THE IMPACT OF ARGERSINGER – ONE YEAR LATER

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I. INTRODUCTION

The impact of United States Supreme Court decisions on the administration of criminal justice by police and lower courts in this country has been the subject of extensive research.[1] A number of empirical studies on the impact of *Mapp v. Ohio* (1961) (Kuh, 1962; Oaks, 1970), *Miranda v. Arizona* (1966) (Reiss and Black, 1967; Yale Law Review, 1967), *Gideon v. Wainwright* (1963) (Blumberg, 1966; Sudnow, 1965) and in re *Gault* (1967) (Duffee and Siegel, 1971) have indicated that Supreme Court decisions have a much smaller impact upon police and court practices than might be expected and that systemic requirements of criminal justice agencies frequently override and suppress the policy objectives of these decisions. The result is the routinization of due process in a way which prevents its requirements from substantially interfering with the operation of the systems involved and the perversion of these requirements to serve organizational ends rather than the ends of justice. These studies raise substantial questions as to the efficacy of attempting to alter the operations of the criminal justice system through constitutional rule-making by the courts.

Ever since the decision of *Gideon v. Wainwright* (1963) it has been assumed that the legal rights of indigent criminal defendants could be protected by the introduction of adversary legal counsel acting as an outsider-watchdog to challenge every attempt to prejudice the rights of his client. Overlooked in this assumption is the fact that the lawyer, even the private lawyer, is as much a part of the system as the policeman and the prosecutor. As a constant participant in the criminal justice system, he is as much subject to the organizational demands of that system as are the other participants (the judge, the prosecutor, police, probation officers, etc.), and his need to "get along" with other members of the system often nullifies his adversary role as champion of the rights of his client (Blumberg, 1966; Sudnow, 1965; Skolnick, 1967).[2]

Although the extension of the right to counsel for indigents

at all important stages of criminal and quasi-criminal proceedings has been continuous since *Gideon* (1963),[3] the process has been cautious and deliberate. It is as if the Supreme Court were proceeding slowly in order to allow the states sufficient time to adjust to the new requirements of its decisions and to test their workability. This has been nowhere more apparent than in the case of the right of counsel for indigent misdemeanants. There was a nine-year gap between the Supreme Court's decision in *Gideon* (1963) and its recent decision in *Argersinger v. Hamlin* (1972), in which the question of the right of indigent misdemeanants to free counsel was decided, though the question was presented to the court several times in the interim.[4] Undoubtedly one factor in the delay in resolving this question was the assumption, held by many members of the legal profession, that *Gideon* was already placing severe manpower and financial burdens on the legal profession and that the addition of misdemeanor representation for indigents might create such an overload of the system that it would collapse under the weight (Iowa Law Review, 1970: 1249, 1258).[5] Thus, even though the language employed by the Supreme Court in *Gideon* implied that the right to free counsel was probably guaranteed under the Sixth Amendment to at least some misdemeanants, the Court deferred a ruling on the exact extent of that right. The result of that decision in 50 states was predictable: a variety of different lines were drawn as to where the cut-off point came, and, with a few exceptions, the states adopted a rule which placed minimal demands on the public treasury.[6] With the diversity of rulings in federal and state courts (sometimes within the same state) it became incumbent upon the Supreme Court to rule on the issue which it had left hanging since *Gideon.*

The case of *Argersinger v. Hamlin* (1972) came to the Supreme Court from Florida, like its predecessor, *Gideon.* Argersinger, an indigent, had been charged with carrying a concealed weapon, an offense punishable under Florida law with imprisonment up to six months and a $1,000 fine, but had actually received a sentence of 90 days in jail. He had been tried before a judge without counsel. The Florida Supreme Court, in denying his habeas corpus petition which alleged denial of his Sixth and Fourteenth Amendment right to counsel, ruled 4-3 that the right to counsel extended only to trials for non-petty offenses punishable by *more* than six months of imprisonment.[7] The United States Supreme Court reversed, holding that, absent a knowing and intelligent waiver, no person may be imprisoned

for any offense, whether classified as petty, misdemeanor or felony and regardless of the duration of the confinement, unless he was represented by counsel at his trial.

It is not my purpose here to examine the reasoning by which the Court arrived at this result. The decision was unanimous, although some of the Justices arrived at the result by different routes. Justice Douglas' majority opinion was supplemented by the separate concurring opinions of Chief Justice Burger, Justices Brennan and Stewart, and Justices Powell and Rehnquist. My purpose in discussing the decision here is limited to the Justices' assessment of the problems the decision would cause for the administration of justice in the lower criminal courts. Each opinion indicated a sensitivity to the manpower and financial problems canvassed above and the impact the decision would have in the states and localities across the country. One of the purposes of this paper is to match the Justices' forecasts against the actual impact the decision had in the year following its pronouncement.

Justice Douglas, who spoke for the majority, disagreed with the assertion[8] that the nation's legal manpower resources were insufficient to meet the requirements of the decision, pointing to the 335,200 registered attorneys and the 18,000 new admissions to the bar each year. He suggested[9] that a "partial solution" to the problem of minor offenses would be to de-criminalize them and transfer their regulation to non-judicial agencies, such as detoxification centers, narcotics treatment centers, social service agencies and specialized administrative bodies. He pointed out[10] that the great number of traffic cases are rarely punished with imprisonment and thus would fall outside the requirements of the decision. Justice Douglas concluded his opinion with the following admonition, which was doubtless meant to be helpful:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts (*Argersinger*, 1972: 40).

Although this remark suggests that the judge or magistrate is to make an assessment as to the seriousness of the case and the kind of penalty he will impose in the event of conviction *at the outset of the trial* of the misdemeanor case, it is obvious from previous cases that he must actually make this assessment

before any plea is entered to the charge and, in fact, at the time of the defendant's first appearance before him.[11] At this time he ordinarily has no more than a bare statement of the charge, together with whatever additional information can be supplied by the prosecutor (assuming the prosecutor is present) or by the arresting police officer. With the lack of such information and under the pressure of a heavy arraignment docket the magistrate might well be disposed to establish his own fixed categories of imprisonable and non-imprisonable misdemeanors at variance with the state or local law in order to speed the determination as to the need for counsel.[12]

Chief Justice Burger's concurring opinion addressed itself almost entirely to this problem. He suggested that the prosecutor assist the magistrate in making a "predictive evaluation" of each case to determine the likelihood of imprisonment in case of conviction. In jury cases, Justice Burger asserted, the prosecutor should be prepared to inform the judge as to any prior record of the accused, the general nature of the case against the accused, the severity of the harm to the victim, the impact on the community and other factors relevant to the sentencing process; in non-jury cases the facts at least as to the prior record of the accused should not be revealed to the judge (*Argersinger,* 1972: 42).

The concurring opinions of Justices Brennan and Stewart suggested that supervised law students might be used as an additional resource for handling the expected additional load on defender services (*Argersinger,* 1972: 40-41).

