

The Dialectics of Legal Repression

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Black Rebels before the
American Criminal Courts

ISAAC D. BALBUS

Russell Sage Foundation New York

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FOR KATHY
and
MY PARENTS

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Preface

This study grew out of a doctoral dissertation begun more than five years ago on the administration of justice during and following black ghetto revolts in three American cities. Its present structure is partly a function of the questions which informed the earlier work:

(1) What impact did the magnitude of the revolts with which local political authorities were confronted have on the severity of the legal sanctions imposed on participants? Were individuals who were arrested during major revolts entailing massive participation, property damage, and injury to life treated more harshly by the local criminal courts than individuals who were arrested during minor confrontations of relatively limited scope, participation, and destructiveness? Or was there a different and perhaps unexpected relationship between the magnitude of violence and the severity of sanctions?

(2) What impact did intercity variations in certain political structures linking court actors to the local political environment as a whole have on the severity of court sanctions, and did this impact vary or remain constant in the face of variations in the magnitude of the revolts? Did the local political dimensions which form the basis for the traditional study of American local politics—for example, the dimension embodying the distinction between “machine” and “reform” political systems—influence the severity of the sanctions imposed on participants in the revolts? If so, was this influence similar at different levels of violence?

In short, my purpose was to explain variations in the severity of sanctions imposed by the local criminal courts of our nation on participants in black ghetto revolts in terms of variations in the magnitude of the violence and variations in the political structures which link court actors to the local political system as a whole.

This concern with the severity of court sanctions and this choice of explanatory variables shaped the structure of my doctoral thesis and dictated the

selection of Los Angeles, Detroit, and Chicago as "sample cities." Each of these cities experienced one major revolt and at least one minor revolt during the period 1964–1968, so that a study of their respective court responses would allow for an assessment of the impact of variations in the level of violence on the severity of court sanctions. Each of the cities, moreover, differs radically along those political structural dimensions which are the standard focus of the student of American local politics, so that a comparison of the three would permit us to gauge the impact of these political structure variations on the court responses. Of all the major American cities which experienced ghetto revolts during the mid-1960s, Los Angeles, Detroit, and Chicago were the most suitable arenas for intensive field study of the interrelationship among the variables forming the organizing paradigm of my study: levels of violence, local political structure variations, and variations in the severity of court sanctions.

In this study I remain concerned with the interrelationship among these variables and I have therefore attempted to reconstruct in detail the court responses in Los Angeles, Detroit, and Chicago. Thus Chapters Two through Four describe the court response to both major and minor revolts in each of these cities, and the first part of Chapter Five compares the severity of court responses across the three cities in an effort to specify the precise interrelationship which occurred among the variables. During the past several years, however, I have come to understand that the most significant question one can pose concerning the response of the American legal order to the black ghetto revolts of the mid-1960s is not "How severe were the sanctions imposed on participants by the authorities of our ordinary criminal courts, and what accounts for variations in their severity?" but rather "What are the implications of the effort to sanction participants by means of the ordinary criminal courts in the first place, and why was this effort successful?" In other words, I came to understand that for a variety of reasons (outlined in Chapter One) the question of the *form* of repression is even more important than the question of the concrete severity of the sanctions which emanate from this form, and moreover, that the interrelationship which occurred among levels of violence, political structure variations, and the severity of sanctions would hold only within this form.

Consequently in this book I have attempted to treat as problematical what I took for granted in my doctoral thesis, i.e., the fact that the sanctioning of the participants in the ghetto revolts of the mid-1960s was contained within the structures and procedures which exist for the sanctioning of "ordinary crime." Thus Chapter One analyzes the difficulties entailed in, and the legitimating implications of, the effort to sanction participants in mass violence by means of ordinary criminal procedures—what I call repression by formal rationality—and the last part of Chapter Five seeks to explain why this effort

was in fact successful in our three cities as well as throughout the nation. The structure of this work, in other words, reflects an effort to subsume my formerly exclusive concern with the *severity* of legal repression under the framework of a broader understanding of the determinants and consequences of legal repression *as such*.

This shift in, or rather enlargement of, focus parallels and was in part a function of my evolution over the past five years from what one might call a behavioral social scientist with critical impulses to an exponent of Marxian critical theory. Behavioralism seeks to establish invariant relationships among a set of variables—"social laws"—but in so doing necessarily takes as given, as unproblematical, the historically concrete structures which determine the scope of applicability of these "laws." The crude "empiricist" tendency within behavioralism simply ignores this structural context, while more "theoretical" advocates of behavioralism such as system theorists or functionalist sociologists transform the concrete, historical structures into permanent, unchanging, and abstract "functions." In either case the structures themselves remain unexplained, and necessarily unexplained, because their explanation would have to be an *historical-critical* one, i.e., an explanation which behavioralism is logically incapable of providing. In my thesis I sought to establish the precise interrelationship among levels of violence, local political variations, and the severity of court sanctions. Although I was somewhat aware that this interrelationship would only hold within the given structural context of the criminal justice system of the American liberal state, I failed to develop an understanding of, a theory of, that structural context itself. In contrast, in this work I have attempted to relate this structural context to the historical dynamics of a specifically capitalist order in such a way as to reveal the determinants of the structural context as well as its historical limits. This has been done, however, in a very tentative and incomplete manner; a fully developed theory which interrelates the legal order in general and the criminal justice system in particular with the capitalist socioeconomic order remains to be elaborated.

The astute reader undoubtedly will notice a certain tension which pervades this work between my earlier behavioralist concerns and my more recently acquired historical-critical concerns. Had I begun the research for this book now, or had I understood the limits of behavioralism and the merits of Marxian critical theory when I began it, I am sure this would have been a very different book. As it stands now, however, it is a reasonably faithful reflection of my struggle to subsume the concerns and techniques of behavioralism under the far broader rubric of Marxian critical theory and to establish the limits of the former by means of the structure of the latter.

If this book represents in some sense the summation of a five-year evolution on my part from behavioralism to Marxism, then my first acknowledgments must go to those who have contributed in a decisive way to this evolu-

tion. My teacher at the University of Chicago, David Greenstone, introduced me to Marx and Marxian social theory, the necessary condition for my emancipation from a generally behavioralist graduate education in political science. My good and dear friend, Ron Bayer, never ceased pointing out the contradictions between my radical impulses on the one hand and my initial commitment to behavioralism on the other, and has from the very beginning of our relationship critically influenced these radical impulses themselves. Many of the Princeton graduate students who have taken my course on Pluralism and Marxism have helped me to sharpen and deepen my understanding of Marx and to overcome my initially behavioralist interpretation of Marxist class analysis. Two Princeton colleagues, Manfred Halpern and H. H. Wilson, who share my commitment to critical theory and practice, have consistently provided the opportunity for intellectual and human communication in the face of an otherwise often alienating environment. Finally, and perhaps most important of all, Kathleen Shannon has helped teach me the importance of the effort to unite theory and practice, work and life, and has therefore immeasurably influenced the personal and political transformation entailed in my evolution from behavioralism to Marxism.

If these individuals contributed to shaping the political and theoretical perspective of which this book is an expression, many others facilitated the research without which this perspective could not have been applied and developed in the context of the specific subject matter of this study. It is a cliché, but nonetheless true, that this book would not have been possible without the cooperation of the many judges, prosecutors, public defenders, private attorneys, police, and detention officials in Los Angeles, Detroit, and Chicago who allowed me to interview them. Many of them, I am afraid, will not be happy with a work whose political and theoretical premises are radically different from their own, and which is implicitly and at times explicitly critical of their actions. If they read and understand this book, however, they will see that my criticisms are largely of a structural rather than personal nature.

Many other individuals contributed substantially to the completion of the book, some of whom deserve special mention. Larry Sperber and Dave Long, staff attorneys respectively for the Los Angeles and Chicago branches of the American Civil Liberties Union (ACLU), gave unselfishly of their time and energy and opened to me their complete files, as did John Emery, chief defender of the Legal Aid and Defender Association of Detroit. Anthony Platt kindly made available data which he and his staff collected in Chicago for the National Commission on the Causes and Prevention of Violence, and Roger Warren, Mark Aronsen, and Nelson Saltman, at that time of the *University of Chicago Law Review*, performed a similar service with respect to the data they collected for their study of the response of the Chicago court system to

the major revolt of April 1968 in that city. Staff members of the Research Division of the Los Angeles County Probation Department were kind enough to grant me access to their statistical analysis of court dispositions following the Los Angeles major revolt of August 1965 prior to its publication, and Wesley Skogan, at that time a graduate student in political science at Northwestern University, allowed me to examine his doctoral thesis on recruitment to the Chicago court system prior to its completion. Donald Kronk, volunteer for the Los Angeles ACLU, deserves thanks for collecting data for me on the Los Angeles court response to the minor revolt there of August 1968. Kathleen Shannon read newspapers, sorted files, and typed envelopes in Los Angeles and Detroit, and has helped me develop and refine my ideas throughout the years that this project has been in progress.

David Easton and Gerhard Casper of the University of Chicago read drafts of my original thesis, as did my principal thesis advisor, David Greenstone, who also helped me clarify some of the theoretical analysis in this work. Their criticisms of my thesis significantly influenced the contours of this book.

Finally, let me express my gratitude to Russell Sage Foundation for having financed that part of my graduate education which allowed me to undertake the research for this book, and to the Committee on Research in the Humanities and Social Sciences of Princeton University for having provided a grant which covered typing and other clerical expenses.

Isaac D. Balbus

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Chapter One

The Dialectics of Legal Repression

This book is a study of the response of the American legal order to the black ghetto revolts of the 1960s. More specifically, its purpose is to describe and explain the administration of justice during and immediately following ghetto revolts of both major and minor proportions in Los Angeles, Detroit, and Chicago, three of America's largest cities. By focusing on the enormous difficulties—even contradictions—entailed in the effort to employ the ordinary criminal courts and ordinary legal procedures to sanction participants in collective revolts, we seek to illuminate the peculiar dynamics of legal repression in the American state in particular and the liberal state in general.

There exists no coherent theory of repression in the liberal state, precisely because such a theory would have to be derived from, and find its place within, an equally nonexistent, broader theory of the role of the state under conditions of advanced capitalism.¹ This theoretical lacuna is reflected in an almost universal confusion concerning the nature and functions of legal repression within the United States today. Liberals generally tend to take a benign view of the state, emphasizing the crucial role which civil liberties and "due process" play in mitigating the severity and arbitrariness of legal repression, yet are continually surprised and outraged in the face of persistent, systematic violations of these norms.² Some radicals, on the other hand, often seek to pursue strategies designed to reveal the "fascist core" of the liberal state, only to discover—much to their chagrin—that the legal repression which these strategies evoke is far more benign than they had anticipated.³ In short, neither the liberal view of repression as "anomaly" nor the simple-minded radical view of repression as "fascist core" appears to come to grips with the distinctive characteristics of legal repression in the liberal state. The central theoretical task of this book is to contribute to a more adequate understanding of these "distinctive characteristics" by means of a detailed analysis of the legal response to the most serious violent challenge to the existing political order in this country since the Great Depression: the black ghetto revolts—euphemistically referred to as "civil disorders"—which between 1964 and 1968

periodically erupted in practically every major urban center of the United States.

Our interest in this is by no means merely academic. We seek to contribute to a greater understanding of legal repression in the liberal state in general and the American state in particular not for the sake of "understanding" alone, but rather because of the partisan conviction that a theory of repression is absolutely essential for those who seek to challenge the existing economic and political order. Differences among students of revolution are manifold, but all serious analysts agree that the response of the state to collective violence on the part of dissidents is likely to be a principal determinant of the revolutionary potential of that collective violence. Every instance of collective violence confronts political authorities with certain crucial decisions—involving varying modes and degrees of repression and/or reform—which help determine the future course of the protest from "below." There is nothing mechanical, in other words, about the state response, and hence nothing automatic about the relationship between collective violence and the social and/or political change which ensues from it. Thus one cannot simply gauge the revolutionary potential of a given outbreak of collective violence by means of the level of discontent or ideological militancy of the participants; rather it is necessary to examine the way in which elite responses themselves shape and define the commitments of the participants as well as those of their actual and potential partisans. In other words, the long-run revolutionary potential of a given outburst or series of outbursts of collective violence is likely to be as much a function of the response strategies and decisions of political authorities as it is of any particular characteristics of the violence itself. If this is so, then it is incumbent on dissidents to develop a more adequate understanding of the dynamics of elite responses if these dynamics are to be controlled and turned to the dissidents' advantage. Therein lies the direct link between our theoretical interest in legal repression and our concern for, and support of, the Black Movement and other militant challenges to the existing economic and political order in the United States.

Since the state response is a crucial variable in the calculus of revolutionary potential, it will be useful to consider for a moment the problem of collective violence from the perspective of the state elite and its interests. Every instance of collective violence confronts the elite, it may be said, with a twofold problem. The most immediate imperative, of course, is to put a swift end to the violence. The second, equally compelling, imperative is to act in such a way as to frustrate as much as possible its revolutionary potential. The dilemma for the elite is precisely that these two imperatives are sometimes incompatible and always difficult to harmonize. For example, a massive display of force might well put a quick stop to the violence, only to increase the size and militancy of the dissidents' constituency; on the other hand, and at the other ex-

treme, a circumspect use of repression might well serve only to convince the dissident rebels of the weakness of the elite and thereby encourage them to increase the intensity of their violence. At any rate, the point to be underscored here is that in practice the two problems of ending the violence and minimizing its revolutionary potential tend to merge and confront the elite with the following critical question: "How can we end the violence in such a way as to minimize its revolutionary potential?" Or, in other words, "How can we reconcile our immediate interest in order with our long-run interest in maximizing our legitimacy?"

This, then, was one of the critical questions confronting American criminal court authorities faced with the challenge of the black ghetto revolts of the 1960s, and the effort to answer this question profoundly shaped the nature of the court response. We shall see that major ghetto revolts in all three cities placed tremendous, immediate pressures on the legal authorities to employ their powers to end the revolts as quickly as possible, and that, in fact, these pressures compelled them to operate for some time as little more than vehicles for the implementation of the political executive's substantive goals. On the other hand, and simultaneously, the revolts confronted court authorities with an almost overwhelming challenge to the entire structure of legality on which their long-run legitimacy is based, a challenge made all the more imminent by the very actions which they were forced to take in order to help put down the revolts. It is precisely this conflict between the long-run interest in law and the immediate interest in order—an example of what Weber called the "insoluble conflict between the formal and substantive principles of justice"⁴—which underlies the peculiar dynamics of the administration of justice following the revolts; which helps explain, for example, why the sentences imposed on participants in major revolts tended to be somewhat less severe than those imposed on participants in minor revolts and far less severe than those imposed for comparable offenses in "normal times."

The nature of this conflict between the immediate interest in ending the violence and the long-run interest in maximizing legitimacy and thereby limiting revolutionary potential was particularly intense, we shall argue, precisely because the bourgeois-liberal state is founded on a permanent and deep-seated tension between these two interests. As we have already intimated, legitimacy in the liberal state resides in the rule of law as an autonomous body of norms and procedures to which even the sovereign is subject, a legitimacy principle not easily reconciled with the short-run interest in ending the violence as quickly as possible. The rule of law, due process of law, or formal rationality, in short, sets definite constraints on the ability of political elites to dispose efficiently of collective violence, constraints which they can ignore only at the risk of endangering their long-run legitimacy and interest in minimizing revolutionary potential. On the other hand, the immediate pressures

to end the violence unavoidably dictate serious abrogations of the principle of formal rationality and hence precisely the risk of delegitimation and maximization of revolutionary potential. The effort to reconcile the interest in order with the interest in legitimacy, in other words, is far more complicated in the liberal state than in, say, a fascist state where legitimacy lies in the command of the party or in the charisma of the leader. Where legality is a fundamental legitimacy principle, then, collective violence creates a peculiarly intense conflict, and perhaps even a contradiction, between order and legitimacy.

LEGITIMACY IN THE LIBERAL STATE: MARX AND WEBER

Both Marx and Weber, the two greatest students of capitalist development, stressed the inseparable links between the origins of capitalism and the growth of formal political equality, and hence the crucial significance of equality before the law as a legitimating principle of the liberal state. Each recognized that the development of a sphere of law to which all were bound and before which all were equal was an essential weapon for a rising bourgeoisie bent on eliminating arbitrariness and the dead weight of ascriptive status distinctions from its profit-making activities. Weber in particular stressed that formal legal rationality was a natural and necessary corollary to economic rationality:

The modern capitalist concern is based inwardly above all on *calculation*. It requires for its survival a system of justice whose workings can be *rationally calculated*, at least in principle, according to fixed general laws, just as the probable performance of a *machine* can be calculated. . . .⁵

Juridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximization of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions. . . . To those who had interests in the commodity market, the rationalization and systematization of the law in general and . . . the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability, and, especially, of capitalistic enterprise, which cannot do without legal security.⁶

For Weber, then, the spirit of capitalism and the spirit of formal legal rationality were two sides of the same coin: a highly rationalized, predictable economic order could only function and flourish within a highly rationalized, predictable legal order. Such legal rationality and predictability, in turn, required that the legal system be insulated from the immediate political conflicts of the day and the shifting substantive goals of any particular set of

political actors. Formal legal rationality, in other words, necessarily entailed "a framework of substantive and procedural norms binding upon and serviceable to both the government and the governed." This requirement was expressed structurally in the evolution of a judicial sphere formally autonomous from the political executive and "maximally immunized against governmental and other pressure."⁷ The "separation of powers" characteristic of the liberal state is thus properly understood as one of the political-legal expressions of the requisites of a capitalist economic order.

Marx devoted less of his energies to the analysis of the "superstructure" of capitalist societies than Weber, but he too emphasized the crucial links between constitutionalism, due process of law, civil liberties, and bourgeois class interests. In fact, he viewed these conceptual developments, to which he gave the name *political emancipation*, as merely the political-philosophic expressions of the interests of the bourgeoisie in freeing their economic activities from the intervention of the state; i.e., as the political-philosophic expression of economic self-interest.

None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice.⁸

Consequently Marx contrasted *political emancipation*, a purely bourgeois freedom founded on self-interest and competition, with the *human emancipation* of a future socialist order based on cooperation and solidarity.

Both Marx and Weber, then, recognized the umbilical connections between formal legal rationality and capitalism; indeed, that it is precisely the combination of formal legal equality and extreme economic inequality which is the distinctive characteristic of the liberal state. Now it goes almost without saying that legal equality in the face of the existence of economic inequality is repressive; that to treat unequals equally is scarcely just. To convey this idea was the intent of Anatole France's famous aphorism praising "the majestic equality of the French law, which forbids both rich and poor alike from sleeping under the bridges of the Seine." If the law is indifferent to the distinction between rich and poor, it follows that the law will necessarily tend to support and maintain this distinction. Even Weber, certainly no great friend of socialism, pointed to the repressive aspects of formal legal rationality:

The propertyless classes in particular are not served, in the way in which bourgeois are, by formal "legal equality" and "calculable" adjudication and administration. The propertyless demand that law and administration serve the equalization of economic and social opportunities vis-à-vis the propertied classes, and judges and administrators cannot perform this function unless they . . . [abandon formal legal rationality].⁹

Both Marx and Weber agreed, then, that under capitalism there exists a permanent conflict between formal legal rationality and the particular substantive rationality behind the demand for economic equality.

Another way of expressing this conflict is to say that formal legal rationality or equality before the law serves to buttress and legitimate the existing economic order. It does this not only by providing a stable, "neutral" framework within which bourgeois class interests in capital accumulation and profit maximization can flourish, but also, and crucially, by convincing the "property-less" that they have the legal right and hence the real opportunity of rising into the bourgeoisie. Where the rights of economic entrepreneurial activity are open to all, and are tied to the legal right of expressing economic grievances politically, it is indeed difficult to persuade aspiring workers and other poor that the system is fundamentally unjust. Thus many observers have correctly stressed the critical connection between the early ascendance of political emancipation in the United States and the subsequent weakness of socialist movements there as compared to Europe.¹⁰ It is probably reasonable to assert that the existence of formal legal rationality and the concepts of due process, an autonomous judicial sphere, and civil liberties which it entails are essential props of the capitalist order; or, in other words, that equality before the law is the political expression of bourgeois class interests.

If equality before the law is consistent with bourgeois class interests, it may nevertheless in the long run serve in a dialectical fashion to undermine the existence of the capitalist order. It is becoming increasingly clear in Western liberal societies that political equality in the face of persistent economic inequality is a mere chimera, and, indeed, that to make political equality a reality requires serious and systematic attacks on a grossly unequal and privately controlled economic system. To give content to the formal principle of equality before the law, in other words, it may ultimately be necessary to abolish the very economic system which spawned that principle. And, paradoxically, a serious attack on economic inequality perforce entails systematic abrogations of the principles of equality before the law and formal legal rationality, since the destruction of a class-based economic system necessarily requires the institution of a system of class justice. The principle of formal legal rationality, then, is a legitimacy principle fraught with tensions and contradictions, a mixed blessing to those with a long-run interest in the preservation of the capitalist order.

At the most general level we can say that there exists a permanent conflict between formal legal rationality and the substantive goals which political elites (and nonelites) wish to pursue, "between political goals and the constitutional and legal structures of the community." Formal rationality dictates that only certain means can be employed to achieve political ends and therefore operates as a continual constraint on political efficiency and expediency.

In short, in a system in which policies are judged as much by the "modes of action they embody"¹¹ as by their results, long-run legitimacy acts as a brake on the short-run pursuit of substantive goals. This is not to say that the procedural norms binding on political elites are not often ignored; rather simply that they cannot be ignored with impunity. As Kirchheimer has emphasized,

Procedural guarantees operate to some extent as self-enforcing devices that carry with them their own sanction. Since the violation of procedural guarantees is visible to all, the image creating purposes . . . are jeopardized.¹²

But in the liberal state the procedural norms of formal rationality are not merely self-enforcing; rather there exist groups organized expressly for their protection.

The appearance of an organization devoted to the legal espousal of civil liberties as an abstract proposition pushes this form of action [formal rationality] to its logical conclusion. Trying to separate the specific political circumstances in an individual case from the constitutional principle involved, the American Civil Liberties Union [for example] will intervene . . . to uphold or enlarge the field of application of a constitutional principle.¹³

The kernel of truth in the pluralist dogma that politics in the contemporary liberal state centers around means, not ends, is thus that only in the liberal state does one find this peculiar phenomenon of such intensive mobilization of emotional and material resources on behalf of purely formal principles. Under these conditions, political elites recognize that flagrant violations of formal rationality on their part are likely to become widely publicized and therefore contribute substantially to their delegitimation. The nature of their dilemma, however, is precisely that, in order to achieve their political goals of the day, such delegitimation must continually be risked. Political elites will generally attempt to harmonize as much as possible their substantive goals with formal rationality, but there are regularly times when the two conflict and a balance must be struck which favors one over the other.

THE ADMINISTRATION OF JUSTICE IN THE LIBERAL STATE: WEBER MEETS HOBBS

This dialectic between formal and substantive rationality lies at the heart of the administration of justice in the liberal state. The constraints of a system of formal legal rationality prescribe certain critical limitations on the manner in which political elites pursue the substantive goal of repressing behavior which is deemed socially or politically offensive. Repression in the liberal state, like policy making in general, is subject to norms and procedures which are binding on political elites in the sense that their abrogation necessarily entails a threat to the legitimacy on which their rule is based. The imperatives

of repression are such, however, that successful repression policy is often impossible to achieve in the absence of just such abrogations and hence just this threat.

Formal legal rationality dictates that the administration of justice respond only to specific acts; that only the empirical question of whether or not a formally proscribed act has been committed is a relevant criterion for the application of punitive sanctions. Strictly speaking, the question of the substantive motivation for the act is irrelevant to the determination of guilt; the law responds not to the "why" of the act but simply to the fact that it has or has not been committed. Similarly, the law in an ideal-typical formal-rational system takes no notice of the characteristics of the alleged offender: rich or poor, black or white, ideological dissident or staunch supporter of the existing order, all are held to be equal in the eyes of the court and all are guilty or innocent by virtue of their acts alone. If their specific acts are determined to fall under a general category of proscribed acts, they are guilty; if not, they are innocent. Formal legal rationality thus circumscribes the conflict between the state and the accused into a conflict over the facts; to have committed a "crime" or to be a "criminal" means only to have been proven to have committed such-and-such act. The question of ideological, class, or racial complexion thus is formally prevented from entering into the meaning of "crime" in the liberal state. Similarly, the application of punitive sanctions following a determination of guilt may be neither arbitrary nor based on racial, class, or ideological considerations. Discretion in imposing punishment is limited by definite, preestablished legal standards which relate specific penalties to specific acts. In short, the administration of justice in the liberal state proceeds through the "application of generally accepted rules and standards of procedure to the [particular] case at hand."¹⁴

These "rules and standards of procedure," moreover, tend to constitute a closed system which attempts to embrace any conceivable set of behavior. In the course of his analysis of the relationship between the economic and legal structures of the bourgeois state, Lukács stressed what we might call this "imperialism" of formal legal rationality:

Here too [paralleling the economic realm], there is a breach with the empirical and irrational methods of administration and dispensing justice based on traditions tailored, subjectively, to the requirements of men in action, and, objectively, to those of the concrete matter in hand. There arises a rational systematisation of all statutes regulating life, which represents, or at least tends towards a closed system applicable to all possible and imaginable cases. . . . [T]he legal system is formally capable of being generalized so as to relate to every possible situation in life and . . . is susceptible to prediction and calculation. This . . . need [for calculation] requires that the legal system should

confront individual events as something permanently established and exactly defined, i.e., as a rigid system.¹⁵

The overriding imperative of a formal-legal administration of justice is thus to assimilate any conceivable particular act to a general category of previously defined and proscribed acts. This hegemony of the universal over the particular, of the abstract over the concrete, radically circumscribes judicial discretion. In an ideal-typical formal-legal administration of justice:

The judge is more or less an automatic statute-dispensing machine in which you insert the files together with the necessary costs and dues at the top, whereupon he will eject the judgment together with the more or less cogent reasons for it at the bottom: that is to say, . . . the judge's behavior is on the whole *predictable*.¹⁶

Undoubtedly Lukács exaggerates the degree of comprehensiveness, closure, and "automatic" qualities of any given liberal legal system. This exaggeration is particularly evident in the case of Anglo-American systems impregnated with the heritage of the common law, where the legitimacy of a measure of judicial discretion—particularly in the sphere of criminal justice—is acknowledged to a far greater extent than in continental systems. Thus one student of "discretionary justice" emphasizes that, according to the common-law tradition, "the judge must be free to create," and argues that "there is more recognizable discretion in the field of crime control, including that part of its broad sweep which lawyers call criminal law, than in any other field in which law regulates conduct."¹⁷ Yet even in Anglo-American legal systems this discretion operates only within certain crucial, fixed limits which constitute the essence of formal legal rationality and which radically constrain both the potential latitude and potential arbitrariness with which discretion is exercised. In all liberal states, these limits are defined by

[t]he principle of legality—that there shall be no crime without law, and no punishment without a crime—[a principle which] is criminal justice. In limiting both crime and punishment by a system of rules, this policy aims at protecting individuals against arbitrary governmental actions. . . . What the principle of legality demands is a law and also an act made criminal by law.¹⁸

Thus if the administration of justice in Anglo-American systems does not exactly function like Weber's "technically rational machine," it is nonetheless a system in which the principle of legality—no punishment without a crime, and no crime without a prior law—subordinates judicial and other discretion to the dictates of formal, general rules which militate against arbitrary and "irrational" decisions.

It is a system, therefore, which is not easily wielded on behalf of the sub-

stantive goals of any particular set of political elites. This follows from the fact, underscored above, that the state must confine itself to the facts of a given case and to the effort to assimilate these particular facts under a general, formal rubric; the other side of a radically circumscribed judicial discretion is an administration of justice highly resistant to substantive political pressures. But the state is not only constrained by formal rules which equate "guilt" with having committed a generally proscribed act; the state also is bound in its efforts to prove the factual guilt of the accused by certain rules and procedures which exist for the protection of the latter. Throughout the legal process the accused retains certain rights which must be respected if the proceedings are to be considered fair and legitimate, rights which the state can abrogate only at the same risk of delegitimation which it runs outside the arena of the criminal court. The existence of these rights—such as those of bail, representation, jury trial, etc.—underscore that the conflict between the state and the defense is conceived as an adversary process in which the resources of each party are equalized as nearly as possible; in Anglo-American liberal systems, this "equalization" extends in theory as far as a presumption of innocence in favor of the accused. In principle, then, the administration of justice in the liberal state operates not only like a machine, but like a machine which is neutral before the conflict between state and the accused and thus equally accessible to both parties.

A peculiarity of the administration of justice in the liberal state is thus that the law is both a party to, and an arbiter of, the conflict between the state and the accused. The ambiguity of this situation is reflected in the division of labor between prosecutor, whose role is to attempt to establish the guilt of the accused, and judge, whose role is that of arbiter of the fairness and adequacy of that attempt.¹⁹ This separation of judicial and prosecutorial functions symbolizes the autonomy of the legal sphere from the shifting political purposes of the day. The fact that the prosecution must submit to the authority of the judge, moreover, symbolizes the subordination of political expediency to the formal dictates of the legal sphere. In short, in a liberal system the "State's efforts to penalize opponents must be subject to freely usable control by a third agency that does not take orders from the government . . . [and] is committed to enforcing an established set of norms. . . ."²⁰

Formal legal rationality thus radically constrains the ability of political elites in the liberal state to wield the administration of justice as an effective instrument of political repression. Any departure from the predictable, machine-like administration of justice necessarily threatens the long-term legitimacy of elite rule. Thus Weber notes that the liberal state

is as little able to tolerate the dispensing of justice according to the judge's sense of fair play in *individual cases* or any other irrational means or principles of administering the law . . . as it is able to endure a patriarchal administration

that obeys the dictates of its own caprice, or sense of mercy, and for the rest, proceeds in accordance with an inviolable and sacrosanct, but irrational tradition.²¹

The dilemma for the political elite, however, is precisely that such departures from formal rationality in the administration of justice are dictated by their substantive policies of repression. Although the law is indifferent to the ideological and class characteristics of dissident nonelites, an elite bent on survival cannot well afford to ignore these substantive considerations. An inherent tension exists, in other words, between the substantive goals of repression and the dictates of formal rationality: on the one hand these dictates make it difficult for the state to implement its immediate interest in disposing of its opponents, and on the other a sustained policy of repression directed at particular individuals or groups is likely to jeopardize its long-run interest in maintaining formal rationality. Although "repression by formal rationality" is the legitimate mode of repression in the liberal state, it is a mode of repression beset by internal contradictions which render it difficult indeed to employ.

Repression by formal rationality is particularly precarious because, where the substantive goal is repression, the temptation to depart from formal rationality is especially great. As the Hobbesian tradition reminds us, a core political function of the state is to preserve public order—to "protect the peace"—and the fulfillment of this function necessarily becomes a paramount goal of the political elite. Whereas in other substantive realms the elite may be able to modify or even give up its policy goals in the face of the constraints of formal rationality, the goal of maintaining order is not so willingly or easily sacrificed, for the maintenance of order is viewed by the citizenry at large as the *sine qua non* of political responsibility and sovereignty. Where the substantive goal is repression, in other words, the conflict between formal and substantive rationality which is endemic to the liberal state assumes particularly intense dimensions. In the realm of repression, liberal political elites inevitably discover that their class interest in formal rationality is at odds with their interest *qua* political authorities in order. The effort to maintain "law and order" thus tends to degenerate into a choice between law *or* order which necessarily sacrifices one of their core interests to the other.

We began our discussion in this chapter by formulating the dilemma confronting a political elite faced with collective violence as that of reconciling its immediate interest in order with its long-run interest in minimizing revolutionary potential and maximizing legitimacy. By this point it should be clear that in the liberal state the effort to reconcile these two competing interests will tend to take the form of repression by formal rationality. At the same time, it should already be clear that this form of repression is fraught with ambiguities and contradictions which render the effort to reconcile the interest in order with the interest in legitimacy extremely problematical.

Repression by formal rationality implies that every effort will be exercised to employ ordinary legal procedures and the ordinary sanctioning mechanisms in the course of the elite effort to repress collective violence. This strategy offers important advantages to the elite in its struggle to minimize revolutionary potential and maximize long-run legitimacy. To begin with, the successful adaptation of the ordinary criminal justice system to the threat of collective violence is likely to have a profound impact on the consciousness of the participants in the violence. As we suggested earlier, the ideological coherence of participants in collective violence is not necessarily fixed, but rather is shaped by the nature of the elite response. Repression by formal rationality, insofar as it attempts to affix the label of "crime" on the behavior of the participants, is likely to help convince participants that their violent acts represent nothing more than massive outbreaks of common "criminality." To recall the insight of Lukács, the legal system in the liberal state tends to "confront individual events as something permanently established and exactly defined"; the effort to apply the routine administration of justice to the problem of collective violence represents nothing less than an effort to fit the violent "events" under the rubric of previously established, general categories of proscribed behavior, i.e., to deprive the violence of its special, hence political, character by defining it as ordinary "crime." Repression by formal rationality thus serves to depoliticize collective violence and to militate against the growth of the consciousness and solidarity of the participants.

The "criminalization" process entailed in repression by formal rationality also serves to delegitimize whatever demands emerge from the collective violence. Demands which arise from "criminals" are unlikely to receive a hearing and thus less likely to be voiced in the first place. Once the process of criminalization is under way, public debate is not likely to center over the substantive grievances of the participants but rather over the severity of punishment which they merit: criminals do not have just grievances; criminals deserve to be punished. Repression by formal rationality thus makes it unlikely that the claims and grievances of the participants in collective violence will be addressed to, or accepted by, significantly large numbers of the population at large.

It follows from what has already been said that repression by formal rationality dramatically reduces the likelihood of alliances between participants and other nonelites or members of the political elite itself. To confer the status of "criminal" on the participants is to suggest strongly the illegitimacy and even potential criminality of expressions of support for the participants, and is therefore likely to discourage vocal support from ideological sympathizers. Similarly, moderate and partially sympathetic members of the elite are likely to find it politically impossible to support the cause of "criminals." Once the process of criminalization has begun, even the most sympathetic elites will be

unwilling to undermine the authority and legitimacy of the court by disputing its criminalizing effort, for in a system in which the law does not respond to the "why" or the "who" of the behavior in question they will have no grounds on which to do so. Instead, they are likely to devote their efforts to ensuring that court authorities in the course of their criminalizing efforts respect the rights of the "criminal suspects"; i.e., they will tend to reinforce repression by formal rationality.

In short, because repression by formal rationality tends to depoliticize the consciousness of the participants, delegitimize their claims and grievances, and militate against alliances between participants and other nonelites or elite moderates, it is likely effectively to minimize revolutionary potential and maximize long-run legitimacy. As Schattschneider has observed, "the control over the agenda of alternatives is the supreme instrument of power"²²; i.e., the most effective utilization of power resides in the capacity to determine what demands will become politically relevant, and what issues will enter the arena of public debate. Viewed from this perspective, repression by formal rationality is an extremely effective example of control over the "agenda of alternatives." To sanction participants in collective violence by means of the ordinary administration of justice is to divert attention from the singularity of the event and its causes in favor of an exclusive focus on the mere "facts" and their relationship to general categories of formally proscribed acts. Repression by formal rationality, in other words, tends to narrow the scope of conflict;²³ i.e., to turn a political conflict into a legal-factual conflict. By "regularizing" the irregular and "generalizing" the particular, repression by formal rationality defines the collective violence in such a way as to prevent demands which grow out of its irregularity and particularity from ever becoming the object of political debate and decision. Repression by formal rationality, in other words, entails a depoliticization, and this, in turn, is a most effective means of minimizing the revolutionary potential of collective violence and of maximizing the long-run legitimacy of the elite.

In the liberal state, then, that form of repression of collective violence most consistent with the long-run legitimacy of the state is repression by formal rationality. This is implicit in the following remarks of Joseph Goldstein, a leading legal scholar specializing in the American criminal justice system:

Any justification for a separate substantive offense of "riot" in a criminal code would require a determination that the conventional body of criminal offenses . . . in that code did not cover all forms of violent or coercive conduct which constitute the essence of a riot. . . . [I]t is manifest that the arsenal of conventional offenses is sufficiently complete to enable officials to invoke the criminal process against all persons who make, threaten to make, or are trying to make a "riot". . . . I submit that there is neither need nor justification for a separate criminal offense of "riot" in local, state or federal criminal codes.

To the extent that the criminal law has a role to play in riot control it is not to be found in a separate offense of "riot" or in treating "riot" as an aggravating or mitigating factor, but rather in holding police and civilian alike accountable for their violations of law.

[Government] can, with due regard to constitutional safeguards, maintain an external reality which continues to function at the "normal" level of deterrence, whatever that may be.²⁴

Yet under conditions of collective violence it may be far more difficult than Goldstein believes to "hold police and civilian alike accountable for their violations of law" and to maintain a "'normal' level of deterrence." To begin with, the very collective nature of the violence makes repression by formal rationality an extremely problematic proposition indeed. The "rules and standards of procedure" of the administration of justice in the liberal state are geared to discrete, individual offenses and not easily adapted to mass violations; large numbers of arrests necessarily tax the sanction mechanism and militate against the individualized treatment which lies at the heart of formal rationality. As Kirchheimer has pointed out,

Judicial determination requires the assertion of an element of personal fault . . . [but] purely administrative procedures become almost mandatory where, for example, huge numbers of people are involved. . . .²⁵

In the face of collective offenses, in other words, the effort to establish "personal fault" becomes problematical and the temptation to resort to "administrative procedures" which abrogate formal rationality becomes difficult, indeed almost impossible to resist.

This is especially true where the imperatives of ending the violence dictate that "the operation must occur with great speed."²⁶ In fact, all the imperatives entailed in ending the violence militate against the successful adaptation of the ordinary procedures for the administration of justice to the problem of collective violence. Police who are sorely needed "in the field" to contain the violence can scarcely be expected to be able to devote the normal amount of time and effort to investigative and other postarrest functions so essential for a subsequent determination of individual guilt. Similarly, prosecutors on whom the police must rely to provide the rationale for further detention will necessarily be under tremendous pressure to alter their normal screening criteria so as to allow for the prosecution and detention of all those whom police feel must be "kept off the streets." Finally, in the face of this need to "keep them off the streets," judges will feel pressure to abandon their normal bail-setting practices and set bail sufficiently high so as to ensure a prolonged detention period. And these pretrial abrogations of formal rationality are not only serious in and of themselves, but they also render subsequent trial proceedings difficult if not impossible.

The pressures to wield the administration of justice on behalf of the goal of ending the violence as quickly as possible thus necessarily dictate departures from the very formal rationality in the administration of justice which it is in the long-run interests of the elite to preserve. On the other hand, the constraints of formal rationality limit the efficiency with which the violence can be ended. The concern with the *legality* of the arrest and the adequacy of postarrest procedures (on which subsequent successful prosecution rest) necessarily complicates the problem of containing the violence. The need to set bail at *some* level unavoidably entails the risk that some of the arrested participants will be able to return to the fray. Political elites with responsibility for the administration of justice thus necessarily find themselves on the horns of a dilemma which is difficult if not impossible to resolve. The long-run interest in "regularizing the irregular," of acting in such a way as to define the violence as "ordinary crime" and thus depoliticize it, runs counter to the short-exigencies of recognizing, and responding to the particularities of the violence in such a way as to end it as quickly as possible. In order to end the violence a process of particularization must take place, but in order to maximize long-term legitimacy a process of generalization is required. The effort to repress collective violence by means of formal rationality, in short, is an effort which is beset by profound internal contradictions.

THE METROPOLITAN CRIMINAL COURT: ENTER MICHELS

Up to this point we have discussed the problems and ambiguities involved in the effort to apply an ideal-typical, formal-rational administration of justice to the exigencies of collective violence. Yet no system for the administration of justice in any liberal state perfectly conforms to this ideal type, and the response of any concrete judicial system to a given instance of collective violence will therefore necessarily entail variations on the themes outlined above. In the case of the American state, court authorities confronting collective violence do so from the perspective of a system in which serious inroads against the principles of formal-legal rationality are an intrinsic and necessary aspect of the ordinary, routine administration of criminal justice. This factor only complicates further the nature of the calculus involved in the effort of the political elite to reconcile its immediate interest in ending the violence with its long-run interest in maximizing its legitimacy and that of the American liberal state in general.

The central fact of life facing the criminal court system of every major city in the United States is a volume of business vastly out of proportion to that which it is capable of handling without resorting to systematic, if covert, evasions of some of the principal norms entailed in formal legal rationality. The parallel emergence of consumer capitalism, under which continued economic

expansion depends critically on the constant creation and stimulation of an ever-higher level of consumer needs, and of a growing class of permanently unemployed and underemployed individuals—a “permanent welfare class”—whose consumption needs by definition cannot be met, has produced in the metropolitan centers of the United States since World War II a vast and rapid growth in those activities—particularly offenses against property—which conventionally come to be labeled as “crime.”²⁷ This in turn has produced a vast increase in the volume of business of (that is, arrests which must be processed by) local systems for the administration of criminal justice.

Thus, the administration of criminal justice has become a major industry in modern urban society. F.B.I. data show that during 1963 there were 4,437,786 arrests covering areas totaling 127,000,000 in population. In California alone in 1963 there were 98,535 adult felony arrests and 595,992 adult misdemeanor arrests.²⁸

Perhaps typical of American political institutions, the structures which comprise the local court system—the police department, the prosecutor’s office, the court bureaucracy, and the detention bureaucracy—have undergone relatively little change, certainly in no sense commensurate with the ever-increasing volume of business with which they are confronted.²⁹ Although of late increasing attention has been paid to this problem, the proportion of city and state budgets allocated for the personnel and facilities of the criminal justice system remains pitifully low.³⁰ Thus for example in 1968 thirteen criminal court judges still handled all the criminal business for Detroit, a city with a population of several millions. In Los Angeles, a city whose court system has been cited as a model of efficiency and reform which other court systems could well emulate,³¹ individual judges in the municipal court typically handle case volumes ranging from 2,500 to 4,500 per month! These examples reflect tendencies present in all metropolitan court systems:

Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate, prosecutors walk into courtrooms to try cases as they take their initial look at the files, defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases.³²

These volume pressures make it impossible for court authorities to sanction by means of the norms and procedures of an ideal-typical formal-rational administration of justice. One such norm, as we have seen, is that of trial before either judge or jury. Trials, however, and especially jury trials, are extremely time consuming; thus for example in Detroit in 1965 jury trials represented

only 5 percent of the total number of felony dispositions but consumed almost 40 percent of the total number of judge-days for that year.³³ Had the number of jury trials tripled, they would have consumed *all* of the judge-days for that year, yet left undisposed 85 percent of the felony cases confronting the court! And this situation is by no means unique to Detroit: all major metropolitan courts are structurally incapable of disposing of the major proportion of their volume by means of an adversary trial. In fact, if the adversary expectations entailed in an ideal-typical formal-rational administration of justice controlled the actual operations of these courts, the administration of justice in the urban centers of the United States would grind to a sudden and dramatic halt.

Whether this combination of ever-increasing volume and ever-decreasing structural capacity to deal with it by standard procedures reflects a fundamental and permanent contradiction of the American liberal state depends on whether these two tendencies are endemic to the American system. It is quite possible that there is an inherent and inevitable tendency for our economic system to deny the allocation of resources necessary to cope with the very problem which that system increasingly produces; that the American system is creating a crisis which it is structurally incapable of resolving on its own terms.³⁴ On the other hand, it is within the realm of possibility that our economic system is capable of ending the upward spiral of "socially offensive" behavior and of providing the resources necessary to deal with that behavior. This whole question deserves a serious theoretical analysis which is beyond the scope of this work. What is certain is this: given the present situation of increasing volume and lack of resources with which to deal with it by "standard procedures," court authorities have been forced to develop a system of sanctioning which seriously undermines the principles of formal legal rationality on which the long-run legitimacy of the American state is based. A system of justice based on the presumption of the innocence of the accused and in which proof of guilt requires a *combat* between the prosecution and the defense before a neutral judge or jury has been replaced by a covert system of justice which revolves around the presumption of the guilt of the accused and the plea bargain—involving the *cooperation* of the prosecution, the defense, and the judge—as the institutionalization of this presumption. Consistent with their long-run legitimacy interests, every effort has been made by court authorities to disguise this radical transformation by means of continued verbal and symbolic invocations of the norms and procedures of formal legal rationality.

The presumption of guilt on which the court system rests is established at the very point of entry into that system. Observers of the criminal court system have often underscored the critical role that police and prosecution screening of cases plays in regulating the case load for the court system;³⁵ less frequently has it been observed that it also serves to establish a (publicly

inarticulated and even disavowed) presumption of guilt against those who are funneled into the court for formal proceedings. The assumption is shared—by prosecutors, defense attorneys, and judges alike—that police and prosecution screening “eliminates doubtful cases; that only persons as to whom there is a high probability of guilt will be brought before the courts.”³⁶ According to Skolnick,

Under these circumstances of mass administration of criminal justice, presumptions necessarily run to regularity and administrative efficiency. The negation of the presumption of innocence permeates the entire system of justice . . . all involved in the system, the defense attorneys and judges, as well as the prosecutors and policemen, operate according to a working presumption of the guilt of persons accused of crime. That the accused is entitled to counsel is an accepted part of the system, but this guarantee implies no specific affirmation of “adversaryness” in an interactional sense.³⁷

This “working presumption of guilt” is fundamental to the operations of the metropolitan criminal court, since it supplies the rationale for “plea bargaining”: the means by which the court disposes of the bulk of its serious business, avoids the impossible burden of full-scale adversary proceedings, yet preserves a façade of formal-legal rationality. Plea bargaining, plea copping, or the negotiated plea, as it is variously called, typically

encompasses a reduction of charges, a limitation of the potential sentence, and an agreement from the prosecutor to urge the judge to sentence in accord with an agreement between defense attorney and prosecution.³⁸

Newman explains this process and its consequences in somewhat greater detail:

As the term implies, plea negotiation involves an exchange of concessions and advantages between the state and the accused. The defendant who pleads guilty is treated less severely than he would be if he were convicted of the maximum charge and assessed the most severe penalty. At the same time, he waives his right to trial, thereby losing his chance, no matter how slight, for outright acquittal. The state, at the relatively small cost of charge reduction or sentence leniency, gains the numerous advantages of the plea of guilty over a long, costly, and always uncertain trial.³⁹

These negotiations, of course, take place “behind the scenes,” and in public every effort is made to pay symbolic homage to the adversary tenets of formal legal rationality. Thus in open court a ceremony takes place which appears the very model of formal rationality, a ceremony in which the rights of the defendant are scrupulously respected. The defense attorney announces to the judge that his client wishes to enter a plea of guilty to a reduced charge; the prosecutor announces that he will accede to the request for such a plea and urges the judge to accept it. The judge, ever solicitous of the defendant’s rights, ensures that the defendant is aware of the implications of his plea and

refuses to accept the plea until he is "convinced" that the defendant has "freely and willingly" given up his right to a trial. Once "convinced," the judge, impressed with the display of contrition on the part of the defendant, will impose a sentence in accordance with the reduced charge. A formal effort is thus made to preserve the voluntariness of the defendant's decision and the integrity of the discrete roles of an adversary system. This effort, of course, is only an elaborate charade designed to provide a legitimating veil over the cooperative, behind-the-scenes efforts of all the actors to coerce the defendant into a plea of guilty.

Each of the actors in the court system, notwithstanding their separate and competing formal roles, shares a common interest in inducing the defendant to plead guilty in return for reduced sanctions.

[T]o police administrators, a plea of guilty is a welcome evidence of their effectiveness, for they correlate a favorable public image with a high conviction rate. Equally important is the fact that valuable police time that would be spent in trial testimony is freed for other activities.

The prosecuting attorney is also

interested in obtaining a negotiated plea. . . . First, there is the almost impossible administrative task of going through the elaborate procedures of a court trial for each case. The personnel and other resources of the prosecutor's office simply could not carry such an impossible burden and the prosecutor would lose a degree of dominance over those variables essential to the maintenance of his "public image" and his "batting average." In those cases which end in a plea, the prosecutor usually retains a far greater influence over the ultimate sentence or disposition. Indeed, the very plea which is finally negotiated and accepted by the accused fairly well defines the limits of punishment ultimately involved.

The judge also

has a vested interest in a high rate of negotiated pleas. He shares the prosecutor's earnest desire to avoid the time consuming, expensive, unpredictable snares and pitfalls of the adversary trial. He sees an impossible backlog of cases, with their mounting delays, as possible public evidence of his insufficiency and failure.⁴⁰

Since the judge bears formal responsibility for the efficiency of court proceedings, he has an especially acute interest in, and experiences particularly acute pressures to ensure, a rapid and predictable disposition of cases. In Chicago, in fact, judges compete in what insiders have dubbed a "disposition derby" in which they are ranked by the chief judge according to the number of cases they have disposed of in a given week or month. In Chicago as well as in all major metropolitan court systems, the judge's position in this ranking is likely to be a prime determinant of his rise in the judicial hierarchy.

The warden of the short-term prison (which houses defendants awaiting trial who have not made bail) also shares an interest in disposing of as many cases as rapidly as possible and therefore in having as few cases go to trial as possible.

[A]ccused who are not released are housed in the short-term prison. As a rule it is overpopulated. . . . Each day a statistical resumé of the jail population is sent to the prosecutor, the judges and the probation department. Its message is not lost upon its recipients: "faster production."⁴¹

The negotiated plea also serves the interests of the defense lawyer and engages him in active cooperation with his formal adversaries, the prosecution and the police.

The lawyer, whether a Public Defender or a privately retained defense counsel, is subject to pressures peculiar to his role and organizational obligations. But ultimately he is also concerned with strategies leading to a plea. Again, impersonal elements prevail—the economics of time, labor, experience and commitment of the defense counsel to the organizational values of the court organization.⁴²

Thus Blumberg's study of a large metropolitan court system found that over 55 percent of defendants surveyed indicated that it was their lawyer who first suggested a plea of guilty and that it was he who most influenced the defendant in his final plea. Blumberg concludes that "it is the lawyer who, in large measure, 'ties together' the seemingly disparate elements of police, prosecution and court organization to help them dispose of a voluminous case load."⁴³ This point is made on a somewhat more general analytic level by Skolnick, who observes that

administrative requirements characterizing the American administration of criminal justice make for a relationship between prosecutor and defense attorney that strains toward cooperation; [and] their relationship is based upon interests wider than those of the parties they represent.⁴⁴

The reality of the metropolitan criminal court is thus far from an ideal-typical formal-rational system in which state and defense compete in adversary fashion and the judge is a neutral arbiter who insures the fairness of the proceedings and is indifferent to the final outcome. Although the prosecutor, the defense lawyer, and the judge retain special interests and responsibilities which grow out of their specific formal roles, they nevertheless share an overriding interest in maintaining the equilibrium of the legal order in the face of the overwhelming volume pressures to which it is subject. This shared interest engages them in a covert process of cooperation upon which the very ability of the administration of justice to function depends.

A broad array of organizational inducements is brought to bear by these

actors on the defendant to secure his cooperation in the negotiated plea. The process begins at the very point at which the defendant is formally charged with a crime. Operating under the presumption of guilt which pervades the entire system, the prosecutor typically selects a charge which he knows is higher than the evidence in the case will sustain. This serves to place more pressure on the defendant to plead guilty than would exist if the less serious, factually based charge were employed. It also provides the prosecutor with the necessary leeway for an eventual reduction which will appear to the defendant as a "break" but in reality is probably the charge with which he should have been confronted in the first place.⁴⁵ The "bargain" involved in plea bargaining is thus little more than the end to a game which is rigged from the outset by "overcharging." Under these conditions,

the impulse to seek a negotiated plea . . . in view of the dire possibilities of going to trial and losing, is almost impossible for the accused to overcome. The possibilities of a defendant being placed on probation are far greater if he has pled to a lesser offense rather than having been convicted after a trial . . . to risk a jury trial poses an obviously greater statistical probability of conviction, often of far more serious charges than those administratively available in the bargained-for plea. The defendant who has been convicted after trial receives rather less generous treatment than one who has negotiated.⁴⁶

The system of monetary bail which serves to imprison the majority of defendants prior to their trial acts as yet another inducement to the defendant to plead guilty.

The common refrain heard in the remand jail from those who have been there for an extended period is a desire to plead guilty and get sentenced so that they can move to a more commodious prison. The greatly crowded conditions . . . are used as part of the process of reducing an accused's resistance to the various agent mediators. In short, crowded conditions in the short-term prison become an extremely functional adjunct for the administrative process of the court system.⁴⁷

The net effect of these organizational pressures on the defendant is that "accused persons shun trials and prefer to alleviate the onerous burden of the defendants' status through a negotiated lesser plea."⁴⁸ Thus, in large metropolitan areas from 50 to 70 percent of all felony cases which enter the court are disposed of by guilty pleas, and between 80 and 90 percent (or even higher) of all convictions result from pleas of guilty.⁴⁹ The metropolitan criminal court system, then, copes with its overwhelming volume pressures by assuring that, adversary norms notwithstanding, very few cases are disposed of by adversary proceedings, i.e., that very few cases ever come to trial, especially to jury trials. Those that do come to trial are often "the outcome of a failure of pretrial negotiation, perhaps as frequently a failure of negotiation between attorney and client as between defense and prosecution."⁵⁰

In order for the plea bargaining machinery to fulfill its function of efficient and dependable disposition of a huge number of cases

the sentencing actions of judges must be predictable. If the defendant and his lawyer are to be influenced to accept a lesser charge or the promise of a lighter sentence in exchange for a plea of guilty, there must be some basis to believe that the judge will fulfill his part of the agreement. Since judges are unable to formally announce their agreement with the details of the bargain, their past performance acts as a guide.⁵¹

Thus "volume pressures make statutory limits in sentence largely academic";⁵² criminal sanctions are as much a response to the administrative pressures of volume processing as they are to any legislative definition of appropriate penalties. In fact, as Sudnow has pointed out, the ultimate charge on which the defendant is convicted is likely to bear little or no relationship to the alleged facts of his offense, but rather is selected because it is the charge which will permit the imposition of a sentence which will be acceptable to the defense.⁵³ Thus the end of the criminal process as well as the beginning is marked by an abrogation of formal rationality in the name of the survival of the court system as a whole. Michels' "law" that the imperatives of *organizational maintenance* inevitably deflect any bureaucracy from the pursuit of its original and professed goals thus appears to hold full force in the case of the metropolitan court bureaucracy.

If criminal sanctions are at least in part a function of volume pressures, it follows that when these pressures increase (or decrease), sanctions will vary accordingly. One of the principal determinants of the initial charging process, in fact, is precisely variation in the volume of arrests with which police and prosecutors are confronted. Acutely aware of the limitations on the capacity of the court to absorb cases, prosecutors will alter their charging criteria according to the degree of volume pressure with which the system is confronted rather than adhere to a single, fixed standard demanded by the machinelike qualities of a formal-rational system. Cole, for example, in his study of the Seattle court system found that "when the system reached the 'overload point,' there was a tendency [on the part of the prosecutor] to be more selective in choosing the cases to be accepted." Similarly, he found that when judges are faced with an increase in the volume of cases, they will alter their sentencing behavior. Thus a Seattle judge reported that

when the number of prisoners gets to the "riot" point, the warden puts pressures on us to slow down the flow. This often means that men are let out on parole and the number of people given probation and suspended sentences increases.⁵⁴

The reality of sanctioning in the American criminal court, in short, is a far cry from an idea-typical formal-rational administration of justice in which a

determination is reached by measuring the facts of the case against the sole yardstick of an abstract, general category of legally proscribed acts. Charging, setting bail, sentencing, and all the other critical stages in the sanction process are as much a function of the shared interests of all the actors in organizational maintenance as they are of the facts and their relationship to a general category. Each actor in the court system knows that there is a certain quota of guilty pleas which must be taken on a day-to-day basis if the court organization is to survive, and each depends on the other to act in such a way as to fulfill this quota. Judges depend on prosecutors and defense attorneys to induce defendants to plead guilty, defense attorneys depend on judges to sentence in accord with prior patterns, etc. Any disruption of this cooperative process, any injection of uncertainty or unpredictability which undermines these shared expectations, can have grave consequences for the court organization. Thus a judge of the Los Angeles County Superior Court acknowledged that "an increase in not guilty pleas of only 5% in the arraignment courts . . . would result in a flooding of the trial courts and a breakdown of the entire system."⁵⁵ A judge from another state echoed this observation, indicating that "if all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state of the union," adding, however, that "they dare not hold out, for such as were tried and convicted could hope for no lenience. . . . The truth is, that a criminal court can operate only by inducing the great masses of . . . defendants to plead guilty. . . ."⁵⁶ Under these circumstances, the demand for strict adherence to formal-legal rationality necessarily becomes a subversive demand which threatens the very survival of the court system.

This was dramatically confirmed in 1964 when the San Francisco court system was confronted with some 400 civil rights cases resulting from a series of sit-in demonstrations. Civil rights lawyers initiated time-consuming motions to dismiss, refused to plead their clients guilty and instead demanded jury trials, with the result that it took the court five months to dispose of the 400 cases. During this time courts which normally handle civil cases were diverted for the processing of the regular criminal calendar, and the processing of civil cases was totally disrupted. According to another Los Angeles judge, "they didn't have a civil case in San Francisco for six months!"⁵⁷ In short, when defense attorneys—or for that matter any of the actors of the court system—refuse to play by the cooperative "rules of the game" and demand the full-scale adversary proceedings entailed by the norms of formal-legal rationality, the very capacity of the administration of justice to function becomes problematical.

Court authorities in the metropolitan centers of the American polity thus face a special dilemma. On the one hand, and as we have seen, their long-run legitimacy and that of the system as a whole depends on the maintenance of

formal legal rationality in the administration of justice. On the other hand, adherence to formal rationality necessarily threatens the very ability of the court system to function. Long-run legitimacy and the need to maintain an ongoing repressive mechanism are hopelessly at odds with one another. The response on the part of court authorities to this contradiction has been to maintain verbal and symbolic adherence to formal rationality yet at the same time to develop a covert sanctioning system which departs at every important stage from its dictates. Obviously, the adequacy of this "solution" from the point of view of the authorities depends entirely on their ability to maintain the guise of formal rationality and prevent the covert sanctioning system from reaching widespread public attention. In the past, an occasional dramatic trial and its "Perry Mason" television counterparts have served to keep the legitimating myth of formal rationality alive. More recently, however, the "crisis in our courts" has received increasing public attention, and the media of this country have begun to explore in depth the inner workings of the covert system.⁵⁸ Thus the adequacy of the "solution" of maximizing symbolic adherence and minimizing actual adherence to formal rationality is becoming increasingly problematical, as is therefore the effort to reconcile the need for an ongoing repressive mechanism with the long-run legitimacy requirements of the American liberal state.

This problem merits serious theoretical consideration. For the purposes of this study, however, it is sufficient to recognize that the imperatives of organizational maintenance outlined above vastly complicate the nature of the dilemma confronting American court authorities who face collective violence. We have already seen how court authorities in any liberal state are faced with the delicate problem of striking a balance between their respective competing interests in order and formal rationality. The fact that organizational maintenance concerns necessarily loom so large in the day-to-day calculations of American court authorities means that during and following collective violence they will be faced not only with the problem of reconciling their interest in order with their interest in formal rationality, but also of reconciling each of these interests with their interest in the survival of the court organization. Confronted with collective violence, the question to which American court authorities must respond is: "How can we end the violence as quickly as possible but in such a way as to maximize formal rationality and minimize the threat to the stability of the court organization?"

A moment's reflection will reveal that an adequate response to this question entails a complicated calculus in which an effort must be made to reconcile a number of "irreconcilables." Each of the three interests in the calculus—order, formal rationality, and organizational maintenance—is at odds with the other. As we have seen, the effort to end the violence as quickly as possible is necessarily hampered by the dictates of formal rationality, and vice versa.

Similarly, as we have emphasized above, the interest in formal rationality and the interest in organizational maintenance stand in a contradictory relationship to one another. The effort to resolve this contradiction by means of symbolic adherence to formal rationality and actual adherence to covert, cooperative "rules of the game," moreover, becomes particularly problematical in the face of the widespread scrutiny of the court system which is likely to accompany the collective violence. Finally, the interest in organizational maintenance inevitably competes with the effort to end the violence as quickly and efficiently as possible. This effort necessarily produces large numbers of arrests which only add to the virtually overwhelming volume pressures which daily confront the court system and which introduce new participants into the arena of the court system who are likely to be unfamiliar with, and mistrustful of, the cooperative "rules of the game" on which the survival of the court organization depends.

Collective violence, then, simultaneously confronts American court authorities with a threefold threat: a threat to their interests *qua* political authorities in *order*, a threat to their class interests in *formal rationality*, and a threat to their bureaucratic interests in *organizational maintenance*. Each of these interests is a compelling one, but the nature of the dilemma facing the elite is precisely that it is impossible to avert a threat to any one of these interests without simultaneously endangering the other two. Thus the court response to collective violence is likely to entail an effort to strike a balance among these interests in which the single-minded, unrestrained pursuit of any one gives way to a compromise which sacrifices each in the name of maximum harmony among all three.

DETERMINANTS OF THE COURT RESPONSE

The response of American court authorities to collective violence, we have been arguing, is likely to be a function of a balance struck among their competing interests in order, formal rationality, and organizational maintenance. The nature of this balance, in turn, will vary depending upon the relative manifestness or intensity of each of these interests. The remainder of this chapter outlines a number of factors which affect the manifestness of these interests and are therefore likely to be crucial determinants of the court response.

The Magnitude of Violence

The "magnitude of violence" encompasses three distinct dimensions which separately affect the manifestness of each of the three elite interests outlined above. The first of these dimensions, what we might call the *intensity* of the

violence, affects the manifestness of the elite interest in *order*. The larger the ghetto revolt, the more obvious and immediate the threat to the stability of the entire political regime is likely to be. Thus, the larger the revolt, the more manifest the court authority interest in order is likely to become, and the more they will be disposed to use their authority to aid in putting down the revolt, e.g., by setting high bail to prevent "rioters" from returning to the scene of the violence and in the hope of discouraging others from participating. A minor and isolated confrontation between police and a relative handful of ghetto residents involving name-calling and rock-throwing is less likely to be perceived as an obvious threat to the political regime than is a full-scale revolt involving the participation of thousands of blacks, widespread burning and looting, and prolonged armed confrontations between rioters and police and National Guard. Consequently, the minor incident is unlikely to activate the court authority interest in order to the extent that a major revolt would. During a major revolt, the pressures on court authorities to employ court sanctions to end the violence as quickly as possible are likely to be irresistible even for those who are acutely conscious of the need to preserve formal rationality and avert a threat to organizational maintenance. The larger the revolt, then, the more are the interest in formal rationality and the interest in organizational maintenance likely to suffer at the hands of the interest in order.

Major revolts, however, represent not only a threat to the political regime as a whole, but also, through the *scope of participation* they evoke, a dramatic threat to the survival of the court organization. The broader the scope of participation evoked by a revolt, the greater will be the volume pressures or volume stress on the court system.⁵⁹ We have already seen that the metropolitan court system is daily faced with an overwhelming volume of arrests which it must process—i.e., it is faced with a high level of volume stress—and that it has evolved an intricate system of cooperation among all its actors to cope with this stress. Thus, under ordinary conditions, high volume stress produces a high degree of manifestness of the interest in organizational maintenance. A ghetto revolt, depending on the scope of participation which it evokes, can either add negligibly or measurably to the already great volume stress facing the court system and thus negligibly or measurably to the manifestness of the interest in organizational maintenance. A small revolt, involving perhaps an input of fifty cases into the court system is not likely to add measurably to the volume pressures confronting court authorities. But a major revolt, involving the input of thousands of cases (perhaps, as in Detroit in 1967, as many as the court system normally handles in a six-month period) is likely to threaten to disrupt the entire balance of relationships within the court system—not simply to occupy the time and energy of court authorities

for months to come but also to disrupt totally the processing of "normal" criminal cases—and consequently is likely to evoke great concern for the survival of the court organization. Other things being equal, under such conditions the pressure to dispose of cases and to avoid at all costs adversary proceedings is likely to be even greater than it is under "normal" conditions.

