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ARGERSINGER v. HAMLIN: A DEMAND FOR CHANGE IN ADMINISTRATION OF CRIMINAL JUSTICE

Candace C. Fetscher

It is characteristic of our legal system that a decision of the highest court in the land can affect the lowest and most remote courts so deeply that the complexion of the latter group is substantially altered. Such is the result in *Argersinger v. Hamlin*,¹ decided by the United States Supreme Court on June 12, 1972. Jon Richard Argersinger, an indigent tried without benefit of counsel, was convicted of carrying a concealed weapon, an offense punishable in Florida by up to six months' imprisonment, a \$1,000 fine, or both.² Reversing the conviction sustained by the Florida supreme court,³ the Court through Mr. Justice Douglas held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."⁴ This decision, bottomed on the Sixth and Fourteenth Amendments,⁵ ended a decade's uncertainty about the scope of an indigent's constitutional right to appointed counsel. This note will attempt to explore the ramifications of the *Argersinger* decision and the problems that it may raise for a jurisdiction such as Montana.

GENEOLOGY OF INDIGENT'S RIGHT TO COUNSEL

Recognition of a right to court-appointed counsel has been gradual,⁶ beginning with its extension to persons charged with capital offenses in *Powell v. Alabama*,⁷ in 1932. Six years later in *Johnson v. Zerbst*⁸ counsel was required for anyone who might potentially be deprived of life or liberty as a result of prosecution in a federal court. The 1942 holding in *Betts v. Brady*⁹ refused to extend the *Johnson* rule to state

¹*Argersinger v. Hamlin*, 407 U.S. 25 (1972).

²FLORIDA STATUTES ANNOTATED, § 790.01(1) (1969).

³State ex rel. *Argersinger v. Hamlin*, 236 So.2d 442 (Fla. 1970).

⁴*Argersinger v. Hamlin*, *supra* note 1 at 37.

⁵U.S. Const. amend. VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

amend. XIV:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

⁶See Note, 7 U. RICH. L. REV. 349, 350 (1972).

⁷*Powell v. Alabama*, 287 U.S. 45, 73 (1932).

⁸*Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

⁹*Betts v. Brady*, 316 U.S. 455, 471 (1942).

courts. Instead, *Betts* held that the right to court-appointed counsel should be extended to those charged with felonies in state courts only if the special circumstances of the case required counsel to insure a fair trial.¹⁰ The "special circumstances" rule persisted until it was overruled by *Gideon v. Wainwright*¹¹ in 1962. Since *Gideon*, counsel has been required for any defendant charged with a felony in either state or federal court. Unfortunately, the *Gideon* court did not delineate the boundaries of the right, and clarification awaited other decisions which held that counsel must be provided during interrogation,¹² during lineup,¹³ during a preliminary hearing,¹⁴ on appeal,¹⁵ and during revocation hearings.¹⁶ It was not until 1967 that the right to court-appointed counsel was extended to juveniles.¹⁷

During the years following the *Gideon* decision, the Court on three occasions refused to rule on the question of the right to court-appointed counsel for indigents charged with misdemeanors.¹⁸ The states took several divergent approaches: nine provided counsel for most misdemeanors, twenty-two extended counsel only for specific misdemeanors, and nineteen had no requirements for counsel at all.¹⁹ It is significant that during these years the Court, over the objections of Mr. Justice Black,²⁰ refused to hold that the Fourteenth Amendment automatically extended Sixth Amendment rights to defendants charged in state courts. Many of these rights, however, such as the right to trial by jury,²¹ have been specifically recognized in separate decisions. The *Argersinger* decision went further than those before it, viewing the right to counsel as one of the fundamental requisites of a fair trial.²²

¹⁰*Id.* at 462.

¹¹*Gideon v. Wainwright*, 372 U.S. 335 (1962).

¹²*Escobedo v. Illinois*, 378 U.S. 478, 491 (1964); *Miranda v. United States*, 384 U.S. 436, 474 (1966).

¹³*United States v. Wade*, 388 U.S. 218, 236-238 (1967).

¹⁴*Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

¹⁵*Douglas v. California*, 372 U.S. 353, 357 (1963).

¹⁶*Memphis v. Rhay*, 389 U.S. 128, 135-136 (1967).

¹⁷*In re Gault*, 387 U.S. 1, 36-37 (1967). Also see Note, 77 DICK. L. REV. 176, 177 (1972) for a discussion of the expansion of the right to counsel.

