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GIDEON'S TRUMPET BLOWS FOR MISDEMEANANTS—ARGERSINGER v. HAMLIN, THE DECISION AND ITS IMPACT

Sheldon Portman*

INTRODUCTION

On June 12, 1972, forty years after Due Process status was conferred upon the right to counsel¹ and nearly ten years after its mandatory application in all state felony prosecutions,² the Supreme Court in Argersinger v. Hamlin³ further extended the requirement of counsel to all cases in which imprisonment is imposed regardless of the classification of the offense. In Gideon v. Wainwright the Court had rejected a previously imposed limitation⁴ that required "an appraisal of the totality of facts in a given case" as a condition to the requirement of providing counsel in state cases.⁵ Although Gideon was interpreted as probably limiting the right to appointment of counsel "in felony cases" only,⁶ neither the language nor the reasoning of that decision expressed such a limitation.⁷ In fact, Mr. Justice Black's majority opinion left little doubt that ultimately the Court would conclude that the right to counsel applied across the board:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into

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5. Id. at 462.
7. On a number of occasions prior to Argersinger, the Court did, however, deny certiorari in state cases wherein counsel had been denied in misdemeanor prosecutions. Winters v. Beck, 365 U.S. 907 (1966); DeJoseph v. Conn., 385 U.S. 982 (1966).
court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.\(^8\)

At the time of *Argersinger*, most states had already recognized the right to counsel in misdemeanor cases.\(^9\) Thirty-six states required counsel, including twenty-two which accorded the right even when the possible penalty was less than six months imprisonment. Only twelve states did not recognize any right to counsel at all in misdemeanor cases.\(^10\)

Despite the "handwriting on the wall," the *Argersinger* decision presented troublesome problems for at least two members of the Court, who voiced grave reservations about the heavy impact the decision was bound to have upon the states.

This article will endeavor to present an in-depth analysis of this important decision, as well as the practical problems it presents and the available solutions to those problems. The potential benefits of the decision will also be considered.

I. THE DECISION ITSELF

A. The Legal Issues

On January 13, 1970, Jon Richard Argersinger pleaded guilty to the Florida misdemeanor offense of carrying a concealed weapon. He was indigent and was not represented by counsel. After receiving a sentence of three months in the county jail, he had obtained the assistance of counsel and petitioned for habeas corpus in the Supreme Court of Florida. He claimed that he had been unrepresented by counsel due to indigence, that he had not waived the assistance of counsel, and that he had had a defense to the charges which he, as an indigent layman, had been unable to properly raise and present.

The Florida Supreme Court dismissed Argersinger's application for a writ, holding that an indigent defendant accused of a misdemeanor is entitled to court-appointed counsel only if the offense carries a possible penalty of more than six months imprisonment. This conclusion was based upon the reasoning in *Duncan v. Louisiana*,\(^11\) wherein the Supreme Court had limited the

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8. 372 U.S. at 344 (emphasis added).

9. Brief of the Nat'l Legal Aid and Defender Ass'n as Amicus Curiae at 41, Argersinger v. Hamlin, 407 U.S. 25 (1972). In Appendix A of the NLADA brief, a survey was presented entitled, *Law and Practice in Fifty States Regarding the Right to Appointed Counsel*.

10. The following states were listed as not recognizing any right to counsel in misdemeanor cases: Alaska, Arkansas, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Rhode Island, South Carolina, Virginia and Washington.

right to trial by jury to non-petty offenses, *i.e.*, offenses carrying a penalty of more than six months imprisonment.

The first issue in *Argersinger* was whether the Florida Supreme Court had correctly applied *Duncan* in restricting the requirement of providing counsel. The Court, pointing out that the origins of the right to counsel and to jury trial were quite dissimilar, was unanimous in rejecting that analogy. Unlike the right to jury trial, which was recognized at common law, there was no such right to counsel in felony cases. However, in misdemeanor cases, the right to counsel was allowed.\(^{12}\) In addition, as noted by Mr. Justice Powell, who authored the minority concurring opinion, the two rights were distinguished on the basis that trial by jury was "not as fundamental to the guarantee of a fair trial as the right to counsel."\(^{13}\) Furthermore, he noted that, unlike *Gideon* which had been given retroactive effect,\(^ {14} \) the sixth amendment right to jury trial had been restricted to prospective application only.\(^ {15} \)

Mr. Justice Douglas, author of the majority opinion, stressed the essential relationship of the right to counsel to the requirement of a fair trial. In this regard, he quoted from Mr. Justice Sutherland's classic opinion in *Powell v. Alabama*,\(^ {16} \) on the need for "the guiding hand of counsel" in order to avoid being "put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible . . . [and in order to] prepare his defense . . . ."\(^ {17} \) To this he added Mr. Justice Black's famous language from *Gideon v. Wainwright*:

The right of 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.\(^ {18} \)

The Court also equated the right to counsel with those rights considered "basic in our system of jurisprudence" such as the right to reasonable notice of the charge, the opportunity to be

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13. *Id.* at 46.
18. *Id.* at 32, *quoting* 372 U.S. at 344.
heard, and the right to examine witnesses and to offer testimony in one's own behalf.\textsuperscript{19}

Referring to a number of important constitutional cases arising from misdemeanor prosecutions,\textsuperscript{20} the Court further observed that it was not convinced that legal and constitutional issues were any less complex in a case where a conviction evoked a lesser penalty. In this connection, reference was made to \textit{In re Gault},\textsuperscript{21} which imposed the right to counsel in juvenile delinquency proceedings. In \textit{Gault} the underlying offense had been a misdemeanor, which if prosecuted in an adult case, would have drawn no more than two months in jail. Nevertheless, the Court concluded that a child required the "guiding hand of counsel" in order "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."\textsuperscript{22}

Beyond the importance of counsel to insure a fair trial, the Court also recognized the need for legal assistance for the purpose of a guilty plea, observing that:

Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.\textsuperscript{23}

In regard to such pleas, the majority was especially concerned about the pressures of the heavy volume of misdemeanor prosecutions and the resultant "obsession for speedy dispositions, regardless of the fairness of the result."\textsuperscript{24} Gross examples of high-volume, inadequate court staffing, and "assembly-line justice," were cited from the Report of the President's Commission on Law Enforcement and Administration of Justice.\textsuperscript{25} Quoting Dean Edward Barrett from the Crime Commission Report, the Court acknowledged the detrimental impact of these conditions upon the individual defendant:

\begin{itemize}
  \item 20. \textit{Id.} at 33, \textit{citing Powell v. Texas}, 392 U.S. 514 (1968) (Issue of violation of the eighth amendment ban on cruel and unusual punishment by prosecution of a chronic alcoholic); Thompson v. Louisville, 362 U.S. 199 (1960) (conviction for loitering or disorderly conduct without substantive evidence of the crime as violation of due process); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965) (City ordinance forbidding loitering or standing on a sidewalk after having been asked to move by a police officer held overbroad and in violation of due process); Papachristou v. Jacksonville, 405 U.S. 156 (1972) (Declaring vagrancy statute which made it illegal to be an habitual loafer, among other things, a violation of the Due Process Clause for being overbroad).
  \item 21. 387 U.S. 1 (1967).
  \item 22. 407 U.S. at 33, \textit{quoting 387 U.S. at 36-37}.
  \item 23. 407 U.S. at 34.
  \item 24. \textit{Id.}
  \item 25. \textit{Id.} at 34-35, \textit{quoting REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE}.}

\end{itemize}
Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between theory and reality is enormous.²⁶

Although the Court was unanimous on the importance of counsel to insure a fair trial, the minority opinion diverged on the question of when the right to counsel is constitutionally compelled.²⁷ The majority concluded that, regardless of the classification of the offense, imprisonment could not constitutionally occur without representation by counsel or an intelligent waiver thereof.