One reminder is in order concerning the concept of volume stress. As we suggested earlier, the volume pressure with which the metropolitan court system is confronted is not simply a function of a given number of arrests but rather also of the structural capacity of the system to handle that number of arrests. The court system operates under constant volume stress not simply because of the huge number of arrests it must process, but also because it has failed over the years to alter significantly the structures through which it processes these cases—it has too few courts, judges, prosecutors, etc., to handle the volume according to the requirements of formal rationality. This suggests that volume stress and the threat to organizational maintenance interests are not simply products of the number of arrests (scope of participation) entailed in ghetto revolts, but rather of the capacity of the court system to cope with these arrests, and that this capacity can vary from system to system and over time. In fact, we shall see that each of the three court systems to be examined in subsequent chapters has attempted to evolve plans to cope with ghetto revolts which entail precisely an effort to reduce volume stress and the threat to organizational maintenance interests resulting from a given volume of arrests.

From what has been said thus far it should be clear that major revolts produce a particularly intense conflict between the elite interests in order and in organizational maintenance. The intensity of major revolts activates the court authority interest in order and compels them to aid political authorities generally in putting down the revolt. This very effort, however, as it is likely to involve the arrest, detention, and prosecution of thousands of participants, entails an overwhelming threat to the survival of the court organization. Yet this is not the end to the dilemma with which a major revolt confronts the court authorities, for major revolts are also likely to evoke a great concern for the maintenance of formal rationality. The larger the revolt, the more *public attention* it is likely to arouse; and the greater the public scrutiny to which the administration of justice is subjected, the more compelled will court authorities be to adhere to formal rationality. As we have seen, under ordinary conditions court authorities are able to avert the threat to the survival of the court organization which strict adherence to formal rationality would produce by developing a covert system of cooperative justice which is carefully kept from public view. During and following a minor revolt, which is likely to generate only a small amount of public attention, court authorities may well be able to

follow this standard procedure without experiencing any greater pressures to adhere to formal rationality than they normally experience. But a major revolt and the public attention it produces is likely to "blow the cover" off the court operations. Once the revolt is over, the media is likely to turn its attention to the way in which the "rioters" are treated by the courts. Similarly, civil liberties and civil rights groups not normally concerned with the operations of the criminal court are likely to press their efforts on behalf of the rights of defendants. In general, a major revolt tends to produce a public "test" of the metropolitan court system. Under these conditions, the pressures on court authorities to adhere to formal rationality, and the delegitimizing dangers of abrogations of formal rationality, are bound to be especially great. Yet, paradoxically, from what has been already said it should be clear that during and following major revolts the likelihood of departures from formal rationality and thus the risk of delegitimation is also especially great, since the interest in formal rationality necessarily conflicts with highly manifest interests in order and organizational maintenance.

Thus the magnitude of the revolt is likely to be a principal determinant of the nature of the court response. Minor revolts are unlikely to be perceived as a great threat to the court authority interest in order; nor are they likely to produce the public scrutiny of court proceedings which would create highly manifest interests in formal rationality, or a massive volume of arrests which would render the court authority interest in organizational maintenance more manifest than it is normally. Consequently during and following minor revolts court authorities will probably experience no more than the ordinary amount of tension between these interests, and thus will not find it inordinately difficult to strike a balance among them. Major revolts, however, in contrast to minor ones, are likely to produce highly manifest interests in order, organizational maintenance, and formal rationality. During and following major revolts, therefore, the contradictions between these interests are likely to be experienced at the height of their intensity, and the effort to strike a balance among them will become especially perilous.

These considerations have in part determined the selection of Detroit, Los Angeles, and Chicago as arenas of investigation. Between 1965 and 1968 each of these cities experienced one major revolt—involving thousands of arrests, massive damage to property and life, and lasting up to a week—and one or more minor revolts—relatively isolated confrontations between police and ghetto residents which lasted only a day or two, produced a minimum number of arrests and damage to property and life, and which failed to gain widespread public attention.⁶⁰ Thus our research design will permit us to submit the foregoing expectations concerning the impact of the magnitude of violence on the nature of the court response to the test of empirical reality.

Political Variables

The Cohesion of Local Political Authorities

If, as we suggested earlier, an ideal-typical formal-rational legal system requires that the judicial sphere be "maximally immunized from governmental and other pressures," then another crucially important factor affecting the nature of the actual balance struck between formal and substantive rationality in any given, concrete system will be the nature of the formal and informal structural channels linking the legal sphere to the broader political system which determine the actual degree of autonomy of the former from the latter. Whereas the formal rules of all liberal states, including those of the American state, provide for "immunization," the degree of formal autonomy tends to vary from system to system. Moreover, and critically, in every system informal structural arrangements linking the formally autonomous legal sphere with the broader political sphere tend to influence the actual degree of autonomy which legal authorities can in fact exercise. The greater the degree of centralized political influence over the legal apparatus, the greater will be the likelihood that the behavior of that apparatus will depart from the dictates of formal rationality in favor of the particular substantive goals of other members of the political elite. Thus we can expect that the degree of autonomy of the metropolitan court system from centralized control exercised by other members of the political elite will affect the manifestness of the court authorities' substantive interest in order and their propensity to employ legal sanctions to aid political authorities generally in ending the violence as quickly as possible.

Although the metropolitan criminal court is part of a state court hierarchy, federalism and the general decentralization and fragmentation of authority within the American state guarantee that it will be powerfully influenced by the immediate local political environment in which it operates.⁶¹ Much of the concern with the structure of local political authority in the literature of American politics has traditionally been expressed in terms of the distinction between "machine" and "reform" types of government. Analysts have disagreed widely as to the relative merits of both types, but they tend to agree that the "machine" centralizes political influence while "reform" acts to decentralize and fragment political influence.⁶² Whereas the strong political party of "machine" cities acts as the cement by which functionally specialized and formally separated local authorities are united and centralized under the control of the party leader, the reformers' concern with separating "politics" from administration led to the virtual destruction of the local political party as a cementing agent and hence to the creation of decentralized and virtually autonomous bureaucracies.

This dichotomous, qualitative distinction between machine and reform governments has been refined and reformulated in more recent literature into a continuous variable whereby it is possible to conceive of cities as partaking to varying degrees of "machineness" or "reformness." Thus Greenstone and Peterson speak in terms of the relative dispersion of political power within local political systems as indicated, for example, by the success of the dominant local political party in monopolizing control of the process of recruitment to public office.⁶³ In fact, the three cities of this study have in part been chosen precisely because they differ significantly along this dimension of dispersion of political power, which we would prefer to call the relative cohesion of the organization of local political authorities. According to the Greenstone-Peterson index, Chicago falls at the extreme cohesion end of the continuum, Los Angeles at the extreme diffusion end of the continuum, while Detroit represents a mixed case falling somewhere between the two extremes. In terms of our analysis, this cohesion variable denotes the relative autonomy of the court system from centralized political influence and thus helps to determine the relative manifestness of the interest of court authorities in uniting with political authorities generally on behalf of the substantive goal of ending the revolt as quickly and efficiently as possible.

CHICAGO AS A CASE OF EXTREME COHESION. In Chicago, the Democratic party exercises virtually complete control over recruitment to, and the perquisites of, positions within the court system. Access to those positions which are elective is controlled through the process of slating for nomination (which in Chicago is virtually tantamount to election), a process controlled by the chairman of the party (Mayor Daley); access to those positions which are appointive is controlled by the elected superiors through a system of patronage which dispenses jobs to the party faithful. Thus associate and circuit court judges are elective, but they (in reality the chief judge) in turn select magistrates who handle the bulk of minor criminal business (ordinance violations and misdemeanors) and who serve an indeterminate tenure at the pleasure of the chief judge. Magistrates typically have held positions low in the party echelons—many have been precinct workers or committeemen—and generally have had little or no prior legal experience beyond training in a local law school.⁶⁴

The state's attorney—the chief prosecutor for Cook County—is slated for nomination according to the electoral needs of the party.⁶⁵ He in turn appoints his staff, none of whom are civil service and all of whom have been approved by local party committeemen.⁶⁶ The court clerk is also elected, and his election is determined by the slating process; he in turn controls nearly 2,000 patronage jobs through which the bulk of the court's administrative business and paper work is funneled.⁶⁷ Similarly, the corporation counsel,

who prosecutes city ordinance violations, is also a party appointee, and traditionally maintains close relations with the mayor. Finally, the public defender, responsible for the defense of indigents, is appointed by, and serves at the pleasure of, a committee of judges controlled by the chief judge. His attorneys, in turn, are largely if not entirely recruited through the process of party committeeman or aldermanic sponsorship.

Political party ties thus serve as a powerful solvent through which the centrifugal tendencies of bureaucratic differentiation are held in check. This informal centralization insures that administrative authority in the court system, although formally lodged in the hands of the circuit court judges acting in committees, will in fact rest with the chief judge, who is handpicked by the chairman of the party. Thus the chief judge not only appoints the chief judges of the municipal and criminal divisions and the public defender, but also exercises budgetary control over the public defender's office, the sheriff's office (which is responsible for detention facilities), and the clerk's office.

The Chicago court system, then, is an integral part of the Chicago political machine. As rich sources of patronage, and as the supports which serve to prop up the legitimacy of the Democratic party rule, the control of elected positions within the court system is much coveted by the party chairman. Thus it is not surprising that in 1968 the machine campaigned most vigorously for two positions within the court system—state's attorney and court (county) clerk—much to the dismay of statewide candidates who were relatively ignored. As we have seen, the county clerk's office controls the bulk of the patronage jobs within the court system and the state's attorney is in control of the investigation of vote fraud and other alleged official improprieties.⁶⁸ It is clear that Democratic control of these two offices is essential for the preservation of the machine; indeed, the fact that control of these two offices was maintained in 1968 led Mayor Daley to claim—despite the loss of the governor's office—"a great victory for the Democratic Party in Illinois."⁶⁹

Under these conditions of centralized party control, it would be surprising if the authorities within the court system, although functionally specialized and formally differentiated, failed to perceive interests which they share in common with other members of the political elite and which dispose them to act at their behest. Their interest in formal rationality and organizational maintenance notwithstanding, the channels of communication to, and control over, the court system entailed in extreme organizational cohesion guarantee that during and following collective violence court authorities in Chicago will be disposed to place a high priority on the substantive goal of restoring order as quickly and efficiently as possible.

LOS ANGELES AS A CASE OF LOW COHESION. In Los Angeles reformers succeeded in radically decentralizing political authority and at the same time

destroyed any possibility that this formal decentralization might be overcome by informal means through a strong local political party. The extent of formal decentralization is such that

the mayor shares the executive authority with a separately elected city attorney and a comptroller. Of the twenty-eight city departments, nineteen are run by independent boards and commissions whose members, although appointed by the mayor, are removable by him only under unusual circumstances.⁷⁰

This general formal decentralization within Los Angeles is mirrored in the administrative structure of the Los Angeles courts. Each division, municipal and superior, has its own presiding judge and administrative apparatus, and unlike the system in Chicago there is no judge or executive officer who presides over the administration of both courts and to whom the individual judges are all responsible.

Moreover, and crucially, in Los Angeles—in radical contrast to Chicago—there is little or no local party control, and hence little or no centralized control, over access to authority positions within the court system, and thus very little solvent available to dissolve this formal bureaucratic autonomy. Municipal and superior court judgeships are typically filled by gubernatorial appointment; control over access to the judiciary is in state rather than local hands, and there is in California little connection between influence at the state level and influence at the local level.⁷¹ Thus, whereas in Chicago party considerations enable the chief judge to exercise a high degree of centralizing influence over his fellow judges, in Los Angeles the absence of party ties severely limits the actual power of the presiding judges and leads them to complain that “you don’t have authority . . . this is the weakness of the job.”⁷²

Incumbents of other authority positions—such as the Los Angeles County District Attorney (who prosecutes felonies) and the Los Angeles City Attorney (who prosecutes misdemeanors)—are elected by different constituencies, and nonpartisanship guarantees that there will be no local political party control over the nominating process which might dissolve the impact of a difference in constituency on their respective perceptions of interest. Moreover, the staff of both prosecutors is recruited almost entirely through civil service rather than through a system of patronage which dispenses jobs to the party faithful. Similarly, the entire staff of the Los Angeles County Public Defender is recruited through civil service, and the public defender himself is appointed by the county board of supervisors after passing a promotional examination.⁷³

There are, in other words, few if any Los Angeles political actors to whom court authorities owe allegiance and to whose directives they are likely to respond. In contrast to Chicago, where there is a high degree of centralization of control over the disparate bureaucracies which comprise the court system,

in Los Angeles these bureaucracies are free from centralized control and thus to an important extent independent from each other. Under these conditions of extremely low cohesion of local authority organization—of maximal “immunization” of the judicial sphere from governmental pressure—we can presume that court authorities in Los Angeles are far less likely than those in Chicago to perceive common interests with political elites generally and thus far less predisposed to unite on behalf of their substantive goals. This means that at any given level of violence we can expect the interest of Los Angeles court authorities *qua* political authorities in order is likely to be far less manifest than in Chicago.

DETROIT AS A CASE OF INTERMEDIATE COHESION. Detroit, like Los Angeles, is a “reform” city in which nonpartisanship and civil service effectively limit the cohesion of the organization of political authorities. Unlike Los Angeles, however, this lack of cohesion is not magnified by extreme geographic decentralization. Perhaps more importantly, formal decentralization of authority is not as great in Detroit as in Los Angeles. Whereas reform in Los Angeles created a plethora of commissions legally independent from mayoral control, and lodged much of the authority for the governing of the city in the hands of the county government, in Detroit reform did not go that far; thus, for example, the mayor appoints his city attorney and does not share his executive authority with county officials nearly to the extent of such sharing in Los Angeles.

This difference in the degree of formal decentralization serves to differentiate the organization of court authorities in Detroit from that of Los Angeles. Whereas, for example, the court system in Los Angeles is divided into a municipal court and a superior court, the latter of which is a court for all felony matters in the entire county of Los Angeles, the Detroit Recorder’s Court is a unified court handling both felonies and misdemeanors only for the city of Detroit. Reformers have consistently failed to merge the operations of the Detroit court with the Wayne County Circuit Court, as a consequence, and in contrast to Los Angeles, where judges are either appointed by the governor or (rarely) run for elective office on a countywide basis, Detroit judges run in (what recently have been) closely contested, citywide elections. Thus the process of recruitment to judicial office is far more closely tied to the issues and cleavages of local politics in Detroit than it is in Los Angeles, and the opportunity and necessity to form alliances with other political authorities in Detroit is consequently far greater than in Los Angeles. Thus, for example, a recent executive judge of the recorder’s court was known to be a personal friend of Mayor Cavanaugh and other judges were viewed as part of the mayor’s “Irish Mafia.”⁷⁴

Another consequence of the failure of reformers to create a court of general jurisdiction for Detroit and Wayne County is that recorder’s court judges

handle only criminal cases; civil cases arising within the city of Detroit are handled by the Wayne County Circuit Court. Given this exclusive concern of recorder's court judges with criminal cases, closer ties with police and prosecution are bound to develop than if the judges had both criminal and civil responsibilities. These judges see nothing but criminal cases, day after day, and cannot look forward, as can Los Angeles judges, to their turn on the civil court bench. They are thus in continual and unrelieved contact with the police department and the prosecutor's office, and tend almost of necessity to develop similar perspectives. Relative geographic centralization reinforces this tendency: all criminal business within the city of Detroit is centered in a one-block area; at the time when this research was conducted the recorder's court was adjacent to police headquarters, and the prosecutor's office was on the fifth floor of police headquarters.⁷⁵ It is not surprising, then, that under these conditions there develops what a local law professor calls a "confraternity of interests," or that defense lawyers generally refer to the recorder's court as a "police" or "prosecutor's court."⁷⁶

Both because formal decentralization is less extreme in Detroit, and because some informal centralization occurs as a result of the need to forge electoral alliances, shared perceptions of interest among court authorities which unite them with political authorities generally are far more likely to develop in Detroit than in Los Angeles. On the other hand, in no sense is the structural relationship between local political system and court subsystem in Detroit characterized by the centralized channels of communication and control which exist in Chicago in the form of a highly cohesive political party. At any given level of violence, then, we can expect that in Detroit the pressures on court authorities to respond to the goal of the political elite as a whole of ending the violence as quickly as possible and to ignore the dictates of formal rationality and organizational maintenance will be more intense than in Los Angeles but less intense than in Chicago.

The Cohesion of the Local Defense Community

The roots of American racism are deep and far reaching, and we can assume as a matter of course that they penetrate the political life of each of the three cities in this study. In Los Angeles, Detroit, and Chicago, as in any city in the United States, abrogations of the principle of equality before the law entailed in formal legal rationality are far more likely to occur vis-à-vis blacks than whites. This does not mean, however, that in each city political elites will be equally free to indulge their racist proclivities; rather their freedom to do so will depend radically on the strength of those forces committed to formal rationality for blacks, on the intensity of their efforts on behalf of formal rationality and their capacity to sanction political elites who

choose to depart from its dictates. More specifically, this means that the freedom of court authorities in particular to depart from formal rationality—or, conversely, the manifestness of their interest in formal rationality—during ghetto revolts will in part be a function of the relative strength of those groups concerned with the legal rights of blacks, i.e., of the relative cohesion of the local defense community.

DETROIT AS A CASE OF HIGH COHESION. In Detroit, the mere existence of a near-majority black population acts as an important constraint on the freedom with which political elites, including court authorities, can depart from the dictates of formal rationality. Equally as important, the presence of a strong industrial union in Detroit, and the alliance which that union forged with elements of the black community, profoundly shaped (as it has influenced politics in Detroit generally) the nature of the Detroit defense community, leaving it more prepared than elsewhere to articulate and defend the interest of blacks in formal rationality within the criminal court system.⁷⁷

The presence of the United Auto Workers in Detroit has produced an abundance of lawyers in that city with labor union backgrounds. This fact alone has significantly influenced the ideological tone of the Detroit legal community, leaving it decidedly more “liberal” than legal communities in other cities dominated by corporation lawyers. Those holding positions within the “establishment” bar of Detroit—the Detroit Bar Association—are typically liberals with a strong interest in and commitment to civil rights for blacks; thus, for example, a recent former president of the Detroit Bar Association was co-chairman of the Michigan Civil Rights Commission. In the words of the 1968 president of the Detroit Bar Association,

If the Detroit Bar is more liberal, it's probably due to the area itself. This is the area in which, for example, only 60 miles from here the technique of the sit-down strike was developed. The fact that this has been a labor town has been important. . . . [We're] probably not as conservative a Bar as places which have not had or only recently had these experiences.⁷⁸

The consequence of the union orientation of so many Detroit lawyers has not only been a relatively liberal “establishment” bar, but also considerable overlap between positions of authority within the bar association and positions of responsibility within “non-establishment” defense groups such as the ACLU and Neighborhood Legal Services (NLS). Thus for example the Office of Economic Opportunity—funded NLS program is staffed largely with lawyers who belong to the radically oriented National Lawyer's Guild (some of whom have ACLU connections), but has the support of the Detroit Bar Association, whose representatives comprise a large segment of the board of governors of NLS.

This overlap of positions within the defense community, moreover, cuts

across racial lines: there is a great deal of interracial cooperation within the Detroit legal community. Thus the black bar association—the Wolverine bar—is presided over by young, increasingly militant black lawyers who have close ties with the ACLU and the guild. The National Lawyer's Guild, which in other cities has developed a predominantly white, antiwar constituency, is in Detroit deeply involved in ghetto projects.⁷⁹ On the other hand, black political leaders such as John Conyers and Coleman Young are on the board of the ACLU.

In short, the historical alliance between a large black community and a strong, relatively progressive labor union has produced a defense community in Detroit with both the propensity and the capacity to articulate and defend black legal interests. Under these conditions of high defense community cohesion, we can expect that at any given level of violence Detroit court authorities will face considerable pressure to maintain formal rationality, and that its abrogation in the name of either the interest in order or the interest in organizational maintenance will carry with it the risk of serious sanctions.

LOS ANGELES AS A CASE OF LOW COHESION. In Los Angeles, a weak labor movement and the dominance of business interests, a relatively small and unorganized black population,⁸⁰ and extreme geographical dispersion have all combined to produce a defense community with a relatively low propensity and capacity to articulate the interests of blacks in formal rationality within the Los Angeles court system.

The Los Angeles County Bar Association, dominated by corporation lawyers, has traditionally been a voice of conservative business interests in Los Angeles. A critical member, when asked about the association's involvement in civil rights, replied that the "L.A. County Bar Association has not been known to come forth on such matters."⁸¹ Moreover, most of the members of the county bar association also belong to separate organizations such as the Beverly Hills or Santa Monica bar associations, and devote most of their efforts to these organizations.⁸² Thus even if the propensity to mobilize on behalf of blacks were present, the organizational locus, given Los Angeles' extreme geographic decentralization, is not.

One consequence of the Los Angeles County Bar Association's conservatism is that "nonestablishment" groups such as the National Lawyer's Guild or the ACLU remain—in contrast to their colleagues in Detroit—virtually isolated from positions of authority and influence within the dominant bar association. Thus an ACLU staff attorney admitted that his organization is "persona non grata with the L.A. courts."⁸³ The nonestablishment groups, in turn, suffer from Los Angeles' extreme geographic decentralization: for example, there appears to be very little overlap and cooperation between the ACLU and the guild, and guild lawyers bemoan their inability, in contrast to Detroit's guild, to mobilize nonguild lawyers for their projects. In the words of one guild lawyer,

We trail behind [Detroit] in terms of group planning. We live in a reactionary city, although decentralization is [also] a factor. There is a tendency for progressive forces only to be rallied to group action under the most extreme circumstances.⁸⁴

This general lack of cohesion within the defense community is reflected in a relative lack of black-white cooperation and coordination. In contrast to Detroit, the guild in Los Angeles has increasingly and largely become a legal arm of the antiwar movement, and is not heavily involved in providing legal services in the ghetto. The ACLU does devote some of its effort to ghetto projects, but has been slow to divest itself of its white, middle-class orientation. Thus in late 1966 the ACLU and the NAACP split over a school bond issue, with the ACLU arguing for "integration" and the NAACP asserting the need for "improvements within an obviously long-persisting ghetto."⁸⁵ Most of the members of the black bar (the Langston Law Club), for their part, share the conservative orientations of the Los Angeles County Bar Association, tending to view their role as lawyers as a means for personal economic advancement rather than as a tool for collective black advancement. Although younger, more militant members are increasingly assuming positions of responsibility within the black bar, their numbers are far fewer than in Detroit, and they have far fewer white allies upon whom they can rely. Under these conditions of relatively low cohesion of the defense community, at any given level of violence we can expect that court authority abrogations of formal rationality in the name of either order or organizational maintenance are far less likely to carry with them the risk of reprisal than in Detroit, and thus far more likely to occur.

CHICAGO AS A CASE OF INTERMEDIATE COHESION. The articulation and defense of black legal interests in Chicago is hampered neither by extreme geographic decentralization nor by a relatively small and unorganized black population such as in Los Angeles. Although the extent of overlap is by no means as great as in Detroit—in part because Chicago lacks Detroit's history of strong and progressive industrial unions—representatives of nonestablishment defense groups do play a role within the Chicago Bar Association: thus the general counsel of the Chicago ACLU has for some years participated in various bar association committees, and serves as a link between the two organizations.⁸⁶ A good deal of cooperation—some of it interracial—exists between the various nonestablishment defense groups themselves, and in contrast to Los Angeles there has existed since the birth of the Civil Rights Movement in the North a fairly sizable group of dedicated black and white attorneys who are well known to the black community and who concern themselves with the legal defense of black community organizations.⁸⁷

The cohesion of the defense community, however, is severely limited by one pervasive reality which colors all of Chicago politics: the Cook County Democratic Party—the "machine." The machine functions not only to centralize the

organization of Chicago court authorities (as we have seen), but also serves to limit drastically the articulation and defense of black legal interests by co-opting organizations which are potential vehicles for the expression of these interests and purposely hampering those organizations which it is unable or unwilling to coopt.

Important elements of the Chicago legal community are dependent upon the party and therefore unwilling and/or unable to support black interests. Thus the Chicago Bar Association, for example (in the words of an ACLU attorney), "functions as an adjunct of the circuit court . . . it will never buck the system."⁸⁸ A bar association representative confirmed this observation, when questioned about his association's role vis-à-vis the establishment, by explaining that "we are the 'establishment' . . . we have to show that the 'establishment' works."⁸⁹

The black bar association of Chicago—the Cook County Bar Association (CCBA)—is even more dominated by considerations of party allegiance than is the Chicago Bar Association. Whereas those who wield influence within the Chicago Bar Association are often Republicans in state and national politics, the political fortunes of those holding positions of responsibility within the Cook County bar have typically been intimately associated with the fortunes of the machine.⁹⁰ The membership of the CCBA comprises many who hold patronage jobs within the party, and one member freely admitted to this writer that for years the organization was controlled by a black southside alderman with close ties to Mayor Daley.⁹¹ In past years the president of the CCBA has typically been rewarded in return for "faithful service" with a judgeship by the party. In this sense the party, in contrast to the union in Detroit, serves to isolate black lawyers from white liberal lawyers and thus to reduce the capacity of both to articulate and defend black legal interests.

Those legal groups specifically concerned with the defense of indigents which cannot be "bought off," moreover, face continual machine harassment. Thus the Chicago Legal Aid Bureau's OEO grant was held up by the city for nearly a year because the mayor wanted a proviso guaranteeing that no legal aid lawyer would ever sue any city agency, and legal aid has been forced to maintain its neighborhood offices in Urban Progress Centers where strict supervision is exercised over its activities by party-appointed Urban Progress Center directors. Similarly, the one Chicago legal service agency funded by OEO outside the mayor's antipoverty "umbrella" recently faced a threat of congressional investigation and dismissal of its VISTA staff initiated by a machine congressman.⁹²

A strong party organization in Chicago, in other words, acts to reduce both the propensity and the capacity of the defense community to mobilize on behalf of black legal interests. Nevertheless, that segment of the defense community which is prepared to articulate and defend these interests is substan-

tially larger and more cohesive than in Los Angeles. Under these conditions, at any given level of violence we can expect that the external pressure on Chicago court authorities to maintain formal rationality vis-à-vis black "rioters" will be less than in Detroit but somewhat greater than in Los Angeles.

CONCLUSION: HOBBS, WEBER, AND MICHELS

The purpose of this chapter has been to clarify the nature of the complex dilemma with which American court authorities facing the black ghetto revolts of the 1960s were confronted and, in so doing, to underscore the substantive and theoretical importance of the subject matter of this study. We have tried to show that ghetto revolts compel court authorities to strike a balance among three interests which together constitute the core functions of political elites in the liberal state: order, formal rationality, and organizational maintenance. These three interests, in turn, have formed the focal points for three long-standing and distinguished theoretical traditions which entail radically different interpretations of political life.

The first, stemming ultimately from Machiavelli and Hobbes, views the political problem above all as the problem of maintaining order. From the perspective of this tradition, the significance of ghetto revolts lies in the fact that their violence brings to the surface the dynamics of coercion and the calculus of force which constitute the very roots of politics in any state, including the liberal state. The second tradition, which we have attributed to Marx and especially to Weber, views formal rationality as the distinctive feature of the liberal state, and therefore holds that the significance of ghetto revolts lies in the fact that they threaten formal rationality and thus the legitimacy of the liberal state and the capitalist economic order on which it rests. Finally, the third tradition, of which Michels may be considered the most important heir, locates the dynamics of political life in the imperatives of organizational maintenance which inevitably deflect, and take precedence over, the substantive goals which formed the original *raison d'être* for political organization. Viewed from the perspective of this tradition, the overriding challenge of ghetto revolts is precisely that they threaten the interest of court authorities in organizational maintenance, which, we have seen, is so assiduously cultivated during "normal" court operations.

This study thus borrows from, and to an extent attempts to merge, three distinguished theoretical interpretations in its effort to illuminate the response of American court authorities to the black ghetto revolts of the 1960s and to arrive at a more general understanding of the dynamics of legal repression in the liberal state. From what has been said in this chapter, it should be clear that although none of these interpretations—the "order" interpretation, the "formal rationality" interpretation, and the "organizational maintenance" in-

terpretation—provides an entirely adequate theoretical focus for either of these purposes, each illuminates aspects of the problem for which the other cannot account. The Hobbesian “theory” is that in the case of collective violence, American court authorities in particular and political elites generally will respond in such a way as to end the violence and restore order as quickly and efficiently as possible. The Weberian “theory” would hold that, faced with collective violence, the overriding imperative confronting political elites in the liberal state, including American court authorities, is to maintain formal rationality. Finally, the Michelsian “theory” asserts that political elites including American court authorities will respond to collective violence in such a way as to above all ensure the survival of the organization for which they have bureaucratic responsibility. Our analysis, in contrast, has suggested that an adequate explanation and interpretation of the response of American court authorities to the ghetto revolts of the 1960s and of legal repression in the liberal state in general requires a synthesis of these three seminal theoretical approaches.

More concretely, we have assumed that court authorities in the American state share all three of the interests which separately form the basis for each of these approaches, and that to understand the dynamics of legal repression in the American state in particular and the liberal state in general is to understand the nature of the balance struck among them. We have emphasized, moreover, that these interests are *contradictory*—that they are all essential yet all incompatible—and that a (from the point of view of the elite) favorable balance is therefore always difficult, and sometimes impossible, to achieve. In this sense the method we have employed to effect our synthesis is *dialectical*, a method which Marx generally confined to an analysis of the socioeconomic “base” of the liberal state but which we are extending to an analysis of the political and legal “superstructure.” Hence the title, “The Dialectics of Legal Repression.”

Finally, we have outlined a number of factors which are likely to operate during and following ghetto revolts to affect the nature of the balance struck among the contradictory interests of the elite. The task of further theoretical analysis will be deferred until the final chapter of this study, when we will have had the opportunity to profit from the empirical examination of the actual operation of these factors to which the next several chapters are devoted.

NOTES TO CHAPTER ONE

1. This point has been underlined by Alan Wolfe in “Political Repression and the Liberal Democratic State,” *Monthly Review* 23, no. 7 (December 1971): 18–38. For two recent efforts to develop a theory of the state under conditions of advanced capitalism, see Nicos Poulantzas, *Pouvoir Politique et Classes Sociales*

(Paris: François Maspero, 1968), and Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969). For an extended review and critique of the latter, see Isaac Balbus, "Ruling-Elite Theory vs. Marxist Class Analysis," *Monthly Review* 23, no. 1 (May 1971): 36-46.

2. As Wolfe makes clear, those who interpret the current period in the United States of heavy reliance on legal repression as a product of Republican conservatism fail to appreciate that the birth of the modern repressive apparatus can be traced to the emergence of contemporary corporate liberalism under the Wilson administration. "Political Repression and the Liberal Democratic State," p. 26. See also Arthur Waskow, *From Race Riot to Sit-In* (Garden City N.Y.: Doubleday Anchor, 1967).

3. In this regard, consider the recent "victories" in the Bobby Seale and Huey Newton trials and the difficulty and embarrassment which they create for this rather simplistic leftist analysis.

4. Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954), p. 319.

5. Max Weber, quoted in Georg Lukács, *History and Class Consciousness* (Boston: M.I.T. Press, 1971), p. 96.

6. Rheinstein, *Max Weber on Law*, pp. 226-227, 304-305.

7. Otto Kirchheimer, *Political Justice* (Princeton, N.J.: Princeton University Press, 1961), pp. 120, 180.

8. T. B. Bottomore, ed., *Karl Marx: Early Writings* (New York: McGraw-Hill, 1963), p. 26.

9. Rheinstein, *Max Weber on Law*, p. 355.

10. For a classic statement of this thesis, see Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, Inc., 1955). See also Reinhard Bendix, *Nation-Building and Citizenship* (New York: Wiley, 1964), chaps. 1-3; and Samuel Huntington, "Political Modernization: America versus Europe," *World Politics* 18 (April 1966): 378-414.

11. Kirchheimer, *Political Justice*, pp. 193-194, 274.

12. *Ibid.*, p. 424.

13. *Ibid.*, p. 249.

14. *Ibid.*, p. 424.

15. Lukács, *History and Class Consciousness*, pp. 96-97.

16. *Ibid.*, p. 96.

17. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 20, 18.

18. Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), p. 152.

19. Kenneth Boulding, *Conflict and Defense* (New York: Harper & Row, Torchbooks, 1962), pp. 320-321.

20. Kirchheimer, *Political Justice*, p. 120.

21. Weber, quoted in Lukács, *History and Class Consciousness*, p. 96.

22. E. E. Schattschneider, *The Semi-Sovereign People* (New York: Holt, Rinehart and Winston, 1960), p. 68.

23. Ibid., chap. 1. Kirchheimer agrees: "So long as the law remains in operation, it will narrow down the area of conflicts. . . . The legal order will tend to limit rather than extend the area of explosive friction. . . ." *Political Justice*, p. 167.

24. Joseph Goldstein, "On the Function of Criminal Law in Riot Control," in *Crime, Law and Society*, ed. Abraham S. Goldstein (New York: Free Press, 1971), pp. 343-359.

25. Kirchheimer, *Political Justice*, p. 96.

26. Ibid.

27. On the emergence of consumer capitalism, see Herbert Marcuse, *One-Dimensional Man* (Boston: Beacon, 1964), and Henri Lefebvre, *Everyday Life in the Modern World* (New York: Harper & Row, Torchbooks, 1971). For an analysis of the emergence of an American "permanent welfare class," see Francis Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Pantheon, 1971). In 1966 the U. S. Department of Labor estimated the subemployment rate—including the unemployed and underemployed—to be close to 35 percent in urban black slum areas.

28. Edward L. Barrett, "Criminal Justice and the Problem of Mass Production," in *The Courts, the Public and the Law Explosion*, ed. Harry W. Jones (Englewood Cliffs, N. J.: Prentice-Hall, 1965), p. 95.

29. For a statement on the tendency for the "modernization" of American political institutions to lag behind the "modernization" of the economic system, see Huntington, "Political Modernization."

30. "The gross estimate is only 2.5 percent of the \$150 billion of direct expenditures of all American governments in 1962 for every purpose." David J. Saari, "Open Doors to Justice: An Overview of Financing," in *The Politics of Local Justice*, eds., James R. Klonoski and Robert I. Mendelsohn (Boston: Little, Brown, 1970), p. 211.

31. Howard James, *Crisis in the Courts* (New York: McKay, 1968).

32. Barrett, "Criminal Justice and the Problem of Mass Production," p. 87.

33. Joseph J. Connelly and Harry I. Subin, "Administration of Justice in the Recorder's Court of Detroit" (Unpublished manuscript in the files of Harold Norris, who was kind enough to make it available to this author).

34. For an argument that under conditions of advanced capitalism there is an inherent "fiscal crisis of the State"—that the economic system necessarily denies to the political sector the allocation of funds sufficient to cope with the very problems which that economic system systematically creates—see James O'Connor, "The Fiscal Crisis of the State," *Socialist Revolution* 1, no. 1 (January-February 1970): 12-54. See also André Gorz, "Capitalist Relations of Production and the Socially Necessary Labor Force," in *All We Are Saying . . . : The Philosophy of the New Left*, ed. Arthur Lothstein (New York: Capricorn Books, 1971), pp. 155-171.

35. See George F. Cole, "The Decision to Prosecute" (Paper prepared for delivery at the 1968 Annual Meeting of the American Political Science Association); and Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice," *Yale Law Journal* 69, no. 4 (March 1960): 543-589.

36. Barrett, "Criminal Justice and the Problem of Mass Production," p. 107.
37. Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in a Democratic Society* (New York: Wiley, 1966), p. 241.
38. Jerome H. Skolnick, "Social Control in the Adversary System," *Journal of Conflict Resolution* 11, no. 1 (March 1967): 62.
39. Donald J. Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," *Journal of Criminal Law, Criminology and Police Science* 46, no. 6 (March-April 1956): 781.
40. Abraham S. Blumberg, *Criminal Justice* (Chicago: Quadrangle Books, 1967), pp. 64, 58-59, 65.
41. *Ibid.*, p. 59.
42. *Ibid.*, p. 64.
43. *Ibid.*, p. 96.
44. Skolnick, "Social Control in the Adversary System," p. 53.
45. David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," *Social Problems*, 12 (1965).
46. Blumberg, *Criminal Justice*, pp. 58, 30.
47. *Ibid.*, pp. 69, 61.
48. *Ibid.*, p. 30.
49. These figures are approximations derived from a number of different sources. See, for example, Dominick R. Vetri, "Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," *University of Pennsylvania Law Review*, 112 (April 1964): 865-908; Newman, "Pleading Guilty for Considerations," pp. 780-790; and Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown, 1966), p. 3.
50. Skolnick, "Social Control in the Adversary System," p. 70.
51. Cole, "The Decision to Prosecute," pp. 16-17.
52. Barrett, "Criminal Justice and the Problem of Mass Production," p. 109.
53. Sudnow, "Normal Crimes."
54. Cole, "The Decision to Prosecute," pp. 13, 16.
55. Ralph Nutter, "The Quality of Justice in Misdemeanor Arraignment Courts," *Journal of Criminal Law, Criminology, and Police Science* 53, no. 2 (June 1962): 217.
56. Henry Tilton Lummus, *The Trial Judge* (Chicago: The Foundation Press, 1937), p. 46.
57. Personal interview with Judge Francis Cochran, municipal court. See also the "Annual Report of the San Francisco District Attorney, 1963-1964."
58. These "inner workings" have recently been explored in *Newsweek*, "Justice on Trial," March 8, 1971, as well as in a number of television series on law and lawyers, such as "The Bold Ones."
59. For the concept of stress and volume stress in particular, see David Easton, *A Framework for Political Analysis* (Englewood Cliffs, N. J.: Prentice-Hall, 1965), pp. 90-95.
60. Despite this manifest diversity, all the ghetto revolts included within this study share certain crucial elements in common. First, they have all involved a con-

frontation between ghetto residents and local authorities *within* the ghetto and have almost always been precipitated by an incident between police and residents. Second, these revolts—in contrast to the “race riots” of previous generations—involved not interracial assaults on persons but rather the destruction of largely white-owned and white-controlled property. Thus we can point to certain important behavioral regularities which merit their classification under the same heading.

61. For the best general analysis of American federalism and decentralization and its consequences, see Grant McConnell, *Private Power and American Democracy* (New York: Knopf, 1966). For a statement about the effects of decentralization on the courts, see Kenneth M. Dolbeare, *Trial Courts in Urban Politics* (New York: Wiley, 1967), p. 12.

62. For works which, in one way or another, focus on centralization of political influence as a key dimension in the study of local politics and describe the cities of this study in terms of this dimension, see Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass.: Harvard University Press and Boston: M.I.T. Press, 1963), especially chap. viii; Edward C. Banfield, *Political Influence* (New York: Free Press, 1961); James Q. Wilson, *Negro Politics* (New York: Free Press, 1960); James Q. Wilson, *The Amateur Democrat* (Chicago: University of Chicago Press, 1962); J. David Greenstone, *Labor in American Politics* (New York: Knopf, 1969); and J. David Greenstone and Paul E. Peterson, “Reformers, Machines and the War on Poverty,” in *City Politics and Public Policy*, ed. James Q. Wilson (New York: Wiley, 1968), pp. 267–292.

63. Greenstone and Peterson, “Reformers, Machines and the War on Poverty,” pp. 279–280.

64. Wesley Skogan, “Party and Constituency in Political Recruitment: The Case of the Judiciary in Cook County, Illinois,” 1971 (unpublished doctoral dissertation, Northwestern University Library).

65. Thus in 1968 John Stamos, a Greek, was “dumped” by the party in favor of an Irishman in the face of a Republican decision to run an Irish candidate.

66. Personal interview with Kermit Coleman, ACLU attorney.

67. Personal interview with Alderman Leon Despres.

68. Interview with Despres.

69. *Chicago Daily News*, November 5, 1968.

70. Banfield and Wilson, *City Politics*, p. 110.

71. Thus Banfield and Wilson note that “No mayor of either Los Angeles or San Francisco in recent years has been able to climb the taller political ladder,” *ibid.*, p. 186.

72. Personal interview with Judge Kenneth Chantry, Superior Court.

73. Personal interview with Richard Buckley, Los Angeles County public defender.

74. Personal interview with a special assistant to Mayor Cavanaugh.

75. A new criminal court building was under construction at the time of this writing. This building will house the prosecutor’s office, and will be within a block of police headquarters.

76. Personal interview with Professor Harold Norris, Detroit College of Law.

77. For an historical outline of this union-black alliance, see Greenstone, *Labor in American Politics*, chap. iv.

78. Personal interview with Arnold Lungershausen, former president, Detroit Bar Association.

79. For example, NLSC and guild lawyers recently aided in the genesis of a landmark tenant-landlord collective bargaining agreement in Detroit.

80. See Harry Scoble, "Negro Politics in Los Angeles: The Quest for Power," *Los Angeles Riot Study* (Los Angeles: Institute of Government and Public Affairs, UCLA, June 1967).

81. Personal interview with Henry Grivi, attorney.

82. Personal interview with Thomas Sheridan, attorney.

83. Personal interview with Larry Sperber, ACLU staff attorney.

84. Personal interview with David Finkle, attorney. Finkle also emphasized that the McCarthy scare of the 1950s had hit Los Angeles and Hollywood harder than elsewhere and that this also tends to militate against lawyer activism.

85. Scoble, "Negro Politics in Los Angeles," p. 30.

86. Personal interview with David Long, ACLU staff attorney.

87. Personal interview with Jean Williams, attorney.

88. Interview with Long.

89. Personal interview with Morris Wechsler, attorney. In contrast, the president of the Detroit Bar Association disassociated his organization's role from that which he attributed to the "establishment."

90. Interview with Despres.

91. Interview with Williams.

92. Richard Mack, "Chicago Justice, 1968," in "The Administration of Justice in Crisis: Chicago, April 1968" ed. Tony Platt (unpublished manuscript), Appendix C. Mack's report also forms the basis for the discussion of the Legal Aid Bureau.

Chapter Two

Los Angeles

THE 1965 WATTS REVOLT

For one week in August 1965, the ghetto of Watts exploded, an explosion evoking the participation of thousands of black ghetto residents, compelling the presence of literally the entire Los Angeles police department and thousands of National Guard troops, and involving destruction of property and life virtually unparalleled since the "race riots" of an earlier and easily forgotten generation. In that one week, in what was up to that time the largest mass arrest in this nation in the twentieth century, 4,000 blacks were arrested and subsequently processed through a Los Angeles criminal court system totally unprepared for such an unprecedented influx.

Arrest, Booking, and Detention

Sporadic violence began in Watts late Wednesday evening, August 11, following rumors of police brutality of unusual proportions, and continued intermittently until late Thursday night/early Friday morning. Until this time, violence was minimal, and participation was limited; as late as Thursday evening Chief of Police Parker had been informed that only 200 people were involved in the "riot" and that it was under control, and only 33 arrests had been made on that day.¹ Until early Friday morning, then, there was little looting or burning and no orders to make mass arrests had been given.

By 5:00 A.M. on Friday, however, the tempo of the "riot" increased, and by 9:00 A.M. reports of massive looting on the part of thousands of blacks were being received at police headquarters. At this point Chief Parker ordered that "as many rioters as could physically be taken into custody should be arrested," and shortly thereafter he requested the National Guard.² During the next three days over 3,000 arrests—or ten times the normal amount for a comparable period—were made, and on Saturday alone almost 1,700 people were arrested. A very small percentage of the total number of arrests, however,

were "serious offenders," e.g., arsonists or snipers. Police, prosecution, and court officials admitted later that the great majority of people arrested were people who were either caught in stores after they had been burned or caught in the street with small amounts of stolen goods.³

The commander of the Newton Street Detective Division, located in one of the principal "riot" areas, described the impact of the rapidly increasing tempo of the revolt and the decision to make mass arrests on police postarrest functions:

The Detective Squad Room was inundated with arrestees waiting to be processed. . . . officers were arresting looters and leaving the station again to pick up other loads without always identifying themselves, and often without writing arrest reports. It became evident . . . that the normal departmental methods for processing arrestees through the division could not possibly cope with the tremendous influx of felony prisoners.⁴

Normally, when an arresting officer brings an arrestee to a station for processing, a determination is made, on the basis of the officer's arrest report, as to the offense for which the arrestee should be "booked." Then the arrestee is fingerprinted, possible evidence is examined and preserved, the arrestee's prior record is assembled, and the arrestee is held in custody. The case then is assigned to a detective who determines on the basis of the arrest report, available evidence, and the arrestee's prior record whether a formal charge should be filed, i.e., whether the police should request that the prosecutor file a complaint. If no request for a complaint is made, or if the request is denied by the prosecutor, the individual must be released within forty-eight hours.

Under the twin impact of the imperatives of "riot control" and the huge volume of arrests, these procedures were seriously disrupted. Arrest reports were sometimes completely lacking, since officers could scarcely afford to spend much time away from the "riot" area; those that were made often were sketchy and were composed to apply uniformly to dozens of prisoners arrested at approximately the same time and place. A former Newton Street detective reported that "it was utter chaos. I had fifteen cases to get complaints for . . . it was impossible to match recovered property with defendants or victims."⁵ Given these formidable evidence problems, individualized determination of proper booking offenses was abandoned, and virtually everyone caught with any "loot," or in or near a store was booked for burglary.

It soon became apparent—as early as late Friday night/early Saturday morning—that standard police lockups would be grossly inadequate to the task of detaining arrestees prior to formal charging. When the number of arrests passed the 300 point and the threshold of normal police holding capability, police reactivated a virtually empty city jail (Lincoln Heights) which had been deactivated some months previously and which had a normal capacity of

about 1,000 prisoners. Following initial processing at police stations or mobile booking stations on the periphery of the riot area, arrestees were sent en masse to Lincoln Heights (the relatively small number of women arrestees were sent to a women's detention facility). At Lincoln Heights

they were placed in large tanks holding eighty to 100 or more persons each. . . . It was bedlam. Never before in American history had there been an instance of such mass arrests. Food was a problem, but it was solved by providing each prisoner with two T.V. meals a day. Toilet and sleeping facilities were inadequate.⁶

Charging and Bail

California law requires that individuals must make their first court appearance within forty-eight hours after their arrest, excluding weekends, or must be released.⁷ Thus arraignments—the initial court appearances—would have to begin for many as early as Monday; prior to arraignment, however, the prosecutor must issue a complaint if prosecution is to occur. Normally the decision to issue a complaint turns on police investigation of the case and on the arrestee's record of prior arrests and/or convictions; during the height of the revolt, however, we have seen that it was virtually impossible to investigate cases—e.g., to match recovered “loot” with alleged offenders and to obtain the testimony of arresting officers—and it became virtually impossible to obtain prior arrest records.

Moreover, once charged, individuals under California penal code are entitled to bail prior to their arraignment, and normally face a standard bail schedule designed to meet this requirement.⁸ This bail schedule, however, varies according to the individual's record of prior convictions, which, as we have said, were unavailable. Court authorities thus were confronted with two pressing decisions for which the normal informational prerequisites were lacking and which now would have to be made in the face of a ghetto revolt which continued to rage. Each of these decisions required, and each evoked, special arrangements if statutory deadlines were not to be violated.

Faced with an imminent deadline, and the inability to evaluate individually the massive number of arrests within the allotted time period, police requested complaints on virtually all of the 3,400 adults arrested. Whereas normally a substantial proportion of arrestees are released when police feel that sufficient evidence is not available for prosecution, during the revolt police released only 8 percent of all adult arrestees.⁹ Thus police filed requests for complaints on some 3,100 adults with either the Los Angeles County district attorney, who prosecutes felonies, or the Los Angeles city attorney, who prosecutes misdemeanors.¹⁰

This massive number of requests for complaints placed an almost unimagin-

nable burden on each prosecution office, but especially on the district attorney, since the overwhelming number of adults arrested during the revolt were booked for burglary, which is a felony offense. According to District Attorney Evelle Younger, by

Friday August 13 . . . it was obvious that normal procedures could not possibly handle the volume within the time limits required by statute. We promptly made contact with the two major policing agencies . . . and devised an emergency system for processing these complaints.¹¹

By assigning approximately twenty deputy district attorneys to complaint duty, the district attorney's office was able to process over 1,400 complaints against 2,600 individuals in a five-day period, for an average of 280 complaints a day. During the three-week period prior to the outbreak of the revolt, the average number of complaints issued was thirty-nine per day.¹² In five days more felony complaints were processed than are normally processed by the district attorney's office in a month's time!¹³

The district attorney's office met this challenge by abandoning or drastically reducing the severity of its normal criteria for issuing felony complaints. Despite the fact that arrest reports were sketchy at best, and that no prior investigation of cases had occurred, an extraordinarily high proportion of the total requests for felony complaints—84 percent—were issued. Complaints were rejected involving only 360 individuals; all 360 cases were referred to the Los Angeles city attorney to determine whether a misdemeanor complaint should be issued. Thus only 16 percent of felony complaints were rejected by the DA's office, as compared to a normal rejection rate of over 50 percent.¹⁴ Had the normal "gate-keeping" rate prevailed, the court would have been swamped with 1,300 felony prosecutions; with this function virtually abandoned, over 2,200 felony defendants faced court proceedings. In the words of the chief of complaints section, it was

an unusually high ratio of accepted to rejected complaints. We usually reject cases on the basis that conviction on a felony seems improbable. [In the riot] if on the face of the [arrest] report it appeared that a felony had been committed, a complaint was filed.¹⁵

The city attorney's office also made special arrangements to process about 600 police requests for misdemeanor complaints. On Friday, according to the assistant city attorney in charge of complaints,

when it became apparent that mass arrests were being made, we prepared mimeographed complaint forms. The police booked on one charge and sent us the [blanket] arrest report; . . . we added extra counts based on the report. It's easier to issue multiple count complaints initially than to have to amend later on. So in the case of the riot, when it was so difficult to know exactly what charges a man was guilty of, we used multiple charges. You couldn't stop and read over the report carefully . . . so you had to use multiple counts.¹⁶

A defense attorney expressed one of the reasons for the multiple charges in less guarded fashion: "Because of the great mass of arrests, police really had no sound basis for arresting people; they figured that within four or five counts one charge could be justified."¹⁷

Thus virtually every misdemeanor complaint requested by the police was issued, and each complaint issued contained four or five standard charges: "riot," unlawful assembly, remaining present after a warning to disperse, disturbing the peace, and, on occasion, theft. This included the great majority of felony complaints rejected by the district attorney that were issued as multiple misdemeanor complaints by the city attorney.¹⁸

During the Watts revolt, then, the police and prosecutor gate-keeping activity normally so essential for the survival of the court system virtually ceased. Of the some 3,400 adults arrested, over 3,000 were prosecuted for either felonies or misdemeanors and hence faced court proceedings. According to California statute, all of these cases would have to be arraigned within two or three days; felony preliminary hearings would have to take place within five days after the arraignment, misdemeanor trials within thirty days after the arraignment, and felony trials within sixty days following the filing of the information (which usually comes within thirty days of the arrest).¹⁹ Moreover, the court was still faced with its usual huge backlog of ordinary criminal cases, for which these statutory deadlines also applied. The deluge of arrests, coupled with the abandoning of gate-keeping activities on the part of police and prosecution, then, threatened to inundate completely the court system and to disrupt totally the stability of relationships within it.

The decisions regarding bail were to have similar consequences. By Saturday afternoon at least 900 people were in custody at Lincoln Heights, and over 100 applications had already been made for the setting of bail under Section 1276 of the California Penal Code, which authorizes judges or commissioners to set bail prior to the individual's first appearance in court.²⁰ The police and prosecution took the position that bail should be denied until people were formally charged and brought to court, and the district attorney in the person of his top two assistants requested a hearing with the acting presiding judge and the senior judge of the criminal division of the Los Angeles County Superior Court to convey his position and to seek judicial acquiescence.²¹

The district attorney later summarized the position taken by his office at this hearing:

[Given that] the riot was at its height and appeared to be spreading and gaining momentum, the District Attorney took the position that to release a large number of those arrested persons on bail could result in their returning to the riot area and increasing the difficulty of control. Furthermore, any knowledgeable recommendation of bail would have been impossible, as the necessary information concerning the background of the large number of arrestees and

the circumstances of the offense could not be obtained . . . due to the unavailability of the arresting officers who were being returned to field duty as soon as they could transport the suspects to the jail.²²

The judges, however, refused to grant the district attorney's petition, arguing that "we are dealing with a type of Civil Right. We are dealing with an absolute Civil Right, that can be buttressed by every document from the Constitution on down." Nevertheless, the judges were aware of what one called

the gravity of the situation. The governor has gone as far as he can go [in issuing a disaster proclamation] and . . . we will go as far as we think we can go. The question I am thinking about is raising [the bail] schedule and telling and instructing the Commissioners it is to be raised to a certain amount because of the condition that now exists.²³

The two judges decided in fact to accede in substance if not in form to the district attorney's request by raising the standard bail schedule \$3,000 for all felony offenses allegedly committed during the revolt. With bail set \$3,000 higher than normal (normal bail for second-degree burglary is \$1,000 or \$2,500 with a prior felony conviction), the goal of keeping people off the streets for the duration of the "riot" could (and would) be achieved. The presiding judge of the superior court later defended this policy, echoing the argument of the district attorney, on the grounds that "we didn't know if the riot was planned or not so bail had to be different . . . otherwise it would have been like capturing prisoners of war and releasing them."²⁴ His feelings were seconded by another superior court judge, who pointed out that "it was indisputable logic that a person released during a riot is likely to go back and riot again."²⁵

The presiding judge of the municipal court also raised bail for misdemeanors \$1,500 above normal schedule, arguing that

we wanted to be sure that they wouldn't go back on the street and do the same things for which they were arrested. You're not dealing with the ordinary citizen in times of a riot . . . ordinarily your misdemeanor is a guy who's had a few drinks and disturbs the peace, etc. An entirely different citizen is involved in a riot . . . they intentionally loot, steal and burn. If you use normal procedures under these circumstances you're lost.²⁶

The Arraignments

On Sunday afternoon the district attorney convened and presided over a special meeting of key city and county police and court officials whose purpose was to make the necessary arrangements for the first appearance in court of the over 2,000 adults thus far in custody, and to develop tentative plans for the subsequent appearance of felony defendants at their preliminary hearings. At this meeting it was agreed that arraignment judges in setting bond should

follow the “revised” prearrest bail schedule for both misdemeanors and felonies. The following morning it was decided that four courts would be necessary for the arraignments, and two were improvised to supplement the two existing courtrooms in Lincoln Heights. Six judges were assigned to man the four courts, three of which would arraign misdemeanors and one felonies. The public defender, city attorney, and district attorney all assigned additional deputies to these courts. Over 3,000 defendants were to be arraigned within a period of two to three days! The arraignments began later that morning, while looting and burning continued to rage in south central Los Angeles. Police and National Guard ringed a two-block perimeter of Lincoln Heights, permitting only attorneys, bondsmen, or family of defendants to enter, while on the inside hundreds of defendants were making their first appearance in court.

In the one felony arraignment court, the district attorney continued his policy of requesting—in the absence of reports as to the background of the defendants—that no bail be granted, and stated publicly that “if facts show offenses for burning, looting and assaulting police or other citizens, conviction and punishment will be vigorously pursued.”²⁷ Accompanied by a black attorney and member of UCRC (a now defunct civil rights umbrella organization), Al Wirin, the dean of the Los Angeles ACLU and one of the few private attorneys present, argued for the constitutional right of bail. As early as Saturday, the ACLU had decided to ensure by the presence of ACLU lawyers that constitutional rights would not be infringed at the arraignments and that bail would be set.²⁸ Bail was in fact set, but at the prearranged, uniform schedule—from \$4,400 to \$5,500—and Wirin’s motions for bond reductions were routinely denied.²⁹ Defendants were informed of their right of counsel, and were directed to appear for preliminary hearings beginning Thursday, August 19.

In the three misdemeanor arraignment courts, defendants were asked to enter a plea of either guilty or not guilty (as misdemeanor defendants are asked in nonriot times as well at this stage); those that pleaded not guilty were confronted with bonds averaging \$1,500 and assigned trial dates beginning on September 1.³⁰ All of Wirin’s motions for bail reductions were summarily denied. The handful that pleaded guilty were sentenced on the most serious of their four or five charges, the judge dismissing the balance of the counts. The sentences of those who pleaded guilty were severe, including the statutory maximum of 180 days in the county jail. The judge who presided over the bulk of misdemeanor arraignments explained that

the sentences were substantial. I felt it was the court’s job to impose fair and just sentences but ones which would bring a quick halt to anyone who wanted to riot again. There should be a policy taken by the courts to have the community be aware that such offenses won’t be taken lightly.³¹

When it soon became apparent that sentences would not be light, the great majority of misdemeanor defendants pleaded not guilty. Within three days, with judges working double shifts, all the 1,000 or so misdemeanor defendants had been arraigned and calendared for trial between September 1 and September 15. Similarly, by Thursday, August 19, the bulk of over 2,000 felony arraignments were completed, and felony defendants had been scheduled to appear for their preliminary hearings beginning on that day.

The *Los Angeles Times* reported that as of Wednesday, August 18, only 5 percent of adult felony defendants were getting out of jail on the \$4,000 to \$5,000 bonds that had been set; in actual fact, only 8 percent of those who eventually bailed out were able to do so within five days.³² Thus virtually no one was able to bail out prior to or immediately following his first court appearance. Very few of those arrested could afford the extraordinarily high bond, and those few who could were unable to find bondsmen. Bondsmen, reacting much like the white community in general, were either staying home or refusing to write bonds for the duration of the revolt.³³ The efforts of court authorities to "keep the people off the streets" for the duration of the revolt had succeeded: with the arraignments completed, and the National Guard preparing to leave the city with the revolt all but over, virtually every defendant was still in custody.

The incarceration of over 3,000 adults by means of extraordinarily high bonds resulted in a tremendous strain on already overburdened detention facilities. Following arraignment, arrestees became the responsibility of the sheriff and had to be shipped from Lincoln Heights to an already crowded county jail. With such a massive influx of arrests, bail set at normal levels would have resulted in a swamping of the county jail; with bail set two to three times higher than normal, detention pressures became overwhelming, almost doubling the existing jail population. An administrative lieutenant in the sheriff's office recalled that

[W]e were completely overloaded. We book an average of several hundred people a night; at the height of the riot we had as many as 3,000 processed through the Central Jail. In fact, the influx was so high we had to activate a minimum security unit and change it to a maximum security unit to take care of the overflow. We didn't have enough booking facilities to do the physical booking . . . we had machines going 24 hours a day which were never shut down.³⁴

Bail Reductions

On August 17—the second day of arraignments—at the urging of the ACLU and the president of the Langston Law Club, an association of black attorneys, the district attorney had initiated a policy whereby attorneys could seek

reductions in bail in felony cases (prior to preliminary hearing) before the presiding judge of the municipal court. In the absence of prior arrest records, however, the district attorney required that attorneys sign an affidavit verifying information they had gathered concerning the defendant's background. Reduction hearings took place on the eighteenth and nineteenth, but since by this time few defendants had private attorneys and since few private attorneys were willing to sign the affidavits, only between fifty and sixty bail reduction motions were considered.³⁵ By the nineteenth, or five days after most had been arrested, only slightly more than 10 percent of the defendants who ultimately bailed out were out of custody; normally approximately 40 percent of those bailing out do so within five days.³⁶

On the nineteenth, the district attorney indicated in a memorandum to judges and attorneys that motions for bail reductions during preliminary hearings would not be opposed if the case did not involve violence to persons and if the defendant had no prior felony convictions.³⁷ On the twentieth, representatives of the ACLU and one UCRC attorney met with representatives of the district attorney and negotiated the establishment of a procedure involving a blanket reduction to normal bail schedules prior to the preliminary hearing for those defendants who met the above standards. Two days before, on Wednesday, August 18, the district attorney's office had begun to receive prior arrest records from Sacramento,³⁸ and defense attorneys agreed to speed this process by interviewing in the jails. The ACLU, in fact, with the cooperation of UCRC, had already begun lining up lawyers to interview in the jails for the purpose of release on recognizance (O.R.) or bond reductions.

As a result of these efforts, by August 23 some 250 defendants had their bonds reduced to \$1,100 prior to their preliminary hearings.³⁹ On the twenty-third ACLU attorneys again held a meeting with representatives of the district attorney's office which resulted in the assignment of a special court to hear bond reduction motions for those who had not yet had their preliminary hearing and had not yet had their bonds reduced to schedule. By the twenty-fifth or twenty-sixth, with the bulk of preliminary hearings over, the majority of felony defendants had had their bonds reduced to schedule, and 35 percent were out of jail.⁴⁰ According to one district attorney staff member,

we initiated requests for reduction of bail in many cases . . . it was most unusual for the D.A. to do this. He tried to bend over backwards to get defendants with no serious record out of jail.⁴¹

By August 25, however, it was apparent that the majority of felony defendants were still in custody, and a group of attorneys met on the twenty-sixth with a superior court judge to argue on behalf of the release on recognizance of all those prisoners who met the standards which had previously been elaborated for bail reduction. A brief on behalf of this position had been submitted

by the Los Angeles chapter of the National Lawyer's Guild, and had apparently received the support of the Los Angeles County Bar Association, whose representative was present at the meeting.⁴² ACLU lawyers were also present to support the motion, although, according to a guild member, this support was somewhat reluctant: they had several days earlier rejected the concept of approaching the court on behalf of all defendants, indicating that the ACLU in its traditional role should concentrate on individual defense work.⁴³ The public defender's office did not participate in this meeting nor in any other efforts to initiate bail reductions. In the words of a district attorney staff member,

the PD's office has a peculiar attitude. . . . it would rather have a guy in jail where they can interview them than out of jail where they can't get a hold of them. Besides, if a guy has the money to bail out, he probably doesn't need the public defender.⁴⁴

At the meeting it was decided that the "Motion for Bail Reduction" forms which attorneys had been distributing in the jails could be used as replacements for the longer, standard "Release on Recognizance" form, and that the embryonic O.R. unit which at that time had only four staff members would be beefed up with several additional personnel. The Los Angeles County bar representative offered to supplement attorneys already interviewing in the jails with his association's own manpower. Within a week's time over 300 applications for release on recognizance were handed over to the O.R. unit, but only 80 to 90 of these were recommended for release.⁴⁵ (This was about the normal ratio of recommendations to investigations; apparently O.R. staff members insisted on conforming to the normal procedure of confirming information in the application by phone call during daytime hours to the family of the defendant. Naturally, only a small percentage could be reached and those who were not were automatically denied O.R.)⁴⁶

The attorney interviewing effort, essential to these various reduction procedures, began on the twenty-first and lasted until the thirtieth. It was conducted largely by white lawyers of ACLU or guild affiliation. Few black attorneys participated, with one prominent exception, a UCRC lawyer. In his words, "I was so embarrassed because I looked around and saw that almost every lawyer was white. Hardly any Negroes participated."⁴⁷ A white ACLU lawyer indicated that "Negro lawyers would interview clients for whom they had been retained, but they wouldn't handle volunteer applications."⁴⁸ The attorney effort received, in the words of one attorney who did a lion's share of the work,

unprecedented cooperation. Both the DA's office and the sheriff's office were cooperative. Whether it was because of their concern with individual rights or because they needed to reduce detention pressures, I'll leave you to decide.⁴⁹

Other volunteers indicated that detention pressures were indeed a principal motivating factor:

The sheriff was concerned with unrest in the jail. We got permission from the sheriff to even let nonlawyers into the jails to do interviewing. In our meetings [with the sheriff], we realized he was anxious to get people out. We were permitted to go into the jail at unusual hours . . . we went to the sheriff and asked for names whether prisoners had called us or not and the sheriff willingly handed over his records. This was an unprecedented intervention on our part, allowing us to interview thirty to forty at a time.⁵⁰

The sheriff's cooperative attitude was confirmed by an administrative lieutenant in the custody section: "We let anyone in who could in any way assist in getting people out. The sheriff did a lot of things beyond the normal scope of his duties to get people out."⁵¹ According to the UCRC attorney, "the sheriff mentioned to me one time that 'we've got all we can handle . . . we're not anxious to hold people.'"⁵² An ACLU staff member expressed the sheriff's motivations somewhat more bluntly: "The sheriff was desperate to empty cells. If we hadn't raised the question there would have been no reductions, but once this option was available it worked to the sheriff's advantage."⁵³ Another volunteer attorney expressed his conviction that "the sheriff took up the custodial problems with the district attorney and this more than anything else was responsible for reductions in bail."⁵⁴

A study undertaken by the Los Angeles County Probation Department shows that, as a result of the combination of detention pressures and defense attorney efforts, median presentence detention time for the 1,100 defendants convicted of felonies was well under three weeks; within three weeks of the beginning of the revolt over 60 percent of these felony defendants had bailed out.⁵⁵ Since this study deals only with those defendants who were convicted and does not include the several hundred who were dismissed at their preliminary hearing no later than two weeks after the beginning of the revolt, it is likely that median detention time for all persons charged with felonies would approximate two weeks.