¹⁸*De Joseph v. Connecticut*, cert. denied, 385 U.S. 982 (1966); *Cortinez v. Flournoy*, cert. denied, 385 U.S. 925 (1966); *Winters v. Beck*, 385 U.S. 907 (1966). See also DICK L. REV., *supra* note 17.

¹⁹For an analysis of each state's approach after *Gideon* see Allison and Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 94-105 (1971).

²⁰*Adamson v. California*, 332 U.S. 46, 71-72 (1947), dissent of Mr. Justice Black; *Duncan v. Louisiana*, 391 U.S. 145 (1967), Mr. Justice Black concurring at 165 as follows:

The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the states.

But see Mr. Justice White writing for the Court in *Duncan* at 149.

²¹*Duncan v. Louisiana*, *supra* note 20.

²²*Argersinger v. Hamlin*, *supra* note 1 at 31; see also Note, DICK. L. REV., *supra* note 17 at 180, commenting as follows:

Even before *Argersinger*, lower federal courts and state courts on the basis of federal and state constitutions, upheld the right of an indigent misdemeanant to have the benefit of counsel. For example, in 1967 the California supreme court upheld a habeas corpus petition from an indigent misdemeanant in the following language:

Under article I, section 13, of the California Constitution,²³ there can be no doubt that the fundamental right to the assistance of counsel is guaranteed to all persons, such as the present petitioner, charged with a misdemeanor in a justice or other inferior court. . . . This guarantee, of course, is meaningless unless the defendant is made fully aware of it: not only must he be advised of his right to counsel, he must also be advised that the court will appoint an attorney to represent him if he is unable to afford one.²⁴

Shortly after *Argersinger*, in *Herndon v. Superintendent, Virginia State Farm*,²⁵ the federal district court in the Eastern District of Virginia wrote:

On March 10, 1971, subsequent to Herndon's conviction, this court decided *Marston v. Oliver*, 324 F.Supp. 671 (E.D. Va. 1971), wherein the court ruled that the denial of appointed counsel to an accused indigent misdemeanant who requested same rendered the conviction therein constitutionally defective. Subsequently, in June, 1972, the Supreme Court reached the same result in *Argersinger v. Hamlin* . . .²⁶

A similar result obtained in *Alexander v. City of Anchorage*,²⁷ but in that case the court went beyond requiring counsel in the face of incarceration, extending that right to defendants facing a possible loss of valuable license or even a heavy fine.²⁸ This holding appears to agree with some of the reservations expressed by Mr. Justice Powell in his opinion concurring in the result of *Argersinger*.²⁹

"In refusing to use the right to jury trial standard to circumscribe the right to counsel, the Court deemed the right to counsel a more fundamental constitutional right. Reviewing the language of *Powell* and *Gideon*, the Court reiterated its position that the 'assistance of counsel is often a requisite to the very existence of a fair trial'."

²³CAL. CONST. art. I, § 13:

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial and to have the assistance of counsel for his defense; to have the process of the court to compel the attendance of witnesses in his behalf and to be personally present with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel. The Legislature also shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (As amended June 6, 1972.)

²⁴In re Smiley, 427 P.2d 179, 184, 58 Cal. Rptr. 579 (1967).

²⁵*Herndon v. Superintendent, Virginia State Farm*, 351 F. Supp. 1356 (E.D. Vir. 1972).

²⁶*Herndon*, *supra* note 25 at 1357.

²⁷*Alexander v. City of Anchorage*, 490 P.2d 910 (Alask. 1971).

²⁸*Id.* at 916.

²⁹*Argersinger*, *supra* note 1 at 44-46.

ARGERSINGER IN SHORT: ACHIEVEMENTS AND PROBLEMS

The *Argersinger* decision was unanimous. The entire court agreed that failure to provide counsel for a defendant unable to provide it himself was equivalent to a denial of equal protection and a denial of due process based on wealth. This clarification of the extent of constitutional right to counsel is welcomed by a legal profession and especially a judiciary which was, by its own admission, making its best guesses at the Supreme Court's probable eventual holding in the area.³⁰ This decision was also heartily welcomed by proponents of that legal philosophy which sees the assistance of counsel as an indispensable means of attaining justice.³¹

