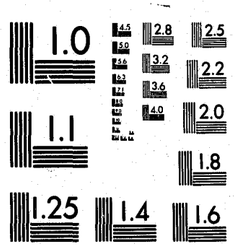

summary report

THE RIGHT TO COUNSEL IN CRIMINAL CASES:

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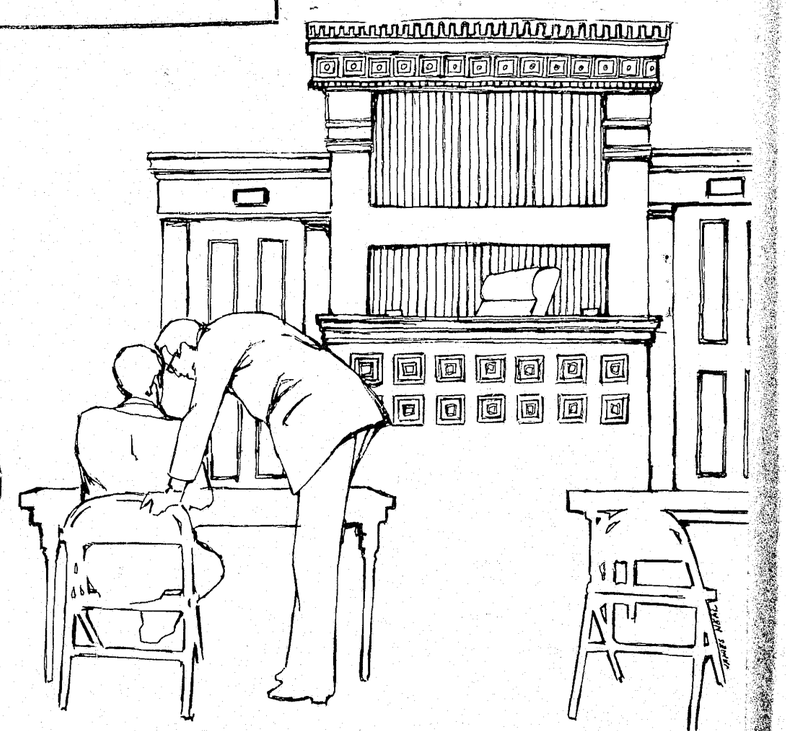

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *ARGERSINGER v. HAMLIN*

EXECUTIVE SUMMARY

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NOTE

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FOREWORD

In 1972, the Supreme Court held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." The ruling extended to misdemeanants and petty offenders a guarantee that had previously been granted only to accused felons: the courts would have to provide legal assistance to those who could not afford it, if imprisonment was a possible penalty for the offense.

In handing down its opinion, the Court acknowledged the far-reaching implications of the decision on the already over-burdened lower courts. To explore the impact of the decision, the Institute in 1973 funded a study by the Center for Criminal Justice at Boston University Law School.

The study's findings, highlighted in this summary report, present a detailed picture of how indigent defense programs are working. The researchers' suggestions for improvements—such as a uniform financial eligibility standard for court-appointed counsel—should help jurisdictions to cope more effectively with their added responsibilities.

Gerald M. Caplan
Director
National Institute of Law
Enforcement and Criminal Justice

March 1976

I. INTRODUCTION

On June 12, 1972, the United States Supreme Court, in *Argensinger v. Hamlin,*[1] held that no person may be subjected to imprisonment unless Sixth Amendment counsel is made available. In a single stroke, this opinion placed significant new burdens on the criminal justice system; yet the decision left unresolved most of the complex issues certain to arise in efforts either to implement or ignore its mandates.

Even recognizing that the threat of imprisonment will not be a factor in many individual nonfelony cases, the new demand for legal assistance resources required now in the lower courts certainly is far beyond present legal defense capabilities.[2] The effect of this increased burden could only be speculated upon by the Justices. Justice Powell, in his concurring opinion in *Argersinger,* expressed grave fears that the "decision could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system."[3] Chief Justice Burger, in another concurring opinion, professed confidence that the legal profession could meet the challenge of the *Argersinger* decision:

> The holding of the Court today may very well add large new burdens to a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed upon it.[4]

The exact nature and scope of those burdens and the wisest methods to meet them went unarticulated in the opinion. Significant Supreme Court opinions that extend the perimeters of the Constitution are rarely self-implementing. This is certainly true of the *Argersinger* decision, given the history of lower criminal courts.

For decades, these courts have been damned for making a travesty of the administration of criminal justice. To millions of people, most of them poor, nonfelony courts appear to—and often do—dispense justice in an assembly-line basis with little regard for the basic rights of the individual.

Study after study has supported this view. In the early 1930's, for example, the Wickersham Report concluded that the lower criminal courts were the most neglected aspect of the criminal justice system.[5] Leonard Downie, Jr., calls these courts "sausage factories."[6] Such findings represent a national tragedy of the highest magnitude because, as the 1967 presidential crime commission observed, most citizens who are brought into the criminal justice process as defendants or victims get their "justice" in these courts:

> Insofar as the citizen experiences contact with the criminal court, the lower criminal court is usually the court of last resort. While public attention focuses on sensational felony cases and on the conduct of trials in the prestigious felony courts, 90 percent of the nation's criminal cases are heard in the lower courts.[7]

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[1] 407 U.S. 25 (1972).

[2] A presidential commission found extreme shortages in legal manpower in criminal cases without even considering misdemeanant and juvenile legal representation needs. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *The Courts* 52-64 (1967). *See also* Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (1965); *but see* Herman, *The Right to Counsel in Misdemeanor Courts* (1973).

[3] 407 U.S. at 52.

[4] *Id.* at 44.

[5] National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931).

[6] Downie, *Justice Denied: The Case for Reform of the Courts* 18-51 (1971).

[7] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *The Courts* 52-64 (1967).

It can be argued that the current state of the lower criminal courts is inevitable, given the sheer numbers and types of cases they must handle. Lower criminal courtrooms and corridors daily are filled with people charged with being drunk, prostitutes, assaultive spouses and neighbors, disorderly persons, and petty thieves. Though criminal law proscribes the conduct these people may or may not have engaged in, criminal courts, for the most part, are simply incapable of responding rationally to that conduct or its underlying causes. Further, the personnel within these courts—judges, lawyers, probation staff—typically are cynical, overwhelmed, and underqualified, and normally function in decaying, squalid conditions. Although the mere addition of appointed lawyers for eligible defendants will not alone reverse a century of neglect, the opinion has nonetheless been heralded by many as a significant advance in ensuring greater fairness for the poor.

Recognizing the potential importance of this opinion, the Law Enforcement Assistance Administration funded several projects related to *Argersinger*. The National Legal Aid and Defender Association was asked to statistically analyze the current status of defender services in the United States.[8] A National Center for State Courts project was funded to explore some preliminary approaches for providing counsel to indigents charged with nonfelony offenses and to provide the states with some guidelines and recommendations.[9] The Boston University Law School Center for Criminal Justice received a grant[10] to report on the problems and implications of *Argersinger* and to prepare and recommend specific strategies for its implementation.[11] The grant also provided additional support to the Center to examine the feasibility of some of its major proposals through collaborative follow-up planning work with a limited number of interested jurisdictions.

What follows is a summary of the Center's final report.[12] As will be seen in the summary, the Center seeks to set far higher standards for the future rather than tinker with present deficiencies. Nevertheless, proposals for the future are tempered by the hard realities gained from extensive field work done in four jurisdictions—Birmingham, Alabama; Boston, Massachusetts; Cleveland, Ohio; and Saco, Maine—and more limited field work done in five others—Belle Glade, Florida; Des Moines, Iowa; Houston, Texas; Rocky River, Ohio; and San Jose, California.

The Center's study and similar reports reveal that alarmingly little has happened since the *Argersinger* decision. Among the Center's general findings are the following:

- Although most jurisdictions have begun to appoint counsel in nonfelony cases where imprisonment may be imposed (some jurisdictions, in fact, had done so even before *Argersinger*), compliance has generally been token in nature. What this means is that: (a) waiver of counsel remains common and is often openly encouraged by judges; (b) indigency standards nationally are disparate and irrational and have not been uniformly applied; (c) appointed counsel is often inexperienced or of limited competence; (d) counsel often is appointed just before or at trial; (e) counsel often is not adequately prepared to represent his client's best interests; (f) limited concern with basic procedural fairness continues to be prevalent in lower criminal courts; and (g) relatively little attention is given to the dispositional needs of defendants.
- There has been no real effort in most jurisdictions to attempt to apply—or even to confront—the difficult questions raised in *Argersinger*. Few states, for example, have enacted legislation or promulgated rules to establish guidelines for implementing the decision. As a result, the predetermination process suggested in the opinion has largely been ignored or misused; the opinion has been applied too narrowly and often unequally; and virtually no effort has been made by legislatures to indicate which offenses should require counsel or to eliminate imprisonment as an option for many offenses, even though there is an obvious need to do so. The effect of this failure is that reform since *Argersinger* has been chaotic and uneven at best, even within the same court system.
- There has been no coherent development of defense systems to meet the need for quality representation mandated by *Argersinger*. In many jurisdictions, the response to *Argersinger* has simply been to assign additional cases to already overwhelmed public defenders; in others, new burdens have been placed on a limited number of appointed counsel who receive a pittance for their efforts and who, predictably, often respond in kind. The result of this is that the Sixth Amendment right to counsel is an empty one for many defendants. There are no real standards for effective assistance of counsel, the performance of counsel is rarely monitored or reviewed effectively, and lawyers, for the most part, are ill-trained to deal with the unique problems presented by nonfelony cases. Further, most of the legal profession has abdicated its responsibility for the lower criminal courts by condoning the often mediocre judges who serve there and by leaving the burden of representation to public defenders or to the lower echelons of the local bar. This in large measure explains why most lower criminal courts are invisible and disreputable. Law schools also have done little to educate potential members of the bar about the deficiencies of these courts, the acute need for reform, and the responsibility of the legal profession both to practice in the lower criminal courts and to participate in reform efforts.
- Basic reform of the lower criminal courts is not possible without wholesale changes in the types of activities that are brought before them. Many of the offenses that are now defined as nonfelony crimes—public drunkenness, insignificant drug use, certain consensual sexual activities, nonharmful disorderly conduct, and family disturbances—needlessly clutter the courts, demean the criminal justice process, and place impossible dispositional burdens on judges and probation staff who have no skills and few options for dealing with them. Although some jurisdictions have begun the process of decriminalizing certain offenses such as public drunkenness, far too little has been done. Jurisdictions must confront the need to eliminate state involvement in certain offenses and to develop alternative methods of dealing with others.