In contrast, sheriff's records indicate that, during the previous year (1964), the average length of presentence detention for county jail inmates was just over four weeks; the sheriff's records, however, include detention time for misdemeanor defendants, so it is likely that average felony detention during "normal" periods runs well over four weeks.⁵⁶ Moreover, this four-week average conceals the fact that in normal times well over half of all felony defendants fail to bail out at all before coming to trial. Thus a study conducted by Lee Silverstein in 1962 found that only 41 percent of a random sample of felony prisoners bailed out before trial.⁵⁷ Silverstein's findings were confirmed by a more recent survey conducted by the criminal courts coordinator, which

found that only 46 percent of felony defendants bail out before their cases are tried.⁵⁸ In radical contrast, by the time riot felony trials began at the beginning of October over 70 percent of felony defendants had bailed out.

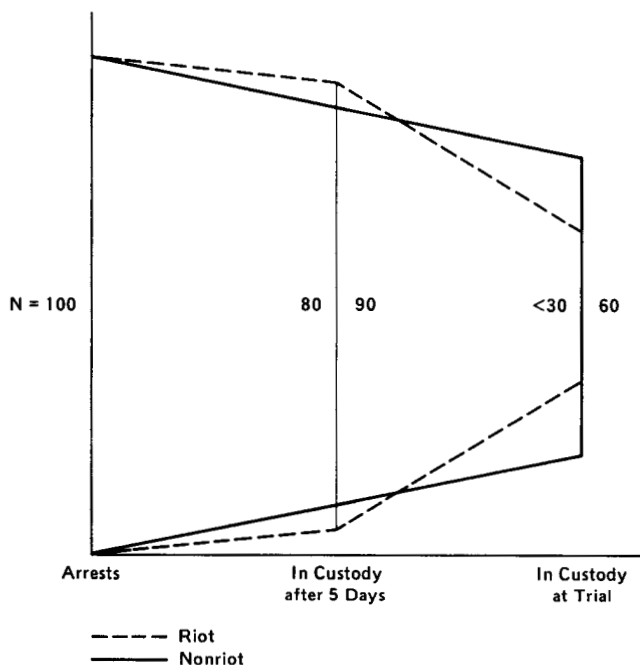


Fig. 2.1. Los Angeles: Comparative Complete Felony Detention Flow

Figure 2.1 compares the flow of bail-outs under riot and nonriot conditions, using the pyramid metaphor suggested by Oaks and Lehman.⁵⁹ Notice that whereas at first the slope of the “riot pyramid” was significantly *less* pronounced than the “nonriot pyramid,” indicating that relatively few riot defendants bailed out during the revolt as compared to the normal five-day bail-out rate, after the initial five-day period the slope of the “riot pyramid” is dramatically *more* pronounced than the “nonriot pyramid,” indicating that once the revolt was over a vastly higher percentage of defendants bailed out than the normal rate of bail-outs prior to trial.

Although no special arrangements were created for reducing the bail of the 1,000 or so defendants prosecuted for misdemeanors—in part because misdemeanor bail although higher than normal was much lower than felony bail and in part because the city attorney, according to ACLU and other attorneys, was not as cooperative as the district attorney—presentence detention time for misdemeanants was also considerably lower than the norm: over 60 percent

of the Los Angeles County Probation Department sample were in custody for less than twenty days.⁶⁰ This figure is misleading, however, because it does not represent simply the percentage of defendants who bailed out before trial, but rather is in part a reflection of the fact that, as we have seen, a not insignificant number of defendants pleaded guilty at their initial court appearance. The unusually high percentage of those in custody five days or less is probably attributable to this fact. Thus although median detention time for misdemeanants was under ten days, it is likely that median detention time for those who did not plead guilty at their first court appearance was at least as high as that of all felony defendants; this jibes with the recollections of defense attorneys, prosecutors, and judges alike that around half the misdemeanor defendants were still in custody when their trials began on September 1.⁶¹

Preliminary Hearings

Following the arraignments court authorities were faced with holding preliminary hearings for some 2,200 individuals charged with felonies—or a two-and-a-half month's normal quota of felony prosecutions—within five days after their arraignment. Unlike the arraignments, which are largely perfunctory and do not involve the presentation of evidence, preliminary hearings are normally time consuming since the prosecutor is required to produce evidence indicating why the defendant should be bound over for felony trial. As early as Monday, August 16, the first day of arraignment, it was clear to the presiding judge of the municipal court, whose judges normally sit as magistrates to conduct preliminary hearings, that the normal procedures for handling preliminary hearings could not possibly cope with the overwhelming volume within statutory time limitations.

On Monday, therefore, he contacted the presiding judge of the superior court, who agreed not only to provide additional courtrooms but also as many superior court judges—both criminal and civil—as were needed to sit as magistrates to hold preliminary hearings. It was further agreed that the preliminary hearings would necessitate the elimination of all civil trials in the main courthouse for the duration of the hearings, and that the ordinary nonriot criminal calendars of judges conducting preliminary hearings would be disposed of during morning hours. Beginning on Thursday, August 19, or three days after the beginning of the arraignments, twenty judges in twenty different courtrooms heard preliminary hearings from 1:00 P.M. to as late as 9:00 P.M.⁶²

The district attorney's office also made special arrangements to cope with the volume of preliminary hearings, working out with the sheriff's office and the police department the logistics of transporting hundreds of prisoners at a time from the County Jail to the Hall of Justice, providing transportation for

witnesses, and assigning deputies from other divisions throughout the office to preliminary hearing duty. All the deputies were given a memorandum setting forth an office policy for the preliminary hearings; as we have seen, bail reductions in the absence of a prior felony conviction or personal violence associated with the alleged offense were not to be opposed. On the other hand, no pleas of guilty to reduced charges would be accepted; if a defendant wanted to plead guilty he would have to plead to the felony charge.⁶³ The district attorney added elsewhere publicly that "the lawbreaker will be punished to the limit of the law."⁶⁴

In the words of a former official in the district attorney's office, "Some of the early pronouncements out of the DA's office as to the charges to be prosecuted on, and what pleas would be accepted, were on the strict side. The early tenor of things was to insist on a felony."⁶⁵ The district attorney later justified his "hard line":

Any crime occurring during the riots becomes more serious because of that fact alone. . . . those who committed crimes during these terrible days of the riot are in a special class. A burglary, for example, is always a serious crime, but a burglary that took place in the course of the riot is even more serious than that same burglary occurring at a different time and place because the burglary which took place during the riot helped to sustain it and was directly or indirectly responsible for the loss of life and the destruction of millions of dollars worth of property.⁶⁶

The preliminary hearings began on Tuesday afternoon; by the admission of all concerned, the first few days were "total chaos."

Courts and corridors were jammed, there was great delay in moving people out to courts which were available and waiting for them. The arraignment courts hadn't kept proper tally of the number of cases to be assigned at a time for hearings and had exceeded our suggested limitation. Halfway through the 10 o'clock calendar the 3 o'clock calendar started to arrive.⁶⁷

Many of these logistical problems were solved by the second day; however, several more formidable difficulties remained unresolved. First, there was a problem of lining up the proper witnesses with the proper cases. This continued to be, according to the chief trial deputy of the district attorney's office, a major problem throughout the preliminary hearings.⁶⁸ Second, even when witnesses were present, there were serious "evidence problems. . . . Police sometimes couldn't remember defendants. Not many pictures were taken at the time of arrest."⁶⁹ Another major problem was bringing together different defendants who had been arrested on the same complaint and were therefore part of the same case. According to one judge, "sometimes up to twelve were on the same complaint. It was difficult to get all the people together, especially if one was out on bail and one still in jail."⁷⁰ Finally, the mass of cases

to be disposed of in a short period of time prevented prosecution officials from undertaking the normal amount of preparation before conducting preliminary hearings. According to the chief trial deputy, "deputy DA's took preliminaries off the cuff with no time for preparation."⁷¹

Given these problems, deputy district attorneys often requested, and were granted, continuances for a number of days. According to one attorney,

The public defender agreed to the DA's request for continuances for people still in jail. He said he felt he could get a better deal for them later if he went along with the DA now. In many cases, however, when the state asked for a continuance for a person still in custody the judges would then permit the person to be released on O.R. if the "rap sheet" [prior arrest record] indicated that this was the type of person who would normally get O.R.⁷²

Despite the great obstacles we have related, and in part because continuances were granted, court authorities were able to dispose of the bulk of preliminary hearings in just over a week's time, or by August 27, so that the five-day postarraignment deadline was met in the majority of cases (except where it was rendered nugatory because of defense requests for continuances). Given the district attorney's policy of insisting on pleas to felony charges only, virtually no one pleaded guilty at his preliminary hearing. Given the admittedly overwhelming evidence problems, however, a substantially smaller than normal percentage of persons were bound over for felony trial. Out of some 2,300 individuals charged with felonies, 1,781 were held to answer for trial, while 522, or 30 percent, were dismissed.⁷³ During the month prior to and the month following the riot preliminaries, the dismissal rate ran 16 percent and 15 percent respectively.⁷⁴

Figure 2.2 compares case flow under riot and nonriot conditions from the point of arrest through preliminary hearings. Notice that whereas during the revolt there was a much lower proportion of prosecution stage "drop off" than normally, following the revolt "drop off" after the prosecution stage is far more pronounced than it is under "normal" conditions. Thus, as in the case of bail, the system at first took in more volume than it normally accepts, then disposed of more volume than it normally eliminates. Notice also, however, that despite greater postprosecution "drop off" following the revolt a much higher ratio of persons bound over for trial as a percentage of total arrests prevailed than normally: 60 percent of all felony arrests were bound over for trial, whereas normally only 38 percent of all felony arrests are bound over. Thus court authorities compensated for the increased volume of the preliminary hearings by increasing the normal rate of dismissals, but not enough to ensure that only the usual percentage of total arrestees would be bound over. Had court authorities simply been interested in minimizing the volume pressures they would have to face in the next few weeks, they would have dismissed a

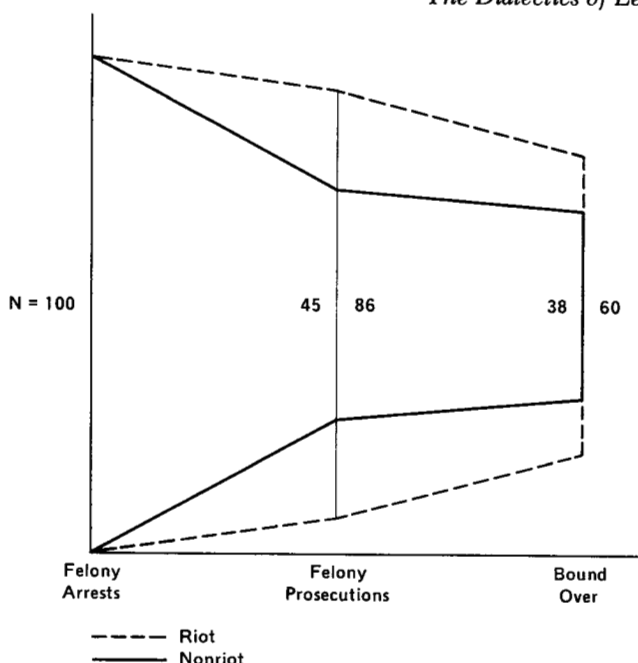


Fig. 2.2. Los Angeles: Comparative Felony Case Flow—Arrest through Preliminary Hearing

much higher percentage of cases; certainly there was every reason to dismiss a much higher percentage of cases on the grounds of insufficient evidence to bind over for trial.

Instead, judges chose to bind over for trial even when critical evidence was lacking. In the words of one attorney, "the judges were tired and witnesses were unavailable. A lot of inferences were drawn, and credibility of witnesses was stretched to favor expediency."⁷⁵ A district attorney official admitted that (referring to the preliminary hearings) "there really was no individual justice there."⁷⁶ Another district attorney representative indicated that

because of the volume, the hearings operated faster. Ordinarily, to prove second degree burglary, you must prove that the individual took the article without the owner's permission. In riot circumstances the court would of course infer that the owner hadn't granted permission [even if he didn't testify].⁷⁷

Thus the relatively high dismissal rate at the preliminary hearings would have been significantly higher if the normal canons of evidence and proof had been maintained. That they were not suggests that judges were at this point—only several days to a week after the revolt was over—unwilling to engage in a wholesale dismissal of cases, and that, to quote one judge, there was still

a hostile atmosphere. There was a good deal of judges' response to public outcry in the sense that if at the preliminary hearing stage a case appeared at first blush to be a felony they would let it stay a felony.⁷⁸

Preparation for Trials

The preliminary hearings over, court authorities were still faced with the unenviable task of bringing over 1,000 misdemeanor defendants to trial by September 15, and with arraigning almost 1,800 felony defendants on the information within fifteen days after the preliminary hearings and trying them within sixty days following the arraignment on the information.⁷⁹ Two weeks after the revolt, then, the Los Angeles court system was still faced with an overwhelming volume of riot cases.

Misdemeanor Trial Preparation

The presiding judge of the municipal court soon realized that a special division—Division 20-A—would have to be opened to handle the riot cases, which were scheduled to be heard at a rate of 80 per day between September 1 and 14. An additional seven judges were in fact made available to hear cases in this division by taking judges away from the civil calendar and by assigning two municipal county judges from outside Los Angeles to the special division.⁸⁰

The presiding judge decided to assign a black judge to preside in the special master calendar division,

with the thought in mind that he was well qualified through years of experience in sentencing and court procedures, and the further fact that he could dispatch the cases to the various courts with unusual efficiency, and that *all the defendants, being Negro would be more inclined to consider entering a plea of guilty before Judge Smith.*⁸¹ (Italics mine.)

The presiding judge emphasized in an interview the importance of guilty pleas, referring to the experience of the San Francisco court system just one year previously to which we alluded in Chapter 1:

I read this report just before the Watts riot. Some of the decisions I made were based on this. They had a great number of jury trials [in San Francisco] and they didn't have a civil case for four months!⁸²

If Judge Cochran wanted a judge who could induce guilty pleas, he also wanted one "who would be firm in cases of pleas of guilty. I talked to Judge Smith and said I wanted certain policies followed; he consented." Similarly, Judge Cochran tried to assure that none of the judges assigned to preside over trials "felt any qualms about hearing these matters"; if they did they were not

assigned.⁸³ On August 30, the day before misdemeanor trials were scheduled to begin, Judge Cochran met with the assigned judges for the purpose of familiarizing them with the multiple count complaints with which they would be confronted, and suggested a uniform procedure concerning those counts to sentence on and those to dismiss.⁸⁴

The city attorney also made special preparations, calling on deputies from the civil division to handle the upcoming trials. Prior to September 1, office deputies were able for the first time to make evaluations of the multiple complaints, and the city attorney indicated to judges and defense attorneys the counts of the complaints he would dismiss if the defendant pleaded guilty to one count. Generally speaking, according to an assistant, the city attorney's policy was to "take a plea to the fifth and least serious count; then we would drop the others. Of course, if they went to trial [i.e., refused to plead guilty] they went to trial on all counts."⁸⁵ According to the judge assigned to head the special division created for riot misdemeanants, the city attorney also "agreed to go through his files carefully and to throw out all junk [bad cases] on a motion to dismiss."⁸⁶ Note the contrast between this position and the earlier "hard line" contention of the city attorney, expressed just after the revolt ended, that police had not made indiscriminate arrests but rather that arrests had been made only in aggravated cases.⁸⁷

Felony Trial Preparation

A special department was created in which riot felony defendants would be arraigned on the information beginning on September 2. At this time defendants were informed of the felony charges confronting them and were assigned trial dates beginning October 2, or between thirty to sixty days after the arraignments. Four additional courts were to be opened, so that beginning on this date twenty-two courts would be open for felony trials; these courts, however, would also have to dispose of their normal criminal calendar. Consequently, it was felt that it would require from three to four months to dispose of the bulk of riot felonies, and that continuances requested by defense attorneys or by prosecuting attorneys with the consent of defense attorneys would enable the court to legally exceed the sixty-day time limit.⁸⁸ According to the chief trial deputy,

I knew I could handle it because I realized that the ACLU would become involved and the public defender would handle the bulk of the cases, and that everyone would want continuances, so that the process would become stretched out and relieve the pressure.⁸⁹

To staff the additional courts, the district attorney's office temporarily re-assigned a number of deputies from other areas in the office.

On August 23, the district attorney decided that a uniform riot-case disposition policy should be drawn up, and on August 31 he distributed to his deputies a memorandum entitled "Riot Case Disposition Policy" in which guidelines for accepting pleas of guilty were outlined.⁹⁰ The district attorney continued to insist that "an offense which was committed during the riot is considered serious and aggravated by reason of the riot itself." Nevertheless, he recognized that "factual and legal difficulties would arise," and contemplated therefore that some cases would have to be "compromised" to a misdemeanor or dismissed. A special docket of riot cases was to be kept in the district attorney's office, and all deputies' motions for dismissals or reductions to misdemeanors would require the approval of the chief trial deputy or his assistant.⁹¹

Thus, although the district attorney continued to articulate a "hard line" concerning riot offenses, he was aware by now that many cases would have to be compromised, and he instructed his deputies that reductions to misdemeanors in the case of burglary, receiving stolen property, and grand theft charges⁹² would be permissible depending on:

- 1) the defendants' prior record of arrests or convictions;
- 2) the circumstances of the commission of offense; e.g., the value of property stolen, whether the building the defendant had entered had already been broken into previously by someone else, etc.⁹³

Notice that although less than two weeks previously the district attorney was insisting on pleas to felonies, he now recognized—in the light of the huge volume of cases and formidable evidence problems—that pleas to misdemeanors would be essential if cases were to come to an efficient and speedy disposition.

Defense Community Preparations

As early as Saturday, August 14—the peak day of the revolt—a meeting of ACLU attorneys had taken place, the result of which was (as we have already seen) the appearance of ACLU lawyers at the initial arraignments beginning the following Monday as well as the beginning of a coordinated UCRC-ACLU effort to get bail reduced. At this time, according to an ACLU spokesman,

the only civil liberty we saw infringed was bail and we wanted to make sure people were arraigned properly and to make sure the system wouldn't be packed and due process overrun. We had no intention of providing a mass criminal defense system . . . this is not our traditional role.⁹⁴

The following week, however, when the magnitude of the arrests became clear, in part because of calls for help to ACLU and UCRC from relatives of persons in jail, ACLU attorneys had decided that some kind of volunteer law-

yer effort would be necessary. With this purpose in mind a meeting of representatives of the Los Angeles defense community was convened by the ACLU, at which over 100 lawyers were present. The meeting revealed significant division of opinion over the question of volunteer representation. Attorneys associated with the Lawyer's Guild argued against providing volunteer counsel on an individual case basis, feeling that such efforts would "place a fig leaf on the statue of Justice,"⁹⁵ i.e., it would lend legitimacy to the effort of court authorities to treat defendants as criminals rather than as political protesters. In the words of one guild lawyer,

we felt it would be wrong because we simply would be a party to due processing the people to death. We [felt we] should find other ways of using our resources to treat the problem as a mass problem.

Guild lawyers suggested therefore that the court should be approached with an O.R. request on behalf of all defendants. According to the above guild lawyer, the

ACLU summarily abandoned this idea. Their rationale was that the ACLU should in its traditional role do individual defense work.⁹⁶

Most black lawyers, on the other hand, opposed the notion of volunteer counsel on economic rather than ideological grounds. Many NAACP and Langston Law Club attorneys, in the words of one lawyer,

didn't want to do free criminal work because it's their principal source of revenue. I can understand this . . . I would be reluctant to volunteer on my bread and butter civil cases.⁹⁷

Another white lawyer explained that

there are only about 100 black lawyers in Los Angeles. Most earn their living from criminal cases with nominal fees, exactly the kind of cases involved in the riot cases. The idea of volunteer counsel was an economic jeopardy to these lawyers; only a small minority of black lawyers went beyond this economic consideration to take stands based on principles of black consciousness.⁹⁸

Despite this division of opinion, the ACLU went forward with a volunteer attorney effort, and in fact was able to evoke some guild and black attorney participation. By the nineteenth or twentieth ACLU staff members were operating ACLU and UCRC phones, lining up attorneys with clients not simply for the preliminary hearings but especially for the upcoming misdemeanor and felony trials. On August 23 the ACLU convened a press conference scheduled for the following day, at which time it was announced that the Lawyer's Constitutional Defense Committee—which up to that time had been a legal arm of the Civil Rights Movement in the South—would serve as a tax-exempt

conduit for covering the expenses of the defense operation, and that A. L. Wirin, chief counsel for the ACLU would direct the legal effort to provide "proper representation for Watts defendants."⁹⁹ According to ACLU sources, it was largely due to Wirin's efforts that a committee involving the participation of the president of the Langston Law Club, the NAACP, Lawyer's Guild attorneys, the head of the Law Enforcement Division of UCRC, a representative of the Los Angeles County Bar Association, the president of the Criminal Courts Bar Association, and ACLU representatives was formed, whose purpose was to coordinate the effort to find volunteer lawyers.

Despite this multifaceted participation, ACLU staff did the bulk of the actual contacting of attorneys, and ACLU-affiliated attorneys—mainly white—formed the bulk of those who volunteered to represent defendants without compensation. According to the ACLU *Open Forum*, requests for volunteers resulted in a response of 125 attorneys willing to serve without compensation.¹⁰⁰ Despite the efforts of the president of the Langston Law Club, the black bar association of Los Angeles, the majority of the members of that association refused to participate unless they could receive compensation on the basis of a statutory provision (987-A) authorizing the state to compensate private attorneys if the public defender is unable to provide representation. The Criminal Courts Bar Association took a similar position, feeling that, in the words of an ACLU attorney, "we don't want to give away our bread and butter for nothing."¹⁰¹ The representative of the Los Angeles County Bar Association was able to recruit a list of only about sixty volunteer attorneys out of a total bar membership of almost 10,000. Even this minimal response evoked pleasure from this representative and surprise from others:

Al Wirin of the ACLU didn't believe that the L.A. county bar would help, especially without going back to the Board of Trustees for permission, but we did. The master calendar judge of the superior court couldn't believe that the L.A. county bar was able to come up with sixty volunteer lawyers.

As it turned out, many of the sixty lawyers were never called upon. According to the above L.A. county bar representative, "we never had to call on this list because one way or another attorneys became available, so that this list became a reserve that the judges were aware of."¹⁰²

Given the unwillingness of a large segment of the defense community to volunteer without compensation (and despite the fact that ACLU attorneys were still prepared to volunteer without pay), it was decided that an effort would be made to secure "987-A" appointments. Contact was established with both the city and county public defender a week before trials were to begin,¹⁰³ but although each said they welcomed volunteer attorney participation, neither would admit his office was incapable of handling the volume—this despite the fact, for example, that the city public defender had a total staff of

ten attorneys, only five of whom had trial experience, and would be faced with some 1,000 cases within a two-week period! The presiding judge of the special riot misdemeanor calendar took the position that he would make no "987-A" appointments unless and until the public defender admitted that he was incapable of handling the load; as of August 31, or one day before the start of misdemeanor trials, both the position of the public defender and of the presiding judge remained unchanged.

Prior to that time defense efforts had extracted certain concessions from court authorities. On August 24 the general counsel of the ACLU, the president of the Langston Law Club, and the chief of UCRC's Law Enforcement Division met with the city attorney, who had agreed not to oppose sentences in misdemeanor cases to time already served (while detained prior to trial).¹⁰⁴ Following this meeting these attorneys met with the presiding judge of the special riot division, who indicated his willingness to go along with the agreement; i.e., that if none of the multiple counts was an aggravated felony, "copping a plea" to the least serious count would result in sentences to time served. It was also agreed that ACLU and other volunteer attorneys could appear as friends of the court—to advise defendants even if they had had no prior contact with them—and volunteer attorneys were thus able before the actual trials began to announce the above agreement concerning pleas and sentences to prisoners awaiting trials in courtroom "holding tanks."¹⁰⁵

Misdemeanor Trials

On the first day of the trials it became apparent that the "agreement" negotiated by volunteer lawyers was not being honored: the public defender was inducing people to plead guilty, but the presiding judge was sentencing the first group of defendants not to time served but rather to "ten days or two weeks plus fines."¹⁰⁶ Once aware of what they later termed a "double cross," volunteer lawyers announced to prisoners in the tank awaiting trial that "all deals were off," that no one should plead guilty, and that if the state were ready for trial they should demand a continuance and if the state wanted a continuance they should demand a jury trial.¹⁰⁷ One black attorney explained that

we wanted 987-A court-appointed lawyers who would get public funds, but the establishment could not accept the fact that "these people" could be defended at public expense. We decided to establish the fact that the public defender couldn't handle the load by demanding jury trials.¹⁰⁸

The reaction of the public defender was, to say the least, unfriendly. In the words of one volunteer attorney, "the public defender shit when we told him we should advise clients to plead not guilty and demand jury trials."¹⁰⁹

The former city public defender recalled that he told volunteer attorneys that "my job is to process cases and I won't stand for anyone's being a stumble-block."¹¹⁰

Despite the public defender's hostility, most defendants who came up on the second day of trials did plead not guilty, and many demanded jury trials. Within several hours, the presiding judge had run out of courtrooms to which to assign cases for trial. According to this judge,

on the second day of the trials there was a surprising number of requests for jury trials. That day's calendar was handled throughout the night. That one day we were hard pressed; the judges working for me did an excellent job. After that there were no more large requests for courtrooms.¹¹¹

This latter fact was not an accident. Court authorities attempted to discourage further jury trial demands by ensuring that those who did demand them would be penalized heavily for doing so. According to the presiding judge of the municipal court, "some of the people got the message that they would receive maximum sentences if they pleaded not guilty whereas people pleading guilty were given consideration to time served."¹¹²

Court authorities also attempted to block the participation of attorneys who displayed such "disruptive" tactics on the second day. The following morning, ACLU and other volunteer lawyers who had advised defendants to plead not guilty were barred from the court unless they would state they were representing a specific individual. If they gave a name, however, they would become the attorney of record without compensation and their effort to compel "987-A" appointments would have been defeated. On the other hand, if they did not give a name, they could not gain entry.

The volunteer attorneys caucused, and although many were in favor of appearing on a volunteer basis, the majority of Criminal Courts Bar Association and black attorneys refused, claiming that "if we did volunteer, we'd be no better than scabs."¹¹³ According to one attorney, their feelings were that "it's taken us a long time to get '987-A' and if we step forward and volunteer this will set a precedent against compensated counsel in the future."¹¹⁴

At this point, according to an ACLU attorney, the public defender gained control of the defense operation.¹¹⁵ Since most attorneys were unwilling to volunteer without compensation, in the absence of "987-A" appointments there could be no substantial volunteer effort; without such an effort, the public defender would retain effective control of the representation process. Some lawyers decided to volunteer anyway—in all, around 100 misdemeanor cases were handled by volunteer counsel—but given the fact that the public defender was handling the bulk of the cases, their efforts, in the words of one volunteer, simply "amounted to taking pressure off the courts." To pursue an effective jury trial demand strategy would have required solidarity among

defense counsel and defendants which public defender control of the majority of cases precluded.

The public defender subsequently admitted his inability to handle all the cases, and a handful of "987-A" appointments were made, but not to any of the attorneys who had sought to "break the back" of the court with jury trial demands. The presiding judge of the municipal court explained that

there is a certain group of attorneys whose sole purpose is to delay and obstruct justice. "987-A" appointments were made, but not for the obstructionists, I'll guarantee that.¹¹⁶

Court authorities thus responded to the threat of disruptive, time-consuming jury trials by assuring that control of defense operations remained with the public defender. Their response was effective, for after the second day there were few if any jury trial demands; according to a *Law in Transition* survey of over 800 misdemeanor cases, only 20 defendants had their cases disposed of by jury trials.¹¹⁷ Following the second day, then, things went smoothly from the point of view of court authorities, and by the end of November the great majority of trials were over, 988 having been held with 135 defendants awaiting trial.¹¹⁸ By the end of December, all but 61 of the 1,133 misdemeanor defendants had been brought to trial; 751 out of 1,072 defendants, or 70 percent, had been convicted, a rate comparable to that for nonriot misdemeanors.¹¹⁹ The municipal court was able to handle such a large volume of cases without dismissing an unusually high percentage of cases because prosecution-defense cooperation ensured (a) that the thirty-day statutory limitation was rendered nugatory in effect and (b) that a high rate of guilty pleas would be forthcoming.

Defense attorney requests, or acquiescence in the city attorney's requests for continuances played a crucial role in allowing the courts to cope with the overwhelming volume of arrests. Had the court been forced to bring over 1,000 cases to conclusion within a one-month period, it is likely that an unusually high percentage of dismissals would have been essential. Instead, continuances allowed court authorities to spend four months disposing of misdemeanor cases. In the words of a former city public defender,

If all the people wanted to go to trial, the courts would have completely collapsed. So it was in the courts' interest to grant continuances. This worked to our benefit by giving us more time.¹²⁰

In view of the fact that an assistant city attorney admitted that "there were great evidence problems,"¹²¹ avoiding trials was especially important, and a high rate of guilty pleas essential, if dismissals were to be avoided. In fact, prosecution-defense cooperation produced an unusually high rate of guilty pleas; according to a *Law in Transition* survey of 555 sample convictions, 476 or 81 percent came as a result of guilty pleas, compared to the normal

rate of around 60 percent in misdemeanor cases.¹²² In the words of one attorney, "there was great public defender pressure to plead guilty so the system wouldn't be clogged."¹²³

Multiple charges served as additional leverage by which the public defender and city attorney could apply this pressure: the more charges initially filed against the defendant, the more likely he was to plead guilty. Of 750 defendants charged with four or more violations, 462 or 62 percent pleaded guilty; of 56 defendants charged with three or fewer violations, only 19 percent pleaded guilty. Ninety-eight percent of the 473 guilty pleas were to one charge only, indicating that in return for a plea of guilty the city attorney would in virtually all cases drop all but one of the multiple charges initially filed against the defendant; well over half of those pleading guilty were convicted solely of curfew violation.¹²⁴ On the other hand, if defendants wanted to plead not guilty they would have to go to trial, and risk being convicted, on all their multiple charges. It is not surprising, then, that such a high proportion of defendants pleaded guilty.

If volume pressures dictated that city attorney-public defender cooperation produce an unusually high rate of guilty pleas, they also assured that the negotiations surrounding the guilty pleas would result in rather minimal sentences. If a high rate of guilty pleas were to be obtained, then defendants would have to be allowed to plead to one charge only and to be given some assurance that they would "get off easy." Despite the ACLU's insistence of a "double cross," *Law in Transition* statistics gathered in part by ACLU attorneys indicate that over one-half of a sample of 408 convictions resulted either in probation, fines, or suspended sentences; i.e., over half served no time in addition to that spent awaiting trial.¹²⁵ Similarly, a statistical survey of 600 convictions in the files of a former special assistant to the district attorney indicates that around 50 percent were not committed following their conviction.¹²⁶

Those who were committed received, by and large, minimal sentences. Of 196 committed defendants in the *Law in Transition* sample, almost one-half were committed for less than one month, and over 80 percent for less than three months. It should be noted that this breakdown includes sentences for those who went to trial during the revolt at their first court appearance. Virtually all the sentences over 120 days were imposed at that time.

Although a statistical comparison of this sentence distribution with sentences for comparable misdemeanor offenses in a nonriot period is not possible,¹²⁷ there are indications that the riot sentences were relatively less harsh than normally. According to the former city public defender,

Defendants got more breaks than normally due to the great volume and pressure on the courts. A lot of defendants who normally would have to go to trial

or to plead to a petty theft got trespass. Sentences were comparatively light because of the pressures. In order to reduce clogging the city attorney's office was making concessions in sentencing and reductions of charges.¹²⁸

Since 30 percent of the 1,133 defendants prosecuted for misdemeanors were not convicted, and since 50 percent of those convicted were not committed, approximately 65 percent or almost two-thirds of all persons prosecuted for misdemeanors received no time in jail at all other than that spent prior to bailing out or coming to trial. Minimal sentences were imposed, then, despite the city attorney's earlier assertion that these were "aggravated offenses" and the presiding judge's allegation that these misdemeanants were entirely different from ordinary misdemeanants and hence deserving of more severe treatment.

Felony Trials

As in the case of misdemeanor trials, the bulk of some 1,800 felony cases were disposed of within three months; as of December 20, only 181 cases remained untried.¹²⁹ The most complete compilations of the district attorney's office showed that (as of August 6, 1968, with over 99 percent of the cases disposed of) out of 1,758 completed cases there were 1,362 convictions, amounting to a conviction rate of 77 percent.¹³⁰ Similarly, a *Law in Transition* breakdown of 1,608 completed cases listed 1,252 convictions, also indicating a conviction rate of 77 percent. This rate is significantly lower than the normal rate of all felony convictions, which in 1966, for example, was 84 percent, and even more dramatically lower than the normal rates for the two specific non-riot felony offenses most frequently charged during the revolt—burglary and theft—which in 1961 were 88 and 89 percent respectively.¹³¹

In a report to the District Attorney's Advisory Council, dated December 1965, District Attorney Younger explained (with only slight exaggeration) that

ordinarily we get convictions in over 90 percent of our cases. If the percentage were to drop substantially, we would start looking for the reasons. . . . Consider what we were up against in the riot cases. When so many people are arrested so fast, it's hard to get the kind of evidence you need.¹³²

Figure 2.3 adds this stage of court proceedings to those which have already been presented to give a comparative picture of both riot and nonriot case flows from point of arrest through final disposition.

Notice that, in the riot case flow, the unusually high "drop off" which began at the preliminary-hearing stage continues through the trial stage, and that this postprosecution drop off (40 percent as compared to a norm of 9 percent) almost offsets the abnormally low preprosecution drop off (16 percent as

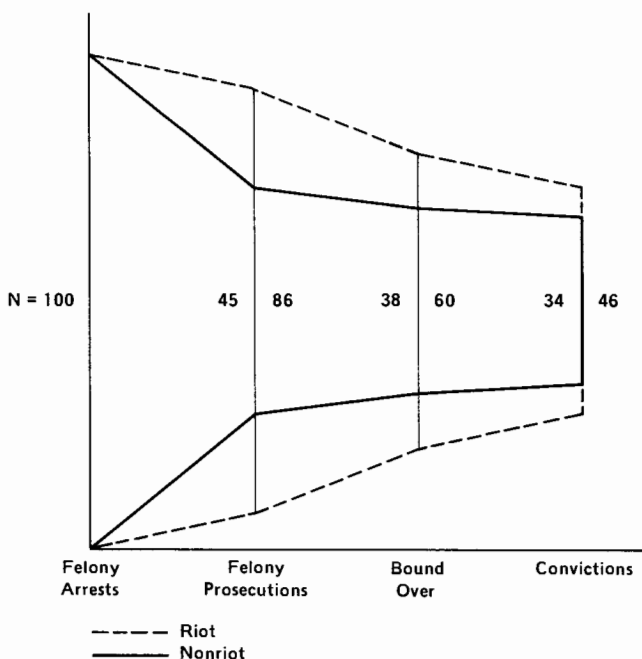


Fig. 2.3. Los Angeles: Comparative Felony Case Flow—Arrest through Conviction

compared to a norm of 55 percent). Thus there was a total increase of only 10 percent in the ratio of convictions to total arrests. Notice further that the ratio of prosecutions to arrests appears in both the riot and the nonriot case flows to be inversely related to the ratio of convictions to prosecutions in virtually equal but opposite proportions. Thus, in the nonriot case flow, a 45 percent ratio of prosecutions to arrests is accompanied by an 80 percent ratio of convictions to prosecutions; while in the riot case flow an 86 percent ratio of prosecutions to arrests is accompanied by a 53 percent ratio of convictions to prosecutions. The conviction ratio declines from nonriot to riot almost in exact proportion to the increase from nonriot to riot in the prosecution ratio, suggesting that the abandonment of normal police and prosecution gate-keeping functions during the revolt was a significant determinant of the ultimate court response.

Method of Disposition

Of the some 1,360 defendants convicted who were charged with felonies, only 188 or 14 percent, pleaded guilty at their trials, remarkably lower than the normal rate of pleas for all felony offenses, which averages between 55

and 60 percent, and the normal rate for burglary offenses, which averages over 80 percent.¹³³ This startling difference, however, should not be interpreted to mean that an unusually high percentage of jury trials took place, or even that an extraordinarily high percentage of time-consuming bench trials occurred. In fact, only 4 percent of all convictions came via jury trials, compared to a normal rate of 7 or 8 percent for all felonies. Similarly, only 25 percent of the 1,300 convictions resulted from full bench trials, not significantly different from the normal ratio.¹³⁴ The unusually low guilty plea rate indicates rather than an unusually high proportion of riot felony convictions resulted from a process which in California is called "submission on the transcript."

Submission on the transcript occurs in normal times in Los Angeles when a defendant refuses to enter a plea of guilty but nonetheless wishes to avoid a time-consuming court trial and the likelihood of severe penalties attendant to it. Specifically, it means that the only evidence presented at his "trial" is that found in the transcript of the preliminary hearing (testimony which was marshaled at that time ostensibly only for the purposes of determining whether there was probable cause to bind the defendant over for felony trial); hence no witnesses need appear and no adversary proceedings occur at the "trial." Submission on the transcript is generally referred to by court authorities and defense attorneys as a "slow plea," since it usually results in a conviction to a reduced charge, i.e., it has much the same result as a guilty plea. Normally, only between 10 and 20 percent of felony convictions, and fewer than 10 percent of convictions for those charged with burglary, are disposed of in this fashion.¹³⁵

In radical contrast, over 60 percent or almost 800 riot felony cases were disposed of in this manner;¹³⁶ if we add this figure to the formal guilty plea rate, almost 75 percent of all felony convictions resulted from what in effect amounted to guilty pleas. If we add the normal 10 to 20 percent "submission" figure to the normal plea rate of 55 to 60 percent, the normal rate of effective guilty pleas averages between 65 and 80 percent, i.e., not substantially different from the rate following the revolt. The fact that there were so many submissions on the transcript rather than formal guilty pleas, however, indicates that evidence problems were so great that formal pleas could not be induced. According to the chief trial deputy in the district attorney's office, "submission on the transcript increased because in many of the cases we had no additional evidence."¹³⁷ There is one sense in which allowing the defendant to submit on the transcript rather than formally plead in return for reduced charges and/or sentence reduction involves a greater concession on the prosecution's part: there is a chance, if small, that the defendant will be found innocent on the basis of the evidence presented in the transcript. As a matter of fact, well over 100 or almost one-half of the felony defendants who were found not guilty were so found on the basis of submission on the transcript.¹³⁸

An effective guilty plea rate of over 70 percent following the revolt indicates that the usual cooperation between prosecution and defense requisite to the speedy and efficient disposition of cases did in fact occur. The county public defender was the attorney of record in 810 of 1,717 cases;¹³⁹ according to the public defender, the "usual contact" with the district attorney concerning plea bargaining occurred.¹⁴⁰ Despite the fact that no "987-A" appointments were made, an unusually high proportion of defendants—over 50 percent as compared to a norm of 40 percent¹⁴¹—were represented either by private, compensated attorneys or volunteer counsel from the ACLU panel. These attorneys as well, however, did nothing to disrupt the cooperative process. One ACLU volunteer attorney who represented a number of people charged with felonies explained that

there was discussion among defense lawyers about clogging the courts by demanding jury trials. We concluded not to insist on jury trials in every case because it was not appropriate, and we were not that organized. The DA was under pressure too—it was generally felt that because of problems of insufficient evidence good breaks could be had on pleas, submissions on transcripts, or even bench trials, and that juries would be more hostile. At first, a lot of lawyers wanted to follow the jury trial strategy, but changed when they became aware of this.¹⁴²

Another attorney reported that

the volunteer attorneys had certain personal considerations and also [it was felt that] submitting on the transcript would lead to convictions on reduced charges and minimal sentences.¹⁴³

This expectation proved to be well founded. An extraordinarily high proportion of defendants were convicted of reduced charges, i.e., charges reduced from those on which defendants were prosecuted. Table 2.1 compares

TABLE 2.1. Charged Offenses and Convicted Offenses

<i>Offense</i>	<i>Charged</i>	<i>Convicted</i>
Burglary	1,025	312 ^a
Misc. felony	21	6
Assault with intent to murder	2	2
Other assault	19	8
Receiving stolen property	33	103
Arson	4	4
Trespassing	0	501 ^b
Misc. misdemeanor	0	22 ^b
Petty theft	0	137 ^b

^a Of these, 306 were second degree.

^b Misdemeanor convictions.

the pattern of convicted offenses to the pattern of charged offenses. Although 1,025 or 91.8 percent of this sample were charged with burglary, only 312 (27.9 percent) were convicted on this charge and, of these, all except 6 (0.6 percent) were in the second degree.

Table 2.2 compares the overall conviction distribution following the revolt

TABLE 2.2. Comparative Conviction Distribution, Felony Cases

<i>Convicted Offense</i>	<i>Riot</i>		<i>January 1, 1965 to June 30, 1965</i>		<i>1958-1962</i>
	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>	<i>Percent</i>
As charged	356	31.8			77.4
As charged—one count— others dismissed	91	8.1	5,204	99.5	
Lesser felony	6	0.6			12.8
Misdemeanor	666	59.5	271	0.5	9.8
Total	1,119	100.00	5,475	100.00	100.00

SOURCES: Riot and 1965 distributions are adapted from the *Los Angeles County Probation Department Report*, p. 15. The distribution from 1958-1962 comes from data in the files of Earl Osadchey.

with the normal distribution in the superior court. The Los Angeles County Probation Department found that 763 out of 1,119 or almost 70 percent of the convicted defendants were convicted of reduced charges; only 356 or about 30 percent were convicted as charged.¹⁴⁴ In stark contrast, normally between 80 and 90 percent of persons convicted in the superior court are convicted as charged.

Perhaps even more significant than the high proportion of convictions to reduced charges is the fact that the overwhelming majority of these convictions were on misdemeanor charges; approximately 60 percent of all convictions in superior court following the revolt were for misdemeanors. In contrast, the regular superior court docket for the first six months of 1963 shows 95.1 percent felony convictions and only 4.9 percent reduced to misdemeanors, only 5.2 percent reduced to misdemeanors for the entire year of 1961, and a five-year average of only 9.8 percent reduced to misdemeanors.

Thus, for example, almost half of all convictions were for trespassing, a misdemeanor, whereas in the first five months of 1961 only 1.6 percent of superior court convictions were for that offense.¹⁴⁵

Table 2.3 illustrates the relationship between the method of disposition and convicted offense for some 540 cases between October 29 and December 14, indicating that defense attorneys were correct in their assessment that "good breaks" could be had on "submissions" and even on bench trials while jury

TABLE 2.3. Type of Conviction by Method of Disposition

<i>Method of Disposition</i>	<i>Felony Conviction</i>	<i>Misdemeanor Conviction</i>
Submission on transcript	76	266
Bench trial	110	57
Jury trial	30	1

trials would result in harsher treatment.¹⁴⁶ Thus, a convicted defendant submitting on the transcript had an 80 percent probability of receiving a misdemeanor conviction, while a defendant who opted for a jury trial had only a 3 percent probability of such a disposition.

A former assistant district attorney explained the unusually high proportion of convictions to reduced and misdemeanor charges in this way:

The DA's early [strict] policy was modified later when it became apparent that the large number of technical burglaries were really petty thefts; therefore a large number of cases resulted in pleas to misdemeanors.¹⁴⁷

In a letter written to the district attorney, a staff member elaborated the reasons why it became apparent that felonies charged were really misdemeanors:

The number of defendants convicted of misdemeanors during this period rose 58.2%. This [is] due to the difficulty in obtaining witnesses and such proof necessary to substantiate the more severe charge.¹⁴⁸

If evidence problems were a major factor, so too was the sheer volume of cases. We have seen that, in light of this volume, a low proportion of jury trials was essential, and this could only be assured if defendants were guaranteed "good breaks." Thus, in the words of the chief trial deputy, "if we had refused to be reasonable, defense attorneys would have fouled up the system."¹⁴⁹ One volunteer attorney who handled felony cases articulated his reasons for what he called "an unusual acceptance of pleas to lesser offenses":

There was a lot of indiscriminate filing [of charges] on the DA's part—there were badly prepared cases and poor evidence. The tremendous number of trespass pleas was a prosecution-defense-judicial triumvirate strategy: a face-saver for the prosecutor, "good deal" for the defense and a disciplinary measure from the point of view of the judge.

The same attorney explained that, in contrast,

normally the DA tries very hard to convict on a burglary charge; normally the prosecutor obtains a plea to a burglary charge and the judge then sentences the man to a county jail sentence rather than to the state prison and his offense is thereby considered a misdemeanor even if the charge convicted on was a felony. This is the normal way of handling a weak case and it happened in

some riot cases but not most. In normal cases the DA would be offended if a burglary charge turned out to be a trespass.¹⁵⁰

Figure 2.4 compares the complete riot and nonriot case flows, adding to Figure 2.3 the percentage of convictions on felony charges. Notice that just as Figure 2.3 indicated that the ratio of prosecutions to arrests is inversely related to the ratio of convictions to prosecutions, Figure 2.4 reveals that the ratio of prosecutions to arrests is also inversely related to the ratio of felony convictions to total convictions. Normally, a 45 percent prosecution ratio is associated with a 90–95 percent felony conviction ratio; following the revolt an 86 percent prosecution ratio is associated with a 40 percent felony conviction ratio.

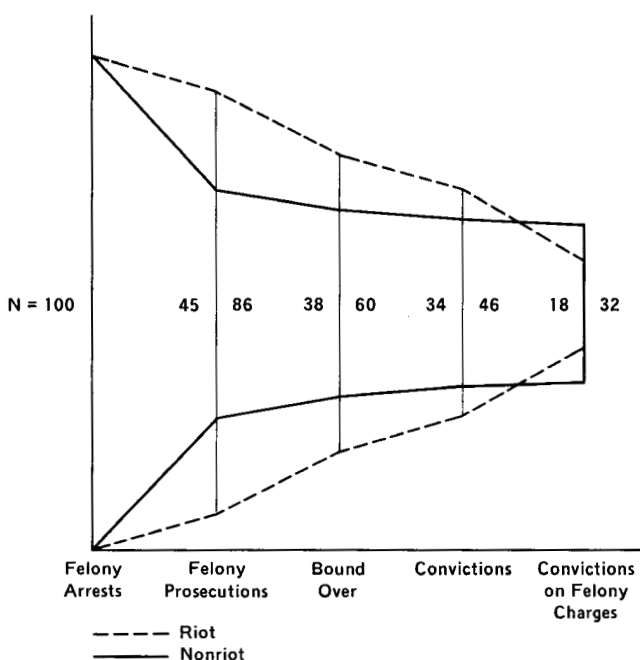


Fig. 2.4. Los Angeles: Comparative Complete Felony Case Flow

tion ratio. As in the case of the total conviction ratio, the felony conviction ratio declines from nonriot to riot in almost exact proportion to the increase from nonriot to riot in the prosecution ratio. The abandonment of police and prosecution gate-keeping, then, is associated not simply with an unusually low conviction rate but also with an unusually low rate of felony convictions.

What we have described as a pyramid Blumberg has described as a series of screens through which the defendant passes.

A fundamental characteristic of the sieve effect is that initially its escape holes are somewhat broad and coarse. They begin to sift in an increasingly finite manner as we move structurally from the starting point of police handling to the court of preliminary hearing, to the arena of the criminal court where felons are tried. Then the process almost freezes, and only infrequently from then on can the accused free himself from the procedural engine in which he is enmeshed.¹⁵¹

The nonriot case flow in Figure 2.4 represents a faithful reproduction of this phenomenon; the "sieve holes" become *smaller*, i.e., the possibility of escaping felony conviction becomes *smaller*, as we progress from arrest through trial. Notice, however, that the riot case flow in Figure 2.4 represents a dramatic departure from Blumberg's description: the "sieve holes" become *wider*, and hence the possibility of "escaping" becomes *greater*, as we move from point of arrest through trial. Whereas it was virtually impossible during and following the revolt to escape prosecution, it was relatively easy to escape conviction and extremely easy to escape felony conviction.

Sentences

Accompanying the convictions to reduced and mostly misdemeanor offenses were sentences which can only be considered minimal. The most comprehensive breakdown of sentencing—undertaken by the Los Angeles County Probation Department—revealed that 75 percent or more of a sample of 1,121 convictions received no prison or jail sentence.¹⁵² Similarly, the *Law in Transition* study of 1,139 convictions showed that 80 percent were not committed.¹⁵³ Table 2.4, adapted from the probation department report, gives a detailed breakdown of superior court sentencing.

Notice that the overwhelming majority of those not sentenced to prison or the County Jail received probationary sentences. Median length of probation, according to the probation department, was between one and three years. Thus over one-half of the probationary sentences were for one year or less; moreover, according to a breakdown of a special assistant to the district attorney, five-sixths or 516 out of 621 probation sentences amounted to what normally is considered misdemeanor probation.¹⁵⁴

The detailed breakdown in the *Los Angeles County Probation Department Report* on which Table 2.4 is based, indicates that over 600 not imprisoned received fines. These fines, however, were minimal, with about 60 percent receiving fines of \$100 or less.¹⁵⁵

Table 2.4 also reveals that of the 21 percent (241) who were imprisoned only 35 or just 3 percent of the total number of convicted defendants were committed to state institutions, that is, received a sentence of one year or more. Most of the rest were committed to the county jail, almost half of these

TABLE 2.4. Felony Sentences

<i>Sentence</i>	<i>Percent</i>
State institutions (California Youth Authority or State Prison)	3
County Jail	18
Probation (with or without fine)	68
Fine only	4
Suspended sentence	7
Total	100

SOURCE: This distribution is based on the *Los Angeles County Probation Department Report*, p. vii and table 11, first draft.

receiving sentences of one month or less. Table 2.5 illustrates the distribution of jail sentences in superior court cases and juxtaposes the distribution of sentences in misdemeanor cases.

According to a special assistant to the district attorney, only 13 percent of all convictions in superior court resulted in what normally are considered felony sentences—lengthy probation and/or over one year in jail, the great majority being lengthy probation.¹⁵⁶ We have already seen that some 35 percent of the total convictions in superior court were for felony offenses; thus almost two-thirds of the felony convictions failed to result in felony sentences. In fact, as Table 2.5 indicates, the pattern of sentencing in the superior court closely resembled the distribution of sentences for misdemeanor cases in the lower court. Thus the California Bureau of Criminal Statistics report found that

There is no substantial difference between most of those initially booked and charged at the felony level, and . . . processed by the superior courts, and those who were charged as misdemeanants and processed by the lower courts. Convictions in both charges resulted in very similar sentences.¹⁵⁷

Thus the conventional distinction between a misdemeanor charge and a

TABLE 2.5. Comparative Felony and Misdemeanor Jail Sentence Distribution

<i>Length of Jail Sentence (in days)</i>	<i>Felony</i>		<i>Misdemeanor</i>	
	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>
1-30	100	41.3	91	46.3
31-90	78	32.1	72	36.8
91-180	58	23.8	24	12.2
180+	6	2.8	9	4.6
Total	242	100.00	196	100.00

felony charge, and even between a misdemeanor conviction and a felony conviction, tended to break down following the revolt.

The distribution of superior court riot sentences we have just reviewed differs markedly from the normal distribution. In 1962, for example, Silverstein found that, based on a sample of 252 felony convictions, 58 percent were imprisoned, 38 percent received probation, 15 percent received fines, and no one received a suspended sentence.¹⁵⁸ Following the revolt, we have seen that only 21 percent were imprisoned, 68 percent received probation, over 50 percent received fines, and 7 percent received suspended sentences.¹⁵⁹ Similarly, statistics published in "Crime and Delinquency in California" revealed that for the entire year of 1965 (15,613 sentences) a full 65 percent were imprisoned.¹⁶⁰ Table 2.6, based on these statistics and those we have already presented, compares normal and riot sentence distributions.

TABLE 2.6. Comparative Felony Sentence Distribution

<i>Sentence</i>	<i>Riot (percent)</i>	<i>Nonriot (percent)</i>
State institutions	3	30
County Jail	18	35
Probation (with or without fine)	68	33
Fine only	4	1
Suspended sentence	7	0
Total	100	99

Normally, then, between half and two-thirds of the convictions in the superior court result in imprisonment; moreover, almost one-third of the total convictions result in commitment to state institutions for one year or more. As we have seen, and in radical contrast, only 21 percent of riot convictions resulted in imprisonment, and only 3 percent of the total convictions resulted in commitment to state institutions. Of these 3 percent, moreover, virtually all were for violation of parole rather than for specific offenses committed during the revolt.¹⁶¹ Despite pronouncements of the district attorney in favor of maximum penalties, and his early unwillingness to compromise, sentences in the superior court for offenses committed during the revolt were significantly less severe than the normal distribution of sentences.

Court authorities explained the radically less severe riot sentences in terms of the type of people arrested during the revolt. Thus the chief trial deputy for the district attorney's office explained that

Very few "big boys" were caught. You just can't make a felon out of people without prior records and little old ladies in tennis shoes. The sentences were comparable to a great many nonriot cases where people never had a record.¹⁶²

Similarly, the former presiding judge of the superior court reasoned that "punishment was not severe [because] many of the rioters had jobs and some were even civil service personnel."¹⁶³

Authorities were correct in arguing that those arrested during the revolt were probably an atypical sample compared to the normal "criminal population." Thus, according to the California Bureau of Criminal Statistics,

of the 3,170 adults arrested for which information was obtained, 27.4% had no prior record at all; 38.3% had a prior record classified as minor . . . ; 22.9% had a major prior record with at least one conviction resulting in a jail sentence of ninety days or more but no prison record; and 11.4% had a prior prison record.¹⁶⁴

Similarly, according to a special assistant to the district attorney,

of the first 1,305 felony defendants held to answer in superior court, 14 percent had prior felony convictions, 48 percent had only prior misdemeanor convictions, and 38 percent had no prior convictions.¹⁶⁵

Thus the California Bureau of Criminal Statistics concluded that

this group of individuals was not the same type of persons usually booked on similar felony charges. A review of their prior criminal history fails to show a record as serious as that generally present in many of the normal felony bookings handled in urban areas by the police and the courts.¹⁶⁶

The atypicality of the sample, however, is not a sufficient or even important determinant of the unusually lenient distribution of sentences: defendants with long records as well as those without any record received sentences less severe than the normal distribution, and there is in fact only a very weak relationship between sentencing and prior arrests and/or convictions. Table 2.7, adapted from the probation department report, compares the distribution

TABLE 2.7. Sentence Distribution by Prior Arrests and Convictions (in percentages)

<i>Sentence</i>	<i>10 Arrests</i>	<i>10 Convictions</i>	<i>Total Riot</i>	<i>Nonriot</i>
State institutions	2.5	2.3	3	30
County Jail	43.1	38.9	18	35
Probation	46.2	43.5	68	33
Fine only	2.0	2.3	4	1
Suspended sentence	6.2	12.9	7	0
Total	100.00	99.9	100.00	99.00

SOURCE: Sentence distribution for those arrested during the major Watts revolt who had ten prior arrests and/or convictions is based on data adapted from the *Los Angeles County Probation Department Report*, tables 64 and 66, first draft.

of sentences for those with at least ten prior arrests and those with at least ten prior convictions with the total riot sentence distribution and with the normal nonriot distribution.

Notice that, although the sentence distribution for those with ten prior convictions is somewhat more severe than for the total convicted riot population, it is still significantly *less* severe than the normal distribution. Even if a riot defendant had ten convictions, his chances of commitment to a state institution were one-tenth that of the "normal" felon; his chances of receiving any sort of imprisonment were four out of ten as compared to six out of ten for the normal felon. Thus even riot defendants with the worst records were likely to receive sentences significantly lower than the norm, refuting the contention of court authorities that it was the lack of prior records which led to relatively light sentences.

Nor can the lenient sentences be attributed to the fact that riot defendants were more educated or had a higher rate of employment than the normal felony sample; as Table 2.8 illustrates, the sentences of those who were unemployed and without a high school education were markedly less severe than the sentence distribution for normal felons.

TABLE 2.8. Sentence Distribution by Employment and Education (in percentages)

<i>Sentence</i>	<i>Unemployed</i>	<i>No High School</i>	<i>Total Riot</i>	<i>Nonriot</i>
State institutions	6.9	2.7	3	30
County Jail	31.3	23.6	18	35
Probation	52.0	59.4	68	33
Fine only	2.1	4.2	4	1
Suspended sentence	8.2	9.8	7	0
Total	100.5	99.7	100	99

SOURCE: Sentence distribution for those arrested during the major Watts revolt who were unemployed and/or without high school education is based on data from the *Los Angeles County Probation Department Report*, tables 19 and 36, first draft.

These tables indicate that the atypicality of the sample is an inadequate explanation for the riot sentences. Whatever their prior records, and whatever their economic and educational backgrounds, riot defendants received less severe sentences than are normally distributed in superior court. In fact, these variables, which in normal times are three principal determinants (along with the offense charged) of sentence variation, had relatively little impact in the case of riot defendants. Just as we have seen that the distinction between a felony charge and a misdemeanor charge, usually a crucial determinant of sentences, was of little importance in predicting sentences following

the revolt, so too we find that the defendants' background was a weak predictor of the sentence he received. None of the traditional variables, in fact, seem to have influenced significantly sentence variation, suggesting that normal systemic decision-making criteria broke down following the revolt.

Given the volume of cases and the need to dispose of them quickly and efficiently, it could hardly be otherwise. Just as we have seen that the increased volume and accompanying evidence problems caused by the magnitude of the revolt and by the abandonment of normal police and prosecution gate-keeping led to a lower proportion of convictions and to convictions on drastically reduced charges, so did they lead to significantly lower sentences. Normally a 45 percent prosecution ratio is associated with a 65 percent imprisonment ratio; in the case of the revolt an 86 percent prosecution rate is associated with a 21 percent imprisonment ratio. As we have observed in the case of the conviction rate and the felony conviction rate, the imprisonment rate declines from nonriot to riot almost in proportion to the increase in the prosecution rate from nonriot to riot.

Summary

Los Angeles County Supervisor Kenneth Hahn, reflecting on the response of the Los Angeles court system to the nation's first major black ghetto revolt, hailed what he called

unprecedented efficiency in the administration of justice. [It was] . . . the greatest display of cooperation and hard work by judges, jurors, attorneys, and law enforcement in history. Nowhere in American jurisprudence has this record been matched. It is evidence of justice swiftly and efficiently dispensed to punish the guilty and free the innocent.¹⁶⁷

The self-congratulatory tone of these remarks is not entirely misplaced. In fact, Los Angeles court authorities had successfully "managed" the intense contradictions among their interests in order, formal rationality, and organizational maintenance which had been made manifest by what was at that time the single largest instance of collective violence in America in this century. On the one hand, they had shared in the successful efforts of political authorities generally in putting down the revolts by prosecuting and incarcerating almost all who were arrested; on the other hand, they were not overwhelmed by the serious challenge created by these actions to the survival of the court organization and the entire structure of legality. Thus the bulk of over 3,000 cases were disposed of within four months following the revolt without either a serious disruption of the processing of "normal" criminal and civil cases or a wholesale, overt, and public abandonment of the standard legal norms entailed in formal rationality. This could only have been accom-

plished through the massive cooperative effort which Hahn justifiably attributed to all the relevant court actors.

As a result of this cooperative effort, however, the "guilty" were scarcely more severely punished than the "innocent." The great majority of sanctions were imposed prior to the determination of guilt, involving presentence detention time imposed uniformly by court authorities on all those arrested in an effort to aid in the management of the revolt. Over 85 percent of those arrested during the revolt received no further confinement. The actual determination of guilt resulted in unusually light sanctions imposed on an unusually small proportion of defendants: almost 80 percent of all persons charged with felonies who were convicted escaped any further detention time, and only a small proportion of those who did not received felony sentences. In order to resolve the contradictions made manifest by such a massive instance of collective violence, then, Los Angeles court authorities not only drastically reduced the normal severity of their criminal sanctions, but also virtually abolished the distinction between guilt and innocence as a determinant of criminal sanctions.

POST-WATTS PLANNING

Within several months following the Watts revolt the Los Angeles Police Department began planning for future mass arrest contingencies, focusing on the massive identification and evidence problems with which the police were confronted in August. This planning culminated in the dissemination in April 1966 of a manual setting forth "Proposed Procedures for Mass Arrests" whose purpose was to "minimize delays to arresting officers and to enhance positive identification of arrestees in the field."

Similarly, superior court administrators prepared a Manual of Emergency Procedures indicating functions to be performed and personnel with which to perform them in the event of a future disorder. This manual, which applies only to the administration of the court and does not include police, prosecution, detention, or public defender responsibilities, is treated as confidential, and the writer was unable to obtain a copy. Court administrators indicated, however, that it largely entails a formalization of the emergency procedures utilized in August regarding assignment of additional judges, courtrooms, and clerical personnel, with the following exception. The master calendar system of assigning all defendants at the time of their initial arraignment to one court out of which they then are assigned to separate preliminary hearing courts, which was followed in August, was abandoned. According to the emergency manual, all cases arising out of future disorders will be assigned directly to different preliminary hearing courts at the time of arraignment, thereby (it is hoped) obviating the tremendous bottleneck which occurred

in the master calendar court following the major revolt. As far as could be ascertained, the manual does not deal with policy questions such as bail and charges but concentrates rather on the "technical" and logistical problem of improving the efficiency of the processing of a given number of arrestees within a given period of time.

In the winter of 1966–1967 the district attorney's office likewise prepared an emergency manual, entitled "Civil Disturbance Manual for Law Enforcement."¹⁶⁸ Unlike the superior court manual, however, it entailed not an allocation of functions to be performed but rather a summary of all potentially relevant statutes with suggestions as to when each should be used and discussions of what proof is necessary to convict on each charge. As such, the manual was designed not solely as an aid in planning for ghetto revolts, but "as a guide to aid law enforcement officers in exercising their responsibility to protect the rights of individuals and of society, whether in the context of peaceful protest, civil disturbance or riot."¹⁶⁹

As with the superior court manual, the district attorney's manual contained no statements regarding bail policy, a subject with which defense groups were vitally concerned. Several months earlier, however, representatives of a number of defense groups—including the Langston Law Club, the ACLU, and the Los Angeles County Bar Association—had extracted a promise from the district attorney in the form of a memorandum to the effect that in the event of future mass arrests normal bail would be followed except in individual aggravated cases.¹⁷⁰ In addition to the contact established with the district attorney, several efforts were made on the part of groups involved in defense work during and following the August 1965 revolt to update lists of volunteer lawyers, and a number of training sessions were held for those inexperienced in criminal law.¹⁷¹

Prior to 1968, then, a number of planning efforts were underway, but there was little formalized interagency cooperation and no effort to develop a comprehensive plan for the administration of justice following ghetto revolts. In the words of one attorney, "people settled back and didn't expect anything to happen again."¹⁷² The massive disorders of the summer of 1967, however, confirmed that the Watts revolt was *not* an isolated phenomenon, and suggested to many authorities that such a comprehensive plan was essential. Two publications appearing in the spring of 1968 provided, according to numerous informants, further impetus for the development of such a plan.