While agreeing with the laudable result achieved by *Argersinger*, Mr. Justice Powell, joined by Mr. Justice Rehnquist, points out what appear to be some very real problems in its application.³² These problems primarily involve lack of finances and manpower, but also reach the question of how far *Argersinger* itself should be extended. For example, Powell points out that there is no constitutional basis for distinguishing between deprivations of liberty and property under the due process clause.³³ He mentions non-prison sentences potentially more harmful to the recipient than short-term incarceration (e.g., loss of licenses). Furthermore, Powell raises the question of adequately achieving justice under the new rule. He questions the fairness of pre-judging (or pre-sentencing) a defendant in order to decide whether to appoint counsel,³⁴ and also the possibility that within the same jurisdiction different judges might or might not wish to preserve a prison-sentence option by appointing counsel. In the latter event, two defendants

³⁰State ex rel *Argersinger v. Hamlin*, *supra* note 3 at 443:

In this confusing situation we feel that we have no alternative but to adopt the decision of the federal court of this judicial district that we feel most nearly approximates any decision in this respect that might be adopted by the Supreme Court of the United States.

³¹At page 36 of *Argersinger v. Hamlin*, *supra* note 1, Mr. Justice Douglas referred to Preliminary Report 1 (1970) of the American Civil Liberties Union, Legal Counsel for Misdemeanants: "One study concluded that '(m)isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.'" See also Note, 55 IOWA L. REV. 1248 (1970) at 1262:

High rates of guilty pleas do not, however, prove a lack of desire for counsel. In fact, the high rates of guilty pleas may be the result of not having counsel. Legal advice may be most important for the defendant who intends to plead guilty, as the ramifications of a guilty plea may be of more consequence than just the fine. . ."

³²*Argersinger v. Hamlin*, *supra* note 1.

³³*Id.* at 52.

³⁴*Argersinger v. Hamlin*, *supra* at 55; see also Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 at 709 (1968):

How certain can a judge be, if he has not prejudged the case, that imprisonment may or may not be imposed? Must he not know, according to modern notions of individualized sentencing, facts that he ought not know prior to the adjudication of the defendant's guilt or innocence?

accused of the same offense in the same jurisdiction would receive different potential sentences before their trials even began.³⁵

Finally, Powell expresses some concern for the courts' ability to preserve the crime-deterrent objective of sentencing under the *Argersinger* rule. He writes:

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.³⁶

ARGERSINGER IN MONTANA

As mentioned earlier, a constitutionally-based decision such as *Argersinger* reverberates to the farthest corners of the nation and affects the administration of justice in the most remote municipal and justice courts. Montana is a good place to look at the practical effects of the *Argersinger* requirement of appointed counsel; *Argersinger* and its predecessors may also pose some special problems for this state due to previously existing law.

Since the enactment of the Montana Code of Criminal Procedure³⁷ in 1967, Montana has required the appointment of counsel for indigents accused of felonies and has permitted the appointment of counsel for indigent misdemeanants at the court's discretion.³⁸ This right may be waived, except in the case of a minor accused of a felony.³⁹ In 1962, counsel was regularly offered to persons charged with misdemeanors and did not prove to be prohibitively expensive,⁴⁰ perhaps because few misdemeanants availed themselves of this assistance. At that time it was recommended that counsel "be assigned to defend indigent persons in *all* criminal proceedings."⁴¹ [emphasis added]. After *Argersinger*, if a jail sentence of any kind is to be imposed, counsel must be appointed. The time has come to recognize this requirement in the courts and the

³⁵See Note, 24 MERCER L. REV. 497 (1972) for expansion of this potential problem.

³⁶*Argersinger v. Hamlin*, *supra* note 1 at 55.

³⁷Laws of Montana (1967), Ch. 196.

³⁸REVISED CODES OF MONTANA, 1947, § 95-1001 (hereinafter cited as R.C.M. 1947):

Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel. If the offense charged is a felony and if the defendant desires counsel and is unable to employ counsel a court of record must assign counsel to defend him. If the offense charged is a misdemeanor and if the defendant desires counsel and is unable to employ counsel a court of record, in the interest of justice, may assign counsel to defend him.

³⁹R.C.M. 1947, § 95-1002.