Despite the generally disheartening national situation, the Center's field work also uncovered several encouraging signs. First, there appeared to be significant interest in lower court reform in many of the jurisdictions visited. In some, the change had already begun. In Massachusetts, for example, the statewide public defender agency, the Massachusetts Defenders Committee, has been substantially improved since it came under new leadership within recent years. The Santa Clara Public Defender agency has developed an admirable national reputation despite its need for increased funding. The Birmingham Legal Aid Society, under contract with the city since

[8] NLADA, *The Other Side of Justice* (1973).

[9] The National Center for State Courts, *Implementation of Argersinger v. Hamlin: A Prescriptive Program Package* (Publ. No. R009, January, 1974).

[10] LEAA No. 73-NI-99-0004-6.

[11] Since these three grants were made, the National Institute has made other grants in related areas. NLADA, for example, was given a follow-up grant to perform an in-depth analysis of the results of its Defender Survey (75-NI-99-0019). It was also given a grant to develop evaluation designs for defense services (74-NI-99-0049). Finally, a grant was given to Rand Corporation to develop performance measures for courts and prosecutors (75-NI-99-0003).

[12] The final report will be published in early fall, 1975 by Ballinger Publishing Company under the title *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin.*

mid-February, 1973, to provide nonfelony defense, is moving to expand its services and to improve counsel effectiveness with significant support from the city judges and the city police department. Des Moines, for a number of years, has been providing extensive social services for persons brought into the criminal justice process. Massachusetts is one of the states that has recently decriminalized public intoxication. Finally, officials in Cleveland have acknowledged deficiencies in their current procedures for handling public intoxication and for providing defender services. But in Cleveland, as in most other cities, change has been frustrated because national, state, and local support has not been forthcoming.

The Center's research suggests that, nationally, several basic needs should have a priority in all future efforts to grapple with the *Argersinger* challenge. These include:

- The need to construe *Argersinger's* language of "imprisonment" and "waiver" consistent with the opinion's intent.
- The need to establish minimum standards of performance for lawyers trying nonfelony cases.
- The need to monitor that performance.
- The need to actively involve the legal profession in the defense functions of lower criminal courts.
- The need to strengthen public defender agencies.
- The need to liberalize financial and dispositional eligibility requirements for publicly-provided counsel.
- The need to reassess substantive criminal laws.

Accordingly, the Center drafted detailed and comprehensive recommendations concerning each of these needs. Many of the recommendations are now summarized.

II. IMPLICATIONS FOR THE LEGAL PROCESS

Argersinger represents a new branch in the evolutionary growth of the right to counsel. That right has progressed in two different dimensions—scope and doctrine. In scope, the class of defendants for whom the assistance of counsel is required has expanded from defendants in capital cases;[13] to defendants whose personal background showed them ill fit to conduct their own defense;[14] to felony defendants;[15] and, with *Argersinger,* to defendants who may be sentenced to imprisonment, whether charged with a felony, misdemeanor, or petty offense. In doctrine, the basis for the right has shifted from an emphasis on a Fourteenth Amendment due process balance to the stricter requirements of the Sixth Amendment.

The *Argersinger* decision rested upon the majority's interpretation of the Sixth Amendment. That provision provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The issue of whether the Sixth Amendment requires counsel in criminal prosecutions not involving imprisonment was expressly left open by the majority opinion.[16] However, the reasoning which supported *Argersinger's* extension of right to counsel applies equally to cases not involving loss of liberty. In fact, Mr. Justice Powell's concurrence noted that the majority's reasoning pointed in just such a direction.[17] The words of the Amendment plainly do not justify limiting the application of right to counsel to less than all accuseds in criminal prosecutions. Moreover, there is no basis in the historical development of the right to counsel on which to ultimately base an imprisonment/nonimprisonment distinction.

Although this logic may impel the Supreme Court eventually to rule that all criminal defendants are entitled to counsel under the Sixth Amendment, *Argersinger's* rule of *"imprisonment"* remains the limit to date of what is constitutionally required. While the Center urges all jurisdictions to adopt the broader view of the Sixth Amendment, coupled with our recommendations that many offenses be decriminalized, it recognizes that such a move goes beyond the Supreme Court's current mandate. However, even the precise scope of the right to counsel mandated by *Argersinger* is not entirely clear. Aside from its proviso that:

> Absent a knowing and intelligent waiver, no person may be imprisoned . . . unless he was represented by counsel at his trial,[18]

there remain many questions concerning what *Argersinger* requires and how best to supply it. Any evaluation of the effect of the *Argersinger* decision must therefore make a threshold analysis of the ramifications of the opinion for the legal process.

The discussion that follows attempts this task. First, it confronts the problem of definition: What does *Argersinger* mean with respect to defendants facing different possible sentences? Second, it responds to the question of implementation: Which defendants should get counsel and which should not? What procedural safeguards should surround the selection process?

A. Definition of "Imprisonment"

The Supreme Court's reluctance, in the hiatus between *Gideon* and *Argersinger,* to deal with

[13] Powell v. Alabama, 287 U.S. 45 (1932).
[14] Betts v. Brady, 316 U.S. 455 (1942).
[15] Gideon v. Wainwright, 372 U.S. 335 (1963).
[16] 407 U.S. at 37 (1972).
[17] *Id.* at 51.
[18] 407 U.S. at 37 (1972).

the question of right to counsel for misdemeanor defendants was indicative of a timidity that is evident in the *Argersinger* decision itself. The case put forward a rather shapeless constitutional requirement, leaving the development of its nuances to the course of judicial evolution. Beyond the specific facts raised by Jon Richard Argersinger himself, the Justices carefully avoided defining how broadly they were extending the right to counsel beyond *Gideon*. The right to counsel bestowed upon nonfelony defendants by *Argersinger* is a curious one in that it depends upon the result of the criminal process. Counsel is required only if it results in imprisonment.

By focusing on the result of the trial in order to activate the right, the Court has created a problem of definition. Although *Argersinger* dealt with a case which involved a sentence of 90 days in jail, the Court indicated at various points in the decision that it is the deprivation of liberty, including actual incarceration in a penal institution, which necessitates assistance of counsel. In applying the decision, it thus becomes necessary to determine the bounds of the concept of "imprisonment." Which losses of liberty are so significant as to reach the level of "imprisonment" for right to counsel purposes?

While *Argersinger* did not purport to deal with the necessity for counsel when a defendant is not subjected to imprisonment, one can abstract from the opinion the distinct tone that the presence of counsel is a significant tool in shaping a fair trial, whatever the result. The Court's actual holding more or less represents pragmatic judicial legislation. The Justices were attacking the problem one step at a time. The means they used to justify the partial step they took was to focus upon the drastic effect on the individual of a sentence of imprisonment. It makes good sense to remedy the most egregious portion of a problem, leaving a solution of the balance for a later time. But such methods are often more common to legislatures than to courts.

In making sense of the opinion, it is fair to conclude that whenever a sentence has the same drastic effect on the defendant's liberty as did the jail sentence that Jon Richard Argersinger faced, then the Supreme Court intended that the Sixth Amendment's right to counsel should apply. The question of whether that right is applicable in cases where the effect on the individual is substantially less than that faced by *Argersinger* remains open.

Many situations other than a jail sentence present the same consequences to the individual as those of *Argersinger;* they should therefore be viewed as within the decision's definition of the scope of the Sixth Amendment's right to counsel. Other than a direct jail sentence, the first stage in the criminal justice system to which *Argersinger* is likely to be applied is the determination of bail. If a defendant cannot be sentenced to jail even for an hour if he is unrepresented at trial, it makes little sense for that same defendant to be held in jail for months awaiting trial without having had the opportunity to be represented by counsel at the bail hearing. The deprivation of liberty *Argersinger* found so significant is equally present here.

The same theory that, for the purposes of right to counsel, views detention after a bail determination as equivalent to a jail sentence must be applied when a defendant's nonjail sentence imposes a probation that significantly restricts his freedom. Probation enables the defendant to avoid jail, but it can be structured so severely that he, in effect, has little real freedom. His job, his ability to travel, his choice of friends, and his hours away from home can all be subject to severe restrictions. Probation is considered a sufficient restraint on liberty to justify a challenge by writ of habeas corpus. It should also be considered a predicate for the appointment of counsel if it restricts the defendant's freedom in any significant way.

The concern expressed in *Argersinger* over the importance of counsel at a criminal trial will

have reverberations in quasi-criminal areas as well. Although they may not be Sixth Amendment criminal prosecutions, civil contempt, civil commitment and pretrial diversion, all may affect the individual in much the same manner as a criminal sentence of imprisonment. The implication for the requirements of due process in those settings is clear: where these noncriminal actions can result in the equivalent of imprisonment, counsel is necessary.

B. Implementation

1. *Predetermination.* Even with a comprehensive definition of "imprisonment" that allows a jurisdiction to determine which defendants must be afforded counsel based upon what sentence they receive after a trial, state courts are still faced with the problem of determining which indigent defendants should be offered counsel prior to trial and which should not. Since *Argersinger* does not require that counsel be offered to all indigent defendants, some method of selection is necessary. This is the process of predetermination. The ideal predetermination process would be able to predict with total accuracy:

- Whether the individual defendant will be found guilty.
- Whether the individual defendant would be sentenced to imprisonment if found guilty.

If the defendant was screened out on either of these two grounds, he would not be offered counsel. Of course, the difficulty in devising such a predictive device requires no elaboration. If such a device were possible, it would obviate any need for the trial itself.

Since accurate prediction of the two conditions is apt to be difficult, predetermination may be structured in a very broad manner to avoid prediction altogether. The broadest method of choosing which indigent defendants receive an offer of assistance of counsel would be simply to appoint counsel for all criminal defendants who were financially eligible. A jurisdiction may well decide that devising a predetermination process in order to restrict the right to counsel to less than all criminal defendants is not desirable and that all criminal defendants should be offered the assistance of counsel. Such a decision eliminates the need for any prediction in order to match assistance of counsel and sentence of imprisonment. While certainly implementing *Argersinger's* requirements, this method of assignment extends the right to counsel far beyond the bounds of the decision and does away with its imprisonment/nonimprisonment criterion.