Mr. Justice Douglas viewed this decision as forewarning a judge that he would be unable to imprison an accused, regardless of local law, unless counsel were provided. Accordingly, the judge would have to measure "the seriousness and gravity of the offense" in advance of trial in order to determine whether to appoint an attorney to represent the accused.²⁸

In a concurring opinion, Chief Justice Burger further explained that the trial judge and the prosecutor would need to "engage in a predictive evaluation of each case to determine whether there [was] a significant likelihood that, if the defendant [were] convicted, the trial judge [would] sentence him to a jail term."²⁹

The minority concurrence by Mr. Justice Powell, joined in

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26. Id. at 35.
27. Although reversal of Argersinger's conviction was unanimous the opinion of the Court was supplemented by three concurring opinions: one by Justice Brennan joined by Justices Douglas and Stewart; one by Chief Justice Burger; and a third by Justice Powell joined by Justice Rehnquist.
28. 407 U.S. at 40. A recent survey of municipal court judges in Cuyahoga County, Ohio, reports scepticism regarding the ability of a trial judge to make such a decision without a full determination of the merits of a case. The judges surveyed were also concerned that a determination of any depth "would compromise the judge's ability to be an unbiased trier of fact." Katz, A Report to the Court Management Project on Right to Counsel in Misdemeanor Cases in Cuyahoga County 5-6 (1972).
29. 407 U.S. at 42.
by Mr. Justice Rehnquist, viewed both the majority's rule and that of the Florida Supreme Court as too rigid. They preferred a "middle course between the extremes," namely that of "the principle of due process that requires fundamental fairness in criminal trials . . . encom[pass]ing the right to counsel in petty cases whenever the assistance of counsel is necessary to insure a fair trial."30

The minority did agree, however, that misdemeanor prosecutions were no less complex than felonies, and that even in minor cases, ignorance or other handicaps could make the layman incapable of representing himself.31 In addition to these considerations, the minority opinion expounded at length on the collateral consequences of petty offense convictions. Among these consequences were noted the "deplorable conditions in local jails" to which misdemeanants were often subjected, the detrimental effect of a criminal record on employability, the stigma of convictions for offenses such as drunk driving or hit and run, and the impact upon employment resulting from the loss of one's driver's license upon conviction of certain traffic offenses. Accordingly, it was concluded that, even beyond imprisonment, the "deprivation of property rights and interests" could render a denial of assistance of counsel contrary to due process.32

This concern for the collateral consequences of a petty offense conviction was the syllogistic springboard for attacking what Mr. Justice Powell described as a "mechanistic application" by the Court of an "inflexible rule . . . regardless of circumstances."33 Then, in a sudden leap of logic, the minority accused the Court of extending the right to counsel to indigents where it would rarely be exercised by others, thus favoring indigents over other low income groups and further accentuating the advantage of being barely self-sufficient economically.34 This

30. Id. at 47.
31. Id. at 47-48.
32. Id. at 48. Mr. Justice Douglas brushed aside this point by observing that the application of the sixth amendment to cases not involving loss of liberty need not be considered because the petitioner had in fact been sentenced to jail. Id. at 37.
33. Id. at 49.
34. Id. at 49-50. This conclusion is clearly inaccurate if the majority's rule is literally restricted to the consequence of imprisonment. If so, it would certainly be a rare case in which a non-indigent defendant, confronted with the "practical possibility" of imprisonment, would not secure the services of counsel. Even in cases of aggravating collateral consequences, such as loss of employment, it is doubtful whether an informed non-indigent person, having an intelligent and understanding knowledge of such consequences, would not obtain counsel. The fact is that in many lower courts, operating under assembly-line conditions, such consequences are rarely explained, and defendants often plead guilty without counsel, ignorant of the ramifications of their plea. Cf. In re Johnson,
criticism was based on the assumption that the scope of the right to appointed counsel under the majority view extended to collateral consequences beyond imprisonment.

Recognizing the gap in logic, the minority doubled back to explain its underlying assumption that the Court's rule would supply counsel in all cases and not merely those involving imprisonment. Conceding that the Court had not gone "all the way," the minority nevertheless contended that that was "the thrust" of the new rule. This assessment was based upon still another assumption, namely that, since the majority opinion had rejected the exercise of judicial discretion regarding the need for counsel if a jail sentence was to be imposed, it could be assumed that discretion would be similarly dispensed with in other petty cases wherein there might be more serious consequences than brief incarceration. Accordingly, it was predicted that the requirement of counsel for imprisonment cases "foreshadow[ed] adoption of a broad prophylactic rule applicable to all petty offenses."

The minority also criticized the new rule on the basis that it would lead to arbitrary judicial classification of imprisonment or non-imprisonment offenses without regard to legislative options, thereby deterring personalized decisions regarding guilt and punishment. In addition, an equal protection issue was predicted based on the prospect of variances in the assignment of counsel for offenses with consequences other than imprisonment.

After giving lengthy consideration to a variety of predicted practical problems the minority concluded that the right to counsel in petty theft cases should best be left to a case-by-case determination. As in the majority view, however, a trial court still would have to make a decision on whether to assign counsel prior to accepting a plea in order to provide a defendant with advice on the necessity of a trial if the evidence of guilt were not overwhelming.

In order to preserve the question for review, the trial court

62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965). If lower court judges were required to explain such consequences, it might well result in a substantial increase of represented defendants, and thus, remove the basis of the minority's objection on this point.

35. 407 U.S. at 51.
36. Id.
37. Id. at 52.
38. These problems are discussed infra at pp. 8-11.
39. 407 U.S. at 63. This view would have required arraignment judges to engage in a far more detailed assessment of evidence in advance of trial than that required under the majority rule. A judge's ability to maintain an unbiased view without prejudice to a later hearing of the case would have been even more precarious had the minority's view prevailed. See note 28 and accompanying text supra.
would be required to state the reasons for denial of counsel on the record. Subsequent proceedings and evidence would have to be "scrutinized" to insure that any later change of plea was supported by the facts. During trial, the judge would have to intervene on behalf of a defendant if necessary. Similarly, the appellate court would be expected to "carefully scrutinize" all decisions denying counsel.

Under the minority view, three factors would be considered: 1) the complexity of the offense, including whether the state had counsel; 2) the probable sentence, including other consequences of a conviction; and 3) the individual factors peculiar to the given case. While recognizing that this was, in effect, the old Betts v. Brady doctrine, which had been rejected in Gideon because state courts had defaulted in the exercise of their responsibilities, nevertheless the minority contended that a similar default should not be assumed with regard to petty offenses.

Finally, while conceding that its view would create problems for local courts, the minority nevertheless insisted that, by comparison, a case-by-case determination would "minimize problems."

B. The Practical Problems Recognized

The practical problems, both inherent in the issue and as a consequence of the Court's ruling, were considered by all of the opinions filed in Argersinger. Such problems included the numbers of cases affected by the decision, the availability of legal manpower, the expense to state and local governments, and the inevitable impact on the courts.

1. The Volume of Cases

The majority opinion's chief concern in regard to case volume was the impact of such volume upon fair trials, creating the

40. Id. at 64.
41. 316 U.S. 455 (1942).
42. 407 U.S. at 65.
43. Id. at 66 n.34. This statement reveals the naivete of the minority with respect to the operations of the lower courts. The requirement that these courts "scrutinize" cases prior to plea and make the highly refined determinations suggested by the minority opinion would doubtlessly impose an impossible burden for the many urban courts which conduct hundreds of arraignments each day. By comparison, assessing the prospect of imprisonment on the basis of the charge and supporting police report would seem a far less onerous and time-consuming burden.

The imposition of the minority view upon the appellate process would also have been considerable. The time expended by appellate judges and law clerks in reviewing denial of counsel claims in petty offenses would undoubtedly far outweigh any burden resulting from an across-the-board requirement of counsel in all imprisonment cases. In almost every case of imprisonment or collateral
“obsession with speedy dispositions” and the phenomenon of “assembly line justice,” thereby necessitating the assistance of counsel.

A secondary problem was that of the difficulty of providing counsel in so many cases. A partial solution was suggested by removal of many petty offenses from the court system. Referring to an American Bar Association report, Mr. Justice Douglas observed that victimless crimes, such as drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior could be transferred to non-judicial entities, e.g., detoxification centers, narcotics treatment centers, and social service agencies. In addition, it was suggested that other non-serious offenses, like housing code and traffic violations, could be handled by specialized administrative bodies.