⁴⁰Ellison, *Assigned Counsel in Montana*, 26 MONT. L. REV. 1, 4 (1964). See also 3 SILVERSTEIN, DEFENSE OF THE POOR, 425, 436 (1965).

legislature. Changes must be made not only in Right to Counsel sections of the Code,⁴² but also in R.C.M. 1947, § 95-2302(b) which provides for detention in lieu of an imposed fine at the rate of \$10 per day.⁴³ This statute, questionable after *Spinler v. Ellsworth*,⁴⁴ appears to be unconstitutional as applied to an indigent defendant since *Tate v. Short*,⁴⁵ in which the United States Supreme Court, per Mr. Justice Brennan, reversed a habeas corpus denial on the basis that the petitioner (convicted of accumulated traffic offenses) was "subject to imprisonment solely because of his indigency."⁴⁶

What does all of this import for Montana? It means that even the traffic offender sentenced to fifty dollars or five days can escape punishment on proof of indigency. It means, perhaps, a parade of indigent misdemeanants to district courts seeking appointment of counsel in situations where more solvent offenders currently waive counsel and merely pay the fine. Montana's situation is further complicated by the fact that execution of judgment is limited by R.C.M. 1947, § 95-2008(a),⁴⁷ to the sentencing jurisdiction. Even read with R.C.M. 1947, § 95-

⁴²R.C.M. 1947, § 95-1001 *et. seq.*

⁴³R.C.M. 1947, § 95-2302 reads in part:

(a) If the judgment is for a fine alone, execution may issue thereon as on a judgment in a civil case.

(b) If the defendant must be committed to the custody of the proper officer, and by him detained until the judgment is complied with. The imprisonment must not exceed one day for every ten dollars (\$10.00) of the fine.

⁴⁴*Spinler v. Ellsworth*, 152 Mont. 69, 446 P.2d 429 (1968). Petitioner, convicted of delivering a fraudulent check—while out on bond for a similar offense—was sentenced to three years and a \$3,000 fine, which, due to indigency was sentenced to be served at \$2 per day. The court held that jail term could be imposed in default of fine, but, it amended the sentence making the petitioner eligible for parole as if the fine portion of the sentence were nonexistent.

⁴⁵*Tate v. Short*, 401 U.S. 395 (1971).

⁴⁶*Id.* at 398. *Tate* further extended the holding in *Williams v. Illinois*, 399 U.S. 235, 244 (1969), that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."

⁴⁷R.C.M. 1947, § 2008 reads as follows:

Execution of Judgment. (a) The judgment must be executed by the sheriff, constable, marshal or policeman of the jurisdiction in which the conviction was had. (b) When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution. (c) If a judgment is rendered imposing a fine only, without imprisonment for non-payment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one (1) day's imprisonment for every ten dollars (\$10.00) of the fine. When such a judgment is rendered the defendant must be held in custody the time specified in the judgment, unless the fine is sooner paid. (d). Any officer charged with the collection of fines, under the provisions of this chapter, must return the execution to the judge within thirty (30) days from its delivery to him, and pay over to the judge the money collected therefrom, deducting his fees for the collection.

All fines imposed and collected by a justice or police court must be paid to the treasurer of the county, city or town as the case may be, within thirty (30) days after the receipt of the same, and the justice or police judge must take duplicate receipts therefor, one (1) of which he must deposit with the county or city or town clerk as the case may be.

2302(a),⁴⁸ which provides that execution can issue on a fine as on a civil judgment, Montana provides no sanction against the convicted transient⁴⁹ indigent misdemeanor.⁵⁰ Once sentence has been passed, without defense counsel, proof of indigency in response to a fine leaves the court with no alternatives at all.

Certainly, *Argersinger* represents a major accomplishment in the area of due process and equal protection, but the cost of that accomplishment may be very great, especially in a predominantly rural state such as Montana. Rough guidelines for judicial procedure were set in *Argersinger* itself. Mr. Justice Douglas wrote, "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."⁵¹ Mr. Justice Brennan, concurring in the result, added:

Because no individual can be imprisoned unless he is represented by counsel, the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. The judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own.⁵²

Judges should now know that counsel must be offered at the outset to indigents, even those charged with misdemeanors, if there is any possibility that a term of imprisonment might be imposed. This is particularly true since *Tate* unless the judge has already determined that he will impose only a fine as sentence in the event of a guilty plea or conviction. Here the practical problems begin. R.C.M. 1947, § 95-1001 provides that a court of record may appoint counsel. Thus, a justice

⁴⁸R.C.M. 1947, § 95-2302 Execution of a Fine, reads in part as follows: "(a) If the judgment is for a fine alone, execution may issue thereon as on a judgment in a civil case."

⁴⁹"Transient" is used here to denote the defendant who is or can readily become sufficiently mobile to remove himself and his goods from the sentencing jurisdiction.

