LEGAL ISSUES RELATED TO THE IMPLEMENTATION OF ARGERSINGER V. HAMLIN

SUPPLEMENT B TO:

IMPLEMENTATION OF ARGERSINGER V. HAMLIN: A PRESCRIPTIVE PROGRAM PACKAGE, Supp B

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Publication No. R0009
Supplement B

April 1974

This project was supported by Grant Number 72-TA-99-0022 awarded by the Law Enforcement Assistance Administration, U. S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the contracting agency and do not necessarily represent the official position or policies of the U. S. Department of Justice.

PART I

LEGAL ISSUES

PART II

DETERMINATION OF INDIGENCY

PART I

LEGAL ISSUES

1.1 The Decision

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Although the constitutional right of an indigent to receive court-appointed counsel was initially recognized in Powell v. Alabama[1] (1932) (for capital cases in federal courts), the right of an indigent to obtain this aid in state courts was not announced until Gideon v. Wainwright[2] (1963). The Court employed broad language in stating: in our "adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[3] While Gideon involved prosecution on a felony count, the reasoning expounded by the Court was greatly relied on by Mr. Justice Douglas in the landmark case of Argersinger v. Hamlin[4] (1972), which held that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." [5]

Thus, what the Argersinger Court really announced was a broadening of the right to counsel already foreshadowed by Gideon,

rather than a new concept of right to counsel.[6] The Court did not extend the right to all defendants charged with misdemeanors involving a possible loss of liberty, but stated that this decision would ensure that in those cases that result in an actual deprivation of liberty,[7] the accused will receive the benefit of "the guiding hand of counsel."[8] Once a trial judge had assessed the "seriousness and gravity of the offense,"[9] he would be in a position to determine whether there was, in fact, a practical possibility that incarceration would be imposed if the defendant were convicted, and could thereby determine if assignement of counsel was required.

Citing the language in Gideon, the Court held that the right to counsel in a criminal case was a concomitant of the defendant's right to fundamental fairness,[10] and was needed "so that the accused (would) know precisely what he is doing, so that he is fully aware of the prospects of going to jail or prison, and so that he is treated fairly by the prosecution.[11] The legal and constitutional issues in a petty offense case were observed to be as sophisticated and complex as in cases involving more severe penalties, and the Court cited a number of examples of petty offense cases which had led to the formulation of other important doctrines in the criminal law.[12]

The Court chose to limit its holding to cases involving incarceration for conviction of a petty offense.[13] Extension to all cases involving the mere possibility of incarceration was deemed to be outside the scope of the Court's decision.[14]

Contrary to the belief of the minority, the Court found that adequate resources existed among the states to provide for the implementation of its limited holding.[15] Apparently aware of the problems its holding would raise, the Court urged the states to develop their own procedures for the determination of eligibility.[16]

1.2 Constitutional Issues Raised by the Decision

1.2.1 Equal Protection: Introduction

The equal protection clauses of the Fifth and Fourteenth Amendments have had, and will have, a great impact on the area of court-appointed counsel.[17] Griffin v. Illinois[18] and Douglas v. California[19] are the key cases employing the equal protection clause. Although neither decision dealt with the right to appointed counsel at the trial level, each court relied upon the theory that "there can be no equal justice when the kind of trial a man gets depends on the amount of money he has."[20] Thus, when a right is offered to one financially capable of exercising it, an indigent may not be precluded from exercising that same right solely because of his insufficient financial resources. Broadly construed, the Griffin/Douglas concept of equal protection required the appointment of counsel to assist the indigent at all stages where the affluent defendant is allowed by law to be represented by counsel.

1.2.1A Equal Protection Consideration: The Likelihood of Incarceration

Under Argersinger, in fact, different defendants whose cases are decided by different judges will not necessarily be treated equally.

The Court indicated that the trial judge is the person who will evaluate each case to determine whether or not the defendant faces a likelihood of incarceration upon conviction.[21] Thus, two indigent defendants, facing the same charges and possessing substantially similar backgrounds, but appearing before different judges, may not receive equal treatment: one judge may view the likelihood of incarceration as minimal and decide not to assign counsel; another judge may review the facts before him and determine that incarceration is a feasible sanction if the defendant is convicted. The net result of this kind of review is that one defendant faces only the possibility of a fine, whereas the other defendant, though provided with counsel, faces a possible jail sentence as well as a fine if found guilty.

1.2.1B Pre-determination by the Court

Discussion here centers on the requirement that the trial judge make a determination prior to the assignment of counsel of the "gravity or seriousness of the offense." Mr. Justice Powell observed that this kind of pre-determination may compromise the ability of the judge to be an unbiased trier of fact.[22] Moreover, it may require him to look at far more than the charge and the police report to make an accurate evaluation, a task that may be difficult to perform without prejudicing the defendant's case. In a concurring opinion, Chief Justice Burger warned that this requirement meant that the court and the prosecutor would have to engage in a predictive evaluation of each case to determine

whether there was a significant likelihood that imprisonment would result if the defendant were convicted.[23] Such a prediction, the Court suggested, amounted to arbitrary statutory classification by the Court without legislative authorization.[24]

One principal difficulty with this requirement is that the court must make its decision without benefit of all the evidence presented at trial.[25] Thus, basing his decision solely on the complaint, affidavit and charge, the judge might decide that incarceration is unlikely and, therefore, proceed without granting counsel. The court may later find that the case is stronger than initially determined, or that defendant's violation follows a previous conviction (a factor which the court must not be advised of prior to trial, and which is admissible only during trial on cross-examination by way of impeachment), and that incarceration is, therefore, more appropriate than assessment of a fine.

There are two aspects to this problem. The first is the effect of such a determination on the court's neutrality. If the court views the assignment of counsel as a necessity, it has, in effect, made a determination of the seriousness or gravity of the case which may be prejudicial to the defendant's interests, even though an attempt has been made to balance the issues by the appointment of counsel. Thus, assigning counsel implies that the court already entertains thoughts as to the defendant's possible guilt. If counsel is not assigned, the judge's bias may still be reflected in his ultimate determination to assess a greater fine than might ordinarily be warranted.

The second major aspect of the pre-determination problem is that the judge may be forced to abandon consideration of the full range of punishments established by the legislature. Imprisonment may turn out to be the proper remedy (as determined by the legislature) but the judge's failure to assign counsel may preclude the implementation of the appropriate remedy.[26] The punishment will often not be tailored to the crime: in effect, a de facto judicial interference with the legislature's intent. In fact, the imposition of a fine may not have the deterrent or punitive effect on an indigent defendant intended by the legislature.[27]

In those states[28] which have operated under rules similar to the ABA "likelihood of incarceration" test,[29] some judges have decided in advance and as a practical matter that they will not incarcerate anyone appearing before them who is charged with a municipal ordinance violation or with commission of a petty offense carrying a penalty of incarceration--determining, in effect, that the likelihood of incarceration is not related to the nature of the evidence, but is a function of the charge. This enables the court to make a consistent determination of the right to counsel --or lack of such right -- based on the charge without overburdening its docket and without requiring the services of a full-time defender. Should the right to counsel ever be expanded into the area of fine-only cases, or traffic cases involving the loss of a license or other valuable privilege (see infra, Sections 1.3.1C, 1.3.2B), the court would be unable to justify such a policy without conceding a suspension of its sentencing power.

Partly in order to avoid the kind of criticism arising out of this kind of practice, Florida has adopted a rule which required the court to certify in writing that it has made the requisite determination and that the defendant will not be incarcerated if convicted;[30] however, most Florida courts have not yet implemented this requirement and continue to assign counsel and sentence defendants without regard to the certification requirement. One public defender commented that the judge's certification might be adequate grounds for appeal based on prejudice of the trial court.[31] A similar kind of determination is required in Idaho where the Supreme Court recently held that appointment of counsel in petty offense cases may only be made "after the trial court makes an initial determination that the defendant will be incarcerated if found guilty. An application for counsel at the outset of the case and prior to such determination is, therefore, premature."[32]

It is evident that the high-volume trial courts are finding it increasingly difficult to straddle a judicial fence which demands both clairvoyance and objectivity. Where the court attempts to assign counsel in every case (as frequently occurs where there is a full-time public defender), the court opens itself up to criticism of being "soft" on criminals, or wasting taxpayer dollars, or of providing better counsel to the poor than to the middle-class citizens. On the other hand, but of at least as much significance, is the charge that the court has abdicated its responsibility to make the required determination under Argersinger.

1.2.2 Due Process

1.2.2A Waiver of Counsel

The issue of waiver is also of extreme importance under the Argersinger opinion. The Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." [33] The right to counsel is perhaps the most significant of all constitutional rights for, unaided by counsel, the accused may not be capable of protecting other rights, privileges and immunities conferred upon him by law.[34] Therefore,

> . . .a defendant who has been advised of his right to counsel at trial should be permitted to waive it only if he "possesses the intelligence and capacity to appreciate the consequences of this decision" and "comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case."[35]

Some courts require that counsel be present to advise the defendant with regard to the decision to waive counsel before such waiver may be accepted.[36] Thus, for example, the New York City Legal Aid Society provides counsel to all persons at first appearance, for the purpose of advising them as to charge and waiver. Should the defendant thereafter be found non-indigent he will be advised of his right to be represented by counsel and proceedings will be adjourned until defendant has retained private counsel if he so desires.[37]

Several states have incorporated detailed waiver requirements into their rules of criminal procedure. For example, Rule 3.111 (d) of the Florida Rules of Criminal Procedure provides as follows:

(d) Waiver of Counsel:

(1) The failure of a defendant to request appointment of counsel or his announced intention to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.[38]

(2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.[39]

(3) No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.[40]

(4) A waiver of counsel made in court shall be of record;[41] a waiver made out of court shall be in writing with not less than two attesting witnesses. Said witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

However, because of the inability of some courts to provide the resources necessary to implement Argersinger, there have been attempts reported to urge defendants to agree to waiver of counsel

in return for assurance that the defendant will not be incarcerated.[42] This would appear to be a gross distortion of the intent of the Argersinger doctrine. If the defendant faces the likelihood of incarceration, counsel must be assigned unless defendant chooses to waive the right. Forcing the defendant to waive counsel with a guarantee that he will not be incarcerated exposes him to criminal prosecution without benefit of his Sixth Amendment rights.[43] It was precisely for this reason that the Court included the waiver language;[44] and it is precisely why any waiver obtained under such circumstances must be deemed invalid.

1.2.2B Due Process: Assigned Counsel Without Compensation

One significant effect of the Argersinger decision has been felt in those states which responded to the decision by requiring private counsel to represent indigent defendants in municipal courts without compensation.[45] While the municipal courts of the State of New Jersey had been operating under a voluntary attorney system for several years, apparently with no major objections from the bar associations,[46] bar associations in some states were not so receptive to the idea,[47] especially where the courts were unable to provide reimbursement to the attorneys even for expenses.