2. Shortage of Legal Manpower

The adequacy of legal resources to meet the need for counsel resulting from the Court’s decision was also given consideration. On the basis of an earlier study, the Court concluded that between 1,575 to 2,300 full-time attorneys would be required to represent all indigent misdemeanants other than traffic offenders. Citing the total number of attorneys in the United States (335,200), projected to double by 1985, the Court concluded that there would be little difficulty meeting the demands for attorney manpower resulting from the new decision. But even if a problem arose in this regard, Mr. Justice Brennan suggested, in a concurring opinion, that law students in clinical programs could provide “a significant contribution, quantitatively and qualitatively, to the representation of the poor. . . .”

But the minority took exception to what it considered to be a lack of concern by the Court on this question. In addition to

consequences, such as the loss of a driver’s license, wherein counsel had not been supplied by the trial court, there would probably be an appeal, adding further congestion to an overburdened appellate court system.

44. Id. at 34 n.4. The majority estimated that there were four to five million misdemeanor cases annually, and between forty and fifty million traffic offenses.

45. ABA SPECIAL COMM. ON CRIME PREVENTION AND CONTROL, NEW PERSPECTIVES ON URBAN CRIME (1972).

46. 407 U.S. at 38 n.9.

47. Id. at 37 n.7, citing Note, Dollars and Sense of an Expanded Right to Counsel, 55 IOWA L. REV. 1249 (1970) [hereinafter cited as Dollars and Sense].


49. Id., citing Ruud, That Burgeoning Law School Enrollment, 58 A.B.A.J. 146, 147 (1972), reporting 18,000 new admissions to the Bar each year—3,500 more than required to fill 14,500 average annual openings.

50. Id. at 41. On the problems associated with the utilization of law students, see note 100 infra.
defense attorneys, Mr. Justice Powell observed that more prosecutors, judges and court reporters would be required. He took issue with the majority's reference to the total number of lawyers in the United States as potentially available, pointing out that many of these were in corporate and government work, and that the ability of the others to function in the area of criminal law was unknown.

3. The Expense to Local Communities

The primary concern for the minority, however, was the financial impact of the decision upon state and local governments—a problem which the majority had virtually ignored, except for a brief reference by the Chief Justice.51

Considerable doubt was expressed by the minority that the states and local communities would have the resources to supply, not only the defense lawyers, but the prosecutors, the additional courts and the court reporters which would be required. Citing the example of the Town of Wood, South Dakota, which had been unable to retain counsel to file a pleading with the Court, the minority was certain that the capabilities of many state courts and local communities would be seriously overtaxed. It concluded that many communities like the Town of Wood would no longer be able to enforce their laws.52

4. The Impact on Overburdened Courts

The minority opinion also gloomily predicted that the problems of congestion and delay in the nation's lower courts would be "exacerbated" by the new rule. Of particular concern in this regard was the penchant of defense attorneys, especially young lawyers who would be likely to receive most appointments, to exhaust every possible legal avenue regardless of the probable benefit and to stretch out the process in their eagerness to make a reputation and to acquire court exposure. In support of the latter statement, Justice Powell cited a survey conducted in Cook County, Illinois, reporting a comparison of jury trials requested by appointed private counsel, retained counsel, counsel from a bar association's committee for the defense of prisoners, and coun-

51. In his concurring opinion, Chief Justice Burger observed that, had he "focused solely" on this problem, he would have been inclined toward the six months confinement rule of the Florida Supreme Court. 407 U.S. at 41.
52. Id. at 61. The Town of Wood occasionally employed an attorney to represent it but the office of the nearest attorney was 40 miles away and the town, with a population of 132, was quite poor. When asked by the Supreme Court to file a response to a writ of certiorari, the town decided that contesting the case would be an unwise allocation of its limited resources. Id.
sel supplied by the public defender's office. The survey showed that the bar association panel opted for jury trials in 63% of the cases, whereas retained and appointed counsel and the public defenders requested such trials in 33% and 15%, respectively.

The minority conceded that its own view of a case-by-case determination regarding the necessity of counsel would also create a burden for the lower courts. But without explanation, Justice Powell asserted that the "careful scrutiny" he would require trial and appellate courts to exercise in order to determine the need for counsel in any given case would impose a lesser burden upon those courts. In sharp contrast, the majority opinion gave no consideration to the impact of its decision upon the lower courts. In fact, the impact of "assembly-line operations" in many lower courts upon the rights of defendants was cited as a primary justification for requiring the assistance of counsel:

The calendar is long, speed often is substituted for care, and casually arranged out of court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risks he presents, or determining how to deal with him after conviction. The frequent result is futility and failure.

II. PROBLEMS AND SUGGESTED SOLUTIONS

The majority and concurring opinions in *Argersinger* indicate essentially three practical problems which must be overcome in order to carry out the mandate of this decision. These problems include the financial burden, the legal manpower requirements, and the impact on an overburdened lower court system. Each of these problems and their potential solutions will now be considered.

A. The Financial Burden

Estimating the financial cost of the *Argersinger* decision is difficult because of the lack of reliable caseload data from which to make financial projections. In *Argersinger*, the Court

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53. Id. at 59 n.24, citing D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 159 (1968).
54. Id. The opinion quotes from a statement in the survey suggesting an explanation for the lower percentage of jury trials requested by public defenders as a consciousness "of the probable extra penalty accruing to a defendant who loses his case before a jury." This seemingly implies minority approval for a patently unconstitutional pressure reportedly practiced in several urban courts. See, I Have Nothing to Do with Justice, LIFE, Mar. 12, 1971, at 57; Justice on Trial, NEWSWEEK, Mar. 8, 1971, at 16.
55. 407 U.S. at 35, quoting REPORT ON THE CHALLENGE OF CRIME IN A FREE SOCIETY, supra note 25.
referred to an estimated need for 1,575 to 2,300 appointed attorneys to service the indigent portion (1.25 million) of between four and five million misdemeanants annually. However, those figures are questionable since they are based on projections from 1962 data of twelve states.

In the absence of current data from which to assess Arger singer's financial impact, available California statistics should provide a fairly reliable basis for making such projections. The state's large population (19,968,004) approximates one-tenth of the nation's total (203,211,926) and allows for an easy-to-apply 1-to-10 projection ratio. In addition, the variations in the ethnic and racial makeup, density of California's population, and the variety of climates and topography in the state, duplicate practically every demographic and geographic condition found anywhere in the country. It also has the dubious distinction of the highest total crime index in the United States (4,307.0 per 100,000 population).

The reliability of projections based on California data is also enhanced by the reputed accuracy of its crime statistics, which are gathered by one of the best crime data centers in the country—the California Bureau of Criminal Statistics. In addition, California has the oldest and probably most highly developed county public defender system in the country. Furthermore, California counties have had more than seven years experience providing compensated counsel to indigent misdemeanants.


57. The Task Force Report in turn quoted projections from L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 123-24 (1965) [hereinafter cited as Defense of the Poor]. The Silverstein estimate that four to five million court cases annually involve misdemeanors is based on a 12 state study.

At this writing, a current data base is being gathered by the National Legal Aid and Defender Association (NLADA), funded by a Law Enforcement Assistance Administration (LEAA) grant. The National Legal Aid and Defender Association is conducting a nation-wide survey of defender services and will assess the costs of such services to meet the requirements of Arger singer.


59. Latest published data reports that in 1969-70, 34 of California's 58 counties expended $13.3 million for public defender services. CCCJ, 1972 Plan A-210. The total staffing of these offices was 998 personnel. Among this number were 621 full-time and 28 part-time attorneys, and 108 full-time and 3 part-time investigators.

The first public defender office in the country was established in Los Angeles in 1914. Currently that office includes nearly 400 attorneys.