The concurring opinions of Justices Powell and Rehnquist (*Argersinger,* 1972: 44-66) were the most critical of the approach taken by the majority. They foresaw numerous legal and practical problems arising as a result of the decision. First, they expressed doubts that the rather wooden standard adopted by the majority, which limited the right to counsel to those cases where a sentence of imprisonment was imposed, could, or would, withstand the test of time. They pointed out that there are other punishments and disabilities resulting from misdemeanor conviction of sufficient seriousness and consequence to make the denial of counsel a denial of due process. Secondly, they predicted that equal protection problems might arise from indigents being favored over those who were not indigent but too poor to comfortably hire counsel for their defense. They foresaw additional equal protection problems arising from disparities in practice between judges and between localities within

a state depending on whether the judge or judges of the locality appoint counsel across the board and leave open the option of imprisonment or whether they divide all cases into imprisonment cases and non-imprisonment cases before trial.[13] Equal protection problems could also be presented in those states which impose jail time for failure to pay fines, where indigents might be subject to no punishment without counsel, whereas the non-indigents would be subject to punishment where only fines were imposed.[14]

To avoid these equal protection problems and to preserve a range of sentencing options, Justices Powell and Rehnquist predicted, most judges would probably appoint counsel in all misdemeanor cases where there was the remotest possibility of a jail sentence. This would impose an enormous financial and manpower burden on the states. It was unrealistic, they claimed, to suggest that the implementation of the new rule would require no more than 1,575 to 2,300 full-time lawyers, because such lawyers were not evenly distributed within the states and not available in many localities, particularly small, rural counties. "In few communities are there full-time public defenders available for, or private lawyers specializing in, petty cases" (*Argersinger,* 1972: 57).

Finally, Justice Powell and Rehnquist predicted that the most serious and likely impact of the Court's holding in *Argersinger* would be a further contribution to the endemic problems of court congestion and "assembly line" justice. They viewed with some misgivings the zeal of "young lawyers, fresh out of law school, [who] will receive most of the appointments in petty offense cases" and who, in their eagerness to make a reputation, gain courtroom experience and add to their income, will raise every procedural point possible in defense of their clients, stretch out the process of litigation, increase costs to the public and add only further to the intolerable delay and congestion in the courts (*Argersinger,* 1972: 58-59).

The opinions in *Argersinger v. Hamlin* (1972) raise a host of empirical questions. Among them are the following:

1. Is it true, as Justice Douglas suggests, that the great majority of misdemeanor cases are minor traffic cases in which imprisonment is rarely, if ever, imposed, so that the additional burdens necessitated by appointment of counsel in other cases do not lie beyond the capacity of existing legal resources to handle?

2. Is there any movement by the states, as the result of *Argersinger,* to de-criminalize certain types of misdemeanors and shift their management to non-judicial agencies?

3. Do courts now, as the result of *Argersinger,* make a preliminary predictive assessment as to possible sentences in each case or divide misdemeanor cases into imprisonable and non-imprisonable categories? Do prosecutors assist judges and magistrates in making this determination in specific cases, as Justice Burger suggests they should?

4. Has *Argersinger* introduced adversariness into the prosecution and trial of misdemeanor cases? Has it resulted in more not guilty pleas? Or has it resulted, instead, in delay in the resolution of cases and court congestion?

5. What has been the impact of the decision on legal manpower resources? Has the decision required the hiring of additional prosecutors or the shifting of prosecutors from felony to misdemeanor cases? Has it had the effect of increasing the number of appointments of counsel in states or localities where the appointed counsel system is used, or forced increases in the size of the staffs of public defenders in jurisdictions where public defenders are used? What other resources (*e.g.,* law school student defenders or prosecutors) have been tapped? Has the decision had a differential impact on localities depending on their size, the greatest burden falling on small, rural counties, as Justice Powell's opinion suggests?

6. Is there any indication that indigents are being favored over non-indigents in the ways predicted in Justice Powell's opinion as a result of the *Argersinger* decision?

7. Is there any indication that sentences for misdemeanors are varying from county to county *within* states depending on each judge's decision as to how many cases he can afford to categorize as imprisonable?

II. RESEARCH PROCEDURES

In order to answer some of these questions a questionnaire was mailed to district, county and city attorneys in 280 counties in all fifty states.[15] In the first mailing of the questionnaire in March of 1973, I selected five counties[16] from each state where it was possible to do so.[17] Since I wanted to examine the differential impact of *Argersinger,* if any, on jurisdictions depending on population size, I divided counties into three categories: *small* (population less than 25,000 by 1970 census figures); *medium* (population between 25,000 and 225,000); and *large*

(population greater than 225,000). The assumption was made that counties of less than 25,000 population would be rural counties with limited financial and legal resources and that counties or cities of more than 225,000 population would be metropolitan centers with large judicial dockets and a relatively plentiful supply of lawyers; counties or cities within the middle range (population between 25,000 and 225,000) were assumed to be of a mixed character, some rural but containing towns of fairly substantial populations, some suburban, and some urban but not major metropolitan centers. An effort was made to obtain a response to the questionnaire from at least one of each of the three categories of counties within each state.[18] The first mailing was to 247[19] counties and cities, from which, eventually, 177 responses (71.7%) were received after several follow-up mailings. This was followed several months later by a second mailing to 33 additional counties, cities and towns in an effort to obtain a better representation of categories from some of the states, which increased the total mailings to 280 counties and municipalities. There were 23 responses from recipients of the second mailing, thus increasing the sample size from 177 to 200, but leaving the response rate approximately the same as before (200/280 or 71.4%). From this sample of 200 counties and cities from which replies were received, 66 were in the *small* category, 85 were in the *medium* category, and 49 were in the *large* category. Inasmuch as I was primarily interested in the situation prevailing in misdemeanor courts, whenever the respondent indicated that he (the county or district attorney) did not have jurisdiction over misdemeanor cases, I made an effort to obtain a reply from the local prosecutor (usually a city attorney) who handled misdemeanor cases. It was not always possible to do so. A complete representation of all categories of counties was achieved in 40 of the 50 states.[20]

III. FINDINGS

Six questions were asked in the questionnaire mentioned in the previous section. For the sake of convenience and clarity, in this section each question will be stated in the form it appeared in the questionnaire. Then, where appropriate, the question will be followed by a table tabulating the data received in answer to the question, and the table will be followed by a discussion and interpretation of the data.

Question One: *Are you interpreting the decision in* Argersinger *to include ordinary traffic misdemeanors?*

(The respondent was given the choice of answering "Yes" or "No" and the opportunity of adding a comment to his answer.)

The survey produced 153 "Yes" answers to the first question (76.5%), 43 "No" answers (21.5%) and 4 blank answers (2%). However, these results are unclear because of the ambiguity inherent in the question, which was discovered, unfortunately, too late to change. The ambiguity is contained in the phrase "ordinary traffic misdemeanors." What I meant to convey by this phrase was non-serious traffic misdemeanors carrying minimal penalties and thus excluding such offenses as drunk driving, hit-and-run, reckless driving and committing a traffic violation while under license revocation or suspension. In other words, I was inquiring whether judges or magistrates in the respondent's jurisdiction appointed counsel in such cases or whether they considered *Argersinger* inapplicable because there was no real possibility of imprisonment in the case of conviction. The comments following the affirmative and negative answers of many respondents indicated that the answer in both cases was in reality the same: *e.g.*, "Yes, if there is a possibility of jail sentence" and "No, except in cases of DWI, hit-and-run, reckless and driving while revoked" (where there is a realistic possibility of a jail sentence being imposed). It can be stated with confidence only that the great majority of jurisdictions follow the holding in *Argersinger* and are appointing counsel in traffic cases if there is a realistic possibility of imprisonment, but are not appointing counsel for most non-serious traffic misdemeanors since usually only fines are assessed in these cases.[21]

There were, nevertheless, several interesting variations to the standard answer described in the preceding paragraph. In Massachusetts, by court rule,[22] private counsel or a public defender is routinely appointed for all indigent misdemeanants, including traffic misdemeanants, whenever the offense carries a possible jail sentence. Thus, in Massachusetts there is no preliminary decision by the judge or magistrate as to the actual imprisonment possibilities of the case and as to the necessity of appointing counsel. Other states and localities[23] may follow the same practice, especially if there is a public defender system in operation which handles misdemeanor cases, but it is impossible to tell how many do since the question was not asked. Some large cities[24] arrive at the same result, in effect, by following the practice of having attorneys present in court on arraignment day to advise all misdemeanants processed through court on

that day of their rights and how to plead to the charge. Whether these "house counsel" are appointed for and continue to represent indigent defendants who plead not guilty or whether separate appointments are made is not clear. Three states (California, Minnesota and Texas)[25] appear to have precluded the application of *Argersinger* to minor traffic misdemeanors by removing them from the cases for which imprisonment may be imposed. A few local jurisdictions — mostly rural counties in the South —— are ignoring the *Argersinger* decision altogether, or are ignoring it to the extent of not advising the defendant of his right to counsel and not appointing counsel for him unless he specifically demands one.