⁵⁰The question of whether a writ of execution directed to the sheriff of another county ordering him to levy on property in his county creates a lien there was answered in *Merchants Credit Service Bank, Inc. v. Choteau County Bank*, 112 Mont. 229, 114 P.2d 1074, 1076-1077 (1941):

No statute can be found in our legislative Acts that authorizes a sheriff to serve a writ of execution directed to the sheriff of another county. A sheriff's power to serve a writ is derived from a writ addressed to himself. Outside his own bailiwick a sheriff has no more power to serve process than a private citizen. The writ served on the defendant could be legally served only by the sheriff of Cascade county, or his duly authorized deputy, and legal levy on property thereunder could be made only in Cascade county.

⁵¹*Argersinger v. Hamlin*, *supra* note 1 at 40.

⁵²*Argersinger v. Hamlin*, *supra* note 1 at 42. See also Leising and Icenogle, *Criminal Law—Sixth Amendment Right to Court-Appointed Counsel for Indigents*, 47 TUL. L. REV. 446, 455 (1973):

If the likelihood of imprisonment appears strong, the judge may preserve his sentencing option only by appointing counsel; if the likelihood appears remote and appointment of counsel is not made, then regardless of the subsequent evidence presented and the punishment prescribed by law, a defendant may not be incarcerated.

or police court, not being a court of record,⁵³ must request an appointment from the district court if there is any contemplation of a possible jail sentence. Even the paper work involved on the part of the district courts in this event would be burdensome. Staff would have to be employed to investigate the veracity of the claim of indigency⁵⁴ as well as to process appointments of counsel. It is, of course, conceivable that much of this work could be handled through a public defender's office,⁵⁵ or that a law could be enacted empowering the justice and police courts to appoint counsel for indigent misdemeanants if there were no available public defender. If this approach were adopted, it would be wise to provide for cooperation between the justice and police court judges and local bar associations, since many of these judges are not members of the bar and therefore do not enjoy the same relationship that has traditionally existed between bench and bar.

R.C.M. 1947, § 95-1006⁵⁶ should be amended to allow municipal governments to provide for the office of public defender if they so desire; this power is presently limited to counties and could prove to be an unnecessary area of controversy between the two units of local government. Another welcome legislative response to the problems raised by *Argersinger* would be some kind of specific provision empowering officials of any county to enforce executions adjudged in other counties. There appears to be no constitutional bar to this kind of action, and it would considerably simplify the collection of fines from transient offenders.

Other jurisdictions have experimented with means of dealing with the problems created by *Argersinger*: how to finance equal justice for all and how to adequately enforce the criminal law against all offenders. Several methods are suggested by Mr. Justice Douglas, and also by Mr. Justice Brennan and Mr. Chief Justice Burger in their *Argersinger* opinions. Among these are use of law students as defenders, decriminalization of some offenses to the point that both prosecution and defense could be handled by para-legal personnel such as clergymen or social workers (or the whole proceeding overseen by administrative bodies in the cases of victimless crimes) and finally installment payment of fines.

⁵³R.C.M. 1947, § 93-102. The courts enumerated in the first three subdivisions of the last preceding section, and only those courts, are courts of record.

R.C.M. 1947, § 93-101. The following are courts of justice of this state: 1) the court of impeachment; 2) the supreme court; and 3) the district courts.

⁵⁴SILVERSTEIN, *supra* note 41 at 427:

Investigation of indigency is more by chance than by plan; unless rebutting evidence is personally known to the sheriff's office, the county attorney, or the judge, the defendant's own statement of indigency is accepted.

⁵⁵R.C.M. 1947, § 95-1006 reads in part as follows:

Any county through its board of county commissioners, may provide for the creation of a public defender's office and the appointment of a salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel. The costs of such office shall be at county expense.

⁵⁶R.C.M. 1947, § 95-1006.

Some jurisdictions have succeeded in billing former indigents for legal representation provided for them during their indigency.⁵⁷ This approach, under *Petition of Hunsinger*,⁵⁸ would be unworkable in Montana without legislation. The Montana supreme court in *Hunsinger* held that the county could not impose a lien on the defendant's estate to recover for the costs of counsel appointed when he appeared to be indigent. This approach might also prove to be a great hindrance to rehabilitation of the habitual offender, adding one more debt to what might conceivably be a Sisyphean burden already carried on account of the original condition of indigency.