The first was the Kerner Commission Report, which focused national attention on the "problem" of civil disorders. Highly critical of previous court responses to such disorders, it included a series of recommendations for the administration of justice under such conditions (chap. xiii). Among other things, the Kerner Commission recommended that "committees should prepare a comprehensive Plan for Emergency Operations of the Judicial system

involving Public and Private Agencies," suggesting that it be "a highly visible plan, in which ghetto leaders and citizens are full participants."¹⁷³

The second was the American Bar Association's (ABA) pamphlet entitled "Bar Leadership and Civil Disorders" which was widely distributed to bar associations as well as to court officials throughout the nation. In August 1967, the annual ABA meeting had created a committee on civil disorders—which included the participation of the Los Angeles County public defender—whose work resulted in the publication of this pamphlet, which called for each local bar association to prepare in advance its own plans for volunteer representation as well as to establish contact with court authorities for the purpose of creating a comprehensive emergency plan. The pamphlet emphasized that "only immediate planning can avert a total breakdown in the system when thousands of additional cases may be presented to the courts in a matter of days during civil disorders,"¹⁷⁴ and included within its pages a detailed checklist of points in the criminal process at which special arrangements would be required.

Despite the assurances of the chief deputy district attorney that these reports had no influence on either the decision to begin coordinated planning or the content of that planning,¹⁷⁵ it does not seem coincidental that such planning did not begin until after the dissemination of these reports at a time when the administration of justice following civil disorders was becoming more and more a subject of national concern. In fact, a special assistant to the district attorney admitted that "the ABA pamphlet helped bring home the need for emergency procedures to this office."¹⁷⁶

The immediate impetus, however, for the Los Angeles coordinated planning effort seems to have been the widespread revolts which followed the assassination of Dr. Martin Luther King, Jr., and which made it clear that ghetto revolts were an everyday possibility rather than simply a summer phenomenon. Thus on April 17, 1968—or about a week after nationwide revolts had subsided—a meeting convened and coordinated by the district attorney took place in his office with "representatives of the courts, public prosecutors, defense attorneys, law enforcement and related agencies," in order "to plan and develop procedures to cope with any possible future riot situation in our community."¹⁷⁷

The composition of the committee is interesting from several perspectives. First, it is clear that despite Kerner Commission recommendations, no effort was made to include anyone who even in the vaguest sense could be called a representative of the ghetto. No black attorneys were invited (not to mention black judges or prosecutors); moreover, not a single defense lawyer who performed a prominent role in the defense effort following the August revolt was invited. The ACLU, which requested participation when it discovered that such a committee had been formed, was refused participation.

Those defense groups which were represented at the first meeting were the Los Angeles County Bar Association and the Criminal Courts Bar Association, i.e., what is generally referred to as the "establishment bar" of Los Angeles.¹⁷⁸

Second, also contrary to the Kerner Commission's recommendations, which called for widespread dissemination of planning efforts and their results, the deliberations of the Countywide Emergency Committee were treated as confidential, as was the fruition of these deliberations. Consequently, it proved extremely difficult for this writer to develop a comprehensive picture of the plan; what follows is hopefully an account of the plan's essentials based on whatever fragmentary data were available.¹⁷⁹

First of all, it is clear that the district attorney played the central role in creating, organizing, and coordinating the countywide committee. Later in the year the district attorney created a special emergency task force within his own office designed to coordinate all "riot" planning activities. The central role of the district attorney is no doubt attributable to the fact that, as many students of the criminal process have observed, the prosecutor plays a central role in the criminal process, "having the greatest number of contact points with all other departments."¹⁸⁰ His initiating role, however, must also be seen as a product of the relative passivity of defense community efforts in Los Angeles. Whereas, as we shall see, defense groups in Chicago and especially in Detroit were to play a major role in initiating coordinated planning, in Los Angeles, according to a spokesman for the district attorney's office, "the Los Angeles Bar Association did not push for the creation of an interagency committee."¹⁸¹ This observation was confirmed by what interviews it was possible to obtain with bar association representatives and interviews with other attorneys, and is consonant with the more than year's time it took to get the simple bail resolution alluded to above passed by the bar association and forwarded to the district attorney.

According to the chief deputy district attorney, the work of the committee consisted mainly of "the meshing or integration of emergency procedures which exist in each of the agencies involved."¹⁸² Nevertheless, it resulted in a number of innovations designed to improve the efficiency of riot processing. To begin with, work was begun on a system of standardized arrest reports designed to reduce to a minimum the time police officers need spend away from the field and yet to ensure that all the necessary elements are present in the report. Second, it is possible that police and sheriff's mobile booking centers, with added district attorney and city attorney participation, will allow the transfer of arrestees directly from the field unit into the arraignment courts, thereby bypassing the police stations, which were overwhelmed during the August revolt.

An effort has also been made to streamline the process of filing complaints and matching complaints with arrest reports and prior criminal records. Included in this streamlining of the complaint-filing process is to be close dis-

strict attorney-city attorney cooperation, so that, in contrast to August, the city attorney can immediately issue misdemeanor complaints if and when felony complaints are refused by the district attorney. This part of the emergency plan reflects a belief, based on the August experience, that a relatively greater percentage of misdemeanor charges would be desirable in the event of a future disorder. In the words of the presiding judge of the municipal court,

The reductions to trespass [following the August revolt] were practical dispositions arising out of the fact that there were a lot of felony bookings which couldn't be substantiated. This time the city attorney will have men in the DA's office—instead of booking a man on a felony and then seeing if later on it should be reduced, like last time, the decision will be made jointly. Last time felonies were filed as sort of a holding action to get around the forty-eight hour rule [requiring an arrestee to be charged within forty-eight hours or be released], knowing that charges could later be chopped down. This time around there will be a lower percentage of initial felony charges . . . let's face it, there just weren't many felony crimes in the last riot.¹⁸³

If the desire to file more misdemeanors was based in part on a realization that these charges would more accurately reflect actual crimes committed, it was also and perhaps more importantly a product of a realization that misdemeanors are far less time consuming and costly to process than felonies, and that the court system in normal times is capable of the mass production of a huge volume of misdemeanors while it is incapable of thus processing felonies. Charging with misdemeanors would thus reduce a large part of the almost overwhelming strain on the court created in August by the filing of 75 percent felony charges. Moreover, the experience of August proved that little difference was to be expected in the sentences of persons charged with misdemeanors and those charged with felonies, so much of the impetus for felony prosecution was eliminated.

Apparently some changes in thinking have occurred with respect to bail policy. Although the district attorney's policy, according to the chief deputy district attorney, is to

continue to advocate a policy of recommending no bail under situations in which it appeared that the person arrested might return to the scene of the riot and thereby assist in its perpetuation [this despite the district attorney's 1966 "normal bail" memorandum],

it appears as though this policy is subject to change. The chief deputy added that

We are not inflexible in this policy. We have had the benefit of the experience in Detroit in which the D.A. there indicated that in the future he would favor setting normal amounts of bail for the reason that certain problems for the prosecution were created when large numbers of arrestees were detained under a high bond policy.¹⁸⁴

According to the presiding judge of the municipal court, whose judges set bail at arraignment for both felonies and misdemeanors,

bail should not be administered in a blanket manner [as it was in August]—we can operate arraignment courts twenty-four hours a day. The L.A. municipal court has fifty-eight judges and nine commissioners. . . . I could assign any of those I want and also have made arrangements with other municipalities in the county so that I can double my force with a second shift. We don't plan to do it the same way next time—all bail will be individually considered.¹⁸⁵

By vastly increasing the number of judges involved at the time of arraignment, and by keeping the courts open on a twenty-four hour basis, it is felt that bail could be set on an individual basis while meeting statutory time limitations and thus avoiding the criticism of the defense community and the strictures embodied in the Kerner Commission's report against blanket bail.

Individualized bail does not guarantee that bail will be within normal ranges, however, and it appears from interviews that there is strong sentiment among Los Angeles judges that defendants must be kept off the streets for at least the duration of the revolt.¹⁸⁶ Plans are underway to beef up the O.R. staff of the superior court, including the emergency addition of some fifty probation officers and, possibly, eighteen juvenile court traffic referees, to undertake the normally time-consuming procedures of verifying release on recognizance applications, in anticipation that following a future revolt greater numbers of people will be released on recognizance than following the August revolt. The presiding judge of the Criminal Master Calendar Department of the superior court, however, doubted whether a massive O.R. effort could be undertaken even with the additional personnel, and the presiding judge of the municipal court indicated that he was no more in favor of releases on recognizances following a disorder than he was normally.¹⁸⁷ If this discussion leaves the reader somewhat confused, it is probably a reflection of a lack of unified opinion concerning the bail question among Los Angeles court authorities. What is clear, however, is that authorities are both sensitive to the problems which high bails and the subsequent incarceration of thousands of arrestees create for detention facilities, and, on the other hand, to what they apparently feel is a need to "keep them off the streets" at least for the duration of the revolt.

Emphasis also was placed on the need to speed up the processing of defendants through the arraignment (bail-setting) courts. According to a municipal court judge,

the major lesson learned is that in the [August] situation, the processing of people through the arraignment courts and through O.R. channels was delayed—we were still processing people through the Friday following the riot.¹⁸⁸

This judge's concern with greater efficiency at the initial stages of the criminal process paralleled a concern on the part of the presiding judge of the municipi-

pal court with a more rapid and efficient operation of the entire criminal process. Thus the presiding judge explained that

Last time the superior court did regular business in the morning . . . the riot courts didn't operate until 1 P.M.—this slowed us up. This time we'll work around the clock; we could get the whole thing done in a week. You can't handle these situations from 9 to 4—the faster they're handled the more good they do. If people in a riot find out right away that they'll go to jail with stiff sentences, they'll stop rioting.¹⁸⁹

The emergency committee also evolved specific plans for the representation of those arrested, plans which include the participation of the Los Angeles County Bar Association and the Criminal Courts Bar Association. According to the chief deputy district attorney,

The involvement of the Bar at the present time consists in having a list of lawyers who have indicated a willingness to serve in case of need. The Public Defender will serve as the coordinator of the program and will only call upon the volunteer groups in the event that his office is unable to handle the cases assigned to it.¹⁹⁰

The participation contemplated from the "establishment bar," then, is extremely limited, and under the control of the public defender. Unlike in other cities, where, as we shall see, the "establishment bar" played an important part in planning efforts and is to be involved in other areas than representation (such as providing observers in police precincts during future revolts), the role of the Los Angeles bar—as far as this writer was able to ascertain—involves only a minimal effort at providing representation in court only.

As far as the "nonestablishment" defense groups are concerned, there is a feeling on the part of many of their members that the "next time around" more effort should be devoted to class actions, such as that initiated in August 1965, by the Lawyer's Guild.¹⁹¹ Planning on the part of these groups, however, has been extremely limited, and, in contrast to other cities, no ad hoc group of nonestablishment lawyers has been formed for this purpose. Moreover, the various defense groups are hampered by a lack of information concerning the plans of court authorities.¹⁹² In the words of one prominent black attorney,

We are bothered by the fact that most activities of the establishment in this area are reactions to a situation—we can't act until they have reacted. And we really don't know what machinery they are going to establish; for example, at what levels bail will be set and whether O.R. will be different.¹⁹³

One exception, however, to this lack of defense community preparation is the effort of a local black bail bondsman with strong civil rights ties to get

a group of bondsmen together in the event of another such situation. Some of the bondsmen involved are from outside the city of Los Angeles. In case of a

local bottle-up, there would be adequate people to come in and more lenient standards would be used.¹⁹⁴

THE "WATTS FESTIVAL" REVOLT

On August 11, 1968, following a festival in Watts commemorating the third anniversary of the Watts revolt of August 1965, violence flared briefly once again. In contrast to August 1965, gun fire and damage to life and property were minimal, and within several hours following its outbreak the incipient revolt was quelled by Los Angeles police. Resident participation was limited, and police did not find it necessary to make mass arrests. Newspapers the next day reported that thirty-five persons had been arrested before press time, including juveniles, and later editions reported that a total of forty-three persons were arrested for "riot-connected" activity.¹⁹⁵

According to newspaper accounts, twenty-five of the forty-three arrested were booked on felonies; this figure jibes almost perfectly with records of the district attorney indicating that twenty-four had been booked on felonies.¹⁹⁶ The rest were either booked on misdemeanors or released—it is not clear which, but it is clear, as we shall see, that many of these, as well as many of those who were booked on felonies, were never prosecuted.

Charging

Of the twenty-four arrested who were booked on felonies, sixteen were booked on either suspicion of robbery or suspicion of burglary, four for burglary, two for throwing objects at a vehicle with intent to harm the driver, one for battery on a police officer, and one for possession of metal knuckles. The deputy district attorney assigned to the processing of complaints on August 13, or one day following the end of "riot" activity, refused to grant felony complaints on fourteen of the twenty-four arrestees, indicating to the author (who was fortunate enough to be in the district attorney's office at the time) that arrest reports failed in these cases to indicate felonious activity. The majority of the felony complaints rejected by this deputy were apparently referred to the city attorney for possible prosecution as misdemeanors; at least three, however, were "rejected outright," in that the arrest report showed, according to the deputy, no evidence of any criminal activity whatsoever.¹⁹⁷ In marked contrast to the major August revolt, then, the district attorney rejected more felony complaints than he issued; in fact, the ratio of ten issuances to fourteen rejections (as compared to a ratio of eighty-six issuances to fourteen rejections in August 1965) approximates the felony complaint issuance-rejection ratio in "normal" times.¹⁹⁸

Of the ten arrestees booked on felonies who were prosecuted, seven were prosecuted for crimes less severe than those for which they were booked;

only three were prosecuted on the booking charge, which was burglary. None of the six arrestees prosecuted who had been booked on either suspicion of robbery or suspicion of burglary were prosecuted on these charges, most having their charges reduced to receiving stolen property. Thus the deputy district attorney not only rejected a large proportion of felony complaints but also reduced charges on the majority of felony complaints that he did issue. The prosecution, then, in contrast to August 1965, performed its normal gate-keeping function.

Of the eleven felony complaints rejected by the deputy district attorney which were (in all likelihood) referred to the city attorney, only five were prosecuted, either for disturbing the peace or for a variety of weapons charges. Of the twenty or so who had been arrested by the police who were not booked on felonies, city attorney records show only five prosecutions, three for disturbing the peace.¹⁹⁹ In contrast to August 1965, where virtually all defendants charged with misdemeanors were multiply charged, charges differed significantly among defendants, some of whom were charged with only one offense and others with as many as three. Thus the city attorney, as well as the district attorney, played his normal screening role. In all there were thus twenty prosecutions out of a total of forty-three arrests. If we subtract the two (or perhaps three or four) juveniles arrested, the ratio of total prosecutions to total arrests is around 50 percent, as compared to a ratio of well over 90 percent during the August 1965 major revolt.

The "normalcy" of the complaint-processing procedure reflected a perception of normalcy which pervaded the district attorney's office. Thus the assistant district attorney in charge of emergency operations related that "it's the dullest riot we've had. There was nothing special in the complaints, just the usual junk we get every day."²⁰⁰ Consequently, it was not necessary, according to this assistant, to invoke emergency procedures, and, as we have seen, only one deputy was assigned to handle the complaints rather than anyone higher up in the office echelons. As far as the author could ascertain, this deputy was in complete control of the complaint-filing process, and utilized the normal criteria for determining whether to issue or reject complaints; he did not sit with a representative of the city attorney's office and jointly determine charges as called for in the emergency procedures. Thus it appears that the learning experience of Los Angeles court authorities to which the previous section of this chapter was devoted was largely irrelevant to its response to such a relatively minor disorder.

Bail

Despite the lack of an atmosphere of emergency—in marked contrast to August 1965—the district attorney's office continued its practice of recommending no bail on all felony offenses arising out of ghetto revolts; according

to the deputy who processed complaints, he recommended no bail because "these persons were dangerous to the community."²⁰¹

Despite the district attorney's recommendations, however, the judge presiding over the arraignment court did set bail, and at levels markedly lower than during the August 1965 revolt. For eleven defendants charged with felonies,²⁰² bail averaged \$2,000 (plus penalty assessments averaging \$500), as compared to an average felony bail in August of around \$4,500. Median felony bail was even lower—\$1,500—indicating that the average of \$2,000 masked a good deal of variation in bail setting by the same judge. Thus one defendant's bail was \$5,000, while two defendants had their bail set at \$1,000.

Bail varied significantly across charges and background characteristics of the defendant. The three defendants charged with burglary faced bonds of \$1,500, approximating the normal schedule for burglary offenses; \$2,500 bonds were generally set for felony charges which were accompanied by misdemeanor charges; and \$1,000 bonds were set for two relatively less serious felony offenses unaccompanied for misdemeanor charges. The one bond set at \$5,000 was for a defendant previously convicted of a felony, indicating that, in contrast to August 1965, arrest reports were available and were taken into consideration. Thus felony bail was not only within normal ranges, but distributed according to the usual individual criteria.

For the ten defendants charged with misdemeanors only, bail at arraignment before another judge averaged \$395 (plus a penalty assessment of \$120). This average, however, also masks significant variations in bail setting: although the median bail of \$375 was close to the average, and hence there was not the wide fluctuation which appeared in the case of felony bail, there were two bonds set as low as \$100 and one as high as \$1,500. Again, this variation was a product of differences in the type and number of charges. Defendants confronted with only one charge generally faced bonds of \$100 or \$250; defendants faced with three charges faced a \$1,500 bond. When a defendant faced only one charge, the distinction between a \$100- or a \$250-bond was based on the severity of the misdemeanor or the defendant's prior record. As in the case of felony bail, then, misdemeanor bonds were set at or near schedule (in contrast to August 1965, where misdemeanor bonds were set at \$1,000 or \$1,500 above schedule) and, as in the case of felony bail, the normal determinants of bond amounts appear to have been operative.

Thus bail setting, as well as charging, functioned much as it does normally—no specific effort was made to "keep them off the streets." No mobilization of the defense community occurred; the author saw no representatives of any defense groups at the felony arraignments and, according to court records, only one case out of a total of twenty (felony and misdemeanor) was represented by anyone other than the public defender. This exception was an ACLU attorney who represented one misdemeanor defendant, but his participation represented the sum total of ACLU or any other defense group

participation at either the arraignment or any other stage of the criminal process.²⁰³

Detention Time

Despite the relatively low bonds, defendants arrested during the Watts festival revolt spent as much or more time in jail prior to their dispositions and/or sentencing as did the defendants in August 1965, who were initially confronted with extraordinarily high bonds. Presentence detention time for felony defendants averaged over fifteen days, comparable to or somewhat higher than the two-week average following the August revolt. In four out of the eleven cases O.R. was granted sometime after the initial bail had been set; this was a higher proportion than following August, which may in fact be attributable to the infancy of the O.R. program in 1965. With respect to the remaining seven cases, however, there were only two bail reductions, as compared to August when virtually everyone charged with felonies had his bail reduced. Thus five defendants or almost one-half of the total charged with felonies were confronted throughout their proceedings with bails as high and in some cases higher than the level to which virtually all bonds were ultimately reduced following the major revolt.

Similarly, detention time for misdemeanants averaged twelve and one-half days, an average comparable to that of misdemeanants following the August 1965 revolt. If we exclude two defendants who pleaded guilty at their initial court appearance, however, detention time (for those not then pleading guilty) averages fifteen days, or approximately the same length of time this category of defendants spent prior to sentencing in August.

Combining felony and misdemeanor detention time, average detention time for all defendants prosecuted for alleged participation in the Watts festival incident averages fourteen days. One-quarter of the defendants spent at least four weeks in jail. Despite substantially lower initial bonds than in August 1965 and an atmosphere significantly less hostile than at that time, presentence detention was at least as prolonged as detention following the major Watts revolt.

Subsequent Proceedings

At the preliminary examinations for the eleven felony defendants—generally all held within a week of the arraignments—only two of the defendants had their cases dismissed; the rest were bound over for trial in the superior court. Although the sample is too small to allow for statistically significant comparison, for what it is worth the eight out of ten bind-over ratio approximates the 85 percent ratio in normal times and exceeds the 70 percent ratio following the August revolt.

Of the nine cases which were bound over for trial, complete disposition information is available on seven (two cases were not completed as of this writing). In all seven cases, defendants either pleaded guilty or had bench trials; there were no jury trials. Convictions were obtained in all seven cases; the lowest the ratio of convictions to trials could be (i.e., if the two uncompleted cases result in acquittals or dismissals), therefore, is 78 percent, and the highest is 100 percent. Similarly, the lowest the ratio of convictions to prosecutions would be is 63 percent; the highest is 82 percent. These figures represent significant departures from the respective ratios following the August major revolt, which were 77 percent and 53 percent, and tend to approach the normal nonriot ratios of 90 percent and 80 percent respectively.²⁰⁴

Thus both preprosecution and postprosecution case flow following the Watts festival incident departs markedly from that following the major revolt, and parallels closely the normal, nonriot case flow. As in "normal" times, selective prosecution gate-keeping as indicated by a 46 percent prosecution ratio ensured that a high proportion of bind-overs and convictions would be forthcoming.

Similarly, examining the charges on which felony defendants were convicted, of the seven convictions all but two were on original felony charges. This 28 percent misdemeanor reduction rate is significantly lower than the 60 percent or higher rate which prevailed following the major revolt, and is much closer to the normal rate of around 10 percent. Whereas following the August revolt only some 25 percent of persons charged with felonies were actually convicted of felonies, following the Watts festival incident at least 45 percent and perhaps as high as 64 percent of the defendants prosecuted on felonies were convicted of felonies.

Sentences

Five out of the seven convicted were given suspended sentences, or sentenced to time already served awaiting sentence. Of the two remaining sentences, one was for ninety days, the other for one year, both in the County Jail. Both these sentences were for defendants who were tried and convicted of burglary charges—the most serious of the seven convictions—indicating that sentencing was, as it is normally, related to the seriousness of the charge. Thus two-sevenths or almost 30 percent of convicted felony defendants served time subsequent to their sentences as compared to only 20 percent subsequent to the major revolt. Whereas following August 1965, half of those committed following their sentence were committed for *less* than thirty days, both sentences following the minor revolt resulted in commitment for ninety days or *more*. Moreover, whereas in August 1965, only 68 percent received probationary sentences, in August 1968, six out of seven or 86 percent received probation; and whereas in 1965 only 51 percent of the convicted felony defendants

received sentences of probation plus fines, in the minor revolt of 1968, 57 percent or four out of seven defendants received this type of sentence.²⁰⁵ Finally, although following the massive revolt of August 1965 well over half of the defendants received probation for *less* than one year, and perhaps as many as 90 percent received probation for *less* than three years, following the minor 1968 revolt five out of seven or 71 percent received probationary sentences of *more* than one year, with three out of seven or 43 percent re-receiving probationary sentences of three years. In sum, although again the sample is too small to permit statistically significant comparison, it appears that sentences for felony defendants following the minor 1968 revolt were substantially *more* severe than those following the massive revolt of August 1965, and tended more to parallel normal sentence distribution.

Misdemeanor Dispositions

Complete disposition information is available on eight of the ten defendants originally charged with misdemeanors. Five out of these eight defendants, or 63 percent, were convicted, a rate similar to that of misdemeanor convictions following the August 1965 revolt as well as to the normal rate.

All of the five convicted pleaded guilty to at least one count. Of the five convicted, one was sentenced to sixty days in the county jail; the others received suspended sentences. Three received probation of one year each, and were fined \$125, \$315, and \$315 respectively; one other defendant received a fine only, of \$125. Although the proportion of misdemeanants committed after sentencing is somewhat lower than following the August 1965 revolt, three out of the five defendants, or 60 percent, received probationary sentences of one year; whereas following the major August revolt, according to a probation department sample of ninety misdemeanor convictions, almost half of the defendants received either no probation or probation for less than one year. Similarly, whereas following the August major revolt (again according to the above sample) 84.5 percent of convicted misdemeanants received fines of \$100 or *less* and 96.6 percent received fines of \$200 or *less*, following the Watts festival incident three out of five defendants, or 60 percent, received fines of *more* than \$100, and two out of five, or 40 percent, received fines of *more* than \$300.²⁰⁶ Thus, although the extremely small sample makes comparison particularly hazardous, it appears that misdemeanor sentences following the minor Watts festival revolt were as severe and in certain respects more severe than subsequent to the massive revolt of 1965.

CONCLUSION

In general, then, the court response to the minor revolt of August 1968 closely approximated the normal pattern of the processing of misdemeanor

and felony cases, and differed markedly from the pattern following the major rebellion of 1965, both in terms of preprosecution and postprosecution case flow. Despite the incomparably smaller damage to life and property in 1968 as compared to 1965, and despite the overwhelmingly less hostile atmosphere in 1968 compared to 1965, defendants arrested in the former revolt fared noticeably *less* well than those in the latter; presentence detention time was somewhat more lengthy following the minor revolt than it was following the major revolt, and sentences following the former were on the whole more severe than sentences following the latter. The data we have presented in this chapter, then, suggest that there was an inverse relationship between the magnitude of the revolts and the severity of sanctions imposed on participants in these revolts.

At the same time, the data suggest that characteristics of the Los Angeles local political system differentially affected the administration of justice depending on the magnitude of the revolt. Following the minor revolt, for example, there was no mobilization of the defense community, as one might expect in a city where the cohesion of the defense community is low; and there was no unified, coordinated response on the part of court authorities, as one would expect in a city where the cohesion of authority organization is also low. On the other hand, following the major Watts revolt of 1965, there was a general mobilization of the defense community which included the participation of both nonestablishment and establishment defense groups, notwithstanding low defense community cohesion, and we found a unified court authority response—with police, prosecution, and judges alike uniting to prosecute and incarcerate virtually all those arrested—despite low authority cohesion. In other words, the political characteristics of the Los Angeles area which inhibited defense community and court authority mobilization following the minor revolt played a decidedly smaller role following the major revolt. Thus, there was an inverse relationship between the magnitude of the revolts and the explanatory significance of those political configurations which are the focal point for the traditional study of American local politics.

Whether the particular relationships we have observed in Los Angeles among these variables have occurred elsewhere, and if so why they occurred, will (hopefully) emerge from a reading of the subsequent chapters of this book.

NOTES TO CHAPTER TWO

1. Robert Conot, *Rivers of Blood, Years of Darkness* (New York: Bantam, 1967), p. 200.

2. *Ibid.*, p. 201.

3. Personal interviews with assistant prosecutors, court administrators, and judges of the municipal and superior courts. See also *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam, 1968), pp. 338–339. (Hereinafter known as the Kerner Commission Report.)

4. "Final Report, Watts Riot," correspondence from Captain Robert C. Perry, commander, Newton Street Detective Division, to Deputy Chief Thad Brown, commander, Detective Bureau.

5. Personal interview with John Lehman, Community Mediation Services.

6. Conot, *Rivers of Blood*, pp. 320–321.

7. Personal interview with Judge Kenneth Chantry, superior court.

8. California Penal Code, sec. 1276.

9. California, Bureau of Criminal Statistics, *Watts Riot Arrests, Los Angeles August 1965* (1966), p. 16, table 3.

10. Generally speaking, a felony is a crime punishable by one year or more in a state penitentiary, whereas a misdemeanor is a less serious offense carrying a maximum penalty of one year.

11. Report by District Attorney Evelle Younger to the Governor's Commission on the Los Angeles Riots, October 28, 1965, p. 14.

12. *Ibid.*, pp. 14, 15.

13. Personal interview with Joseph Carr, assistant director of central operations, Los Angeles County District Attorney's Office.

14. For example, in 1966 complaints were issued against 11,201 individuals and rejected against 12,580 individuals. This statistic was supplied by Joseph Carr.

15. Interview with Carr.

16. Personal interview with Phil Gray, assistant city attorney.

17. Personal interview with Stanley Malone.

18. Conot, *Rivers of Blood*, p. 385.

19. Interview with Chantry. These deadlines are automatically waived, however, if the defendant requests a continuance.

20. Report by Younger on the Los Angeles Riots, appendix C, p. 7.

21. The district attorney was on vacation but in constant phone contact with his office, and returned to Los Angeles later that night.

22. Report by Younger on the Los Angeles Riots, p. 15.

23. *Ibid.*, appendix C, pp. 13, 16, 22.

24. Interview with Chantry.

25. Personal interview with Judge Richard Schauer, superior court.

26. Personal interview with Judge Francis Cochran, municipal court.

27. *Los Angeles Times*, August 17, 1965.

28. Personal interview with Ed Cray, director of ACLU publications.

29. *Los Angeles Times*, August 18, 1965.

30. This computation of mean bail level was based on a sampling of files undertaken by this author.

31. Personal interview with Judge Mary Waters, municipal court.

32. This statistic comes from a forthcoming report of the Los Angeles County Probation Department on dispositions arising out of the Watts revolt which was

made available to the author prior to its completion. (Hereinafter cited as the *Los Angeles County Probation Department Report*.)

33. Personal interview with Celes King, bail bondsman.
34. Personal interview with Earl A. Galpin, administrative lieutenant, sheriff's office.
35. Interview with Cochran.
36. *Los Angeles County Probation Department Report*, "Days in Jail to Probation Hearing," p. 20. The statistic on normal bail-outs comes from Lee Silverstein, "Bail in the State Courts," *Minnesota Law Review* 50, no. 4 (March 1966): 638.
37. Report by Younger on the Los Angeles Riots, appendix E.
38. Interview with Carr.
39. Report by Younger on the Los Angeles Riots, appendix E.
40. *Los Angeles County Probation Department Report*, "Days in Jail to Probation Hearing," p. 20.
41. Personal interview with Earl Osadchey, special assistant to the district attorney.
42. Personal interview with David Finkle, attorney.
43. Interview with Finkle.
44. Personal interview with an assistant district attorney.
45. Personal interview with Bill Box, O.R. investigator, sheriff's office.
46. Personal interview with Larry Sperber, ACLU staff attorney.
47. Personal interview with Arnette Hardsfield, Community Mediation Services.
48. Personal interview with Abraham Gorenfeld, attorney.
49. Interview with Hardsfield.
50. Interview with Gorenfeld.
51. Personal interview with Harry M. Mear, administrative lieutenant, custody section, sheriff's office.
52. Interview with Hardsfield.
53. Interview with Cray.
54. Interview with Malone.
55. *Los Angeles County Probation Department Report*, "Days in Jail to Probation Hearing," p. 20.
56. Los Angeles County Sheriff's Department, "Compilation of Average Length of Stay, LASO Prisoners in Custody," compiled by Deputy Chief Douglas Slate, administrative office, July 1966.
57. "Bail in the State Courts," p. 638.
58. Interview with Box.
59. Dallin H. Oaks and Warren Lehman, *A Criminal Justice System and the Indigent* (Chicago: University of Chicago Press, 1968), chap. 1.
60. *Los Angeles County Probation Department Report*, "Municipal Court Riot Cases: Days in Jail Prior to Sentencing," Table 15.
61. Personal interviews with defense attorneys, Los Angeles County assistant district attorneys, and municipal and superior court judges.

62. These arrangements were described in an unpublished report by Judge Francis Cochran (hereinafter cited as the Cochran Report), p. 6.

63. Report by Younger on the Los Angeles Riots, appendix E.

64. Evelle Younger, "Report to the Citizens of Los Angeles on the Plans and Operations of the District Attorney's Office," August 1965, p. 2.

65. Personal interview with Judge Harold Ackerman, municipal court.

66. Report by Younger on the Los Angeles Riots, p. 13.

67. Personal interview with a superior court administrator.

68. Personal interview with J. Miller Leavy, chief trials deputy, district attorney's office.

69. Interview with Ackerman.

70. Personal interview with Donald Wright, presiding judge of the superior court.

71. Interview with Leavy.

72. Personal interview with a Los Angeles attorney.

73. District Attorney's Records Section, as of August 6, 1968.

74. Figures from the "Monthly Summary of Activities" of the Los Angeles County District Attorney's Office. As late as the summer of 1967, this 15-16 percent figure remained the normal rate of dismissals.

75. Interview with Malone.

76. Interview with Ackerman.

77. Interview with Carr.

78. Interview with Ackerman.

79. Again, defense request for continuances would nullify these deadlines.

80. Cochran Report, p. 10.

81. Ibid., p. 9.

82. Interview with Cochran.

83. Interview with Cochran.

84. Cochran Report, appendix E.

85. Interview with Gray.

86. Personal interview with Judge Sherman Smith, superior court.

87. *Los Angeles Times*, August 18, 1965.

88. These emergency operations are described in the Report by Younger on the Los Angeles Riots, appendix H.

89. Interview with Leavy.

90. See the Report by Younger on the Los Angeles Riots, appendix I.

91. Ibid., pp. 1, 3-4.

92. These charges, especially burglary, formed the overwhelming majority of cases (see Table 2.1). Reductions were to be opposed with respect to the relatively few cases involving aggravated violence.

93. Report by Younger on the Los Angeles Riots, appendix I, p. 2.

94. Interview with Cray.

95. Interview with Finkle.

96. Interview with Finkle.

97. Personal interview with Hillel Chodos, attorney.

98. Interview with Finkle.
99. Press release, August 23, 1965, in the files of the ACLU of Southern California.
100. *Open Forum*, October 1965, p. 5. Out of 690 requests for representation, the ACLU volunteer effort was able to handle 347 cases, most of them to their conclusion, including 120 misdemeanors, 182 felonies, and 45 juveniles.
101. Interview with Sperber.
102. Personal interview with Henry Grivi, attorney.
103. At that time the city public defender handled misdemeanors, and the county public defender handled felonies. Several months later the functions of the city public defender were absorbed by the county public defender, which now handles both felonies and misdemeanors.
104. Interview with Hardsfield.
105. Interview with Hardsfield.
106. Interview with Sperber.
107. Interviews with Malone, Sperber, and Cochran.
108. Interview with Hardsfield.
109. Interview with Sperber.
110. Personal interview with former city public defender Benjamin Avan, now trial deputy, Los Angeles County Public Defender's Office.
111. Interview with Smith.
112. Interview with Cochran.
113. This viewpoint was summarized by Arnette Hardsfield, a black attorney in sharp disagreement with it.
114. Interview with Hardsfield.
115. Interview with Sperber.
116. Interview with Cochran.
117. Roger S. Klein, Kenneth R. Ogren, and Robert H. Thomas, "Symposium on Watts 1965: Analysis and Statistics," *Law in Transition Quarterly* 3, no. 3 (Summer 1966): 186. (Hereinafter cited as *Law in Transition Quarterly*.)
118. These figures are in the files of a special assistant to the district attorney.
119. Interview with Gray.
120. Interview with Avan.
121. Interview with Gray.
122. *Law in Transition Quarterly*, p. 186.
123. Interview with Malone.
124. *Law in Transition Quarterly*, p. 187.
125. *Law in Transition Quarterly*, p. 190.
126. See note 118.
127. The city attorney keeps no such statistics and it proved impossible to find sufficient cases in "normal" periods with comparable offenses to obtain a reliable sample.
128. Interview with Avan.
129. See note 118.
130. District Attorney's Record Section.

131. *Law in Transition Quarterly*, p. 181; for the normal rates, see note 118.
132. Thus the more serious the charge and hence the more evidence needed to convict, the more unlikely was conviction. Only 1 out of 7 booked for homicide was convicted; only 7 out of 27 booked on arson were convicted, and only 60 out of 120 booked on aggravated assault were convicted. See California, Bureau of Criminal Statistics, *Watts Riot Arrests*, table 2, p. 15.
133. See note 118.
134. Ibid.
135. Ibid.
136. Ibid.
137. Interview with Leavy.
138. See note 118.
139. *Los Angeles Journal*, November 23, 1965.
140. Personal interview with Richard Buckley, Los Angeles County public defender.
141. *Los Angeles County Probation Department Report*, p. 11.
142. Interview with Chodos.
143. Interview with Malone.
144. *Los Angeles County Probation Department Report*, pp. 14-15.
145. Ibid., p. 8.
146. See note 118.
147. Interview with Ackerman.
148. Letter from Earl Osadchey to Evelle Younger, December 1965.
149. Interview with Leavy.
150. Personal interview with Joseph Loeb, Community Mediation Services.
151. Abraham S. Blumberg, *Criminal Justice* (Chicago: Quadrangle Books, 1967), p. 51.
152. *Los Angeles County Probation Department Report*, p. vii.
153. *Law in Transition Quarterly*, p. 185.
154. See note 118.
155. *Los Angeles County Probation Department Report*, table 87.
156. See note 118.
157. California, Bureau of Criminal Statistics, *Watts Riot Arrests*, p. 37.
158. Lee Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (Chicago: American Bar Foundation, 1965), p. 85.
159. Some defendants received imprisonment and probation or probation and fines, which is why the total exceeds 100 percent.
160. See note 118.
161. Conot, *Rivers of Blood*, p. 382.
162. Interview with Leavy. Compare this remark with that of Judge Cochran cited on p. 52. Whereas during the revolt the assertion that "hardened criminals" were involved served to justify the imposition of severe bails in order to "clear the streets," following the revolt the assertion that "little old ladies in tennis shoes" were involved served to justify the lenient sentences required to "clear the docket." That both Judge Cochran and Assistant District Attorney Leavy were referring to

the *same people* is a manifestation of the conflicting requirements of the early and later stages of the criminal process and of the difficulty of justifying the way in which these conflicting requirements were reconciled.

163. Interview with Chantry.
164. California, Bureau of Criminal Statistics, *Watts Riot Arrests*, p. 12.
165. See note 118.
166. California, Bureau of Criminal Statistics, *Watts Riot Arrests*, p. 37.
167. *Los Angeles Journal*, November 23, 1965.
168. Prepared under the supervision of L. C. Waddington, deputy district attorney (February 1967).
169. "Civil Disturbance Manual for Law Enforcement," p. 5.
170. Interview with Sperber.
171. Interview with Hardsfield.
172. Interview with Crivi.
173. Kerner Commission Report, pp. 344, 346.
174. American Bar Association, Section of Criminal Law, "Bar Leadership and Civil Disorders," p. 2.
175. Letter from Lynn D. Compton, chief deputy district attorney, to the author, November 12, 1968.
176. Interview with Osadchey.
177. Letter from Evelle Younger, district attorney, to Richard Buckley, public defender, April 17, 1968.
178. *Ibid.*
179. It proved possible to obtain a copy of the agenda of the first meeting as well as copies of subcommittee lists and to gain an impression of the plan through interviews with judges, prosecutors, and public defenders.
180. National District Attorneys Association, "Guidelines for Prosecuting Criminal Cases during Civil Disorders" (June 1968), p. 16. See also George F. Cole, "The Decision to Prosecute" (Paper prepared for delivery at the 1968 Annual Meeting of the American Political Science Association).
181. Letter from Lynn D. Compton to the author, October 29, 1968.
182. *Ibid.*
183. Personal interview with Walter Bins, presiding judge of the municipal court.
184. Letter from Lynn D. Compton to the author, November 12, 1968.
185. Interview with Bins.
186. Interviews with Schauer and Chantry.
187. Interviews with Schauer and Bins.
188. Interview with Ackerman.
189. Interview with Bins.
190. Letter from Lynn D. Compton to the author, October 29, 1968.
191. Interview with Cray.
192. Thus one ACLU attorney was most interested in finding out from this author the nature of the court plans, feeling that the authorities would be more reluctant to talk to him than to this author.

193. Interview with Malone.

194. Interview with King.

195. *Herald Examiner*, August 12, 1968.

196. Personal interview with Paul J. Marin, deputy district attorney.

197. Interview with Marin.

198. See note 14.

199. This information was supplied by David Perez of the city attorney's office, and made available to the author by Donald Kronk, an ACLU volunteer.

200. Interview with Carr.

201. Radio interview with Paul J. Marin on station KGFG, Los Angeles, August 12, 1968.

202. One defendant not included in the district attorney's records was arraigned on this day and treated by the judge as a "mass arrest" case.

203. In fact, ACLU lawyers received their information as to complaints filed and bonds set from this author, who, in a perhaps typical breach of the canons of social science research, was their source of information about the early stages of a response he was studying.

204. See Note 118.

205. The one defendant who received no fine or probation was convicted of a misdemeanor offense, indicating that the charge convicted on was a decisive determinant of sentences.

206. *Los Angeles County Probation Department Report*, tables 85, 87.

Chapter Three

Detroit

THE "KERCHEVAL INCIDENT"

On the evening of August 9, 1966—almost one year to the day following the outbreak of Los Angeles' first ghetto revolt—a confrontation between representatives of two militant organizations of Detroit's east side Kercheval ghetto and police precipitated Detroit's first ghetto revolt. Beginning at 10:00 P.M. and continuing intermittently for three days crowds of up to 100 gathered to throw rocks and occasional fire bombs (most of which failed to ignite) at police and passing motorists; according to police records during the three-day period there were no deaths, some 21 persons were injured, 169 fire alarms were reported, property damage was limited to broken windows, looting was "nominal," and there was no sniping.¹ By August 12 the police began to phase out their mobilization,² content that they had, with the aid of several militant leaders who had been persuaded to "cool it," prevented a major outbreak.³

According to the *Detroit News*, orders were in effect throughout the three-day period that no mass arrests were to be made, and, according to police records, only ninety-four to ninety-eight adult arrests were in fact made during that time, the majority (fifty-eight) during the first twenty-four hours of the disturbance.⁴ Among those arrested were the leaders and other members of the Adult Community Movement for Equality and the Afro-American Youth Movement, who subsequently were to claim, with much justice, that the arrests represented an effort on the part of the police to destroy their organizations.⁵ Despite the absence of major violence, police records indicate that all but one of the eighty-nine arrested adults were booked for felony offenses, with well over half booked for inciting to riot.⁶

Out of eighty-nine adults arrested,⁷ the police requested warrants involving fifty arrestees, releasing the others—mostly because of insufficient evidence—after holding them for investigation for between one and two days. Of the fifty requests for warrants, seven were denied by the prosecution; in all, then, forty-three out of a total of eighty-nine arrested—or 48 percent—were prose-

cuted. Combined police and prosecution gate-keeping thus screened out over half of those arrested, a proportion comparable to that normally screened out during nonriot periods.⁸ Among those prosecuted, however, were ten militants active in the two organizations listed above. According to the prosecutor in charge of warrant (complaint) issuance at that time,

Because it was a small operation, we were able to isolate troublemakers and get a better bag of militants than we usually get. Probably one-third of them were Harrison's crowd [the leader of the Afro-American Youth Movement].⁹

Of the forty-nine warrants filed relating to forty-three individuals (several individuals were charged with having committed different crimes on different occasions during the three-day period), all but two charges relating to two defendants were for felony offenses. This dramatic reversal of the normal ratio of felony to misdemeanor prosecutions¹⁰—especially in the light of the rather minimal violence which occurred during “Kercheval”—suggests that both police and prosecution were committed to securing the most serious convictions possible. Thus rather than charging defendants with misdemeanors such as failure to disperse or disorderly conduct, virtually all defendants were charged with common law “riot,” which carries a five-year maximum penalty. Although the assistant prosecutor assigned to these cases explained that he was unable to charge with failure to disperse because the Michigan statute inadvertently omitted a penalty provision and was therefore inoperative, he admitted that, at any rate, “I would have been reluctant to consider misdemeanor charges on those hard-shell troublemakers.”¹¹ Significantly, almost all the defendants were charged with multiple felony offenses—including inciting to riot and conspiracy to disturb the peace—some of which were added at the preliminary examination stage when the militant backgrounds of several leaders were revealed. Thus several of the militant leaders faced prison terms of from five to twenty years.¹² It is not surprising, then, that both the east side community and lawyers subsequently involved viewed the prosecutions as “an effort to get the militant leaders.”¹³

Bail and Detention

Virtually all the felony defendants were arraigned during the three-day period of the revolt—the great majority on August 10 and 11. Despite the fact that a disorder, if minor, was in progress, and despite the combined police-prosecution effort to prosecute to the limit of the law, bail was set at or—in some cases—below the normal level for felony offenses. In all, seventeen of forty-one felony defendants, or 41 percent, were released on personals (on their own recognizance) at their arraignment, while median bond for those not released was \$1,000. Statistics for the entire year of 1965 reveal that 23

percent of felony defendants were released on personals, and a 1962 study conducted by Silverstein reveals that, based on a sample of some 188 defendants, 37 percent of felony defendants not receiving personals had bonds set from \$500 to \$1,000, and another 41 percent from \$1,000 to \$3,000.¹⁴ During "Kercheval," then, bail was within normal ranges; if anything, there were more personal releases than normally, probably due to the fact that the median age of defendants was only nineteen.¹⁵

These averages, however, conceal the fact that several defendants with the most serious records and the most militant backgrounds received bonds ranging from \$2,000 to \$7,500 (this latter bond was for one defendant charged with committing two separate crimes on two separate days). Despite the insistence of a police department spokesman that judges at the arraignment on the warrant were not presented with information relating to the defendants' organizational affiliations,¹⁶ it does not seem purely fortuitous that only two of the ten militants prosecuted were released on personals—or 20 percent, compared to the overall rate of 41 percent.

What is significant, however, is that the normal criteria of bail setting appear to have been employed; thus youthful defendants with minor or no records tended to be released on personals, while those with serious records or "dangerous backgrounds" received relatively high bonds. There was, then, no across-the-board effort to keep all defendants off the streets for the duration of the revolt (in fact, some of the militants were originally released on personals, only to return to the riot scene and be rearrested and then confronted with higher bonds). Thus one judge who presided over arraignments on the second day warned the defendants that "We must protect the public safety above all other considerations. If there is trouble in an area you should show you are smart by staying out of there," but nonetheless released thirteen defendants on their own recognizance.¹⁷

Presentence detention time reflected the generally lenient bail practices followed by recorder's court judges. Only one felony defendant failed to bail out prior to the disposition of his case. In all, thirty-one out of forty-one felony defendants or 76 percent served no more than three days presentence detention time, and twenty-six or 63 percent served no more than two days detention time. Two militants, however, whose bail had been set at unusually high levels remained in custody for ten days; significantly, however, two defendants who remained in custody for over two months were not militants or persons against whom unusually high bond had been set; one had a \$1,000 bond and the other had only a \$500 bond, confirming the notion that prolonged presentence custody was not a product of a determination to "keep them off the streets" but rather of individual indigency which operates in normal times as well.

Recorder's court statistics for the year 1965 show that normally 26 percent

of felony defendants fail to bail out. These statistics also show that an average of about 40 percent of the felony defendants incarcerated prior to trial were detained thirty days or less, 27 percent were detained from thirty to sixty days, 15 percent from sixty to ninety days, and 18 percent over ninety days.¹⁸ Silverstein's more refined breakdown of detention time during 1962 shows that 69 percent of all felony defendants who bailed out or 37 percent of all felony defendants were released within three days.¹⁹ These figures indicate that pre-sentence detention time following "Kercheval" was, if anything, considerably lower than the norm, a fact which can be attributed to the unusual youthfulness of the Kercheval felony sample as well as to the financial and organizational resources of those few militants who were confronted with high bail.²⁰

Bail was not set for the two defendants charged with misdemeanors since their cases were disposed of at their initial court appearance. They thus spent from two to three days each in custody prior to their cases' dispositions, paralleling Subin's observations in his study of the normal working of the recorder's court that "Early Sessions [misdemeanor] defendants are usually able to obtain a trial within one day after their arrest; thus pretrial detention does not present a serious problem."²¹

Defense Community Efforts

Shortly after the arraignments, Al Harrison, director of the Afro-American Youth Movement, arranged a meeting of black community leaders which included the participation of State Senator James Del Rio and Congressman John Conyers. Its purpose was to inform the community of the arrests which threatened to decimate Harrison's organization and to raise bail for the few militants who were still in custody.²² The upshot of subsequent discussions was a decision on the part of Nathan Conyers—the brother of John Conyers—to assemble a list of lawyers who would be willing to handle the Kercheval cases on a volunteer basis. As a result of Conyers' efforts, a group of twenty to twenty-five was assembled, largely black but including several radical white guild attorneys. Individual attorneys were assigned to the various defendants, and a decision was made to incorporate under the name of East Side Defense Community, which was subsequently changed to the Metropolitan Defense Committee. Following the assignment of cases and formal organization, committees were established to write up briefs on constitutional issues in preparation for the preliminary examinations and subsequent stages of the criminal process.²³

At the preliminary examinations, a uniform defense strategy was unveiled, since most of the cases involved the same charges. Attorneys at the exams and at subsequent stages attacked the applicability of the charges, arguing (1) that common law "riot" (a five-year felony) could not be charged since the

failure to disperse statute (ninety-day misdemeanor) preempts the field; (2) that inciting to riot cannot be proved unless there was a riot, and there was none; and finally, (3) that there was no conspiracy to disturb the peace since proof of a conspiracy was lacking. This strategy indicated that defense attorneys were not willing to play the normal "game" of cooperating with the prosecution with a view toward an eventual plea of guilty to reduced charges, an observation confirmed by the fact that examinations were held for thirty-eight of forty felony defendants (one felony was found at the arraignments to be a juvenile and released) or for 95 percent of all felony defendants, an unusually high percentage. Normally, according to Silverstein's 1962 study and Subin's 1965 study, between two-thirds and three-quarters of all felony defendants waive their preliminary exams.²⁴ Waiver of a preliminary examination means that the defendant is automatically bound over for arraignment on the felony charge and subsequent trial; exams are usually waived because attorneys who "anticipate eventually pleading guilty may not feel that expending their time on an examination is of great advantage. Moreover, normally the prosecution encourages waiving the time-consuming examination process with the tacit promise of acceptance of a plea to a reduced charge."²⁵ The fact that Metropolitan Defense Committee attorneys insisted on exams, and that during the exams they made numerous motions to dismiss, reveals that the quality of representation received by defendants was unusually high and unusually committed to the interests of the defendants.

Defense efforts succeeded in having all charges dismissed at the exams against eight defendants of the thirty-eight who received exams, or 21 percent, slightly higher than the normal dismissal rate of 20 percent at the examinations.²⁶ The fact, however, that eight out of forty or 20 percent of all felony defendants prosecuted following "Kercheval" were dismissed as compared to a normal rate of 5 to 7 percent of total felony defendants dismissed at the examinations indicates that the preliminary examination played a much greater screening role following "Kercheval" than it does normally.²⁷ This assertion tends to be confirmed by the fact that twelve defendants other than those dismissed outright had the most serious of the charges facing them reduced at their examination. In most cases the charge of inciting to riot was dropped, since the judges sided with defense arguments that it was necessary to prove the existence of a riot and that none had been proved. In all, then, almost half of the felony defendants profited measurably by their attorneys' efforts at the preliminary examinations.

Dispositions

We have complete information on the dispositions of twenty-seven of the thirty-one defendants brought to trial:²⁸ cases against four defendants are still

pending. Of the twenty-seven dispositions, there were fourteen convictions and thirteen acquittals or dismissals, i.e., 52 percent of those felony defendants brought to trial and 40 percent of those prosecuted (fourteen out of thirty-five) whose cases were completed as of this writing were convicted. Four of the eight militants whose cases have been disposed of were convicted, indicating that the prosecution was no more successful with respect to them than with the general defendant population. According to Subin's 1965 study, 73 percent of those felony defendants brought to trial and 61 percent of those prosecuted normally are convicted,²⁹ indicating that the defense effort of the Metropolitan Defense Community was remarkably successful, and that, moreover, they were unwilling throughout the entire criminal process to play the normal game of acquiescing in convictions in return for prosecutorial consideration of reduced charges.

This observation is confirmed by the fact that of the fourteen convicted defendants only two—or 14 percent—entered guilty pleas, and, consequently, that only 14 percent as compared to a norm of 80 percent were convicted on charges reduced from the ones they faced following preliminary examination.³⁰ Again, according to Subin, almost 85 percent of convicted defendants in recorder's court normally plead guilty. Even more significantly, seven of the convictions came after jury trials, and two of the thirteen not convicted also received jury trials. Thus one-half of all convictions and one-third of all cases were disposed of by jury trials. Subin's data reveal that normally only 5 percent of all convictions result from jury trials (with 10 percent from bench trials and 85 percent from guilty pleas), and that only 6 percent of all felony cases were disposed of by jury trials.³¹ We have seen in Chapter 1 that jury trials are normally eschewed by court authorities because they are time consuming, unpredictable, and require the appearance of numerous witnesses, and by defense attorneys also because of time and efficiency considerations, and because of the penalties that are attached by court authorities for opting for them, in favor of the cooperation institutionalized in the negotiated plea. From the foregoing it is clear that the Metropolitan Defense Community lawyers refused to engage in this cooperative process with police, prosecution, and judges, and were successful in getting many charges dismissed through adversary proceedings, and in producing for their clients a conviction rate markedly lower than the norm in recorder's court.

Sentences

Only three of the fourteen convicted defendants—or 21 percent—were incarcerated following their conviction. According to Subin, for the entire year of 1965, 57 percent of all convicted felony defendants were incarcerated. Similarly, eleven convicted "Kercheval" defendants, or 78 percent, received pro-

bationary sentences, compared to a norm of only 36 percent.³² These comparisons indicate that the distribution of sentences following the Kercheval revolt was considerably less severe than it is normally. The three defendants who were incarcerated, however, received state prison (felony) sentences ranging from one to five years; six of the probationary sentences were for three years or more, and eight probationary sentences were accompanied by fines of \$100 or more. These figures notwithstanding, however, court authorities had succeeded in incarcerating only three of thirty-five defendants (or 9 percent) against whom they had initiated costly felony prosecution; thus the overwhelming majority of Kercheval felony defendants whose cases have been disposed of—91 percent—never served any time in jail other than the median two days presentence detention time.

Misdemeanor Dispositions and Sentences

There were two misdemeanor prosecutions arising out of the Kercheval revolt—one for disturbing the peace and one for assault and battery—and we have seen that both were disposed of at the initial court appearance some two days following arrest. The defendant charged with disturbing the peace entered a not guilty plea and was tried by a judge and found not guilty. The defendant charged with assault and battery pleaded guilty and was sentenced to thirty days. In all, then, thirty-two of thirty-seven completed Kercheval prosecutions (89 percent) failed to result in incarceration, and twenty-two defendants (60 percent) escaped even the onus of conviction. Faced with an obvious and determined effort on the part of police and prosecution to prosecute to the limit of the law, it is not surprising that Metropolitan Defense Community attorneys were subsequently to feel that “we beat the system.”³³

THE JULY REBELLION

Despite the Kercheval incident, little if any planning on the part of either court authorities or the defense community took place between the summer of 1966 and 1967. According to a department spokesman, the Detroit police had developed as early as the beginning of 1966, and were continuing to update, an emergency arrest and booking plan based on the experience of the Watts revolt of 1965 (a plan which had proved unnecessary during the minor Kercheval incident).³⁴ Neither the prosecutor's office, the recorder's court, nor any defense groups, however, developed any plans prior to July 1967, confident that a major conflagration would never ignite in a city widely publicized as a model of northern race relations. On July 23, 1967, however, what could “never happen” did indeed happen: the ignition of a ghetto revolt in the “model city” of Detroit which was to far surpass even the Watts revolt in the

intensity of its fury and in the extent of participation it evoked. Within a week's time an estimated \$40 million in property would be damaged, hundreds would be injured, and at least 44 killed³⁵—the great majority black victims of police and National Guard bullets—and over 6,000 ghetto residents would be arrested in the single largest instance of collective violence witnessed in this country in our time.

Arrest, Booking, and Detention

In the early morning hours of Sunday, July 23, 1967, a "routine" raid on a 12th Street "blind pig" (ghetto argot for an after-hours drinking establishment) was met by an unexpectedly hostile crowd of several hundred, which shortly thereafter—by 6:00 A.M. according to police eyewitnesses—grew to proportions in excess of 2,000.³⁶ By 7:00 A.M. two police platoons consisting of twenty-two patrolmen and two sergeants had been dispatched to the area in order to clear the streets and make "good arrests," i.e., to arrest violators for major offenses but not to make mass arrests.³⁷ Between 5:00 A.M. and noon, only 44 arrests were made, and by early evening police records showed a total of only 119 arrests.³⁸ By this time, however, the revolt had completely escaped the control of what had been an unusually small number of available police; thousands of blacks were engaged in widespread looting, and mass arrests were initiated by a now totally mobilized police force and recently arrived National Guard forces. According to police records, 1,129 arrests were made during the remaining hours of that day, 2,931 arrests were made on Monday, and 732 arrests were made on Tuesday—almost 5,000 arrests within a three-day period of peak rioting, or more than were arrested in the Watts revolt of 1965 during a week's time, and the equivalent of well over a normal month's quota of arrests for the Detroit Police Department.³⁹

By the week's end, over 6,000 black adults had been arrested, or virtually anyone on the streets that police or National Guard were able to apprehend. Thus the *Ann Arbor News* reported on July 27 that "throughout the central part of Detroit since early Sunday the National Guard, the State Police, and the thousands of Detroit police and now almost 4,000 federal troops have been arresting *anyone who moves* on certain streets, enters a ravaged store, or is believed to be a sniper, an arsonist, or an agitator."

As in the case of the major Watts revolt, apparently very few major offenders were caught up in this massive dragnet effort. According to one assistant prosecutor, "by the time the cops would arrive on the scene, the first two waves of arsonists and serious looters were gone; all that was left when they arrived were the people stealing the 'soda crackers.'" ⁴⁰ This observation tends to be confirmed by the fact that, despite the unparalleled destruction to property and life—the hundreds of fires which decimated entire neighborhoods and

the reports of major gunfire activity—there were only seven homicide arrests, thirty-four arson arrests, and twenty-six sniping arrests.⁴¹

The unprecedented influx of arrests soon rendered ineffective the police plans for booking and processing arrestees which had been developed following the Watts revolt. According to the superintendent of police, the plan called for the use of mobile booking units and was based on an expected influx of some 3,000 arrests over a nine-day period, and quickly broke down in the face of over twice as many arrests during a comparable period. Thus “the mobile units did some of the preliminary booking in the field. However, this became inadequate and we had to branch out to peripheral precincts.”⁴²

Although the use of Polaroid cameras for future identification of arrestees and matching them with arresting officers and stolen “loot” was an integral part of the police plan, and although it was put into effect during the revolt,⁴³ this procedure by no means eliminated identification problems. Thus

throughout the emergency period the police were working long hours under severe tension, and it was a common occurrence for one officer to arrest a large number of individuals, under widely varying circumstances and usually amidst great confusion. Many of the arrests occurred at night, which added to the problems of identification. To say that, by the time a police officer was to serve as an identifying witness . . . , most of the defendants would look alike to him would be an understatement.⁴⁴

As in the case of the major Watts revolt, other normal police postarrest functions were disrupted as well. During the nine-day emergency period, the normal investigation of cases virtually ceased, and functioned only haltingly subsequent to that time. According to a Detroit detective attached to a unit with special mass arrest responsibilities, “we have around 400 detectives in the entire department, and a lot of them are in supervision. Even with them there would be 18 arrests per detective. It was physically impossible for us to investigate 5,000 arrests.”⁴⁵

In the absence of the normal investigative procedures which serve to “clear” cases, police requested warrants on an unusually high percentage of arrestees. According to police records, 6,528 adults were arrested during the emergency period, and warrants were requested for the prosecution of 4,881, or 75 percent of those arrested, as compared to a normal rate of from 50 to 60 percent.⁴⁶ Even this 75 percent figure, however, overestimates the extent of police screening which did occur. First of all, as we shall see shortly, there are indications that the 1,647 persons for whom warrants were not requested were arrested mainly during the latter part of the emergency period after most of the actual violence had subsided but while the emergency curfew was still in effect. Second, it is very likely that a sizable proportion of those not prosecuted were arrested for offenses not arising out of the revolt, since police statistics included all arrests made in an extremely large “riot area” for a nine-day pe-

riod.⁴⁷ Finally, although it proved extremely difficult to obtain information relating to the 1,647 for whom police did not request warrants, there are indications that most spent between one and two days (or even longer) in detention prior to their release, a longer period of time without freedom than they would normally spend.⁴⁸

The disruption of investigative functions along with the imperatives of riot control led not only to an unusually high percentage of requests for prosecution but also to an extremely arbitrary booking process. Virtually anyone found near or in a store, with or without loot, i.e., the overwhelming majority of those arrested, were booked for "looting," and the majority of other arrestees were booked for violation of the governor's curfew proclamation.

The rapid and overwhelming influx of arrests soon inundated the normal police preprosecution detention areas, and, unlike in Los Angeles, police officers did not have the good fortune to have access to a large and empty emergency facility. Thus by the second day of the revolt the thirteen police precincts in Detroit were overflowing, as was the central detention area in police headquarters. For the remaining days of the revolt the overflow—involving several thousand people—was placed either in court lockups normally designed as waiting areas for defendants about to make their court appearance, a converted police garage, or buses stationed outside police headquarters—none of which had even a modicum of sanitation or toilet facilities. Due to a breakdown in the processing of warrants (which we shall discuss later) and a consequent inability to maintain a steady flow of prisoners from detention areas to court, many spent more than the usual amount of preprosecution detention time in these facilities. Thus as late as Thursday, July 27, police records revealed that 1,671 prisoners remained in the various precincts.⁴⁹ (Since this figure is close to the police figure on nonprosecution arrests, and since by this time the courts were completely backed up, it is quite possible that the bulk of those for whom the police did not request warrants came from this group of 1,671 arrestees.)

The catalogue of horrors produced by these emergency detention measures has been vividly documented by Detroit newspapers, the Kerner Commission Report, and the *Michigan Law Review* Report. The reader interested in the potential for man's gross inhumanity to man would do well to refer to these accounts; suffice it to say that thousands of arrestees—prior to any appearance in court or even a determination to prosecute—spent several days in detention facilities scarcely fit for cattle.

Charging

The Wayne County Prosecutor's Office, with a staff of only thirty-five attorneys normally assigned to the recorder's court,⁵⁰ was suddenly confronted

with over 4,000 requests for warrants which had to be processed within statutory time limitations which require that there be no "unnecessary delay" between arrest and initial court appearance—usually interpreted in Detroit to mean seventy-two hours.⁵¹ Working around the clock and without the aid of any advance planning,⁵² assistant prosecutors succeeded in processing almost two-thirds of the warrant requests by Wednesday, July 26, but were still processing the last few warrant requests as late as the following Thursday.⁵³

In the words of William Cahalan, prosecuting attorney of Wayne County,

The problems confronting the Prosecutor's office last summer during the riot can be likened to those of the keeper of a water reservoir who is confronted with a sudden cataclysmic deluge.⁵⁴

Cahalan did not add, but well might have, that coincident with the deluge were the fires: while thousands of arrestees were being processed and the prosecutor's office was being deluged with thousands of requests for warrants, the city was in flames.

The prosecutor's office responded to this twin threat by opening wide the "sluices" and inundating the "reservoir"; i.e., by prosecuting virtually all those arrested for whom the police had requested warrants. According to one assistant prosecutor with warrant issuance responsibilities, "during the riot we recommended about everything that was brought in."⁵⁵ Another high-ranking official confirmed that

In July, we didn't reject any warrants. When you have 4,800 warrants coming in in a period of a week, you obviously don't have time to interview witnesses, or the defendant . . . so you sign the warrant. In the normal course of events we don't consider ourselves a rubber stamp for the police, [but] in July it's no secret that we rejected very few warrants.

In actual fact, warrants were issued relating to 4,260 defendants, or 98 percent of the total of 4,367 warrant requests (4,881 minus the 514 arrests later determined to be unrelated to the revolt). This figure represents a marked abandonment of normal prosecutor gate-keeping functions. According to the above prosecution official who in normal times personally reviews every warrant signed or denied, "I believe we [normally] reject about 20 percent of the warrants that come to us. About one out of every five is denied and I would say that about half they send over are reduced."⁵⁶

Even if the normal rate of combined police-prosecution screening had prevailed, with a month's quota of arrests in a three-day period the recorder's court would have been faced with an overwhelming number of cases. As it was, however, combined police-prosecution screening declined significantly, with the result that, as we shall see, the court would be completely inundated with thousands of cases which threatened not only to occupy judges' and

prosecutors' time for months to come but also to disrupt totally the processing of normal nonriot criminal cases.