> *Question Two*: *Have you noticed any increase in the number of misdemeanants pleading not guilty after being advised of their right to counsel since* Argersinger? ("Yes" or "No" choices were provided.) *If your answer above was "Yes," what is your best estimation as to the approximate percentage of increase of those pleading not guilty?* (Space was provided for inserting percentage figure.)[26]

It will be seen from Table 1 below that *Argersinger* has not had the effect of greatly increasing the number of not guilty pleas entered to misdemeanor charges.[27] Only 80 counties and cities, or 40% of the total sample (200), indicated any increase since the *Argersinger* decision and, of these, more than half answered that it was an increase of 20% or less. When the sample is broken down into small, medium and large-size counties, it appears that the greatest effect was felt in medium-sized counties (25,000-225,000 population); 44.7% of these counties indicated an increase in the number of not guilty pleas, most answers (15.3% of that group) falling within the range of a 5% to 20% increase. The least effect was felt in large counties (over 225,000 population), where only 34.7% indicated any increase, and again most answers (14.3%) indicated only a moderate increase of from 5% to 20%. Thirty-eight percent of the small counties (less than 25,000 population) noted an increase, but here the amount of the increase was greater, most answers (13.6%) falling within the range of a 21% to 50% increase.

It would appear that *Argersinger*, so far, has not had the effect of introducing a great amount of adversariness into the system by changing the nature of the pleas substantially or requiring many more trials. Many respondents in their com-

TABLE 1: INCREASE OF MISDEMEANANTS PLEADING NOT GUILTY SINCE ARGERSINGER BY COUNTY POPULATION SIZE

County size	(1) Yes	(2) Breakdown of "Yes" Answers: Amount of Increase Where Specified[a] <5%	(3) 5-20%	(4) 21-50%	(5) >50%	(6) No	(7) No Answer	Totals of Columns 1, 6 & 7
small (N=66)	25 (38%)[b]	2 (3%)	6 (9.1%)	9 (13.6%)	3 (4.5%)	38 (57.5%)	3 (4.5%)	66 (100%)
medium (N=85)	38 (44.7%)	7 (8.2%)	13 (15.3%)	10 (11.8%)	3 (3.5%)	45 (53%)	2 (2.3%)	85 (100%)
large (N=49)	17 (34.7%)	2 (4.1%)	7 (14.3%)	4 (8.2%)	1 (2%)	30 (61.2%)	2 (4.1%)	49 (100%)
Totals (N=200)	80 (40%)[c]	11 (5.5%)	26 (13%)	23 (11.5%)	7 (3.5%)	113 (56.5%)	7 (3 5%)	200 (100%)

[a]Since not all respondents gave an estimate of the amount of increase of misdemeanants pleading not guilty, the figures in columns 2-5 and the percentages below them do not, when added, equal the numbers in column 1.

[b]The percentages given here are the percentages of the total number of counties in the subsample — in this case (small counties), 25 being 38% of 66.

[c]The percentages given here in the Totals column are the percentages of the total number of counties in the sample (N=200). Thus, 80 is 40% of 200.

ments indicated that misdemeanor defendants still come to court with their minds made up to plead guilty and get the unpleasant business over with. Many more indicated that the most significant impact *Argersinger* has had is to simply delay the proceedings and defer until a later date the point at which defendant pleads guilty to the original charges against him or a reduced charge.[28] This may indicate that *Argersinger* may have the effect in the future of increasing the role of plea bargaining in misdemeanor cases, but it is unlikely that it will substantially increase the number of trials.

Why was the least effect on pleas experienced in the large counties? The data furnishes no satisfactory answer to this question; one can only speculate. It may be that the large number of cases in major metropolitan areas creates pressures on the system which produce various procedures for encouraging guilty pleas, such as plea negotiations, continuances and delays, or avoidance of the necessity of appointing defendant counsel by removing the threat of imprisonment (Mileski, 1971: 515-21). Another possible explanation is that increases in not guilty pleas (especially if the increase is slight) are less perceptible in a major metropolitan area where dockets are crowded than they are in medium-size and small counties where the numbers of cases are considerably less.

> *Question Three*: *Have you assigned any additional assistant district attorneys (if you have any) to that part of your staff which handles minor misdemeanor cases?* (Three alternative answers were provided: "Yes," "No," and "I am a one-man office, but have experienced an additional caseload since *Argersinger*." The last alternative was treated as a "No" answer and included in the results appearing in column 3 of Table 2 below. In case of a "Yes" answer, the respondents were directed to state how many assistant district attorneys were hired to handle minor misdemeanor cases as the result of *Argersinger* or shifted from the existing felony staff to the staff handling misdemeanors. The results from this part of the question appear in column 2 of Table 2 below.)

If *Argersinger* introduced adversariness into the handling of misdemeanor cases in lower courts by requiring the appointment of defense counsel for indigents, major strains would be expected in the prosecutor's office; he would be required to shift part of his staff prosecuting and trying felony cases to

misdemeanor cases and might further be required to hire additional lawyers to handle the increased case load. We see from Table 2 below that this has not happened to any significant degree. Of all the counties polled, less than 15% (29) of the

TABLE 2: INCREASE OF PROSECUTORS HIRED OR ASSIGNED TO HANDLE MISDEMEANOR CASES AFTER ARGERSINGER ACCORDING TO COUNTY SIZE

County size	(1) Yes	(2) Number of prosecutors hired or assigned	(3) No	(4) No Answer	Totals of columns 1, 3 & 4
small (N=66)	3 (4.5%)	3 part-time	62 (94%)	1 (1.5%)	66 (100%)
medium (N=85)	11 (13%)	12 full-time[a] 2 part-time	72 (84.7%)	2 (2.3%)	85 (100%)
large (N=49)	15 (30.6%)	33 full-time[a] 1 part-time	32 (65.3%)	2 (4.1%)	49 (100%)
Totals (N=200)	29 (14.5%)	45 full-time[a] 6 part-time	166 (83%)	5 (2.5%)	200 (100%)

[a]Some of the full-time help employed were law shool students who were not counted as part of the regular staff.

prosecutors indicated any increase in staffing whatever, with 83% indicating no change as the result of *Argersinger*. Moreover, the total number of personnel hired in all 200 counties were 45 full-time prosecutors (some of whom were law students from nearby law schools) and 6 part-time prosecutors. The greatest manpower needs were felt, as might be expected, in the large counties, with 30.6% indicating additional hiring or shifting of personnel to handle misdemeanor cases. The impact of *Argersinger* on the prosecutor's office declines as one goes to medium-size counties (13%) and small counties (4.5%).