The net result of this resistance was felt in a recent decision of the Kentucky Court of Appeals,[48] which held that requiring an attorney to represent a defendant without compensation amounted to a deprivation of property without due process of law, prohibited by the Fifth and

Fourteenth Amendments to the Constitution of the United States.[49] The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[50]

The issue in the decision was rendered somewhat moot, however, as the Court of Appeals of Kentucky did not rule on the case until after the legislature had voted to provide funds to compensate assigned counsel.[51] A similar result was reached by the Missouri Supreme Court which found that its assigned counsel system amounted to involuntary servitude and struck it down as violative of the Thirteenth Amendment.[52] Despite these rulings, Judge Harold Greene of the District of Columbia Superior Court recently ordered the members of the D. C. Bar Association to provide counsel in petty offense cases in the Superior Court without compensation.[53]

While there has been considerable dissatisfaction with orders such as Judge Greene's, a number of attorneys interviewed in other states expressed pride and satisfaction with voluntary unpaid counsel systems. One example has been the experience of the Young Lawyers Section of the Cuyahoga County Bar Association in Cleveland, Ohio. "This committee undertook to handle before all the municipal courts of this county all indigent misdemeanants from July, 1972 to date. . . at great personal sacrifice."[54]

1.3 Extension of the Right to Counsel in All Criminal Cases

A basic question which must be asked with regard to the decision is whether or not expansion of the right to counsel should be based on the consequences of conviction, as in Argersinger, or whether the Sixth Amendment requires expansion to all criminal offenses, regardless of consequence.

1.3.1 Expansion Based on the Consequences of Conviction

1.3.1A The Possibility of Incarceration: Victimless Crimes

The right to counsel in Argersinger is based on a pre-determination by the court of the consequences of conviction, specifically, the likelihood of incarceration. If the likelihood of incarceration is sufficient, it follows that offenses carrying the possibility of incarceration may be a logical area for extension of the doctrine. It has been suggested that the difficulties encountered in requiring the court to pre-judge the case, as well as the possible equal protection problem inherent in such a determination, may require that counsel be provided whenever the statute provides for incarceration as the penalty.[55] Indeed, the consequences of criminal conviction other than incarceration may in some instances be more serious than incarceration (see infra, 1.3.1B).

Yet the states and the organized bar have been unwilling to extend the right to counsel beyond the "likelihood of incarceration" cases to fine-only cases, or to cases where incarceration would, in fact, never be imposed, their unwillingness apparently stemming from an

appreciation of some inherent differences between the severity and permanence of the scars of incarceration and the less serious implications of a fine. In enunciating the standard of "practical likelihood of incarceration," the ABA Defense Services Committee had observed:

> Nor is it adequate to require the provision of defense services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely, if ever, imposed for certain types of offenses, so that for all intents and purposes the punishment they carry is at most, a fine.[56]

The Committee was unwilling to extend the concept further for fear that the effects "might be unduly burdensome." In attempting to promulgate a workable standard, the Committee sanctioned a method under which the determination became a function of the temperament, caseload and volume of the individual court.[57]

Another suggested approach is the reclassification of statutes by the legislature to remove the imprisonment penalty from certain "victimless crimes," offenses in which often no harm inures to other persons or the community, including certain drug-abuse related offenses, prostitution and gambling, most sexual offense cases involving consenting adults, vagrancy, minor traffic offenses, and drunkenness.[58] Such a step would eliminate much possible confusion in the lower courts concerning pre-determination of the possibility of incarceration, and would remove one additional cause of court delay.

The National Advisory Commission on Criminal Justice Standards and Goals[59] recommends the transfer of jurisdiction to the administrative agencies set up under Standard 8.2 to handle cases of "certain non-

traffic matters, such as public intoxication."[60] Professor Bruce Rogow of the University of Miami suggested in his brief on behalf of the petitioner in Argersinger that the extension of the right to counsel in all criminal cases should encourage the state legislatures to undertake wholesale revisions of their criminal codes to reduce the impact on the courts, including the elimination of prison sentences from most minor offenses and the removal of jurisdiction of the whole body of victimless crimes from the criminal courts, either by transfer to an administrative agency, or by repeal.[61]

1.3.1B Loss of Liberty: Consequences of Conviction Other Than Incarceration

Another area for concern raised by the decision is the need for interpretation of the phrase "loss of liberty." While conviction may not result in incarceration, mental commitment or sentencing to a detoxification center or half-way house clearly involves a "loss of liberty" to the defendant[62] as does revocation of probation and parole.[63] "Incarceration" is typically defined in state criminal codes as confinement to a jail or penitentiary;[64] but where statutory law is silent,[65] or where the court if given the option of diversion or referral in addition to incarceration,[66] an interpretation is needed as to whether or not possible "loss of liberty" requires the right to counsel. In California, for example, municipal court judges are empowered to sentence certain offenders to work for the parks department.[67]

Civil disabilities are frequently attendant to criminal convictions. Often these disabilities may be greater than a loss of liberty for a short period of time. For example, incarceration for any substantial period of time will often result in a loss of employment.[68] In addition, conviction in a criminal case may be an automatic loss in a civil case based on the same facts, in that the conviction can be prima facie proof in a civil case.[69]

Criminal convictions, though not involving the likelihood or possibility of incarceration, often prohibit individuals from pursuing certain careers or exercising certain freedoms.[70] In New York, for example, conviction of a citizen will disqualify him from being a private detective,[71] will prevent his obtaining a liquor license,[72] and will also bar him from becoming a notary public.[73] A conviction may also result in subsequent deportation of the "offender."[74] Although the individual's liberty per se is not infringed upon, in the sense that the offender will not be incarcerated as a result of the deportation proceedings, it is clear that he will have suffered a loss of some "liberty." The federal district court for the Eastern District of Pennsylvania has extended the right to counsel in these proceedings.[75]

It thus appears that where criminal stigma will attach as a result of a conviction so as to affect other civil rights and freedoms, courts seem increasingly willing to extend the right to counsel, and are likewise willing to assign counsel to indigents so affected, especially where the wealthy or non-indigent citizen would retain counsel. As

the Supreme Court said in Bolling v. Sharpe:[76] "Liberty under the law extends to the full range of conduct which the individual is free to pursue. . ."[77] Such a definition of "liberty" goes beyond the concept of bodily freedom to cover conduct which affects a citizen's other substantial rights and freedoms.

1.3.1C Possibility of a Serious Fine Only

Some states have already proceeded to recognize that the right to counsel exists in fine-only cases[78] albeit under extraordinary circumstances,[79] and at the discretion of the court.[80] At least two attempts have been made in recent years to extend the right to counsel in fine-only cases through the promulgation of national standards. The first was through the National Conference of Commissioners on Uniform State Laws, which proposed as part of its 1966 Model Defense of Needy Persons Act that the states adopt a provision under which an indigent accused is entitled to be assigned counsel for any crime the "penalty for which includes the possibility of confinement (for six months or more) or a fine (of $500 or more)."[81]

This was an attempt to extend the right to counsel in state courts to all cases in which the penalty included the possibility of incarceration or fine, leaving to the individual states the option of deciding at what minimum level of imprisonment or fine it wished to establish the right. This model has been adopted in various forms by a number of states.[82]

The second important standard promulgated in this area is that of the National Advisory Commission on Criminal Justice Standards and Goals of LEAA, issued in final draft form on August 9, 1973. These standards, prepared with the cooperation of the National Institute of Law Enforcement and Criminal Justice, recommended a broad array of reforms in the criminal justice system, including the complete abolition of plea bargaining by 1978[83] and transfer of all minor traffic offenses to an administrative agency.[84] One of the Commission's recommendations was that the right to counsel be extended to eligible persons in all criminal cases, at their request.[85] This standard [86] was conceived of by the Commission as a necessary and proper extension of the right to counsel under Gideon, and was designed to assure that all defendants are guaranteed the right to a fair trial. The inclusion of the phrase "at his request" was apparently not intended to suggest that the burden of availing oneself of the constitutional right to counsel rests with the defendant. Rather, it was a direct result of the desire of the Courts Task Force members to recommend appointment of counsel at an earlier point in time[87] than is presently required under the Coleman,[88] Miranda,[89] or Kirby [90] decisions, i.e., to such "time (as) the individual either is arrested or is requested to participate in an investigation that has focused on him as a likely suspect."[91] As long as the U. S. Supreme Court is unwilling to grant a full extension of the present doctrine, a defendant (or someone acting on his behalf), must still "request" counsel.[92]

The Commission was not concerned with the problems of a greatly increased caseload on the courts since it assumed that, as a result of Argersinger, the only substantive area to which the right to counsel had not yet been extended was in traffic cases and, as indicated below, it recommended that the jurisdiction of traffic cases be transferred to an administrative agency.[93]

Just as earlier ABA Standards foreshadowed Gideon,[94] and the 1968 Standards preceded Argersinger, it should be observed that the present standards are likely to have a long-range impact on the operations of the criminal justice system. The present standards represent a major step away from the rationale of the Argersinger Court and the earlier ABA comments by basing the right to counsel not on a practical assessment of the likelihood of incarceration upon conviction, but on the consequences of any possible conviction including fines. The new standard addresses the problems inherent in the complexity and risk of any criminal proceeding.

1.3.2 Extension of the Right to Counsel to All Crimes, Regardless of Consequence

1.3.2A Minor Criminal Offenses

California has provided counsel in all criminal cases by statute for several years.[95] The right to counsel has likewise been extended by the supreme courts of a number of states to all or nearly all criminal cases.[96] Alaska requires counsel in any case involving "incarceration, loss of a valuable license, or heavy enough fine to indicate criminality."[97]

The Supreme Court of New Jersey has recognized the right to assigned counsel for indigent persons "whenever the penalty will be incarceration or other consequence of magnitude."[98]

The extension of the right to counsel to all criminal cases including traffic[99] (and, as in California, to some civil cases)[100] will remain within the province of the respective state legislatures and state supreme courts, who must also wrestle with the problems of burgeoning caseloads and increasing demands on the criminal docket.

1.3.2B Non-Criminal Offenses: Right to Counsel in Traffic Cases

The minority opinion in Argersinger raised the issue of the ultimate extension of the right to counsel to all petty offenses and traffic. The majority had chosen not to consider the issue of the collateral consequences of petty offense convictions, including loss of liberty,[101] loss of a valuable license or imposition of a substantial fine. However, Justice Powell criticized them for what he believed to be a reckless expansion of the Gideon doctrine, foreshadowing the adoption by the Court of a broad "prophylactic" rule that would require the appointment to indigents in all criminal cases.[102]

Most courts which do not apply the right to counsel "across-the-board" to all misdemeanors or petty offenses, argue that the courts might not be able to handle the resulting caseload and that such an extension would impose prohibitive costs. In addition, some judges have noted certain distinctions between the processing of felony and

certain misdemeanor cases, pointing out that minor misdemeanors are often prosecuted in the municipal courts by the arresting officer rather than a prosecutor and that for many offenses, the defendants generally proceed pro se.