The total cost for all indigent defense services provided by public defenders and other appointed counsel in California during 1969-70 was $18.5 million.\(^6\) By projecting California's cost for these services on the basis of the ratio of the state's population to that of the nation (1-to-10), it may be concluded that, had \textit{Argersinger} been in effect during 1969-70, indigent legal services in all of the states would have required a maximum cost of $185 million. This compares with an actual nation-wide expenditure during that period of $46.4 million—only about one-fourth of the California cost projection.\(^2\)

If the $138.5 million disparity between the California projection and the actual expenditure was due to the absence of services for misdemeanants, then obviously an increase equal to that amount would be required to comply with \textit{Argersinger}.\(^5\) On the other hand, this disparity could be attributed to the generally low level of funding for defense services in other case categories as well. In either event, assuming that the California experience is a reliable basis for projecting the costs of optimum defender services, it may be concluded that a total annual expenditure of $185 million will be required, or four times the amount actually expended.

Although there is no official breakdown of California costs by category of cases, misdemeanor cases can be roughly estimated at $7.3 million, based on an average cost of $66 per misdemeanor case.\(^4\) Applying the 1-to-10 population-ratio project-to-indigents in misdemeanor cases. \textit{Defense of the Poor} 125. This estimate was based upon a 12 state misdemeanor caseload projection of $1.25 million, at a cost of $50 per case for assigned counsel or defender services.

\(64\) Misdemeanors, as defined herein, do not include minor traffic offenses. The $66 per misdemeanor case cost is derived by dividing the total cost ($18.5 million) by a total of 269,000 weighted case "units." These weighted units are calculated by applying a weight of two to the felony caseload on the basis that the average misdemeanor case requires only one-half the work of one felony case. Thus, for these calculations, 69,000 indigent felony cases in California during 1970 would convert to 138,000 misdemeanor case units. Misdemeanor case units—calculated on the basis of one case equivalent to a case unit—would total 110,000. Juvenile cases, which represent the other major category of indigent cases, must be reduced in weight by a factor of .67, on the basis that the average workload for a single juvenile case is equivalent to .67 misdemeanor cases. Thus, approximately 31,000 indigent juvenile cases in which there were appointed counsel in California during 1970 would convert to 21,000 misdemeanor case units. Dividing the $18.5 million total cost by the total of 269,000 weighted units for all three case categories (felonies, misdemeanors

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\(61\) CCCJ, 1972 Plan 9. The categories of cases covered by this cost included felony and misdemeanor prosecutions, and juvenile petitions for wards and mental illness and narcotics commitments.


\(63\) In 1964, Silverstein estimated that it would cost $62.5 million to provide representation to indigents in misdemeanor cases. \textit{Defense of the Poor} 125. This estimate was based upon a 12 state misdemeanor caseload projection of $1.25 million, at a cost of $50 per case for assigned counsel or defender services.

\(64\) Misdemeanors, as defined herein, do not include minor traffic offenses. The $66 per misdemeanor case cost is derived by dividing the total cost ($18.5 million) by a total of 269,000 weighted case "units." These weighted units are calculated by applying a weight of two to the felony caseload on the basis that the average misdemeanor case requires only one-half the work of one felony case. Thus, for these calculations, 69,000 indigent felony cases in California during 1970 would convert to 138,000 misdemeanor case units. Misdemeanor case units—calculated on the basis of one case equivalent to a case unit—would total 110,000. Juvenile cases, which represent the other major category of indigent cases, must be reduced in weight by a factor of .67, on the basis that the average workload for a single juvenile case is equivalent to .67 misdemeanor cases. Thus, approximately 31,000 indigent juvenile cases in which there were appointed counsel in California during 1970 would convert to 21,000 misdemeanor case units. Dividing the $18.5 million total cost by the total of 269,000 weighted units for all three case categories (felonies, misdemeanors
tion, it may be concluded that an expenditure of $73 million would be required for indigent misdemeanor defense in state and local courts throughout the nation.\(^6^5\)

The California misdemeanor unit cost of $66 calculated above may be readily applied to the indigent caseload of any community to determine the approximate costs for supplying counsel to misdemeanants. For example, in the city of Cleveland, Ohio, a recent study estimated that 4,000 misdemeanor cases annually would require the service of appointed counsel.\(^5^6\) Applying the $66 misdemeanor unit cost calculated above, it may be concluded that an expenditure of $264,000 would be required for misdemeanor defense services in Cleveland which would conform to California standards.\(^6^7\)

Assuming the accuracy of the above projections indicating

and juveniles) results in a misdemeanor weighted unit cost of $66. Multiplying this cost by the total indigent misdemeanor caseload of 110,000 produces a total cost of $7.3 million for indigent misdemeanor representation in California during 1970.

The caseload data for misdemeanors and felonies relied upon in making the above calculations was derived from case filings reported in the Calif. Judicial Council's 1971 Annual Report 176, 180, 189. An indigency factor of 25% for misdemeanors and 60% for felonies has been applied based on the experience of California public defenders. See also Defense of the Poor 125, which also estimates a 25% indigency for misdemeanants. In the absence of other more reliable data, indigent juvenile case units are estimated on the basis of a recent unofficial caseload survey of California defender offices showing an average 1:28 ratio of misdemeanor to juvenile cases among those offices.

65. This estimate compares with an estimate of $62.5 million based on the 1962 data. Dollars and Sense 1249, 1264; Defense of the Poor 123.
67. In the report, cited note 66 supra, Katz expressed the opinion that representation could be provided by a staff of only four attorneys handling 1800 cases each. That caseload was based upon the experience of the Cook County, Illinois, Public Defender's Office, which is reputedly one of the most overworked and understaffed defender offices in the country. Furthermore, the assembly-line process of municipal courts in Cook County is probably one of the worst examples of that evil which was criticized in Argersinger. See Justice on Trial—A Special Report, Newsweek, Mar. 8, 1971, at 16.

"Effective" representation cannot be provided, in any sense of that term, when each attorney is required to handle 1800 cases per year (more than 7 cases each working day). Where such caseloads have been imposed upon public defender attorneys, the representation is characterized by quick pleas following whispered interviews and en masse bull-pen advisement of rights. Such practices by certain public defender and legal aid programs have generated much criticism toward the public defender system in general. If the spirit of the Argersinger decision as enunciated in the majority opinion is to be realized, it is imperative that reasonable caseload standards be adopted. The Cook County experience is clearly not such a standard.

The fact that the Cook County misdemeanor caseload is excessive is also indicated by the substantially lower standard of 600 cases recommended by the Nat'l Advisory Comm'n on Crim. Justice Standards and Goals, Working Papers of the Nat'l Conference on Crim. Justice 179 [hereinafter cited as Nat'l Conference on Crim. Justice].
that state and local governments must raise their expenditures for indigent defense from $46.4 million to a total of $185 million, including $73 million for misdemeanor assistance, then quite obviously, they face a considerable financial burden in attempting to comply with Argersinger. The various methods and the potential sources of financial assistance available to accomplish this will now be considered.

Unfortunately, in most states, the financial burden of providing counsel falls upon local governments. These local jurisdictions (mostly counties) are currently faced with heavy fiscal problems, aggravated by a tendency of state governments to delegate more and more responsibilities without providing adequate financial assistance. Other disadvantages suffered by these local jurisdictions include state-imposed limitations on their taxing authority, and a reluctance to assist accused persons because of public insensitivity to the rights of criminal defendants.68

The past inadequacy of local funding of defender services has led to a recommendation that the states should take more direct responsibility for such assistance.69 Three possible methods for state involvement include: 1) state authorization of additional local sources of revenue; 2) direct payment of state funds to local governments; and 3) direct provision of services by the state itself.

Direct state funding presents a number of difficulties.70 These include the problem of devising standards for allocating the money among local governments and for determining how it should be spent (e.g., the cases covered, the quality and quantity of services, the staff salaries). Another problem is that of auditing local governments to insure that state funds are being properly expended in accordance with statutory requirements. Such considerations have caused several authorities to recommend that the states take over the operation of defender programs and conduct them on a state-wide basis.71

68. An example of this attitude in the author's experience was the remark of a former county supervisor during a hearing on the public defender office budget, to the effect that he couldn't understand why the county had to spend money to get the criminals out of jail, while at the same time spending money to put them there in the first place.

69. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIM. JUSTICE SYSTEM 52 (1971). The Commission has cited local funding as the "principal cause of the poor response ... in many States" to the Supreme Court's earlier mandate for legal services in felony cases.