Maintaining the imprisonment/nonimprisonment line, the broadest remaining standards for predetermination would be to appoint counsel for all indigent defendants charged with a crime for which imprisonment is a permissible sentence. This has been called the "imprisonment in law" standard. It is the recommended predetermination procedure of the Center.

The use of this standard of predetermination would most effectively implement the concern expressed in *Argersinger* that the presence of an attorney is an important element of a fair trial, regardless of the consequence. "Imprisonment in law" thus carries the *Argersinger* banner as far as the decision can go, given its express limitation that it did not reach the question of the necessity for counsel in a case where the defendant was not imprisoned. The recommended standard is thus a broad prophylactic implementation of *Argersinger's* focus on defendants who are sentenced to imprisonment.

A broad application for appointment of counsel finds support in numerous views on the problem. *The Uniform Rules of Criminal Procedure* recommend that the assistance of counsel be offered to all defendants charged with an offense punishable by incarceration.[19] The

[19] *Uniform Rules of Criminal Procedure,* Rule 15(b) (1974). *See also* A.L.I. *Model Code of Pre-Arraignment Procedure* §310.1(5), 10.2 (1975) (requiring counsel for all but parking and minor traffic violations); National Advisory Commission on Criminal Justice Standards and Goals, *Courts,* Standard 13.1 (1973).

National Advisory Commission on Criminal Justice Standards and Goals even goes beyond *Argersinger* and recommends that counsel be offered in all criminal cases. It should be noted that the discussion here is confined to means to implement *Argersinger* itself. Elsewhere in this report there is a recommendation that counsel should be available in all Sixth Amendment criminal prosecutions, as an extension of *Argersinger.*

The "imprisonment in law" standard has not only been subject to recommendation by advisory groups, but also has been the standard in use by many of the states, both prior to and after the *Argersinger* decision. The following states have in current use an "imprisonment in law" standard or a standard which is even more broad:

Alaska	Massachusetts	Oklahoma
Arizona	Michigan	Oregon
California	New Hampshire	South Dakota
Illinois	New York*	Tennessee**
Indiana	Ohio	Texas

*"Imprisonment in law" is the rule for all but traffic cases.

**"Imprisonment in law" is the rule for all but ordinance violations.

The standard is thus not only conceptually desirable, but also workable. However, any consideration of predetermination must also discuss three more narrow methods which were mentioned in the *Argersinger* decision.

The first alternative means of implementing *Argersinger* is by the "retrial" standard. Under this method, counsel need not be appointed at the start of the trial. If it subsequently appears, however, that the defendant would be sentenced to imprisonment if convicted, the trial is either terminated and counsel appointed for a new proceeding which may result in imprisonment, or the trial continues and results in a sentence of imprisonment, from which the defendant may appeal and obtain a new trial with counsel. This "retrial" standard, in the form of a trial de novo system, was suggested in the amicus brief filed by the United States Solicitor General in the *Argersinger* case. In his concurring opinion, Mr. Justice Powell discussed another "retrial" standard—the trial judge could declare a mistrial if he wished to preserve the option of imprisonment for a defendant who did not have counsel, and then could appoint counsel at the new trial.

Whether the "retrial" standard takes the form of a trial de novo, a mistrial, a continuance to allow the court to appoint counsel after the trial has begun, or an appeal with counsel appointed at a new trial; it represents an inefficient method of implementing Argersinger. Worse, it makes a travesty of the right to counsel announced in the decision.

Perhaps the greatest stumbling block to the "retrial" standard is the Fifth Amendment's prohibition against twice being placed in jeopardy for the same offense. In any of the "retrial" situations in which the original trial is terminated and a new one, with counsel, begun, the double jeopardy ban is violated. The only purpose for terminating the first trial would be to afford the judge an opportunity to impose a harsher sentence. This is exactly the type of hazard which the double jeopardy clause is designed to prevent. Apart from any double jeopardy problems, a "retrial" standard does violence to the long established doctrine that a defendant is entitled to the assistance of counsel at all critical stages of a Sixth Amendment prosecution. The initial trial proceedings at which a defendant is unrepresented by counsel under the "retrial" standard is, in fact, such a critical stage. The "retrial" method of predetermination is thus woefully inadequate.

A second method of predetermination was described by Chief Justice Burger in his concurring opinion:

> 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.[20]

This "individual prediction" standard for predetermination of those defendants who will receive counsel poses, in effect, a mini-sentencing hearing prior to the start of the trial.

The most obvious drawback of such a proceeding is the possibility that the information on which the "individual prediction" is based will taint the trial. This problem is most acute when no juries are involved, as would be the case in the large majority of nonfelony prosecutions. Although there exists a presumption that a trial judge will be able to excise from his eventual decision any improper information that comes to his attention during the course of judicial proceedings, the potential for prejudice is great.

Aside from the inherent potential for bias that exists in the "individualized prediction" standard, there are substantial resource problems in implementing this approach. These problems are illustrated by the courts in Belle Glade, Florida. The municipal court has no probation staff to gather information on which to base an individualized prediction. In sentencing, the judge relies on whatever information he can obtain about the defendant at the trial (usually through the means of someone in the community coming forward and vouching for the defendant) and on the defendant's police arrest record. Since there is only one judge in the municipal court and no jury trials, cases cannot be transferred to another judge for the eventual hearing on the merits in order to minimize prejudice. With the exception of arrest records, little information exists prior to trial other than the crime with which the defendant is charged. (Chief Justice Burger recognized that the trial judge should not see the defendant's arrest records; however, an individualized prediction in a court such as Belle Glade Municipal Court without use of arrest records would be meaningless.)

In the county court in Belle Glade, a more complete presentence report is provided, with information on the defendant's family, education, and employment record as well as his arrest record. It takes 30 days to complete, however; two weeks at the bare minimum. Thus, providing this sort of information prior to trial would entail serious delay.

Chief Justice Burger's suggestion that nothing akin to a full presentence report would be required was met with much the same reaction by the county court judge in Belle Glade as that expressed by the Commentary to the Uniform Rules of Criminal Procedure: such a skimpy predetermination hearing would amount to a pretrying of the case, and with less than all the facts. Even hearing a prosecutor's summary of the facts surrounding the offense may unnecessarily bias a judge. Moreover, that summary may often be impossible to obtain sufficiently in advance of trial to permit appointment of counsel. In many jurisdictions, no one familiar with the offense is available in court when the defendant appears for arraignment and appointment of counsel.

In fact, the reaction of most lower court judges interviewed by Center staff was that any sort of "individualized prediction" hearing prior to trial was impractical and unwise. This reaction, and the actual practice in courts observed by Center staff, lead to a conclusion that, rather than making a truly individual prediction, the process would revolve totally around the crime with which the defendant is charged. This assessment of the current situation was foreseen by Mr. Justice Powell in his *Argersinger* opinion. Such a standard is discussed next, and is termed the "class of offense" standard.

[20] 407 U.S. at 42.

A number of jurisdictions that were the subject of site visits had a "class of offense" standard in one form or another. The standard was unarticulated and operated on an ad hoc basis. For example, in both Belle Glade and Saco, certain minor offenses such as fish and game violations were never the subject of appointed counsel even though the statute permitted imprisonment. The judges merely implemented their experience, which showed that no one ever went to jail for such violations.

This common sense approach to the subject is certainly easy to apply, but it has several serious constitutional drawbacks. The most important is inherent in the separation of functions between a legislature and a court. When a judge decides never to appoint counsel for a defendant charged with a crime for which there is a maximum potential penalty of imprisonment, the judge in effect is repealing the legislatively mandated penalty. The judge's actions are equivalent to a policy that, regardless of what the statute says, the court will never impose a sentence of imprisonment. This approach may have some benefits. The possibility of a jail sentence remains on the books for many crimes that do not call for such harsh penalties. However, if this kind of reform is needed, it should come about in its own right and not as a result of a plan to implement *Argersinger*. When a legislature draws up a criminal statute setting a sentence involving imprisonment, the proper function of a court applying that statute is to determine if imprisonment is appropriate in the individual case, and not to reject absolutely the legislative determination that imprisonment is necessary as a maximum penalty.

Apart from such institutional concerns, the "class of offense" standard is subject to constitutional attack on the basis of the judge's decision as to which offenses never require counsel even though the statute provides for a jail term. Defendants charged with such offenses, cannot, of course, go to jail; while those charged with other crimes may still end up incarcerated. This difference in maximum potential penalty is not the result of a determination made by the legislature—which is, after all, the public institution designed to reflect society's ordering of the gravity of offenses—but is the result of an individual judge's opinion of individual crimes. When the basis of a classification is significant enough to determine whether or not a person goes to jail, a substantial equal protection question is raised when the classification is made by an institution not designed to properly reflect the considerations involved. Judges should determine sentences on the basis of the individual defendants and not on the basis of the individual offenses.

2. *Waiver*. Even adopting the imprisonment in law standard of predetermination will not guarantee that the right to counsel provided in *Argersinger* will be effectively guaranteed. Any decision announcing the recognition of a new constitutional right—in this case right to counsel—will have little effect unless that right can be successfully implemented. In the area of criminal justice, constitutional rights are not always automatically set into irrevocable motion. Even if the mechanics to implement the right exist in theory, in practice defendants may be placed in situations where they are forced to provide the appearance of having voluntarily refused its benefit. Thus develops the importance of the doctrine of waiver.

The Supreme Court in *Argersinger* recognized that merely because a defendant has a right to counsel does not mean that he actually will be represented by an attorney at trial. The Court's precise holding was 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."[21] The problem is how to ensure that the waiver doctrine does not swallow up the new right to counsel for non-felony defendants.

[21] 407 U.S. at 37 (emphasis added).

Explicit threats designed to coerce waiver of counsel are rare. Very often, however, defendants perceive, correctly or not, a tacit rule of court that those who ask for counsel are treated more harshly. In one court we observed, for example, waiver was the course of action taken by the large majority of defendants. No explicit coercion was present, but local attorneys expressed the view that the defendants, in fact, were intimidated by the entire proceeding and their waivers were not wholly voluntary.