Despite these concerns, the erosion of such limitations continues. State and federal decisions since Argersinger have extended the right to counsel in the areas of probation and parole[103] and criminal contempt,[104] and most recently to all summary courts-martial.[105]

No court has yet held that the right to counsel extends absolutely to all traffic violations. However, the California Supreme Court, in In Re Johnson,[106] appeared willing to grant this extension, declaring the right "not limited to felony cases but. . .equally guaranteed to persons charged with misdemeanors in a municipal or other inferior courts.[107] This decision noted the fears of the other courts that have outwardly refused to grant counsel in "non-serious" traffic cases. The court argued that the great portion of citizens facing traffic violations are as interested in prompt dispositions of their cases as are the courts, and thus would not ask that counsel be provided.[108] A North Carolina District Court has offered extremely broad language in providing counsel "in all cases where it is determined by the judge that the defendant cannot defend himself," and that will apply to traffic cases, if necessary.[109]

A number of lower courts have considered extending the right to appointed counsel to indigents in traffic offenses. While the right has been recognized in a few jurisdictions,[110] most state courts which

have dealt with the question have left the decision up to the discretion of the court,[111] whose determination must in turn be based on the consequences of conviction. Where, for example, conviction could result in suspension of defendant's driving privileges,[112] or where the offense was characterized as "serious",[113] counsel has been assigned. Because of the courts' concern for the potential burden on its docket,[114] however, many courts have chosen to exclude minor traffic from the right to assigned counsel.[115] New York State courts have declared traffic violations to be minor transgressions which are "distinguishable from more serious breaches of the law" in that they are not "crimes" under the state code and the sanctions imposed are "civil, community penalties." [116]

Attempts are being made to effect a compromise in this area between the mandate of the Sixth Amendment and the burgeoning caseload demands of inferior courts. In the Standards of the National Advisory Commission on Criminal Justice Standards and Goals,[117] the commission proposed transfer of all minor traffic offenses from the criminal courts to an administrative agency.[118] This would enable the courts to concentrate on serious criminal cases without being burdened by a high-volume, minor offense docket. If the states are to adopt the concept of a unified trial court system,[119] disposition of traffic cases will have to be delegated to nonjudicial officers.[120] Thus, the Commission proposed that traffic matters be recognized as not essentially criminal[121] and be handled accordingly.[122]

The Commission did not attempt to provide answers to the questions of how to staff and finance a separate administrative agency, nor did it suggest that such an alternative would be cost-effective. But it did suggest that the impact of extension of the right to counsel in all criminal cases would not create insufferable burdens on the courts because the bulk of cases presently outside the scope of Argersinger were traffic cases.[123] Nonetheless, it must be observed that the basis of widespread concern among local criminal justice agencies evoked by the Argersinger case is due to the increased operational costs anticipated as a result of the decision; whether or not the burden is to be assumed by the courts or by a separate administrative agency, local government seems inexorably bound to increase its "courts" budget, unless additional managerial/ administrative approaches can be developed to facilitate the desired objective.

The Standards include two such suggested approaches which bear on the issue of delay and expenses. The first is that jury trial should not be available in minor traffic cases.[124] It should be noted that as a matter of practice, jury trials in minor traffic cases are rare occurrences.[125] The second suggested approach is to permit pleas by mail in most traffic cases;[126] however, the Commission's recommendation arbitrarily precludes plea by mail by a repeat violator, thereby seriously limiting the impact of its own proposal. A better approach might tie the limitation to repeated offenses which carry a greater statutory penalty[127] or to a point system.[128] At a minimum, such a provision should establish an outside time limit following conviction on a traffic

charge after which time a plea by mail on a subsequent (repeat) charge would be permitted.[129]

PART I

NOTES

1. 287 U.S. 45 (1932).

2. 372 U.S. 335 (1963).

3. Id., at 344.

4. 407 U.S. 25 (1972). Held, retroactive, Cincinnati v. Berry, U.S.L.W., November 5, 1973.

5. Id., at 37.

6. Portman, "Gideon's Trumpet Blows for Misdemeanants -- Argersinger v. Hamlin, The Decision and Its Impact," unpublished law review article, 1973.

7. The Court, in Argersinger, recognized that certain statutes or ordinances provided for the possibility of imprisonment, usually under the "fine and/or days" formula, but that in actual practice, the possibility of imprisonment was extremely small. For example, of the 1,288,975 people convicted for jaywalking, speeding, etc., in New York City in 1970, only 24 were given sentences involving any confinement.

8. 287 U.S. at 69.

9. 407 U.S. at 40.

10. The Fourteenth Amendment provides in pertinent part:
"(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."
The "fundamental fairness" concept is a method of interpreting the due process clause of the Fourteenth Amendment. It is generally held to mean that due process encompasses those rights and/or procedures necessary to insure that the individual is able to receive a fair trial or that the procedures do not, per se, favor the government.

11. 407 U.S. at 34.

12. See, e.g., Papachristou v. Jacksonville, 405 U.S. 156 (1972) (vagrancy); In re Gault, 387 U.S. 1 (1967) (juvenile delinquency).

13. 407 U.S. at 37.

14. Id.

15. Id., at 37 n. 7.

16. Id., at 38.

17. The Fourteenth Amendment provides in part:
"(N)or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

18. 351 U.S. 12 (1956).

19. 372 U.S. 353 (1963).

20. Griffin, 351 U.S. at 19.

21. 407 U.S. at 40.

22. See, generally, concurring opinion of J. Powell, 407 U.S. 25, 44.

23. "Trial judges sitting in petty and misdemeanor cases -- and prosecutors -- should recognize exactly what will be required by today's decision. Because no individual can be imprisoned unless he is represented by counsel, the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. The judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own. This need to predict will place a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper. Yet the prediction is not one beyond the capacity of an experienced judge, aided as he should be, by the prosecuting officer. As to jury cases, the latter should be prepared to inform the judge as to any prior record of the accused, the general nature of the case against the accused, including any use of violence, the severity of harm to the victim, the impact on the community, and the other factors relevant to the sentencing process. Since the judge ought to have some degree of such information after judgment of guilt is determined, ways can be found in the more serious misdemeanor cases when jury trial is not waived to make it available to the judge before trial. This will not mean a full 'presentence' report on every defendant in every case before the jury passes on guilt, but a prosecutor should know before trial whether he intends to urge a jail sentence, and if he does he should be prepared to aid the court with the factual and legal basis for his view on that score." 407 U.S. at 42.

24. Id., at 53 (Powell, J., concurring).

25. "If counsel is not appointed or knowingly waived, no sentence of imprisonment for any duration may be imposed. The judge will, therefore, be forced to decide in advance of trial -- and without hearing the evidence -- whether he will forego entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature." Id.

26. Argersinger clearly states that if counsel is not provided, the defendant cannot be incarcerated if found guilty. In order to impose a sanction of penal confinement once a jury has been empaneled and a trial has begun, the judge would have to declare a mistrial. Since the jury has been empaneled and the trial has begun, a retrial raises grave problems of double jeopardy. The Fifth Amendment to the Constitution states, in pertinent part:
"(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
Since the retrial was declared for the sole purpose of assigning counsel so as to impose incarceration upon conviction, a purpose clearly contrary to the interests of the defendant, it can be argued that the defendant is being twice put in jeopardy in derogation of the Fifth Amendment. Had the mistrial been declared before the jury was empaneled, or as a result of defendant's actions, the double jeopardy argument would not be a bar to a subsequent retrial.

27. In the decision of the U.S. Supreme Court in Tate v. Short, 401 U.S. 395 (1971), it was held that an indigent cannot be imprisoned for failure to pay a fine except in breach of a "time-payment" schedule established by the court:
"In each case, the Constitution prohibits a State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. . .We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses to do so." 401 U.S. at 398, 400.
But, cf., Opinion of Attorney General of Florida, May 23, 1973, holding that imposition of an installment fine constitutes an unlawful suspension of sentence under Florida law.

28. See, Appendix, infra.

29. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services. (Approved Draft, 1968.)

30. Florida R. Crim. P. 3.111 (b) (1).

31. Interview with Public Defender of Florida, 14th Judicial Circuit, May 24, 1973.

32. 95 Idaho 14, 501 P. 2d 282 (1972).

33. 407 U.S. at 37.

34. See, Powell v. Alabama, 287 U.S. 45 (1932).

35. ABA Project on Minimum Standards for Criminal Justice, "Standards Relating to the Function of the Trial Judge," Sec. 6.6 (Tentative Draft, 1972); See, also, Standards of the National Advisory Commission on Criminal Justice Standards and Goals, Standards Relating to Courts, Standard 13.1, which would add to the ABA Standard the requirement "that the defendant be capable of conducting a defense with reasonable efficiency and that he not be deceptive in his manner of defending."

36. State v. Tomlinson, 100 N. W. 2d 121 (S.D. 1960); People v. Culbert, 215 N.E. 2d 470 (N.Y. 1966). Accord, American Bar Association Project on Minimum Standards for Criminal Justice, "Standards Relating to Providing Defense Services," Sec. 7.3, Approved Draft, 1968; Cf., ABA Standards, "Standards Relating to the Function of the Trial Judge," Sec. 6.7 (Tent. Draft, 1972).

37. N.Y. C.P.L. 170.10.

38. Miranda v. Arizona, 384 U.S. 436 (1966).

39. 304 U.S. 458 (1938):
"It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiesence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . ." Id., at 464.

40. Von Moltke v. Gillies, 332 U.S. 708 (1948).

41. Carnley v. Cochran, 369 U.S. 506 (1962).

42. See, Pennsylvania Public Defender Report, V. Ziccardi, June, 1973.

43. In a draft proposal by NLADA for the Courts Task Force of the National Advisory Commission on Criminal Justice Standards and Goals, Professor

Shelvin Singer and Public Defender William Higham urged adoption of the following standard:

> "The administration of the method or procedure whereby it is determined whether or not a defendant is entitled to have counsel provided may not, by any unnecessary means, deter either the said defendant, or other defendants who may reasonably be expected to have knowledge thereof, from exercising any constitutional rights. Specifically, such rights shall not be deterred by any means, including but not limited to the following. . .
>
> 2. By unnecessarily conditioning the exercise of the right to counsel by a defendant on the waiver of some other constitutionally based right."

44. See, n. 36, supra.

45. The defense of indigents accused of crime was traditionally considered to be one of the services every member of the bar was expected to provide upon request by the court without expectation of compensation. United States v. Dillons, 346 F 2d 633, 635 (9th Cir. 1965).

46. Staff interview with Director of the Newark, New Jersey Municipal Court Voluntary Assigned Counsel System, Essex County, New Jersey, January 17, 1973.

47. The question of attorneys' rights to fees for indigent defense has been litigated in a number of jurisdictions. See, n. 47, infra. See, also, U.S. v. Moore, 332 F. Supp. 919 (E.D. Va. 1971); Polakovic v. Superior Court of San Bernadino County, 104 Cal. Rptr. 383, 28 Cal. App. 3d 69 (1972).

48. Bradshaw v. Ball, 487 S.W. 2d 294 (Ct. App. Ky. 1972).

49. Id., at 298.

50. U.S. Const. Amend. V.

51. 12 Cr.L.R.P.T.R. 2046.

52. State v. Green, Mo., 470 S.W. 2d 571 (1971).

53. Washington Post, June 22, 1973.

54. Letter from Judge James M. DeVinne, East Cleveland Municipal Court, April 26, 1973, to American Bar Association, nominating the Young Lawyers' Section of the Cuyahoga Bar Association for the ABA's annual Award of Merit.

55. Nancy Goldberg and Marshall Hartman, Help for the Indigent Accused: The Effect of Argersinger, N.L.A.D.A. Briefcase, July 1972.

56. See, n. 29, supra, comment to standard 6.1.

57. See, Section 1.2.1A, supra.

58. A National Strategy to Reduce Crime, Report of the National Advisory Commission on Criminal Justice Standards and Goals, August 9, 1973, Ch. 8: Criminal Code Reform and Revision.

59. Report of the Courts Task Force of the National Advisory Commission on Criminal Justice Standards and Goals (Approved Draft, January 15th, 1973).