71. NAT'L CONFERENCE OF COMMISS'RS ON UNIFORM STATE LAWS, MODEL PUBLIC DEFENDER ACT (1970); Nat'l Defender Project of NLADA, REPORT OF
Federal assistance to the states and local governments has also been recommended to relieve their financial burden. Such assistance is probably a necessity for a large number of relatively poor states and counties which can not be expected to provide adequate compensation for appointed counsel because of their very limited financial resources.7

There are a number of indications that federal financing for indigent representation in state courts may not be far off. No less a spokesman for the legal profession than former President of the American Bar Association, Robert W. Meserve, has acknowledged that justification exists for federal assistance to the states and local governments on the basis that “a significant part of the increased cost can be attributed to the implementation of federal constitutional rights.”78

Ample precedent exists for federal financing of legal services in the states. State and local health, education and welfare services have been heavily financed by federal contributions. More significantly, civil legal services have been supported by substantial federal contributions as part of the Office of Economic Opportunity (OEO) “War on Poverty” Program. Although federal assistance to civil legal services is now being curtailed, the Administration has shown considerable interest in problems associated with the Argersinger decision. This has been manifested in several large grant awards from the Law Enforcement Assistance Administration to finance a variety of studies on the impact of Argersinger.74

PROCEEDINGS OF THE NAT’L DEFENDER CONFERENCE, Wash., D.C., 37, 121 (1969); REPORT ON THE CHALLENGE OF CRIME IN A FREE SOCIETY, supra note 25, at 151; U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, supra note 69, at 52.

The prefatory note of the Uniform Law Commissioners’ 1970 Model Public Defender Act includes a reference to the “Model Defender Act” adopted in 1966. After acknowledging the propriety of its procedural aspects, the Commissioners observed that the 1966 Act was unsatisfactory in regard to its so-called “county option” plan which left the decision to each county on whether to establish a public defender or other type of system for providing counsel. Quoting from the 1967 PRESIDENT’S CRIME COMM’N REPORT, the Commissioners concluded that, “[e]ach state should finance assigned counsel and defender systems on a regular and statewide basis.” NAT’L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL PUBLIC DEFENDER ACT 3 (1970).

72. TASK FORCE REPORT, supra note 56, at 159. An example of such a community is the Town of Wood, South Dakota, which was described in the concurring opinion of Justice Powell in Argersinger; see note 52 and accompanying text supra.

73. Speech delivered to the Los Angeles County Bar Association, Oct., 1972.

74. These have included a $100,000 grant to NLADA to survey the fifty states to determine the adequacy of defender services; a grant of $257,000 to the Center for Criminal Justice at Boston University to finance an 18-month study on ways to implement the Argersinger decision; a grant of $54,000 to the National Center for State Courts to study the various systems (appointed and public
These indications seem to make almost certain the prospect of some form of federal assistance for state and local defender services. The manner in which such aid would be provided is unknown at this time. But the Administration's current fondness for revenue-sharing suggests that this approach is a very distinct possibility. Other suggestions include a National Defender Commission to provide assistance in establishing and expanding defender programs and a federally-funded State Criminal Justice Act\textsuperscript{6} to assist the states in providing the same legal services in state courts that are now provided in the federal courts.\textsuperscript{76}

The type of system adopted by a particular community may substantially influence the cost of providing counsel. A number of studies have concluded that a public defender program is more economical in an urban area than is a system of appointment of private counsel.\textsuperscript{77} Despite this economic advantage, however, one authority has contended that there are long-range benefits in a dual system which justify at least some additional costs.\textsuperscript{78} One benefit cited was a greater frequency of jury trials under the private counsel system—such trials serving "a worthwhile standard-setting function."\textsuperscript{79}

The advantages of a public defender system, according to its proponents, include the expertise provided by experienced criminal lawyers and the supervision and training afforded to young lawyers in such a program.\textsuperscript{80}

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B. The Demand for Capable Legal Manpower

The number of lawyers needed to supply the legal services required by *Argersinger* is as difficult to assess as the financial cost for the same reason—a lack of reliable statistics. As heretofore noted, Mr. Justice Douglas' majority opinion referred to an estimate of between 1,575 to 2,300 additional attorneys required to represent indigent misdemeanants. That estimate was from an Iowa Law Review note which had made the projection on the basis of statistics cited by the President's Crime Commission. The Crime Commission in turn took those statistics from "rough estimates" and a "crude survey" by a 1966 Conference on Legal Manpower Needs.

In the absence of reliable, current statistics, an estimate of legal manpower demands will be made here on the basis of a projection of California data. In 1970, there were approximately 110,000 indigent persons charged with misdemeanor offenses in California. Multiplying that number by ten on the basis of the ratio of California's population to the nation's indicates that a total of about 1.1 million persons charged with misdemeanors annually require the services of appointed counsel. An estimate of the number of attorneys needed to handle these cases may then be determined by dividing that number by an acceptable attorney misdemeanor caseload.

The Conference on Legal Manpower Needs of Criminal Law in 1966 estimated that an attorney working full-time could provide adequate representation in misdemeanor cases at a rate of between 300 and 1,000 cases per year. The Crime Commission further estimated that a single lawyer working full-time could provide representation in 300 to 400 serious misdemeanor cases and 1,200 social nuisance cases, or in 600 of the remaining too many motions are filed which may irritate the judges, attorneys who file such motions are apt not to be appointed again. Another problem is the likelihood that private counsel may give more time to paying clients than to those represented on assignment for limited fees.

81. 407 U.S. at 37 n.7.
82. *Dollars and Sense*, supra note 47, at 1261, citing TASK FORCE REPORT, supra note 56, at 55-56.
83. Report of the Conference on Legal Manpower Needs of Crim. Law, Airlie House, Va., 41 F.R.D. 389, 392-93 (1966) [hereinafter cited as Conference on Legal Manpower Needs]. The Conference report complained about a lack of adequate statistics which hampered determinations concerning the "need" for lawyers, and noted "two distinct needs": 1) for accurate information about the current situation, and 2) for standard procedures for collecting and reporting relevant information. Id. at 394-95.
84. As previously noted, this figure is derived by applying a 25% indigency rate to the total number of misdemeanor filings in California during 1970. See note 64 supra.
85. Conference on Legal Manpower Needs 393.
Applying the 600 caseload average to the 1.1 million indigent misdemeanor cases estimated above indicates that approximately 1,840 attorneys would be required to handle these cases. It would seem that this need could be readily satisfied by the more than 300,000 lawyers in the United States. However, only a very small fraction of that number have handled criminal matters on more than an occasional basis. In 1966 the Legal Manpower Conference estimated that the number of such attorneys ranged between 2,500 and 5,000. That range represents only between 1% and 2% of the approximately 236,000 lawyers engaged in private practice. Furthermore, in addition to the 1,840 lawyers required for indigent misdemeanor defense, there remains a need for approximately 5,520 attorneys required for the balance of the non-indigent misdemeanor caseload.

In addition to the attorneys required to defend misdemeanor cases, the number of attorneys required to defend felony prosecutions must also be considered in assessing the availability of legal manpower for *Argersinger* purposes. On the basis of a projection of California data, it may be estimated that an additional 5,500 attorneys would be required to handle felony cases nationwide. Thus, approximately 12,680 attorneys, or roughly 2½ times the estimated number available would be required for misdemeanor and felony cases alone, not to speak of those needed in juvenile cases, nor more significantly those required to swell the ranks of prosecutor offices to meet the additional workload resulting from more defense lawyers.

Assuming the correctness of these calculations, the supply of lawyers to handle criminal cases on a regular basis will have to be substantially increased to meet the demand for legal manpower generated by *Argersinger*. Two current trends should facilitate the availability of such manpower. One is the shrinking demand for lawyers in the personal injury-tort field as a result of the

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86. *Task Force Report*, supra note 56, at 56. More recently, the National Advisory Commission on Criminal Justice Standards has recommended an average misdemeanor caseload of 400 cases per year on the basis of the "increased complexity" of the practice of criminal law. *See Nat'l Conference on Crim. Justice*, note 67 supra.


90. This number represents the remainder of 7,360 attorneys needed to handle a projected total of 4.4 million misdemeanor cases, derived from California data.