The traditional standard by which to judge the validity of a waiver is to determine if it is a knowing, voluntary, and intelligent act. To embellish upon this foundation, the defendant should be aware of the crime with which he is charged, the possible sentence he faces, and the fact that the assistance of counsel is available at no cost to him, should he desire it. In addition, any defendant who indicates that he wishes to waive counsel should be advised of the advantage of having an attorney represent him, and be offered an opportunity to speak with an attorney before he makes the decision to proceed alone. To be truly effective, the entire process should operate in a way that makes it difficult for a defendant to waive counsel. The judge must be sure the defendant understands the disadvantage at which he places himself by his waiver.

Many courts provide notice to the defendants of their right to counsel by reading a statement at the start of the proceedings. If a defendant does not thereafter ask for counsel, it is presumed that he waives his right. Such mass warnings clearly fail to ensure that a valid waiver takes place. Defendants may not hear or understand a mass warning.

The only type of notice that can be truly effective is a dialogue between the judge and the individual defendant. Written forms have some of the same drawbacks as mass warnings—the defendant may not fully comprehend them. An oral colloquy can be tailored by the responsible official in terms which can not only be understood by the defendant, but which can elicit responses which demonstrate that the waiver meets the recommended standard.

This oral exchange between judge and defendant will vary according to the circumstances of the case. Therefore, it is most important that the procedure be memorialized by a verbatim recording rather than a notation on the records that the defendant was given his rights. This recording will facilitate appellate review of any claim of invalid waiver, and will also serve the prophylactic purpose of ensuring that the procedure is not overlooked by harried court officials.

III. IMPLICATIONS FOR THE DEFENSE FUNCTION

A. Effective Assistance of Counsel

Since the 1932 decision of *Powell* v. *Alabama,*[22] Sixth Amendment "assistance of counsel" has been defined to mean "effective assistance." Currently, there are few meaningful standards to measure the effectiveness of defense attorneys. Some lower federal courts and the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the National Legal Aid and Defender Association have begun developing standards giving some content to the concept of effective assistance, but these standards seldom have nonfelony cases in mind. Compounding the lack of standards is the fact that individual defendants rarely have an opportunity to obtain relief from ineffective assistance of counsel through judicial review by an appellate court. The traditional means which appellate courts use to measure ineffectiveness, involving such vague terms as "mockery of justice," "farce," and "sham," do not adequately meet the need: it not only permits and possibly encourages abusive attorney practices, but also reinforces the clear failure of trial judges to meet their responsibilities. Appellate courts should establish standards holding that if counsel totally omits or fails to:

- consult with and advise the defendant;
- prepare the case factually and legally;
- protect the legal rights of the defendant; or
- represent the defendant's interest in dispositional alternatives;

there has been a violation of the Sixth Amendment. Partial omissions or failures to abide by these minimum requirements, such as minimal consultation with the defendant, should constitute a denial of effective assistance of counsel unless the state, on which the burden of proof lies, can establish that the defendant was not in fact prejudiced.

[22] 287 U.S. 45 (1932).

Because normal time delays may moot appellate or post-conviction remedies occurring after a defendant already has served his sentence, alternative strategies to judicial review for monitoring the performance of counsel, focusing on the trial and pretrial process, should be developed. Trial judges might require that counsel demonstrate adequate case preparation, especially before guilty pleas are accepted, through submittal of a worksheet reporting on steps covered. Public defender agencies and organized assigned counsel systems should set internal standards, and both internal monitoring and external monitoring of the defense delivery agencies by such groups as bar associations, trained citizen groups, and law school task forces should be encouraged. Internal standards by defender agencies are particularly important in the following areas:

- Counsel should be appointed promptly after arrest;
- Realistic caseload limits should be placed upon counsel representing defendants in nonfelony cases;
- Counsel should interview the defendant immediately, should advise and confer fully with the defendant, should arrange for the defendant's release from custody, and should explore all tactics and strategies with the defendant;
- No case should be disposed of prior to trial or proceed to trial without adequate factual, legal and dispositional investigation; and
- Counsel should have sufficient supporting staff to assist in all necessary investigations, specifically including those addressing disposition.

The particular significance of "caseload" is that it determines the amount of time available to develop a complete defense, including proper attention to disposition alternatives. Like retained counsel, appointed counsel, whether assigned from the private bar or drawn from a public defender, should be able to control caseload so that he can devote sufficient time to each client. Public defenders must be insulated from unworkable caseloads by legally enforceable restrictions in their enabling legislation, their corporate charter or by-laws, their internal administrative regulations, or their contractual obligation. Attorney caseload reflects only an average that needs to be made responsive to particular client needs, changes in substantive law and court procedures, experimentation in defense delivery, and attorney experience. Caseload projections, then, should be used by jurisdictions to guide public defense funding. Once established, the defense delivery system should still be able to demonstrate to the jurisdiction that initial projections were erroneous and that ineffective assistance is or will be caused by overloading. Along with standard setting, jurisdictions should establish responsive and easily accessible grievance procedures for nonfelony defendants (including ombudsmen) and should involve the media in reporting on how justice is dispensed in the lower criminal courts. There are other impediments to effective performance not attributable to the individual attorney, but rather induced by the system itself, such as overcriminalization and late attorney appointment. Without such monitoring and debate, it is doubtful that systemic problems of current lower court practices will be identified and remedied.

This type of monitoring can ensure more comprehensive standards than those which an appellate court, sitting in judgment after the fact, can use.

B. Defense Delivery Systems

Jurisdictions now must carefully evaluate their defense delivery systems and engage in thoughtful experimentation. Five types of delivery systems will be considered here: public defender, assigned counsel, mixed system using both the private and public bar, law school clinics, and prepaid legal services. Our observations and study revealed no single model appropriate for adoption throughout the country. *Argersinger* permits no easy answers; it is most important that federal funds be allocated to assist jurisdictions in experimenting with the provision of counsel in the nonfelony courts.

1. *Public defender systems.* Because of their single focus (and, in many cases, their years of experience), public defender attorneys can offer expert representation. Their potential often is not realized, however, because they are expected to be the most efficient, least costly form of providing constitutionally required defense counsel.

This results in most public defender offices having overwhelming caseloads, insufficient investigative and social service staff, low salaries, and assembly line service. Public defenders must evaluate their training, assignment procedures, and support services to be performed in order to ensure development of the special skills required in the nonfelony courts. These courts must not be viewed simply as a training ground for new lawyers. It is most important that public defenders assign experienced lawyers to these courts, both to guide less experienced counsel and to aggressively challenge existing procedures. In addition, public defenders should protect themselves against excessive caseloads, which may amount to institutionally imposed ineffectiveness. Further, public defender agencies should develop methods for personal delivery of counsel service. Finally, public defender offices should be responsible for determining client eligibility and for assigning attorneys to cases. Neither function should reside with the judiciary.

The public defender office should also institute methods for challenging systemic problems in the lower criminal courts. It should have the capacity and the intention to undertake law reform actions and to advise the legislative and

the administrative branches of government. To retain sensitivity to institutional problems and to maintain their clients' faith, the public defender should be insulated from improper influences or even the appearance of suspicious camaraderie with prosecutors or judges. Similarly, the office should institute and make known the existence of grievance procedures that are easily accessible to clients, defender staff and attorneys. Finally, it is critically important that public defenders establish internal standards and case review procedures for effective delivery and monitoring of counsel performance in the nonfelony courts.

2. *Assigned counsel systems.* The private bar has fought the concept of public defenders just as it has fought legal aid; yet it has largely ignored the need to assist those who cannot afford to retain its members. As a result, the legal profession is ill-equipped to respond to decisions like *Argersinger.* While Chief Justice Burger may be correct in stating that "the dynamics of the legal profession have a way of rising to the burdens placed on it,"[23] it has yet to invoke this dynamism in a productive, constructive fashion.

The private bar has a critical role to play in assuring justice in the nonfelony courts—a role on the one hand, political (for example, in assuring adequate counsel funding and review of overcriminalization) and, on the other, participatory. With reference to the latter, two basic principles must be applied: private bar participation in nonfelony defense must be as widespread as possible, and assigned counsel systems must be organized.

To elevate an assigned counsel system in the lower courts to a proper level, efforts should be made to use the services of a high percentage of the members of the private bar. It simply is wrong to leave nonfelony defense in the hands of a few jaded "regulars."

[23] Argersinger v. Hamlin, 407 U.S. at 44 (Burger, C.J. concurring in the result).

Efficiency, supportive services, equitable assignments, counsel training, and greater cost effectiveness all result from an assigned counsel system that is organized, with its own central administrator. While his power to make assignments may at times have to rely on judicial intervention against a balking attorney, the fact that the bar itself controls assignments just as the bar retains clients should place the system properly on the side of the defense; no longer will lawyers be dependent upon judicial largesse.

An effective, organized assigned counsel system needs an adequate budget—not only providing for training, library, and backup services, but also guaranteeing participating counsel sufficient remuneration. Because time equals money for the private attorney, and because time also may equal effectiveness, inadequate money invariably will result in inadequate defense. While reimbursement schedules may be based on an hourly fee or on a sum for each service provided, the guiding principle must be parity with private bar fees. At the very least, an assigned counsel must be able to recoup his office overhead and sufficient profit to assure that he treats his assigned client no differently than his retained.

3. *Mixed systems.* Mixed systems involve representation by both the public defender and the private bar. Public attorneys and private attorneys bring special perspectives and resources to the nonfelony process; monopoly by either group has unfortunate hazards. Without the competition of the public defender, assigned counsel systems may drift back into disorganization and cronyism, and without the energy and special vision of the private bar, public defender agencies may be compelled to take on more and more cases without increased funding.

Joining together an organized assigned counsel system and a public defender not only will improve both systems but additionally will have a direct and positive impact on the nonfelony criminal justice process. The more populous jurisdictions should experiment with mixed systems. The first level of experimentation could combine these two systems administratively, while maintaining the separate identity of each. As coequals, the administrators of each system should arrange to divide the total caseload equitably by number and interest. Once a mixed system is established, jurisdictions might then continue experimentation by testing such concepts as client choice of attorney. This simply extends to the "indigent" defendant the basic marketplace concept now available to the nonpoor. Defendants might be offered a choice between assigned counsel and public defender attorneys, beginning with a pilot program presenting choice of system to a random sample of defendants. Gradually, more and more persons could be included. Defendants, by their choice, would illustrate both client acceptance and client discontent with each system. Ultimately, funding decisions and budget allocations would be based not only on cost effectiveness but on defendant preference as well.