One possible reason for the minimal effect just described has been suggested in the answers to Question Two. If most of the misdemeanor defendants are pleading guilty regardless of appointment of counsel, then there is really not much in the way of additional trial work for the prosecutor to do. In many jurisdictions throughout the country a prosecutor does not even appear in the lower courts on arraignment day and does not see the defendant until after a plea of not guilty has been entered and a trial date set.[29] The arresting officer presents the charge, and the magistrate arranges for bail and counsel and accepts the plea of the defendant. Therefore, unless the defendant pleads not guilty either *pro se* or through counsel, the workload of the prosecutor is not substantially affected.

This possible explanation is not contradicted by the fact that, while the large counties are those in which the *least* increase in not guilty pleas has been noted, they are the ones in which *most* additional hirings and appointments of prosecutors have taken place. For one thing, in large cities the misdemeanor dockets are so huge that prosecutors are often assigned to misdemeanor courts to help the court in the management and disposition of cases, even if most of the cases are disposed of by guilty pleas; this is less true in the case of counties of medium size, and hardly true at all in small counties. For another, even a small percentage increase in the number of not guilty pleas in large metropolitan counties can result in a sufficient number of additional cases to prosecute to final disposition to necessitate additions to the prosecutor's staff. Finally, it should be noted that finances for hiring additional prosecutors are least available in small counties as a rule, and increasingly available as the population of the county increases. This factor is at least partially responsible for the very small number of additional prosecutors hired in small counties, since many of the prosecutors in those counties indicated in their responses that they were overworked and needed assistance.

> *Question Four: What resources are available in your county, district or municipality to afford free legal counsel to indigents in criminal cases?* (The following alternatives were provided: "appointed lawyers from the local bar," "volunteer lawyers," "public defenders," "law school student defenders," and "others." The respondent was also provided space to add a comment to his answer.)

First, a few comments about Table 3 are required: (1) The figures and percentages in columns 1 through 5 do not add up horizontally to 100% of the sample. Many prosecutors indicated that more than one of the indigent legal defense systems listed in the questionnaire were in use in their counties. Thus, a county could be counted more than once in the table. (2) Since the term "volunteer lawyer" was not defined in the questionnaire,[30] there may be some error in the figures tabulated under this column. It may be that these figures should be consolidated with figures in the appointed lawyer column.

It would appear from Table 3 that in 1973 the public defender system was the system of preference in the majority of large counties; whereas the assigned counsel system was still preferred in small counties. Reliance on the assigned counsel system

TABLE 3: AVAILABLE LEGAL DEFENSE RESOURCES: PERCENTAGE USE BY COUNTY POPULATION SIZE

County size	(1) Appointed lawyers	(2) Volunteer lawyers	(3) Public defender	(4) Law school student defender	(5) Others[a]
small (N=66)	50 (75.8%)	2 (3%)	21 (31.8%)	1 (1.5%)	2 (3%)
medium (N=85)	52 (61.2%)	9 (10.6%)	38 (44.7%)	5 (5.9%)	4 (4.7%)
large (N=49)	26 (53.1%)	11 (22.4%)	33 (67.3%)	9 (18.4%)	6 (12.2%)
Totals (N=200)	128 (64%)	22 (11%)	92 (46%)	15 (7.5%)	12 (6%)

[a]The term "others" was found in the responses usually to refer to privately funded organizations of lawyers serving indigent persons, such as Legal Aid, or to federally-funded programs for the representation of indigent defendants.

steadily *decreases* as one moves from small counties to medium-size counties to large counties, while reliance on other systems of representation (volunteer lawyers, public defenders, law school student defenders and others) steadily *increases*. This result probably reflects the fact, noted in Silverstein's (1965: vol. 1, ch. 4) survey in the early 1960's, that the assigned counsel system becomes progressively more expensive and difficult to administer as the population size of the county increases, whereas the public defender system grows more economical and administratively easier to manage.

Perhaps the most noteworthy result of the survey was the startling increase in the use of public defenders in small and medium-sized counties: 31.8% of the small counties polled indicated the use of public defenders for indigent misdemeanants and 44.7% of medium-sized counties indicated the same. Nine years ago Silverstein's survey (1965: Vol. I, p. 15) revealed that the assigned counsel system was the only one used in about 2900 of the 3100 counties in the United States (93.5%), although at that time studies revealed the growing number and importance of public defender systems. The remarkable increase in public defender systems in small and medium-sized counties may be recent and at least partially attributable to *Argersinger*. Many respondents to the questionnaire indicated the recent enactment of state legislation authorizing public defenders on a state-wide or local-option basis,[31] and others[32] indicated that their county had recently contracted with a private lawyer or law firm to act as the county public defender to handle the increase in indigent representation brought on by the *Argersinger* decision. The growing preference for public defenders can probably

be attributed not only to savings in costs to the local jurisdictions but also to the administrative ease with which public defenders can process the vast number of defendants who plead guilty and the convenience of enlisting their aid in the determination of indigency (Silverstein, 1965: vol. 1, ch. 4). This may in the long run be the most significant effect *Argersinger* will have on the administration of criminal justice in the United States.

If there was any hope that the use of law school student defenders would substantially ease the burden of counties and localities in the representation of indigent misdemeanants,[33] that hope must be dispelled by the results of the survey. Only one of the 66 small counties, five of the 85 medium-size counties, and nine of the large counties availed themselves of this resource. In almost every case there was a law school nearby which made the use of law student defenders feasible. In most counties, however, there is no law school present or nearby.

> *Question Five*: *Are the courts in your county finding it necessary to make additional appointments for indigent misdemeanants?* or *Is the Public Defender's office in your county increasing the size of its staff to meet the increased case load?* (Three alternative answers were provided for each of these questions: "Yes," "No," and "Not applicable," with a space provided for an explanation of the "Not applicable" answer.)

Again, a word of explanation is required for Table 4: (1) The figures and percentages in columns 1 through 7 read horizontally do not add up to 100% of the sample for the same reason given in the explanation for Table 3. In some cases the counties had a variety of different methods of providing counsel for indigent misdemeanants and therefore were counted more than once in the table. (2) The figures in the "yes" and "no" columns under the headings "courts finding it necessary to make additional appointments" and "public defender finding it necessary to increase the size of staff" do not add up to 100% of the subsamples but do roughly reflect the proportions between assigned counsel systems (including "volunteer lawyers" and "others") and public defender systems in the counties. For instance, the sum of the "yes" and "no" columns under "courts finding it necessary to make additional appointments" in small counties exactly equals the number and percentage of small counties which have assigned counsel systems (50 or 75.8%). The same is true of the sum of the "yes" and "no" columns

TABLE 4: IMPACT OF ARGERSINGER ON APPOINTMENT OF PRIVATE COUNSEL AND PUBLIC DEFENDER SYSTEMS BY COUNTY SIZE

	Courts finding it necessary to make additional appointments?			Public defender finding it necessary to increase size of staff?			No Answers
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
County size	Yes	No	N/A	Yes	No	N/A	
small (N=66)	33 (50%)	17 (25.8%)	3 (4.5%)	1 (1.5%)	18 (27.3%)	3 (4.5%)	4 (6.1%)
medium (N=85)	41 (48.2%)	19 (22.4%)	9 (10.6%)	10 (11.8%)	24 (28.2%)	3 (3.5%)	6 (7.1%)
large (N=49)	23 (46.9%)	9 (18.4%)	1 (2%)	18 (36 7%)	15 (30.6%)	5 (10.2%)	6 (12.2%)
Totals (N=200)	97 (48.5%)	45 (22.5%)	13 (6.5%)	29 (14.5%)	57 (28.5%)	11 (5.5%)	16 (8%)

under "public defender finding it necessary to increase the size of staff" for large counties (33 counties or 67.3% of these responding to this question — see Table 3). The correspondence is not always exact, but the discrepancies can be explained by virtue of incomplete answers and the fact that some respondents answering the first part of Question Five may have included in "additional appointments" law school student defenders, volunteer lawyers and "other" systems of representation.