60. Id., Standard 8.2.

61. See, Brief for Petitioner, Argersinger v. Hamlin, December 6, 1971, No. 70-5015.

62. The courts in these cases have indicated that the proceeding is quasi-criminal in nature and that the indigent is to be involuntarily deprived of his liberty by state officials. In re Popp, 33 O. App. 2d 22, 292 N.E. 2d 330 (1972); People v. Stanley, 17 N.Y.2d 256, 217 N.E. 2d 636 (1966); Denton v. Commonwealth, 383 SW 2d 681 (Ct. App. Ky. 1964). The same rationale applies in cases of proceedings to commit one to a training school or to rehabilitation facilities for juvenile delinquency. Heryford v. Parker, 396 F. 2d 393, 396 (10th Cir. 1968).

63. Although these proceedings are not criminal in nature, the indigent defendant must be assigned counsel when probationer would be at a disadvantage in presenting his case to maintain his "liberty." Hewett v. North Carolina, 415 F. 2d 1316 (4th Circuit 1969); Laquay v. State, 16 Md. App. 709, 299 A.2d 527 (Ct. Spec. App. Md. 1973). The same arguments centering around defendants' potential "loss of liberty" are made with respect to parole revocation hearings. Morissey v. Brewer, 408 U.S. 471 (1972). The courts point out that the defendant's rights should not be determined by labels describing the proceedings but must be controlled by the significance of the right involved in those proceedings -- i.e., the defendant's liberty. Warren v. Michigan Parole Board, 23 Mich. App. 754, 179 N.W. 2d 664 1970; Commonwealth v. Tinson, 433 Pa. 328, 249 A. 2d 549 (1969). Concluding that Argersinger is fully retroactive, the U. S. Court of Appeals for the Fifth Circuit has held that counselless misdemeanor convictions cannot be used as a basis for revocation of parole. Cottle v. Wainwright, 338 F. Supp. 819 (M.D. Florida, 1972). Although noting that the Supreme Court had not decided in Morissey whether or not a defendant was entitled

to counsel at parole revocation proceedings, the court adopted the rule previously announced in the Tenth Circuit, that a state which allows parolees to be represented by counsel cannot deny counsel to those who cannot afford it. Earnest v. Willingham, 406 F.2d 681 (10th Circuit 1969).

64. Black's Law Dictionary defines "incarceration" as:
"Confinement in a jail or penitentiary; confinement by competent public authority or under due legal process."

65. See, Maine Rev. Stat. Ann.

66. See, Cal. Pen. Code § 19b.

67. Id.

68. Marstan v. Oliver, 324 F. Supp. 691, 969 (E.D. Va. 1971).

69. In Re Richtschauffer, 278 N. Y. 336, 340, 16 N.E. 2d 357, 359 (1938). Note, Admissibility of Criminal Judgment in a Civil Action, 17 Corn. L. Rev. 493 (1932).

70. American Bar Association, Removing Offender Employment Restrictions, (January, 1973).

71. N.Y. Gen. Bus. Law Section 74 (2) (McKinney, 1968).

72. N. Y. Alc. Bev. Control Law Sec. 102(2) (McKinney, 1968).

73. N.Y. Exec. Law, Sec. 130 (McKinney Supp. 1972-1973).

74. Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir. 1961).

75. United States v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950).

76. 347 U.S. 497 (1954).

77. Id. at 499. (Petitioners, black minors, were refused admission to a public school attended by white children solely on account of their race. The District Court of the District of Columbia dismissed their complaint for aid in gaining entrance. Writ of certiorari was granted and judgment reversed by the U.S. Supreme Court.)

78. Bolkovac v. State, 229 Ind. 294, 98 N.E. 2d 250 (1971).

79. See, e.g., Alexander v. City of Anchorage, 490 p.2d 910 (Alaska, 1971).

80. See, Super. Ct. R. Crim. Proc. 44.

81. Uniform Law Commissioners, Model Defense of Needy Persons Act (1966).

82. See, Appendix, infra.

83. Standards and Goals, supra, n. 59, Standard 3.1.

84. Report of the Courts Task Force of the National Advisory Commission on Criminal Justice Standards and Goals (Approved Draft, January 15, 1973), Standard 8.2.

85. Id., Standard 13.1.

86. See, Appendix, infra.

87. California Government Code, Sec. 27706(a).

88. Coleman v. Alabama, 399 U.S.1 (1970).

89. Miranda v. Arizona, 384 U.S. 436 (1966).

90. Kirby v. Illinois, 406 U.S. 682 (1972).

91. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Standard 13.1, September, 1973.

92. Id., comment, p. 254.

93. See, n. 84, supra.

94. See, Comment to Standard 6.1, ABA Minimum Defense Services Standards, n. 29, supra.

95. Cal. Penal Code, ss 859,987. (1970).

96. See, Appendix, infra.

97. Alexander v. City of Anchorage, 490 P.2d 910 Alas. (1971).

98. Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971).

99. See, Sec. 1.3.2B, infra.

100. Although no statutory or constitutional right to counsel exists for indigents in civil cases, if access to the court is of a fundamental nature, Boddie v. Connecticut, 401 U.S. 371 (1971), the courts must have discretionary authority to assign counsel in the interests of

justice Peterson v. Nadler, 452 F.2d 784, 757 (8th Cir. 1971). Such authority has been provided by statute in California, where the public defender is empowered upon request to prosecute actions on behalf of indigent persons for wages and other demands exceeding $100, and to defend any indigent person in a civil action whom the defender believes is being unduly harassed. Cal. Gov't. Code ss 27706 (b) - (e).

101. See, Sec. 1.3.1b, supra.

102. 407 U.S. at 50 (Powell, J., concurring).

103. See, n. 63, supra.

104. State v. Rou, 298 A.2d 867 (Ct. App. Md. 1973).

105. Daigle v. Warner, 348 F. Supp. 1074 (D. Haw. 1972), aff'd, U.S.L.W., June, 1973.

106. 42 Cal. Rptr. 228, 398 P. 2d 420 (1965).

107. Id., at 422.

108. See also, Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771, P. 2d (1966).

109. Creighton v. North Carolina, 257 F. Supp. 806 (E.D.M.C. 1966).

110. See, Conn. Practice Book, s 845; In re Johnson, 62 Cal. 2d 325, 42 Cal. Rptr. 228, 398 P.2d 420 (1965).

111. See, n. 81, infra.

112. In Mills v. Municipal Court of San Diego Judicial District, 105 Cal. Rptr. 271, 29 Cal. App. 3d 121 (1972), the court refused to revoke petitioner's license for reported traffic offenses where he was unrepresented and convicted at his first trial. The court pointed out that although incarceration may not result from a first misdemeanor conviction, conviction of a second offense may involve substantial sanctions (such as the loss of a driver's license) and in such circumstance counsel must be provided. See also, Bell v. Burson, 402 U.S. 535 (1970): driver's license may not be revoked "without that procedural due process required by the Fourteenth Amendment." 402 U.S. at 539.

113. See, e.g., Norten v. Curry, 33 O. Misc. 94, 291 N.E. 2d 799 (Mun. Ct. 1972) (driving while intoxicated); Matthews v. Florida, 463 F.2d 679 (C.A.5 1972) (driving without a license).

114. In 1969, 78% of all adult misdemeanant court cases in California were traffic cases. See, n. 59, supra, p. 210. See, also, District of Columbia Courts, Annual Report 1971, p. A-2; Profile of the Criminal Justice System in Cuyahoga County, Ohio, December, 1971, Berg and Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Boston (1970).

115. See, e.g., People v. Letterio, 16 N.Y. 2d 307, 213 N.E. 2d 670.

116. Id.

117. See, n. 59, supra.

118. New York State already recognizes administrative disposition of traffic offenses in cities with population in excess of 1,000,000. N.Y. Veh. Traf. Law, Sec. 155 (McKinney, Supp. 1966).

119. The Commission urged the creation of a unified judicial system financed by the state and administered through a state-wide court administrator or chief judge under the supervision of the chief justice of the state supreme court. All trial courts would be unified into a single trial court with general criminal as well as civil jurisdiction. Criminal jurisdiction now in courts of limited jurisdiction would be placed in these unified trial courts of general jurisdiction and jurisdiction over certain traffic violations would be transferred to an administrative agency. Standard 8.1.

120. See, n. 59, supra, Standard 8.2.

121. See, n. 116, supra.

122. See, n. 59, supra, Standard 8.2.

123. Id., Standard 8.2, Comments.

124. Baldwin v. New York, 399 U.S. 66 (1970).

125. In Cleveland, Ohio, for example, in 1970, only 15 jury trials were held on 251,457 traffic cases filed. Cleveland Municipal Court Annual Report, January 1, 1970 to December 31, 1970.

126. See, n. 59, supra, Standard 8.2.

127. See N.Y. Vehicle and Traffic Law S 1800 (b).

128. See, Ohio Rev. Code S 4507.40.

129. Id., There seems to be no compelling reason why pleas should even be limited to minor traffic cases. In those communities which have experimented with the use of the street or field citation such as Oakland, New Haven, and New York City, there is growing support for the idea of permitting offenses which carry a fine-only penalty to be eligible for plea by mail. See, generally, American Bar Association Project on Minimum Standard for Criminal Justice, Standards Relating to Pretrial Release (Approved Draft, 1968); See, also, Mark Berger, "Police Field Citations in New Haven", Wisconsin Law Review, Vol. 1972 (no. 2, 1972); Floyd F. Feeney, "Citation in Lieu of Arrest: The New California Law" Vandebelt Law Review, 367 (1972); Comments, Standard 4.2, Citation and Summons in Lieu of Arrest, Standards of National Advisory Commission on Criminal Justice Standards and Goals, Approved Draft, August 9, 1973.

PART II

DETERMINATION OF INDIGENCY

Although the issue of the determination of indigency was not specifically raised by the Argersinger Court, the problems of determination and of the establishment of standards for this determination become increasingly important as the right to counsel is extended to misdemeanor and petty offense cases. This section outlines some of the legal issues of indigency raised in the implementation of the decision.

2.1 Standards of Indigency

A determination of indigency is generally based on the inability of the defendant to financially provide for adequate legal counsel without substantial hardship to himself or his family.[1] The Criminal Justice Act of 1964 of the District of Columbia provided for assignment of counsel where a defendant entitled by law to be represented by counsel was otherwise "financially unable to obtain an adequate defense."[2] This standard was intended to reflect two inter-related concepts: (1) that the inability to obtain representation must be judged in the context of the cost of the representation or service required;[3] and, (2) that indigency should not be synonymous with poverty or destitution.[4] The standard was based on the recommendations of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice,[5] which provided that poverty should be seen as a relative concept,

and that it "must be measured in each case by reference to the particular need or service under consideration."[6] The standard was later clarified to provide for eligibility:

> . . .when the value of (a defendant's) present assets . . .and his net income. . .were insufficient to enable him to promptly obtain a qualified attorney, obtain release on bond and pay other expenses necessary to an adequate defense, while furnishing himself and his dependents with the necessities of life.[7]

The language of the Criminal Justice Act standard loosely followed the suggestion of Professor Oaks in his study, "The Criminal Justice Act in the Federal District Courts,"[8] and paved the way for the language of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services,[9] Section 6.1:

> Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. (Emphasis supplied)

The significance of the ABA Standard was its addition of the phrase, "without substantial hardship to himself or his family." This phrase was included "to emphasize that eligibility is not to be determined . . .only after he (the defendant) has exhausted every financial resource," but should be responsive to the defendant's reasonable obligations to provide shelter, food, and clothing for his family, as well as to meet other current debt obligations.[10]

The broadening of the standard also reflected growing awareness among legal scholars and jurists that the financial screening process required by the Powell and Gideon decisions had evolved into a time-consuming, sensitive, largely discretionary investigation which, it

seemed at times, was intended not so much to measure the defendant's assets against some objective standard, but to catch him sipping at the public trough. This trend was in direct contrast to studies by Moore[11] and others suggesting that the typical defendant would prefer to retain private counsel of his choice if he were able.