4. *Law school clinical programs.* Justice Brennan's suggestion that law students may provide both quantitative and qualitative aid in implementing *Argersinger*[24] sounds attractive; in fact, it is misleading. Law students as nonlawyers presumptively cannot provide on their own, even under a student practice rule, that "counsel" required under the Sixth Amendment. As well, law schools are engaged in education, not service. The quality of student work from a well-supervised clinic might satisfy any jurisdiction, but jurisdictions should not expect law students to assume any of *Argersinger's* quantitative burden. Although clinical programs may not help solve the immediate *Argersinger* manpower dilemma, their existence is so important to the future health of the criminal justice system that substantial state and federal funding should be directed to them.

5. *Prepaid legal systems.* Prepaid legal services offer promise as one way to provide low-cost legal assistance to persons who are reluctant or unable to retain their own attorneys. To date, however, little attention has been paid to the content of prepaid policies. With *Argersinger* the law for three years and its extension presumably only awaiting evidence that full application of the Sixth Amendment right to counsel is not an impossibility, the time has come to consider the implication of prepaid legal services on the delivery of criminal defense services to accused nonfelons.

Legislation, either Federal or State, should require that every prepaid legal services package contain a mandatory criminal defense component. This component should include coverage sufficient to enable the "insured" to receive competent counsel in nonfelony cases. The arguments for this legislative order are compelling. First, it is unlikely that persons would purchase the component without it. Few individuals foresee themselves as criminal defendants, even though the probabilities may be somewhat higher than they expect. Second, if few people buy an optional component, and the component is expected to pay for itself actuarially, it is quite possible that the component will price itself out of the market. Further, unless legislatures move to protect the public purse in this manner, it is possible that *Argersinger's* implementation will be stymied by improper restrictions on the quality and extent of publicly provided defense counsel.

Beyond the initial mandatory nature of the component, legislatures should also require, either statutorily or through regulatory action, that any actuarial input be controlled so that individuals otherwise eligible for prepaid coverage are not differentiated under group coverage for the cost of the criminal defense component. This should also be true of individual purchasers, who should not be required to pay additional component fees due to their profile in the abstract. The important concept here is that, as with all "insurance," there is a sharing of costs; and, because this component concerns a constitutional right, coverage should be as thorough and extensive as possible.

Once a prepaid legal services program is operational, the Federal government, State or

[24] 407 U.S. at 40-41.

jurisdiction should consider meeting its Sixth Amendment responsibilities and the civil law needs of some of its poor and near-poor citizens through state or jurisdiction purchase or underwriting of prepaid policies. In essence, this approach ties the experimental judicare program into an established delivery system. It offers an interesting alternative to continued full reliance on assigned counsel and public defenders in the criminal area and legal aid in the civil area.

6. *New federal support.* While existing federal support programs, such as those now possible under LEAA, provide increased funding for experimental and pilot projects in nonfelony courts, it is critically important that the federal government commence the establishment of a new program on criminal legal services. This program would include grants to develop and expand defense and prosecution systems; grants to improve existing law school criminal offerings, including clinics, and to add scholarships and internships, and courses in administration, research, and planning at both undergraduate and post-graduate law levels; and grants for law-reform efforts and for research and experiments on lower court manpower problems.

C. Financial Eligibility

In most jurisdictions, financial eligibility is determined by a judge either without specific criteria or with improper criteria, frequently viewed in terms of destitution, thereby eliminating the near-poor and lower middle class from public counsel coverage. The proper standard would call for no defendant being found financially ineligible for publicly provided criminal defense counsel unless he can purchase effective counsel assistance in the private marketplace without substantial hardship to self or family. Using this as a general standard, there are two methods for determining eligibility. The first is self-determination, where the defendant assesses his ability to hire a private lawyer. He is advised of the importance of counsel, of the general range of local counsel fees, of the usual requirement of substantial fee prepayment for attorney retention, and of attorneys to whom he might speak. He then determines whether he can affort to retain counsel without substantial hardship.

The second method for determining eligibility is the establishment of fair and workable income-based criteria to implement the standard of substantial hardship. The goals are two-fold—to assure uniformity and to develop a proper calculus of hardship. Uniformity in decision-making will require that standards be published and that findings of ineligibility be subject to review. As well, the initial financial eligibility decision should be placed with the administrator of the defense delivery system (be it public defender, organized assigned counsel, or a mixture). Trial judges then would be relieved of a potentially burdensom administrative chore and would also be in an excellent position to review decisions of ineligibility.

Calculations of substantial hardship should involve two determinations: the defendant's available funds and the cost of purchasing effective representation. Realistically, available funds should comprise only two sources: savings and income. In the form of cash, a savings account, a checking account, and stocks and bonds, savings are set aside for emergencies. Being charged with a criminal offense should constitute an emergency. Income, defined as money earned rather than money to be earned, is the only appropriate source with which to hire a private attorney. The question, then, is how much income can be diverted for this unexpected cost without causing hardship to oneself or one's family. Measuring hardship is a difficult task involving delicate questions of what another individual needs and can do without.

The Federal Bureau of Labor Statistics' Standard of Living Budgets provide a workable standard which jurisdictions should consider in establishing appropriate income levels. Assiduously avoiding social valuation, the Bureau has developed three standards of living—lower, moderate, and higher—for typical urban families. Standards of living may vary slightly within jurisdictions, but the B.L.S. standard still should be studied as an unbiased formulation for assessing hardship.

Once income levels are established, jurisdictions should use them to create a presumption of eligibility. The presumption should include some measure of the minimum fee a private attorney will ask in order to be retained and in order to provide effective assistance. The jurisdiction may find it advisable to add the projected fee to the living cost below which hardship is presumed in order to establish a total income cut-off figure for the individual defendant. Of course, those individuals with more income should have the opportunity to show that their particular circumstances are such that recourse to private counsel would result in hardship. This income-based concept incorporating notions of hardship and availability of liquid assets would broaden current restrictive and often irrational standards, extending publicly provided defense to the lower-middle class, currently excluded by the frequently applied Legal Aid income standard.

Prepayment of some portion of the estimated cost of public counsel is subject to serious abuses, such as shakedowns by unethical lawyers or coerced waivers. Posttrial repayment makes sense only in the context of broad eligibility standards, like those derived from BLS standards of living figures. The defendant should be given a time limit within which to pay; if he defaults, the jurisdiction could begin civil court processes against him to collect. Repayment should not be incorporated as part of the criminal disposition. Making repayment a term of probation improperly correlates reimbursement for assertion of the right to counsel with the underlying criminal offense. In addition, although reimbursement conceptually is for a debt, civil processes should be restrained by continuing reference to concepts of hardship to self or family. No defendant should be penalized for asserting his Sixth Amendment right to counsel, and certainly no defendant should be forced into bankruptcy to repay his cost of defense. Still, any repayment scheme may cost the jurisdiction more to administer than it recoups and, as well, have the clearly negative aspects of over-intrusion by the government into citizens' privacy. All efforts should be made to avoid recoupment schemes because they tend to be counterproductive both economically and in terms of restraint on governmental intrusions into personal privacy.

IV. IMPLICATIONS FOR THE ROLE OF CRIMINAL LAW AND ITS ENFORCEMENT

Not only are inadequate resources devoted to providing counsel for indigent defendants in nonfelony cases, but efforts to improve this situation too frequently are met with recalcitrance. Despite this, many of the recommendations urge expansion of the right to counsel and improvement of the quality of services, goals that critics may believe are impractical in light of the present acute shortage of resources. However, staggeringly heavy criminal dockets in nonfelony courts are not an inevitable fact of life. For example, less than one-fourth of all the criminal charges in the Cleveland Municipal Court were for truly criminal behavior—offenses against persons and property. The remaining cases concerned activities such as drunkenness, prostitution, gambling, drug possession, and family fights. These are all problems which either should be controlled in a less costly and drastic manner, should be resolved in forums better prepared to respond than are the criminal courts, or should not be subject to society's intervention at all.

This summary explores a wide range of alternatives to traditional criminal justice processing. All of these are intended to remove cases from the criminal court dockets. Each of the major facets of the criminal justice system are addressed in turn: the legislatures should be primarily concerned with decriminalization; the police with arrest alternatives; and the courts and their officers with pretrial intervention and alternative modes of adjudication. Each area bears on the ultimate question of the ability of the lower criminal courts to effectively deal with the daily press of cases upon them.

A. Legislative Options: Decriminalization

Removing certain subject matter from the jurisdiction of the criminal courts necessarily means that the criminal sanction can no longer be applied. Therefore, an important guide to an inquiry into what conduct should be removed from criminal jurisdiction is the role of the criminal sanction. Conduct for which the santion's application is difficult to justify constitutes a likely subject for decriminalization or legislation.

In combing through the criminal statistics for offenses which satisfy none of the reasons for punishing conduct with a criminal sanction, the most conspicuous candidates are "victimless crimes." By definition, a victimless crime is one without a complaining victim. Another distinguishing feature is that such crimes are tolerated, if not encouraged, by substantial segments of the community. Finally, to the degree that it is involved at all, harm is indirect. Typically, a victimless crime statute is enacted for the purpose of enforcing the legislature's conception of proper moral principle. An additional but unstated purpose of some statutes is the provision of social services.

Diversion of overextended law enforcement resources to crimes without victims is a serious inversion of priorities. While the rate of all crimes rise dramatically, the clearance rates of serious crime have declined over the last dozen years. Yet, 25 percent of the nation's arrested persons are accused of petty crimes which inflicted no direct harm. In some parts of the nation—Houston, for example—victimless crimes account for 67 percent of all arrests.

Dissipation of criminal justice resources is made all the more pointed by the fact that criminal courts are generally unwilling or unable to provide meaningful sanctions for those convicted of committing one of the crimes without victims. A Cleveland judge who handles drunk cases simply tells the defendants to go home. If the defendant has no home to go to, the judge may ask one of the public defenders sitting in court to see whether shelter can be found.

Houston prostitute arrestees simply submit to a "voluntary payment of fine." The city's criminal prosecutor admits that this process amounts to little more than an expensive method of taxation.

The cost of victimless crimes is measured in more than economic terms. The importance of the criminal sanction is demeaned when it is applied to conduct so harmless that no complaints are generated. Application of the criminal sanction to activity tolerated and enjoyed by substantial segments of the community creates a "crime tariff" and guarantees a monopoly profit for the enterpreneur willing to systematically break the law. Organized crime obtains most of these profits and invests them in more objectionable criminal efforts.