Several observations about the impact of *Argersinger* on the courts can be made from Table 4. The first is that the decision has had a notably greater impact on defense attorneys than on prosecutors. While there were no more counties indicating increases in the public defender's staff than in the prosecutor's staff (29 counties or 14.5% of the sample in both cases — *cf.* Table 2), the number of counties indicating the necessity of increasing the amount of appointments of counsel for indigents approached the 50% level (48.5%). There were no substantial differences between small, medium and large counties in this regard. However, there were substantial differences between small, medium and large counties in the impact of the decision on the public defender's office: in small counties only one out of 21 (4.8%) registered an increase in the size of the public defender's staff, whereas the ratio was ten out of 38 (26.3%) for medium-size counties and 18 out of 33 (54%) for large counties. These facts are consistent with the author's conclusion that the effect of *Argersinger* has been principally to increase the need for defense counsel to process the defendant through the system by negotiating guilty pleas and performing other stand-in functions necessary to give the appearance of procedural regularity and due process.

The second noteworthy fact revealed by the data is that the impact of *Argersinger* on legal manpower for defense purposes has not been severe. Over 50% of the respondents indicated no additional appointments and no increases in the size of the public defender's staff. While this may partially reflect lack of financial resources to pay additional defense counsel[34] and additional workloads for already existing personnel, the lack of any indication of a crisis situation in the comments of the prosecutors to the questionnaire suggests that *Argersinger* has had a much lesser impact on the legal system than was contemplated before or at the time of the decision. It seems quite apparent that it is only in the case of serious misdemeanors where imprisonment is likely and where defendants do not

waive counsel or plead guilty routinely that *Argersinger* could be expected to have a significant impact, and in such cases most states and localities afforded counsel for indigent misdemeanants prior to *Argersinger*. Thus, *Argersinger* has had little effect in changing the situations in which the need for counsel actually arises.

> *Question Six*: *Are you dividing minor misdemeanor cases into those in which you intend to ask for a jail term and those in which you intend merely to ask for a fine, and advising the judge at the time of arraignment what kind of penalty you will be seeking, so that he will have a preliminary basis for deciding whether assignment of counsel is required in a particular case?* ("Yes" and "No" alternatives were provided.) *If your answer to the above question is "No," do you leave the appointment of counsel in indigent cases entirely to the discretion of the arraignment judge or magistrate?* ("Yes" and "No" alternatives were provided, and a space was left for any comment the respondent wished to add to his answers.)

Question Six was asked in order to determine whether many prosecutors were following the suggestion of Chief Justice Burger[35] that they assist lower court judges in making a preliminary "predictive evaluation" of misdemeanor cases in order to determine which were likely to, or ought to, result in imprisonment of the defendant on conviction and which ought not. It was doubtless the Chief Justice's intention by this suggestion to ease the administrative burden of the lower courts in deciding the necessity for appointment of counsel in counties where the dockets were crowded with misdemeanor cases involving indigents. If that was the assumption underlying the Chief Justice's recommendation, the data present a rather curious picture: the counties which *most* frequently follow this procedure are small counties (36.4%), where presumably dockets are relatively uncrowded; the practice steadily declines in frequency as one moves from small counties, to medium-size counties (27%), to large counties (22.4%). In less than one-third of all the counties (29%) do prosecutors follow this practice; in almost two-thirds (65.5%) the prosecutors leave the decision as to the sentence-potential and necessity of appointing counsel entirely to the local magistrate. Many prosecutors, in agreement with Justice Powell, indicated in their comments to this question that they refrained from recommending sentences, or even from express-

TABLE 5: RESPONSE TO QUESTION OF WHO MAKES DETERMINATION AS TO NECESSITY OF COUNSEL FOR INDIGENT MISDEMEANANTS UNDER ARGERSINGER RULE BY COUNTY SIZE

County size	Prosecutor occasionally advises judge of sentencing recommendation at arraignment	Prosecutor routinely advises judge of sentencing recommendation	Prosecutor leaves decision as to necessity of appointing counsel entirely to judge	Other procedure[a]	No Answer
small (N=66)	0 (0%)	24 (36.4%)	39 (59.1%)	2 (3%)	1 (1.5%)
medium (N=85)	3 (3.5%)	23 (27%)	57 (67.1%)	2 (2.4%)	0 (0%)
large (N=49)	0 (0%)	11 (22.4%)	35 (71.4%)	1 (2%)	2 (4.2%)
Totals (N=200)	3 (1.5%)	58 (29%)	131 (65.5%)	5 (2.5%)	3 (1.5%)

[a]Question Six (see above) has two parts which can be answered four different ways: Yes/Yes (col. 1), Yes/No (col. 2), No/Yes (col. 3), and No/No (col. 4). "Yes/Yes" would appear to indicate that the prosecutor sometimes attempts to influence the appointment of counsel by expressing his view of the seriousness of the offense to the magistrate and his recommendation as to sentence in the event of conviction, and sometimes he leaves this decision (the need for the appointment of counsel in a particular case) entirely to the magistrate. The meaning of a "Yes/No" and "No/Yes" answer is fairly clear from the wording of the question and is summarized in the headings to columns 2 and 3. "No/No" would seem to be an impossible answer, but may reflect some procedure unknown to the writer.

ing their preliminary evaluation of the seriousness of the case, to the arraignment judge because they felt such a procedure would be improper and would have a prejudicial effect upon the fair consideration of defendant's case prior to the production of evidence. Others indicated that they had no occasion to make such a statement to the court inasmuch as they rarely attended the original arraignment of misdemeanants in the lower courts. This may explain why Chief Justice Burger's recommended procedure is less followed in larger counties than in smaller counties. Another explanation could be that the procedure is rarely used in counties where public defenders are routinely appointed for all indigent criminal defendants, as is most often the case in large counties.

IV. SUMMARY AND CONCLUSION

The nationwide survey just discussed showed that, while the great majority of misdemeanor courts were following *Argersinger* and appointing counsel for indigent misdemeanants whenever there was a realistic possibility of jail time being imposed in case of conviction, the effect of this compliance on the processing of misdemeanor cases through the courts and on the prosecutor's office and the bar was much less than had been expected prior to the decision. No substantial increase in the number of not guilty pleas entered to misdemeanor charges has resulted in the majority of jurisdictions polled. This may reflect the fact that misdemeanants are continuing in the great majority of cases to plead guilty to the charges placed against them even with counsel or that they are pleading guilty and signing waivers of counsel; or it may indicate that the courts are compensating for *Argersinger* by reducing the number and kinds of cases in which they impose jail terms so as to avoid the necessity of appointing counsel and reduce the possibility of not guilty pleas being made. The effect of *Argersinger* on the prosecutor's office was shown to be minimal, with less than 15% of the offices polled indicating any increase in staffing as a result of the decision and then with only minimal additions to the staff handling misdemeanor cases. The impact on defense counsel resources was of greater significance, the most noteworthy effect of *Argersinger* being a noticeable shift in favor of public defender systems, especially in counties with small populations where the appointed counsel system was previously and still is the system of preference.