Historically, the right of an indigent accused to be assigned counsel by the state was based on the constitutional right to counsel guaranteed to criminal defendants, combined with the danger of conviction of an innocent person whose financial status precluded him from seeking representation.[12] As the cost of defense services increased, however, and as elaborate schemes were being developed for the determination of eligibility, the trial courts began to find themselves in an administrative quandary, being required to further clog the docket with questions concerning income, assets and liabilities, only to find that from 50% to 90% of all criminal defendants were "legally indigent" anyway.[13]

Establishment of the "substantial hardship" test evidenced an attempt to expand the scope of eligibility to include representation for persons who could not be considered destitute, but for whom the costs of legal counsel would be oppressive, rendering them indigent in effect.[14] It was supposed to provide the court with an objective standard, albeit vague, for evaluating a defendant's circumstances. As it turned out, however, the kinds of delay attendant to such inquiry and the inevitably subjective nature of the evaluation rendered the "substantial hardship" standard ineffective in practice.

2.2 Standards of Partial Indigency

Despite the impracticalities inherent in the court's assessment of "substantial hardship," a noticeable trent toward refinement of the standard and quantification of eligibility has begun to emerge. Rather than recognize the fact that ability to pay is more properly and easily a subjective assessment on the part of the individual,[15] court systems have developed elaborate forms, questionnaires and affidavits for defendants to complete so that the defendant's circumstances can be held up to some objective standard of solvency. Rather than accede to the idea that most persons, regardless of their economic status, will be substantially burdened by the costs of representation in a criminal trial, the courts have intensified efforts to separate the truly-needy from the non-needy. Operating on the theory that defendants' resources should be stripped equally to the same point (of "substantial hardship"), the National Advisory Commission on Criminal Justice Standards and Goals has recommended adoption of the concept of "partial indigency."[16] Although conceived of as the fairest way to provide counsel to accused persons, partial indigency requires a much more detailed, far more quantified assessment of the defendant's circumstances, thereby creating further administrative confusion amidst the crowded docket.

Nonetheless, the concept of partial indigency is worthy of consideration, as it seems to address two major concerns of the public about assigned counsel systems: (1) that adequate counsel is made available only to the rich or the poor, but not to the middle class; and, (2) that

no one should be able to get legal counsel for free -- if a defendant can afford some portion of his defense, he should pay that portion:

> An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing "substantial hardship" to the individual or his family. Where any payment would cause "substantial hardship" to the individual or his family, such representation should be provided without cost. (Emphasis supplied.)[17]

Thus, the ability to pay part of the cost of adequate representation will not preclude eligibility for some assistance under the standard, provided such payment is no more than an amount which can be paid without "substantial hardship" to the individual or his family.[18] Note, however, that the defendant is required only to pay for that portion of the cost of the representation he is able to at the time the services are provided.[19]

Standard 13.2 was based in part on the recently adopted definition of partial indigency of the Florida Rules of Criminal Procedure:

> A partially indigent person is one who is unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to himself or his family.[20]

Representation is to be provided to a defendant who is partially indigent,

> provided that person shall defray that portion of the cost of such representation and the reasonable costs of investigation as he is able to without undue hardship to himself or his family as directed by the court.[21]

The concept, however, may be more easily articulated than implemented. (See, infra, Sec. 1.3.3.) As Silverstein has pointed

out in his Defense of the Poor In Criminal Cases in American Courts,[22] it is far easier to place defendants on one side of the judicial fence or another; that is, it is simpler, more efficient and less likely to interfere with a person's constitutional rights to decide that he simply is either indigent or not indigent.[23]

In a background paper prepared for the American Bar Association Committee on Judicial Administration Standards,[24] Elizabeth Albert suggests that there are numerous practical problems in the determination of partial eligibility. Ms. Albert indicates that without specific guidelines it is impossible to determine what amount the defendant should be required to contribute. Presumably, the development of such guidelines would have to take into consideration, among other factors, the feasibility of establishing a priority of financial obligations of an individual.[25]

Especially where the determination is made in the courtroom fear of protracted docket delays combined with the ease by which any questionable candidate can be declared indigent, increases the reluctance of judges and public defenders to conduct an extensive inquiry into the nature of a defendant's income, assets and obligations. Even where a conscientious court is willing to undertake so intensive a survey, the costs and time delays of verification render the exercise practically prohibitive.[26]

2.3 Guidelines for Determination of Indigency

2.3.1 Flexible Test: Need

Information provided by the defendant to the court on its interview

form or during the court's inquiry will be assessed either by the court, by an independent agency, or by the Office of Public Defender which will, in turn, make a recommendation. Any finding of total or partial ability to pay, inability to afford counsel or "substantial hardship," will be based on need. The New Jersey indigency statute is explicit:

> Need shall be measured according to the financial ability of the defendant to engage and compensate competent private counsel. . . (and) shall be recognized to be a variable depending on the nature. . .of assets and on the disposable net income on the one hand. . .and on the nature of the charge (and services) required. . . on the other hand.[27]
> 2A: 158A-14

Likewise, as suggested by the National Advisory Commission on Criminal Justice Standards and Goals, need is a variable which must be based on a flexible standard:

> The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents, and the cost of subsistence for the defendant and those to whom he owes legal duty of support.[28]

In addition, the determination must be guided by general "rules of thumb," such as those proposed by the National Advisory Commission on Criminal Justice Standards and Goals:[29]

> In applying this test, the following criteria and qualifications should govern:
> 1) Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting, bond.
> 2) Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.
> 3) The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.

4) The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered.

A variety of additional factors may have to be taken into consideration, depending on the nature of the defendant's circumstances. But in all cases, certain substantive and procedural guidelines are necessary. The assets and liabilities of the defendant must be analyzed and compared to some acceptable local standard, and guidelines necessary to assure that the defendant's economic circumstances are reviewed fairly, must be used. At the same time, the nature of the procedure used to determine eligibility must be closely scrutinized to assure that the determination of eligibility does not prejudice the defendant in any way.

In the following section, these substantive and procedural aspects of determination will be reviewed.

2.3.2 Substantive and Procedural Considerations

2.3.2A Substantive Considerations in Determining Indigency

1. Assets and Income

a. Assets of Defendant (Preferably Liquid Assets for the Initial Determination)

Defendant should not be required to dispose of property which would cause undue or "substantial hardship" to himself or his family.[30] Neither should defendant be required to dispose of property which may be used to secure a debt merely because defendant is able to repay the debt. While the defendant's credit rating is a readily identifiable

asset which may be considered in determination of ability to pay, nonetheless, the standard must be flexible. A defendant whose credit rating is satisfactory but whose assets are non-liquid should probably not be provided counsel, however, where his property is not fully encumbered and he is otherwise able to maintain his debt repayments.

b. Assets of Friends

"Counsel should not be denied to any person merely because his friends. . .have resources adequate to retain counsel. . ."[31]

c. Assets of Relatives

While authorities are split on the issue of whether or not the assets of defendant's immediate family should be considered assets of defendant, the assets of a defendant's spouse are typically subject to the inquiry of the court. The standards of the Criminal Justice Act and of the American Bar Association approve the inclusion of these assets, although the National Advisory Commission on Criminal Justice Standards and Goals is clearly opposed; the analogous determination of in forma pauperis indigency precludes such consideration;[32] and such inquiry may involve a constitutional interference with defendant's rights.[33] The American Bar Association recommends inquiry into the assets of a spouse or other relative where local law places some obligation of support on that person,[34] and proposes establishment of procedures for collection. Some states have attempted by statute to deal with the question by prohibiting certain transfers to one's spouse for the purpose of rendering oneself indigent, by analogy to the laws of bankruptcy.[35]

The assets of a minor's parents do come under the court's scrutiny, although in most cases no such inquiry is made. California has required the parents' assets to be included by statute.[36] In In re Ricky H., the California Supreme Court stated:

> It would be anomalous to suggest that the parental support obligation extends to furnishing food, clothing, shelter and medical care, but not legal assistance essential to protect and preserve the minor's constitutional rights.[37]

Statutes in Florida, Ohio and elsewhere provide for parental liability, but such liability is limited.[38]

2. Bail

Defendant should not be made to choose between counsel and release on bail.[39] Release on bond will frequently enable the defendant to continue his employment and, thereby, enable him to afford counsel and to assist in his own defense.[40] In this type of situation, it is desirable to appoint counsel first and if defendant's subsequent release affects his circumstances, require contribution later. Note, however, that many new types of pretrial release programs have been established in courts across the country, ranging from 10% bond deposit plans to "release on recognizance."[41] As these programs gain credibility and acceptance by the courts and community, it is likely that the issue of bond will have a gradually diminishing effect on the determination of indigency.

3. Local Economic Standards

Other factors to be considered in determining eligibility include the local minimum bar fees established for adequate representation, minimum living allowances or uniform low-income budgets and whether or not a private attorney would be interested in representing the defendant

in his present economic circumstances.

a. Minimum Bar Fee Schedules

Bar-published minimum rates for representation are often the most convenient vehicle for establishing the level of defendant's needs; lately, however, bar fee schedules have started to come under scrutiny by the Justice Department as possible unlawful price-fixing arrangements.[42]

Some states have adopted statutory rates expressly for this purpose.[43] However, unless such statutes include a mechanism for periodic review, the statutory minimums tend to become rapidly obsolete.[44]

b. Minimum Living Allowances or Uniform Low-Income Budgets

Some court systems choose to compare the defendant's income and liabilities to a minimum living allowance schedule or to welfare eligibility levels. In both the District of Columbia and New York City, a preliminary determination of the defendant's weekly income is made and compared to a schedule used by the Public Defender. A New York City defendant with no dependents whose income is more than $75 per week is ineligible; the minimum amount for the "necessities of life" for an individual in the District of Columbia is $52. These weekly amounts are intentionally low so that there will be no question about the eligibility of anyone falling "below the line." Receipt of income "over the line" is only one factor to be considered by the court in determining indigency, and is not conclusive.

Some courts use the uniform low-income budget schedules of the Departments of Agriculture and Commerce which establish minimum

subsistence level guidelines for families and individuals. To be of most benefit to the court, low-income budgets must be factored to account for the defendant's residence (e.g., whether rural, urban or suburban), and should not be based solely on the economic circumstances in the neighborhood or community in which the court is located.

c. Private Attorneys' Interest in Representation

Where no bar fee schedule is current or available, the court may survey the private bar or urge the defendant to investigate the cost of local private representation as an indicator of the amount the defendant will need. Especially in partial indigency cases, where the defendant is able to afford part of the cost of representation, an attorney will represent the defendant for a fee which is below that typically charged by the private bar, and if the court is satisfied that such attorney is competent to provide such services, the court need not inquire further into the economic circumstances of the defendant. Likewise, if the Public Defender chooses to represent a defendant who meets the eligibility requirements of the defender, the court may not inquire into the economic status of the defendant.[45] This type of approach offers the court more flexibility in assessing need than does reference to a fixed minimum fee schedule, although the latter is probably an easier index for comparison.

