, the question arises as to what extent the state can include the expense of such counsel in the costs assessed against the defendant. It would seem that to burden the indigent with reimbursement of the costs of his court-appointed counsel would defeat the purpose of the initial appointment. Since payments by the state to appointed counsel are generally less than fees chargd by privately retained counsel, it would follow that reimbursement of costs by the indigent to the state would be a lesser burden than payment to retained counsel.[59] Nevertheless, the question would still remain whether or not it was the intention of the Supreme Court in *Gideon* that the defendant who is found to be unable to retain counsel should be responsible for this expense at all.

Mr. Justice Black, in delivering the opinion of the Court in *Gideon*,

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[56]419 F.2d at 1127.

[57]In *Cohen*, Judge Matthes, delivering the opinion of the court stated:

> The assumption of adequate liquidity from appellant's bald statement of "I am buying some land," coupled with the court's personal knowledge of land values in the area of appellant's acreage, is not sufficiently "appropriate inquiry" to ensure the appellant's Sixth Amendment right.

419 F.2d at 1127.

[58]Judge Matthes, in explaining the meaning of indigency under the Criminal Justice Act of 1964 and the sixth amendment, stated that "indigency in that sense is not necessarily equatable with destitution. Rather, the status comprehended is a more realistic one." 419 F.2d at 1127.

[59]*E.g.*, MD. ANN. CODE art. 26, § 12A (1970 Supp.) ($500 maximum in Prince George's County); VA. CODE ANN. § 14.1-184 (1970 Supp.) ($400 maximum for defending crime punishable by death or more than 20 years; $200 maximum for other felonies); W. VA. CODE ANN. § 62-3-1 (1970 Supp.) ($50 for defending felony). *But see*, N.Y. COUNTY LAW § 722(b) (McKinney 1970 Supp.) (maximum $1500 where crime is punishable by death, $500 for other felonies).

declared that "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."[60] Likewise, Mr. Chief Justice Warren, speaking of the preinterrogation right to counsel in *Miranda,* stated that "if [the accused] cannot afford one, a lawyer will be provided for him."[61] The language in both cases includes the phrase "provided for him," which strongly implies that this service should be without charge to the indigent defendant. Since the above-quoted passage in *Gideon* is immediately followed by Justice Black's reference to the vast amount of money spent by the federal and state governments to prosecute alleged criminals,[62] it may be inferred that the expense of assuring an adequate defense should also be borne by the various governmental entities. However, it remains a practice in many states to appoint counsel for indigent defendants and then to assess the cost of the appointment against the defendant.[63]

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[60]372 U.S. at 344.

[61]384 U.S. at 474.

[62]Mr. Justice Black states:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indication of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right to one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344.

[63]*See* Woodberry County v. Anderson, — Iowa —, 164 N.W.2d 129 (1969); State v. Konvalin, 181 Neb. 554, 149 N.W.2d 755 (1967); Witherspoon v. Belt, 177 Ohio St. 1, 201 N.E.2d 590 (1964); *Ex parte* Wilson, 89 Ohio L.Abs. 575, 183 N.E.2d 625 (Ohio Ct. App. 1962); Wright v. Matthews, 309 Va. 246, 163 S.E.2d 158, 159 n.1 (1968); VA. CODE ANN. § 14.1-184 (1970 Supp.).

[64]VA. CODE ANN. § 14.1-184 (1970 Supp.) provides in part; "If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as part of the costs of the prosecution...." *See also* W. VA. CODE ANN. § 62-3-1 (1970 Supp.) provides: "The amount so paid, in the event the accused shall not prevail, shall be and constitute a judgement of said court against the accused to be recovered as any other judgement for costs."

For example, in Virginia there is a statutory provision authorizing the assessment of costs against a convicted individual for whom counsel was appointed. In *Wright v. Matthews*,[65] a convicted indigent filed a writ of habeas corpus directing his release from a state farm where he was being confined solely to pay the costs of his criminal prosecution.[66] A substantial part of the cost involved was for court-appointed counsel in the county and circuit courts.[67] The court awarded the writ on the grounds that costs assessed against a person convicted of a crime are not part of his punishment for the crime, and therefore, the imprisonment for non-payment of costs violated the involuntary servitude prohibition of the thirteenth amendment.[68] The Virginia court, however, did not consider the validity of assessing the cost of counsel against an indigent.

If adequate determination of the accused's financial status is made, some reimbursement may be in order. Partial reimbursement of court expenses appears proper when the accused's financial position is such that, while he cannot afford the full fee of retained counsel, his resources are sufficient to justify some contribution. This consideration was demonstrated in the *Wood* case where, after the Supreme Court had remanded for reconsideration, it was decided that counsel should be appointed with Wood to pay part of the expense.[69] Furthermore, the Criminal Justice Act provides a procedure for such circumstances.[70]

Contra, NEW MEX. STAT. ANN. § 41-22-4(B) (1969 Supp.) provides that: "the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense."

[65]209 Va. 246, 163 S.E.2d 158 (1968).

[66]Justice Gordon of the Supreme Court of Appeals of Virginia described Wright's situation as follows:

> The State's sole ground for detaining Wright is his failure to pay these costs. If the costs had been paid, Wright would have been released on September 11, 1967; if the costs remain unpaid, he will not be released until July 29, 1970. Wright is indigent and unable to pay costs.

163 S.E.2d at 159.

[67]*See* 163 S.E.2d at 159 n.1. Of the total cost of $1,064.75 assessed against Wright, $675.00 were fees paid to his court-appointed attorneys.

[68]*Cf.* Williams v. Illinois, 399 U.S. 235 (1970), where the United States Supreme Court recently held that imprisonment of an indigent for fines or cost beyond the maximum statutory sentence for the particular crime, violated the Equal Protection Clause of the Fourteenth Amendment.

[69]Wood v. United States, 413 F.2d 437, 438 (5th Cir.), *cert. denied*, 396 U.S. 924 (1969).

[70]Sec. 3006A(c) provides:

> If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the repre-

While these provisions apparently have been applied in only one instance,[71] their inclusion in the Act would seem to indicate an intent to cover those defendants who would fall on the borderline between complete financial inability and financial ability.[72] This inclusion would also seem to indicate that Congress contemplated three types of defendants: those who can retain counsel on their own; those who cannot afford to retain counsel on their own, but who are capable of making some contribution toward such costs; and those who are financially unable to pay anything and for whom counsel should be provided at public expense.

In conclusion, it would appear that the problems confronting the courts in cases such as *Davis* and *Cohen* could have been avoided if proper examination of the accused's financial abilities had been made initially in the trial court. In absence of any specific directions from the Supreme Court as to the correct method of judicial administration for court-appointed counsel for indigents, courts should make a realistic inquiry into the financial status of the accused. Such inquiry is, it would seem, a fundamental procedure necessary to prevent violation of the constitutional right to counsel. In light of the "adequate inquiry" standard set out in *Wood* and the "provided for" language of Mr. Justice Black in *Gideon,* it can be said that state procedure in many instances is not being employed in a manner which protects the rights of indigents as envisioned by the Supreme Court.

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sentation, he may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate.

18 U.S.C. 3006A(c).

[71]Other than *Wood,* no other cases were found in which a court has decided that the defendant should pay part of the costs. *See* Oaks, *Improving the Criminal Justice Act,* 55 A.B.A.J. 217, 219 (1967).

[72]*See* Letter of transmittal from Att'y Gen. Robert F. Kennedy to President John F. Kennedy, March 6, 1963, 1964 U.S. CODE CONG. & ADMIN. NEWS 2994-95.