All of these findings are consistent with the hypothesis that the effect of *Argersinger* has not been to increase the amount

of adversariness within the system but merely to increase the need for defense attorneys to process the defendant through the system in an expeditious way. Thus, *Argersinger* may have the effect of delaying the proceedings, of increasing the legal costs of such proceedings, and of routinizing procedures for handling misdemeanor cases, but it does not appear that it is having much effect in changing the nature of the process from one of negotiation to one of adjudication.[30]

It is necessary at this point to clarify what I mean by increasing the amount of "adversariness" in the system. "Adversariness," as the term is used here, means conduct consistent with the norms of the adversary system of justice.

Justifiers and eulogizers of the adversary system of justice have stated these norms in terms of challenge and the critical examination of governmental action. "The essence of the adversary system is *challenge*. The survival of our system of criminal justice and the value which it advances depends upon the constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process . . ." (Allen, 1963: 11). The adversary system, another source states, is based on the supposition that ". . . two adversaries, approaching the facts from entirely different perspectives and objectives and functioning within the framework of an orderly and established set of rules, will uncover more of the truth than would investigators, however industrious and objective, seeking to compose a unified picture of what had occurred" (American Bar Association, 1970: 3). Based on the presumption of innocence, the adversary model seeks to force the state to establish the defendant's guilt only by the introduction of competent evidence fairly obtained through constitutional procedures (Packer, 1968: 166). What is at issue, as much as the factual question of whether defendant committed the acts charged, is whether he has been fairly arrested, investigated and charged and whether he ought to be punished. The ideal role of defense counsel in the adversary process, therefore, is not merely that of investigator and presenter of facts in court; his role includes the function of challenging the constitutionality of the law and proceedings which have brought his client before the bar. Even when the "facts" are not in dispute, he is also supposed to present facts in mitigation of the crime, to persuade the adjudicator that, though his client may technically be guilty, he ought not be punished. If these, then, are important objectives of the adversary system of justice, it would seem *a trial*, during which

all issues bearing on defendant's legal and moral guilt are developed and given a full and fair hearing, is an essential part of the process and cannot be achieved through behind-the-scenes negotiation between the prosecutor and defense counsel.

Just as important as the foregoing goals is the requirement, perhaps necessary for public confidence in any system of justice, that the public, as well as defendants, *perceive* the process as fair and just. Often forgotten is the symbolic function of the public trial, the visible dramatization of the moral conflict between the offender and society and the confirmation of moral expectations (Arnold, 1935: ch. 6). Not until all relevant facts and circumstances surrounding the crime have been publicly aired is it felt that defendant's guilt or innocence has been truly established (American Bar Association, 1970: 4-5; Fuller, 1961: 35).[37] This objective of the adversary system, which has been enshrined in the Sixth Amendment public trial provision, is likewise frustrated by private plea negotiations between prosecutor and defense counsel.

In what sense are these norms of the adversary system relevant to misdemeanor prosecutions? It is true that the great majority of these cases involve no substantial issues of factual guilt and are frequently resolved without trial. But the same thing may be said of felony cases. As Justice Douglas observed in *Argersinger* (1972: 33), legal and constitutional questions raised by misdemeanor cases may be no less complex than questions which arise in felony cases. The difference, if there is one, is probably more one of degree than substance.

It is fairly clear by now that the process by which most criminal cases are administratively processed by negotiation between the prosecutor and defense counsel frustrates the objectives of the adversary system of justice. As the editors of the Harvard Law Review (1970: 1397-98) succinctly stated:

> Plea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials. The practice forfeits the benefits of formal, public adjudication; it eliminates the protections for individuals provided by the adversary system and substitutes administrative for judicial determinations of guilt; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sentencing decisions by introducing noncorrectional criteria. . . .

Moreover, the administrative process of plea negotiation changes the adversary role of defense counsel as trial advocate and combatant to that of negotiator. As Skolnick (1967: 68) points out: "What this situation leads to is a system where the prin-

cipal combatants are continually 'regressing' to a state of cooperation. This state, in turn, threatens to undermine the ethic of genuine conflict underlying the [adversary] system. . . ."

It may be, as Skolnick also points out in the article just quoted, that such negotiation and cooperation between defense counsel and prosecutor often accrues to the advantage of the defendant, an advantage which would not be realized were defendant forced to trial by the elimination of the option of plea bargaining. But this observation misses the essential point that the adversary system of justice is not constructed for the exclusive protection or advancement of the defendant's interests. No system of "justice" could make the claim of neutrality and objectivity if it were established to protect the rights of only one of the parties.

Therefore, what I mean by increasing "adversariness" in the criminal justice system is introducing an element which will ensure or make more certain that cases go to trial and that defense counsel performs his ideal role as defender of his client *in court*. There is very little evidence in the data discussed above which indicates that *Argersinger* has had this effect so far. It might take some far more radical measure than the mere introduction of lawyers into the defense of minor misdemeanor cases to ensure this result; it might take the total elimination of plea bargaining as an acceptable alternative to trial.

As was pointed out at the beginning of this article, previous studies have revealed that the impact of leading Supreme Court decisions on the operations of the police, courts and corrections systems in the United States has been surprisingly slight, considering the prestige and authority of the Court in our system of government and considering the breadth and scope of the decisions themselves. Lack of "impact," as the word is used here,[38] means not lack of *compliance* with the holding of the Court, but rather lack of effectuation of the policies underlying the decisions. Neither this study nor other impact studies reveal much deliberate evasion of the due process requirements laid down in the Court's decisions by agents of the criminal justice system. As the authors of one previous study (Duffee and Siegel, 1971: 546) put it:

> There appears to be agreement that the Court's lack of influence over frontline agencies (*e.g.*, police, trial courts and correctional agencies) is more accurately described in terms of misunderstanding rather than open conflict, misapprehension

> rather than insubordination. When judicial directives are not reflected in the daily operation of the system, it is often the case that the Court's message has been distorted to fit individual organizational needs. It is less often the case that organizational officials have received, understood, and then *knowingly ignored* Supreme Court decisions.

It may be assumed that the policy underlying the *Argersinger* decision was to introduce adversariness into the prosecution of misdemeanor cases and to ensure adequate legal representation of the indigent's case on trial, on appeal, and in the intelligent, voluntary and fair negotiation of guilty pleas.[39] The Court was not ignorant of the fact that there are substantial pressures on misdemeanor courts with overloaded dockets to dispose of cases rapidly, and was also, perhaps, not unaware of the fact that trials are atypical and that the usual role of counsel in misdemeanor court is not that of pleader of innocence but of negotiator for leniency (*cf.* Mileski, 1971: 491). The role of agent-negotiator is not the same as that of trial advocate (Aubert, 1969: 282-303), and, although lawyers customarily act in both roles in the performance of their duties, it is obvious from what has been said before that a conflict exists between the behaviors expected in each role in our adversary system. What the Court has overlooked in this and previous right-to-counsel cases is that defense counsel, be he appointed private counsel or public defender, is a member of a system which has systemic needs and demands which it enforces on its members through various forms of subtle, and not so subtle, pressures and sanctions (Blumberg, 1966). It may be presumed that in most cases defense lawyers desire to protect their clients, but the pressures imposed upon them by their own busy schedules and by the courts demanding the speedy disposition of cases may be sufficient to override a full-hearted commitment to exercise every fair and legal device at their disposal to improve the position of their clients.