2.3.2B Procedural Considerations

Three types of "procedural" considerations affect the determination of indigency. The first is the method by which information is obtained

from the accused and the manner in which it is verified; the second is the degree of emphasis which is placed on the defendant's assessment of his own circumstances. The third area is the effect of the financial screening process on the exercise and/or waiver of constitutional rights.

1. Collection and Verification of Income and Obligation Data

The commentary to the ABA Defense Services Standard 6.3 recommends the use of questionnaires for the determination of eligibility, either as part of, or in conjunction with bail or release on recognizance interviews.[46] Such a form is in use in many courts throughout the country. These forms generally solicit information concerning the defendant's current economic status in terms of weekly income and obligations, and are compared to some locally developed standard (more often the intuition of the court) of minimum weekly income,[47] low-income budget or eligibility for public assistance criteria.[48] The court will then consider the charge and the nature of the services required, and determine if the defendant is eligible for assigned counsel. The survey conducted for the instant study demonstrated, however, that such forms are rarely relied upon entirely, the court instead choosing to expedite the flow of cases by asking the defendant if he is indigent, or accepting an affidavit to that effect, and assigning counsel whenever the answer is in the affirmative, resources are available to the court, and no other evidence is offered to contradict the allegation.

One reason why judges and defenders may be unwilling to actively assume that defendants are trying to take advantage of the system is that, as officers of the court, they may tend to feel that they are wasting valuable court time in an effort to carry out what is essentially an administrative detail.

Another reason why forms may be ignored is that court staff usually lack adequate resources to justify extensive investigation of the veracity of defendant's statements, and judges are aware of this fact.[49] In New York City, the Legal Aid Society interviewer is required to make one phone call to verify some aspect of information on the form; in lieu of verification on the first or follow-up call, the court will ask the defendant to swear to the truth of such statements, although such statements were not made under oath. Another method of verification used by a Public Defender in southern Ohio involves liaison with the local credit bureau. His staff calls the agency and requests debt information on a particular person. The agency quickly responds from their records. If the statements of the defendant and the records of the credit bureau agree, the affidavit is marked verified. The adoption of this type of practice, however, particularly where conducted by a court agency, may amount to a considerable invasion of the defendant's privacy (even where access to such records is waived) that may be outside the permissive scope of the indigency inquiry.

It has been urged that such verification procedures are too costly and time-consuming and tend to over-emphasize the importance of the defendant's economic situation in comparison to the nature of the criminal charge. In a discussion draft of defense standards prepared by the National Legal Aid and Defender Association for the Court's Task Force of the National Advisory Commission on Criminal Justice Standards and Goals, co-authors Shelvin Singer and William Higham, in urging adoption of a subjective standard, pointed to the gross inefficiency of the current practice:

> It would, therefore, seem to us to be unnecessarily costly to require the completion of lengthy forms by an accused claiming indigency so that they can be compared with some so-called objective standard of indigency. The complexities of the problem seem to far out-weigh the need for indigency standards and for enforcement of such standards, where there is generally a strong inclination to use counsel of one's own choice rather than court supplied counsel when the accused can adequately pay an attorney. In criminal cases, the time, energy and expense in developing precise standards of indigency with the intent of enforcing such standards is not warranted.[50]

The full dimensions of the problem may be seen in two examples: The Supreme Court estimates that from 50% to 90% of all criminal defendants are "legally indigent;"[51] and Professor Oaks notes that of 20,000 affidavits filed under the Criminal Justice Act of 1964, 95% had no assets at all.[52]

Yet the courts and legislatures continue to feel that unless the screening process is seen --at least in part -- as a vehicle for preventing defendants from taking "unfair" advantage of the right to assigned counsel, that government is somehow derelict in its obligation to the taxpaying public. Typically, this feeling is reflected in legislation which requires a defendant to contribute funds to his own defense if he is discovered to have committed fraud in the filing of the affidavit of indigency.[53] The deterrent value of such statutes, however, is open to serious question.

2. Degree of Emphasis Placed on Defendants' Assessment of Their Own Circumstances

The standards of the National Advisory Commission on Criminal Justice Standards and Goals include a recommendation that:

> The defendant's own assessment of his financial ability or inability to obtain representation without "substantial hardship" to himself or his family should be considered.[54]

Basing the determination of indigency on defendant's own assessment of his need has long been the rule rather than the exception in many jurisdictions. In those courts where the defendant's indigency is based on affidavit[55] the defendant's own assessment has been accepted for years. The theory is that the defendant is in the best position to know if he can afford counsel:

> Although this may result in abuses by some accused persons, most defendants will prefer to retain private attorneys if they can afford to do so. The desire for private representation is the best single safeguard against excessive use of appointed counsel or defenders' services at public expense by non-needy persons.[56]

The desire for private representation combined with the cost and tedium of data collection and verification, in fact, tend to dictate greater reliance than ever on the defendant's own determination. At least some authorities feel it is the only viable course. In addition to proposing adoption by the National Advisory Commission on Criminal Justice Standards and Goals of this particular part of Standard 13.2, in fact, Singer and Higham also drafted an alternative to the entire standard, to the effect that the defendant's own assessment be used as the only criterion for eligibility:

> 2.1 (Alternative)
> Defense services in criminal proceedings shall be available to any person facing such proceedings who, based on his own assessment of his economic condition, has determined that he is financially unable to obtain adequate representation without substantial hardship to himself or his family.[57]

The authors argued that, whereas the defendant's decision on ability to pay is based on his assessment of the effect this decision will have on his family (who are denied the benefits of the income), the decision to refuse him counsel at public expense is being made by a second person.[58]

3. Financial Screening Process and the Exercise and/or Waiver of Constitutional Rights

As suggested earlier, abuse of the financial screening process may lead to inducement of waiver of right to counsel[59] or an invasion of right to privacy.[60] Higham and Singer have recommended adoption of the following standard for financial screening which would address these kinds of abuses:

> e. The administration of the method or procedure whereby it is determined whether or not a defendant is entitled to have counsel provided may not, by any unnecessary means, deter either the said defendant, or other defendants who may reasonably be expected to have knowledge thereof, from exercising any constitutional rights. Specifically, such rights shall not be deterred by any means including but not limited to the following:
> (i) By such stringency of application of financial eligibility standards as may cause a defendant to waive representation by counsel rather than incur the expense of private counsel.
> (ii) By unnecessarily conditioning the exercise of the right to counsel by a defendant on the waiver of some other constitutionally based right.[61]

The authors point out that the possible imposition of a fine which amounts to less than the cost of representation may be seen by the accused as a cost and time-saving reason for waiving the right to counsel. They also note that seeking a continuance so as to earn enough money to afford counsel amounts, in effect, to an involuntary waiver

of right to speedy trial; and they point out that the fee that a defendant can afford may not be enough to cover the cost of a jury trial. Furthermore, the privilege aginst self-incrimination may be involuntarily waived through the process if defendant is required to discuss his assets in open court, where, for example, the charge is criminal non-support and the defense is lack of financial resources.[62]

2.3.3 Special Considerations in the Determination of Partial Indigency

As indicated earlier, the National Advisory Commission on Criminal Justice Standards and Goals recently advocated adoption of the concept of "partial indigency," observing that:

> Provision of representation at public expense should not be in all-or-nothing proposition. If an individual can afford to contribute something, but cannot pay enough to finance it entirely, he should be provided with public representation but required to reimburse the State to the extent that he is able.[63]

The Commission failed to provide guidelines for implementation of the standard, other than those criteria which apply to the determination of indigency generally. But the experience of California is instructive:

1. Marginal Indigency Panels

Several counties in California have established marginal indigency panels through the local bar associations. When it appears that a defendant is ineligible for assistance by the Public defender, he is referred to the panel, which in turn estimates the cost of representation according to local fee schedule and then makes a determination as to what the defendant can afford. The defendant is then given the names of three

private attorneys who will represent him at a reduced fee rate. The problem with this system is the phrase, "what the defendant can afford." From all indications, this determination is largely based on a combination of the interviewer's subjective evaluation and a negotiation process with the defendant designed to "settle" on a dollar amount.

Although Florida is cited by the National Advisory Commission on Criminal Justice Standards and Goals as an example to follow, Florida courts have yet to develop guidelines to enable the trial courts to implement this particular Supreme Court Rule. And, as Elisabeth Albert suggests,[64] without specific guidelines, the amount of the defendant's contribution becomes pure guesswork.

2. Other Approaches

There are a variety of other possible approaches besides the "negotiated fee" which should be examined, including the concept of pre-paid legal services; the use of credit cards and credit accounts for professional services; and establishment of minimum percentages of existing fees as the basis for providing court-appointed counsel or public defender services. This last approach differs from the marginal indigency panel approach used in California in that the defendant's contribution is collected by the court, or by an authorized agency of the court, and paid into an indigent defense fund maintained by the court and subsidized by the state or local government. The cost of representation is based on a fee schedule and expenses are payable to the attorney out of this fund, upon application for services rendered.

In no event is a defendant's contribution payable to the private assigned counsel; nor is the fee of such private counsel reduced by the percentage paid by the defendant as a result of the determination of partial indigency.

3. Nature of Actual Services Required -- Average Fees for Representation

While the same criteria used to determine indigency are used to determine partial, or marginal indigency, greater detail may be required in the latter instance to determine the amount of contribution required. For example, while the average cost of representation may be used in an indigency determination as an estimate of the services required, the actual services to be provided must be considered in assessing partial contribution. In other words, a $1,000 average fee for representation on a particular charge may require a finding of indigency for defendant X; but it may not be as important a factor for partially indigent defendant Y, who is prepared to pay a portion of the actual fee for representation. In other words, a pre-determination of the fee is adequate for X; but a post-adjudication determination may be necessary for Y. Expressed differently, the actual amount of time spent on a case becomes extremely important in a partial indigency case; whereas, in ordinary indigency situations, the amount of services to be provided will more than likely "average out." Thus, if a partially indigent defendant was required to contribute 50% of the average fee, and if counsel were able to dispose of the case by entering a plea at arraignment or at the preliminary hearing, the defendant might well be justified in objecting to the assessment of the percentage fee,[65] as being unrelated to the amount of time (rather than the nature of service) supplied.

4. Uniform Determination of Defendants' Contribution

A further consideration in partial indigency determinations is the source of the determination. Inevitably, there are bound to be differences among individuals as to dollar-amount in their assessment of the same or similar sets of economic circumstances, amounting to a denial of equal protection[66] and leading to deprivation of property without due process of law.

2.3.4 Determining Indigency in Petty Offense Cases

1. Nature of Services Required

It is apparent that the extension of the right to counsel in petty offense cases will lead to modification of the current system for determining indigency, primarily because the prevailing bar fees for petty offense representation (based on the nature of the service to be provided) are much lower than for other misdemeanor and felony representation.

Ordinarily, a petty offense does not involve pre-trial motions, hearing, or jury trial, stages more applicable to serious misdemeanor or felony cases. Petty offense cases rarely, if ever, involve preliminary hearings, except for indictable misdemeanors carrying a minimal confinement penalty. Even in those jurisdictions where misdemeanors proceed by indictment, preliminary hearings are rarely invoked.