91. This number is derived by taking an estimated 1.1 million cases resulting from a ten-fold projection of California felony filings in 1970 (115,000), and applying a 200 caseload rate based on estimates of the Crime Commission. *See Task Force Report*, supra note 56, at 55.
movement to adopt no-fault automobile insurance legislation. At the same time, in the past few years there has been a substantial increase in law school enrollment, and this trend promises to continue. The combination of these two situations will undoubtedly create an overabundance of lawyers to meet the swelling manpower demands resulting from Argersinger.

A more difficult problem than the availability of a sufficient number of lawyers to meet the demands of Argersinger will be that of ensuring attorney competence in the practice of criminal law. In recent years, criminal law has become increasingly complex due in large part to the so-called criminal law revolution resulting from decisions of the Warren Court. Accordingly, the President's Crime Commission has stressed the urgent need for improving the standards of competence and training of defense counsel in criminal cases.

The competency of criminal practitioners is important for two reasons. First, it is desirable from an efficiency standpoint to insure that cases are promptly handled without undue delay. In addition, effective representation is mandated by the sixth amendment. While that requirement has long been ignored, more recently, appellate courts have become highly sensitive to post-conviction claims of incompetency of counsel in criminal cases.

92. In the decade from 1961 to 1971, law school enrollment more than doubled, increasing from 41,499 to 94,468. During the same period, new annual admissions to the bar climbed from 10,729 to 17,922. On the basis of law school enrollments, the projection for new admissions to the bar indicates that there will be 29,000 new lawyers who will be admitted in 1974—up 12,000 from 1970. It is further anticipated that by 1985 the number of lawyers in the United States in 1971 (342,935) will have doubled. Ruud, That Burgeoning Law School Enrollment, 58 A.B.A.J. 146-47 (1972).

Without considering the requirements of Argersinger, the occupational opportunities for lawyers are not expected to keep pace with this growth. Thus, before Argersinger, it was estimated that job openings for attorneys until 1980 would be only about 14,500 annually. Id. at 148, citing U.S. DEPT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (1970-1971 ed.).

93. REPORT ON THE CHALLENGE OF CRIME IN A FREE SOCIETY, supra note 25, at 152; TASK FORCE REPORT, supra note 56, at 61-64.


95. See Lumbard, The Adequacy of Lawyers Now in Criminal Practice, 47 J. AM. JUD. Soc'y 176, 177-80 (1963), criticizing the bench and bar for “sweeping the whole business under the rug.”

96. See, e.g., Cooks v. United States, 461 F.2d 530 (5th Cir. 1972) (erroneous plea bargain advice); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (failure to investigate alibi defense); Johns v. Perini, 462 F.2d 1308 (6th Cir. 1972) (failure to investigate alibi defense); Barber v. Nelson, 451 F.2d 1017 (9th Cir. 1971) (failure to confer and prepare for probation revocation hearing); Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971) (plea of guilty induced by unprepared attorney); U.S. ex rel. Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970) (brief ten-minute consultation before trial); Zavala v. Craven, 433 F.2d 335 (9th Cir. 1970) (failure to make a “knock-and-notice” search objec-
Thus, the problem of adequacy of counsel to meet the requirements of *Argersinger* is not merely one of supply, but involves the equally important matter of well-trained, competent legal personnel.

A number of important activities are now going on which should bring about a substantial increase in the number of trained criminal lawyers. These include a vast expansion in clinical student programs, internships for law students in prosecutor and defender offices, increased continuing legal education seminars on criminal law subjects, and a unique pilot program in the state of California for certification of criminal law specialists.

In his concurrence in *Argersinger*, Mr. Justice Brennan expressed the opinion that law students in clinical programs could provide "a significant contribution, quantitatively and qualitatively, to the representation of the poor . . ." to alleviate any legal manpower burden imposed by the new decision. While there are a large number of excellent clinical law programs, it is seriously questionable whether they can provide an immediate source of substantial manpower to meet the demands imposed by the *Argersinger* decision. As one critic of Justice Brennan's view has pointed out, law schools are designed to teach, and if they are given the operational assignment of defending indigents as well, without the intense supervision required, such clinical programs will be unable to provide effective representation, which will cause a disenchantment with clinical education. Skilled
faculty supervision of law students is essential in order to assure quality of work and to prevent the students from acquiring un-
sound attitudes and practices. 100

Given the financial plight of most law schools, their ability to
provide careful supervision is quite limited, thereby substan-
tially restricting the volume of cases which such programs can
handle. Thus, law student programs cannot be depended upon
for any immediate, substantial manpower benefits beyond para-
legal assistance such as investigation, interview of clients and
witnesses, and legal research.

Nevertheless, clinical law student programs do afford a
number of potential long-range advantages. These stem from the
involvement and the training of more young lawyers in the crimi-
nal field. It may be anticipated that, as a result of their exposure
to criminal practice, many of these students will later become
prosecutors and defense attorneys, and will thereby help to fill
the growing demands for skilled criminal lawyers. This contact
may also inspire other students, who may become legislators, gov-
ernment officials and leaders of the bench and bar, to work for
improvement of the criminal courts. 101

Other methods of criminal law training for lawyers to meet
the demands of Argersinger are post-graduate courses and bar
association continuing legal education programs. An example

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100 In an article on the successful University of Minnesota program, it was
noted that:

[q]uality supervision of a student program is extremely important to
its success. Experience has led us to conclude that students cannot
perform adequately without a carefully structured, carefully supervised
program . . . A student can never be left to handle a trial or put in
a plea of any kind without first conferring at length with his experi-
enced supervisor.

Students should also be evaluated at every stage of their work in
the program. This means that evaluations are made on their pre-trial
preparation (including interviewing), the trial work and post-trial
work. No aspect of a student's efforts should be overlooked.

Sedgwick & Oliphant, supra note 98, at 18.

These views are confirmed by this author's personal experience with clinical
law student programs over the past five years, in cooperation with the University
of Santa Clara and Stanford University. Trial work naturally requires intensive
supervision. On the other hand, after careful training, third year students with
minimum supervision can be relied upon for assistance in conducting client and
witness interviews and for preparing legal memoranda and briefs. See Bird,
Supporting Services for Defenders-Students, 31 LEGAL AID BRIEFCASE 385 (1973),
describing in detail the student programs of the Santa Clara County Public
Defender's Office, including a highly innovative training project carried on in
cooperation with Stanford University.

101 Student programs often succeed in attracting brighter students who are
eager to deal with live clients and cases and to escape the boredom of academic
routine, particularly after their second year. See Sedgwick & Oliphant, supra
note 98, at 13-14, 18.
of the latter type is the Criminal Advocacy Institutes of the Practicing Law Institute (PLI). In California, the Continuing Education of the Bar, a program sponsored by the State Bar in cooperation with the University of California, has presented several informative criminal law seminars and has produced two excellent texts.

Law schools have also offered post-graduate criminal law courses in the past, and they are likely to increase such offerings if the demand arises.

A related development which should contribute substantially to upgrading the quality of criminal law expertise is California's new pilot program for certification of legal specialists. Criminal law is one of three specialties included in the new program, which was initiated last March. It allows qualified California lawyers to represent themselves as criminal law specialists. The requirements for certification are stringent and include educational as well as experiential criteria. Qualifying educational courses must be approved by a Board of Specialization, which administers the entire program. If this experiment proves successful, it will provide an important new method for improving the quality of criminal law practice.

In addition to training additional lawyers in order to meet the new demands of Argersinger, criminal legal services can also be expanded by greater utilization of para-legal personnel to assist lawyers with work which does not require their direct attention and expertise. Investigation and stenographic services are traditional examples of such para-legal assistance. Initial interviewing and legal research and writing are other examples. Less traditional kinds of services are those performed by social workers

102. Shortly after the Argersinger decision, PLI's Fifth Annual Criminal Advocacy Institute featured topics on the impact of the decision and on effective techniques in defending misdemeanants. See Practicing Law Institute, The Fifth Annual Criminal Advocacy Institute (1972).


104. One of the most well-known of these is Northwestern's annual Short Course for Defense Lawyers in Criminal Cases, which attracts lawyers throughout the country.