Over three-quarters of those prosecuted—or 3,230 defendants—were charged with felony offenses, a dramatic reversal of the normal ratio of felony to misdemeanor prosecutions.⁵⁷ As in the case of the major Watts revolt, the issuance of warrants proceeded despite the fact that prior arrest records were not available, and prosecution officials claimed that this was a principal reason for the preponderance of felony charges. In the words of one official, "in July 1967 we had to go with felonies because we didn't know with whom we were dealing."⁵⁸ Given the prosecutor's virtually automatic acceptance of police requests for warrants (according to one attorney, "assistant prosecuting attorneys freely admitted that police arrest reports were not even read"),⁵⁹ however, and the fact that over three-quarters of police requests were for "looting" (felony) offenses, it is doubtful if the availability of prior records would have made any difference. Rather the prosecutor's office—faced with the twin threat of a huge volume of warrant requests and a revolt which continued to rage in the streets of Detroit—followed the initiative of the police in issuing a preponderance of felony charges.

Prosecution officials did exercise considerable discretion, however, as to the specific felony charges on which defendants would be brought to court. The police booking charge "looting" has no legal meaning, and had to be translated into a formal charge; in July the overwhelming majority of "looting" offenses were translated to mean "entry without breaking with intent to commit larceny" (E W/O B), a felony with a four-year maximum sentence. The decision to charge with this offense, rather than the more serious and more standard burglary offense, "breaking and entering" (B & E), was predicated on the fact that during the revolt dozens of persons were often caught in a store which had been already broken into: conviction of "E W/O B," in contrast to "B & E," would not require proof of breaking, which would be virtually impossible to obtain. In retrospect, Prosecutor Cahalan underscored what he felt was the crucial importance of the decision to use this charge, confessing that "had we charged them on breaking and entering we would have had to dismiss every case,"⁶⁰ and also admitting that this decision would still enable the prosecution to charge with felonies and thereby to justify the extraordinarily high bonds being set to keep people off the streets.⁶¹

At any rate, well over three-quarters of all felony prosecutions were for "E W/O B."⁶² Of the 1,030 misdemeanor prosecutions (in Detroit the Wayne County prosecutor and the recorder's court handle both felonies and misdemeanors), 975 or 95 percent were for violation of the governor's curfew proclamation, which carried a maximum penalty of ninety days in jail and a \$100 fine.⁶³ Thus the overwhelming majority of defendants were charged with one or two types of offenses, confirming our earlier observation that there was little if any individualization throughout the charging process.

The combined impact of the huge volume of arrests, the lack of prosecution screening, and the decision to charge the overwhelming majority of defendants with felonies was to be dramatic: in a week's time the court would be confronted with a six-month normal quota of felony cases and a month's quota of misdemeanor cases!⁶⁴ And, although rapid disposition of misdemeanor cases was a possibility, no immediate or even proximate disposition of the far more costly and time-consuming felony cases was in sight.

Bail and the Arraignments

On the evening of Sunday, July 23—when the magnitude of the revolt was rapidly becoming apparent—the first step was taken by court authorities toward the implementation of a bail policy which was to remain substantially in effect for the duration of the revolt. Following consultation with the United States attorney for the eastern district of the state of Michigan, who agreed that extraordinary bail measures would be necessary to “avoid turning them back onto the streets,”⁶⁵ Prosecutor Cahalan publicly stated that his office would ask for bonds of \$10,000 and up for all those arrested during the revolt. According to the prosecutor, this policy was recommended “so that even though they had not been adjudged guilty, we would eliminate the danger of some of those who had caused the riot to return to the street during the time of stress.”⁶⁶ Throughout Sunday evening and night, the two recorder's court judges (including the executive judge) who happened to be assigned to Sunday court duty followed the prosecutor's recommendations with respect to the several hundred defendants who were arraigned before them.

The following morning all thirteen judges assembled in the office of Executive Judge Brennan, who informed them that he had been in communication with the prosecutor's office the previous day, that the prosecutor had requested a high bond policy, that this was the policy that had been followed in court Sunday night, and that it was his (Judge Brennan's) intention that it be the policy followed by all the judges.⁶⁷ Judge Brennan subsequently announced to the press that “we will, in matters of this kind allocate an extraordinary bond. We must keep these people off the streets. We will keep them off,” and was echoed by one colleague who explained that

What we're trying to do here is keep them off the streets. And apparently we're being successful at that. If we let them back on you know what would happen. In a way, we're doing what the police didn't do.⁶⁸

Several months later, another judge remarked in retrospect that during the disorder “we had no way of knowing whether there was a revolution in progress or whether the city was going to be burned down or what.”⁶⁹

At the Monday morning meeting little opposition to the executive judge's recommendation was articulated, and all but one judge agreed to follow the

\$10,000 to \$15,000 bail policy for all riot offenses.⁷⁰ They further agreed that despite the absence of prior arrest records that the arraignments would proceed, and decided to break down into teams of three judges working six-hour shifts so that the arraignments could be held on an around-the-clock basis. Finally, it was decided to suspend indefinitely the normal criminal calendar to further the expedition of the riot cases.

During the next three days—the peak days of the revolt—judges with one exception set few bails at the arraignments under \$5,000, most at \$10,000, and a good number as high as \$25,000. The one exception was Judge George W. Crockett, Jr., a black judge with a Lawyer's Guild background who set most of his bonds between \$1,000 and \$3,000 but who subsequently admitted that even his bonds were much higher than normal and “much higher than they should have been.”⁷¹ With the exception of those bonds set by Judge Crockett and one or two other judges who followed his lead on the second and third day of the arraignments, bond was being set at ten times (or more) higher than the normal level. During the last few days of the arraignments—when the revolt had spent its force—bond was being set at somewhat lower levels, but still far above normal.⁷²

Thus a study of bail practices found that, based on a sample of 1,014 riot defendants who following their arraignments were incarcerated in Jackson State Prison, over half the bonds were set at \$8,000 or above, with only 23 percent under \$3,000.⁷³ Similarly, a study undertaken by the Department of Justice, Bureau of Prisons, revealed that of 144 prisoners incarcerated at the Federal Correctional Institute at Milan, Michigan, over 90 percent of the defendants were confronted with bail of \$10,000 or above, with only 6 percent facing bonds under \$3,000.⁷⁴

Bail amounts bore little or no relation to either the offense with which the defendant was charged, his prior arrest record, or his employment status. Bond for alleged curfew violators—who faced a maximum punishment of ninety days in jail and a \$100 fine for an offense comparable to a traffic violation for which a ticket is given and the defendant not detained⁷⁵—was set as high as bond set for E W/O B, a felony with a four-year maximum penalty. Thus, based on the Jackson sample, “24 percent of those charged with E W/O B had bonds set under \$3,000 and 43 percent had bonds from \$8,000 to \$12,000, [while] 25 percent of those charged with violation of the curfew had bonds of under \$3,000 and 35 percent had bonds of \$8,000 to \$12,000.”⁷⁶

Similarly, while 22 percent of defendants with no previous arrest record had bonds set under \$3,000 and 48 percent had bonds set between \$8,000 and \$12,000, 22 percent of those with prior arrests and/or convictions had bonds set under \$3,000 and 40 percent had bonds set between \$8,000 and \$12,000. Finally, almost as many persons who were married, employed, and who had no arrests and no convictions received bonds over \$8,000 as those persons who

were single, unemployed, and had records of previous arrests and convictions.⁷⁷ Thus the normal criteria of bail setting were virtually abandoned during the riot arraignments by court authorities bent on incarcerating everyone for at least the duration of the revolt.

Court authorities argue that the reason for the arbitrary bond was that arrest records and other information pertaining to defendants which normally help form the basis for a bond determination were lacking at the time of arraignments. This was indeed the case, but their absence does not account for the bail practices; thus the one judge who set consistently lower bail availed himself of the information relating to defendants' backgrounds obtained by Neighborhood Legal Service Center attorneys' interviews with defendants, while the majority of judges during the first three days of the arraignments refused to allow NLSC attorneys to interview in their courtrooms.⁷⁸ Had the judges wanted to set individualized bail, the information would have been made available; as it was they deliberately prevented it from becoming available.

The refusal of the judges to allow attorneys to interview on the behalf of defendants was but one example of an atmosphere of extreme hostility toward defendants and defense efforts which prevailed in the court. Thus one University of Detroit Law School professor reported that

these judges have conceded privately that they were filled with fears and doubts about the structural capacity to resist the riots, as they watched from their courtroom windows, smoke filling the sky from fires burning in the city. These fears and apprehensions affected them in the manner in which they were discharging their official responsibilities.⁷⁹

Many judges simply forbade those few defense attorneys who were present at the arraignments to represent defendants, and constitutional arguments against the bail practices were routinely ignored.⁸⁰ On Tuesday a judge of the Michigan Supreme Court met with recorder's court judges, asserting that he spoke for the majority of his colleagues in assuring the judges that their bail practices had the wholehearted support of the supreme court. His appearance undercut the arguments of a liberal supreme court judge who was at the time attempting to persuade the recorder's court judges to accept offers of additional judicial personnel and to moderate their bail policy.⁸¹

The prosecutor declared that

I want to warn these people who are stealing and burning and looting that they will be charged with the full criminality of their acts. I want to warn these criminals that they will be prosecuted to the full extent of the law, and they will not be forgotten but will have to answer for their crimes.⁸²

With rare exceptions occurring toward the latter part of the week, defendants charged with misdemeanors who ordinarily are permitted to enter a plea at

the time of the initial hearing and receive an immediate sentence were not allowed to do so.⁸³ Writs of Habeas Corpus filed in recorder's court by defense attorneys on behalf of incarcerated defendants were made returnable in a week's time rather than the normal practice of making them returnable immediately, thereby effectively denying the constitutional right of habeas corpus.⁸⁴ Bail bondsmen, and the criminal lawyers who normally frequent the recorder's court (known as the Clinton Street gang) were nowhere to be found during the first three days of the revolt.⁸⁵ Even if they had been in court, their efforts would have been to no avail; signs appeared on the door of the Wayne County Jail to the effect that no attorneys, either assigned or retained, could see their clients, and that no bonds would be accepted on orders of the executive judge.⁸⁶ Thus even if a defendant was able to meet the exorbitant bond, he was not permitted to bail out.

Finally, despite the fact that the thirteen judges were faced with arraigning over 4,000 defendants in less than a week's time, and despite the fact that a serious bottleneck had developed in the warrant clerk's office (which must type up the warrant subsequent to its issuance and prior to the arraignment),⁸⁷ the recorder's court refused offers of judicial and clerical manpower from the Wayne County Circuit Court and a number of municipal courts in Wayne County.⁸⁸ During the week of the revolt, the circuit court had suspended its operations, leaving its twenty-six judges and a large number of clerical personnel available, but this manpower went unused. In addition, an offer from a federal judge based in Detroit to make available federal probation personnel as well as the Wayne County probation staff to interview prisoners for release on recognizance was rejected, as was this judge's suggestion that volunteer lawyers be deputized as special prosecutors for the purpose of going into the jails and recommending that cases such as curfew violation should be "nolle prossed" (a form of dismissal) on the basis of the prosecutor's normal standards.⁸⁹ Recorder's court judges offered a number of excuses for their failure to avail themselves of the services of the circuit court and other manpower sources,⁹⁰ but at least to one former Michigan Supreme Court justice, deeply involved in attempts to change the direction of the recorder's court policy, the actual reason was clear: "I think the recorder's court didn't want anyone to observe what was going on. They had a fixed notion of what they were going to do and didn't want anyone to interfere."⁹¹

As a result of these concerted efforts, court authorities were successful in "keeping them off the streets" at least until the revolt began to subside. Thus two local bail bondsmen respectively reported that "It was impossible to get anyone out until Wednesday" and "No one got out the first three days."⁹² These observations are confirmed by statistics which reveal that throughout the arraignments—the bulk of which were over by Friday, July 28, but which ran through August 1—only 2 percent of all defendants were released on per-

sonal bonds (most of these were hardship cases released by Judge Crockett).⁹³ This 2 percent represents virtually the sum total of defendants who were able to bail out during the first three days following their arrest. We have seen that normally between 26 and 30 percent of felony defendants are released on personal recognizance, and 37 percent of felony defendants not released on personals gain their release within three days after their arrest. If the 37 percent rate of money bond bail-outs within three days has remained constant since 1962, it is possible that from 53 to 56 percent of all felony defendants normally bail out within three days of their arrest.⁹⁴

Even if the normal rate of three-day bail-outs had prevailed, Detroit's already overtaxed detention facilities would have been swamped with some 2,000 additional prisoners within a week's time.⁹⁵ As in the case of warrant issuance, however, normal gate-keeping activities were virtually completely abandoned—the floodgates were opened wide—and it was necessary to find facilities for some 4,000 prisoners following their arraignment! One result of the successful effort to "keep them off the streets," then, would be a fantastic, almost unimaginable strain on detention facilities.

Normally the Wayne County Jail serves as the short-term prison for the city of Detroit, and defendants following their arraignment become the responsibility of the Wayne County sheriff who administers that facility. The Wayne County Jail has a capacity of 1,260 prisoners, and the jail population on the day before the ignition of the revolt was 1,099.⁹⁶ By Wednesday the jail population had risen to some 1,700, or half again its normal capacity, and there remained over 3,000 riot defendants for whom space had to be found. Following consultation with state and some federal officials, police and sheriff's department officials were able to send some 1,200 prisoners to Jackson State Prison, 200 to Milan Federal Correctional Institute, 50 to the Washenaw County Jail, 105 to the Ingrahm County Jail, and finally 450 to be housed in a makeshift compound at a women's bathhouse on Belle Isle.⁹⁷ At considerable cost and inconvenience to court authorities, then, prisoners were shipped to various outlying state and federal facilities in an effort to "solve" the detention problem. These emergency measures, however, by no means solved the problem; as we shall see, by the latter part of the week pressures on the various detention facilities—including the (apparent) threat of jail revolts—were to become intolerable and were to play, along with growing efforts on the part of the defense community, a major role in producing a dramatic reversal of the court bail policy.

Bail Reductions

As we have indicated, during the early (and peak) days of the revolt the attitude of court authorities was one of overt hostility toward those arrested

and toward defense efforts on their behalf. On Sunday evening and Monday, the first two days of the arraignments, these defense efforts consisted largely of attempts by a number of attorneys—including John Emery, a part-time Birmingham, Michigan, municipal court judge, head of the Detroit Legal Aid and Defender Association, and chairman of the Detroit Bar Association's Criminal Law Committee, as well as several Neighborhood Legal Service attorneys—to represent defendants and to argue on their behalf for lower bail. As we have seen, these efforts were rebuffed. Emery's suggestion that the court appoint bar association attorneys to handle the arraignments was rejected by the executive judge; many judges refused even to permit lawyers into their courtrooms to act in an advisory capacity, and in all but one of the courtrooms in which lawyers were permitted to enter, arguments on behalf of lower bail were rejected or simply ignored.

Sometime on Monday, when it became apparent that all but one judge were setting exorbitant bonds and that the efforts of the few attorneys who were present in court were totally ineffective, two OEO-funded legal service agencies—the Neighborhood Legal Service Centers (NLSC) and the Urban Law Program (ULP) of the University of Detroit—established contact and began to mobilize their respective staffs on an around-the-clock basis in an effort to respond to the court's bail policy.⁹⁸ NLSC and ULP attorneys established contact with Executive Judge Brennan and requested a meeting for later that evening; Judge Brennan refused to see them that evening and instead set the meeting for the following day (Tuesday).⁹⁹ Contact was also made with Wayne County Suburban Legal Services, representatives of the Detroit Bar Association, and a general strategy session involving all these groups was also scheduled for Tuesday morning.

On Tuesday representatives of the above-mentioned groups met in an effort to map out a strategy leading to a quick reversal of the high bond policy. A significant split over the best means to effectuate this end developed between many NLSC and guild lawyers on the one hand and the representatives of the Detroit Bar Association on the other. The former group advocated class actions which would attack the bail practices of the court on behalf of all defendants subject to them; specifically, several individuals had begun to work on, and wished to file, a Writ of Superintending Control with the Michigan Court of Appeals which would direct the recorder's court to set bail at constitutional levels.¹⁰⁰ The latter group argued that there was insufficient time available to allow for a potentially time-consuming higher court decision, that at any rate such an action would only antagonize recorder's court judges, and that a more effective strategy would be to continue the negotiations with judges and the prosecutor which (they announced) they had already begun.¹⁰¹

It was the latter position which prevailed. A decision was made to abandon

the Writ of Superintending Control, and in fact no class actions whatsoever were filed during that first week. In the words of one NLSC and guild attorney, "Emery negotiated for us and told us the judges would do this and would do that so we never got to bring the suits that we threatened."¹⁰² Instead, it was decided that a concerted effort would be made to obtain through negotiations with judges and the prosecutor's office lower bond for those who had not yet been arraigned and an immediate review of bonds for those who had been arraigned.

That afternoon the heads of NLSC, ULP, Wayne County Suburban Legal Services, and the Detroit Bar Association, among others, met with Executive Judge Brennan as scheduled, and were informed that the "High bond policy would be stopped forthwith."¹⁰³ As we shall see, it was not, but on that day, according to one NLSC attorney, "the court told us in effect 'don't bother bringing writs, all you have to do is help us with our administrative problems and we'll release them.'"¹⁰⁴ Subsequent to this meeting NLSC and ULP attorneys and law students began a massive effort to interview defendants both in the recorder's court and at the various detention areas throughout the state for the purpose of obtaining information requisite for the anticipated review of their bonds and possible release on recognizance.

By Wednesday, however, it was apparent that judges were continuing to set high bonds, and a further meeting between an NLSC representative and the executive judge produced further promises that the bond policy would be changed, subject to the latter's proviso that "each judge is sovereign in his own court room."¹⁰⁵ At this point, according to a member of the "left wing" of the defense coalition, members of the coalition "began to have arguments" over the wisdom of the negotiations strategy, but, again, this strategy prevailed: "they kept telling us they were close to agreements so we held back on our suits and writs."¹⁰⁶ Despite the reservations of several NLSC and ULP attorneys, the energies of these agencies were largely directed for the next several days toward the preparation of interview forms designed for bail reduction. The ULP and the NLSC sent teams of attorneys and law students to Jackson Prison where some 1,000 prisoners were interviewed, to Monroe County Jail, Milan, and Ionia, and continued the interview efforts which had already begun in recorder's court courtrooms and bullpens.¹⁰⁷ By the end of the week, and with the aid of two groups of VISTA volunteers, over 1,300 interviews had been completed and verified.

Earlier on Wednesday, a meeting took place in the office of Prosecutor Cahalan which was described in its minutes as the "First Co-ordinating Committee to Deal with Riot Prisoners." Present at the meeting were the prosecutor and four of his assistants, the sheriff and two of his assistants, two Wayne County Circuit Court judges, two judges of the Michigan Supreme Court, the executive judge of the recorder's court, three police officials, and John Doar,

chief of the Civil Rights Division of the U.S. Department of Justice, who had been sent to Detroit as a member of the Vance federal troop mission and who was assigned by Assistant Attorney General Warren Christopher to deal with the mass arrest problems.¹⁰⁸ According to an official in the prosecutor's office, the meeting had been called because by the third day "we realized that people were backing up in the jails, and we made it our number one concern to do something about this."¹⁰⁹ The previous night, in fact, rumors of a revolt (which proved unfounded) on the sixth floor of the Wayne County Jail had reminded authorities of the ever-present threat that the extreme overcrowding presented. At the meeting "the members of the committee agreed that the present conditions of many of those incarcerated and the cessation of riot conditions and the apparent restoration of law and order justified that priority be given to a review of the bonds presently placed on the defendants."¹¹⁰

It was decided that priority should be placed on defendants in the nearby Wayne County Jail (where things were, according to an assistant prosecutor, "just terrible"),¹¹¹ that a master list of prisoners and their place of incarceration should be compiled to facilitate bail review, that it would not be necessary to have defendants present in the court in order to have their bonds reduced, and that it would not be necessary for the bond review to be conducted by the same judge who set the original bond.¹¹² With the aid of John Doar, who from the outset "saw my role as one of relaxing the stringent court policies with respect to release on bail,"¹¹³ and in view of the police logjam in identifying prisoners on the basis of the normal fingerprint check facilities, it was arranged to fly over 1,000 prints to Washington to be checked by FBI specialists. Finally, it was agreed in principle that the prosecutor's office would bear the responsibility of assembling arrest reports ("write-ups") and prior arrest records ("rap sheets") and that recommendations would be made by the prosecutor to release on personal recognizance all those felony defendants who had no prior record and whose alleged offenses did not indicate any aggravated violence.¹¹⁴ Beginning on Wednesday, then, the administrative and clerical processes preliminary to bail review were underway. According to the assistant prosecutor assigned to "break the logjam," the arduous process of matching write-ups and rap sheets had begun,¹¹⁵ but no one had yet been released and the overwhelming pressure on detention facilities continued to mount.

Late Wednesday evening an emergency meeting of the board of directors of the Detroit American Civil Liberties Union passed a resolution which entailed the first organizational indictment of court authorities' bail policy. Released to the press on Thursday morning, the ACLU statement, while somewhat moderate in tone, called for the "restoration of law" now that "order has apparently been restored," condemned the "excessive bond" and the inability of attorneys to obtain access to clients, recommended remedial action on the

part of the court, and offered to "extend its more than 250 Detroit area members as volunteers" in an effort to make "legal counsel available to the Courts and the accused."¹¹⁶

According to the executive director of the Detroit ACLU, "the resolution wasn't as strong as the one I proposed." However, he was pleased that it passed, since "if it had been Monday I couldn't have gotten it through at all. At that time, even members of our board panicked. Frankly, I wasn't too happy with the ACLU role—we didn't do ourselves proud."¹¹⁷

Other than the ACLU resolution the only organizational criticism directed at the courts during the entire week of the revolt was a similar resolution passed by the Detroit chapter of the Lawyer's Guild. According to the president of the Detroit guild, "at the meeting where this statement was drafted, the older guild members were conservative . . . they were frightened,"¹¹⁸ and two other younger guild members angrily confided to this author that most of the older guild members "stayed home."¹¹⁹

These facts tend to confirm the observation of another attorney.

The mood is pretty important to understand . . . even the "good guys" were somewhat immobilized. Everything was burning . . . we were stunned. We had all convinced ourselves that in terms of race relations Detroit was a pretty good city. To understand why lawyers reacted the way in which they did, you must understand the overwhelming feeling of shock which everyone shared.¹²⁰

Still another attorney reported that "even 'good liberals' were outraged and furious. There were in these first few days few who concerned themselves with those who were arrested and incarcerated."¹²¹

Sometime on Thursday following the dissemination of the ACLU resolution, a meeting of predominantly black community organizations was convened by Congressman John Conyers with the purpose of providing a forum for the airing of various community grievances with respect to the authorities' handling of the revolt. Among the grievances aired was the continued detention of thousands of arrestees, and it was decided that on Friday a committee of representatives composed of Conyers, State Senator James Del Rio, and ACLU Executive Director Ernest Mazey would personally convey the concerns and demands of the community concerning this detention to Prosecutor Cahalan.

By Thursday, then, pressure from various segments of the defense community was growing, but, although bail was now being set at somewhat lower levels for those who were being arraigned at this time, no bail review of the over 3,000 defendants who remained in postarraignment detention facilities had taken place.

According to prosecution officials, by Thursday they were well underway toward implementing the agreements of the Wednesday morning coordinating

meeting. Arrest records were now becoming available, those meriting release on recognizance or nominal bail were separated out from the rest of the defendants, and in all "a couple of thousand cases" were reviewed.¹²² A number of seemingly technical problems, however, intervened (according to prosecution sources) to prevent the immediate release of those meriting release. In the words of one prosecution official,

When they got the write-ups and the rap sheets to court, the files couldn't be found; they were understaffed clerically. We made arrangements to send in nuns to help, to prepare the files and necessary papers for release. Then there weren't enough typewriters, then not enough space for the additional typewriters we got, etc. There were a lot of stupid little problems to resolve.

Adding to these problems was the fact that "the sheriff didn't know where anyone was";¹²³ apparently he had not kept adequate records of the thousands of riot prisoners within his jurisdiction.

By Friday morning, then, there had been few if any releases, and detention pressures continued to mount. All the available detention facilities were overflowing, and there were several hundred defendants who had not yet been arraigned and for whom detention space had to be found. According to the clerk of the recorder's court, there were at this time very real threats of an internal riot at Jackson State Prison.¹²⁴ According to Judge Crockett, "by Thursday things got so far out of hand that there was justifiable fear that if there were no riot then the recorder's court actions would surely have started one."¹²⁵

These concerns were not lost upon city and state officials, and, on Friday Police Commissioner Girardin called the prosecutor's office and indicated that Governor Romney and Mayor Cavanaugh wanted to know what progress had been made toward the release of the prisoners and the consequent reduction of the stress on detention facilities. Informed that very little progress had been made, a meeting was called around noon in Girardin's office which included the participation of the prosecutor and several of his assistants, the mayor, the governor and his legal adviser, Cyrus Vance, and John Doar. The detention problem was discussed, including the threatened revolt at Jackson, and reluctant consideration was given to the use of the state fairgrounds as an additional detention facility.¹²⁶

At this point contact was made with Executive Judge Brennan and the other recorder's court judges. According to Judge Crockett, Governor Romney informed Judge Brennan that if quick releases were not possible he would issue a proclamation activating the state fairgrounds. It was at this point that Prosecutor Cahalan offered to unilaterally release all those whom his office had already recommended for release, i.e., to bypass the determination of individual judges. This proposal met with a great deal of resistance from the

judges, as did another of his suggestions to ask the governor for an executive order authorizing their release.¹²⁷

It was finally agreed that Executive Judge Brennan with assistance from court personnel would personally review the write-ups and records of those for whom the prosecutor had recommended release, that it would not be necessary for these records to be matched with court files, and that following this review Judge Brennan would personally enter release orders for those for whom he recommended release. It was therefore determined that it would not be necessary to activate the state fairgrounds, and that the bathhouse at Belle Isle would suffice for the remaining defendants yet to be arraigned. Following the meeting John Conyers and his fellow community representatives met with the prosecutor and the executive judge, who informed them of the nature of the agreement which had just been implemented.¹²⁸

That evening release orders were prepared—with the aid of John Emery, John Doar, and Phil Colista of the ULP—for some 1,500 defendants, or approximately half of the total number of felony defendants, the overwhelming number of whom were released on personal recognizance.¹²⁹ At 9:00 P.M. police were informed that large numbers of defendants would shortly be released for whom the curfew would be relaxed until they were safely home. As of one o'clock Saturday, according to the clerk of the recorder's court, "half of all the felony people had been released on personal recognizance or at least orders were filed for their release by that time." As the clerk's statement implies, there were some delays between the issuance of the release order and the actual release; thus for example at Milan Federal Correction Institute "there were refusals on the part of detention officials to release people except to the custody of the Wayne County sheriff, so a lot were returned to the County Jail before their ultimate release."¹³⁰ By the end of the weekend, however, virtually all 1,500 had gained their freedom.

In retrospect, NLSC and ULP attorneys were bitter over the manner and timing of these releases, particularly over the fact that their massive interview effort had little apparent impact on the release process. According to *In Brief*, a University of Detroit Law School publication,

The weekend immediately following [the interview effort] was a time of disillusionment for the people in the Urban Law office. Except in a very few cases, the court did not act upon the recommendations of the office.¹³¹ In short, our efforts were in vain. Obviously when the Recorder's Court suggested that we engage in this information taking . . . they did not realize the value of the mission until it was completed and then decided it was useless.¹³²

One NLSC attorney put it somewhat more bluntly: "We got taken on the bail interviews. They really released people when they wanted to despite promises that people would be released sooner." As for the entire defense effort with respect to bail, and particularly to the strategy of "negotiation" rather than

"confrontation," another NLSC attorney admitted that "I'm not sure our badgering did anything . . . they simply had a tremendous problem with the jails."¹³³

The weekend release of some 1,500 defendants significantly diminished the "problem with the jails." In addition, "the court was following a very liberal policy in setting bond for those persons brought before the court for arraignment on Friday or Saturday," setting surety bonds within normal felony ranges as well as a good number of personal bonds. Thus by Monday, July 31, or eight days following the outbreak of the revolt, almost half of the total number of prosecuted defendants had gained their freedom, with approximately 2,200 (out of the original 4,200) still in confinement.¹³⁴

As we shall see, by August 1, the preliminary examinations for felony defendants began, at which time bail was reduced even for those who had prior records, if not to personals then to nominal surety bonds. Similarly, misdemeanor trials for the approximately 1,000 alleged curfew violators began on August 1, and virtually every defendant was sentenced to the time he had already spent in custody. By Friday, August 4, then, only 1,200 remained in prison; within less than two weeks of the outbreak of the revolt, well over two-thirds of the defendants had gained their freedom. Defendants continued to be released through the preliminary examinations, and by August 10, or eighteen days after the outbreak of the revolt, there remained approximately 350 or only 8 percent in confinement;¹³⁵ by September 28, or two months following the end of the revolt and just prior to the beginning of felony trials, forty defendants or less than 1 percent—either charged with serious crimes or being held for other crimes committed prior to the revolt—remained in custody.¹³⁶

A precise calculation of presentence detention time for misdemeanor and felony defendants is impossible. Unlike the case of Los Angeles (and, as we shall see, Chicago), there is no systematic study, either published or unpublished, on which to rely; nor was it within the resources of this writer to examine individually the case files of thousands of arrestees. What we do have to rely on, however, are the above figures on the jail population at various points in time. These figures make it clear that approximately 2,060 out of 4,260 defendants or over 48 percent bailed out within eight days, that within twelve days this figure was up to almost 72 percent, and within eighteen days to 92 percent. These figures, however, represent all defendants—both alleged misdemeanants and alleged felons—and we thus have no precise way of calculating separate detention time for misdemeanants and felons. We do know, however, that the misdemeanor trials began on August 1, and that they were over within two weeks, so that detention time for misdemeanants varied from a minimum of three days¹³⁷ to a maximum of three weeks—for an average estimated by the prosecutor of between five and ten days¹³⁸—longer than the

norm in "early sessions" cases for which bail is not usually set because trials and dispositions usually occur within two days of prosecution.

We also know that approximately one-half of the felony defendants were released by August 30, and therefore spent between five and seven days (depending on the date of their arrest) in custody. In addition, by August 10 over two-thirds of the preliminary examinations had been held,¹³⁹ and a sampling of cases on the recorder's court docket sheet reveals that at the examinations most of the defendants who were not among the original 1,500 released had their bonds reduced to personals or nominal surety bonds, with personal bonds predominating. It is likely, therefore, that between July 31 and August 10 close to another 1,000 felony defendants had gained their freedom, which means that over 80 percent of all felony defendants were free within eighteen days. Finally, scarcely more than 1 percent of all felony defendants were in custody by September 28, before any felony trials had begun.

As we have seen, in 1965 a full 26 percent of arraigned felony defendants were unable to bail out prior to the disposition of their case.¹⁴⁰ Moreover, 60 percent of arraigned felony defendants who were detained on surety bonds were detained for a period of over thirty days, with over 30 percent detained over two months. Similarly, an earlier study of the recorder's court conducted by the American Bar Foundation in 1957 but published in 1967, revealed that "170 of 376 Recorder's Court prisoners awaiting trial had been held for more than 30 days. Of this number 44 had been held for more than 60 days, and 22 were awaiting trial or sentence after more than 90 days."¹⁴¹ Finally, whereas Silverstein found that in 1962 only 8 percent of felony defendants ever had their bails reduced, following the July revolt at least 90 percent of the felony defendants had their bonds reduced.¹⁴²

Precise comparison is not possible, but it is clear that while a far *greater* proportion of felony defendants normally bail out within a three- to five-day period than bailed out within three to five days following the revolt, a much *lower* proportion of "normal" felony defendants bail out following the initial three- to five-day period than bailed out subsequent to this point after the revolt. In fact, as in the case of the major Watts revolt, post-five day bail-outs following the revolt more than made up for the lack of them during the first five days, so that a substantially greater proportion of defendants bailed out following the revolt than bail out normally. Figure 3.1 compares detention flow under riot and nonriot conditions.

The Preliminary Examinations

Having greatly reduced detention pressures within ten days of the outbreak of the revolt, court authorities were still faced with the unenviable prospect

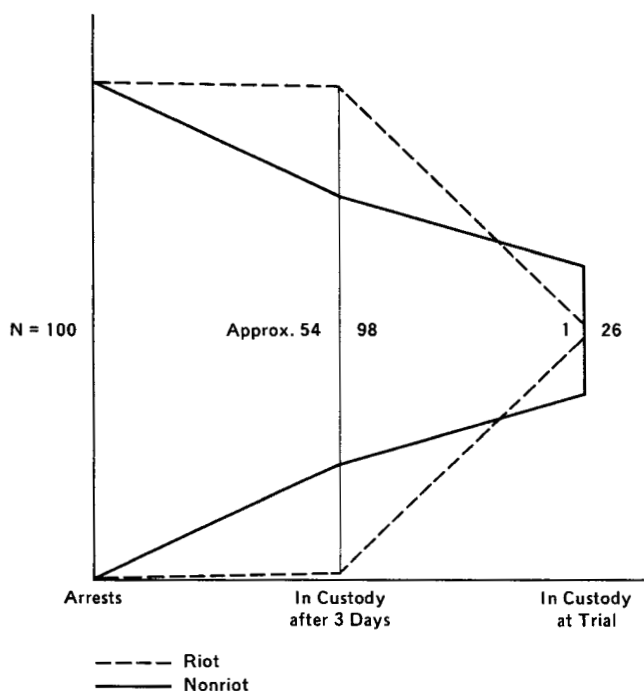


Fig. 3.1. Detroit: Comparative Complete Felony Detention Flow

of disposing of a six-month's normal quota of felony cases and a month's normal quota of misdemeanor cases within normal statutory time limitations and without neglecting completely the regular criminal calendar. Although Michigan law is generally less strict than California law with respect to time limitations throughout the criminal process, it does require that the preliminary examinations for felony cases be held within ten days of the arraignment on the warrant.¹⁴³ Beginning Tuesday, August 1, then, the first of over 3,000 felony defendants were scheduled to appear for their preliminary examinations; prior to that time, however, court authorities had evolved a number of arrangements designed to cope with the tremendous crush.

It was decided that two six-hour shifts (from 9:00 A.M. to 3:00 P.M. and from 3:00 P.M. to 9:00 P.M.), with six judges assigned to each shift, would be employed throughout the examination period, or at least until the bulk of examinations had been completed.¹⁴⁴ It was also anticipated that a number of Wayne County Circuit Court judges and a traffic court judge would be obtained (and were obtained) to replace vacationing recorder's court judges, although no overall increase in judicial manpower was contemplated (or implemented).¹⁴⁵ Finally, it was decided to assign the regular docket of pend-

ing felony cases to the Wayne County Circuit Court, and seventeen circuit court judges were made available for this purpose.¹⁴⁶

These measures taken, it was felt that the bulk of the preliminary examinations could be disposed of within or near the ten-day statutory limit. Interestingly enough, a suggestion on the part of a ULP representative that the ten-day rule be waived so that priority might be given to those still in custody was rejected by court authorities; although there is at least one precedent for the waiver of the ten-day rule by the court,¹⁴⁷ apparently recorder's court judges were reluctant to do so on their own initiative. "Thus Judge Brennan stated that they always set the examination date within ten days of the arraignment, and if it became evident that it would not be held before the eleventh or twelfth day, the reason for the delay was placed on the record and the attorneys would then specifically waive the rule."¹⁴⁸

Soon after the arraignments had begun, it had become apparent to recorder's court judges that their usual pool of criminal lawyers would be grossly inadequate to handle the statutorily required task of representation of defendants at their preliminary examinations. There is no state- or city-supported public defender in Detroit, and judges have traditionally relied upon a group of fifteen to twenty-five "police court lawyers" known in Detroit somewhat unaffectionately as the "Clinton Street gang" as a source of court-appointed lawyers to handle the representation of indigents. It was clear that additional lawyer manpower would have to be mobilized, but it was also clear that "compensating court appointments under the normal system [to handle over 3,000 defendants awaiting preliminary examinations] would have been extraordinarily expensive."¹⁴⁹

As we have seen, John Emery's suggestion that bar association counsel be appointed at the arraignments and continue to represent their clients throughout the criminal process had been rejected by the executive judge on the grounds that he wanted to retain control of the appointment process. Following this refusal, according to Emery,

We volunteered to get together a list and have people volunteer to render their services free, at least during the initial proceedings. We also advised the judges that we would be happy to—if the judges saw fit—have perhaps more experienced counsel appointed later on a more selective basis, that all of the people we would have volunteer would withdraw from cases when requested by the judge.¹⁵⁰

Toward the end of the week the judges realized that a rapid mobilization of a large lawyer manpower pool was imperative, and a telegram dated July 28 (Friday) but apparently composed somewhat earlier¹⁵¹ which was signed by Governor Romney, Mayor Cavanaugh, and Executive Judge Brennan was addressed to the president of the Detroit Bar Association requesting that "the State Bar, Detroit Bar, Wolverine Bar, and American Bar cooperatively

submit a list of legal counsel for voluntary assistance.”¹⁵² Later on Friday, the recorder’s court judges met and decided to request that the Detroit Bar Association handle without compensation representation at the preliminary examinations only. The president of the Detroit bar was named as chief of the effort, but he was on his way to an American Bar Association conference in Honolulu; in his absence John Emery was to preside over the volunteer program. Despite the concern earlier expressed by Emery that continuity of counsel be provided for, and that experienced criminal lawyers be appointed immediately following the volunteer attorney effort at the examinations, the court plan made no provisions for continuity of counsel; in fact, none was to occur.

On Sunday, August 30, a meeting of the defense community coalition was held at NLSC headquarters for the purpose of developing a volunteer lawyer mobilization plan. Serious disagreement emerged, revolving over the issue of whether the coalition should consent to participate in a plan which provided for representation at the preliminary examination stage only. NLSC representatives in particular objected to this proposed procedure, arguing that “Emery’s volunteer plan would give piecemeal representation, and that no serious constitutional challenges would result,” and that, after the examinations, “judges would go back to the old assignment process,” with the result that “the Clinton Street gang would be pleading people by the hundreds. Recorder’s court judges are generally hostile to counsel who really represent defendants—there is a direct relationship between lawyers who plead their clients guilty and lawyers who get assignments.”¹⁵³

In contrast, NLSC and a handful of other lawyers felt that “we ought to force the judicial system to appoint counsel who would stay with the case from start to finish right there and then.” Another NLSC attorney indicated that, in the absence of such appointments, “we insisted that the lawyer volunteering for the examination should be the lawyer to handle the trial,” and that about seventy-five people should be represented to serve as test cases for constitutional challenges.¹⁵⁴

Despite NLSC’s objections it was the position of the bar association which prevailed, and immediate efforts began to mobilize what had been declared as a goal of at least 500 attorneys to appear for the purposes of representation at the preliminary examinations only. Twenty to thirty bar association attorneys began the arduous task of contacting the Detroit area’s some 7,000 attorneys, and NLSC and ULP attorneys, although many declined to participate in the representation, did agree to prepare a manual on relevant criminal law and procedure intended to serve as a guide for the many lawyers unfamiliar with criminal proceedings who would necessarily be involved.¹⁵⁵

In all about 700 lawyers volunteered, or 10 percent of the total Detroit area

lawyer population,¹⁵⁶ of whom around 550 were utilized during the two-week examinations period, spending approximately six hours each (one shift) in court.¹⁵⁷ An effort was made to assign to each courtroom a "team captain" who was an experienced criminal lawyer, and what subsequently was dubbed the (NLSC-ULP) "riot bible" was supplemented by brief lectures by these and other experienced criminal lawyers prior to the beginning of each six hour shift.¹⁵⁸ According to Eduard Ziegenhagen of Wayne State University, "the bulk of volunteers were not very much different from the general legal community—there are no striking differences between them and a random sample of nonvolunteers in terms of age, income, or ideology."¹⁵⁹ None of the lawyers he interviewed expressed any feeling against "the system" and most failed to see in their efforts anything more than a "professional obligation" to aid the legal system in a time of stress.

The preliminary examinations began on Tuesday, August 1, and the overwhelming majority were disposed of within two weeks. The inadequate quality of representation which prevailed during the examinations—largely the result of an effort to hold preliminary examinations for 3,000 people within a two-week period—has been well documented,¹⁶⁰ and will not be repeated here. What will be emphasized, however, and what the University of Michigan study fails to note, is that to begin with, an unusually low percentage of preliminary examinations were waived as compared to the normal rate. It will be recalled that normally between two-thirds and three-quarters of all felony examinations are waived by defense attorneys; i.e., that waiver of the preliminary examination is an integral part of the process by which the recorder's court copes with an overwhelming volume of cases. We would expect, therefore, that faced with over 3,000 defendants to be examined within a two-week period considerable pressure would be exerted on the part of prosecution and judge to waive the examination, particularly in the light of the fact that many prosecution witnesses were not available at this time and that the general quality of evidence was poor.¹⁶¹

In fact, unusual pressure *was* exercised to obtain waivers, and volunteer attorneys later complained that this pressure from the prosecution and judges had a negative effect on their ability to represent their clients.¹⁶² According to one assistant prosecutor assigned to conduct preliminary examinations, "we wanted waivers so we could expedite the handling of cases having in mind subsequent review of cases. We said if you waive the examination, based on the facts in the write-ups you'll get a reduced plea—we don't ordinarily make that guarantee in normal times."¹⁶³ The assistant prosecutor assigned to oversee the entire "riot operation" agreed that "as an attorney you're under a lot of pressure in such a situation to waive—one, from other attorneys who want to get out of court, also from judges, cops, and prosecutors. It would break

down if everyone had an exam . . . you couldn't run fifteen exams in six hours."¹⁶⁴

Despite this pressure, as we have indicated a much lower proportion than normal waived their exams. Recorder's court statistics reveal that (as of August 9, 1968, with all but a handful of examinations completed) only 1,224 out of 3,154 defendants—or just under 38 percent—waived their examinations, as compared to the norm of from 67 to 75 percent. In part, this was because volunteer lawyers were daily advised by more experienced criminal lawyers that, given the weakness of prosecution cases and the lack of witnesses, exams should be held in the hope of obtaining dismissals.¹⁶⁵ In part also, there were no guarantees that individual prosecutors' promises with respect to eventual reductions would in fact be fulfilled. According to one attorney, "there was the practical problem involved in the communication of the agreement to another prosecutor at a later date . . . despite the promises made by individual prosecutors the chief prosecutor had not at this time evolved the policy of taking pleas to misdemeanors."¹⁶⁶ The accuracy of this observation was confirmed by the assistant prosecutor overseeing the "riot operation," who indicated that

I told my guys not to offer pleas in return for waivers, but some of the guys did. In view of the stupendous problem I wanted their recommendation in the file, but this was only an advisory opinion as I could make the decision later. I wanted to keep my options open at this time. The riot was over but we still didn't know what we had and what our policy should be.¹⁶⁷

Of the 1,930 defendants who were examined, 930 or 48 percent were dismissed, 554 by the court and 376 on motion of the prosecutor. (According to an assistant prosecutor in charge of operations, "it was in our self-interest to locate weak cases early so they wouldn't get through.")¹⁶⁸ Normally, only 20 percent of the examinations which are held result in dismissals, a confirmation of the proposition that the prosecution faced evidence problems of unusual proportions following the July rebellion.¹⁶⁹ As we have seen, normally less than 7 percent of prosecuted felony defendants are dismissed at the preliminary examination stage. In marked contrast, as Table 3.1 shows, following the July rebellion 930 out of 3,154 prosecuted felony defendants—more than 28 percent, or four times higher than the normal ratio—were dismissed at this stage.

The much *greater* role which preliminary examination screening played following the revolt as compared to normal times is not surprising in view of the much *smaller* role which police and prosecution screening played at the booking and warrant issuance stage during the revolt. Figure 3.2 illustrates this reversal and gives a comparative picture of riot and nonriot case flows from point of arrest through preliminary examination.

TABLE 3.1. Comparative Preliminary Hearing Dispositions

	<i>Riot</i> (percent)	<i>Nonriot</i> (percent)
Dismissed or discharged	28	7
Bound over for felony prosecution	72	93
Total	100 (62% had exams)	100 (33% had exams)*

* At most, 33 percent.

Notice that, as in the case of the major Watts revolt, the court system compensated for the unusually low preprosecution drop-off with an unusually high postprosecution preliminary examination drop-off. Notice too, however, that as in the case of Los Angeles' revolt, this compensation was not sufficient to offset completely the lack of preprosecution drop-off—thus there was still a higher than normal ratio of cases bound over to total arrests, and court authorities still were faced with well over 2,000 felony cases which required further disposition.

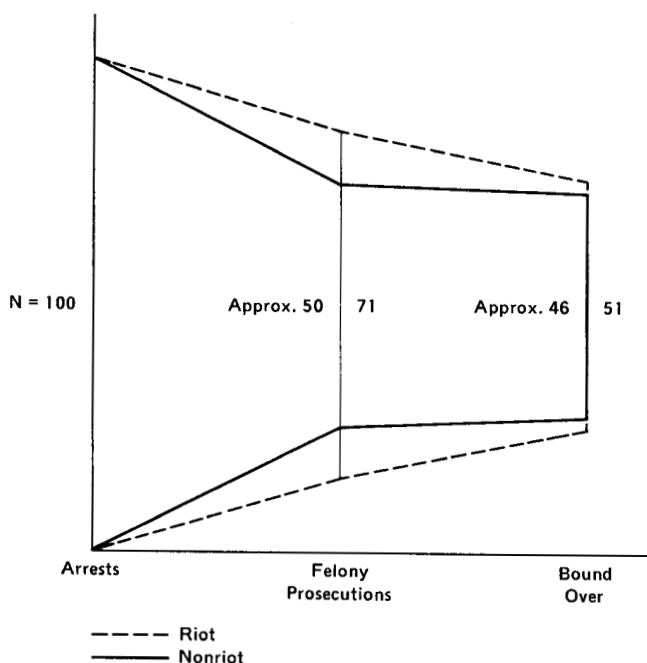


Fig. 3.2. Detroit: Comparative Felony Case Flow—Arrest through Preliminary Hearing

Misdemeanor Trials

During the two weeks in which preliminary examinations were held two recorder's court judges disposed of the bulk of the 1,030 misdemeanor defendants prosecuted for alleged riot offenses, 975 of whom were charged with violation of the governor's curfew proclamation, which carried a maximum sentence of ninety days in jail and/or a \$100 fine. As of August 8, some 600 cases had already been disposed of, although a few cases were held as late as October.¹⁷⁰

The misdemeanor program of NLSC—which at that time was an OEO-funded project specifically designed to provide representation for indigent misdemeanants—and the ULP mobilized approximately forty lawyers to provide representation at the misdemeanor trials. They represented an estimated 20 percent of the total number of misdemeanor defendants; another 20 percent were represented either by private attorneys or the Clinton Street gang, and an estimated 60 percent went unrepresented,¹⁷¹ probably a substantially lower percentage than normally.¹⁷²

Recorder's court statistics covering 940 misdemeanor defendants reveal that 642 or 68 percent were convicted, as compared to a normal rate of 88 percent for the entire year of 1965.¹⁷³ A combination of an unusually high percentage of representation and the unusually great evidence problems attendant with the mass arrests accounts for the unusually low conviction rate.

Precise statistics are not available concerning the method of disposition of the 642 convictions. According to the prosecutor, the great majority were disposed of by guilty pleas, with the rest via bench trials; there were few if any jury trials.¹⁷⁴ The extraordinary rapidity with which the misdemeanor docket was cleared is not surprising in light of the fact that court authorities established the policy, and informed defendants, that virtually all curfew violators would be sentenced to the time they had already served in return for a plea of guilty.¹⁷⁵ This policy enabled the court system to dispose of nearly a month's normal quota of misdemeanor cases in approximately two weeks, without seriously disrupting the processing of normal misdemeanor cases. Thus Prosecutor Cahalan could claim, with justification, that "the misdemeanor docket was cleared up without any particular problem."¹⁷⁶ Then too, it must be remembered that most misdemeanor defendants were still in custody at the time of their trials and that the "time served" policy was an effective means of clearing the jails of hundreds of persons, in effect a substitute for simply releasing all misdemeanor defendants on their own recognizance. Thus one NLSC attorney explained that "eventually it got so crowded that they had to release them—they 'released' a batch on curfews by asking them to plead guilty to time served."¹⁷⁷

Finally, a combined NLSC-Wolverine bar suit attacking the constitution-

ality of the curfew was being considered by the recorder's court and other courts at the time of the trials, and suspending in effect the sentences of the overwhelming majority of those convicted would, and did, render the constitutional question moot.¹⁷⁸

Thus court statistics reveal that of 664 defendants convicted at most 25 and at the least 16—or between 3 and 4 percent—were sentenced to any additional time in jail. Normally, according to Subin's 1965 data, 21 percent of convicted misdemeanor defendants are imprisoned, another 31 percent receive fines, and 19 percent receive probation. Only 29 percent of the convicted defendants normally receive suspended sentences, as compared to 96 to 97 percent following the July rebellion. Faced with a huge influx of cases to be disposed of within a short period of time (the ten-day rule for felony preliminary examinations also holds for misdemeanor trials),¹⁷⁹ cases for which there were often serious evidence problems, the court authorities drastically reduced the normal severity of their misdemeanor penalties. Of the 1,030 misdemeanor prosecutions, at most only 25 or 2 percent received any punishment other than that which they had already received by virtue of their presentence detention. Table 3.2 compares the riot misdemeanor sentence distribution with the normal distribution in recorder's court.

TABLE 3.2. Comparative Misdemeanor Sentence Distribution

<i>Sentence</i>	<i>Riot (percent)</i>	<i>Nonriot (percent)</i>
Jail	3-4	21
Probation	0	19
Fine	0	31
Suspended sentence	96-97	29
Total	100	100

Felony Dispositions

With 2,179 felony defendants bound over for trial, or almost half the normal yearly quota, court authorities were still faced with seemingly insurmountable administrative problems. Even the most efficient disposition of these cases would necessarily, in the words of one judge, "disrupt our court docket and greatly increase the city and county's cost of operating recorder's court."¹⁸⁰ Many of these cases, moreover, were largely unsupportable due to the overwhelming identification and evidence problems attendant to the mass arrests. Finally, there was the ever-present possibility that even a relatively small proportion of jury trial demands would bring the operations of the court to

a complete standstill. Thus one Wayne County Circuit Court judge predicted that the recorder's court would feel the effects of the revolt for months to come: "On a 50-week basis the average judge can conduct no more than 150 trials a year. Each case takes an average of two days, and you can bet that most of these riot-connected defendants will want trials."¹⁸¹ A recorder's court judge added that "it would be impossible to try all the cases."¹⁸² It is against this background of a huge volume of cases and the inherent threat of disruptive jury trial demands that the subsequent decisions of court authorities must be understood.

An immediate problem confronting court authorities was that of providing representation at the arraignment on the information, at which time defendants are informed of the felony charges facing them and asked to enter a plea. Since the Detroit Bar Association's volunteer effort was restricted to the preliminary examination stage, the executive judge preferring to retain control of the appointment process, most defendants (other than those who could afford private attorneys) went unrepresented between the time of their examination in August and their arraignment on the information in September. It was therefore necessary to assign counsel for over 2,000 defendants; at the normal rate of \$30 a case, however, the cost to the county would have been prohibitive,¹⁸³ so it was decided to assign two counsel per courtroom at \$200 each per day to handle all the arraignments. Assigning attorneys on a per day, per court basis rather than on a case basis, it was felt, would provide an estimated savings of at least \$2,000 per day in attorney's fees. Perhaps more significantly, under these conditions of one or two attorneys representing fifty to sixty defendants during the same twelve hour working day, it was unlikely that any serious and therefore potentially troublesome representation would occur.¹⁸⁴

Moreover, it was largely from the pool of court regulars—the Clinton Street gang—that assigned counsel for the purposes of the arraignment were drawn.¹⁸⁵ Thus the worst fears of NLSC and guild attorneys were realized: by retaining control of the appointment process, the judges were able to ensure that the defense attorney cooperation so essential to the smooth and rapid disposition of cases would be forthcoming. With representation in the hands of the Clinton Street gang, time-consuming defense motions could be avoided, maximum pressure to obtain guilty pleas could be exerted, and the threat of jury trial demands could be greatly reduced.¹⁸⁶ An attorney intimately involved in the volunteer effort at the preliminary examinations summed up the effort at that stage in the light of the subsequent form of representation provided to the defendants:

[At the exams] we demonstrated that defense counsel had the power to place an almost intolerable stress on the system. But this had a limited impact

because later the cases were handled by the Clinton Street group; the judges knew our representation was only for the preliminary examinations. Under normal conditions there is a positive correlation between the number of exams held [as compared to waived] and demands for jury trials, but this didn't occur because of the lack of continuity of counsel.¹⁸⁷

The threat of jury trials would be reduced even further by a lenient policy regarding the acceptance of guilty pleas initiated by the prosecutor's office. We have seen that at the time of the examinations no such policy was in effect; according to one judge, however, "after they realized how many people had to be set for trial and the great difficulties in proof they were only too glad to agree to pleas to reduced charges."¹⁸⁸ A prosecution official agreed, explaining that

Because of the large number of cases set for trial, the normal operation of the docket was prevented; serious felony cases had to be postponed. This put us about a year behind in our regular run of cases. From a practical standpoint, the urgency of reduced pleas was increased.¹⁸⁹

According to prosecution sources, reduced pleas were not to be granted for those "fanning the riot flames; anyone charged with arson, sniping, or stealing large amounts of loot would have to stand to face the full charge in court."¹⁹⁰ For those charged with E W/O B, or for 85 percent of all felony defendants, prosecution standards were the following:

- 1) if a defendant had two previous convictions arising out of a felony warrant, there would be no reduced plea;
- 2) if a defendant had a prior record, other than a traffic offense, a plea to a lower felony would be acceptable;
- 3) if a defendant had no prior record, a plea to a misdemeanor was acceptable. In these cases, prosecution and judges agreed, sentences following a plea to a misdemeanor could be limited to time already spent in custody.¹⁹¹

It is not clear whether by "prior record" the prosecution was looking at prior arrests or prior convictions. Since around half of all those arrested had no prior arrests, and as many as two-thirds had no prior convictions,¹⁹² this means that the prosecution would accept pleas to misdemeanors from, and not impose further incarceration on, anywhere from 42 to 57 percent of all felony defendants (one-half to two-thirds of the 85 percent charged with E W/O B), and that countless others would be permitted to plead to lesser felony charges. The abandonment of many of the normal criteria employed in plea bargaining, and the rigid adherence to the one criterion of prior criminal records, it was felt, would encourage a large number of guilty pleas and therefore be "an expeditious method of disposing of the more than 2,000 felony cases thrust upon [the court]."¹⁹³

Felony trials began in October, shortly after the arraignments on the in-

formation, although the bulk were not disposed of until the following April. As of August 9, 1968, with 1,871 or about 90 percent of the trials disposed of, court statistics reveal that 1,415 or 75 percent of the defendants bound over for trial were convicted, a rate markedly lower than the norm of from 80 to

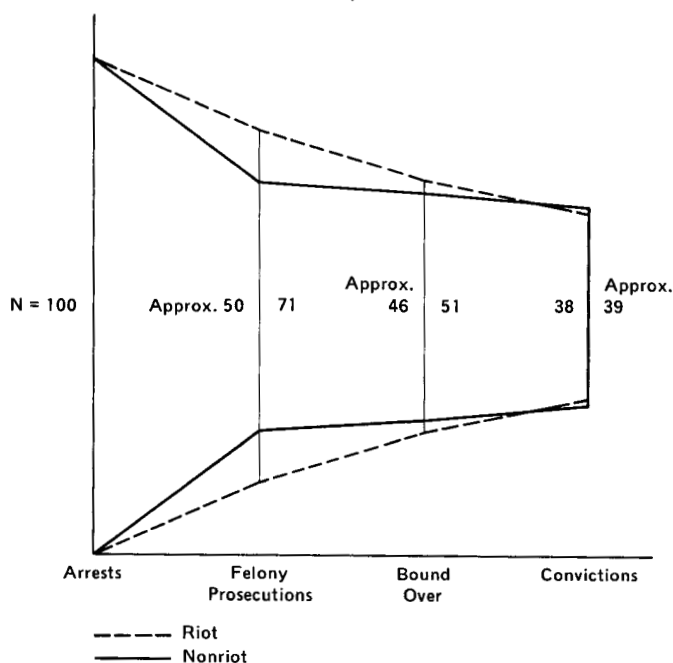


Fig. 3.3. Detroit: Comparative Felony Case Flow—Arrest through Conviction

85 percent convictions in recorder's court.¹⁹⁴ Figure 3.3 adds the conviction stage of the case flow "pyramid" to those which have already been presented to give a complete picture of comparative riot and nonriot case flows. Notice that the unusually high postprosecution drop-off which began at the preliminary examination stage continues through the trials, so that of a total of 2,846 prosecutions (on which we have disposition information) only 1,460 (1,415 plus 45 who pleaded guilty at their examination) or 51 percent were convicted, as compared to a normal rate of from 73 to 75 percent.¹⁹⁵ Note that this postprosecution drop-off virtually offset the unusually low preprosecution drop-off, in that the proportion of convictions to arrests was virtually the same following the revolt as it is normally.

Notice too, that, as in the case of the major Los Angeles revolt, for both riot and nonriot the conviction rate (convictions/prosecutions) is inversely related to the prosecution rate (prosecutions/arrests), although in opposite but almost exactly equal proportions. Thus a normal conviction rate of 73

percent is associated with a normal prosecution rate of around 50 percent, while a riot conviction rate of 51 percent is associated with a riot prosecution rate of 71 percent, indicating that the relative absence of police-prosecution screening during the revolt, and the consequent entry of both a large number of cases and a large number of unsupportable cases, accounts for the unusually low rate of convictions.

Of the 1,460 convictions, 1,443 or 99 percent were a result of guilty pleas! This extraordinarily high guilty plea rate, contrasting markedly with a norm of around 85 percent,¹⁹⁶ indicates that court authorities were almost completely successful in their efforts to ensure a smooth disposition of cases through the inducement of guilty pleas. Only seventeen convictions came as a result of trials; and of these only five, or about 0.3 percent of the total number of convictions, were a product of jury trials. Again, in contrast, normally a full 15 percent of convictions result from trials, with 5 percent coming from jury trials. An unusually high degree of prosecution and defense attorney cooperation successfully averted the threat of trials and consequent breakdown of the system.

The importance of this cooperative effort and of the consequent inducement of guilty pleas is evident when we consider that of the 473 defendants bound over for trial who did not plead guilty, all but seventeen or 97 percent escaped conviction. Of the 456 who were not convicted, 411 or over 90 percent had their cases dismissed either by the court (47) or on motion of the prosecutor (364), indicating that in the overwhelming majority of cases of those who could not be persuaded to plead guilty there was not even sufficient evidence to hold a trial. (Of the forty trials that were held, there were twenty-three acquittals, or 57 percent, compared to a normal rate of only 15 percent acquittals following trials.) In the absence of the concerted and successful effort to induce large numbers of guilty pleas it is likely that a conviction rate vastly lower than even the unusually low conviction rate (convictions/bind-overs) of 75 percent would have prevailed, and that, possibly, the majority of cases would have to have been dismissed.

A precise statistical breakdown of the charges on which defendants were convicted is not available.¹⁹⁷ We do know, however, that of the first 666 convicted defendants who were originally charged with felonies only 2 were convicted on the original charges; 664 or 99.7 percent pleaded guilty to misdemeanor offenses with maximum penalties of ninety days.¹⁹⁸ Although we have no precise data on the remaining convictions, there is no reason to assume that there was any deviation from the pattern established with the first 666.¹⁹⁹ Thus a special agent with the Intelligence Division of the U. S. Treasury Department testified at the McLelland Commission Hearings that "by far the majority of the felony charges were reduced to misdemeanor charges,"²⁰⁰ and this observation was verified by countless interviews with judges, prosecutors, and defense attorneys.

It should be noted that pleading guilty to reduced charges in recorder's court is extremely common during normal times as well; Silverstein's 1962 data show that of 156 felony convictions there were 113 pleas to lesser offenses, for a 72 percent reduced charge rate. Thus the rate of reduced charge convictions which prevailed following the revolt, although unusually high, was not extraordinary; what was extraordinary, however, is the degree of offense to which the defendant pleaded. Thus one assistant prosecutor who is known as the chief plea bargainer assigned to the recorder's court explained that

There was not a far greater percentage of reductions in riot cases than normally . . . the percentage of plea bargaining was about the same as normally. What the offense was reduced to [however,] was less. A guy charged with E W/O B in nonriot times . . . his chances are slim of getting a misdemeanor. But during the riot, we did it. Normally it would have been reduced to "attempt" [to E W/O B,] which is a two and a half year felony, instead of to the ninety-day misdemeanor as in the riot.²⁰¹

This assistant prosecutor's observations are confirmed by those of an attorney with a firm grasp of the normal operations of the court: "During the big riot, we copped a lot of felonies out to curfew violations. For example, normally receiving stolen property over \$100 is usually reduced to receiving stolen property under \$100: we copped a lot of these to curfew. This was very unusual."²⁰²

The unusually lenient reductions pattern is reflected in the distribution of sentences following the revolt. Of 1,453 convictions (the number disposed of by August 9, 1968), 849 received suspended sentences or sentences to time already served, 413 were placed on probation, 147 were fined, and only 42 were sentenced to any time in jail following their conviction. Significantly, of this last group only nine were sent to the State Prison of Southern Michigan, i.e., only nine received what are generally considered felony sentences

TABLE 3.3. Comparative Felony Sentence Distribution

<i>Sentences</i>	<i>Riot (percent)</i>	<i>Nonriot (percent)</i>
State prison	1	33
Jail	2	24
Probation	28	36
Fine	10	6
Suspended sentence	58	2
Total	99	101*

* The total exceeds 100 percent because some defendants had "mixed sentences," e.g., fine and probation.

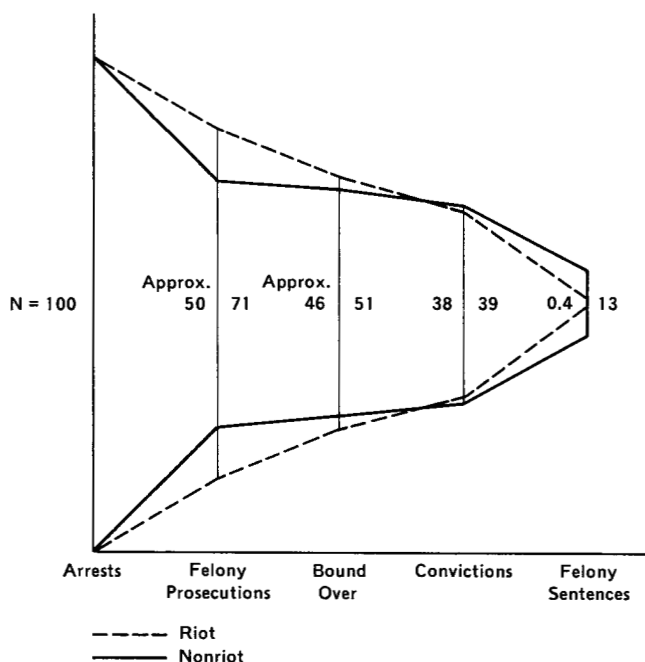


Fig. 3.4. Detroit: Comparative Complete Felony Case Flow

(of one year or more).²⁰³ Of the thirty-three defendants incarcerated who did not receive felony sentences, complete sentence information is available on nineteen sentenced to the Detroit House of Corrections: fifteen received terms of three months or less.

Thus over 58 percent of those convicted received suspended sentences or time-served sentences, 28 percent received probation (the majority for no more than one year), 10 percent were fined (all under \$100 and most between \$25 and \$50), and only 3 percent were incarcerated following their sentence, with less than 1 percent receiving felony imprisonment. This sentence distribution, as Table 3.3 indicates, involves a dramatic reversal of the normal distribution. Thus for the entire year of 1965 a full 57 percent of convicted felony defendants were incarcerated, 36 percent received probation, 6 percent were fined, and only 2 percent received suspended sentences.²⁰⁴ Moreover, of the 2,188 incarcerated in 1965, 1,263 or a full 58 percent (or 33 percent of all convictions) received felony sentences of at least one year in the state prison. Figure 3.4 compares riot and nonriot case flows, adding to Figure 3.3 the percentage of defendants receiving felony sentences.