Where no complainant will bring an offense to the attention of the police, enforcement techniques inevitably involve such intrusions into the citizen's privacy as searches of home and person, electronic surveillance, and the use of police decoys. The policeman is forced into the untenable position of deciding whether to ignore the violation of a criminal law or to violate the individual rights of citizens. Where purveyors of illegal goods and services must make themselves known to customers and yet avoid law enforcement measures, corruption of police and government officials is inevitable. Offenses which are widely tolerated can be enforced only in an unusually small percentage of instances. This results in arbitrary and sporadic enforcement, and in turn, leads to discriminatory enforcement and the alienation of significant segments of the community.

1. *Prostitution.* The classic use of a criminal penalty to enforce a moral code is found in the statutes prohibiting consensual sexual conduct. Prosecution in prostitution cases, especially, brings out the worst features of the system. Big city courts are often crowded with prostitution cases in which the presence of a large majority of repeat offenders testifies to the questionable deterrent effect of the law. In Boston, for example, a docket survey indicates that one-quarter of the Boston Municipal Court criminal charges are for prostitution. Thirty percent of those so charged had five or more prior convictions. Moreover, the courts' handling of prostitution reflects society's indifference to the practice. Of 323 arrests for prostitution made in Cleveland in 1971, only 33 resulted in convictions. There are a number of reasons for a court's general reluctance to find guilt:

- failure of the state to prove the elements of the offense;
- desire by the judge to avoid the stigma of conviction where there is no indication of prior conviction; and
- disapproval of police methods.

Establishments which support prostitution are rarely prosecuted; and when they are, conviction generally results in lenient dispositions. In Houston, arrests for prostitution in 1971 numbered 5,588, but 84 percent of the dispositions were guilty pleas of "voluntary payments of fines" which amounted to no more than a cost defendants readily tolerated as an item of overhead.

States should seriously reevaluate the need for keeping prostitution laws on the books. Other activity such as assaults and robbery, which assertedly are associated with prostitution, should be prosecuted as independent crimes.

2. *Public drunkenness.* If prostitution statutes typify the criminal system's misguided efforts to enforce morals, drunkenness statutes represent the system's inappropriate attempts to provide needed social and medical service.

Few would question the need to retain criminal provisions to protect the public from disorderly and blatantly offensive behavior, whether committed by sober or intoxicated persons. The problem is the stuporous drunk, the drunk in public streets or alleyways who is in danger to himself and an ugly inconvenience to others. Staggering numbers of these drunks are fed daily into the criminal justice system machinery. In 1972, the estimated 1,676,800

arrests for public drunkenness totaled one-fifth of the number of arrests made in the United States that year. In recent years, public drunkenness accounted for 58 percent of Boston's arrests, 42 percent of Houston's arrests, and 20 percent of Cleveland's arrests. One of Cleveland's three criminal courtrooms is devoted amost wholly to public drunkenness—despite the fact that in each case, the clerk often spends more time calling it than the judge does disposing it. In the Houston Municipal Court, public drunkenness was charged in more than half of all nontraffic misdemeanor cases.

Public drunkenness offenses put so much pressure on the courts that, with the best of intentions, some of the more overtly illegal courtroom practices are frequently employed, in apparent violation of Supreme Court decisions. Houston courts routinely fail to make clear to the defendants their right to free counsel; and then send them to the "pea farm" to work off their fines. Jail offers no genuine opportunity for rehabilitation. A criminal conviction undermines self control and may encourage more irresponsible drinking.

Detoxification centers which provide emergency medical care, food, and shelter for homeless chronic alcoholics have proved to be of value in the treatment of public drunkenness problems. Decriminalization of public drunkenness in Massachusetts may not have cured many of Boston's habitual drunks, but its street population of alcoholics is evidently healthier.

These two classes of offenses are convenient examples which illustrate the trend toward "overcriminalization," evident in the work load of the lower criminal courts. The list could profitably include many other areas of conduct—notably gambling and drug offenses. Marijuana, in particular, presents a case for decriminalization so compelling that the high rate of arrests and even jail sentences can only be regarded as a marvelous anachronism.

B. Police Options: Arrest Alternatives

1. *The unnecessary burdens of current breach of peace laws.* The lower criminal courts are unnecessarily burdened by cases involving charges of disorderly conduct, loitering, vagrancy, and other breach of peace type offenses. Criminal court jurisdiction over these offenses is often justified as the means of controlling police behavior, and the judiciary is not empowered to committed. But in actual practice, judicial review has largely failed to supervise police behavior and the judiciary is not empowered to provide genuine relief for the problems underlying the offense. The judges' treatment of convicted offenders is the strongest evidence that the typical breach of peace offense is not sufficiently serious to warrant the criminal sanction. Jail sentences are rare and fines light.

While breach of the peace offenses command a substantial amount of the courts' attention, they occupy an even greater proportion of police resources. Nearly half a police department's energies are concentratred on problems of order maintenance, noise, minor disputes, fights, domestic disturbances, and other conduct generally thought to fall within the reach of breach of peace statutes. In contrast, only about 10 percent of police effort is devoted to traditional criminal law matters. A policeman is thus less likely to be a "cop" than a nurse, rescuer, or on-the-spot arbiter.

Despite society's expectation that the policeman deal with a wide variety of problems, he is explicitly authorized to perform only one official act—arrest. As a result, police are often required to intervene in situations where the authority to even be present is open to question (domestic disputes), where statutes under which police operate are of questionable legality (vagrancy and loitering), or where initiation of arrest and criminal prosecution is of dubious wisdom (helpless persons and potentially troublesome demonstrations and crowds).

2. *Streamlining the administration of police order maintenance duties.* Because order maintenance problems are often more easily resolved by means short of arrest, local jurisdictions should structure incentives for police officers to employ arrest alternatives. Two major steps may be taken: vague statutory authorizations for arrest should be repeated or more carefully drafted; and specific administrative rules authorizing alternatives to arrest should be promulgated.

a. *Legislative reform.* As currently drafted, most disorderly conduct statutes are probably overbroad and void because of vagueness. They are stated broadly enough to encourage police, in one case, to arrest a citizen for tapping his foot to the cafe juke box, and, in another, for playing basketball on a court in a neighborhood whose residents were of a different race than the ballplayers. Most of these statutes are unconstitutional on their face because they purport to regulative activity which the Bill of Rights protects from state interference. Of course, the state has a legitimate interest in regulating genuinely harmful activity. Accordingly, disorderly conduct statutes should be redrawn to permit criminal arrest only where harmful activity is serious and protection of the community can be ensured only by arrest. Vagrancy and loitering laws should be repealed because they are unconstitutional, unjust, and often unenforceable.

b. *Police rulemaking.* Narrowing the reach of criminal statutes will not solve order maintenance problems. The void created by the repeal of unconstitutional statutes should be filled both by narrowly drafted statutes and by administrative regulations promulgated by the police department defining how such statutes will be enforced. The purpose of such regulations would be to guide the officers' discretionary exercise of their arrest powers.

Regulations are particularly important in the handling of disorderly behavior and in the too frequently neglected area of the provision of social services. Experience shows that police rarely want any part of work such as aiding a helpless drunk to a detoxification center: in a city conducting one of the early detoxification center experiments, policemen reportedly abused drunks and failed to transport them to the detoxification center. Explicit regulations, along with other forms of incentive may establish appropriate police priorities.

In addition to statutory reform and police rulemaking, a third important step should be taken to encourage police officers to employ techniques other than arrest: where necessary specialized police units should be created in order to develop expertise in the handling of especially difficult and sensitive order maintenance problems, such as intrafamily violence.

C. Judicial Options

1. *Formal pretrial intervention.* Innovative responses to *Argersinger* will also include the use of pretrial intervention programs. Formal pretrial intervention amounts to a probationary program for certain offenders which avoids the cost to society of traditional criminal processing and disposition and the cost to the individual of a criminal sentence. A typical intervention program involves the selection of appropriate candidates from the list of persons facing trial and an offer to candidates of the opportunity to participate satisfactorily.

Implementation of a formal pretrial intervention program is desirable for a number of reasons. First, it may greatly reduce the courts' *Argersinger* burdens. Participation can be undertaken and completed without any assistance from the court. An intervention program is especially appropriate for *Argersinger* burdens specifically because forebearance from the imposition of the criminal stigma is better suited to nonfelonies, inherently less serious crimes. There is little doubt that participation in an intervention program is superior to incarceration from both the offenders' and society's point of view. Prisoners are brutalized and alienated from

mainstream values; they are likely to be trained by peers in the expertise of crime; incarceration is a large drain on the state's resources. Conventional probation can also be improved by a formal pretrial program because the money saved by averting courtroom processing can be rechanneled into supervisory programs which offer the genuine assistance so often lacking in current probationary programs. Although as yet inconclusive, statistics strongly indicate that recidivism rates can be substantially reduced by institution of an intervention program. Similarly, cost-benefit studies suggest that by reducing demands on law enforcement, prosecutorial, and judicial time, and by avoiding witnesses' and juries' fees and court administrative costs, an intervention program can generate net savings for the state, despite the increased cost of intensive counseling services.

Participation in any of the intervention programs should be possible either by virtue of agreement between the candidate and the prosecutor or pursuant to a court order. In every case, the former method should be attempted first; if the candidate is unsatisfied with the results of his negotiations with the prosecutor, he may demand a judicial hearing on the issue of participation. This would assure that an equitable offer was extended to every defendant.

If the participant fails to live up to explicit criteria, the prosecutor may reinstitute criminal proceedings after giving the defendant opportunity to explain why he should not be prosecuted. Contrary to current practices of observed intervention programs, the ultimate decision whether to undertake reinstitution proceedings should not be made by the intervention agency; counselor-client rapport will be difficult to maintain if the client knows his confidante may one day be his informer.

All records created in the course of prosecutorial negotiation, judicial hearing, or program participation should be sealed for all purposes but criminal investigation and rehabilitative treatment. Information made available for the former purpose should include only name and dates of participation.

A pretrial intervention program poses the grave danger that citizens can be arbitrarily, mistakenly, or maliciously arrested; then coerced into participation. It is entirely possible for a person to complete an entire program without so much as testing the validity of his arrest with a probable cause hearing before a magistrate. To minimize this danger, conditions for participation should include a certification by the prosecutor that he has sufficient evidence to obtain a conviction.