In the final analysis, the conflict between the adversary model of criminal justice and the routine processing of guilty pleas which characterizes most of the activity in misdemeanor courts in the United States may be an ideological one: the advocate of adversariness sees justice as a matter of right and wrong to be adjudicated, not as a matter of conflict to be negotiated. He therefore wants to see the issues of right and wrong placed in open conflict and resolved by neutral observers. For him process (the contest) is more important than result.

NOTES

[1] For a review of the relevant literature, see Wasby (1970) and Becker and Feeley (1973).

[2] For further remarks concerning the author's conception of defense counsel's adversary role, see Section IV, *infra*.

[3] *Douglas v. California* (1963) (on appeal from conviction for serious crime); *Escobedo v. Illinois* (1964) (at time of post-indictment police interrogation); In re *Gault* (1967) (at adjudicatory hearing in juvenile delinquency cases); *United States v. Wade* (1967) and *Gilbert v. California* (1967) (at post-indictment line-up identification procedures); *Mempa v. Rhay* (1967) (at sentencing proceedings); *Coleman v. Alabama* (1970) (at preliminary hearings).

[4] *Winters v. Beck* (1966); *State v. De Joseph* (1966); *Cortinez v. Flournoy* (1966).

[5] Junker (1968) estimated that there were eight times as many indigent misdemeanor cases as indigent felony cases (not counting traffic misdemeanors) and that the number of lawyers working full-time on the prosecution and defense of such cases would be in the realm of from 15,000 to 20,000. Other studies have estimated the manpower needs for the representation of indigent misdemeanants alone (excluding traffic misdemeanors) as being between 1575 to 2300 lawyers working full-time (Iowa Law Review, 1970: 1261; President's Commission on Law Enforcement and the Administration of Justice, 1967: 56). The above-mentioned Iowa Law Review Note (1970: 1262) concludes: "To provide counsel to all indigent defendants accused of felonies, misdemeanors, and traffic offences would require . . . the full-time services of 13,006 to 13,281 attorneys: 1,014 for felonies, 1576 to 2300 for misdemeanors, and 10,417 for traffic offenses."

There is no agreement as to how many of the 335,200 enrolled attorneys in the United States are actually available for service in the representation of indigents. At the Airlie House Conference on Legal Manpower Needs of Criminal Law held in 1966, it was estimated that there were between 2500 and 5000 lawyers who accept criminal representation more than occasionally, but the number of private lawyers available for representation may far exceed this number (President's Commission on Law Enforcement and the Administration of Justice, 1967: 57).

Estimates of the financial costs of compensating lawyers for representing indigent misdemeanants vary between $50 million and $62.5 million annually under an assigned counsel system with an average payment of $50 per case and between $31.5 million to $46 million annually under a public defender system, assuming an annual disbursement of $20,000 for each defender. These figures may be compared with the combined state expenditures for the legal defense of indigent criminal defendants in 1966 of $17 million (President's Commission on Law Enforcement and the Administration of Justice, 1967: 56). It is apparent from this summary that notwithstanding that the number of admissions of new lawyers to the bar has been increasing in recent years, the fears of many members of the legal profession that extending the right of counsel to indigent misdemeanants would place impossible burdens on the system were not entirely without foundation.

[6] The latest law review count of states extending free legal representation to indigent misdemeanants prior to *Argersinger v. Hamlin* (1972) revealed that no less than 31 states regularly assigned counsel in less than felony criminal cases. See Creighton Law Review (1969). However, of the 31 states listed, 12 granted the right only in cases of "serious misdemeanors" (those carrying a penalty of imprisonment for six months or more and/or fine in excess of $500). When this number (12) is added to the number of "felony-only" states (19), we can see that the greatest number of indigent misdemeanants (most misdemeanors carrying penalties of less than six months in jail) in most of the states were not granted the right of counsel.

[7] *State ex. rel. Argersinger v. Hamlin* (1970); the Florida Supreme Court followed an earlier U.S. District Court decision, *Brinson v. State* (S.D. Fla. 1967).

[8] See footnote 7 of Justice Douglas' majority opinion (*Argersinger*: 37).

[9] See footnote 9 of the same opinion (*Argersinger*: 38).

[10] See footnote 10 of the same opinion (*Argersinger*: 38).

[11] In *White v. Maryland* (1963), it was held that the arraignment stage at which the defendant in a felony case enters his plea to the charge is a "critical stage" of the criminal proceedings requiring the presence and assistance of counsel. Although there may be no separate pretrial proceeding for the taking of pleas in most misdemeanor cases in the majority of states, it is plain that the uncounselled entry of a guilty plea prior to trial would be just as constitutionally infirm in misdemeanor cases as in felony cases. In *Escobedo v. Illinois* (1964) and *Miranda v. Arizona* (1966), it was held that a defendant may not be denied the presence and assistance of counsel at a pretrial custodial interrogation by the police. From the *Wade-Gilbert-Kirby* triad of cases (1967, 1967 and 1972) it appears that police may not conduct pretrial line-up identifications of defendants in the absence of counsel, once a formal charge has been filed and the prosecution begun. Therefore, the appointment of counsel at the very outset of the case is necessary if an investigation of the defendant's involvement in a crime is to continue beyond the stage of his arrest.

[12] Such a possibility was referred to in the course of Justice Powell's concurring opinion:

> . . . The rule laid down today will confront the judges of each of these courts with an awkward dilemma. If counsel is not appointed or knowingly waived, no sentence of imprisonment for any duration may be imposed. The judge will therefore be forced to decide in advance of trial — and without hearing the evidence — whether he will forego entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.
>
> . . . In resolving the dilemma as to how to administer the new rule, judges will be tempted arbitrarily to divide petty offense into two categories — those for which sentences of imprisonment may be imposed and those in which no such sentence will be given regardless of the statutory authorization. In creating categories of offenses which by law are imprisonable but for which he would not impose jail sentences, a judge will be overruling *de facto* the legislative determination as to the appropriate range of punishment of the particular offense (*Argersinger*: 52-53).

[13] From Justice Powell's concurring opinion:

> There may well be an unfair and unequal treatment of individual defendants depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair trial, even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory (*Argersinger*: 54).

[14] From Justice Powell's concurring opinion:

> A different type of discrimination could result in the typical petty offense case where judgment in the alternative is prescribed: for example, "five days in jail or $100 fine." If a judge has predetermined that no imprisonment will be imposed with respect to a particular category of cases, the indigent who is convicted will often receive no meaningful sentence. The defendant who can pay a $100 fine, and does so, will have responded to the sentence in accordance with law, whereas the indigent who commits the identical offense may pay no penalty. Nor would there be any deterrent against the repetition of similar offenses by indigents (*Argersinger*: 55).

[15] There are 3,049 counties in the United States according to the latest count (U.S. Department of Commerce, 1972). This pilot study attempts to present the situation which prevailed in those counties during the period April 1, 1973 to July 30, 1973 through a non-random, stratified sample.

[16] In a few cases (*e.g.*, in Virginia and Missouri) the jurisdictional units were independent cities.

[17] It was not possible to select five counties from Alaska, Delaware and Hawaii. Alaska has no counties but instead four judicial districts. Hawaii has only four counties and Delaware, three.

[18] Not all states had counties falling within all three categories. The following states have no counties falling in the *large* category (>225,-000): Alaska, Idaho, Maine, Mississippi, Montana, North Dakota, South Dakota, Vermont and Wyoming.