Determination of indigency should be related to the nature of services required: representation of a defendant in a petty offense situation may involve little more than brief consultation prior to, at, or as a result

of, first appearance. Frequently, a defendant will be counseled to enter a plea and will be sentenced. Since better than 90 percent of most convictions are presently the result of negotiated pleas,[67] the anticipated demands on the time of assigned counsel should be minimal. Although the assignment of counsel in felony cases often results in delays for interviews, continuances and the filing of motions and appeals, the nature of the petty offense tends to minimize the number and nature of these types of legal maneuvers. In addition, defendants in petty offense cases are reluctant to return to court for additional appearances due to fear of losing time from work or of being forced to wait until their cases are called.

The services of counsel, even where there is a practical likelihood that incarceration may result, are often limited to an explanation of the charge, advice as to the consequences of conviction, and a recommendation as to a plea. Furthermore, since many of the petty offense cases which carry a prison sentence frequrnyly result in a suspended sentence,[68] counsel may not always be constitutionally required.

2. Cost of Representation

Courts should develop a local schedule based on prevailing bar fee rates for petty offense representation, perhaps similar to the $250 fee in the District of Columbia. Such an average could be refigured on a regular basis by an administrative board made up of representatives of the bar association, the public defender, and the court. Establishment of the fee schedule maximum or minimum should not be the function of the legislature, inasmuch as the legislative process is not flexible enough to reflect frequent increases in the cost of legal work.[69]

3. Indigency as a Function of the Nature of the Consequences of Conviction

Even though the right to counsel is limited under Argersinger to cases involving the likelihood of incarceration upon conviction, it is apparent that a defendant may be rendered indigent by imposition of the consequences of conviction. For example, a defendant who loses his job because he is incarcerated may be, in effect, rendered indigent by the judicial process.

What possible difference is there between a defendant who is indigent before trial and a defendant who, by virture of trial, is thereby rendered indigent? Any sentence which would prohibit the defendant from pursuing a lawful occupation may require the same result:

> Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail.[70]

Futhermore, even the possibility of the imposition of a fine which defendant would be unable to pay ought to render the defendant eligible for counsel. Since the vast majority of petty offenses carry penalties of imprisonment and/or fine, it may be incumbent upon the court to inquire into the ability of the defendant to pay a fine if convicted.

Even under Tate v. Short,[71] under certain circumstances a defendant may be imprisoned for failure to pay a fine. Thus, an indigent defendant who is unable to pay a fine could be incarcerated as a direct result of conviction of a petty offense for which he was not represented by counsel.

4. Assets of Defendant (Partial Indigency)

While determination of indigency should not require a finding that defendant is destitute in order to qualify him for some kind of assistance, nonetheless, in petty offense cases, because of the minimal nature of the prevailing bar fee, the question is a much closer one, and the use of a presumption of solvency[72] or at least partial indigency[73] where defendant is able to post bond with his own assets, or is gainfully employed, may be justified.

On the other hand, defendant who has some assets should not be completely barred from a determination of eligibility. The Argersinger decision raises the possibility that a far larger percentage of indigent defendants than previously estimated may be determined to be partially indigent. A defendant who could afford $20 per month may, for all practical purposes, be indigent as regards a fee of $500 or $1,000. However, the same defendant would be eligible if the prevailing fee rate were $100, and partially eligible if the fee were slightly higher. Some jurisdictions may find it desirable to establish a minimum percentage requirement or a flat fee retainer requirement in all petty offense cases. Such fees are frequently assessed by bar association referral services for initial interviews and minimum fees are also required by the clerk in small claims courts.

PART II
NOTES

1. See, Model Defense of Needy Persons Act, National Conference of Commissioners on Uniform State Laws (1966), Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, (American Bar Association, Approved Draft 1968), Standard 6.1.

2. P.L., 88-455, 18 U.S.C., S 3006A(a), 78 Stat. 552 (1964).

3. Bar associations generally have a schedule of fees which are used in charging clients for services. The District of Columbia, for example, has adopted these levels in determining whether a defendant is indigent or not. See, P.L. 91-358, 2 D.C. Code 2221-2228 (Supp. V. 1972); Survey of Minimum Fees, (Bar Association of the District of Columbia, May 1, 1969).

4. See, e.g., Ga. Code Ann. S 27-3209.

5. Poverty and the Administration of Federal Criminal Justice, Allen Committee (1968).

6. Id., at 8.

7. See, P.L. 91-358, 2 D.C. Code 2221-2228 (Supp. V 1972).

8. Sen. Jud. Comm., Report on the Criminal Justice Act in the Federal District Courts, (Professor Oaks, ed., 1969).

9. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services (American Bar Association, Approved Draft, 1968).

10. Id., at 54.

11. Moore, "The Right to Counsel for Indigents," 44 Oreg. L. Rev., 255 at 276 (1965).

12. Powell v. Alabama, 287 U.S. 45 (1932), Gideon v. Wainwright, 372 U.S. 335 (1963).

13. Miranda v. Arizona, 384 U.S. 436, n. 40 (1966).

14. "The better approach, given the objectives of the criminal justice system, is that where the payment of money would cause a substantial hardship to (the defendant) or those to whom he owes a legal duty to support, the cost of representation should be borne by the jurisdiction." Standards Relating to Providing Defense Services (Approved Draft, 1968), Standard 6.1, Comment.

15. The Courts, Report of the National Advisory Commission on Criminal Justice Standards and Goals, September, 1973, Standard 13.2(4).

16. Id., see, also, N.J. Stat. Ann., S 2A:158A-15, 16; S.C. Code Ann., S 17-282; Florida R. Crim. P., 3.111 (b) (1).

17. Id.

18. For example, an accused might have a low-paying job that he had held for a long time and that had resulted in a substantial accumulation in a pension fund. By leaving his job, he may be able to obtain the money in the pension fund. But, at the same time, he and his family might be forced to become welfare recipients and his family might lose the protection of any survivor's benefits provided by the pension plan. "Providing Minimum Defense Services," Approved Draft, 1967, ABA Project on Minimum Standards for Criminal Justice, Part VI, pp. 53-59, Section 6.1.

19. The standard makes a defendant liable for partial costs of defense representation only if, at the time of the prosecution, he is able to bear the costs. Thus, it does not go so far as the Uniform Law Commissioners' Model Public Defender Act, which, in Section 9 (b), authorizes reimbursement to the state for defense representation if, after three years, the individual is able to pay for it. The adverse effects of a criminal prosecution, both financial and otherwise, are so great for both convicted and acquitted defendants, that there should not be added the deterrent disincentive to gainful employment that the Model Public Defender Act would provide. Cf., Commissioners on Uniform State Laws, "Model Public Defender Act," in Handbook of the National Conference of Commissioners on Uniform State Laws, 1970. Baltimore: Port City Press, Inc., (1970).

20. Florida R. Crim. P., 3.111 (b) (4).

21. Florida R. Crim. P., 3.111 (b) (3).

22. Silverstein, L., Defense of the Poor in Criminal Cases in American State Courts (American Bar Foundation, 1965).

23. Id., Ch. 3.

24. Unpublished paper, June 23, 1973.

25. See, Section 2.3.4, infra.

26. See, n. 49, infra.

27. N.J. Stat. Ann., S 2A:158A-14.

28. People v. Lewis (1971) 19 C.A. 3d 1019, 1023, Williams v. Superior Court (1964) 226 C.A. 2d 666, 672, People v. Ferry (1965) 237 C.A. 2d 880, 887, 13 Stan. L. Rev. 522, 545.

29. See, n. 15, supra.

30. See, e.g. Ga. Code Ann., S 27-3202(4); Iowa Code Ann., S 336A-4.

31. See, n. 28-29, supra.

32. See, Criminal Justice Act of 1967, c. 80, S 78(2); ABA Standards, n. 9, supra, std. 6.1, comment (b.) But see, State v. Vallejo's, 87 Ariz. 119, 348 P.2d 554 (1960); Lawrence v. State, 76 So. 2d 271 (Florida, 1954); Keur v. State, 160 So. 2d 546 (District Ct. App. 1963).

33. See Stifler, Determining the Financial Status of an Accused, 54 Ill., B.J. 868, 875-77 (1966).

34. See, n. 9, supra, Standard 6.1, comment.

35. See, e.g., Alas. Stat. S 18.85.170.

36. West's Ann. Welf. and Inst. Code S903.1.

37. 2 Cal. 3d 513, 86 Cal. Rptr. 76, 468 P.2d 204 (1970).

38. See, e.g., Fla. Stat. Ann., S 27.52 (1970).

39. See, Alas. Stat., S 18.85.120; Idaho Code Ann. S 19-854.

40. See, n. 9, supra, Standard 6.1.

41. See, Ohio R. Crim. P., 46 (1973); People v. Eggers, 27 Ill.2d 85, 188 N.E. 2d. 30 (1963).

42. Testimony of Bruce B. Wilson, Acting Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, before Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee, September 20th, 1973, Washington, D.C.; reported, 59 ABA Journal 1296 et seq. November, 1973.

43. 15 U.S.C.A SS 1-7 (1890); 15 U.S.C.A SS 12 et. seq. (1914).

44. The costs of legal work may change rapidly and fee schedules seem to be reviewed fairly often, especially where the right to counsel is potentially based on these fee schedules. Whereas representation on a misdemeanor charge might cost $250.00 in a bar schedule, the actual cost

might be $350.00 to secure an attorney to handle such a case. Standards to determine indigency would have to be flexible enough to reflect the rising costs of legal services. Without such flexibility, one who might be able to "afford" a lawyer at $250.00, but who would be unable to do so if the actual fee were $350.00, would be denied legal counsel though actually indigent. The legislative process has historically been a time-consuming system rarely able to keep pace with day-to-day variances were the legislatures allowed to set bar schedules, many persons would be declared "non-indigent" when in light of actual and current legal costs, they would be unable to afford counsel.

45. Youngstown v. Faulke, (Ct. App. 7 Ohio unreported opinion, March 6, 1973).

46. See, n. 9 supra Comment to Standard 6.3 at 57-58.

47. See, e.g., P.L. 91-358, 2 D.C. Code, 2221-2228 (Supp. v. 1972).

48. See, n. 24, supra.

49. "Studies have indicated that establishing enforceable standards of indigency may be futile, for the cost of systematically verifying financial information supplied by defendants claiming indigency costs more than the savings that accrue from the occasional exclusion of one who falsely claimed indigency. Note, "The Representation of Indigent Criminal Defendants in the Federal District Courts," 76 Harvard L. Rev. 579, 586; (1963) Moore, "The Right to Counsel for Indigents," 44 Oreg. L. Rev. 255, 259-60 (1965)."

50. Higham and Singer, "Defense Services Standards," Discussion Draft, NLADA, Martinez, California, August 1973, Appendix B.

51. See, n. 13, supra.

52. See, n. 8, supra.

53. See, e.g., N.M. Stat. Ann. SS 41-22-1 to -10; Ky. Rev. Stat. Ann., S 31.150.

54. See, n.15, supra.

55. Katz, "Right to Counsel in Misdemeanor Cases in Cuyahoga County," December, 1972, p. 27.

56. See, Comment, n. 15, supra.

57. See, n. 50, supra.

58. Id.

59. See, Part I, supra.

60. See, Sec. 1.3.2B, supra.

61. See, n. 50, supra.

62. Id., at p. 21.

63. See, n. 15, supra.

64. See, n. 24, supra.

65. It should be noted that the process of plea bargaining is less taxing on an attorney's schedule than is the normal trial process. The normal plea bargaining agreement will arise during a discussion between the prosecutor and defense counsel, wherein the latter agrees to have his client plead guilty to a lesser-included offense if the prosecution does not pursue the criminal charge further. The time needed to formulate such an agreement is far less than the time necessary to prepare for and conduct a trial.