Use of law students in Montana, a state with only one law school, would not be feasible except during the summer months. The geographic area of Montana precludes this approach as well as suggesting great difficulties if the public defender approach were to be employed cooperatively by several counties.

Finally, any of these approaches are costly; legal manpower is expensive. On a nation-wide basis, even before *Argersinger*, a shortage of practitioners in the field of criminal law was noted by the 1966 Conference on Legal Manpower Needs of Criminal Law.⁵⁹ A year earlier, in 1965, an estimation of annual misdemeanor charges was made at five million *excluding minor traffic offenses*.⁶⁰ Even reduced to correspond with Montana's population, the potential defense caseload in this area is staggering.⁶¹ The cost might be even more so, especially as viewed by city and county governments already struggling financially in order to provide necessary services for their constituents.

CONCLUSION

Philosophically, the *Argersinger* decision could not be more welcome in any jurisdiction; financially it may prove to be disastrous. As Mr.

⁵⁷OREGON REVISED STATUTES, § 161.665 (1962). *State v. Fuller*, Ore., 504 P.2d 1393, 1397 (1972) held that under the recoupment statute the court could revoke probation if it found the defendant able to pay without hardship and also intentionally in default.

Both installment payment and recoupment, however, might further discourage an indigent offender who felt driven by society to the initial offense.

⁵⁸*Petition of Hunsinger*, 153 Mont. 445, 456 P.2d 304 (1969).

⁵⁹*Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 394 (1966).

The extent to which the estimated need for 15,000-20,000 lawyers in the administration of criminal justice is presently being met was indicated by the estimate that of the nation's approximately 300,000 lawyers, there are now about 4,000 full-time prosecutors or their equivalent, 400 defenders and between 2,000 and 5,000 lawyers who serve more than occasionally as retained defense counsel. Thus, the lawyer manpower presently in the field meets less than half the estimated need.

⁶⁰SILVERSTEIN, *supra* note 41 at 10.

⁶¹On a nationwide basis it was estimated that,

(t)o provide counsel to all indigent defendants accused of felonies, misdemeanors, and traffic offenses would require . . . the full time services of 13,006 to 13,281 attorneys: 1,014 for felonies, 1,575 to 2,300 for misdemeanors, and 10,417 for traffic offenses.' Note, 55 Iowa L. Rev. 1248, 1262 (1970).

Justice Powell points out, “. . . to require that counsel be furnished virtually every indigent charged with an imprisonable offense would be a practical impossibility for many small town courts. The community could simply not enforce its own laws.”⁶² In any event, the trial court should “make a record, prior to accepting a plea of guilty, advising the defendant of his right to a jury trial, right to counsel, right to have counsel appointed for him, if indigent, and in the event that the defendant wishes to waive such right, it must affirmatively appear of record.”⁶³

The legislature could help considerably by enacting the statutory changes suggested above, facilitating both appointment of counsel and execution of fines. State funding or sponsorship of defense programs, whether defender or appointed counsel, should also be considered. It is clear that a comprehensive study of the administration of criminal law within the state, including an economic analysis of our ability to support alternative approaches to criminal justice and a comparative analysis of the public defender and appointed counsel programs, must be made. This study will take time, even if begun immediately. In the meantime, perhaps as a part of the study, experimental programs should be undertaken throughout the state's courts. Montana must look to the future as well as to the rules thrust upon us by the past: perhaps, before we have even provided for indigent criminal defendants we shall be required to provide for any indigent who, through legal process, might be deprived of his property. *Argersinger* presents problems which cannot be adequately met by the bench and bar alone. They must be aided by the legislature and the executive, especially in terms of funding and program development and administration.

Montana should perhaps begin to consider some radical approaches for providing for criminal justice such as the proposal considered by the Conference on Legal Manpower Needs that every defendant be provided counsel at state expense regardless of financial status and subject to a right to retain private counsel.⁶⁴ At the very least, *Argersinger* may introduce some new attitudes into an old system. It might even be argued, as suggested in the Conference report, that “indigency, and its correlate charity, may no longer be relevant concepts in the administration of criminal justice.”⁶⁵

⁶²*Argersinger v. Hamlin*, *supra* note 1 at 61.

⁶³*Fraizer v. City of Tulsa*, 507 P.2d 940, 941 (Okla. 1973).

⁶⁴*Report of the Conference on Legal Manpower*, *supra* note 59 at 396.

⁶⁵*Id.* at 397.