States which have no counties in the *small* category (<25,000) are: Connecticut, Delaware, Hawaii, New Jersey, and Rhode Island.

[19] Five to each state, except Alaska (4), Hawaii (4), Delaware (3) and Maryland (6): 250−4+1=247.

[20] The states where a complete representation was not obtained were: Alabama (no middle range counties reporting); Colorado (no small counties reporting); Delaware (no large counties reporting); Georgia (no small counties reporting); Massachusetts (no large counties reporting); New Hampshire (no small counties reporting); Ohio (no small counties reporting); South Carolina (no middle-range counties reporting); Virginia (no middle-range or large counties reporting); and Wisconsin (no large counties reporting).

[21] The traffic offenses most usually referred to as exceptions to the rule that traffic misdemeanors are non-imprisonable offenses were: driving while intoxicated, hit-and-run, reckless driving, driving while one's license is revoked or suspended, and the repeated traffic violation where state statutes often call for mandatory jail terms.

[22] Rule 79 of the District Courts.

[23] *E.g.*, Los Angeles, California; Philadelphia, Pennsylvania. (In Pennsylvania, counsel is not appointed at the district magistrate level where traffic misdemeanors are tried in a summary fashion by a judge without a jury. However, the defendant is entitled to a trial de novo on appeal to the next higher court, at which time counsel is routinely provided.)

[24] *E.g.*, Shreveport, Louisiana; Detroit, Michigan; Duluth and St. Paul, Minnesota.

[25] *California*: "Effective January 1, 1969, certain vehicle offenses were made infractions (§16, California Penal Code; §§ 4200 et seq., California Vehicle Code). An infraction is not punishable by imprisonment nor is the person charged entitled to a trial by jury or to have counsel appointed at public expense unless he is arrested and not released on his written promise to appear, his own recognizance, or a deposit of bail (see § 19, California Penal Code)." (Reply of respondent from California.)

Minnesota: "In 1971 the Legislature created a special class of offenses called 'petty misdemeanors' which are punishable by fine only, up to a maximum of $100. Most non-serious traffic misdemeanors fall into the class of 'petty misdemeanor' and therefore no counsel is supplied for indigent offenders in these cases." (Reply of respondent from Minnesota.)

Texas: ". . . most traffic misdemeanors in Texas are punishable by fine only." (Reply of respondent from Texas.)

[26] The respondent was directed to answer the questions in Question Two in relation to the approximate date on which his jurisdiction began following the practice of affording counsel in all misdemeanor cases where jail or prison sentences might be imposed, even if that practice preceded and anticipated the holding in *Argersinger*.

[27] It has been estimated that in misdemeanor cases the percentage of convictions obtained by guilty pleas may be as high as 95% (President's Commission on Law Enforcement and the Administration of Justice 1967: 9; Newman, 1966: 3, n. 1). Let us assume that there are in a hypothetical court 1,000 misdemeanants charged during a calendar year, 5% of whom plead not guilty (50). The following year the number of misdemeanants pleading not guilty increases to 60, the number of misdemeanants charged remaining the same (a 20% increase in the number of not guilty pleas over the number of the previous year). The percentage of convictions now obtained by guilty pleas in this hypothetical court has dropped to 94% (940). Therefore, it takes a 20% increase in not guilty pleas to reduce the percentage of convictions obtained by guilty plea by one percentage point. It is for this

reason that the author has concluded that the effects of the percentage increases in not guilty pleas registered by his data has had a "minimal" effect on the administration of justice in misdemeanor courts, at least so far as trials are concerned.

[28] The following replies from large counties in Illinois, Louisiana and Maryland are representative:

Louisiana: "No (there has been no increase in guilty pleas), but the procedure for handling of misdemeanors now requires substantially more time than before."

Illinois: "The number of guilty pleas has probably been reduced slightly by the appointment of counsel in the traffic matter. The major impact is that the time necessary to obtain the plea has been extended from the arraignment stage to the pretrial conference stage of proceedings. This represents an increased docket load, increased costs for court personnel, and a greater pressure on misdemeanor prosecutors."

Maryland: "A problem that you have not inquired about but may have some bearing on your discussion concerns the time lapse between original charging and the trial of the defendant as affected by *Argersinger*. It appears that the bench is keenly aware that without an intelligent waiver of counsel, jail sentences cannot be imposed on a convicted defendant. A person wanting a lawyer and not being indigent can cause the court to grant more continuances than would be normally granted before *Argersinger*. Concurrent with this comes the conglomerate of problems continuances bring about including fading memories, disappearing witnesses and overall case staleness. . . ."

[29] Replies from some of the prosecutor respondents indicated that this was true in the following jurisdictions as to petty offenses: City Attorney of Albuquerque, New Mexico; State's Attorney in Baltimore, Maryland; Attorney General, State of Rhode Island; District Attorney from Macon County, Tennessee; and State's Attorney for Pacific County, Washington. This probably represents only a tiny sample of all the counties in the United States where prosecutors do not appear at arraignments in traffic courts and petty misdemeanor courts.

[30] What the writer meant by the term "volunteer lawyer" was private counsel who make themselves available to indigent clients voluntarily and without appointment by the court on a no-fee basis. Some of the respondents may have confused the term with appointed lawyers who serve without compensation simply because no system for compensation yet exists in the county or state where they practice.

[31] Respondents indicated recent enactment or submission for enactment of legislation authorizing a Public Defender System for misdemeanants on a state-wide or local-option basis in the following states: Kentucky, Missouri (?), Nebraska (pending), Nevada, New Mexico, Oklahoma (pending), and Wyoming.

[32] Counties and cities indicating that they had recently contracted with a private lawyer, law firm, or organization for legal representation of the poor (*e.g.*, Legal Aid) to represent indigent misdemeanants or indicating that there was a recently-instituted local public defender service funded by the state or federal government were: Mohave and Greenlee counties, Arizona; Monroe County, Indiana; Hyannis, Massachusetts; Kansas City, Missouri; Hall County, Nebraska; Akron, Ohio (Summit County); Rapid City, South Dakota (pilot project).

[33] See concurring opinion of Mr. Justice Brennan in *Argersinger v. Hamlin* (1972: 40-41).

[34] In the following states there was at the time the survey was taken no state fund or appropriation for the compensation of appointed counsel in misdemeanor cases: Alabama, Iowa, Kansas, Mississippi, Missouri, New Jersey (non-indictable misdemeanors) and North Dakota. In the absence of a local (county or city) appropriation for this purpose, appointed counsel in these states serve without compensation.

[35] See *Argersinger* (1972: 42)

[36] In other words, changing the nature of the process from that described in the Skolnick (1967), Blumberg (1966), Sudnow (1965) and Mileski (1971) articles to one in which the defendant's guilt and sentence are determined after a full trial of the issues.

[37] It seems that the present system of conviction by negotiated plea comports with neither the public's nor the litigant's ideas of true jus-

tice. Both the police and criminal defendants, for instance, dislike it (Arcuri, 1973; American Friends Service Committee, 1971: 3; New York State Special Commission on Attica, 1973: 30-31).

[38] Compare Becker and Feeley (1973: 213): "Impact refers to *'all policy related consequences of a decision.'* Thus it refers not only to compliant behavior, but to other types of behavior as well. . . ."

[39] Mr. Justice Douglas, writing for the majority in *Argersinger* (1972: 34), stated: "Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."

CASES

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

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