As in the case of Los Angeles, court authorities rationalized this exceptionally lenient sentence distribution in terms of the atypicality of the riot sample. Thus one assistant prosecutor explained that

Our standards remained pretty much the same as far as reductions and sentences were concerned. What changed was the type of people we brought in. We hardly caught any "first wave" looters and the second and third wave weren't really criminals in terms of their prior records.²⁰⁵

A judge added that "we handled these cases in the same way as we handle any cases."²⁰⁶ It is true, as in the case of Los Angeles, that the riot sample probably had less serious conviction and arrest records than a random sample of those who normally pass through the recorder's court—thus one-half had no prior arrest record and two-thirds had no prior convictions. But it is clear from the data we have presented that the leniency of prosecution and judicial standards was not restricted simply to first offenders, as the articulated policy of the prosecutor and judges prescribed.²⁰⁷ Rather it appears that *leniency was applied across-the-board, to persons with and without prior records*. Although 50 percent of arrested defendants had prior arrest records, and 33 percent had prior convictions, only 3 percent of those prosecuted were incarcerated. Thus, even if there is a positive correlation between prior record and severity of sentence (our data is not broken down in such a way as to confirm or disconfirm this proposition), the relationship is likely to be extremely weak and certainly much less pronounced than normally. Thus one attorney commented that "because of the volume, the real criminals [i.e., those with prior records] got their biggest break ever in recorder's court."²⁰⁸ In the light of these observations, then, it is unlikely that prosecution standards remained "unchanged"; rather, it appears that prosecutors and judges radically altered the severity of their normal reductions and sentencing criteria. Thus we have seen that the chief plea bargainer for the prosecutor's office indicated that, due to the "increased urgency of pleas," cases which normally would have been reduced to attempted E W/O B, a two-and-a-half year felony, were reduced to entry W/O owner's permission, a ninety-day misdemeanor, following the revolt (perhaps 90 percent of all convictions in original felony cases). As in the case of the major Watts revolt, and as a consequence of a massive influx of felony cases, a drastic reduction in the normal severity of sanctions was necessary to achieve an efficient disposition of thousands of cases and to thereby cope with the overwhelming volume pressures which threatened to disrupt the entire court system.

Summary

As in the case of the major Los Angeles revolt, court authorities were successful in disposing of an unprecedented influx of cases without on the one hand engaging in wholesale dismissals and on the other completely disrupting normal court operations. This was only accomplished, however, by means of

a drastic reduction in the severity of sanctions normally imposed on defendants convicted of both misdemeanor and felony offenses: of the over 4,200 adults prosecuted, a maximum of only 67—or between 1 and 2 percent—served any time as a result of their sentence. As for the other well over 4,000 prosecuted adults, the determination of their guilt or innocence was virtually irrelevant as a determinant of the sanctions which they received. In the face of a very real and imminent threat to the court system, adversary proceedings gave way to an unprecedented cooperative effort between the “state” and the “defense”; as in the case of the major Watts revolt, but in an even more pronounced fashion, this cooperative effort of the court system to cope with such a massive influx of cases produced a virtual abolition of the traditional distinction between guilt and innocence as a determinant of criminal sanctions.

POSTREVOLT PLANNING

Planning on the part of court authorities—particularly on the part of police and prosecution—began almost immediately following the revolt itself. As early as November 1967 the police and the prosecutor’s office each assigned one individual to coordinate the planning of the respective agencies and to maintain constant contact between them.²⁰⁹ In an article written sometime during the fall, Prosecutor Cahalan summed up the major problems encountered by his office during the July rebellion and the major lessons drawn from the experience with these problems. His recommendations emphasized four main problem areas encountered in July—the massive detention problems, the bottleneck at the warrant clerk’s office, the unavailability of arrest records and the decision taken to charge and arraign defendants without records, and, finally, the abandonment of prosecution screening at the warrant issuance stage. Concerning detention facilities, the prosecutor advised that standby detention areas located near the court be available “so that those arrested can be channeled quickly and orderly from the precinct stations into this area, thus freeing-up the precinct detention cells for subsequent arrestees,” and recommended that methods be devised for keeping better track of prisoners.²¹⁰

As for the bottleneck at the warrant clerk’s office—a major reason in July for the unusually long delay between arrest, prosecution, and arraignment—Prosecutor Cahalan emphasized the need for additional clerical personnel and facilities as well as the need to prepare standard complaint forms. Regarding arrest records, he indicated that

It was our decision upon retrospect that it was a mistake to arraign the riot prisoners before a check was made for their arrest and conviction records be-

cause this meant that each person who was arraigned without his record had to be brought back into court a second subsequent time after his record had been checked. This taxed the police personnel whose job it was to bring the prisoners to and from the courtrooms.²¹¹

In a personal interview, Prosecutor Cahalan added that, in the future, "we will not recommend a warrant without the criminal record of the accused."²¹² To insure that records would be available, he recommended that police augment their normal capacity to obtain prisoner identification through fingerprint checks and other means.

Finally, the prosecutor recommended that

the most experienced assistant prosecutors should be assigned to the task of recommending warrants. At the very beginning of the process, much unnecessary volume can be eliminated from the flow and kept out of the courts, thus easing the clerical and custodial load through the proper screening of the police writup and the refusal of warrants where the facts do not justify them.²¹³

Police and prosecution planning, in fact, closely followed the recommendations of Prosecutor Cahalan. A special computerized prisoner control section was established within the Detroit Police Department which includes an emergency information center designed to "provide for the recording of prisoner information and its rapid dissemination upon request to prisoners' families and other interested persons";²¹⁴ and a "senior officer was assigned to the whole problem of control of prisoners from arrest through final disposition."²¹⁵ A complete survey was undertaken of all available police and court detention facilities, and the capacity of the identification bureau of obtaining past records was to be augmented through the importation of experts from other cities in the event of a future disorder.²¹⁶

A "Riot Emergency Plan" was established in the prosecutor's office which included the creation of a "riot executive committee" composed of senior prosecutors assigned to one of two teams designed to coordinate emergency activities on a two-shift, around-the-clock basis. Reiterating Prosecutor Cahalan's emphasis on (1) backup at the fingerprint identification bureau; (2) backup at the warrant clerk's office; (3) locating prisoners; and (4) reducing felonies to misdemeanors as "the principal sources of trouble,"²¹⁷ the plan called for, among other things:

1. A constant check of the identification situation. According to the head of one "riot team,"

If we get to the point where we have more than 1,000 coming in, I've set up my own audit department to have prosecutors out in the police departments and the sheriff's office to see how many identification cards are backing up. If prints are backing up, we'll waive a print check on those arrested on curfew violations, and for the balance everyone who has two valid pieces of identifi-

cation on his person . . . we'll check through a nationally hooked-up computer which keeps tabs on people. Above all else [we need] to keep ourselves fluid, to keep the rap sheets coming in—virtually every problem flows from that. During the July disorder the identification bureau fell behind immediately; we recommended “blind” without records and judges set bond without records. The high bonds backed the jails up. The first bottleneck was with the records—this led two steps later to the jail backup.²¹⁸

2. Combining the write-ups (arrest reports) and complaints and warrants into one standard form “in the high volume charges such as curfew and Entry Without Breaking.” This combination and standardization, it was felt, would “avoid the largest source of backup at the warrant clerk’s office”;²¹⁹

3. And finally

Reducing felonies to misdemeanors in proper cases. By refining the fingerprint identification process so that the Bureau doesn’t fall behind, we should be able to have records on all “looters” when a warrant request is presented to the prosecutor. Thus we can make our decision before the case formally reaches the court, as to whether a particular defendant will be charged with a felony or misdemeanor.²²⁰

In July virtually all but curfew violators were charged with felonies, and this put a tremendous strain on the court system. One assistant prosecutor emphasized the significance of the new decision to charge where possible with misdemeanors instead of felonies:

This means that cases will be disposed of within two or three days of arrest. It will save the felony docket from being bogged down, and save the taxpayer money as it won’t be necessary to appoint counsel to defend indigents, and will save the production of a large number of witnesses and police in court.²²¹

Thus by early winter of 1967, a considerable amount of planning had been accomplished. This planning, however, had focused largely on refining the techniques of mass processing rather than on crucial policy questions such as bail; it had not, moreover, involved the participation of all the agencies comprising the court system nor any representatives of the defense community. As early as January, pressures from various quarters began to mount for the creation of a formal, citywide committee which would address itself to a broader variety of questions than those to which police and prosecution planning had thus far been devoted and which would involve the participation of the broad spectrum of the legal community.

Beginning in January, Lois Pinkus, a staff assistant to John Emery, head of the newly established Legal Aid and Defender Association of Detroit,²²² began research on what was to culminate in the outlines of a comprehensive arrest-through-final-disposition plan calling for volunteer lawyer participation

at all stages of the criminal process and recommending the establishment of a citywide committee involving all relevant court agencies.²²³ Virtually at the same time both the Criminal Law Committee of the Detroit Bar Association and the Civil Liberties Committee of the State Bar Association—both of which include John Emery as a member—began an examination of this problem, and shortly were to adopt as their own the plan of Emery's office, as well as to cause this plan to be circulated to all city and county bar associations in the state as well as to the presiding judges of every court in the state.²²⁴ At the same time, largely through the efforts of Lois Pinkus, contact was made with an administrative assistant of the mayor in the hope of persuading the mayor to establish under his aegis a formalized citywide committee.²²⁵

Paralleling the efforts of Emery's organization and those of the city and state bar associations was the creation in March of an Ad Hoc Committee for the administration of justice during civil disorders involving the participation of the Detroit ACLU, NLSC, and the Wolverine bar, and presided over by Mike Wahls, president of the Wolverine bar. According to Wahls, although the major focus of the initial and subsequent meetings was the consideration of various types of class actions and affirmative suits that might be undertaken in the event of a future disorder, "we wanted to discuss with the mayor and the officials their policy . . . up until this time there was no indication from the mayor's office that they were going to do this."²²⁶

Despite the efforts of the Legal Aid and Defender Association, the Detroit bar, the state bar, and the Ad Hoc Committee, by the end of March no citywide planning committee, such as recommended in the Kerner Commission Report disseminated earlier that month, had been established. In April, however, the nationwide violence that flared anew following the assassination of Martin Luther King provided a further and more pressing impetus for the creation of such a committee. Several other factors also contributed to an increased sense of urgency. One was the publicity attendant to the development of a comprehensive emergency court plan for New York City under the aegis of Mayor Lindsay.²²⁷ A second was a resolution passed on May 9, by the Wayne-Detroit Legal Services Coordinating Council—composed of representatives of the Detroit Bar Association, NLSC, the Legal Aid and Defender Association, and the ACLU—unanimously "urging the President of the Detroit Bar Association to meet with the mayor immediately and urge him to assume leadership" of a citywide planning effort.²²⁸ Finally, there was the fear on the part of the mayor's office, as well as some recorder's court authorities, that Michigan Supreme Court Justice Tom Brennan, who had been chairing expanded planning sessions already taking place in the prosecutor's office, was preparing his own comprehensive plan. According to a special counsel to the mayor who was to assume responsibility for the city planning

committee, "we felt we ought to head him off. He's a conservative, and since it would be mainly Detroit which would be affected we felt we needed a plan of our own."²²⁹

After persuading some reluctant judges and prosecutors that a formal, co-ordinated effort was necessary, the initial meeting of the Mayor's Committee on the Administration of Justice during Civil Disorders took place on June 24. In his remarks to the committee members, Mayor Cavanaugh indicated that "the goal to be reached is that set by the President's National Advisory Commission on Civil Disorders, to guarantee all citizens justice under conditions of civil disorder,"²³⁰ and set a target of 7,500 arrests for four consecutive days as the maximum influx for which court plans should be geared.

The membership of the committee—which included representatives of the Detroit Bar Association, the Legal Aid and Defender Association, and the Wolverine bar as well as police, prosecution, and judicial officials—was selected by the mayor after his administrative assistant Paul Borman submitted to him a list of suggested names. Borman's list, in turn, was largely based on a list submitted by Lois Pinkus, John Emery's staff assistant, although, according to Pinkus, "lots of people were rejected. The mayor didn't choose anyone from the ACLU, guild, NLSC or any black militants. The present president of the Wolverine bar was rejected in favor of a less militant former president."²³¹ The coordinator of the planning committee agreed that the mayor had been selective, but argued that his selectivity was based on personal rather than ideological considerations:

The fact of the matter is that the mayor has strong personal likes and dislikes even if he might find himself agreeing ideologically . . . as it happens the mayor just doesn't like the director of the ACLU. When he puts together a committee he wants his friend to be on it.²³²

The fact that the coordinator is on the board of the Detroit ACLU and has a solid liberal reputation would tend to lend credence to this observation.

At the initial meeting, eight functionally differentiated subcommittees based largely on the New York City plan were created and charged with preparing their respective reports within three weeks as a preliminary to the development of a coordinated plan. Since the police, sheriff's, and prosecutor's offices had already developed plans which cross-cut many of the separate subcommittee responsibilities, much of the planning simply involved the presentation to the committee of the whole of previously developed plans. Thus, according to Lois Pinkus, "there has been a minimum of interaction. Each agency submits its own plan."²³³ The coordinator of the mayor's committee agreed, indicating that "for example, the detention subcommittee was nothing more than a vehicle for the sheriff communicating his plans to us. We sort of accepted his plans passively."²³⁴

Several innovations were developed by the committee, however, which indicated an effort on its behalf to implement at least on paper many of the Kerner Commission recommendations. Thus for example an expanded role for volunteer lawyers was contemplated, to begin at the initial arraignments stage and to be coordinated by the Legal Aid and Defender Association. The question of continuity of counsel, however, was not answered to the satisfaction of some on the committee,²³⁵ and it appears as though plans call for the retention of the process of the previous July of judges appointing permanent counsel only after the arraignment on the information stage.

In addition to expanding the representation role of volunteer attorneys to include the initial court appearance, the committee called for the legal community to play another role, that of serving in the capacity of observers in the police precincts. Such observers would be appointed jointly by the Detroit Bar Association and the Wolverine bar. In addition, these teams of volunteer attorneys were to be matched by lay observers chosen from various community groups; at the time of this writing, however, no agreement had been reached on how active or passive the lawyer observers would be—e.g., whether they would in effect represent the defendant at this initial stage of the criminal process or whether their role was simply that of observers strictly speaking—or on how the lay observers would be selected.²³⁶

Also out of a concern for "community relations," a central information center was to be created designed "to provide information to relatives and friends of defendants relative to his location, charges against him, visiting hours and the steps which can be taken to help him."²³⁷ It will be recalled that in July a central complaint of attorneys and relatives alike was that they were unable for many days to establish contact with arrestees.

Finally, several new steps were taken with regard to the crucial question of bail. In general, the recommendations of the committee followed those of the Kerner Commission, which called for separate bail policies for misdemeanors and felonies, with misdemeanants being released on their own recognizance or on the equivalent of traffic citations and felony defendants receiving individualized, not uniform, money bail.²³⁸ Thus committee plans called for the precinct station release of curfew violators on their own recognizance or on a minimal interim bond,²³⁹ and, according to one judge, release on recognizance was contemplated for other misdemeanants at their initial court appearance.²⁴⁰

As for felonies, no precise policy has been articulated; according to the committee coordinator, "all the executive judge said regarding felony bails is that in effect July 1967 will be repudiated, and that the policy will be individualized bail."²⁴¹ To this end, arrangements have been made to utilize the services of the probation department as well as volunteer attorneys to conduct interviews on an around-the-clock basis to provide the necessary in-

formation for bond setting at the arraignment if arrest records were not available.

Despite these various arrangements, the coordinator of the mayor's committee expressed skepticism over the probability of eventual implementation:

There are no guarantees [concerning implementation]. The executive judge can tell us that the recorder's court will do x, y, and z, but if there should be an emergency and he decides this isn't feasible, all we could do is protest. Beyond that there is nothing we could do. If he decided on a tough bail policy I seriously doubt that the mayor could reverse it. Regardless of who's on the committee, the mayor still can't control the recorder's court. I'm minimizing the importance of the committee, frankly.²⁴²

The coordinator's skepticism was heightened by the recognition that the Michigan Supreme Court, dominated by conservatives, could in effect nullify the plans of his committee by asserting its powers of superintending control. Thus in July the supreme court passed a resolution to the effect that "in the event of a judicial emergency, the Chief Justice or a judicial officer designated by him shall direct and coordinate the work of all affected courts, court employees, court officers and judicial personnel for the duration of the emergency."²⁴³ Thus the chief justice or his designee would have the power to suspend local court rules.

Although the precise impact of this resolution on the mayor's committee plans is not clear, since the Michigan Supreme Court resolution entailed little but an affirmation and public articulation of powers which they already possessed according to the state constitution, the potential court intervention did add another element of unpredictability into planning efforts. Even if the cooperation of recorder's court authorities would be forthcoming, there was no guarantee that the committee's plans would not be superseded by the Michigan Supreme Court. Thus in September, Tom Brennan of the supreme court indicated in a press conference that the initial arraignments during a future disorder might well take place in police precincts, a plan which had been specifically rejected by the mayor's committee on the grounds that "we felt it would create a bad atmosphere by suggesting a police-judge tie-in and that the use of probation officers for bail review would require a central location for the arraignments."²⁴⁴

As of the fall of 1968, then, the status of the committee's plans remained in doubt; no part of the report had been made public and no comprehensive plan had been submitted to the mayor. The efforts to "head off" Tom Brennan had failed, and given the reality of Michigan Supreme Court involvement, as well as several new judges being elected to the recorder's court bench, new meetings were contemplated, where, according to the coordinator, "the whole thing will be rethought." Although he indicated that planning

efforts would be in abeyance throughout the winter of 1968–1969, he expressed his intention to review planning efforts in the spring “when things begin to get hot again.”²⁴⁵

The reaction of the “left wing” of the Detroit defense community was one of unmitigated hostility to the planning efforts outlined above. An inquiry directed to the NLSC by the committee as to its plans for the utilization of attorneys was termed “illegitimate,” in the light of the abuses of the previous July, by the head of NLSC’s Bail Release Project, who added that

A public demand must be made by either the Committee or NLSP of the courts, the Prosecutor, the Sheriff, the Police Commissioner and the Mayor as to what *they* will do. A public response is due. If there is no response, or the wrong response, then I believe NLSP should withhold disclosure of its contingent plans.²⁴⁶

Similarly, ACLU and guild lawyers vigorously attacked the composition of the mayor’s committee at a meeting of the Wayne-Detroit Legal Services Coordinating Council, and the executive director of the ACLU indicated in September 1968 that he planned to get a press release through the ACLU board attacking what he called the “establishment committee.”²⁴⁷

As for the plans of the “left wing,” in the first draft of a contemplated public release it was announced that

Last year many attorneys such as ourselves greased the skids at Recorder’s Court serving as volunteer lawyers during and after the July Revolution. . . . [I]n the event of another July, 1967 . . . we agreed that we should be prepared to move into Federal Court to attack procedures that might be repetitive of last year’s wholesale denial of reasonable bail, file removal petitions, attack unconstitutional proclamations, etc. A number of us have previously moved in this direction and work on such projects is continuing.

The draft concluded with an exhortation that

Attorneys who lent support to the system’s injustices then by volunteering their services, saving the county thousands of dollars, should not do so again. We the undersigned will not, for we recognize the hypocrisy of our profession if it does not demand first that the system be just before trying to help individuals who, at best, can but grasp for the remnants of justice denied.²⁴⁸

CONCLUSION

As in the case of Los Angeles, wide variations in the magnitude of ghetto revolts produced wide variations in the nature and severity of the sanctions imposed by the courts on participants in those revolts. Following the Kercheval revolt, a cohesive and committed group of attorneys engaged the authorities in systematic and largely successful *adversary* proceedings. Following the

major July rebellion, a large, more amorphous and less united defense coalition (which included some of the same actors involved in the 1966 defense effort) *cooperated* with court authorities to achieve the most efficient possible disposition of cases which threatened the very persistence of the court system. Despite the relative success of defense efforts in 1966, the sanctions imposed by the court following adversary proceedings on convicted Kercheval defendants were markedly *more* severe than those which resulted from the cooperative process which followed the major and incomparably more destructive July rebellion.

Similarly, as in the case of Los Angeles, planning on the part of court authorities in Detroit, although evoking more widespread participation than in Los Angeles, focused largely on the "technical" and mechanical problems of adjusting and streamlining court procedures to better cope with a given volume of cases, in itself testifying to what we have asserted was the decisive impact of the huge volume of cases following the major revolt. This planning in Los Angeles and Detroit, however, was of marginal significance in shaping subsequent court responses; neither city experienced a major revolt following the completion of its planning efforts. In Chicago, however, similar plans would be developed *prior* to the major revolt in that city, and these plans would have a significant impact on the response of the Chicago court system to its major ghetto revolt.

NOTES TO CHAPTER THREE

1. Testimony of Dr. Robert Emmet Dunne, assistant counsel, Subcommittee on Riots, Civil and Criminal Disorders, Senate Committee on Government Operations, March 20, 1968.

2. Report of the Detroit Commission on Community Relations, in the files of the commission.

3. Personal interview with Hubert Locke, former special assistant to the Detroit police commissioner.

4. *Detroit News*, August 21, 1966, Section G. See also the files of the Detroit Commission on Community Relations.

5. Controversy persists as to whether the entire incident was provoked by the police to this end, or whether it was provoked by members of the two organizations and then utilized to this end by the police.

6. Personal interview with Detective Lieutenant William McCoy, Detroit Police Department.

7. The discrepancy in arrest figures is a product of the fact that several persons were arrested more than once during the incident; one person, in fact, was arrested four times. Thus the figure of ninety-four to ninety-eight arrests represents separate arrests, while the figure eight-nine represents the total number of individuals arrested.

8. In 1965, 36 percent of all Detroit arrests were nonprosecution arrests; in 1964, around 50 percent were nonprosecution arrests. See Harry I. Subin and Joseph J. Connelly, "Administration of Criminal Justice in the Recorder's Court of Detroit," preliminary draft, April 29, 1966, appendix. (Hereinafter cited as the Subin Report.)

9. Personal interview with Assistant Prosecutor Jay Nolan.

10. In 1965, of some 27,000 prosecution arrests, there were 6,307 felony warrants issued and 21,111 misdemeanor warrants issued. Subin Report, p. 5.

11. Interview with Nolan.

12. *Detroit News*, August 23, 1966 and August 17, 1966.

13. Personal interview with Ron Reosti, Neighborhood Legal Service Centers. See also an advertisement in the *Detroit News*, August 17, 1966, paid for by the Citizens for Fair Law Enforcement.

14. Subin Report, p. 17; and Lee Silverstein, "Bail in the State Courts," *Minnesota Law Review* 50, no. 4 (March 1966); 626, table 2.

15. From the files of the Detroit Commission on Community Relations.

16. Interview with McCoy.

17. *Detroit News*, August 12, 1966.

18. Subin Report, p. 18.

19. Silverstein, "Bail in the State Courts," p. 638.

20. There are indications that, in the absence of bail-raising efforts conducted by these organizations, several militants would have spent longer periods in jail prior to bailing out.

21. Subin Report, p. 17.

22. Personal interview with Nathan Conyers.

23. Interview with Conyers.

24. Lee Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (Chicago: American Bar Foundation, 1965) p. 377, table 15, and Subin Report, p. 11.

25. Personal interview with David Rosenthal, attorney. Another reason that examinations are waived is that there are no financial advantages in holding them. Generally speaking, a court-appointed attorney receives more for the case if it goes to the arraignment on the information stage than if it is dismissed at the preliminary examination. Waiver of the examination, therefore, which guarantees that the case will go to the arraignment on the information stage, is in the financial interest of the attorney.

26. Subin Report, p. 21.

27. We have seen that normally from 25 to 33 percent receive exams, and that 20 percent of those having exams are dismissed. Thus normally only between 5 and 7 percent of the total number of prosecuted felony defendants are dismissed at the exams.

28. One defendant died prior to the time of his trial.

29. Subin Report, p. 5.

30. Silverstein, *Defense of the Poor*, p. 377, table 16.

31. Subin Report, pp. 5, 14.

32. Ibid., p. 16.
33. Personal interview with Myron Wahls, president, Wolverine Bar Association.
34. Personal interview with Superintendent John Nichols, Detroit Police Department.
35. Rumors persist in Detroit that the actual number of deaths was far greater—perhaps three times as high—but that publication of the “real total” has been suppressed.
36. Hubert G. Locke, “Riot Response: The Police and the Courts,” *Journal of Urban Law* 45 (Spring and Summer 1968): 808. (Hereinafter cited as the Locke Report.)
37. Interview with Hubert G. Locke.
38. Locke Report, pp. 806, 808.
39. Detroit Police Department, “Monthly Report,” November 1968. See also Detroit Police Department, “Report on the Civil Disorder Occurring in the City of Detroit,” p. 11. (Hereinafter cited as the Police Report.)
40. Interview with Nolan.
41. Report of the National Advisory Commission on Civil Disorders (New York: Bantam, 1968), p. 339. (Hereinafter known as the Kerner Commission Report.)
42. Interview with Nichols.
43. William Cahalan, “The Detroit Riot,” *To the Point*, Wayne County Prosecutor’s Office Law Enforcement Training and Information Bulletin, p. 6. (Hereinafter cited as the Cahalan Report.)
44. Unpublished and unattributed report, in the files of the author.
45. Interview with McCoy.
46. Police Report, p. 11, and Detroit Police Department, “Monthly Report,” November 1968, p. 9, which shows that in the first nine months of 1968 there were 20,864 prosecution arrests and 19,026 nonprosecution arrests.
47. Thus it was subsequently discovered that of the 4,881 prosecution arrests, 514 were not “riot related.” See Senate Subcommittee on Riot, Civil and Criminal Disorders, Senate Committee on Government Operations, appendix, Exhibit 68, March 20, 1968.
48. Interview with Nichols.
49. This information was made available to this author on a confidential basis by a former Detroit Police Department official.
50. Cahalan Report, p. 5.
51. Personal interview with Doreen Koenig, Neighborhood Legal Service Centers.
52. According to the assistant prosecutor who supervised much of the July operations, “there was no plan at all prior to the July riot.”
53. From the files of E. Burke Montgomery, clerk of the recorder’s court.
54. Cahalan Report, p. 5.
55. Interview with Nolan.
56. Personal interview with James Garber.

57. See note 10.
58. Interview with Nolan.
59. Dennis James, "Report of the Project Coordinator of Bail Release Project," Neighborhood Legal Service Centers, p. 3.
60. Personal interview with William Cahalan.
61. "The Administration of Justice in the Wake of the Detroit Civil Disorder July 1967," *Michigan Law Review* 66 (Summer 1968): 1554, n. 51. (Hereinafter cited as the *Michigan Law Review* Report.)
62. Police Report, p. 6.
63. From the files of E. Burke Montgomery.
64. Kerner Commission Report, p. 339.
65. Personal interview with Lawrence Gubow.
66. Quoted in Cyrus Vance, "Final Report Concerning the Detroit Riots" (unpublished manuscript), p. 44. (Hereinafter cited as the Vance Report.)
67. Personal interview with Judge George W. Crockett, Jr., recorder's court.
68. *Michigan Law Review* Report, p. 1550.
69. *Detroit Free Press*, October 15, 1967.
70. Interview with Crockett. Judge Crockett, the one judge who refused to follow Judge Brennan's recommendations and who wrote a letter to Brennan defending his position, remarked that "there wasn't even much discussion of the constitutionality of high bail."
71. George W. Crockett, "Recorder's Court and the 1967 Civil Disorder," *Journal of Urban Law* 45 (Spring-Summer 1968): 841.
72. *Webster Report*, an unpublished paper in the files of John Emery, Jr., Legal Aid and Defender Association of Detroit, p. 8.
73. Philip Colista and George Domonkis, "Bail and Civil Disorder," *Journal of Urban Law* 45 (Spring-Summer 1968): 835, table 19.
74. From the files of the author.
75. Crockett, "Recorder's Court and the 1967 Civil Disorder," p. 843.
76. Colista and Domonkis, "Bail and Civil Disorder," p. 811.
77. *Ibid.*, p. 835, tables 18 and 19.
78. Personal interviews with Ron Reosti, Dennis James, and John Emery.
79. An exchange between one judge and one defendant typified the atmosphere at the arraignments: Judge: "You can't get a personal bond in this court—you're nothing but lousy, thieving looters." Defendant: "You have to prove that." Judge: "We will." Quoted in the *Michigan Law Review* Report, p. 1573.
80. Interview with Rosenthal. See also John Emery, "The Public Defender and Civil Disorders" (Speech delivered at Midwest Regional Meeting of the National Legal Aid and Defender's Association, June 13, 1968).
81. Personal interview with former Michigan Supreme Court Justice Theodore Souris.
82. *Detroit News*, July 25, 1967, and *Detroit Free Press*, July 24, 1967.
83. Personal interview with Jerry Clay, Neighborhood Legal Service Centers.
84. Emery, "The Public Defender and Civil Disorders."

85. Interview with Nolan.

86. Emery, "The Public Defender and Civil Disorders"; *Michigan Law Review* Report, p. 1551; interview with Nolan. According to NLSC records, this policy lasted until Friday, July 28. See August 10 memo from Conrad Egan, in the files of the University of Detroit's Urban Law Program.

87. This bottleneck, along with another one in the police fingerprint identification procedure, was the major reason that arraignments were running far behind arrests. Thus the prosecutor estimated that by Tuesday, arraignments were eight hours behind arrests, and we have already seen that by Thursday over 1,600 arrests had yet to be processed. *Michigan Law Review* Report, p. 1558, n. 64.

88. *Ibid.*, p. 1558.

89. Yale Kamisar, "Some Salient Features of the Administration of Criminal Justice During and After the July 23-28 Detroit Riot," unpublished paper (October 5, 1967), p. 7.

90. *Michigan Law Review* Report, p. 1558.

91. Interview with Souris.

92. Personal interviews with Harvey Wish and Mr. Badamo, bail bondsmen.

93. *Michigan Law Review* Report, p. 1549.

94. Silverstein, "Bail in the State Courts," p. 638.

95. Note that normally detention pressures at the Wayne County Jail play a role in influencing bail policy. Thus one judge, quoted in *Law Enforcement in the Metropolis*, ed. by Donald J. McIntyre, Jr. (Chicago: American Bar Foundation, 1967), p. 122, remarked that "if everyone appearing on arraignments was required to produce a [surety] bond, the jail population would rise to unmanageable proportions."

96. Cahalan Report, p. 5.

97. *Detroit Free Press*, July 29, 1967. Approximately 750 additional prisoners were detained in recorder's court bullpens, which have a combined normal maximum capacity of 360 and which are not designed for overnight detention (Detroit Police Department Interoffice Memo, "Location and Capacity of Detention Quarters of Prisons," November 22, 1967, on file with the author).

98. Personal interviews with Philip Clista, dean of the University of Detroit Law School and John Houston, Neighborhood Legal Service Centers.

99. Personal interview with Art Bowman, executive director, Neighborhood Legal Service Centers.

100. Interviews with Reosti and with James Lafferty, president, Detroit chapter, National Lawyer's Guild and NLSC attorney.

101. Personal interview with John Feikens, former president, Detroit Bar Association.

102. Interview with Reosti. Another attorney, Sheldon Otis, who had planned to file an action in federal court attacking bail practices also dropped his plans, in part because "Emery's negotiation efforts took the impetus away from class actions." Two class actions unrelated to bail practices were undertaken, however, but only after the revolt had ended. One was a joint NLSC-Wolverine bar attack on

the constitutionality of the emergency curfew proclamation, and the other an NLSC attack on the house-to-house searches undertaken by the National Guard following the revolt.

103. Interview with Bowman.
104. Interview with Reosti.
105. Interview with Bowman.
106. Interview with Lafferty.
107. NLSC *Newsletter* I, no. 1 (July–August 1967): 2.
108. Telephone interview with John Doar.
109. Interview with Garber.
110. Minutes of the First Co-Ordinating Committee to Deal with Riot Prisoners, July 26, 1967. (Hereinafter cited as Minutes.)
111. Interview with Garber.
112. Minutes.
113. Interview with Doar.
114. Interview with Garber.
115. Interview with Nolan.
116. Detroit ACLU *Civil Liberties Newsletter* 9, no. 1 (Summer 1967).
117. Personal interview with Ernest Mazey.
118. Interview with Lafferty.
119. Interviews with Reosti and Colista.
120. Interview with Rosenthal.
121. Emery, "The Public Defender and Civil Disorders."
122. Interview with Garber.
123. Interview with Garber.
124. Personal interview with E. Burke Montgomery, clerk of the recorder's court.
125. Interview with Crockett.
126. Interview with Garber. According to one prosecution official, the governor was concerned that such a move would destroy the possibility of holding the annual state fair that year.
127. Interview with Crockett.
128. Interviews with Mazey and Garber. According to Conyers, he had had earlier meetings throughout the week with judges and prosecution officials to protest the bail policy.
129. Interview with Garber.
130. Interview with Montgomery.
131. At a Friday meeting between NLSC and ULP representatives and Judge Brennan and Prosecutor Cahalan, however, the latter agreed to review for lowering of bond those persons whom NLSC and ULP attorneys had interviewed and recommended for reductions but whose bonds had not yet been reduced. See chronology of defense efforts, in the files of the Urban Law Program.
132. *In Brief* 45, no. 1 (October 16, 1967): 6.
133. Interviews with Reosti and Lafferty.
134. Vance Report, p. 47.

135. Ibid.; also from the files of John Emery, Detroit Legal Aid and Defender Association.

136. From the files of Inspector Shoemaker, Detroit Police Department; interview with Montgomery.

137. Most curfew arrests, in contrast to felony arrests, were made during the latter part of the week, whereas the 1,500 felony defendants released by the thirtieth had all been arrested between the twenty-third and twenty-fifth.

138. Cahalan Report, p. 11.

139. From the files of E. Burke Montgomery.

140. Subin Report, p. 7.

141. McIntyre, *Law Enforcement in the Metropolis*, p. 130.

142. Silverstein, "Bail in the State Courts, p. 634, table 5.

143. Michigan Comp. Laws, 766.4 (1948). Thus for example there is in Michigan no statutory provision limiting the time between preliminary examination and arraignment on the information.

144. Interview with Montgomery.

145. *Michigan Law Review* Report, p. 1602.

146. Letter from Presiding Judge Leonard to judges of the recorder's court and clerical staff, August 5, 1967, in the files of E. Burke Montgomery.

147. *In Re Peoples*, XLVII, Michigan, 626, 14 N.W. 112 (1882).

148. *Michigan Law Review* Report, p. 1600, n. 273.

149. Ibid., p. 1603 and n. 285.

150. Testimony of John Emery before hearings of the Kerner Commission, in the files of John Emery.

151. Interview with Feikens.

152. From the files of John Emery.

153. Interviews with Lafferty and Houston.

154. Interviews with Reosti and Lafferty.

155. Thus the Subin Report, p. 19, indicates that there are only from fifty to seventy-five full-time criminal lawyers in Detroit.

156. Testimony of Emery before hearings of the Kerner Commission.

157. According to Prosecutor Cahalan, this volunteer effort accounted for 70 percent of the total representation at the examinations; he estimated that some 30 percent had retained counsel. Cahalan Report, p. 11.

158. Interviews with Emery and Rosenthal.

159. Personal interview with Professor Eduard Ziegenhagen.

160. See the *Michigan Law Review* Report, pp. 1594-1622.

161. Interview with Rosenthal.

162. Emery, "The Public Defender and Civil Disorders," p. 6, reports this as well as other findings of Professor Ziegenhagen.

163. Personal interview with Clarence Lassiter, assistant prosecutor, chief of the recorder's court detail.

164. Interview with Nolan.

165. Interview with Rosenthal.

166. Interview with Rosenthal.

167. Interview with Nolan.
168. Interview with Nolan.
169. Thus an assistant prosecutor explained that not only was police identification of suspects an extremely difficult enterprise, but also that store owners would often refuse to appear as complaining witnesses. Interview with Nolan.
170. From the files of E. Burke Montgomery.
171. Interview with Bowman.
172. Subin Report, p. 12, n. 27.
173. *Ibid.*, p. 5.
174. Interview with Cahalan.
175. Interview with Bowman.
176. Cahalan Report, p. 11. Prosecutor Cahalan's further remark that "most pleaded guilty and *most of the rest were found guilty*," however, is a gross distortion of the facts: 300 defendants not pleading guilty were either dismissed or acquitted. See Senate Subcommittee on Riots, Civil and Criminal Disorders, Exhibit 6, Schedule 6, March 20, 1968.
177. Interview with Reosti.
178. Interview with Wahls.
179. As with the ten-day felony rule, it can be waived in the case of misdemeanors by a defense request for a continuance. Interview with Clay.
180. Interview with Crockett.
181. *Detroit News*, August 27, 1967.
182. *Detroit Free Press*, October 15, 1967.
183. Interview with Crockett.
184. Unpublished and unattributed report, p. 24.
185. Interviews with Crockett, Lafferty, and Rosenthal.
186. The prosecution also generally received the consent of defense attorneys to the waiver of the normally mandatory presentation of the transcript of the preliminary examination at the time of the arraignment on the information. Interview with Lassiter.
187. Interview with Rosenthal.
188. Interview with Crockett.
189. Interview with Lassiter.
190. Interview with Nolan.
191. *Michigan Law Review* Report, p. 1625, n. 376.
192. Kerner Commission Report, p. 350.
193. *Michigan Law Review* Report, p. 1625.
194. Thus Silverstein in 1962 found that of 188 felony defendants in his sample, 85 percent were convicted. *Defense of the Poor*, p. 377, table 16.
195. Subin Report, p. 5, appendix.
196. *Ibid.*, p. 5.
197. Thus Subin notes that "because of the way in which statistics are kept in Recorder's Court, it is impossible to determine how many cases originally instituted as felonies are disposed of on misdemeanor charges; all dispositions in the felony division are listed as 'felony dispositions.'" Subin Report, p. 16.

198. Crockett, "Recorder's Court and the 1967 Civil Disorder," p. 847.
199. If anything, there are indications that as the dispositions progressed, the prosecution *reduced* the severity of its reduction criteria. Interview with Crockett.
200. Testimony of Laverne Anderson, Senate Subcommittee on Riots, Civil and Criminal Disorders.
201. Interview with Lassiter.
202. Personal interview with Karl Levin, Legal Aid and Defender Association. This attorney headed a study undertaken by the Levin Foundation some years earlier of sentencing behavior of recorder's court judges. See "Report of Study of Recorder's Court Over 20 Month Period, November 1, 1957 through June 30, 1959," Saul R. Levin Foundation, mimeographed.
203. "Civil Disturbance Cases," recorder's court, July 23-31, 1967, amended as of August 19, 1968, in the files of the author. Of the nine receiving felony sentences, we have more detailed information on three: two received a term of one-and-one-half to two-and-one-half years for entry without breaking; one received one to fifteen years for armed robbery. Senate Subcommittee on Riots, Civil and Criminal Disorders, Schedule C, Exhibit 68.
204. Subin Report, p. 16, appendix.
205. Interview with Nolan.
206. Personal interview with Judge Donald Leonard, recorder's court.
207. See p. 141. See also *Detroit Free Press*, October 15, 1967, where Judge Donald Leonard was quoted as indicating that he was lenient with first offenders, who made up about half the riot prisoners.
208. Interview with Levin.
209. Interview with Nolan.
210. Cahalan Report, pp. 12-14.
211. *Ibid.*, p. 13.
212. Interview with Cahalan.
213. Cahalan Report, p. 14.
214. From "Proposed Format for Emergency Prisoner Control," November 22, 1967, in the files of John Emery.
215. Interview with Nichols.
216. Interview with Nolan.
217. From "Summary of Riot Plan Activity by Wayne County Prosecuting Attorney's Office between August 1967 and July 1968," in the files of John Emery.
218. Interview with Nolan.
219. "Summary of Riot Plan Activity," p. 4.
220. *Ibid.*
221. Interview with Lassiter.
222. Funded by the Ford Foundation and the Detroit Bar Association, among others, the LADA of Detroit opened on January 2, 1968.
223. In the files of John Emery.
224. Interview with Emery.
225. Personal interviews with Lois Pinkus and Paul Borman, former administrative assistant to the mayor.

- 226. Interview with Wahls.
- 227. Interview with Borman.
- 228. From the minutes of the May 9, 1968, meeting of the Wayne-Detroit Legal Services Coordinating Council, in the files of the author.
- 229. Confidential interview.
- 230. From the minutes of this meeting, in the files of John Emery.
- 231. Interview with Pinkus.
- 232. Confidential interview.
- 233. Interview with Pinkus.
- 234. Confidential interview.
- 235. Interview with Pinkus.
- 236. Interview with Pinkus and confidential interview.
- 237. From the minutes of the July 22, 1968, meeting of the Mayor's Committee on the Administration of Justice During Civil Disorders, in the files of John Emery.
- 238. Kerner Commission Report, p. 357.
- 239. No specific agreement had been reached at the time of this research over which of these options should be exercised, although it appeared that committee members were leaning toward precinct recognizance releases.
- 240. Minutes of the July 22, 1968, meeting of the mayor's committee.
- 241. Confidential interview.
- 242. Confidential interview.
- 243. *Michigan State Bar Journal* 27, no. 8 (August 1968): 31.
- 244. *Detroit News*, September 16, 1968, for a report on the press conference. Confidential interview for the rationale for the prior rejection by the mayor's committee of the precinct-arraignments plan.
- 245. Confidential interview.
- 246. James, "Report of the Project Coordinator of Bail Release Project."
- 247. Interview with Mazey.
- 248. Unpublished draft, pp. 1, 4. Supplied through the courtesy of James Lafferty.

Chapter Four

Chicago

In the summers of 1965 and 1966 the Civil Rights Movement—fresh from hard-won victories in the South—opened a drive against Chicago's separate but decidedly unequal schools and housing and the unsympathetic head of the school system, Benjamin Willis. Bringing with them the movement tactics of marches and sit-ins designed in part to obstruct traffic, these activities confronted a Chicago Police Department which had little or no experience in handling civil rights protest. It was in the summer of 1965, therefore, that the superintendent of the Chicago police department, O. W. Wilson, requested the assistance of the office of the corporation counsel—the attorney for the city of Chicago—in the determination of what arrests should be made and what charges should be filed against those arrested. Wilson's request resulted in the creation of a three-man unit in the corporation counsel's office headed by Assistant Corporation Counsel Richard Elrod, a unit which accompanied police to the scene of various demonstrations and helped determine arrest and charging policy.¹

Normally, in Chicago, in contrast to Los Angeles and Detroit, prosecution officials, be they the corporation counsel who prosecutes city ordinance violations or the state's attorney who prosecutes state offenses (both felony and misdemeanor), do not screen out cases prior to their initial court appearance; police and then judges dominate the charging process.² Thus Oaks and Lehman note that "here the State's Attorney is in the relatively unusual position of having, as a practical matter in most criminal cases, virtually no discretion in who is to be charged or what charge is to be filed."³ The police-corporation counsel arrangement, then, marked a new departure for the city of Chicago, and the beginning of close police-prosecution cooperation in, and control of, the charging process which has been a hallmark of the Chicago court system's response to every subsequent "civil disorder" which was to occur over the next several years.

In the spring of 1966, anticipating possible mass arrests of civil rights demonstrators later that summer, police and corporation counsel officials met with

circuit court personnel for the purpose of developing a mass arrest formula which would permit all cases arising out of such arrests to be handled in one court.⁴ Out of this meeting came Court Order 66-12 which called for special "mass arrest" procedures to go into effect "whenever 50 or more persons, excluding juveniles, are arrested in any one incident."⁵ These procedures included the creation of a special mass arrest court open on a twenty-four hour basis for the setting of bail and cases for trial, "so police officers would have a central place to bring all persons arrested for the same incident and so all involved in the same incident would have bond and a trial date set at the same time and courtroom."⁶ It was contemplated that magistrates would be assigned to the bond court, thus beginning a pattern in Chicago whereby magistrates—who are, as we saw in Chapter 1, little more than yearly machine appointees—have presided over the crucial tasks of bail setting and trial date setting during every ghetto revolt in the city of Chicago.

Thus, by the spring of 1966, a rudimentary mass arrest plan involving the cooperation and coordination of police, corporation counsel, and circuit court judges had been developed. Although these plans evolved out of a concern with civil disobedience, they later formed the basis for expanded plans designed to cope with both the threat and reality of ghetto revolts. Indeed, they marked the beginning of a coordinated effort, unique to Chicago, to employ the court system as an integral weapon in the city's general violence prevention strategy.

SUMMER 1967

During the summer of 1967—when major ghetto revolts erupted with unparalleled fury across the nation—Chicago court authorities unveiled, sharpened, and retooled a strategy of employing the court system to ensure that, as the mayor of Chicago had repeatedly emphasized, no such revolt would occur in Chicago. In five successive minor incidents the tactics of overcharging, extraordinarily high bail, and lengthy continuances were used with ever-greater forethought and precision to ensure prolonged incarceration of defendants without any determination of guilt whatsoever. These tactics, however, were to produce a significant if somewhat delayed reaction on the part of the Chicago defense community which would later culminate in a major and partially successful legal challenge against the use of the Chicago court system as an integral part of Mayor Daley's violence prevention strategy.

In a letter of protest sent on August 21 to Mayor Daley, the executive director of the Chicago ACLU outlined in broad detail the strategy of the city:

The police move in quickly on any volatile situation. . . . As a "preventive" measure, many persons are arrested, including those who may be innocent by-

standers. . . . Most of those arrested are simultaneously charged with mob action, disorderly conduct and interfering with a police officer or alternatively resisting arrest. All of which are misdemeanors. . . . [T]he court, apparently out of indignation, routinely sets bail at \$5,000 to \$50,000 at the request of the Corporation Counsel and without the benefit of a hearing. . . . In effect, the mere act of arrest . . . means imprisonment for a week or longer . . . without a fair bond hearing.⁷

This writer has collected complete data on four of the five incidents during the summer of 1967 in which these tactics of wholesale arrests, multiple charging, and extraordinarily high bond were employed. In each of these four incidents, in which sixty-one, fifty-three, twenty-one, and thirty-one adults respectively were arrested, defendants faced more than one misdemeanor charge: in incident number one (West Side, July 26-27) the average was two charges per defendant; in incident number two (67th and Cottage, August 1) the average was four charges per defendant; in incident number three (111th and Throop-Morgan Park, August 23) the average was just under three charges per defendant; and in incident number four (47th and Langley, September 14) the average was just over two charges per defendant. The state "mob action" charge which provides for a possible one-year imprisonment for the mere "assembly of two or more persons to do an unlawful act"⁸ was routinely filed against virtually all defendants, despite the fact that arrest reports showed no more than that the defendants were "part of an unruly mob," "failed to disperse," "were arrested with 16 others," "shouted 'Black Power,'" etc.⁹

The use of multiple charges—both state and city—against all defendants arrested and the inclusion of the serious charge of "mob action" enabled the corporation counsel and the state's attorney to recommend, and the judges to set, bonds as much as ten times higher than normal misdemeanor bonds (clearly violating Illinois statute which requires that misdemeanor bonds may be no more than double the maximum fine, or, generally, \$1,000) and several times higher than are normally set for far more serious felony offenses. Thus bail per defendant averaged in incident number one almost \$9,000, in incident number two \$6,500, in incident number three \$6,000, and in incident number four \$13,000. These bonds were routinely set despite the objections of a number of private defense attorneys who were present at initial court proceedings; the extent of court hostility to their efforts can be measured by the threat made by one magistrate to an attorney on one occasion that "you will be locked up if you are not quiet."¹⁰ Given these exceedingly high bonds, along with the routine granting of two-week continuances requested by the state over the objections of these attorneys, defendants were assured of spending at least two weeks in jail before ever coming to trial: thus in incident number one average presentence detention time was twenty-one days, in incident

number two it was thirteen days, in incident number three eighteen days, and in incident number four twenty-eight days.

We have strong evidence to the effect that the use of multiple charges—both state and city—the inclusion of the mob action charge in particular, and the setting of exorbitant bonds was part of a carefully calculated policy involving the cooperation and coordination of the police, the corporation counsel, the state's attorney, and circuit court personnel. Thus a member of the corporation counsel's special civil disorder unit explained that

We were meeting regularly with the police department. We realized that if city charges were only used [as in the 1965 civil rights marches] that people wouldn't worry about being arrested because city charges carry fines only, so we decided to use state charges, including mob action. We realized that if people were only charged with city charges, they could put up bond money, and using state charges would allow us to raise the level of bail. It turned out that [in 1965] city charges and low bail were too easy, that people would go back and be arrested again. The multiple charges and the high bonds were used as a deterrent to similar actions.¹¹

The assistant state's attorney acting at that time as his office's "civil disorder unit" explained further that

The incidents that summer [1967] were only minor because police would move in so fast and make wholesale arrests. We worked closely with the corporation counsel, and were on the scene, advising police on charges. During the summer you didn't have looting; rather you had mass attempts at violence. So we used mob action charges.¹²

Elsewhere in a report to the Illinois State's Attorneys Association, this assistant state's attorney emphasized the crucial importance of the mob action charge:

This section has become one of the most useful of all in civil disorder situations. Generally, it is impossible to determine exactly what any one member of a mob did during a demonstration; however, it is not so difficult to determine that a particular arrestee was a member of a mob and then determine what the mob did. Furthermore, this section enables the Authorities at the scene to clear the streets and restore order by providing for [a one year] penalty to any member of the mob that does not withdraw upon command by the police officers.¹³

This same assistant state's attorney revealed in an interview another important reason for the use of multiple and mixed (state and city) charges:

What we would ultimately charge them with depends a lot on what the ultimate result would be. If the riot cooled down, they wouldn't be charged with all of them . . . if it cooled down, we would nolle the state charges or just keep the state charges on the leaders, and let them plead to one city charge.

It's much easier to put all the charges on in the first place and then nolle them than not to have them on in the first place and have to add them on later.¹⁴

Thus not only were multiple charges used to rationalize the setting of exorbitant bonds, but also to increase the leverage of the prosecution in inducing defendants to plead guilty. This was especially important in view of the fact that a large proportion of defendants, as indicated by the arrest reports, were simply swept off the streets and had engaged in no illegal activity whatsoever.¹⁵

It should be clear that judicial cooperation was an essential element to the conspiracy on the part of court authorities, and that, in fact, magistrates played a key role by routinely accepting the recommendations of the prosecution for high bails, refusing for several weeks to hold hearings by accepting prosecution requests for continuances, and by preventing defense attorneys from addressing the court. In this respect, it is significant that in each incident the same two (and by now infamous) Chicago magistrates presided over the initial proceedings in mass arrest court. As we have emphasized, magistrates are little more than patronage employees, and since the chief judge of the circuit court bears ultimate responsibility for their assignment to the various branches of the Chicago court system and to cases held within these branches, it may be assumed that the court violence prevention strategy had the blessings of circuit court personnel belonging to the highest circles of the Democratic party. In fact, according to Alderman Leon Despres,

There were high level conferences in 1967 (and again in 1968) on how to handle the bail question, involving Mayor Daley, probably Alderman Keane [Daley's chief lieutenant in the city council], Ray Simon [the corporation counsel], Boyle [the chief judge], and at some point Stamos [the state's attorney]. The decisions were made by the mayor acting as party chairman. . . .¹⁶

Dispositions

The respective conviction rates (defendants convicted over defendants arrested) for the four incidents for which we have disposition information are 67, 88, 67, and 80 percent. These rates are far higher than the normal conviction rate for misdemeanor offenders in the Chicago courts; thus for the entire year of 1963 only 20 percent of those arrested for city ordinance violations, and 37 percent arrested for misdemeanors (state offenses), were convicted.¹⁷ Normally an overburdened municipal department, in the absence of prosecution screening in Chicago, routinely dismisses over half of the ordinance violation and misdemeanor cases which come before it. Following the summer incidents, however, the normal pressures to dispose efficiently of minor offenses gave way to unusually strong pressures to convict.

The strength of these pressures is illustrated by the fact that guilty plea rates (guilty pleas over convictions) for the four incidents were 90, 88, 75, and 87 percent respectively, far higher than the normal rate of pleas in misdemeanor court.¹⁸ Faced on the one hand with the announced prosecution policy of having to go to trial on the as many as five charges facing them, and with the unhappy prospect of prolonging their presentence detention (65, 56, 42, and 67 percent of the defendants in the respective incidents were unable to bail out before coming to trial),¹⁹ defendants could hardly afford to demand jury or even bench trials. On the other hand, faced with a prosecution policy to drop all but one of the charges facing them and to receive fines and/or probation following a plea of guilty, they could hardly refuse to plead guilty. Thus in the two incidents where multiple charging was the most pronounced, for example, 79 and 52 percent of the charges with which defendants were originally confronted were dismissed. Yet, as we have seen, 88 and 75 percent of the defendants in these incidents were convicted of at least one charge. Multiple charges proved to be extremely useful levers through which extreme conviction pressures could be applied.

Having pleaded guilty, only a minority of defendants in any of the four incidents were sentenced to any time in jail in addition to the presentence detention time they had already served; the respective incarceration percentages for each of the four incidents were 32.5, 2.5, 16.6, and 17 percent,²⁰ and few of these sentences were for more than thirty days. This sentence distribution does not markedly depart from the norm; thus in 1963 and 1964, 18 and 17 percent of those convicted either of misdemeanors or ordinance violations were sentenced to some time in jail following their conviction. Most convicted defendants in the summer incidents received fines varying from \$25 to \$200; again, a normal type of disposition. An unusually high proportion of convicted defendants, however, received probationary sentences. Thus whereas normally, as for the entire years of 1963 and 1964, only between 5 and 6 percent of defendants convicted of city ordinance violations and misdemeanors receive probation,²¹ in three of the four summer incidents 28, 33, and 88 percent respectively received probationary sentences of from one to two years.

The assistant state's attorney assigned to these cases revealed the reason for the unusually high proportion of probationary sentences:

On misdemeanors the biggest weapon we had was probation. We recommended a year's probation . . . just to get us past the summer. Probation was unusual because if they were picked up in another disturbance they wouldn't need another trial; you could just send them away.²²

Thus the city's violence prevention strategy encompassed not simply the use of initial court proceedings such as charging and bail as deterrents against major ghetto revolts but also the final, dispositional stage of criminal pro-

ceedings, long after the original incident which had provoked them had ended. Indeed, it is not an exaggeration to say that every aspect of the court response to the incidents of the summer of 1967 was a response to the threat of violence of far greater magnitude than was entailed in the incidents to which the responses were ostensibly directed. Thus one attorney explained that

The experience in Chicago of the 1965 and 1966 disorders and riots elsewhere made it apparent that Chicago was a potential tinderbox. The mayor had determined that Chicago would not go up in flames. The excessive bonds, etc., were a warning to the black community as to what would happen if they created problems.²³

His words were echoed by those of Alderman Despres, who indicated that

As head of the local government, Daley prided himself on his success in not having any [major] black riots in Chicago, in contrast to New York. The specter of riots was always present; Daley was frightened and took extraordinary precautions.²⁴

This Chicago court strategy produced during the summer of 1967 a mobilization of the defense community which began slowly but which gradually increased in tempo. Neither the ACLU nor any other defense organization played a role in defense efforts following the first summer incident of which we have spoken, and none of the defendants arrested during the second incident at Cottage Grove on August 1 was represented at his initial court appearance. Shortly following the initial Cottage Grove proceedings, however, a number of defense groups assumed responsibility for working on bail reductions. From August 4-7, incarcerated defendants were interviewed by lawyers from the Community Legal Council (CLC), two cooperating ACLU attorneys, and the Chicago Legal Aid Bureau; the Chicago Legal Services Project (CLSP), moreover, agreed to represent three defendants and to cooperate in the bail reduction effort. Habeas corpus petitions were presented on Tuesday, August 8, by CLC and CLSP attorneys before the acting chief judge of the municipal court, and on Thursday, August 10, bond was reduced on virtually all of the twenty-one defendants still in custody. It was largely due to these continued efforts, then, that presentence detention time following the Cottage Grove incident was limited to an average of two weeks.

At the end of July and the beginning of August, two meetings were held at the headquarters of the Chicago Bar Association to which Chicago court authorities as well as representatives of a number of nonestablishment defense groups were invited. The purpose of these meetings was to establish communication between court authorities and the newly formed Civil Disorders Committee of the Chicago Bar Association. According to bar association offi-

cials and attorneys present, court authorities—who included the chief judge, the state's attorney, the corporation counsel, the public defender, and police officials—were noticeably unenthusiastic about bar association offers to provide volunteer attorneys or other assistance in the event of future possible disturbances during the summer, and noticeably vague about describing the specifics of court plans regarding the processing of large numbers of defendants.²⁵ Court authorities did make it clear, however, that they planned to continue to follow a high bail policy, an announcement which provoked no noticeable opposition from Chicago Bar Association representatives. It did, however, provoke the concern of a number of representatives of nonestablishment groups, and one of them—an attorney for the Legal Aid Bureau—sent a letter several months later to the chief judge protesting the high bail policy and demanding that bail be set within constitutional limits.²⁶ Although the two meetings, then, evoked little overt opposition to the bail policy from representatives of the Chicago Bar Association, they did serve to convince members of the nonestablishment defense community that high bail was an established court policy, one which they would have to confront throughout the entire summer.

Shortly after the second meeting an ACLU press release publicized its study of bail practices during and following a looting incident during a major snowstorm the previous winter, along with the contents of a letter to Mayor Daley protesting the summer continuation of the high bond policy. This letter went unanswered, as did requests for meetings with Chief Judge Boyle and Public Defender Ghetty. Similarly, a request on the part of the ACLU that the Civil Rights Division of the Justice Department investigate the Chicago court strategy was met with the reply “as you know, the setting of bail for state crimes is within the discretion of the state judge.”²⁷

In contrast to the two previous incidents, where defendants went unrepresented at their initial court appearances, two black attorneys with the Cook County Bar Association and the Community Legal Services Project were present at initial proceedings following the third summer incident at the end of August to protest the setting of high bail and argue for reductions. Their efforts met with the unrestrained hostility of the sitting magistrate and were of no avail; later, however, joined by the staff attorney of the ACLU, they were successful in obtaining a number of bond reductions. Attempts to obtain relief in federal court, however, were consistently rebuffed; in fact, throughout the entire summer of 1967 the federal court consistently refused to hear any cases brought before it designed to protest the bail policies of the Chicago court.²⁸

These continued defense efforts had little impact on court policy; as we have seen, following the final summer incident bail was set at levels even higher than for the previous three, despite the fact that, according to the exec-

utive director of the ACLU, the court was careful to conduct hearings for the first time that summer.²⁹ Once again a defense effort including ACLU cooperating attorneys, a number of unaffiliated progressive defense attorneys, and a black attorney working for the Legal Services to Youth project in the vicinity of 47th and Langley was undertaken to press for bond reductions, and most defendants had their bonds reduced from the \$10,000–\$15,000 range to the \$2,000–\$3,000 range, still far above normal misdemeanor limits. For the first time, however, segments of the black community other than the legal community became involved in the general defense effort, and an ad hoc committee coordinated by Larry Landry of the militant ACT organization attempted to raise bail money and encourage additional lawyers to participate in the defense of those arrested.³⁰

It was largely through Landry's efforts that a meeting was organized between movement lawyer William Kunstler and the various representatives of CLSP, CLC, Legal Aid, CCBA, and the ACLU who had participated in the defense efforts throughout the summer. The culmination of this and several other meetings was the development of a comprehensive legal attack against the major statutes employed by Chicago court authorities to stifle dissent and thereby prevent possible violence: *Landry v. Daley*.

Landry v. Daley, naming Mayor Daley, the police superintendent, the state's attorney, the sheriff, the corporation counsel, and the assistant corporation counsel as codefendants, was filed in United States District Court on behalf of the several defendants awaiting trial following the 47th and Langley incident but also on behalf of all individuals and community groups whose rights of dissent were effectively "chilled" by the city ordinances and state statutes, so that the court could not possibly avoid the constitutional questions which the defense wished to raise. Under attack in the suit were the city's disorderly conduct and resisting arrest ordinances, and the state mob action, intimidation, assault and battery and resisting arrest statutes, as being unconstitutional on their face as well as in their application during the summer of 1967.³¹

By what attorneys involved in *Landry v. Daley* later called a "stroke of luck" the assignment mechanism of the United States District Court for the northern district of Illinois placed the case in the hands of Judge Hubert Will, the one judge of a generally conservative eleven member bench with decidedly liberal predilections, the one judge "with the daring to challenge Mayor Daley's influence."³² Much to the surprise of the corporation counsel and state's attorney lawyers who had, according to an attorney for Landry, come to court expecting that the constitutionality of the city ordinances and state statutes would be routinely upheld, Judge Will in early March held that the city's disorderly conduct and resisting arrest statutes were unconstitutional on their face because of their vagueness and lack of specification of illegal in-

tent, and that sections of the state mob action and intimidation laws were similarly unconstitutional.³³

On March 26, within weeks of Judge Will's decision, the Chicago City Council passed over the strenuous objections of the ACLU new ordinances designed to meet constitutional requirements but which were, in the words of the ACLU executive director, "worse than the old ones."³⁴ By another stroke of luck, however, these ordinances were scheduled to go into effect only days after the outbreak of Chicago's major ghetto revolt on April 5, and could not be used at that time.

Defense attorneys, then, had reason to rejoice at the outcome of *Landry v. Daley*; they had, after all, beaten the "machine," even if the victory was temporary. More perceptive ones, however, might well have bemoaned the fact that their success had depended on the chance (one out of eleven) assignment of the case to the only reasonably independent judge on the United States District Court: such is the precarious nature of the limits to total machine control of the Chicago court system.

POSTSUMMER 1967 PLANNING

Court authority planning to cope with ghetto revolts remained relatively static throughout the summer and fall of 1967. Other than a supplement to Court Order 66-12 disseminated in August which provided for additional courts if the number of arrestees rose above 300, and the addition in September of several assistants to the previously one-man civil disorder unit within the state's attorney's office,³⁵ the basic formula remained unaltered. There are no indications that the defense efforts which were to culminate in *Landry v. Daley* had made any significant impact on this formula. Thus at the November 1967 budget hearings of the Chicago City Council, Corporation Counsel Raymond Simon, in response to prodding from Alderman Despres, vigorously defended the high bail policy. His defense was echoed by Mayor Daley's chief lieutenant on the council, Thomas Keane, who argued over the objections of Despres that the city's "bail policy had received great favor and support."³⁶ Similarly, in an address in December to the Illinois State's Attorneys Association, the head of the state's attorney's civil disorder unit, speaking for the state's attorney, indicated that

Because of the emergency of the situation, high bail should be set during the demonstration, if it is a violent one, and the bail can be reviewed and modified when order has been restored. *We have found that initial bail of not less than \$2,500 for a misdemeanor charge and not less than \$25,000 for a felony charge is adequate.*³⁷ [Italics added.]

Over the next few months, however, a number of factors were to produce a

radical change in bail policy, as well as a significant upsurge in the energy directed to overall planning within the court system.

The first, and perhaps most significant factor was the February 19 meeting in Chicago of the Committee on Riots and Disorders of the National District Attorney's Association, at which time Chicago prosecutors were able to reap the benefits of the experiences of the prosecutors of Los Angeles, Detroit, and Newark with respect to the major ghetto revolts which had occurred in those cities, in particular those of Prosecutor Cahalan of Detroit, who spent the entire next day in the state's attorney's office detailing the many problems faced by his office following the Detroit rebellion of July 1967.³⁸ In a memorandum to the state's attorney the newly appointed head of the state's attorney's riot control unit summarized the lessons of the Detroit experience:

1) *Arrests*—To overcome the difficulty of identification, use polaroid cameras to photograph the accused, police officer, and merchandise, if a theft is involved, and fingerprint on the arrest slip;

2) *Overcharging*—In many cases [in Detroit] felonies were charged when a misdemeanor should have been used. *Reduce those cases which should be reduced at the earliest practical moment rather than clutter the felony trial call.* [Italics mine.]