66. The equal protection clause of the Fifth Amendment demands that a state treat similarly situated individuals in a similar manner. If the statute calling for partial payment or contribution from persons declared to be partially indigent is not uniformly applied to all defendants similarly situated, a violation of the equal protection provision might arise. In order to prevent this, states must set up rather specific guidelines which will not be subject to great judicial manipulation. Individual judicial opinions should be minimized.

67. See, A Profile of the Criminal Justice System in Cuyahoga County, Ohio (Administration of Justice Committee, 1971); (Katz) A Report to the Court Management Project on Right to Counsel in Misdemeanor Cases in Cuyahoga County, December, 1972.

68. Argersinger v. Hamlin, 407 U.S. at 38, n. 10.

69. See, n. 44, supra.

70. Argersinger v. Hamlin, 407 U.S. 25, 48 (1972).

71. 401 U.S. 395 (1971).

72. See, Florida Stat. Ann., Sec. 27.52.

73. Cf., Sec. 1.3.2, supra.

APPENDIX

EXTENSION OF THE RIGHT TO COUNSEL UNDER ARGERSINGER:

CURRENT STATE LAW

Prior to Argersinger, most states did not extend the right to counsel to indigent defendants in petty offense cases. In a survey conducted in 1971 by the National Legal Aid and Defender Association,[1] it was found that 36 states appointed counsel for indigents in some misdemeanor cases: 22 states called for counsel when the possible penalty was less than six months; 11 provided counsel when the penalty exceeded six months; and in the remaining three states, the exact scope was not determined. Eleven other states did not recognize any right to counsel in misdemeanor cases, and three states left the appointment in misdemeanor cases up to the discretion of the court. California, the remaining state, appeared to be the only "full counsel" jurisdiction. In the Federal Courts of Appeal in the Fifth, Seventh and Eighth Circuit, the right to counsel had also been extended to indigent misdemeanants.

NLADA's survey failed to differentiate among the crime classifications of the various states. Classification of a crime as felony, misdemeanor, or petty offense, is generally--but not always--[2]based on the nature of the statutory penalty which conviction carries.[3] The Supreme Court has drawn the semantic line on felonies at cases involving incarceration for one year or more,[4] and the misdemeanor line at cases involving

incarceration for six months or less,[5] but the legislatures of the states have never been uniformly required to adopt this system of nomenclature. Thus, for example, "misdemeanors" can be processed by indictment,[6] and such offenses can carry penalties of up to three years imprisonment,[7] a penalty defined as a felony in other states.[8] Likewise, "misdemeanors" are defined by statute in some states as offenses carrying a maximum of one to six months in prison,[9] a penalty which is defined under federal law as a "petty offense".[10] In still other jurisdictions, the right to counsel is extended to "all but petty offense cases, except those involving confinement,"[11] a contradiction in terms under Argersinger.

A further problem evident from a review of the Silverstein,[12] Iowa Law Review,[13] and NLADA[14] studies is seen in the variance between existing state law and local court practice in the same state. For example, while courts in Wyoming have long extended the right to counsel to misdemeanants in practice, state statute[15] and a report of the Attorney General[16] indicate that the right to counsel is only available for "misdemeanors" carrying a sentence of one year or more. On the other hand, the State of Missouri, generally recognized as a felony-only state in practice, has had an Attorney General's opinion on file since 1963 interpreting the Missouri statute and Constitution as extending the right to counsel to misdemeanor cases.[17]

Despite these differences, much of the confusion has been rendered moot by the Argersinger decision, made binding on the states by the Fourteenth Amendment.[18] In the short time since Argersinger, a number of states have begun to recognize the holding through state court decisions,[19] revisions

of state statute,[20] or through administrative adoption of court rule.[21] Thus, whether existing state law presently limits the right to counsel to felony-only cases;[22] whether the right is theoretically subject to the discretion of the court;[23] whether the right to counsel is extended based on a minimum fine or period of incarceration;[24] or whether the right extends generally to "misdemeanor" cases,[25] where an indigent defendant faces the likelihood of incarceration in any criminal case, the due process and equal protection requirements of the Fourteenth Amendment obligate the states to extend such defendant the right to counsel. For purposes of interpreting Argersinger, neither characterization of a particular offense as a misdemeanor, gross misdemeanor or petty offense nor classification of statute by penalty necessarily offers any convenient avenue for comparison; nor does such an analysis indicate what legislative response to Argersinger is required. Thus, the chart below compares state statutes, rules of criminal procedure and cases only as they relate to the question of whether the right to counsel is less than, the same as, or greater than that guaranteed by the United States Supreme Court. Each state law is also coded to reflect the particular state's classification of crimes.

The significance of the analysis in Appendix C is that in 32 states,[26] the right to counsel is limited by statute to less than what is required by Argersinger. In 14 other states[27] and the District of Columbia, all defendants charged with petty offenses who face the likelihood of incarceration are entitled to assigned counsel. The law of the remaining four states[28] goes beyond the Argersinger decision. In practice, most of the misdemeanor states (Col. I) have already begun to implement Argersinger in the local

courts. The petty offense states (Col. II) have either adopted the ABA standard of loss of liberty as their rule for eligibility or have followed Argersinger in their supreme courts.

APPENDIX/FOOTNOTES

1. The Other Face of Justice, A Report of the National Defender Survey, National Legal Aid and Defender Association, Chicago, Illinois (1973).

2. See, e.g., N.H. Rev. Stat. Ann., SS 604-A-1 to 2; Utah Code Ann. S 77-64-2.

3. See, e.g., Ore. Rev. Stat. SS 135.320, 133.625.

4. Adams v. United States ex. rel. McCann, 317 U.S. 269 (1942).

5. Baldwin v. New York, 399 U.S. 66 (1970).

6. See, W. Va. Code S 62-2-1,2; 19 Pa. Stat. S 241.

7. See, e.g., W. Va. Code S 61-2-11 (unlawful shooting at another).

8. See, e.g., Rev. Code Wash. Ann. S 9.92.010.

9. See, e.g., Cal. Pen. Code S 19.

10. 18 U.S.C.A. S 1 (3).

11. N. H. Rev. Stat. Ann. SS 604-A: 1,2.

12. Silverstein, L., Defense of Poor in Criminal Cases in American State Courts, American Bar Foundation (1965).

13. 57 Iowa L. Rev. 598 (1972).

14. See, n. 1, supra.

15. Wyo. Stat. Ann., SS 7-9.2,3.

16. 57 Iowa L. Rev. 598, (1972).

17. Op. Mo. Atty. Gen. No. 207, June 21, 1963.

18. Argersinger v. Hamlin, 407 U.S. 25 (1972).

19. See, e.g., Mahler v. Birnbaum, 95 Idaho 14, 501 P.2d 282 (1972); Wertheimer v. State, 201 N.W. 2d. 383 (Minn. 1972); People v. Morrissey, 52 Ill. 2d 418, 288 N.E. 2d 397 (1972).

20. Ohio is a present example of a state revising its statutes in an attempt to effect compliance with the Argersinger directives. See, Ohio Rev. Amend. H.B. 107 (pending); R.44 Ohio R. Crim. Procedure.

21. See, e.g., Florida R. Crim. Proc., 3.111 (b) (1); Ky. R. Crim. Proc., 8.04.

22. See, Notes, 12-17, supra, and accompanying text; Ark. Stat. Ann., S 43-1203; Kan. Gen. Stat. Ann., S 22-4053; Neb. Rev. Stat., SS 29.1803.01-.03.

23. See, Colo. Rev. Stat. Ann., SS 39-21-3; Mont. Rev. Codes Ann., SS 95-1001.

24. See, e.g., Wash. Rev. Code Ann., S 10-40-030.

25. See, e.g., Ill. Rev. Stat., S 34:5604; Mass. Sup. Jud. Ct. R., 3:10.

26. See, Column I, infra.

27. See, Column II, infra.

28. See, Column III, infra.

I. RIGHT TO COUNSEL LESS THAN ARGERSINGER*

Alabama 3
Arizona 3bbb
Arkansas 1
Colorado 2
Georgia 3
Hawaii 3a
Iowa 3aa
Kansas 1
Louisiana 3
Maine 3bbb
Maryland 3c
Michigan 3cc
Mississippi 3d
Missouri 1a
Montana 2
Nebraska 1
New Mexico 3b
North Carolina 3bbbb
North Dakota 3
Ohio 1b
Oklahoma 3
Oregon 3
Rhode Island 3b
South Carolina 3aa
South Dakota 3aaa
Tennessee 3e
Vermont 3d
Virginia 1c
Washington 3
West Virginia 3
Wisconsin 3bb
Wyoming 3

II. RIGHT TO COUNSEL SAME AS OR SIMILAR TO ARGERSINGER*

Connecticut 4a/y
Delaware 4/y
District of Columbia 4
Florida 4/y
Idaho 4/x
Illinois 4/x
Kentucky 4b/y
Massachusetts 4a/y
Minnesota 4/x
New Hampshire 3/4b/y
New Jersey 4c/x,y
New York 4/y
Pennsylvania 4/y
Texas 4/y
Utah 3bbb/4c/y

III. RIGHT TO COUNSEL EXTENDS BEYOND ARGERSINGER *

Alaska 5
California 6
Indiana 7
Nevada 8

*See code, p. 7-8

I. Right to Counsel Less than Argersinger

1. Felony only.

1a. Contra, Op. Atty. Gen. No. 207, 6/21/63 (right extends to misdemeanants).

1b. Cf., however, State v. Kirby, 33 O. Misc. 48, 289 N.E. 2d 406 (1973), (Argersinger followed, dicta); Rev. Am. H.B. 107, pending, establishing State-wide Public Defender agency to provide defense services for offenses carrying penalty in excess of six months, or otherwise at the discretion of the court.

1c. Argersinger followed in federal court, Herndon v. Superintendent, Virginia State Farm, 351 F. Supp. 1356 (E.D. VA. 1972).

2. Right in misdemeanor cases is discretionary.

3. Limited Right in Misdemeanor Cases (petty offense cases excepted).

3a. 30 days.

3aa. 30 days or $100.

3aaa. 30 days or $500.

3b. 6 months or more.

3bb. Discretionary, but mandatory if 6 months.

3bbb. Discretionary, but mandatory if six months or $500.

3bbbb. 6 months or $500.

3c. 3 months or $500.

3cc. 3 months or $100.

3d. 2 months or $1,000.

3e. "any crime or misdemeanor whatever".

II. Right to Counsel the Same As or Similar to Argersinger

4. Likelihood of incarceration (except traffic) (Argersinger Rule).

4a. Likelihood of incarceration (including traffic).

4b. Likelihood of confinement or $500.

4c. Incarceration or other consequence of magnitude.

4/X. Argersinger followed by highest trial court in state.

4/Y. Argersinger adopted by statute or court rule.

III. Right to Counsel Goes Beyond Argersinger

5. Alaska: incarceration, loss of valuable license, or heavy enough fine to indicate criminality.

6. California: all criminal offenses; traffic cases; some civil.

7. Indiana: all criminal cases, including fine-only cases.

8. Nevada: "any public offense".