2. *Adjudicatory alternatives.* Legislative reform, police diversion, and pretrial intervention will greatly reduce the number of cases in the criminal justice system; but, of course, a substantial number will be unaffected by these measures. Those cases which for reasons of their seriousness or complexity have not been diverted prior to being subjected to formal fact finding and dispositional hearings need not incur the full burdens of criminal processing. Adjudicatory alternatives to the criminal trial may include civil trials, administrative proceedings, and private arbitration.

Criminal offenses—such as shoplifting, driving while intoxicated, or the "white-collar" crimes—which merit decriminalization but which are serious enough to warrant judicial attention, may be reclassified as civil offenses. Such reclassification will permit greater flexibility of remedy, the appointment of masters as fact finders, and other procedural devices less burdensome than those employed by the criminal courts.

Administrative regulation of certain offenses, such as moving traffic violations, may be an appropriate adjudicatory alternative if the offenses occur with great frequency, and if the offenses are serious enough to warrant governmental attention but not so serious or complex as to require formal judicial pronouncement. Houston municipal courts process seven times as many traffic cases as nontraffic criminal cases; six of Houston's seven criminal courts are devoted exclusively to traffic offenses. Nevertheless, the seriousness of the criminal sanction is wholly disproportionate to the seriousness of the offense. Moving traffic violations are not popularly regarded as crimes. There is no criminal intent to be deterred.

Where society's interest in the prosecution of certain criminal offenses is less compelling than the need for the resolution of basic personal problems in a continuing and complex relationship, private arbitration may be preferable to criminal court processing. Where relationships over an extended period of time—whether within a family or in the course of business dealings—result in a criminal offense, the likelihood that both parties are at fault is usually ignored at the criminal trial, which focuses instead on the defendant. Rather than getting at the roots of the problems, the criminal process simply becomes another weapon in the continuing conflict.

V. THE PROCESS OF PLANNING FOR CHANGE AT STATE, LOCAL, AND FEDERAL LEVELS

Little in the way of constructive reform in nonfelony courts and defense services can be expected at state and local levels without careful research and planning that build on national studies. Few jurisdictions, however, are currently equipped to do the necessary research, planning, testing, experimentation, and follow-up evaluation in this area. Although all states and many cities and regional areas now have criminal justice planning agencies, they have focused little attention, to date, on nonfelony defense services, on the nonfelony courts or on substantive and procedural criminal law reform relating to these courts.

As a follow-up to this study, LEAA must provide incentives to state and local criminal justice planning agencies to give priority to comprehensive research, planning, development, and experimentation on nonfelony defense services and nonfelony courts.

In this planning effort, emphasis should be given to establishing clear goals and objectives as well as short- and long-term programs to achieve them. Such planning must involve concerned representatives from the executive, judicial, and legislative branches of government; prestigious members of the private bar; expert staff; and often expert consultants. Planning group representatives from the various branches of government and from the private bar must obviously involve public defender personnel, active practitioners, lower court judges, police, probation and corrections officials who have contact with nonfelony defendants, diversion agency personnel, legislators concerned with law reform and defender budgetary issues, bar association and law school representatives, and representatives of the client population.

Early attention in the planning process must be given to data collection since limited accurate information is available nationally. This is reflected in the following assessment by the Center of national statistics on nonfelony crimes and the nonfelony client population.

A. Relevant National Statistics and Their Deficiencies

1. *Nonfelony crimes and caseloads.* To date, there have been few studies that accurately measure the number of nonfelony arrests or cases arising annually either on a national or local basis. Many recent reports examining nonfelony representation—and notably even the Supreme Court in *Argersinger*—have relied upon figures that may have little basis in fact. For example, the Supreme Court, in a footnote, noted the estimate that there are annually between four and five million court cases involving misdemeanors.[25] It cited the 1967 presidential crime commission's *Task Force Report: The Courts,*[26] in support of this figure. This presidential commission, in turn, relied heavily upon a 1965 study by the American Bar Foundation in reaching its estimate. The American Bar Foundation had estimated, based upon field studies of the defense of the poor in criminal cases, that nationally no less than five million misdemeanor cases were being disposed of annually.[27] This figure has been cited in numerous articles since that time as authoritative estimates of the number of nonfelony cases.[28] But as has recently been pointed out by Lawrence Herman, that estimate is certainly not accurate now and was not accurate even in 1965:

> [T]he estimate was based on figures that were out of date and excluded traffic offenses as well as nontraffic misdemeanors punishable only by a fine. Consequently, even in 1965 the estimate was questionable, and it is hardly a reliable basis for present computation.[29]

Recently, the National Legal Aid and Defender Association used another approach to estimate potential caseload. In *The Other Face of Justice* (1973), the National Legal Aid and Defender Association (NLADA) relied upon 1971 FBI arrest statistics to reach its estimate of potential defendants in adult nonfelony cases:

> In 1971 over 8 million nontraffic arrests were reported to the FBI. While accurate national statistics are not available for the number of felony or nontraffic misdemeanor arrests, the number of arrests for Crime Index offenses reported by the FBI roughly corresponds to the number of arrests for serious or felony offenses. Using this indicator approximately 1.7 million persons were arrested for felony offenses while 6.9 million persons were arrested for nontraffic misdeamor offenses during 1971. These figures, however, included 1,796,942 juvenile arrests. Subtracting these arrests, the number of adult felony defendants is therefore, 1,075,052 and the number of adult nontraffic misdemeanor defendants is 5,767,706.[30]

There are several obvious problems in arriving at caseloads by utilizing this approach. One is that arrest figures cannot easily be reduced to a number of cases in nonfelony courts. Many persons who are arrested are not tried and many persons are also arrested for more than one charge. This suggests that arrest figures would overestimate the number of nonfelony cases. On the other hand, arrest statistics undoubtedly do not include ordinance offense violations tried in courts of limited jurisdiction, which could be voluminous. Thus it could be argued that arrest statistics may underestimate nonfelony cases as well.

The problem is not limited to grossly inadequate national statistics on nonfelony caseloads. Few, if any, state and local jurisdictions maintain appropriate statistics in this area. This was certainly true of all of the jurisdictions visited during the research for this study. One must conclude that accurate nonfelony case statistics are simply not available at either the national or local level.

2. *Nonfelony client population eligible for appointed counsel.* Accurately determining the number of nonfelony cases is only one step in the process of determining the number of nonfelony defendants who might be eligible for appointed counsel nationally or at state and local levels. Under *Argersinger,* not all "indigent" defendants are eligible for appointed counsel; only those who may be imprisoned are eligible. If eligibility on this issue is to be decided on "predetermination by individual prediction" the process of estimating the poten-

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[25] 407 U.S. 24, 34 n.4.

[26] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1967).

[27] *See,* L. Silverstein, *Defense of the Poor in the Criminal Cases in American State Courts* 123 (1965).

[28] *See, e.g.,* LaFrance, *Criminal Defense Systems for the Poor* 50 Notre Dame Lawyer 41,100 (1974).

[29] Herman, *The Right to Counsel in Misdemeanor Courts* 60 (1973). Further, it is unclear whether these data include criminal ordinance violations for which imprisonment is a possibility. As well, excluding traffic offenses may seriously distort the number of *Argersinger*-type offenses, for many offenses that could be categorized as "traffic"—such as drunken driving and leaving the scene of an accident—call for imprisonment penalties.

[30] NLADA, *The Other Face of Justice* 70 (1973). Using this approach to dissect 1973 arrest statistics, it would be argued that an additional one million more persons were arrested for nontraffic misdemeanors in 1973 than had been arrested in 1971. See FBI, *Crime in the United States 1973* Uniform Crime Reports 121 (1974).

tial client population clearly will be difficult to quantify for any future period. Those jurisdictions, however, that adopt the "imprisonment in law" standard proposed in this study (that any defendant who is charged with an offense under which imprisonment is a permissible sanction qualifies initially for appointed counsel) could make projections annually by analyzing the number of defendants charged in previous years under statutes authorizing imprisonment.

The issue of how many nonfelony defendants qualify for appointed counsel only represents part of the problem in defining the eligible client population. Attention must also be focused on the issue of how many nonfelony defendants who may otherwise qualify under *Argersinger* will also qualify for appointed counsel on financial grounds.

Many gross national estimates of the percentage of the total defendant population who qualify for appointed counsel on financial grounds have been made over the years. Silverman, for example, in the 1965 American Bar Foundation study, estimated that 25 percent of those charged with misdemeanors are "indigent."[31] This figure was raised with considerable caution in 1965, and there is no basis for relying upon it today. NLADA, in its 1973 report, *The Other Face of Justice,* arrived at quite different estimates of indigency. Based upon surveys conducted in over 1,300 counties, NLADA determined that the average rate of indigency among felony defendants is 65 percent, while the average rate of indigency among nonfelony defendants is 47 percent.[32] Although NLADA asked judges in the survey to give both percentages and their basis for determining indigency, only the percentage estimates were used in its report. Thus the 47 percent figure used, aside from only reflecting the rough estimates of individual judges, does not truly reflect the tremendous variance in and confusion over what the criteria to be used in determining indigency were, nor does it reveal the deficiencies in relying upon mailed questionnaires.

There are dramatic differences in the financial eligibility determination process around the country and even among judges within the same court. Some judges within the Boston Municipal Court, for example, simply appoint counsel for virtually all defendants who request it. In other jurisdictions, appointed counsel will be refused for any defendant securing release on bail. Findings in Birmingham and Cleveland illustrate the use of questionnaires, court record surveys, and census tract analysis for local predictions of demand for constitutionally required appointed counsel and emphasize the need for careful study of this issue in all jurisdictions. National estimates are not very helpful, therefore, in the form presented by NLADA. Estimating the counsel-eligible client population for nonfelony cases will require an assessment within state and local jurisdictions under both *Argersinger* predetermination requirements and financial eligibility requirements without the benefit of comparative information.

More specifically, data collection at state and local levels should focus on substantive and procedural criminal law reform, defense systems and manpower needs, and methods for monitoring defense services. Planning suggestions will now be offered in each of these three areas.