105. In response to a new criminal law specialist program in California, the University of Santa Clara has recently announced a new post-graduate course on post-conviction remedies.

106. The other fields of law which are included are Taxation and Workmen's Compensation. See Standards for Specialization Announced, 48 Calif. State B.J. 80 (1973).

107. As soon as the California experiment began, several approved criminal law courses were announced, including a video-taped, state-wide program by the State Bar's Continuing Education of the Bar.
or other lay persons, such as ex-offenders, to develop sentencing alternatives or diversion programs.\footnote{108}

C. The Burden Upon The Courts

1. The Present Situation and the Possible Effects of the Decision

The majority of the Court in Argersinger, as heretofore noted, seemed to ignore the potential effect of its decision upon an already overburdened lower court system. That circumstance was only alluded to in the Court's opinion in its reference to the assembly-line character of the lower court system as additional justification for the aid of counsel in such courts. However, the concurring minority opinion placed great stress on this problem, predicting that the across-the-board requirement of counsel would "exacerbate" the situation.\footnote{109}

The congestion which has plagued big-city lower courts has been well-documented.\footnote{110} Probably the worst example is the situation in New York City, where arraignment courts process a daily minimum of 200 cases each and calendar courts between 100 and 250 cases, with judges unable to spend more than one or two minutes per defendant to decide questions of bail.\footnote{111}

As of this writing, Argersinger's impact upon these courts is as yet indiscernible. An advance prediction by one authority—that such a decision would sound the death knell of the lower


\footnote{109. See discussion in note 43 supra.}

\footnote{110. See Whitebread, MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL (Papers Presented and Proceedings of a Conference on Problems Associated with the Misdemeanor 1970) [hereinafter cited as MASS PRODUCTION JUSTICE].}

\footnote{111. MASS-PRODUCTION JUSTICE 147.}

The assembly-line aspect of these courts has been well described by one observer as follows:

[Great numbers of defendants are processed by harrassed and overworked officials . . . [with] scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. Barrett, Criminal Justice: The Problem of Mass Production, in THE AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION, 87 (1965).}
court, mass justice system—is, as yet, unfulfilled. A contrary prediction—that such a “fiat from on high” would result in compliance “in form rather than in substance”—may well be more accurate.

The accuracy of the latter prediction is reflected in a report of the response to Argersinger by municipal court judges in Cuyahoga County, Ohio. Without any state assistance, and able to rely only upon Legal Aid Society lawyers supplemented by volunteer, uncompensated attorneys, these courts have been reportedly following “... the general practice, whether overt or covert, ... [of] encourag[ing] defendants to waive the right and proceed on their own, if for no other reason than the absence of an attorney on the scene to counsel a person how to plead.”

2. Required Solutions

A collapse of the assembly-line process of justice in the lower criminal courts is a consequence devoutly to be wished. No greater blot upon American justice can be imagined. In its downfall lies the best hope for reform. Only then may it be anticipated that state and local legislatures will at last respond and provide the additional judges, prosecutors and defense attorneys needed for the proper administration of criminal justice in these courts.

112. Katz, Municipal Courts—Another Urban Ill, 20 Case W. Res. L. Rev. 87, 125 (1968). Professor Katz supports his view by citing statistics showing how much slower case dispositions are when defendants are represented by counsel. Thus, in a study of 1,034 cases in the Cleveland Municipal Court, only 7.95% of 264 represented defendants were disposed of immediately, compared to such dispositions for 63.78% of the unrepresented defendants. Furthermore, only 34.47% of the represented cases were disposed of within one month, as compared with 84.59% of the unrepresented cases. Id. at 103.

113. Enker, Lower Courts, in MASS PRODUCTION JUSTICE 195 (1970). In support of this prediction, Professor Enker referred to a description of the manner of representation of indigent misdemeanants by a legal aid lawyer in one large city. When the volume of cases was too heavy for one attorney to handle individually, the attorney merely addressed all of the defendants as a group in the bull-pen, advising them of their rights.

114. Katz, A Report to the Court Management Project on Right to Counsel in Misdemeanor Cases in Cuyohoga County 5, 7 (1972). Further evidence supporting Professor Enker’s view is the report of a recent observer of the lower court system in Boston, who commented that “[t]he principal difference between the old system and the new one is that whereas most criminal defendants were formerly run through the mill without a lawyer and convicted, now they are run through the mill with a lawyer and convicted.” Harris, Annals of Law in Criminal Court—I, THE NEW YORKER, Apr. 14, 1973, at 81.

115. The Advisory Commission on Intergovernmental Relations has pointed out that an underlying cause of the problems of the lower courts is the neglectful and negative attitude toward them by the public, the bar, and even the judiciary. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL
In addition to an increase of staffing for judicial, prosecutor and defense functions, effective lower court reform also requires adequate training programs for lawyers and judges. Such training is essential to insure the competence needed to cope with the increased complexities of the modern criminal justice process.\textsuperscript{116} If such training can be provided along with adequate


In the light of its own observations and the earlier studies, the Crime Commission issued the following admonition:

\begin{quote}
No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality, and rehabilitation professed in theory, yet frequently denied in practice. The result may be a hardening of antisocial attitudes in many defendants and the creation of obstacles to the successful adjustment of others.
\end{quote}

\textit{Task Force Report, supra} note 56, at 29.

Unfortunately, despite this warning, the lower court system has been virtually ignored, while massive amounts of federal money under the Omnibus Crime Control and Safe Streets Act have been spent for other criminal justice (principally law enforcement) activities. \textit{See Nat'L Legal Aid and Defender Ass'n, The Dollars and Sense of Justice—A Study of the Law Enforcement Assistance Administration (LEAA) 15-21 (1973), reporting on the “low priority” which has been given to the court function for funding by LEAA. Over the first three years of the LEAA program (1969-1971), a mere 2.5\% of discretionary grant funds, and only about 6\% of state block grant funds were allocated to the courts.}

116 The need for such training for judges as well as lawyers has been stressed by the Advisory Committee on the Prosecution and Defense Functions of the American Bar Association, Project on Minimum Standards for Criminal Justice as follows:

\begin{quote}
The participants in criminal trials can not meet today’s exacting standards unless they make themselves virtual specialists, giving close and constant study to the decisions of recent years. This underscores the need for continuity in prosecution offices and continuing in-service training. On the defense side, similar study and training is called for. Many observers see the need for expertise as a reason for wider institutionalized legal aid and public defender offices having permanent staffs and auxiliary services comparable to the prosecution offices.
\end{quote}

\textit{See ABA Standards, Providing Defense Services §§ 3.1-3.3 (Approved Draft 1968).}

The need to cast as much light as possible on the nature of the lawyer’s role and function in criminal justice is manifested in at least three major contexts. \textit{The first of these is the education of law students, the bar and the bench.}


An extremely promising training study is presently being conducted for the three major components of the criminal justice system—police, courts and corrections—under a $1.6 million LEAA grant. The program, entitled “Project STAR”, an acronym for Systems and Training Analysis of Requirements for
supervision, then the adverse effects of what Mr. Justice Powell referred to as the overzealousness of young defense attorneys (which affects young prosecutors as well) can be avoided.

A well-organized public defender program probably offers the best method for providing the supervision and training which young defense lawyers need to guide them in this complex field and to teach them the technical knowledge and skills required by modern criminal law practice. Without this training and guidance, they are very likely to demand unnecessary hearings and file frivolous motions, as suggested by Mr. Justice Powell—not merely because of their overzealousness, but also because of an excess of caution resulting from their lack of knowledge and experience.  

The problem of overburdened lower criminal courts can also be alleviated by decriminalization of many victimless crimes and by diversionary programs. Offenses which would be likely subjects for decriminalization are traffic violations, public intoxication, prostitution, obscenity, certain forms of disorderly conduct, and sexual offenses between consenting adults. Of these, the leading candidate for decriminalization is public intoxication, which accounts for about one out of every three arrests in the United States.