3) *Men and Machines*—A paper logjam occurred in Detroit because of insufficient facilities and clerical personnel. A two day delay occurred simply because of the lack of typing facilities.

4) High bonds were used in all cases. *In retrospect, this was unnecessary and inefficient. Very high bonds were set on persons who could not make standard bonds;* [Italics mine.]

5) *Detention facilities*—The vast numbers of prisoners created such pressure on detention facilities that some had to be sent as far as 130 miles from Detroit. It often took several days to locate a prisoner in order to bring him before court to have bond reduced;

6) *Past criminal records*—The bail setting was severely delayed because of inability to locate arrestees' prior criminal records. At one point two Detroit detectives were flown to the FBI with 100 fingerprints and 18 hours later returned with FBI records;

7) *Rearraignments*—The Detroit Prosecutor's office attempted to bring all offenders before the court within one week after initial incarceration in order to set realistic bond after criminal records became available.

The memorandum added that "the experience of the Los Angeles Prosecutor's office during the Watts riots was comparable to the situation in Detroit."³⁹

According to the new head of the state's attorney's civil disorder unit, the Detroit, Los Angeles, and Newark experiences convinced the members of his office that a high bail policy was both unwise and unnecessary. The most moving consideration was that "we felt that it didn't make any difference . . . it took so long to process people at the police stations so that [regardless of

the level of bond] by the time they could bail out the riot would be over.”⁴⁰ He was echoed by State’s Attorney John Stamos, who indicated that “we found out that no matter what the bail was mechanical problems would prevent people from getting out . . . so why set high bonds when there is no danger of his getting out earlier?”⁴¹ In short, it was felt that lower bonds would not foreclose preventive detention during a revolt, and that on the other hand they would avoid a good deal of criticism from the defense community. Thus the former head of the state’s attorney’s riot control unit, reflecting on the change in bail policy, remarked that “if they can’t make \$1,000 why set \$20,000, so let’s set it reasonably so nobody screams.”⁴²

Another motivation for the change in bail policy, according to the new head of the riot control unit, was the desire to avoid the massive detention problems caused by prolonged incarceration through exorbitant bonds. Thus, he explained, “the problem I worried most about was detention facilities.”⁴³ Once the revolt was over, it was felt, it was no longer necessary, and might prove extremely difficult, as in Detroit, to hold defendants for prolonged periods; consequently bonds should be set sufficiently high to ensure detention during the riot period but not so high as to prevent releases shortly thereafter.

Although by February what we can call the “normal bail” policy had become the policy of the state’s attorney’s office, there was still, according to the head of the riot control unit, “a split in the whole court system; some still wanted minimum bonds of \$25,000 for felonies.”⁴⁴ Although this assistant state’s attorney was reluctant to reveal the identification of those who continued to favor the high bond policy, by implication he indicated that it was the corporation counsel who fought hardest to retain it. Although, as we shall see, it was the normal bail policy which for the most part was to prevail during the April major revolt—following what a former head of the riot control unit called “discussions at the highest level between the chief judge and the state’s attorney about what to do”⁴⁵—the corporation counsel would continue to be a force for higher bail during that revolt.

Along with the determination on the part of the state’s attorney to opt for more “reasonable” bail came a commitment to a more “realistic” charging policy. On the basis of the Detroit experience, it was felt that overcharging should be avoided so that the burdens of costly and time-consuming felony prosecutions and the ultimate necessity of reducing to misdemeanors because of lack of evidence could be avoided. Thus, according to the head of the riot control unit, “we didn’t want the reductions [that occurred] in Detroit and Los Angeles . . . this was shameful . . . if the elements aren’t there we didn’t want to charge with felonies.”⁴⁶ For those felony cases that were initiated, it was anticipated that a policy of “going direct” to the Grand Jury would be implemented in order to maximize prosecution control of the charging process, to eliminate the problem of marshalling witnesses and evidence while a revolt

was in progress, and at the same time to eliminate the potential burden on court facilities of large numbers of preliminary hearings.⁴⁷ An assistant state's attorney described the process of "going direct":

Say we request a thirty-day continuance. Unbeknownst to the defendant, we can bring the case directly to the Grand Jury. If a True Bill is voted, then the defendant is arraigned on the indictment. You can go from the preliminary stage to the arraignment on the indictment without even holding a preliminary hearing.⁴⁸

Following the National District Attorney's Association meetings, the state's attorney's office began to assume the initiative in planning for what was feared might well be another long, hot summer.⁴⁹ The riot control unit was beefed up by the addition of several state's attorney and police representatives, and began to organize a number of meetings with other court agencies designed to implement the new bail and charging policies as well as other plans based on the imperatives of the Detroit and Los Angeles experience.

Thus for example on March 22, as an outgrowth of previous informal contacts, the head of the riot control unit and the deputy chief of the criminal division met with command personnel of the patrol division of the police department and with the corporation counsel to work out arrest procedures, and on March 26 the head of the riot control unit addressed police command personnel concerning the substantive charges to be used during revolts and the evidence required to substantiate them. According to this assistant state's attorney, he emphasized at this time that he did not want any overcharging, e.g., the "filing of burglarly charges if people are just standing around." Where felony prosecution was merited for looting offenses, he emphasized that the charge of burglary rather than looting was appropriate, as the newly passed looting statute was considered impractical and unworkable. According to Martin, he also indicated at this time that "Stamos [the state's attorney] and I took serious exception to mixing charges [the filing of both city charges and state charges against the same individual],"⁵⁰ as what he called "split jurisdictions" would create serious practical problems when large numbers of cases were involved. Finally, Martin indicated to police officials that he would make available to all police processing units assistant state's attorneys who would aid in the drafting of complaints and the determination of proper charges.

On March 19 this same assistant state's attorney met with the public defender regarding the adequacy of his staff during a potential major revolt, and the first assistant public defender furnished the state's attorney's office with addresses and home phone numbers of sixteen public defenders who should be contacted in the event of an emergency. On March 28, the assistant state's attorney and a detective attached to his unit met with the superintendent-

ent of the House of Corrections regarding detention and transportation facilities; following this meeting and a number of further surveys it was estimated that Chicago had sufficient detention facilities to cope with some 3,000 arrests.⁵¹ Throughout the month of March, according to the state's attorney's report to the Austin Commission, there were frequent contacts with sheriff's personnel concerning booking procedures, and surveys were undertaken regarding potentially necessary additional detention facilities, e.g., the Illinois State Prison at Joliet, and of available typing and clerical facilities. On April 4, contact was established with the clerk of the circuit court, and work began on the processing of preprinted complaints which would include all common riot offenses and would eliminate language requiring the appearance of arresting police officers in court, as per a memo of law prepared by an assistant state's attorney attached to the riot control unit establishing that a police officer may swear to a complaint before a police sergeant without actually appearing in court to file a complaint.⁵² By April 4—the day of Martin Luther King's assassination and one day before the eruption of Chicago's major ghetto revolt—the state's attorney's office was, according to the former state's attorney, “within 5 percent of total preparation.”⁵³

This concerted planning effort on the part of court authorities was not matched by any coordinated planning on the part of the defense community. In October the Civil Disorder Committee of the Chicago Bar Association, despite its rebuff by court authorities during the summer, initiated an effort to obtain the commitment of volunteer lawyers in the event of future disorders. Two hundred and fifty individual letters—whose contents had been approved by the chief judge, state's attorney, and public defender prior to being sent⁵⁴—were drafted to the members of the four bar association committees that the president of the bar association thought would be most interested in service. Only 35 out of 250 responded favorably.⁵⁵

This minimal activity on the part of the Chicago Bar Association paralleled a similar inactivity on the part of nonestablishment defense groups. The ACLU did succeed in attracting nationwide legal attention to the excesses of the Chicago courts the previous summer and winter in an article appearing in the November *Criminal Law Bulletin*. They were also somewhat later successful in persuading a bar association committee not to recommend for slating as an associate judge one of the two magistrates who had consistently been setting high bail since the snowstorm looting; this magistrate, in fact, was not slated by the machine for that position.⁵⁶ Other than these efforts, however, no concrete planning on the part of the nonestablishment defense community took place prior to the April revolt. In the words of one black ACLU attorney, “there were no defense meetings prior to April . . . when the emergency dies down, the interest dies down . . . we didn't do anything.”⁵⁷

On April 5, then, well-prepared court authorities and an ill-prepared defense community would be challenged by Chicago's first ghetto revolt ap-

proaching the proportions of the major revolts in Los Angeles and Detroit. The lack of preparation of the defense community was not unique. What was new, however, was the relative preparedness of court authorities. As we have seen, neither in Los Angeles nor in Detroit did any serious planning on the part of court authorities take place prior to their respective major revolts. For the first time, a good deal of coordinated planning had preceded a major revolt; as we shall see, this planning was to have a major impact on the court response and to differentiate it in certain crucial respects from the responses of the Los Angeles and Detroit courts to their major revolts.

THE "MARTIN LUTHER KING REVOLT"

On Thursday evening, April 4, Martin Luther King was assassinated, and the city of Chicago waited for the almost inevitable reaction on the part of its black residents. That reaction began on early Friday afternoon, following the closing of most Chicago public high schools with predominantly black enrollments, when adults joined teen-agers to break windows and loot up and down West Madison Street. By 2:00 P.M. the looting had become sufficiently widespread for Mayor Daley to request the presence of the National Guard—which arrived late Friday evening—and for the superintendent of the police to augment by 40 percent normal police manpower.⁵⁸ By this time fires were burning throughout the west side, and the disorders had spread to the near-north and south sides.

The revolt continued unabated until 2:00 A.M., decreasing in intensity throughout the early morning hours of Saturday, April 6, only to regain its fury later in the morning and throughout the afternoon. By 8:00 A.M. there were more than 4,000 police officers plus several thousand National Guard on the streets to contain the renewed activity.⁵⁹ That afternoon the mobilization of additional National Guard troops was requested and implemented. Acting Governor Shapiro at Mayor Daley's request called for federal troops, and Mayor Daley announced the imposition of a citywide curfew effective each night from 7:00 P.M. to 6:00 A.M. on all residents of the city under twenty-one years of age, along with a warning from his office that violators would face fines up to \$500.⁶⁰ By late Saturday, the fires were contained and the looting had been reduced to a minimum, and by Sunday morning and during the afternoon it became increasingly apparent that relative calm was being returned to the city. Nevertheless, in part because the funeral of Dr. King was not scheduled until Tuesday, at which time the possibility of further violence was contemplated by city officials, the citywide curfew was not lifted until Wednesday, April 10—over three days after the cessation of major violence—at which time Mayor Daley declared the official emergency to be terminated.⁶¹

During the two days of concentrated looting and burning, total insured

losses arising from the revolt were estimated at approximately \$14 million, with actual losses running much higher.⁶² During the course of the revolt nine persons died—most shot by police officers or National Guardsmen—and several hundred were injured. During the full six-day emergency period, over 2,700 persons, including around 2,200 adults, were arrested in the largest mass arrest incident in Chicago's recent history.⁶³

Arrests and Charging

By early Friday afternoon, police manpower was still insufficient to make mass arrests; in fact, "relatively few arrests were made in the riot areas prior to the late afternoon." As a consequence, and as in Los Angeles and Detroit, it is likely that many of the original arsonists and looters escaped apprehension.⁶⁴ By late afternoon, however, the police began to make mass arrests, and by midnight almost 400 arrests had been made, with more than 600 arrests made the following day.⁶⁵ The Austin Commission, created by the mayor to study the causes and handling of the revolt, concluded that there was

a tendency on the part of the police to make arrests . . . on April 5 and particularly on April 6 in a less discriminating and more sweeping way than is desirable, so that a number of persons who were on the streets on legitimate business . . . were incarcerated along with actual violators of the law.⁶⁶

This large and rapid influx of arrestees seriously disrupted, as it did in Los Angeles and Detroit, normal police arrest and booking procedures. The arrest procedure was complicated by the division of labor between police and National Guard, and several police officers arrested persons on the basis of information provided by guardsmen who either did not give their names or who later failed to appear to testify at the trials of the defendants. The volume pressures caused considerable delays in the booking procedures at district stations; to meet these delays, "one district simply had one officer sign all the complaints; this sped up the arrest procedure but [would make] convictions nearly impossible."⁶⁷ At the height of the revolt, and in the face of these volume pressures, normal police screening⁶⁸ at the district stations of "bad" cases ceased almost entirely; thus, "with the exception of approximately 550 juveniles who were released by police prior to prosecution, virtually none of the Chicago arrestees were screened out prior to prosecution."⁶⁹ At one point on Friday evening, the district stations had become so overwhelmed that over 200 arrestees were taken directly from the riot area to be processed at bond court (established by executive order of the chief judge earlier that day) at central police headquarters at 11th and State, and a delay of several hours in booking procedures ensued prior to setting up a processing area in one of the four available courtrooms.⁷⁰

There are indications, however, that the volume pressures entailed in the April mass arrests in Chicago were considerably lower than during and following the major Los Angeles and Detroit ghetto revolts. In the first place, the absolute number of adult arrests in Chicago—under 2,500 for a six-day period—was less than half that of Detroit and 1,000 less than Los Angeles during comparable periods. Second, at no time during the Chicago revolt were more than 725 arrests made during a single twenty-four hour period,⁷¹ which is the normal number of daily arrests in Chicago, whereas in Detroit and Los Angeles during several twenty-four hour periods of their respective revolts, arrests often totaled many times higher than their normal daily intake. The Chicago revolt entailed less volume pressure on police and (subsequently) on court officials because it was smaller, in terms of the absolute number of arrests, and because it was less concentrated, in terms of the number of arrests during any twenty-four hour period. Finally, the nature of the riot offenses and arrests served to reduce further the disruptive effects of the mass arrests: one-third of all adult arrests, in contrast to Los Angeles and Detroit, were for alleged curfew violations, and the great majority (83 percent) of these arrests were made after 6:00 P.M. on April 7, at which point the revolt had been contained.⁷² Thus a substantial proportion of arrests were made when riot activity had subsided and police officials were relatively free to concentrate on booking and processing problems.

Thus prearrestment detention problems were nowhere near as overwhelming in Chicago as in Los Angeles and Detroit. Whereas in these cities arrestees often spent two or three days in inhumanly crowded and often makeshift detention facilities before making their initial court appearances, in Chicago, despite the fact that there was extreme overcrowding in the precincts and in the "bullpens" annexed to bond courtrooms, there was rarely more than a six-hour delay between arrest and initial court appearance.⁷³

If the nature of the riot activity itself, as reflected in the type and distribution of arrests, produced a relatively small strain on processing and detention facilities, prosecution charging policy served to reduce further the potential impact of this influx of arrests on court and postarrestment detention facilities. As early as Friday, April 5, at the very outbreak of the revolt, the state's attorney's office took steps to assure its dominance of the charging process and the implementation of its above-mentioned policy recommendations. On that day some 60,000 form complaints containing potentially applicable charges were mimeographed and distributed to police precincts and to 11th and State. Assistant state's attorneys were assigned to 11th and State for the purpose of screening police charges already filed and the filing of charges on defendants who had yet to be fully processed, and additional assistants were sent the next day to those police precincts in which arrestees were being processed, where they remained twenty-four hours a day until April 7.⁷⁴ Due

to these efforts, the state's attorney office was, in the words of former State's Attorney Stamos, "in good control of charging," an observation which was confirmed by every defense attorney with whom this writer raised this question.

The distribution of charges during the April revolt reflects the state's attorney's dominance of the charging process and the fact that his specific policies with respect to this process were implemented. Thus, although as we have seen all adults arrested had charges filed against them (there is no way the state's attorney can stop prosecution once police have filed charges), the majority of charges filed—or 60 percent—were for misdemeanor offenses.⁷⁵ Although this radical departure from the charging pattern in Detroit and Los Angeles' major revolts, in which between two-thirds and three-quarters of all defendants were charged with felonies, can in part be attributed to the relative lack of intensity of the Chicago major revolt (e.g., in the case of curfew charges), it was also in large part a product of prosecution discretion and a desire of the state's attorney to avoid the burdens of felony prosecution wherever possible.⁷⁶ Thus, in contrast to Detroit, for example, where virtually anyone caught on streets during curfew hours was charged with burglary, in Chicago a full one-third of the charges confronting adults arrested were for violation of the state disorderly conduct statute. Another major charge category virtually absent in Los Angeles and Detroit but used extensively in Chicago was that of property misdemeanors, such as theft, a charge applied to some 170 defendants.⁷⁷ Where the exercise of discretion was possible, then, the state's attorney's office generally opted for misdemeanor charges.

The *Chicago Law Review* study accurately summed up the state's attorney's motivations for avoiding felony prosecution:

The stress upon the criminal system resulting from crowded felony case dockets, the necessity of obtaining Grand Jury indictments and assigning judges rather than magistrates to hear cases, evidence problems related to more serious charges [and the consequent risk of a low conviction rate], the increasing likelihood of private defense counsel in more serious cases, the necessity of conducting preliminary hearings, and search and seizure and self-incrimination problems more often associated with serious crimes, can be avoided to a large extent by reliance on less serious charges wherever possible.⁷⁸

The state's attorney was aware, then, that increased reliance on misdemeanor rather than felony charges promised a more rapid and more efficient disposition of cases. It is a simple fact that the Chicago court system, like any other metropolitan court system, is geared for the processing of many more misdemeanor cases than felony cases; thus in 1967, the First District (Chicago) of the Municipal Department of the Cook County Circuit Court dis-

posed of 223,867 misdemeanor and ordinance violation cases, an average of 4,305 per week, whereas in the same year this court held only 16,589 preliminary hearings in felony cases and transferred only 3,338 defendants to the criminal division under indictment—an average weekly load of 319 and 64 respectively.⁷⁹ Thus, any given number of misdemeanor cases represents a far less serious burden on the court system than an equivalent number of felony cases.

At the same time, reliance on misdemeanors promised to produce less serious detention problems than those attendant to the overwhelming reliance on felony charges in Los Angeles and Detroit. Defendants charged with misdemeanors normally receive much lower bonds than those charged with felonies, and are consequently much more likely to bail out sooner, thus minimizing pressures on already crowded detention facilities and obviating the necessity for costly and time-consuming bail review for all defendants.

Since the outcome of *Landry v. Daley* left the corporation counsel without any applicable ordinance violations, the entire prosecution was in the hands of the state's attorney. Thus, in the absence of available city charges, over 600 adult curfew violators were formally charged with state disorderly conduct, and the effect of *Landry v. Daley* was thus to reduce the influence of the corporation counsel, who in the past had been a major factor in favor of high bonds, over the charging process.

The decision of the state's attorney to minimize the complexity of prosecution was reflected in the fact that in contrast with prior minor revolts in Chicago, very few defendants—or just 10 percent—were multiply charged.⁸⁰ The overwhelming majority of these, in turn, were charged with only two offenses. Although the absence of multiple charges can in part be attributed to the invalidity of two city charges which in the past had been routinely employed and the partial invalidity of two such state charges, the fact that there was *some* multiple charging means that sufficient charges were available for multiple charging of all defendants if this had been the strategy that the state's attorney had wished to follow.

Finally, state's attorney control over the charging process is reflected in the fact that, as per the prerevolt instructions of the assistant state's attorney in charge of the riot control unit, the looting statute was not employed. The overwhelming majority of felony charges—or 777 out of 873 charges—were for burglary,⁸¹ a charge whose substantiation requires far less rigorous proof than the ambiguous and impractical looting statute.⁸²

In summary, although normal police station-house screening of arrests was abandoned and although virtually all adults arrested were charged with crimes, the unusual degree of prosecution dominance of the charging process served to minimize the potential impact of this influx on both detention and court facilities. This was only the first of several ways in which Chicago court

authorities had profited from the experiences of Los Angeles and Detroit, and only the first instance of an unusually dominant role on the part of the state's attorney in the overall court response.

The Bail "Hearings"

As early as Thursday night—almost immediately following the news of the assassination of Dr. King—court authorities established contact with one another concerning the possibility of an emergency situation, and on Friday morning, prior to the actual outbreak of any violence, a meeting took place at the County Jail involving the participation of the warden, members of the sheriff's office, the superintendent of the House of Correction, and the state's attorney's office, at which the question of the availability of detention facilities was broached.⁸³ It was established at this time that there was room for some 3,000 arrestees. On Friday afternoon, upon receiving the first reports of violence on the west side, the chief judge issued an order assigning all circuit court judges and magistrates to the First District, and specifically assigned four magistrates to staff emergency bond court at police headquarters at 11th and State. At the same time contact was established with the state's attorney and the public defender's office, which mobilized and then assigned attorneys to 11th and State. By early evening then, four courts—three for adults and one for juveniles—were in operation at 11th and State. By 9:00 P.M., however, the normal facilities for processing arrestees at 11th and State had become inadequate, and one of the courtrooms was converted to a processing area; after this point juveniles received detention hearings in the nearby library of the Psychiatric Institute. On Saturday afternoon, following renewed riot activity and a meeting of police and court officials, two courts at 26th and California were opened in anticipation of a continued rapid influx of cases. It was soon discovered, however, that few cases were being held there, and on Sunday these courts were closed down.⁸⁴ For most of the emergency period, then, only three courtrooms were open for the purpose of setting bond, with magistrates sitting in eight-hour shifts.

Earlier on Friday the heads of the Chicago Legal Aid Bureau and the Civil Disorders Committee of the Chicago Bar Association had offered the volunteer services of the attorneys of their respective organizations,⁸⁵ and both were informed by the chief judge that their services were not needed, that the public defender was capable of representing all arrestees. This rebuff marked the end of any organizational efforts on the part of the Chicago Bar Association during the initial bond-setting period; Legal Aid attorneys, however, would be present throughout the bond "hearings," and played a major part in the defense effort which took place during this period.

The rejection by the office of the chief judge of offers of volunteer attorney

help was but the first example of court hostility to any defense efforts during the emergency period. As others have well documented,⁸⁶ during the first day access to 11th and State was made extremely difficult; "although some volunteer lawyers were admitted . . . as a general rule they were turned away"⁸⁷ on the grounds of security and of a rule of the court under normal circumstances barring lawyers not requested by specific defendants. Although on Saturday this rule was set aside by Presiding Judge of the Municipal Division Wachowski, volunteer attorneys, most of whom were either affiliated with Legal Aid or the ACLU, were not permitted to represent defendants at their bond hearings, but were restricted to interviewing defendants for the purpose of obtaining information necessary for the setting of bonds. Even this minimal effort, however, was hampered by the fact that neither volunteer attorneys nor the public defenders were permitted into the court bullpens holding prisoners awaiting court appearances, and for several days no interviewing (for the purpose of ultimate bond reduction for those defendants who had already had their bail "hearing") was permitted in the jails. On Saturday evening an administrative assistant of the chief judge cleared the courtrooms of all nonaffiliated lawyers, onlookers, and law students who had been helping to interview defendants.⁸⁸ Despite these limitations, it was largely due to the prodding of ACLU and Legal Aid volunteers that even a semblance of due process was achieved; it was only through their efforts that judges agreed to appoint public defenders to represent defendants, that public defenders unfamiliar with bond hearings received lectures on how to conduct them, and that contact was established with the families and friends of the defendants, informing them of the location of, and amount of bond confronting, defendants.⁸⁹

The hostility of court administrators to volunteer defense efforts was matched by hostility to these efforts on the part of the public defender. Throughout the emergency period, the public defender took the position that his office of some fifty-five attorneys could adequately handle the representation and interviewing of all defendants, and consistently rejected the offers of volunteer attorneys. According to an ACLU staff attorney,

[T]here were orders, probably from the chief judge, that the public defender handle all these cases and that the volunteer attorneys were not to be permitted or encouraged to intervene in these cases. [It was] apparent to the judiciary that a large number of volunteer attorneys could really mess up the system. For example, in your disorderly conduct cases there is a right to have Bills of Particulars to specify exactly in writing what the defendant is charged with. These charges are so big that it is very difficult to defend them unless the state comes through with more information. The other thing that I imagine the judiciary was a little frightened of was that the 3,000 cases, if the defendants wanted jury trials . . . volunteer attorneys might be willing to take them

and this would be a crippling burden on the system. A decision was made early in the game to keep out as many volunteer lawyers as possible.⁹⁰

Public defender "representation" at the bail hearings in April was perfunctory at best. Thus a careful study of over 200 bond hearing transcripts on the part of the *Chicago Law Review* project revealed that the public defenders rarely made motions for bond reductions or any other motions on behalf of defendants which might have entailed a disruption of the smooth processing of cases. In fact, their role was generally extremely passive, with the state's attorney playing the dominant role in recommending bond. Where public defenders did make motions for bail reduction on the basis of information on defendants' backgrounds supplied by volunteer attorneys, these motions were almost always ignored or denied by sitting magistrates. Public defender control of the representation process, then, effectively served to eliminate the threat of volunteer attorney "disruption" of the bail setting process and to ensure—within a façade of due process—the swift implementation of court authority bail policy.

The perfunctoriness of public defender representation reflected a general decision on the part of court authorities that, despite an Illinois statute requiring that preliminary hearings in felony cases be held without unreasonable delay, initial court appearances would be for the purposes of bail setting only. In normal times, despite this statutory provision, continuances are often granted and preliminary hearings sometimes do not take place until several days or even a week following the initial court appearance. During the revolt, court authorities took full advantage of this continuance option. According to the chief judge's administrative assistant,

Previous to April 5, in discussion with the corporation counsel and the state's attorney, we had agreed that these would be bond hearings alone, not preliminary hearings and that police officers would not have to appear in court if they made a sworn affidavit as to the facts in the case and filed it with the clerk, so they could remain in the streets to fight the rioting. People would not be allowed to enter a plea even if they wanted to. [The initial court appearances] . . . were purely for the purpose of setting bond and a preliminary hearing date in felony cases and trial dates in misdemeanor cases.⁹¹

In fact, all of the cases, both misdemeanor and felony, were continued at least until Monday, April 15, or over one week following the initial court appearance of at least half the defendants. According to the administrative assistant of the chief judge, this "was based on a tentative guess of how long the rioting would last . . . the idea was not to have preliminary hearings until after the riot was contained."⁹²

In marked contrast to prior minor revolts in Chicago, bails were generally set either within or close to statutory limits in the case of misdemeanors and within normal ranges in the case of felonies. A careful review of bonds by the

Chicago Law Review project reveals that, although defendants charged with state disorderly were not permitted to post cash bonds at police precincts (as they would be for comparable offenses during nonriot times), their court bonds were generally set at either \$1,000 or \$500, i.e., within statutory limits. Similarly, property misdemeanors such as theft were set at \$1,500, and burglary felonies were set at between \$3,000 and \$5,000. The charge against the defendant was in fact a principal determinant of the bond confronting him; as in the case of Los Angeles and Detroit, prior arrest records were unavailable throughout the bail hearings, and information concerning the defendant's background gathered by volunteer attorneys was routinely ignored by magistrates. Thus the *Chicago Law Review* study concluded that there was "no overall statistical relationship between bond amount and such factors as number of prior arrests . . . convictions . . ., employment status . . . marital status, length of residence in Chicago, [or] number of children."⁹³

Another principal determinant of bond variation appears to have been the relative intensity of the revolt itself, supporting the conclusion of the *Law Review* study that bond was used "to realize temporary and preventive detention" and thus to aid in the control of the revolt. Thus

Bond amounts in Disorderly Conduct and property felony charge categories increased during the peak riot hours of the evening of the sixth, but after Saturday evening [the seventh] after the riot had subsided, the percentage of Disorderly and property felony defendants with bonds set above \$500 and \$2,500 dropped radically.⁹⁴

There is considerable evidence that the corporation counsel, although not technically involved in the prosecution of any riot cases due to the absence of city charges, played a major role in producing these variations in magistrate bond setting. Numerous volunteer attorneys and public defenders have reported that on Friday and Saturday the head of the corporation counsel's riot control unit engaged in several conferences with a number of magistrates, following which the pattern of bail setting was radically altered. Thus one public defender reported that on Friday

the State's Attorneys were recommending either \$500 or \$1,000 on State Disorderly Conduct charges and generally \$2,000 or \$3,000 bond on burglary charges. Later in the evening Richard Elrod [head of the corporation counsel's riot control unit] started to circulate from courtroom to courtroom. After these tours of the courtrooms . . . the State's Attorneys began recommending the \$4,000 [burglary] bond. I saw Elrod talk to one judge who was setting very fair bonds; after Elrod talked to him and the State's Attorneys, Disorderly [bond] immediately went up to maximums.⁹⁵

That bond—despite the fact that it was lower than in previous revolts—was indeed used to "keep people off the streets" was confirmed by the remarks of judges and magistrates themselves. Thus the presiding judge of the munici-

pal division remarked that "when a man is sitting on the bench and he's looking out the window and sees the city afire, big blazes here and there and everywhere, and he sees the people who are supposedly involved, it's very difficult for him to make a real considered judgement," and added that "they [judges] *should* look out the window."⁹⁶ Several magistrates were somewhat more explicit; thus one admitted that "the idea is clearly to get as many people off the streets as possible," and another admitted that his bonds were harsher than those he would normally set since he felt that this policy would help "squelch the riots."⁹⁷

That bail policy was designed to implement preventive detention is further confirmed by the fact that even defendants who could meet the bonds generally were not permitted to gain their freedom until many hours or even days after they had obtained the necessary financial resources. Thus the *Law Review* study notes that "bail payment facilities were highly inefficient, resulting in extended incarceration and even when bail had been put up it was sometimes two days before prisoners were released due to the breakdown of jail record-keeping facilities."⁹⁸ Another eyewitness observer reported that

the majority of relatives who did not know . . . where the prisoners were consulted law students and Legal Aid lawyers who were doing the work that clerks normally should have been doing had there been any assigned to the bond clerk. There was no coordination between the records department and the bond clerks, and no coordination between the Jail and House of Correction lists. . . . The records window was closed without much explanation much of the time. People who had paid and were waiting for the prisoners' release stood . . . for hours.⁹⁹

There is strong evidence to the effect that this administrative confusion was at least in part a calculated "conspiracy of confusion"; despite the obvious need for additional bond clerks to accept bail money, for example, no use was made of a large reservoir of personnel at the Civic Center, where the civil courts conducted "business as usual." At the very least it is undeniable that court authorities did little if anything to alleviate the administrative "confusion." An ACLU attorney summarized the court authorities' strategy:

You don't provide enough clerks . . . you slow everything down. When you have got that kind of power there are a number of ways you can use it to preserve the façade but to keep the substance of what is going on the same.¹⁰⁰

Given this administrative "confusion," bails within legal and normal ranges did not forestall the incarceration of virtually all defendants during the peak days of the revolt and hence the implementation of a preventive detention policy. It is clear, in fact, that the bail policy followed in April closely paralleled the state's attorney's strategy, articulated (as we have seen) prior to the revolt, of setting lower bonds so that people wouldn't "scream" with the

knowledge that administrative delays would in any case preclude the defendants' early release.

As in the case of Los Angeles and Detroit, the incarceration of thousands of defendants as a result of the preventive detention bail policy threatened to inundate postarrestment detention facilities, which in Chicago are divided between the County Jail, with responsibility for defendants charged with state offenses, and the House of Corrections, which generally houses city ordinance violators along with some misdemeanor offenses. By early Saturday both institutions were filled far beyond their normal maximum capacity. Thus, for example, the House of Corrections prior to April had a population of 1,786, or about 250 short of its maximum capacity, but took in between the fifth and eighth of April approximately 975 riot prisoners.¹⁰¹ Similarly, the County Jail, which normally operates at maximum capacity, received during one eighteen-hour period about 400 prisoners, whereas under normal circumstances only 50 to 60 inmates are admitted during a comparable period of time. Its jail tiers, which were designed to accommodate about 39, but which under normal circumstances accommodate around 70 prisoners, housed as many as 200 prisoners each during the emergency period, during which a total of 800 riot prisoners were housed within its walls.¹⁰² The following description was based on detention conditions in the County Jail but in general is equally applicable to both institutions:

As prisoners entered the jail there were insufficient temporary detention facilities, and only two doctors available to conduct medical examinations. Few prisoners were permitted to shower. There were, according to the chief guard, insufficient number of mattresses, blankets, beds and toilet facilities. Many prisoners were forced to sleep on bare floors in the tiers. Two bologna sandwiches a day constituted the daily diet of many prisoners.¹⁰³

Despite efforts on the part of both institutions to segregate riot prisoners from regular prisoners, the warden of the County Jail admitted that many prisoners were simply lost, and that "everything broke down." The *Law Review* survey of detention conditions concluded that "the chaos inside the jails almost matched that in the streets."¹⁰⁴

This problem of mounting detention pressures was the principal subject of concern of a meeting on Saturday afternoon in the office of the chief judge attended by police, court administrators, the chief judge, the state's attorney, the corporation counsel as well as a representative of the mayor's office. The meeting took place at 2:00 P.M., at which point, according to the administrative assistant of the chief judge, "it appeared that there was a danger of exhausting the present detention facilities,"¹⁰⁵ and the imposition of the mayor's curfew threatened to increase drastically the influx of arrests. The saliency of the authorities' concern for detention pressures, however, was

mented by a firm desire to continue to implement a preventive detention policy. Thus the superintendent of the House of Corrections recalled that at this meeting the chief judge indicated with the approval of all present that "I don't care what the institutions hold, we're going to handle the cases as we normally do . . . we won't let the population of these institutions influence our [bond] judgments."¹⁰⁶ Thus arrangements were made to house defendants charged with state offenses in the House of Corrections, which as we have seen normally houses mainly city ordinance violators, but which at this point had more room left than the nearly full County Jail. Discussions were also undertaken with respect to possible additional detention facilities, such as Navy Pier, Soldier's Field, and the outdoor compound at the County Jail, among others. No such action was taken at this time, however, since, according to the chief judge's administrative assistant, "there was still room for a couple of hundred in the House of Corrections."¹⁰⁷ One ameliorative action was taken, however: the superintendent of the House of Corrections, with the consent of the chief judge and the corporation counsel, discharged all nonriot prisoners from his institution convicted of city ordinance violations who had no more than ten days remaining on their sentence and who had already served at least half of that sentence. As a result of this amnesty, space was freed for approximately 270 additional riot prisoners.¹⁰⁸

Despite this effort to free space within the House of Corrections, with the effective imposition of the mayor's curfew later that evening and a new and substantial increase in the number of arrests detention pressures continued to mount, with the result that, according to an assistant state's attorney, "detention facilities were about to bust."¹⁰⁹ According to the administrative assistant to the chief judge, "at this point we became acutely aware of the problem of detention facilities." It was at this point—late Saturday night—that a decision was taken by the chief judge, and communicated to the magistrates, to release all curfew violators without serious prior records on their own recognizance, a decision, according to his administrative assistant, which was taken "primarily because of detention pressures."¹¹⁰

Actual releases, however, did not begin until Sunday morning, by which time almost all serious riot activity had ceased, and very few of the several hundred defendants arrested for curfew violation on Saturday evening were released on their own recognizance. Thus the *Chicago Law Review* study reveals that, although in fact 72 percent of all curfew violators were released on their own recognizance, 91 percent of those arrested on Saturday night were not released on their own recognizance but rather faced monetary bond.¹¹¹ Thus, detention pressures notwithstanding, systematic releases were not permitted until after the revolt had been effectively suppressed. Moreover, only 8 percent of defendants charged with offenses other than curfew received recognizance bonds at their initial court appearances, almost all of

whom were arrested after the revolt had subsided.¹¹² Throughout the two-day period of actual rioting, then, court authorities consistently adhered to a policy of preventive detention. And, as we shall see, it was not until several days later, until the actual lifting of the mayor's curfew on Wednesday and his declaration that the emergency was over, that this policy would be relaxed with respect to those defendants charged with offenses more serious than curfew violation.

Bond Reductions

On Sunday evening many of the ACLU and Legal Aid attorneys who had been present in court as early as the first night of bond hearings met at ACLU headquarters, at which time it was decided to recruit and mobilize teams of volunteer attorneys to interview defendants at the County Jail and the House of Corrections preparatory to bringing motions for bond reductions at the upcoming preliminary hearings and trials. Although the flyer requesting volunteers indicated that the "Public Defender's office has informed us that its own staff will assume responsibility for all pre-trial interviews of defendants," and that "it has informed us that no assistance is desired by the Public Defender from volunteer interviewees,"¹¹³ it was hoped that the public defender would soon alter his position. In fact, shortly thereafter the public defender did accept the joint ACLU-Legal Aid offer, and volunteer attorneys interviewed throughout the next week in the County Jail, although ACLU attorneys and volunteer law students were not allowed into the House of Corrections.¹¹⁴

It was also decided at this meeting that "a forceful expression of opinion will be necessary to correct and abate the practices of the Circuit Court"¹¹⁵ and that an effort should therefore be made to engage the support of the leaders of the Chicago Bar Association to this end. By this time, according to a staff attorney from the ACLU, "we decided that it was a political ball game, not a legal ball game," and that "our role [should be] one of negotiations." Consequently, in order to encourage the support of the establishment bar and to not alienate court authorities with whom negotiations were contemplated, the ACLU purposely refrained from publicly criticizing the courts.¹¹⁶ A meeting was convened at the initiative of Legal Aid personnel on Monday, April 8, at Chicago Bar Association headquarters, which evoked the participation of the president and vice-president of the bar association, members of leading Chicago law firms, the dean of the University of Chicago Law School as well as several other prominent law school professors. The president and vice-president of the bar association, claiming that the information provided at this meeting was the first which they had received relevant to the situation at 11th and State,¹¹⁷ agreed to meet that day, apparently along with at least

two Legal Aid attorneys, with Chief Judge Boyle and other relevant officials in order to persuade them to initiate bond reduction hearings. These meetings in fact took place later that day, although through a "misunderstanding"¹¹⁸ Legal Aid attorneys did not accompany the bar association representatives, and resulted in a promise from the chief judge that reduction hearings would begin on Wednesday. Bar association representatives apparently agreed with Judge Boyle that the situation on Tuesday, the day of Dr. King's funeral, would be too tense to hold the reduction hearings at that time.

In fact, no bond reduction hearings were held on Wednesday, and on Thursday—after the emergency was declared over—one magistrate heard only a handful of bond reduction motions during daytime hours only.¹¹⁹ At this point and for several days following the state's attorney was insisting that a one-day notice had to be given before prisoners could be brought from the jails, and the normal practice was being followed of requiring that attorneys advance written motions for bond reduction on behalf of individual defendants rather than on behalf of all or groups of defendants still incarcerated.¹²⁰ Given the difficulty of securing access to the jails and the extreme confusion in the jails, the court authorities' adamant insistence on adhering to standard procedure amounted to an effective denial of bond reduction hearings. By Thursday, in fact, or a week following the assassination of Dr. King, some 600 people were still in jail, and no procedures were being developed to effectuate their release.¹²¹

On Wednesday an emergency meeting of the Cook County Bar Association (CCBA)—the black bar of Chicago—was convened, largely through the efforts of several young black attorneys with ACLU and Legal Aid affiliations. These young attorneys were able to persuade the president of the association to send a telegram to the chief judge documenting the court abuses and demanding an "immediate conference" with Judge Boyle at noon the following day for the purpose of "relieving the conditions complained of, all of which are contrary to the recommendations of the Kerner Report."¹²² On Thursday Judge Boyle met with, and then walked out on, a contingent from the Cook County Bar Association, who then took their case to the television cameras.¹²³ Sometime following this confrontation, a CCBA lawyer filed a Writ of Habeas Corpus, which was denied by the presiding judge of the criminal division, who informed the attorney that general bond reduction hearings would begin on Friday.¹²⁴

Despite the promise conveyed to this attorney that some 400 bond reduction cases would be heard on Friday, in actual fact no more than 60 were heard on that day before just one magistrate. The public defender displayed a noticeable lack of urgency, noting that trials would begin on Monday, and therefore refusing to file a blanket petition covering all the defendants still in jail.¹²⁵ Volunteer attorneys, however, were permitted for the first time to rep-

resent defendants at their bond hearings, the presiding judge of the municipal division ruling (following a conference with an ACLU-Chicago Bar Association representative) that special appearances could be filed and that volunteer attorneys would therefore not have to be the attorney of record and stay with the case until its ultimate disposition. Several CCBA attorneys as well as about eight Chicago Bar Association attorneys¹²⁶ argued bond reduction motions, marking the beginning of both these organizations' participation in volunteer representation efforts.

On Friday the president of the CCBA joined a Northwestern University law professor and Legal Aid attorneys who had become "convinced that no effective relief would be initiated by responsible officials"¹²⁷ in filing a mandamus petition with the Illinois Supreme Court requesting that the court direct the chief judge of the circuit court to provide the necessary facilities for special bond reduction courts over the Easter weekend, and for preliminary hearings for defendants charged with felonies. Although no judicial decision on the part of the Illinois Supreme Court would be forthcoming as the question was soon mooted, Justice Schaefer (with whom the petition had been filed) did speak to Judge Boyle, urging him that courts be opened to hold reduction hearings.¹²⁸ Other than one suit filed several weeks later by a CLC attorney attacking the constitutionality of curfew arrests, the mandamus petition represented the only class action undertaken by Chicago defense attorneys. According to one black attorney, others were contemplated, including one contesting the prosecution of all individuals arrested during the revolt, but were rejected because other defense attorneys felt such actions were too "revolutionary" for any court to accept.¹²⁹

On Friday evening another meeting of the CCBA was convened, at which time it was decided to organize teams of attorneys to assist in bond reduction hearings for some 400 defendants which they now expected would be held the following day (Saturday).¹³⁰ On Saturday, however, once again only one court was open to hear bond reduction motions, and the state's attorney was still requiring that individual written reduction motions be filed by defense attorneys. Relatively few reductions took place, and by the end of the day some 400 defendants remained in custody.¹³¹

Throughout Saturday representatives of the Chicago Bar Association and the Cook County Bar Association met with the chief judge and officials in the state's attorney's office in an effort to persuade court authorities to hold mass reduction hearings on Easter Sunday. Late Saturday evening the chief judge indicated that eight courts would be opened for reduction hearings, and the state's attorney's office indicated that it would relax its stringent requirements with respect to defense motions for such reductions. Defense attorneys secured the cooperation of both the warden of the Cook County Jail and the superintendent of the House of Corrections in obtaining lists of prisoners, and

some 275 prisoners—all those remaining in custody with the exception of those for whom court appearances had already been scheduled for Monday—were scheduled for Easter Sunday bond reduction hearings.¹³²

On Easter Sunday, eight courts were opened in the Criminal Courts Building at 26th and California and the adjacent House of Corrections, all of which were staffed with public defenders and “at least two or three” volunteer attorneys.¹³³ Volunteer attorney participation, which at the initial bond “hearings” had included only a handful of ACLU and Legal Aid attorneys, now included a large number of black as well as “corporation type” Chicago Bar Association attorneys. Whereas the public defender had earlier rejected all volunteer attorneys’ offers of help, individual public defenders and volunteer attorneys were now cooperating in arguing for reduction motions, although some hostility remained and although the bulk of the defendants were choosing the public defenders, because, as one black attorney put it, “they don’t know a black lawyer from Adam.”¹³⁴

At these hearings, almost 90 percent of the defendants who initially faced bonds of \$1,000 or less were released on their own recognizance, while those (felony) defendants initially confronted with bonds between \$2,500 and \$5,000 generally had their bonds reduced to \$1,000.¹³⁵ Despite the complaints of some volunteer attorneys and even some public defenders that many of the reductions in felony cases were meaningless because magistrates did not always determine the level of bond that defendants could afford to meet—thus some 30 percent of the defendants who had reduction hearings never made bail, and a total of sixty defendants were still in custody as of June 12¹³⁶—it was generally agreed that the numerous defense efforts of the past week produced the desired results. Indeed, the level to which felony bonds was reduced was unusually low; while the majority of felony riot defendants had their bails reduced to \$1,000, Silverstein’s 1962 study of bail in Cook County found that 78 percent of initial felony bonds were set at \$5,000 or more, and that 64 percent of these bonds remained at \$5,000 after reduction hearings.¹³⁷ Thus Cook County Bar Association lawyers congratulated themselves for their confrontation tactics which had, as one attorney put it, “kicked the rump of the Establishment,”¹³⁸ attorneys who worked on the mandamus petition could feel that their efforts had been successful, and Chicago Bar Association representatives could credit their negotiation role as having been productive. The fact that by this time the emergency period was long since over—and along with it the impetus for a preventive detention policy on the part of court authorities—and that detention facilities were still overcrowded, however, casts some doubt on the significance of these defense efforts as exclusive determinants of bail policy. In fact, an examination of bail records reveals that those arrested on April 8, 9, and 10—after the peak of the revolt was over but *before* many of the above defense efforts had taken place—received initial

bonds almost as low as the level to which bonds of those arrested earlier were reduced on Easter Sunday,¹³⁹ suggesting that a combination of a decrease in the threat of violence along with continued detention pressures played a perhaps equally decisive role as defense efforts in producing an alteration of bail policy.

Presentence Detention

Presentence detention time during and following the April major revolt was markedly *lower* than following the minor revolts of the previous summer, reflecting the relatively low bond strategy pursued by court authorities. According to a statistical analysis of 1,955 defendants arrested during the revolt, a full 57 percent spent less than three days in custody prior to bailing out. By the authors' own admission, however, "long delays in the release of persons after bail was posted are not reflected in our statistics. It is extremely significant to note that our computation of pre-disposition custody time measures the length of time between a person's arrest and payment of bail."¹⁴⁰ As we have seen, delays in releases following payment often varied from several hours to as many as two days, so we should properly add one day to this computation of detention time to reflect more accurately actual time spent before securing freedom. Thus corrected, these statistics reveal that 57 percent spent less than four days in custody, and that a full 73 percent spent no more than ten days in jail, with only slightly more than 9 percent in custody for more than two months.¹⁴¹ In marked contrast, we have seen that during the previous summer presentence detention time following four minor incidents averaged between two and four weeks.

Presentence detention time tended in April to vary with the severity of the charge; thus, whereas only 7 percent of alleged curfew violators spent four days or more in jail prior to disposition, 72 percent of alleged property felons spent at least four days in custody. Similarly, only 17 percent of all defendants were unable to make bail prior to the disposition of their cases, whereas 32 percent of the alleged property felons did not secure pretrial release.¹⁴² Even felony detention time alone, however, was significantly lower following the April revolt than detention time following the previous summer's arrests, virtually all of which were for misdemeanor offenses. Almost half the felony defendants spent no more than ten days in custody, in radical contrast to detention in the summer of 1967.¹⁴³ Similarly, whereas only 32 percent of felony defendants failed to bail out prior to disposition, during the summer of 1967, 65, 56, 42, and 67 percent of *misdemeanor* defendants in the respective four incidents were unable to bail out.

Detention time following the April revolt was not simply lower than following previous minor revolts, but also (except in the case of curfew violators,

who ordinarily would be released at the police station) tended to be lower than detention time during normal, nonriot periods. Table 4.1 compares the overall riot detention flow (excluding curfew violators) with the normal detention flow of prisoners arrested for state offenses (misdemeanor and felony). Notice that the riot distribution is considerably less harsh than the normal detention flow; thus, for example, there were 15 percent more riot bail-outs within the first four days than normally. Perhaps more significant than this difference, however, is the fact that the general shape of both detention flows, in contrast to those in Los Angeles and Detroit, is most similar—thus in both columns the predominant number of releases are clustered in the first (0–4 days) category, and the other clusterings closely parallel one another.

TABLE 4.1. Comparative Presentence Detention, State Offenses

	<i>Detention Time (in days)</i>	<i>Number</i>	<i>Percent</i>
Riot	0–4	720	49.6
	5–10	215	14.8
	11–30	246	16.9
	Over 30	270	18.6
	Total	1,251	99.9
Nonriot ^a	0–4		33.9
	5–9		12.1
	10–29		23.8
	Over 30		24.3
	No information		5.9
	Total		100.00

^a The nonriot distribution is based on C. O. Reilly and J. Flannegan, *Men in Detention: A Study of Criteria for the Release in Recognizance of Persons in Detention* (Chicago: Citizen's Committee for Employment in Chicago, 1967), p. 5.

Figure 4.1 graphically portrays comparative riot-nonriot detention flows and depicts perhaps more dramatically their similarities. The slope of the riot pyramid is somewhat more pronounced than the slope of the nonriot pyramid, especially during the first ten days; but, in marked contrast to Los Angeles and Detroit, where the general shape of major riot and nonriot pyramids are almost diametrically opposite, in Chicago the shapes are virtually congruent. Whereas in Los Angeles and Detroit the radical departure from normal bail policy during their respective major revolts accounts for the radically different riot-nonriot detention flows, in Chicago a bail strategy closely approximating

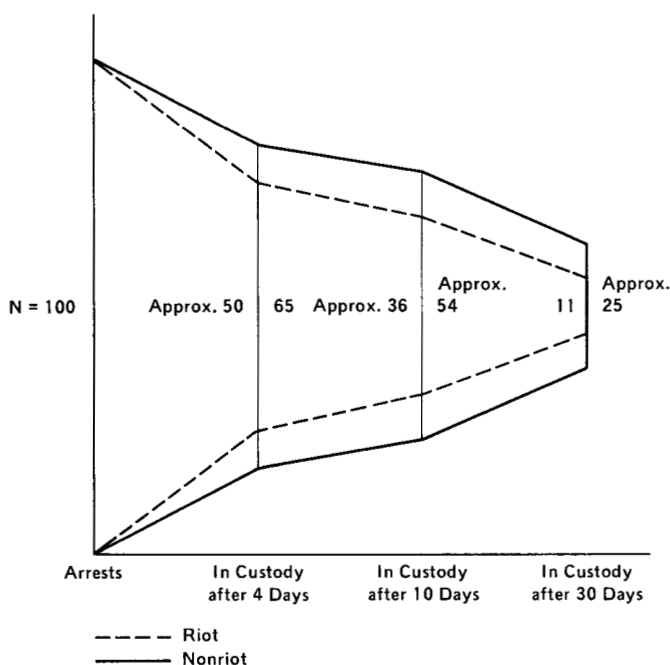


Fig. 4.1. Chicago: 1968 Comparative Detention Flow

normal bail policy led to a major riot detention flow closely approximating normal detention flow.

Trial Preparation

As we have seen, some 2,200 defendants—over 1,300 charged with misdemeanors and just under 900 charged with felonies—were scheduled for court appearances beginning on Monday, April 15. According to Illinois statute, without defense motions for continuances all these cases would have to be disposed of within 120 days of the day of arrest or would automatically result in dismissal.¹⁴⁴ Since the great majority of defendants were by this time out on bail, however, it was expected that large numbers of defense motions for continuances would be forthcoming, and would render this statutory deadline largely academic.¹⁴⁵ Nevertheless, emergency preparations were undertaken to cope with the large volume of cases. By order of the chief judge, as early as Sunday during the revolt, all traffic cases had been continued for an indefinite period, thus freeing police who would otherwise have had to testify in nonriot cases, and the regular criminal calendar was scheduled for mornings only.¹⁴⁶ It was anticipated that, beginning on Monday afternoon, four

courts could adequately handle both riot misdemeanor trials and felony preliminary hearings, and that the regular court docket could be disposed of during the morning hours.

Defense community preparations for the upcoming trials and preliminary hearings were halting and largely uncoordinated. The ACLU, in part because of lack of resources and a general reluctance to undertake mass defense efforts, and in part because of a continued feeling that it was a "political not a legal ball game" undertook no major representation effort. Instead, according to a staff attorney, it hoped that the black bar—the CCBA—would play the major representation role, and it was prepared to help them to this end.¹⁴⁷ The CCBA agreed after some debate to represent persons without fee, but never resolved the question of the nature and extent of the representation it should provide. At its initial meeting on Wednesday, April 10, and at subsequent meetings on Friday and on the following Tuesday, a number of attorneys suggested that "jury trials be requested in all cases in order to bog down the system," and that "if the Bar Association left the defense of indigents to the Public Defender, a massive cop-out would result, with even people not guilty being copped out on a bench trial."¹⁴⁸ Other attorneys felt, however, that it was the public defender's responsibility to provide quality representation, and that the CCBA's role should be to ensure that this in fact would be forthcoming, rather than to itself become involved in the defense of a large number of individuals.

It was the latter position which, in general, prevailed; according to one CCBA attorney favoring in principle the jury trial strategy,

The system penalizes people for demanding jury trials. You need to have the solidarity of defendants. After arraignment the defendant must be brought to trial within four months, but the organized bar was not disposed to take advantage of this provision. [Thus] it was not a serious alternative.¹⁴⁹

The jury trial strategy, then, was abandoned and no concerted effort was made to provide representation throughout the criminal process. Instead, lawyers were organized who would file special appearances for the purpose of making bond reduction motions or for representation at the preliminary hearing only. Although CCBA attorneys were not prevented from being the attorney of record, in actual fact very few of the volunteers represented clients beyond their second appearance in court.¹⁵⁰ According to one CCBA and Legal Aid attorney, "you volunteered just for the bail [or preliminary] hearing . . . you could at your option go all the way with the case, but the majority of people appeared only at the hearing."¹⁵¹ The vice-president of the CCBA admitted that although "we started out with thirty lawyers [by the time of the trials], it fizzled down a bit."¹⁵²

Noticeably absent from the representation effort were a number of black

lawyers who in past years had undertaken the bulk of civil rights litigation in Chicago, many of whom had been involved in *Landry v. Daley*. According to one of these attorneys,

I personally have withdrawn from representing people in these things. I went to court only once after the King revolt. . . . I left. . . . I felt I was lending legitimacy to it. Others feel this way but they feel any degree of help is better than none. I personally have decided it's too distasteful an experience for me to involve myself in.¹⁵³

A number of black attorneys expressed the view at CCBA meetings that it was the responsibility of black attorneys to represent black defendants, and that white volunteer efforts should be accepted only if they would accept black leadership.¹⁵⁴ In view of the fact that the Chicago Bar Association was planning its own volunteer effort to begin on April 15, however, others felt that the CCBA should coordinate its activities with the Chicago Bar Association. Perhaps in part because of this ambivalent attitude, no such cooperation was forthcoming, however, and in contrast to Detroit, no unified defense community strategy was evolved. As one CCBA attorney put it, "there was virtually no coordination between the Cook County bar and the Chicago bar,"¹⁵⁵ and a CLC attorney explained that "everyone wanted to do his own thing."¹⁵⁶ A Chicago Bar Association spokesman confirmed the fact that "there was no coordination between us and the CCBA, mainly because of the emergency situation . . . no one was fully prepared."¹⁵⁷

Some of the lack of coordination may be attributable to what some CCBA lawyers felt was an effort on the part of the CBA to dominate the representation effort. Thus on Monday, August 15, CCBA attorneys were excluded from a meeting of defense groups with the associate judge presiding over misdemeanor trials and preliminary hearings designed to work out an agreement over the nature of representation to be provided. Although CCBA lawyers eventually gained access to this meeting, and although it was ultimately agreed that special appearances could be filed, and that the judge would inform defendants that they could be represented either by the public defender, CBA lawyers, or CCBA lawyers, CCBA attorneys were miffed at what they called a "purposeful exclusion" and the fact that young, inexperienced "pin-stripe suit" Chicago bar volunteers were receiving the bulk of press coverage of defense efforts.¹⁵⁸

The CBA volunteer effort, like that of the CCBA, was planned for the bail and preliminary hearings only; according to the executive director of the CBA, over 100 lawyers were present at one time or another during the bail reduction hearings or the second court appearances beginning April 15. As with the CCBA lawyers, very few, if any, CBA volunteers were to take cases from beginning to end.

Thus there were no systematic plans for representation beyond the second court appearances of riot defendants, and no such representation would in fact occur. In the absence of such an effort, and given the public defender's interest in controlling the representation process, it was inevitable that the public defender would be the attorney of record for the overwhelming majority of cases.¹⁵⁹ Public defender control of the representation process, in turn, would guarantee that no serious challenges to the rapid and efficient processing of cases would occur.

Misdemeanor Trials

Despite the fact that the Chicago court system, like all metropolitan court systems, is geared to the mass production of misdemeanor cases, the presiding judge of the municipal division admitted that "the 1,300 misdemeanor cases threatened to interfere with the regular processes of the court. We were concerned with getting rid of cases and the threat to the docket."¹⁶⁰ The assistant state's attorney in charge of the prosecution of these cases voiced similar concerns: "We wanted to try misdemeanor cases as quickly as possible in order to get rid of them." He indicated that, in order to effectuate a rapid and efficient disposition of cases, the policy of his office toward curfew and disorderly conduct cases (representing over 80 percent of the total number of misdemeanor cases) was "to get a plea and to sentence to time served and a slight fine."¹⁶¹ The presiding judge of the municipal division refused to admit the existence of a judicial policy with respect to misdemeanor cases, but indicated that "one judge serves as a guideline for the other," and explained that the (associate) judge who handled more misdemeanor cases than any other had evolved a policy identical to that of the state's attorney. He added that "I don't know what the public defender's policy was, but I think that if there was any inclination on the part of the defendant to enter a plea they would not discourage it."¹⁶²

Public defender control of the representation process—almost 90 percent at their final and next-to-the-last appearances in municipal court were represented by the public defender¹⁶³—also helped assure a smooth and rapid disposition of cases. Thus few if any disruptive demands for jury trials, and few time-consuming defense motions, were advanced by public defenders on behalf of their clients. The *Chicago Law Review* study reveals, for example, that only 10 percent of the defendants made written defense motions.

(Nine defendants made more than one motion.) The total number of motions made was comprised overwhelmingly of only 5 different types of motions at the second court appearance, and of only 3 different types of defense motions at the third court appearance. Motions which might have been advantageous to the defendant were seldom, if ever, made, such as motions to dis-

miss, for discovery, for writ of habeas corpus, to strike the complaint, and for a bill of particulars.¹⁶⁴

Similarly, only one affirmative suit was filed on behalf of the collectivity of misdemeanor defendants. Toward the end of April, a CLC attorney sought to get a writ of prohibition in the Illinois Supreme Court to restrain prosecution of all curfew cases on the grounds that the mayor had no legal authority to impose an executive curfew, but Judge Lynch, a former law partner of Mayor Daley, denied this motion. According to this CLC attorney, other class actions were contemplated, but the "problem was the public defender wasn't cooperative. He was the attorney of record and wasn't willing to file suits on behalf of his clients."¹⁶⁵ Public defender control of the representation process thus helped eliminate the threat of defense opposition to court authority policy. The CLC attorney admitted, however, that the court's lenient sentence policy also discouraged such potential actions:

We weren't sure we'd be benefiting people by filing affirmative suits. A lot of guys were copping out and getting better deals than normally. In order to handle the volume judges were favoring the defendant.¹⁶⁶

Dispositions

A lenient disposition policy combined with virtually total public defender control of the representation process produced a rapid and efficient disposition of misdemeanor cases. As of June 28, or within two-and-a-half months following the beginning of misdemeanor trials, virtually all curfew and disorderly conduct cases, and hence the great majority of all misdemeanor cases, had been completed.¹⁶⁷ According to the *Chicago Law Review* statistics, 54 percent of all misdemeanor defendants were convicted; this rate was almost double that for the few defendants who had private attorneys, again indicating the crucial importance to court authorities of public defender domination of the representation process.

The overall conviction rate of 54 percent is significantly higher than the normal rate of around 25 percent for misdemeanors and ordinance violations during the entire year of 1964.¹⁶⁸ This comparison, however, is somewhat misleading. First, the misdemeanor conviction rate following the April revolt varied markedly according to the charge on which defendants were convicted. Thus, according to the *Law Review* statistics, 62 percent of the curfew defendants, 53 percent of the disorderly conduct defendants, 59 percent of the resisting arrest defendants, 40 percent of the personal misdemeanants, and 31 percent of the property misdemeanants respectively were convicted; the conviction rate declined as the charge became more serious.¹⁶⁹ In the case of the more serious charges, personal misdemeanors, and property misdemeanors,

the conviction rate closely approximated the normal rate of 37 percent in misdemeanor cases in 1963.

If the conviction rate in at least the more serious misdemeanor cases approximated the normal rate of misdemeanor convictions, the overall misdemeanor conviction rate following the April revolt was much *lower* than the misdemeanor conviction rate of 75 percent following the four minor incidents the previous summer. This is undoubtedly in part due to the evidence problems inevitably attendant to large-scale mass arrests to which we have alluded, particularly in the case of the more serious misdemeanor charges. Thus, 60 percent of the more serious misdemeanor cases were dismissed without trial, much higher than the normal rate of 30 percent pretrial dismissals in ordinary misdemeanor cases.¹⁷⁰

The relative normalcy of the conviction rate in April as compared to the previous summer, however, is also a reflection of the relative normalcy of the charging process in April as compared to this process during the previous summer. Whereas that summer virtually all defendants were multiply charged, and, faced with the real possibility of severe penalties, pleaded guilty en masse, in April only a tiny fraction of misdemeanor defendants were multiply charged, and consequently faced less serious potential sentences and less pressure to plead guilty. Our emphasis on the impact of the decision generally not to use multiple charges in April on the conviction rate is substantiated by the fact that the conviction and guilty plea rates of those relatively few misdemeanants (sixty-four) who were multiply charged in April were markedly higher than the rate for all misdemeanor defendants. Thus sixty-two of the sixty-five multiply charged misdemeanor defendants—or 97 percent—were convicted, and fifty-eight out of the sixty-two convicted—or almost 98 percent—pleaded guilty.¹⁷¹ Had multiple charging been more frequent, it is therefore likely that both overall conviction and plea rates would have been substantially higher.

It is not surprising then, that the guilty plea rate in misdemeanor cases following the April revolt was far lower than following the incidents of the previous summer, where between 75 and 90 percent of those convicted pleaded guilty. According to the *Law Review* statistics, only 289 out of 624 convicted misdemeanor defendants, or just over 46 percent, pleaded guilty. The plea rate, however, increased with an increase in the seriousness of the charge; thus, whereas just under 45 percent of those convicted of curfew and disorderly conduct offenses pleaded guilty, 70 percent of those convicted of property misdemeanors pleaded guilty.¹⁷²

The relatively low guilty plea rate for minor misdemeanors, however, in no way indicates any disruption of the cooperative, efficient disposition of misdemeanor cases. The *Chicago Law Review* study uncovered absolutely no jury trial dispositions; those defendants pleading not guilty received bench trials, which, in minor misdemeanor cases, involve a minimum of time and effort on

the part of court authorities, and thus in no sense are as potentially disruptive as jury trials. Rather the low plea rate is an indication that defendants soon learned that judges, due to volume pressures, were disposed to implement a lenient sentence policy virtually without regard to the nature of the defendant's plea; as we shall see, sentences in the curfew and disorderly cases were uniformly minimal whether a defendant pleaded guilty or not. Thus, in the case of the great majority of misdemeanor cases, there was little to gain in pleading guilty, except in the relatively few more serious cases where more substantial penalties were a potential consequence of a not guilty plea.

Sentences

Ninety-one percent of the convicted misdemeanor defendants received no penalties following their conviction other than small fines.¹⁷³ Of the remainder, 2 percent received straight probation (mostly one year), 3 percent received probation along with some time in jail, and 4 percent received straight jail sentences. Thus only 7 percent of the total number of convicted defendants were sentenced to any time in jail following their conviction.¹⁷⁴ As Table 4.2 indicates, this sentence distribution is significantly *less* severe than the

TABLE 4.2. Comparative Misdemeanor Sentence Distribution

	<i>Riot</i> (percent)	<i>Nonriot</i> (percent)
Fine only	91	75
Straight probation	2	8
Jail	7	16
Total	100	99

normal misdemeanor and ordinance violation distribution in Chicago.¹⁷⁵ It is also far less severe than the distribution following the four minor incidents in the summer of 1967, where an average of 17 percent of convicted defendants received jail sentences and extensive use was made of probationary sentences.