B. Priority Areas for Local Planning and Action

1. *Substantive and procedural criminal law reform.* Changes in substantive and procedural criminal law will be needed in most jurisdictions in order to achieve many of the improvements called for.

a. *Court rules governing appointment of counsel.* Initially, a review must be made of the court rules or legislation that govern the appointment of counsel in nonfelony cases. This study makes several recommendations which, to be implemented, will require alterations in the court rules or statutes of most states. These recommendations involve: (1) the offenses for which appointed counsel might be required; (2) the standards of financial eligibility for appointed counsel; (3) the time and method of appointment of counsel; and (4) the standards for waiver of counsel.

b. *Legislation for public defender and assigned counsel systems.* Along with reviewing the existing rules governing appointment of counsel, jurisdictions must examine the need for revising existing legislation or enacting new legislation concerning defense systems for nonfelony cases. Some states, such as Ohio and Maine (which were visited by our staff), had neither state-supported public defender systems nor any other formalized system for providing appointed counsel. Although no single model may respond equally to the problems and needs of all jurisdictions, mixed systems (a coordinated public defender system, combined with a formalized assigned counsel system) offer considerable promise in alleviating nonfelony caseload pressures. However, jurisdictions must make their own assessment of system needs in the nonfelony area, since few programs of any type around the country (public defender, assigned counsel, mixed system) are currently providing adequate services in the nonfelony area.

Regardless of what type of system is eventually devised, analysis must be made of legislative authorization of appointment of counsel. Inquiry should begin immediately into such issues as whether existing legislation authorizes either the use of public defenders for nonfelony cases or the use of state funds to pay assigned counsel adequate compensation for such cases. In drafting new legislation, jurisdictions are encouraged to consider the recommendations presented here. In addition, jurisdictions should review the legislative authorization in states that already have state public defender systems. Jurisdictions should also review student rules as they relate to law student assistance in nonfelony cases.

c. *Review of criminal statutes and ordinances.* Many of the problems now confronting the lower criminal courts cannot be solved simply by adding more competent lawyers to represent nonfelony defendants. Some conduct now defined as criminal in state statutes and ordinances places impossible burdens upon lower court judges and supporting personnel. This is true both in terms of caseload pressures and in terms of a criminal court's inability to deal with certain social problems that are rarely resolvable through the use of criminal sanctions.

Argersinger compels a dramatic increase in required counsel for defendants charged with nonfelony offenses. If, prior to *Argersinger,* it made little sense from a public-policy point of view to process certain types of offenses (such as public drunkenness, consensual sexual offenses, marijuana possession, etc.) through the criminal courts, it makes even less sense to do so now given the additional cost of providing counsel to persons charged with these offenses. Thus, as part of any law reform planning on *Argersinger*-related issues, jurisdictions must assess the costs of an overreaching criminal law.

Overcriminalization is an issue that must be confronted when planning for defense systems that comply with *Argersinger.* In the short term, this involves eliminating imprisonment as a possible sanction for offenses in which imprisonment is a rarely used or undesirable option. This, in turn, would eliminate the need for *Argersinger* appointed counsel for defendants charged with those offenses. On a long-term basis, *Argersinger* hopefully will be extended to all criminal defendants. To prepare for this likelihood, jurisdictions will also have to begin to determine what conduct now defined as criminal should be decriminalized.

Some states, such as Massachusetts, have

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[31] *See* Silverman, *Defense of the Poor* 125 (1965). He also estimated that 60 percent of those charged with felonies would be defined as being indigent. The distinction was drawn largely on the basis that misdemeanant defense takes less time and is therefore less expensive. Because of this, more defendants could afford the cost of counsel in misdemeanor cases, assuming the economic status of defendants for the two types of offensses was relatively similar.

[32] NLADA, *The Other Face of Justice* 71 (1973).

already begun this process through the decriminalization of public drunkenness. Others are beginning to follow this lead. To determine the impact of continuing to treat conduct such as public drunkenness as criminal, jurisdictions should initiate careful research projects that assess the costs and benefits of current enforcement practices.

2. *Defense systems and manpower needs.* Before appropriate judgments can be made on the composition of a defense system and on manpower needs for nonfelony representation, careful research and planning must be initiated. This process must include: (1) data collection; (2) program-need analysis; and (3) program development.

a. *Data collection.* Although the following is not meant to be exhaustive, it does reflect areas in which data are needed in individual jurisdictions to make sound decisions on defense systems and manpower needs:

- Total annual nonfelony court caseloads, broken down by charge and disposition;
- Total annual number of individual nonfelony defendants;
- Total annual number of nonfelony defendants who receive appointed counsel under existing standards, and percentage of total number receiving public defender and assigned counsel;
- Total annual number of nonfelony defendants who are unrepresented by counsel;
- Existing number of lawyers currently utilized annually to provide nonfelony services through: (1) public defenders and (2) assigned counsel; and average caseloads in each category;
- Cost of retaining effective private nonfelony counsel;
- Existing numbers of supporting personnel currently utilized annually to support nonfelony legal services (public defender and assigned counsel) in the following areas: (1) administrative; (2) investigative; (3) social service; (4) clerical; (5) law students;
- Funds utilized annually for expert witnesses and other litigation costs (public defender and assigned counsel);
- Total annual budgetary support for nonfelony defense services, sources of such support, and relationship of this support to support given to other criminal justice services. Budgetary analysis should include salary breakdowns for public defenders and other personnel and supporting staffs, and fee breakdowns for assigned counsel;
- Extent and nature of training and education programs devoted to nonfelony representation;
- Description of how and when nonfelony assignments are made to public defenders and assigned counsel, including method and time of appointments;
- Potential number of lawyers available to provide nonfelony representation (both total number of lawyers and total number of lawyers with criminal trial experience;
- Potential number of law students available to assist in nonfelony representation.

Using sampling and survey research techniques, our staff began preliminary data collection in selected jurisdictions in many of these areas. Annual court caseloads emerged through carefully constructed docket surveys in Cleveland; the potential number of lawyers available to provide nonfelony defense in Saco was determined in conjunction with local bar association officials.

b. *Analysis of program need.* After collecting relevant data and conducting other forms of necessary legal research as described earlier, a planning group could then begin to make an assessment of program need. This assessment might include: (1) a review of the standards and proposals made in this and other comparable or related studies; (2) an analysis of the relevancy of such proposals to the jurisdiction being studied and a comparison of the proposals to existing programs; and (3) a formulation of defense system goals and objectives coupled with short- and long-term programs and strategies for achieving these goals (including further research and planning, program development and implementation, experimentation, and evaluation studies).

In undertaking this type of analysis, certain priorities should emerge in research and program development. Some of these priorities will now be examined.

c. *Program development and research priorities.* In order to undertake an effective analysis of program needs, certain types of research studies will have to be done, and alternative strategies will have to be tested. Some of the more important of these are as follows:

- Determination of annual population to be served: estimation of total annual number of nonfelony defendants who will qualify for appointed counsel on the basis of preferred standards (*i.e.,* "imprisonment-in-law" and Bureau of Labor Statistics financial eligibility standards);
- Determination of number of lawyers and supporting personnel needed to serve eligible nonfelony defendant population: this would include an assessment of suitable average caseloads for individual public defenders and assigned counsel;
- Determination of alternative strategies for providing defense services: to a certain extent, this determination can be made on a cost-benefit analysis basis.

This alone, however, would be an insufficient type of system to use. Heavy consideration must be given to the potential quality of service and other values. Many studies have concluded, for example, that a substantial percentage of criminal cases can best be handled by a public defender system, not only because of cost benefit analysis, but also because of greater expertise and better access to supporting services. This has recently been countered by arguments, such as the ones made in this study, that there is a critical need to involve the private bar more actively in criminal cases. The result of this debate has generally been support for a mixed system approach to defense systems.

In summary, a determination on the best strategies for delivering defense services, along with being made on a cost-benefit analysis basis, must be made by factoring in certain values and assumptions. Most of these values and assumptions have been summarized, aside from this study, in a variety of recent studies by groups such as the American Bar Association, NLADA, and the National Advisory Commission on Criminal Justice Standards and Goals.

In undertaking this type of research and development and in ultimately developing both short-term and long-range programs (including new forms of defense services, new training programs, etc.), jurisdictions may want to obtain the consulting services of groups such as the National Legal Aid and Defender Association. The Law Enforcement Assistance Administration should provide financial support to interested jurisdictions to achieve this end.

3. *Methods for monitoring defense services.* Finally, state and local planners must focus attention on the need to set standards for, and continually monitor, the quality of defense services. Earlier in this summary, it was noted that standards for effective assistance of counsel are critically needed for nonfelony cases in the following areas: time of appointment; consultation with defendant; extent and type of preparation; protection of legal rights; concern with dispositional alternatives; and caseload limits.

We have suggested that standards in these areas should be further refined within individual jurisdictions through court decision, court rule, legislation, and administrative rulemaking by public defender agencies. Jurisdictions can easily determine the need for such standards by analyzing what now exists within their respective boundaries. While considering the standards specifically proposed in this study, jurisdictions should also examine standards proposed by the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. Individual public defender agencies should also review proposed standards being developed by the National Legal Aid and Defender Association.

Once standards are formulated through the various approaches described previously, attention must be directed to methods for monitoring the actual implementation of quality nonfelony defense services. Earlier in this summary, we suggested that monitoring can be achieved in the following ways:

- Increased monitoring by the trial court;
- Increased monitoring by public defender agencies;
- Establishment of minimum requirements for public defender employees through collective bargaining;
- External monitoring and evaluation of public defender performance;
- Improved grievance procedures for defendants and monitoring of private and public counsel performance by bar associations and the courts. On a long-range basis, jurisdictions should implement most or all of these methods of monitoring defense services, because more than one method is needed to ensure quality representation and accountability. Initially, however, priority concern might be given to increased monitoring by public defender agencies in those jurisdictions that have such agencies. As one of our planning efforts, we examined how an internal monitoring process might function in one selected public defender agency, the Massachusetts Defenders Committee.

The emphasis in this planning section has been placed primarily on structuring change in the context of defense services for nonfelony defendants. Although the mere provision of lawyers for eligible defendants will not by itself reverse a century of neglect in the lower courts, *Argersinger v. Hamlin* demands, at the very least, an analysis and reevaluation of nonfelony court and client needs. In the entire study, we have attempted to anticipate the problems raised by the decision, but only action by local officials can fulfill the mandate of *Argersinger.*

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