Criminal Justice Participants, was conceived by a group of innovative law enforcement officials of California’s Commission on Peace Officers Standards and Training (P.O.S.T.). In 1971, P.O.S.T. obtained the LEAA grant and contracted with the American Justice Institute—a consulting firm—to conduct the training study and development program in four states—California, Michigan, New Jersey and Texas. The consultant receives guidance from a National Advisory Council and specialized task forces (police, courts and corrections). The Council consists of representatives of all participants in the criminal justice field, together with educators and local government representatives. By 1974 the project will complete work on the development of model training programs for use by police, prosecutors, defense attorneys, judges and correctional officers. See Calif. Comm’n on Peace Officer Standards and Training, Systems and Training Analysis of Requirements for the Crim. Justice System, Sixth Quarterly Progress Report January, 1973 (an unpublished report available from Mr. Gene Muehleisen, Project Director, Project STAR, 7100 Bowling Dr., Suite 250, Sacramento, CA.).

117. The advantages of implementing Argersinger by means of a public defender system have been discussed in Goldberg & Hartman, Help for the Indigent Accused, supra note 76, at 2-5. Among those advantages the authors stress “professionalism and expertise” and “adequate supervision and training.” See also Portman, Public Defender Office Administration, 29 Legal Aid Briefcase 107, 111 (1971), describing various in-house methods for training defenders, including regular office meetings, training seminars, and a newsletter digest of recent cases.


119. Report on the Challenge of Crime in a Free Society, supra note 25, at 233. California belatedly responded to this recommendation in 1971 by enacting a provision authorizing a police officer to place a public drunk in “civil protective custody” in a facility designated for a 72-hour treatment and evalua-
An increasingly popular method of dealing with petty offenders is the "diversion" process, originated by the renowned Vera Institute of Manhattan. Diversion has been defined as "halting or suspending before conviction formal criminal proceedings against a person on the condition or assumption that he will do something in return." The criminal offense is not changed, but the offender is "diverted" from the system, thereby avoiding conviction.

A typical example would be the taking of an intoxicated person into custody and later releasing him to his family or a detoxification center. Another example would be that of holding formal charges in abeyance while a defendant participates in a rehabilitative program. An essential characteristic of the process is the exercise of official discretion to allow an alternative to prosecution in dealing with a particular defendant.

In addition to lessening the burden upon the court system by avoidance of formal proceedings, diversion also has the advantages of allowing the offender to avoid the stigma of a criminal conviction and bringing to bear community rehabilitative resources, earlier and more effectively, in a more flexible and informal way. However, diversion programs will not entirely obviate the need for appointed counsel. Since diversion usually

120. See Vera Institute of Justice, Programs in Criminal Justice Reform 78 (1972).
122. The effectiveness of the diversion approach has been amply demonstrated in the experience of the Vera Institute's Manhattan Court Employment Project. During a 12-month period, the re-arrest rate for offenders who successfully completed the program was only 15.8% compared to 46.1% for those in a comparison control group. Vera Institute of Justice, Programs in Criminal Justice Reform 88-90 (1972). Similarly, a District of Columbia diversion program known as "Project Crossroads" reported that, during a 15-month period, 140 out of 191 participants in its counseling and employment services program for youthful first offenders successfully completed the program and had their charges dismissed. Thereafter, they experienced a 22.2% recidivist arrest rate, compared to the 51 who did not complete the program and who experienced a 56.8% recidivist rate. This compared very favorably with a 105-defendant control group, of which 50 had their charges dismissed and experienced a 44% rate of recidivism; the other 55, who did not have their charges dismissed, experienced a 47.3% recidivist rate. Nat'l Conference on Crim. Justice, supra note 67, at 21, citing Leiberg, A Final Report to the Manpower Ad., U.S. Dep't of Labor, Project Crossroads, Nat'l Comm. for Children and Youth (1971).
involves the interruption of formal court procedures after they have been initiated, a defendant must decide whether to agree to forego the opportunity to contest an accusation and to assume the burdens of a rehabilitative program in which he may not be successful. If innocent of the charge, diversion would be an onerous and unnecessary obligation to undertake. Furthermore, the delay could prejudice the preparation of his defense. To avoid such prejudice and to assist a defendant with the decision whether to accept diversion, appointment of counsel may be a constitutional necessity. Beyond that, however, defense counsel may be able to assist the diversion process by recommending alternative plans which may be more suitable to a particular client's needs.\(^{123}\)

### III. CONCLUSION: THE POTENTIAL RETURNS

The *Argersinger* decision's demand for more lawyers in the lower court criminal justice system portends several potential benefits for the criminal justice system as a whole. Clinical student programs, including internships, will undoubtedly increase in number and size. This will not only create a new reservoir of better-trained criminal lawyers, but it will also expose more students to the problems of the lower court system, and inspire them as future legislators and judges to support meaningful reforms.\(^{124}\)

Lower court reform should, in turn, generate a far greater respect for law among those who are subjected to those courts.

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123. Compare this with the role of defense counsel at sentencing as recommended in the ABA Standards of the Defense Function, *viz.*, that "in an appropriate case [the defense attorney should] be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services." ABA, *STANDARDS ON THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION* §8-1(b) at 285 (Approved Draft 1971). *See also* two unpublished reports for Project STAR (discussed at note 116 supra); FRIESEN, *FUTURE ROLES OF JUDGES, PROSECUTORS AND DEFENDERS* 12 (1972); RESOVE, *THE IMPACT OF SOCIAL TRENDS ON CRIME AND CRIMINAL JUSTICE* 61-62 (1973).

124. In the past, the practice of criminal law, particularly in the lower courts, has been avoided like the plague by most reputable attorneys. That situation seems to be changing due, perhaps, to the constitutional emphasis given to criminal practice in recent years. A significant manifestation of this interest is the ABA's Project on Standards for Criminal Justice, which began in 1964 following a proposal by the Institute of Judicial Administration at New York University Law School. Coincidentally, the President of the ABA at the time the project was initiated was Lewis F. Powell, Jr., now Associate Justice of the United States Supreme Court and author of the concurring opinion in *Argersinger*. Chief Justice Burger, then a United States Circuit Judge, was chairman of the Supervisory Committee on the Prosecution and Defense Functions, and later became Chairman of the Special Committee on Standards for the Administration of Crim. Justice. *See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION* v-viii (1971).
Presently, much resentment toward the law undoubtedly results from the existing obnoxious assembly-line procedures of the lower courts. In 1967, the National Commission on Civil Disorders reported that the “apparatus of justice in some areas had itself become a focus of distrust and hostility” as the result of “... a belief pervasive among ghetto residents that the poor and uneducated are denied equal justice in many of our lower courts.”

The greater involvement of attorneys in defending against misdemeanor prosecutions should also have a beneficial effect upon law enforcement. The provisions of the Constitution and the interpretations thereof by the courts are mere words on paper without vigorous assertion of those provisions by capable criminal defense attorneys. Higher professional standards by law enforcement officers must include obedience to constitutional limitations governing police powers. Zealous enforcement of constitutional rights by criminal defense attorneys serves as a powerful reminder to the police of their constitutional obligations. Effective representation by counsel in misdemeanor cases can serve to focus judicial attention upon, and thereby, hopefully reduce, improper police procedures which have heretofore gone undetected.

Previous absence of counsel in such cases undoubtedly resulted in considerable laxity by the police in this regard, subjecting untold numbers of innocent persons to improper police practices. Hopefully, effective implementation of *Argersinger* will minimize such practices and also result in higher standards of law enforcement.

Finally, the economic pressures resulting from the financial burden of supplying counsel will, perhaps, induce a greater effort to resort to alternatives to prosecution, such as the diversion of offenders into rehabilitative programs. Initial indications are that such programs can substantially reduce recidivism. This is a welcome change from the dismal experience of the punishment-deterrent approach. By spurring the drive toward rehabilitative alternatives, the *Argersinger* decision may well produce its most meaningful and long-lasting benefit to the criminal justice system.

125. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 337 (1968).

126. See Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 LEGAL AID BRIEFCASE 151-52 (1970), wherein the author reports:

Police perjury is also most blatant in misdemeanor cases. Numerous arrests are made on the basis of insufficient cause. Once again, the psychological factor that the case is not a felony is at work, and the arresting officer will subscribe to the additional rationalization that even if the defendant did nothing wrong in this case, he is known as a bad fellow and things just even out.