The *Chicago Law Review* study reveals that 82 percent of the handful of defendants who received jail sentences were sentenced to between one and thirty days. Even these minimal sentences, however, do not reflect the actual time spent in jail following conviction; thus the study indicates that the great majority of convicted defendants were allowed credit for the time they had spent in custody. Although the maximum potential fine confronting them was \$500, well over 90 percent of the 600-odd defendants who suffered no other penalties were fined \$50 or less, with more than half receiving fines of \$15 or less.¹⁷⁶ Moreover,

Seventy-five percent of the multiply charged defendants and 55 percent of the singly charged defendants were not actually required to pay the fines stipulated. Instead, these defendants were credited with having worked off their fines on the basis of the time they had spent in custody prior to trial.¹⁷⁷

Thus, not only did the overwhelming majority of convicted defendants escape imprisonment, but a majority also escaped *any actual penalties whatsoever following their conviction*. Consequently it is with much justification that the *Chicago Law Review* study concluded that

For most misdemeanor offenders, post-trial sentencing was a meaningless formality. This suggests that with respect to these defendants the actual sanctions of the system rested not in formal sanctioning but in the time spent in custody awaiting release on bail or disposition of the case, [and] the conviction record itself.¹⁷⁸

The impact of volume pressures on this sentence distribution is reflected in the fact that many of the traditional determinants of sentence variation failed to play a significant role following the April revolt. For example, although only about half of those defendants convicted of curfew violations pleaded guilty, 99 percent received fines only. Thus if there was any relationship between type of plea and type of sentence, it was almost totally insignificant. Moreover, there was no positive correlation between guilty pleas and the amount of fine received.¹⁷⁹ Similarly, although precise data are not available, it appears that there was little positive correlation between prior arrest records, employment status, bond history (whether the defendant did or did not make bond), presentence detention time, and the type of sentences distributed.¹⁸⁰ In the face of great volume pressures, then, many of the traditional determinants of sentence variation gave way to a virtually uniform application of a sentencing policy designed to effectuate the efficient disposition of a large number of cases in a relatively short period of time. In the words of one prosecution official,

We were trying to clear up the call [i.e., the trial calendar]. We would do anything within reason to clear up the call. For example, if there was a petty theft defendant who had served 18 days in the County Jail, we would recommend a sentence to time served. It wasn't worth bringing witnesses back for this petty stuff . . . our time is important and we have more important things to do.¹⁸¹

Felony Preliminary Hearings

Beginning on April 15, at the same time that the first misdemeanor cases were scheduled to come to trial, defendants charged with felonies were scheduled for preliminary hearings. As a first step toward the implementation of his

strategy of "going direct" to the Grand Jury in those cases where indictments would be sought, however, the state's attorney uniformly requested and received two-week continuances for all felony cases. During the next two weeks, according to the assistant state's attorney in charge of riot prosecution, he and six assistants worked closely with police detectives in an effort to sort out those cases for which it was felt there was sufficient evidence to seek direct indictments and those which they would permit to come to preliminary hearings. In the words of the riot prosecutor,

We had made a decision to avoid preliminary hearings. We wanted to have complete opportunity to investigate cases and to determine if they should be sent to the Grand Jury. We felt that the preliminary hearing especially then [i.e., after a riot] was not an adequate determinant of whether there should be indictments.¹⁸²

The significance of the decision to bypass the preliminary hearing must be comprehended in the light of an understanding of the function which preliminary hearings normally play in the processing of felony cases in Chicago. According to McIntyre, "in large measure it supplants the discretionary power for charging crime that in other jurisdictions is exercised within the prosecutor's office," and its importance as a screening device is indicated by the fact that "only about 20 percent of the cases receiving a hearing are bound over to the Grand Jury for further prosecution; the remainder are disposed of by dismissals, convictions of lesser (misdemeanor) offenses, or by one of several other alternatives." Thus the hearing "represents a convergence of the discretionary power traditionally used by both the police and prosecutor when preparing and screening cases; when exercising judicial discretion in determining guilt or innocence; and, perhaps more importantly, when making a final disposition of cases."¹⁸³

The decision to bypass the preliminary hearing, then, meant that the normal roles of prosecution passivity and judicial dominance in the charging process were reversed; moreover, since the charging process in Chicago in the majority of cases is tantamount to disposition of the felony cases,¹⁸⁴ prosecution dominance over this process meant that his influence over the criminal process, including his control over the relative probability of conviction, was dramatically enhanced.

There are a number of reasons why the state's attorney would have a vital interest in playing a more dominant role than normally in the felony charging process. To begin with, since assistant state's attorneys had already screened charges prior to cases coming to court (at the police precincts and 11th and State), the state's attorney's office would naturally be more interested than normally (where only the police control the initial charging process) in assuring that the final charge facing a defendant conformed to the initial charge.¹⁸⁵

More importantly, we have seen that prior to April the state's attorney, sensitive to the outcome of Los Angeles' and Detroit's court proceedings, and holding that "a [felony] offense in a riot is a more serious offense than normally,"¹⁸⁶ had decided that reductions in felony cases would be avoided wherever possible. Given the fact that judges at the preliminary hearing normally reduce or dismiss 80 percent of all felony cases, prosecution dominance over the charging process and the bypassing of the preliminary hearing was essential to the implementation of the policy of avoiding reductions.

The major evidence problems attendant to all large-scale mass arrests with which the prosecution was confronted moreover, increased the normal probability of reductions at preliminary hearings and provided added impetus for their avoidance. Thus an assistant state's attorney assigned to the evaluation of felony cases admitted that, had preliminary hearings taken place, "we might not have been able to get our witnesses there."¹⁸⁷ In bypassing the preliminary hearing and going directly to the Grand Jury for indictment, the state's attorney would be able to overcome many of the formidable evidence problems which in Los Angeles and Detroit led to an unusually high rate of dismissals at the preliminary hearing stage and the criticisms of the Kerner Commission Report directed against unsubstantiated charges which later had to be dismissed.¹⁸⁸ Since the Grand Jury traditionally acts as a "rubber stamp" for the prosecution¹⁸⁹—little evidence is generally required to produce a True Bill (indictment) and defense attorneys are not present to challenge what evidence is presented—"going direct" would permit the state's attorney to obtain felony indictments without ever having his evidence challenged. As McIntyre notes, in a discussion of the rare occasions in nonriot times when the state's attorney elects to bypass the preliminary hearings, "going direct obviously permits the prosecution to withhold exposure of certain elements of his case."¹⁹⁰

Finally, and equally as important, as the chief of the state's attorney's criminal division indicated, "going direct" would avoid time-consuming hearings and the very real possibility of dismissals resulting from the failure to adhere to the strictures of the "four-term rule," which requires that, without defense motions for continuances, felonies must be brought to trial within 120 days of arrest. As McIntyre notes, "where investigation lasts several weeks [note that by April 15, it was already over a week since most had been arrested], the time consumed in holding a preliminary hearing may become critical in making the 120 day limitation."¹⁹¹ Given the fact, as we have seen, that a normal weekly preliminary hearing load is 319 defendants, holding hearings for the approximately 900 defendants charged with felonies in April would have presented formidable problems and threatened to endanger the prosecution's chances of bringing cases to disposition within the required time limit. As one assistant state's attorney explained,

Let's say you've got seventy cases with six or seven defendants in each case. You've got big time problems. And we had to handle the regular business in the morning, and [riot] misdemeanor trials were going on at the same time.¹⁹²

Thus the judiciary was effectively excluded from control over the charging process. As we shall see, the great majority of cases would be taken directly to the Grand Jury, and the relatively few defendants who had preliminary hearings had them only because the prosecution had permitted them to come to a hearing either because witnesses were available or because it had determined that they were "bad cases."¹⁹³

According to one assistant state's attorney,

The departmental order was that on every felony detectives should interview witnesses and police officers. We ordered the background reports . . . this was beginning about ten days after the riot. All we did was read over police reports and files, trying to get together under the same file defendants who were arrested together. As a general rule, regardless of the defendant's age, background, etc., we indicted. On occasion we went for a preliminary hearing if all witnesses were ready.¹⁹⁴

Although the normal background criteria were largely ignored in the determination of whether to seek an indictment, evidence criteria were not. Thus the assistant state's attorney in charge of riot prosecution indicated that on all cases where indictments were sought, his associates and detectives had interviewed store owners and gained assurances that they would act as complaining witnesses. According to this source, "only defendants who had been arrested inside the burglarized premises or within a short distance of the premises with goods clearly identifiable as having been stolen from a particular premises were prosecuted on felony charges."¹⁹⁵ Thus the cases for which direct indictments were sought were, according to this assistant state's attorney, relatively "good cases."¹⁹⁶

According to prosecution sources, around 700 out of 900 felony cases were taken directly to the Grand Jury for indictment; according to the more precise statistics of the *Chicago Law Review* study, 65 percent of all property felony cases (which comprised about 85 percent of the total number of felony cases) were taken directly to the Grand Jury.¹⁹⁷ The decision to take such a large proportion of cases directly to the Grand Jury meant that two-thirds of the felony defendants were automatically excluded from the normal processes of plea bargaining, reductions, and dismissals which characterize the preliminary hearing under normal circumstances. According to one attorney, it was generally felt that this meant that it "had been decided by [Chief Judge] Boyle and others to attempt to send as many riot prisoners as possible to prison in the name of law and order rather than permit reduced sentences or dismissals after the passage of time."¹⁹⁸

Thirty-five percent of the property felonies were permitted to have preliminary hearings, but they too were denied the normal opportunity to bargain for reduced charges. One assistant state's attorney indicated that "if you had witnesses, the policy was not to allow to plead," and was seconded by the assistant in charge of riot prosecution, who explained that "we had a conscious policy not to reduce charges at the preliminary hearing."¹⁹⁹ Thus, as did the Detroit and Los Angeles prosecutors, the Chicago prosecutor took a "hard line" at the preliminary hearing stage; unlike his colleagues, however, the Chicago prosecutor was able to ensure that only a small proportion of cases actually reached preliminary hearings.

Of those cases which did reach preliminary hearings, 39 percent were bound over to the Grand Jury; 56 percent were dismissed or discharged; and only 5 percent were reduced to misdemeanors.²⁰⁰ The unusually low rate of reductions in the riot preliminary hearings was a consequence of the prosecution's policy against reductions; this rigid policy on the one hand and serious evidence problems on the other account for an unusually high dismissal rate. These statistics emphasize the importance of the state's attorney's strategy of "going direct" in the majority of cases; they suggest that, had he opted for preliminary hearings, a large number of the total felony cases would have been dismissed.

Instead, prosecution domination of the charging process and the bypassing of the preliminary hearing in the majority of cases produced an unusually high ratio of cases bound over to the Grand Jury. Table 4.3, adapted from the

TABLE 4.3. Comparative Preliminary Hearing Dispositions

	<i>Riot</i> (percent)	<i>Burglary: Nonriot</i> (percent)
Dismissed or discharged	19	44
Reductions to misdemeanor	2	22
Held for felony prosecution	79 ^a	33 ^b
Total	100	99

^a Fourteen percent had preliminary hearings, sixty-five percent did not.

^b One hundred percent had preliminary hearings.

Chicago Law Review study, compares riot and nonriot dispositions of felony cases at the preliminary hearings stage. Whereas we have seen that normally only around 20 percent of all felony cases are bound over, following the revolt 71 percent of all felony cases were bound over. Whereas normally only 33 percent of burglary cases are bound over, following the revolt 79 percent of all burglary cases were bound over. "This difference is more than accounted

for by the 65 percent of the property felonies for which the State's Attorney on his own motion obtained indictments." While in nonriot times all of those bound over receive preliminary hearings, following the revolt only 14 percent of the property felonies bound over received preliminary hearings.²⁰¹

The prosecution was thus successful in its efforts to achieve a high proportion of bind-overs to the Grand Jury and to avoid a large number of reductions. This abandonment of normal gate-keeping functions at the preliminary stage, however, would result in the imposition of a serious burden on the felony trial courts. This becomes clear when one examines the primary rationale for the normal screening out of approximately 80 percent of all felony cases at the preliminary stage. As McIntyre points out, normally

The selection of felony cases which are to be pursued through conviction is, in the first instance, determined by the numerical limitation on cases that can be accommodated by criminal law agencies. . . . [T]he judge is markedly influenced by his knowledge that the single Grand Jury in Cook County, the ten judges who preside over felony trials, the limited personnel in the State's Attorney's office, and the heavily taxed jails and probation facilities can only handle about 20 percent of the cases initiated.²⁰²

The crucial screening role allotted to the preliminary hearing under normal conditions is underscored by the fact that normally the Grand Jury plays an insignificant screening role; "practically all charges referred to the Grand Jury through the preliminary hearing result in indictment."²⁰³ Thus Oaks and Lehman found that in 1964, the Grand Jury returned No Bills (refused indictments) in only 9 percent of the cases referred to it.²⁰⁴

Following the revolt, even this minimal screening role on the part of the Grand Jury was virtually eliminated. According to the state's attorney's office, the Grand Jury returned only ten No Bills—or just over 1 percent—of the more than 700 cases referred to it for indictment.²⁰⁵ One assistant state's attorney who presided over the presentation of cases to the May Grand Jury explained frankly that

We did have a lot of evidence problems . . . sometimes we indicted people without a complaining witness being at the hearing, under the assumption that the police had already interviewed him and that he could be subpoenaed for the trial. . . . Sometimes we proceeded in a way we normally wouldn't proceed. As we progressed from day to day it became easier and easier to get a True Bill, as people got into the spirit . . . reason withdraws and emotion takes over. They were so tired of hearing case after case. . . . —after twenty days of this I could have indicted Mayor Daley!²⁰⁶

The abandonment of normal screening at the preliminary hearing stage and even the minimal screening which normally takes place before the Grand Jury meant that the normal concerns of efficiency and economy—as reflected in

McIntyre's emphasis of the crucial impact of limitations in court facilities and personnel on normal screening—gave way to the state's attorney's insistence on maximum felony prosecutions. The more than 700 defendants indicted represented over one-fifth of the normal total of felony defendants indicted in an entire year in Cook County, or approximately a normal eleven weeks' load of felony trials.²⁰⁷ Of the 728 defendants indicted, 662 were indicted for burglary, or a full two-thirds the number normally indicted for burglary in an entire year.²⁰⁸ According to one assistant state's attorney,

The 700 cases are a much greater burden than the normal call. This puts at least twenty more cases on everyone's [judge's] call, or an additional sixty or seventy defendants on everyone's call. And if only one of the four defendants [in a case] wants a jury trial, you have to go to jury for all four.²⁰⁹

Felony Trials and Dispositions

According to Chief Judge Boyle's administrative assistant and the assistant state's attorney in charge of riot prosecution, a conscious decision was made to integrate the indicted riot felony cases into the normal call of felony cases rather than to segregate them, as had been done at the early stages of the criminal process. According to the administrative assistant, "we decided as a matter of policy that once the Grand Jury had returned indictments that these cases should not be treated specially, so it couldn't be said that all cases were treated by one judge who was unfair."²¹⁰ The assistant state's attorney concurred, explaining that "it didn't seem practical or fair to isolate these people from those charged with nonriot offenses. [If we did this] assembly line justice was likely."²¹¹

The riot felonies, then, were split up between the regular ten criminal courts at 26th and California and four downtown courts which had been created during the summer (1968), according to the administrative assistant of the chief judge, to handle a long-term, secular increase in the number of felony indictments.²¹² According to court authorities, this decision not to segregate riot cases reflected their [stated] opinion that riot cases should be treated no differently from normal cases. Thus the presiding judge of the criminal division explained that "there doesn't need to be a special docket . . . the cases should be treated like any other cases. No policy has been established as to how to handle them . . . they're just another case."²¹³

The presiding judge was echoed by the chief of the criminal division of the state's attorney's office: "following indictments our assistants were told that they should handle the cases in the same way as any other cases; therefore, we put them on the regular docket."²¹⁴

Despite the articulated policy of treating "riot" cases as normal criminal cases, and the integration of the "riot" cases with the regular call so as to con-

firm this impression, there are indications that, contrary to the above protestations, a separate and more severe policy for riot felonies was evolved by the state's attorney's office. The same state's attorney who claimed his assistants were instructed to treat the riot cases like normal cases admitted that

Anyone, a judge or us, would generally believe that an offense in a riot is a more serious offense and anyone could expect that the penalties would be more severe. In the back of your mind, regardless of how liberal or conservative you are, you must take a more serious approach.²¹⁵

One of his assistants elaborated that "our policy in general was and is against probation. This is somewhat stricter than in 'nonriot' times. We don't consider riots normal things."²¹⁶

As of February 28, 1969, or nine months after the felony indictments had been handed down, 599—or 81 percent—of the 738 indicted defendants had come to trial. Since almost 19 percent of the cases had not been disposed of by the time this research was completed, the information below on dispositions and sentences is subject to some change. It is unlikely, however, that there would be any substantial changes, since the conviction rate and sentence distribution remained remarkably stable over the first nine months: those derived from the February 28 sample are virtually identical to those based on a January 2 and December 9 sample.²¹⁷

Of the 599 defendants disposed of as of February 28, 414 or some 70 percent were convicted. Since the 185 defendants not convicted includes 102 defendants who did not appear and for whom warrants were issued, however, the actual proportion of convictions to completed cases is much higher, reaching 83 percent.²¹⁸ The normal felony conviction rate in 1964 was 72 percent, or somewhat lower than the riot felony conviction rate; the 28 percent not convicted, however, includes 494 defendants in the SOL category, of whom about 300 received warrants for failing to appear.²¹⁹ If we exclude these 300 from our calculation of the normal conviction rate, as we excluded this category from the calculation of the riot conviction rate, the actual proportion of convictions to completed felony cases reaches 78 percent, or only 5 percentage points lower than following the April revolt.

This similarity in conviction rates is striking in the light of what we have seen was an unusually low preliminary hearing drop off following the April revolt. Figure 4.2 illustrates this phenomenon. Notice that, unlike following the major revolts in Los Angeles and Detroit, the Chicago court system following the April revolt did *not* compensate for an unusually high prosecution rate by reducing the normal proportion of defendants convicted at the trial stage; the Chicago conviction rate, in contrast to that of Los Angeles and Detroit, is not inversely related to the prosecution rate. This lack of compensation is reflected in the fact that, unlike Los Angeles and Detroit, where the pro-

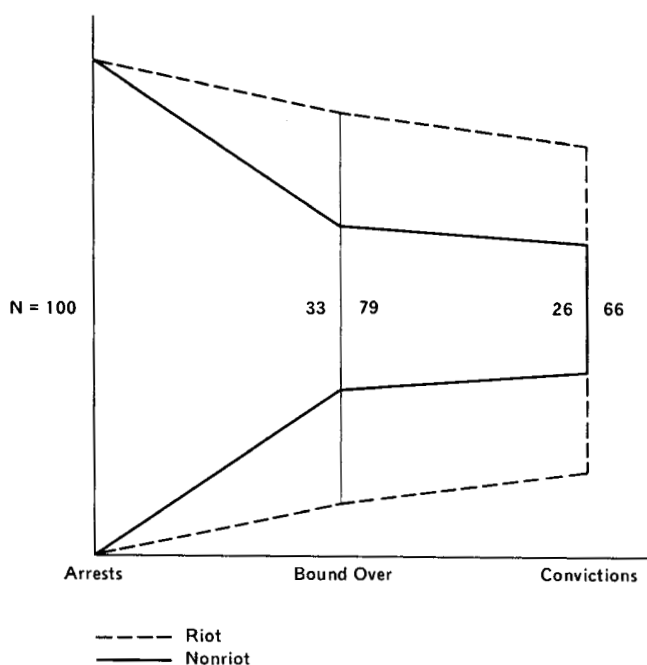


Fig. 4.2. Chicago: 1968 Comparative Case Flow—Arrest through Conviction

portion of all those arrested who were convicted approximated the norm, in Chicago the proportion of total arrestees who were convicted is more than twice the norm.²²⁰

There are a number of possible reasons for Chicago's failure to conform to the pattern of Los Angeles and Detroit. First, the 21 percent drop off rate at the preliminary hearing stage in Chicago underestimates the amount of actual screening of felony arrests which took place: as we have seen, assistant state's attorneys in April (unlike normally) screened charges at the precincts and at 11th and State, and it is likely that several hundred defendants who might otherwise have been initially charged with felonies were charged with property misdemeanors. Thus, whereas *less* screening took place at the preliminary hearing stage, *more* screening than normal took place at the initial charging stage. Moreover, whereas in Los Angeles and Detroit prosecutors barely (if at all) read the complaints,²²¹ and conducted no investigations prior to charging and in most cases even prior to the preliminary hearing, in Chicago six assistant state's attorneys and detectives conducted intensive interviews with arresting officers, obtained the assurances of cooperation from complaining witnesses, and screened out "bad cases" by allowing them to be disposed of

at preliminary hearings, prior to their decision to take cases directly to the Grand Jury (i.e., to charge them with felonies). The abandonment of gate-keeping functions was not as total in Chicago as it was in Los Angeles and Detroit, with the result that there was actually more occasion to screen out cases which for reasons of lack of evidence stood no chance of (felony) conviction. Even though the "prosecution"²²² rate in Chicago was comparably high to that in Los Angeles and Detroit, the proportion of bad cases screened out prior to "prosecution" was undoubtedly much greater; consequently one would expect less "adjustment" in the conviction rate.

Given his unusually large role in the prosecution of felony cases, and consequently his unusually strong commitment to them, the state's attorney took a "hard line" at the felony trials, refusing to dismiss any but a handful of cases. Thus an unusually high proportion of total indicted defendants—almost 97 percent—had their cases disposed of on their merits; normally only about 80 percent of indicted felony defendants have their cases disposed of on their merits.²²³ Whereas normally the great majority of defendants who are not convicted are dismissed without trial on the merits of the case, following the April revolt 76 percent of those not convicted were disposed of by trial on the merits, i.e., by some form of acquittal. This unusually low proportion of dismissals indicates that the prosecution was confident enough about the quality of his evidence to push strongly for convictions in virtually all cases.

No precise breakdown of the method of disposition of the cases resulting in conviction is available. According to what this writer could ascertain, none was tabulated by court authorities, and the fact that the "riot" cases have not been handled on a separate docket made it impossible for the writer to undertake such an analysis. We know, however, that normally well over 80 percent of convicted felony defendants eventually plead guilty,²²⁴ and, according to interviews with state's attorney personnel, that "an even higher percentage of ["riot"] defendants eventually pleaded guilty."²²⁵ Given the fact that public defender control over the representation process was, as we have seen, greater than normal, and the fact that studies have shown that the public defender is more likely to "plead" his client than a private attorney,²²⁶ there is no reason to doubt the words of the state's attorney spokesman. The fact that the rate of convictions is higher than normal, while at the same time the rate of acquittals is also higher than normal, also tends to confirm the impression that the plea rate was higher than normal.²²⁷

We also have no precise data as to the number of convictions resulting from jury trials. We know that normally about 7 percent of all convictions in felony cases come from jury trials,²²⁸ and there are indications that following the April revolt the jury trial rate was even lower. One law student observer, con-

firming a contention on the part of state's attorney personnel, noted that "I know that there were some jury trials, but I'm sure there were far fewer than normally."²²⁹ The increase in the guilty plea rate, and the fact that public defenders generally demand fewer jury trials than private attorneys, tend to substantiate the contention that even a higher proportion of cases than normally were disposed of efficiently and without the disruptive consequences of jury trial demands.

If the state's attorney's office was successful in its effort to achieve a high conviction rate, it was also apparently successful in avoiding convictions on reduced charges. As we have seen, even before the April revolt the state's attorney had decided that he would not tolerate the huge number of reductions attendant to the court response to Los Angeles' and Detroit's major revolts. According to the chief of the criminal division, "it was our position . . . that because of our system of reviewing the file after arrest, and of interviewing witnesses and making judgment as to the charge prior to indictment . . . we would not reduce the charge."²³⁰

Normally in Chicago, in contrast to Los Angeles and especially to Detroit, and in large part because of the unique charge reduction role of the preliminary hearing in Chicago, there is very little charge reduction following felony indictment. Thus McIntyre explains that "it was learned from several trial judges that negotiations and charge reductions rarely occur after the indictment is returned. The great bulk of guilty pleas in the trial courts were to the charges contained in the indictments."²³¹ Following the revolt, given the above policy on reductions described by the head of the state's attorney's criminal division, there was no deviation from this pattern. Thus this assistant state's attorney explained (and was echoed by the one in charge of riot prosecution) that

There have not been significant reductions after indictment. This has been consistent with our normal procedures. We didn't have to do any bending. The judge could, I suppose, in his discretion find the man guilty of a lesser included charge, he could reduce it on his own. As a general rule, this has not happened. Our convictions have been for felonies.²³²

Although the unusually high proportion of cases bound over for felony trial did not prevent the state's attorney from achieving a high conviction rate and convictions on the original charges, it did prevent him, we shall see, from implementing his rather severe (no probation) sentence policy. Normally, in Chicago, as with all metropolitan court systems, there is as we have seen tremendous pressure to dispose of indicted felony cases with efficiency and rapidity. Although as we have said plea bargaining following indictment in Chicago does not normally encompass charge reduction, it does entail sentence "leniency" as a means of coping with the volume pressures. Thus Oaks

and Lehman note that "prosecutors typically agree to lower sentences" in order to encourage guilty pleas, and thereby "keep the number of trials down to a level reasonable in the light of available manpower," and that "the decision . . . to plead guilty appear[s] to be motivated by a balancing by the defendant or his lawyer of leniency in sentencing against the chance of being found guilty at all."²³³

As we have seen, the more than 700 indicted felony defendants added measurably to the already great volume pressures confronting the felony trial courts, representing over one-fifth the normal year's quota. Even though these cases were reasonably "good cases," relatively free of evidence problems compared to those bound over in Los Angeles and Detroit, they still represented an absolute increase of substantial proportion in the number of cases on each judge's call. Given this additional burden, an unusual degree of sentence leniency on the part of judges was necessary to assure that no serious disruption of the Chicago "disposition derby" would take place. Despite the state's attorney's policy against probation, we shall see that probation was the predominant sentence. The assistant state's attorney who earlier articulated his office's "no probation" policy explained that

Judges are giving probation anyway . . . because you have to keep your call moving, you have to get rid of cases. If you're going to slap a guy with one to three years on a plea of guilty, he'll take a trial. But for the volume people would never get probation.²³⁴

In fact, however, given volume pressures over 70 percent of all convicted defendants received no more than probationary sentences, generally ranging from between two and five years.²³⁵ Table 4.4 presents the distribution of those sentences for which we have information and compares this distribution with the normal distribution of felony sentences.²³⁶ Notice that normally a convicted felony defendant is three times more likely to receive a penitentiary sentence of at least one year than to receive a probationary sentence; follow-

TABLE 4.4. Comparative Felony Sentence Distribution

	<i>Riot</i>		<i>Nonriot</i>
	<i>Number</i>	<i>Percent</i>	<i>Percent</i>
Penitentiary	37	9	59
Probation	291	71	21
Jail	76	18	17
Other (fine, supervision, etc.)	8	2	3
Total	412	100	100

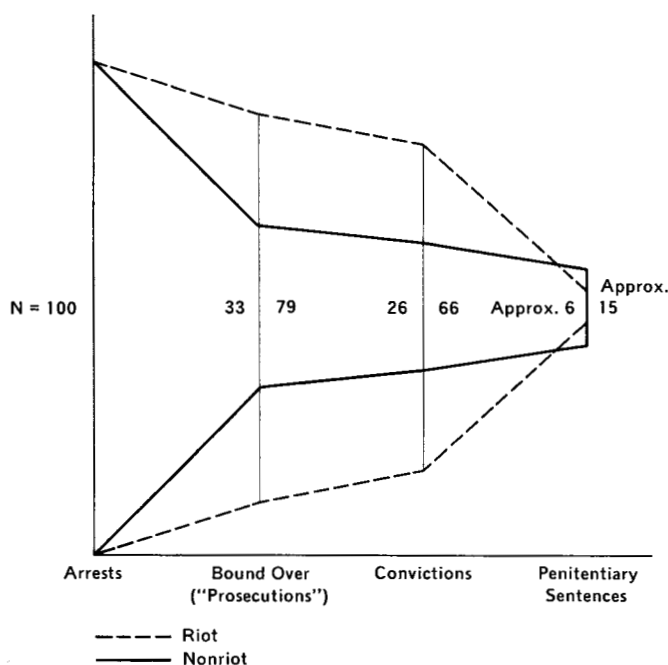


Fig. 4.3. Chicago: 1968 Comparative Complete Case Flow

ing the April revolt, however, the probabilities are dramatically reversed, and a convicted defendant was seven times more likely to receive probation than a penitentiary sentence.

Figure 4.3 graphically portrays this comparison by adding to the riot and nonriot case flows the proportion of convicted defendants receiving penitentiary sentences. Notice that the drop-off in penitentiary sentences following conviction after the April revolt is so great that, despite the fact that four times the normal proportion of arrestees were convicted after felony trials, the proportion of total arrests in April which resulted in penitentiary sentences is little more than one-third of the normal proportion.

Summary

We have tried to show that the Chicago court response to its major ghetto revolt was significantly shaped by its prior learning experience, that it was actions taken on the basis of this learning experience which in large part serve to differentiate its court response to a major revolt from that of Los Angeles and Detroit. By opting for a relatively low bail policy, Chicago court authorities were able to implement preventive detention without creating the over-

whelming detention pressures attendant to a high bail policy in Los Angeles and Detroit. By screening charges more carefully than normally at the arrest stage and by taking felony cases directly to the Grand Jury following another intensive prosecution screening, Chicago court authorities were able to obtain a high conviction rate and to avoid the dismissals and reductions which we have seen resulted in Los Angeles and Detroit from the abandonment of gate-keeping functions in these cities. In these respects, Chicago court authorities were able to minimize the disruptive effects of the influx of several thousand cases over a six-day period; it is not an accident that the criminal process in Chicago following the April revolt approximated "normal" functioning—in terms of bail, charging, and convictions—much more closely than did the criminal process following the major revolts in Los Angeles and Detroit. Thus Chief Judge Boyle could with some justification boast of his court's efficiency, indicating that "if we had it to do again tomorrow, I think we would handle it in the same fashion, because we could have handled an unlimited number of defendants. We could have taken care of two or three thousand more if necessary."²³⁷

We have also tried to show that, despite these deviations from the pattern of major revolt response established in Los Angeles and Detroit, Chicago's response in crucial respects conformed to this pattern. Thus in Chicago, as well as in Los Angeles and Detroit, court sanctions were markedly less severe than normally. Despite the initial hostility of court authorities, and their insistence on severe sentences, only a small fraction of those arrested received any penalties other than probation or several days of presentence detention; an unusually small proportion of convicted defendants spent any time in jail following their conviction, and an even smaller proportion than normally received felony sentences. "The punishment imposed by the criminal justice system was borne by [most] defendants before, not after, trial, and it was borne without respect to whether there was final judgment of guilt."²³⁸ As in Los Angeles and Detroit, the normally crucial role of the determination of guilt as a determinant of criminal sanctions receded in the face of a massive, collective threat to both political authorities in general and the court system in particular.

POST-APRIL PLANNING

With the Democratic convention scheduled for August in Chicago, court authorities faced the prospect of another "hot summer." As early as one month following the outbreak of the April revolt, the first of a series of meetings of police and court officials was scheduled, marking the beginning of an effort which was to culminate several months later in new and detailed police and court mass arrests orders. As late as June 12, however, court authorities were

criticized at a hearing of the Illinois Advisory Committee of the United States Civil Rights Commission for having failed to develop specific, concrete plans for future disorders.²³⁹ This hearing (to which court authorities and members of the defense community were invited and which reviewed in highly critical terms the court response in April) and the publicity attendant to it undoubtedly served as an impetus for the rapid development of specific court plans.

Prior to the June meeting of the Illinois Advisory Committee, as early as May 10, the president of the Chicago Bar Association had reactivated the Civil Disorders Committee under a new chairman, expanded its membership, and charged it with developing a comprehensive volunteer lawyer plan and maintaining liaison with police and court officials.²⁴⁰ According to the executive director of the bar association, "the Civil Disorders Committee was completely revamped after April. We set out to deliberately find people who were involved in the basic causes of the disturbances."²⁴¹

The membership of the committee did in fact reflect to some degree such an effort, the president of the CBA appointing representatives of the ACLU, Legal Aid, CCBA, and CLC in addition to a number of Chicago Bar Association officials. In an effort to engage the interest and cooperation of court authorities, they were offered membership on the committee; they refused formal membership, on the grounds of not wanting to be bound by committee votes which might pertain to their responsibilities,²⁴² but several, including the assistant state's attorney who had been in charge of riot prosecution in April, the presiding judge of the municipal court, and representatives of the offices of the corporation counsel and public defender participated as ex-officio members.

According to Chicago Bar Association representatives, the participation of court authorities was sought both because their approval of any volunteer lawyer plan developed by the committee was desired and because the committee members wished to influence the content of police and court plans. Despite the proddings of the chairman of the Illinois Advisory Committee and of the Ad Hoc Legal Committee, created that summer and comprised of representatives of a variety of nonestablishment defense groups including the ACLU, Legal Aid, and CLC, the CBA committee did not press for the establishment of a formal, citywide committee integrating police, court, and lawyer plans—in part, according to one member, because "the mayor didn't want one."²⁴³ Instead, it was felt that the informal membership of court authorities on the Civil Disorders Committee would ensure the desired coordination of, and lawyer influence over, planning efforts. In actual fact, however, as we shall see, court authorities were to exercise a controlling influence over the development of the CBA committee's volunteer lawyer plan, while the com-

mittee was to have very little real influence over the development of police and court orders.

By the middle of June, and following submission to, and editing by, court authorities, an interim report was submitted to the board of managers of the CBA for approval. The report, subsequently approved by the board, called for volunteer lawyers to aid without compensation the public defender at bond hearings if the public defender determined that his resources were inadequate, and for the public defender to conduct with the assistance of the bar association a training program for volunteer lawyers to familiarize them with bond-hearing procedures. Volunteer representation was contemplated for the bond hearings or bond-reduction hearings only; no arrangements were made for continuity of volunteer counsel. Provision was made, however, for volunteer attorneys to observe the entire court proceedings. Language in an earlier draft of the report insisting on the right of volunteer attorneys to appear at the bail hearings regardless of whether or not the public defender claimed to have sufficient manpower, and suggesting that the volunteer attorney plan be put into effect "if it appears that the public defender is not taking adequate steps to implement the foregoing plan" was deleted from the final draft following its submission to the public defender.²⁴⁴

The committee plan thus placed control of the volunteer lawyer effort squarely in the hands of the public defender. Although the final version of the committee plan contemplated some volunteer representation at the trial as well as the bond-hearing stage, all volunteer efforts would be, in the words of the public defender, "under the direction of my office."²⁴⁵ Teams of bond-hearing, trial, and observer lawyers were expected to "work with" the public defender, and no mention was made of any class actions which attorneys might undertake on behalf of their potential clients.²⁴⁶ Moreover, at no time did the committee take a stand on bail policy, or any other substantive issue, preferring instead to restrict itself solely to the question of volunteer representation. According to the chairman of the committee, Kerner Commission recommendations were not adopted because they were "too vague."²⁴⁷

The administrative director of the circuit court summed up the administration's view of the committee's role, explaining that "they were to make recommendations as to citywide planning, but this was a committee which could only make suggestions. We indicated [however] that we would consider seriously the recommendations of the committee."²⁴⁸ Thus representatives of the CBA committee were invited to two citywide planning sessions during which their recommendations for new police and court plans were solicited. In actual fact, however, most of the recommendations of the committee, as conveyed in an August 8 letter to Chief Judge Boyle and the superintendent of police, were ignored or rejected. According to a committee member, "more

of our ideas didn't get through than did."²⁴⁹ Thus, although the committee was successful in persuading court authorities to include a provision expressly advising defendants that they could be represented either by the public defender or volunteer counsel at the initial hearing, and in apparently dissuading court authorities from permitting only Chicago Bar Association volunteer attorneys to enter mass arrest court,²⁵⁰ the committee's suggestions with respect to the separate handling of minor misdemeanor defendants and felony defendants were not incorporated into the forthcoming new police and court orders. Nor, in addition, were suggestions made by some committee members that the normal policy of station house releases following the posting of a minimal cash bond be implemented for riot misdemeanor offenses.²⁵¹

The new police order outlines in some detail procedures from point of arrest through booking and prearrest detention, creating functionally differentiated teams of officers and detectives. Special attention is given to the problems of marshalling evidence and arrest reports, and of maintaining complete and accurate lists of all prisoners, which plagued police and detention officials during the April revolt. One provision in the order formally recognizes the role of the corporation counsel and/or state's attorney in screening charges at the initial stages of prosecution.²⁵²

The court order, General Order Number 18, outlines court procedures, concentrating on initial bail hearings. The order vests broad discretion in the hands of the chief judge, who is charged with the responsibility of assigning courtrooms, assigning judges and magistrates, and directing the activities of the clerk of the circuit court, the sheriff, the state's attorney, the corporation counsel, the public defender, and the chairman of the Chicago Bar Association's Volunteer Lawyers Committee. Moreover, only "persons designated by the Presiding Judge of the District shall be allowed to interview the defendants," or to "be admitted to . . . court facilities to observe the proceeding therein." Finally, the order contemplates that only members of the CBA Volunteer Lawyers Committee will be appointed "if the defendant requests counsel other than the Public Defender."²⁵³

The order indicates further that bail should not be oppressive and should be "considerate of the financial ability of the accused," encourages the use of recognizance bonds in "appropriate cases," and provides for reduction hearings to take place subsequent to the initial hearings.²⁵⁴ Despite these assurances, one member of the Civil Disorders Committee admitted that his impression, conveyed to him by the presiding judge of the municipal division, was that the widespread use of recognizance bonds was not contemplated,²⁵⁵ and confided in a letter to another attorney that "unfortunately, the public agencies with which our committee has been dealing are reluctant to permit any outsiders to participate in planning. Consequently it appears that preventive detention will still be the order of the day."²⁵⁶ Indeed, Chief Judge

Boyle indicated in an interview with staff of the Austin Commission (appointed by Mayor Daley to investigate the April revolt) that he did not favor bail reductions until the emergency were declared over by executive officials,²⁵⁷ and the court order specifically indicates that reduction hearings will not begin until "as soon as practicable after the incident which gave rise to the mass arrest has ended."²⁵⁸

The plans of Chicago court authorities, unlike those of authorities in Detroit, then, in no sense represented an implementation of the recommendations of the Kerner Commission. No provisions were made for separating "petty" from "serious" offenders, and no endorsement of a genuine low bail policy or station house release policy was forthcoming. The Chicago defense community played a relatively insignificant role in the development of police and court plans; moreover, its participation in future defense efforts would be centralized under a bar association committee subject to the direction of the public defender. By thus eliminating the threat of "disruptive" defense efforts, it was anticipated by the chief judge that the new plan could guarantee the efficient processing of up to 10,000 defendants in any one disorder. As we have seen, relatively unchallenged court authority control and coordinated manipulation of the criminal process has been a hallmark of the court response to ghetto revolts over the past several years in Chicago, and there is nothing in the new plans which suggests that this will not continue to be the case.

NOTES TO CHAPTER FOUR

1. Personal interviews with Richard Elrod, assistant corporation counsel, and Lawrence Chambers, staff member.

2. Donald J. McIntyre, "A Study of Judicial Dominance of the Charging Process," *Journal of Criminal Law, Criminology, and Police Science* 59, no. 4 (December 1968): 465-490.

3. Dallin H. Oaks and Warren Lehman, *A Criminal Justice System and the Indigent* (Chicago: University of Chicago Press, 1968), pp. 28-29.

4. Personal interview with Benjamin Makoff, administrative director, Cook County Circuit Court.

5. General Order Number 66-12 of Municipal Court of Chicago, "Subject: Mass Arrest Procedure."

6. Interview with Makoff.

7. *Illinois Advisory Committee Report*, pp. 180-181, mimeographed, in the files of the United States Civil Rights Commission.

8. Illinois Statutes, 38-25, 1-a2, in Robert Karton, "Procedures in Civil Disobedience Cases" (Presented and distributed at the 71st Annual Conference of Illinois State's Attorneys Association, December 1968).

9. Selected case records are in the author's files.

10. Selected case transcripts are in the author's files.
11. Interview with Chambers.
12. Personal interview with Robert Karton.
13. Karton, "Procedures in Civil Disobedience Cases," pp. 8-9.
14. Interview with Karton.
15. Thus one eyewitness to court proceedings following the 67th and Cottage incident reported that, at the trials, "no evidence was presented of any unlawful activity taking place at 67th and Cottage." From the files of the Chicago ACLU.
16. Personal interview with Alderman Leon Despres.
17. Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 39.
18. No statistics are kept by the municipal court on guilty pleas, but this observation was confirmed by numerous defense attorneys familiar with the treatment of misdemeanor cases in that court.
19. These statistics are based on data collected by the author from case records.
20. See note 19. Since at the time that this research was conducted there was still a handful of incomplete cases, and the sample is small, these proportions are subject to slight change.
21. Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 49.
22. Interview with Karton.
23. Personal interview with Leo Holt, attorney.
24. Interview with Despres.
25. Personal interview with Jacques Fuller, executive director, Chicago Bar Association.
26. Personal interview with Marshall Patner.
27. Letter from John Doar, assistant attorney general, to Jay Miller, executive director, Chicago ACLU, in the files of the Chicago ACLU.
28. Personal interview with Robert Tucker, attorney.
29. *Illinois Advisory Committee Report*, p. 182.
30. See flier, "Revolt at the Wall," in the files of the Chicago ACLU.
31. Interview with Tucker.
32. Interview with Tucker.
33. See the *Hyde Park-Kenwood Voices*, April 1968, p. 15.
34. Ibid.
35. Interview with Karton.
36. Interview with Despres. It took almost a year, even with the persistent aid of Alderman Despres, to obtain a transcript of this budget hearing testimony.
37. Karton, "Procedures in Civil Disobedience Cases," p. 16.
38. Interview with Makoff and personal interview with Assistant State's Attorney William Martin. See also the files of the Austin Commission.
39. From the files of the Austin Commission.
40. Interview with Martin.
41. Telephone interview with John Stamos.
42. Interview with Karton.
43. Interview with Martin.

44. Confidential interview.
45. Interview with Karton.
46. Interview with Martin.
47. Chicago, in contrast to Los Angeles and Detroit, uses the Grand Jury for almost all felony cases. The normal procedure involves a preliminary hearing, at which time an alleged felon is either bound over to the Grand Jury (which then votes in closed session whether to hold the man over for trial), has his case reduced to a misdemeanor, in which case disposition and sentencing may take place at the preliminary hearing, or is discharged. See McIntyre, "A Study of Judicial Dominance of the Charging Process," pp. 463-490.
48. Interview with Karton.
49. Interview with Martin. The fact that the Democratic convention was likely to take place in Chicago added fuel to these fears.
50. Interview with Martin.
51. Personal interview with William Ruddell, superintendent, Chicago House of Corrections.
52. Interview with Makoff.
53. Interview with Stamos.
54. Testimony of Lawrence Pusateri, former head of the Chicago Bar Association Civil Disorders Committee, before the Austin Commission.
55. *Illinois Advisory Committee Report*, p. 48.
56. Confidential interview.
57. Personal interview with Kermit Coleman, ACLU attorney.
58. *Report of the Chicago Riot Study Commission* (1967), pp. 6-9, 12-13. (Hereinafter cited as the *Austin Commission Report*.)
59. *Ibid.*, p. 35.
60. *Chicago Daily News*, April 6, 1968.
61. *Austin Commission Report*, p. 19.
62. *Ibid.*, p. 20.
63. The precise number of riot-related arrests was difficult to ascertain. Police statistics show 3,120 arrests during the course of the revolt, of which 546 were juveniles. These statistics, however, refer to the number of separate charges, not individuals, and a study undertaken by the *University of Chicago Law Review* indicates that over 200 defendants received more than one charge. According to this study, 2,189 adults facing a total of 2,439 charges were arrested between 7:00 P.M. on April 4 and 7:00 P.M. on April 11. See "Criminal Justice in Extremis: Administration of Justice During the April, 1968 Chicago Disorder," *The University of Chicago Law Review* 34, no. 3 (Spring 1969): 456. (Hereinafter cited as the *Chicago Law Review Report*.)
64. *Austin Commission Report*, p. 43, and see the *Chicago Law Review Report*, p. 469.
65. *Chicago Law Review Report*, p. 477.
66. *Austin Commission Report*, p. 43.
67. *Chicago Law Review Report*, first draft, chap. iii, p. 35 (in the files of the author).

68. According to Oaks and Lehman, it is virtually impossible to calculate the number of cases which police normally screen out, but it is no doubt substantial. *A Criminal Justice System and the Indigent*, pp. 18–27. Screening, however, is less frequent with respect to felony cases than it is with respect to misdemeanors and ordinance violations. See McIntyre, “Judicial Dominance of the Charging Process,” pp. 469–470.

69. *Chicago Law Review* Report, first draft, chap. vi, p. 16. According to one assistant state’s attorney, however, “a large number of arrested persons simply could not be transported from the scene of arrest . . . 11th and State and finally to 26th and California; apparently those for whom no vehicles were available were simply released.” From the files of the Austin Commission.

70. Interview with Makoff and *Austin Commission Report*, p. 89.

71. *Chicago Law Review* Report, p. 477.

72. *Ibid.*, first draft, chap. v, p. 4. A statistical summary of the findings of the *Law Review* is in the files of the author.

73. *Ibid.*, chap. vii, p. 53.

74. *Ibid.*, chap. vi, p. 10.

75. *Ibid.*, pp. 15–16.

76. Interview with Martin.

77. Statistics compiled by the state’s attorney’s office and made available to the author.

78. *Chicago Law Review* Report, first draft, chap. vi, p. 18.

79. *Ibid.*, p. 25.

80. From the statistical summary of the findings of the *Law Review*.

81. Statistics compiled by the state’s attorney’s office.

82. Karton, “Procedures in Civil Disobedience Cases.”

83. From the log of activities of the state’s attorney’s office in the files of the Austin Commission.

84. Interview with Makoff.

85. *Austin Commission Report*, p. 101, and *Illinois Advisory Committee Report*, p. 49.

86. Anthony Platt, “The Administration of Justice in Crises,” unpublished manuscript (Chicago, April 1968), pp. 5–8. (Hereinafter cited as the Platt Report.)

87. *Austin Commission Report*, p. 86.

88. Platt Report, p. 6; personal interview with David Long, ACLU staff attorney.

89. Philip Ginsberg, *Report to the National Legal Aid and Defender Association*, May 19, 1968 (unpublished manuscript), p. 4. (Hereinafter cited as the Ginsberg Report.)

90. Interview with Long.

91. Interview with Makoff.

92. Interview with Makoff.

93. *Chicago Law Review* Report, first draft, chap. vii, pp. 2, 65.

94. *Ibid.*, chap. vi, pp. 37, 32.
95. See the files of the Austin Commission.
96. Interview with Judge Kasimar Wachowski conducted by Sharon Dunkle, made available to the author through the courtesy of Anthony Platt.
97. *Chicago Law Review* Report, first draft, chap. vi, p. 38.
98. *Ibid.*, chap. vii, p. 27.
99. Platt Report, p. 29.
100. Interview with Long.
101. Interview with Ruddell.
102. *Chicago Law Review* Report, first draft, chap. vii, p. 103.
103. *Ibid.*
104. *Ibid.*, p. 104.
105. Interview with Makoff.
106. Interview with Ruddell.
107. Interview with Makoff.
108. Interview with Ruddell.
109. Interview with Martin.
110. Interview with Makoff.
111. *Chicago Law Review* Report, first draft, chap. vii, pp. 21, 31.
112. *Ibid.*, p. 25.
113. From the files of the Chicago ACLU.
114. Platt Report, p. 16; Interview with Long.
115. Ginsberg Report, p. 4.
116. Interview with Long.
117. Confidential interview.
118. Personal interview with Philip Ginsberg, attorney, Mandel Legal Aid Clinic.
119. *Illinois Advisory Committee Report*, p. 51.
120. Platt Report, p. 11; interviews with Coleman and Martin. See also *Chicago Law Review* Report, first draft, chap. vii, pp. 85–86.
121. *Chicago Law Review* Report, first draft, chap. vii, p. 88.
122. From the files of the Chicago ACLU.
123. Platt Report, p. 20; interview with Makoff.
124. From minutes of emergency meeting of the Cook County Bar Association, April 12, 1968, in the files of the author.
125. *Ibid.*
126. *Illinois Advisory Committee Report*, p. 50.
127. Ginsberg Report, p. 7.
128. Personal interviews with Justice Walter Schaefer and Curtis Heaston, attorney; interview with Long.
129. Interview with Heaston.
130. From minutes of emergency meeting of the Cook County Bar Association, April 12, 1968.
131. *Chicago Law Review* Report, first draft, chap. vii, p. 13.

132. Interview with Martin.
133. From eyewitness report of Sharon Dunkle, in the files of the author, made available to the author through the courtesy of Anthony Platt.
134. From minutes of meeting of the Cook County Bar Association, April 16, 1968.
135. See *Chicago Law Review* Report, first draft, chap. vii, pp. 91ff., for a more detailed breakdown of bond reductions.
136. *Ibid.*, p. 95.
137. Lee Silverstein, "Bail in the State Courts," *Minnesota Law Review* 50, no. 4 (March 1966): 626.
138. Platt Report, p. 20.
139. *Chicago Law Review* Report, first draft, chap. vii, p. 32.
140. *Ibid.*, p. 27.
141. *Ibid.*, p. 29.
142. *Ibid.*, p. 94.
143. This figure is based on an extrapolation from table vii-4, *Chicago Law Review* Report, first draft, which treats as felonies all those for whom bail of \$2,500 or above was set.
144. Personal interview with Robert Boyle, chief of the criminal division, Cook County State's Attorney's Office.
145. In fact, defendants would be told in court that if they wanted continuances, they could obtain them at once; but defendants were not always aware that in so requesting they were waiving their right to have their cases disposed of within 120 days of the date of their arrest. See testimony of Gary Palmer, attorney, before the Austin Commission, in the files of the Austin Commission.
146. Interview with Makoff.
147. Interview with Long.
148. From minutes of emergency meeting of the Cook County Bar Association, April 12, 1968.
149. Interview with Heaston.
150. *Chicago Law Review* Report, first draft, chap. viii, p. 21.
151. Interview with Heaston.
152. Interview with Lawrence Kennen conducted by Sharon Dunkle, made available to the author through the courtesy of Anthony Platt.
153. Interview with Holt.
154. Minutes of emergency meeting of the Cook County Bar Association, April 12, 1968.
155. Interview with Heaston.
156. Personal interview with Stanley Bass.
157. Interview with Fuller.
158. Minutes of meeting of the Cook County Bar Association, April 16, 1968.
159. See above, pp. 198.
160. Interview with Wachowski.
161. Interview with Martin.
162. Interview with Wachowski.

163. See note 150.
164. *Chicago Law Review* Report, first draft, chap. viii, pp. 21–22.
165. Interview with Bass.
166. Interview with Bass.
167. Statistics compiled by the state's attorney's office.
168. Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 39.
169. *Chicago Law Review* Report, first draft, chap. vi, p. 57. According to statistics compiled by the state's attorney's office, conviction rates for curfew and disorderly cases were 57 and 68 percent respectively.
170. See above, pp. 185–186.
171. Data supplied to the author by the *Chicago Law Review*.
172. *Chicago Law Review* Report, first draft, table vii–5.
173. *Ibid.*
174. There are indications, moreover, that the proportion of defendants who actually served time was even lower. Thus the *Chicago Law Review* Report notes that "imprisonment sentence[s] [accompanying probation] were most frequently not in excess of the amount of time already served." First draft, chap. vi, p. 59.
175. Nonriot sentence distribution is based on Oaks and Lehman, *A Criminal Justice System and the Indigent*, Table 7, p. 39, adapted to exclude Support-Order to Pay cases.
176. *Chicago Law Review* Report, p. 554, n. 262; p. 555, table 38.
177. *Ibid.*, first draft, chap. vi, p. 61.
178. *Ibid.*
179. *Chicago Law Review* Report, pp. 548, 554, 556, table 40.
180. *Ibid.*, first draft, tables vi–18 and vi–19.
181. Personal interview with Robert Baranek, assistant state's attorney.
182. Interview with Martin.
183. McIntyre, "Judicial Dominance of the Charging Process," pp. 464, 469, 464.
184. *Ibid.*
185. Interview with Martin.
186. Interview with Boyle.
187. Interview with Baranek.
188. Report of the National Advisory Commission on Civil Disorders (New York: Bantam, 1968), p. 339. (Kerner Commission Report.)
189. Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 44.
190. McIntyre, "Judicial Dominance of the Charging Process," p. 483.
191. *Ibid.*
192. Interview with Baranek.
193. Interviews with Martin and Baranek.
194. Interview with Baranek.
195. *Chicago Law Review* Report, p. 566.
196. Interview with Martin.
197. *Chicago Law Review* Report, first draft.
198. Interview with Coleman.

199. Interviews with Boyle and Martin.
200. Normally, 33 percent of burglary defendants are bound over after the preliminary hearing, 44 percent are dismissed or discharged, and 22 percent are reduced to misdemeanors. McIntyre, "Judicial Dominance of the Charging Process," p. 463.
201. *Chicago Law Review* Report, first draft, chap. vi, p. 45.
202. McIntyre, "Judicial Dominance of the Charging Process," pp. 464-465.
203. *Ibid.*, p. 482.
204. Oaks and Lehman further suggest that at most, 7 to 10 percent of No Bills—or about 1 percent of the total number of bound-over defendants—are refused because of evidence problems, so actual screening at the Grand Jury is even far lower than the 9 percent figure of refused indictments would suggest. *A Criminal Justice System and the Indigent*, p. 45.
205. Interviews with Martin and Baranek. According to the *Chicago Law Review* Report (p. 565, n. 278), the cases referred to the Grand Jury for indictment included 662 burglaries, 6 arsons, 16 grand thefts, 4 attempted murders, 10 robberies, 9 weapons, and 4 aggravated battery.
206. Interview with Baranek.
207. See p. 183.
208. See Annual Report of the Circuit Court of Cook County, January 1, 1967 to December 31, 1967, p. 4.
209. Interview with Baranek.
210. Interview with Makoff.
211. Interview with Martin.
212. Interview with Makoff.
213. Personal interview with Judge Joseph O. Power.
214. Interview with Boyle.
215. Interview with Boyle.
216. Interview with Baranek.
217. Statistics compiled by the state's attorney's office.
218. See note 217.
219. Oaks and Lehman, *A Criminal Justice System and the Indigent*, pp. 70-71.
220. *Ibid.*, p. 46.
221. Thus, for example, in Detroit almost 100 percent of the nonprosecutions were a product of police decisions not to request warrants, rather than any prosecution screening. In both cities, virtually all police requests for warrants were granted without any prosecutorial investigation.
222. "Prosecution" rate in Chicago refers (in felony cases) to the proportion of defendants arrested who were bound over, since, as we have seen, the preliminary hearing in Chicago is the functional analogue to prosecution screening in Detroit and Los Angeles.
223. The 97 percent figure is based on the *Chicago Law Review* Report, table 49, p. 567, adjusting for the 102 defendants who did not appear and who therefore should not be included in a compilation of completed cases. The "normal"

figure of 80 percent comes from Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 70.

224. See Annual Report of the Circuit Court of Cook County, 1964, p. 15.

225. *Chicago Law Review* Report, first draft, chap. vi, p. 55.

226. See, for example, the forthcoming report of the Los Angeles County Probation Department, p. 11.

227. *Chicago Law Review* Report, p. 568. If the conviction rate was higher than normal, yet more defendants were "getting off" following trial than normally, one would have to conclude that the higher conviction rate was a product of a higher than normal rate of guilty pleas.

228. From "Three Year Survey: Analysis of Cases and Revenue, County Department. Criminal Division, December 1 to November 30, 1964-1967," Joseph J. McDonough, Clerk of Circuit Court of Cook County, in the files of the author.

229. Personal interview with Mark Aronsen.

230. Interview with Boyle.

231. McIntyre, "Judicial Dominance of the Charging Process," p. 482. According to court statistics, in 1967 almost 84 percent of indicted felony defendants who were convicted pleaded guilty to the charge on which they were indicted. See *Chicago Law Review* Report, p. 568, n. 285.

232. Interview with Boyle.

233. Oaks and Lehman, *A Criminal Justice System and the Indigent*, pp. 77, 54.

234. Interview with Baranek.

235. Statistics compiled by the state's attorney's office.

236. Normal felony sentence distribution comes from Oaks and Lehman, *A Criminal Justice System and the Indigent*, p. 75, collapsing the separate distributions for 1963 and 1964 into one overall distribution.

237. See the files of the Austin Commission.

238. *Chicago Law Review* Report, p. 539.

239. *Chicago Tribune*, April 13, 1968.

240. Personal interview with Morris Wechsler, attorney.

241. Interview with Fuller.

242. Interviews with Martin, Fuller, and Wechsler.

243. Interview with Ginsberg.

244. From the files of Philip Ginsberg.

245. Personal interview with Gerald Ghetty.

246. Letter from Justin Stanley, president of the Chicago Bar Association, to Cook County attorneys, June 27, 1968, in the files of the author.

247. Interview with Wechsler. Another member of the committee indicated that several members were opposed to a low bail policy, and that some endorsed preventive detention. Confidential interview.

248. Interview with Makoff.

249. Interview with Ginsberg.

250. This proposed provision encountered the vocal opposition of the Chicago ACLU and a number of nonestablishment committee members.

- 251. Interview with Ginsberg.
- 252. See *Austin Commission Report*, appendix D, pp. 192–201.
- 253. Circuit Court of Cook County, *Proceedings in Mass Arrests*, General Order Number 18, August 21, 1968.
- 254. Ibid.
- 255. Interview with Ginsberg.
- 256. From the files of Philip Ginsberg.
- 257. See the files of the Austin Commission.
- 258. See note 253.

Chapter Five

Conclusion: Black Rebels before the American Criminal Courts

The analysis developed in the first chapter of this study demonstrated that any given court response to collective violence in the liberal state is likely to be a function of a delicate balance which court authorities are forced to strike among their compelling and competing interests in order, formal rationality, and organizational maintenance. It was also suggested that the nature of this balance would in large part be determined by the magnitude of the collective violence and by the nature of the structural relationship between the court system and the broader political system in which it is embedded. We are now in a position to compare systematically the nature of this balance following black ghetto revolts in the three cities to which the three previous chapters have separately been devoted in an effort to specify the precise way in which these variables affected the court response. The final sections of the chapter explore the implications of the results of this comparison for a theory of legal repression in the American liberal state.

COURT RESPONSES TO MAJOR REVOLTS

The analysis in the past three chapters has revealed that the 1965 Watts revolt, the 1967 Detroit rebellion, and the 1968 Chicago revolt each confronted court authorities with comparable and virtually overwhelming problems. To begin with, in each city the "fires in the street" made court authorities acutely aware of their interest in aiding political authorities generally in ending the violence as quickly and efficiently as possible. That is to say, in all three cities major revolts produced highly manifest interests in *order*. We have also seen, however, that these revolts and the public attention attendant on them compelled court authorities to adhere publicly as closely as possible to ordinary legal norms and procedures, i.e., that major revolts also produced highly manifest interests in *formal rationality*. Finally, and at the same time, the overwhelming volume pressures resulting from mass arrests threatened the very survival of the court organization and produced highly manifest in-

terests in *organizational maintenance*. In all three cities, then, major revolts produced highly manifest interests in order, formal rationality, and organizational maintenance, and in all three cities these common and conflicting imperatives produced a remarkably similar court response.

In each city the initial phase of the court response was characterized by a subordination of the interests in formal rationality and organizational maintenance to the interest in order; police, prosecution, and judges alike attempted to wield legal sanctions in an effort to end the revolts. Thus the processes of arrest, charging, and bail-setting were characterized by serious and widespread abrogations of the dictates of formal rationality and organizational maintenance whose interplay ordinarily determines the nature of these processes.

Most obviously, in all three cities normal police arrest procedures were subordinated to the overriding pressures on the police and military to contain and end the revolts. Thus in Los Angeles, Detroit, and Chicago arrests were made in a sweeping, indiscriminate fashion; a "dragnet" process was evoked in which the ordinary canons of evidence necessary to arrest and the normal constraints of limited police manpower were largely ignored in an all-out effort to clear the streets. This overriding imperative produced arrest reports that were fragmentary or even nonexistent as well as a booking process in which uniform rather than individualized charges were employed. Given that the overwhelming bulk of police manpower was engaged in "riot control," the normal police postarrest screening function of gathering evidence and marshalling witnesses was almost totally abandoned. The result in each city was not only an unusually large volume and high proportion of requests for prosecution, but also an abnormally high proportion of requests for prosecution of cases which by the ordinary canons of evidence would be considered "bad cases."

In Los Angeles and Detroit the next stage in the criminal process—the charging stage—was similarly marked by a subordination of the constraints of formal rationality and organizational maintenance to the imperatives of order. Thus normal prosecution gate-keeping activities—in which the dictates of formal rationality are balanced against the interests in the stability and survival of the court organization—were virtually abandoned; in both cities police requests for prosecution were routinely accepted (or not even read), with the result that in each city there was an unusually high ratio of prosecution arrests to total arrests. Thus whereas under normal conditions the prosecution in both Los Angeles and Detroit rejects at least 50 percent of police requests for felony prosecutions, during the major revolts the ratio of felony prosecutions to felony arrests was 86 percent in Los Angeles and 71 percent in Detroit. Given the huge volume of arrests—in Los Angeles some 3,400 adult arrests during a week's time and in Detroit over 6,000 adult arrests

during a five-day period—even the maintenance of the normal ratio of prosecution arrests to total arrests would have produced a quantity of prosecutions sufficient to swamp court facilities and personnel; with the abandonment of normal gate-keeping and the prosecution of the overwhelming majority of those arrested, however, both court systems were faced with the threat of total collapse! This threat was made all the more imminent by the fact that—in order to justify bails sufficiently high to ensure prolonged detention, and despite the absence of prior arrest records—the overwhelming majority of those arrested in both cities were charged with felonies, thus reversing the normal preponderance of misdemeanor over felony cases. Thus the majority of cases could not be immediately disposed of but would rather require costly and time-consuming prosecution which would be extremely difficult due to overwhelming evidence problems.

The prosecution response in Chicago was somewhat different, reflecting what Chicago court authorities had learned from the experience of Los Angeles and Detroit. In fact, as per pre-April plans, the prosecution in Chicago abandoned its normal passivity at the charging stage and screened charges at the police precincts, charging the majority of defendants with misdemeanors rather than felonies. Although as in Los Angeles and Detroit the overwhelming majority of those arrested were prosecuted, in Chicago the decision to employ mostly misdemeanor charges—for which all metropolitan court systems are far better geared to process in large volume—meant that there would be considerably less strain on court facilities and personnel than in the former two cities, and fewer “bad cases” as well. Nevertheless, the approximately 900 felony prosecutions—or an influx of a normal three weeks’ load of felony cases in a three-day period—represented a very real threat to the stability of the court organization, and in this sense decision making at the initial charging stage in Chicago conformed to the pattern of, and was to result in a similar threat of disruption as, decision making at the charging stage in Los Angeles and Detroit.

The bail-setting process in all three cities also saw the abrogation of the constraints of formal rationality and organizational maintenance in favor of the demand of order. Thus in each city bail was set so as to ensure that those arrested would be “kept off the streets” at least for the duration of the revolt, and in each city both judges and prosecutors publicly articulated this policy of preventive detention. In Los Angeles felony bail was set at \$3,000 above normal schedule and misdemeanor bail generally at \$1,500 above schedule; in Detroit bail was generally set at or around \$10,000 irrespective of the nature of the offense. In Chicago, where court authorities were acutely aware of the enormous detention problems which bonds set at these levels created in Los Angeles and Detroit, cognizant of past criticism from the defense community, and aware from prior experience that most defendants

could not quickly meet even normal felony bonds, the prosecutor recommended, and judges set, felony bonds at or below normal levels and misdemeanor bonds above normal levels. In all three cities, however, bail was not set on an individualized basis. Thus in each city the level of bail set bore no relation to standard determinants such as prior arrest record, age, employment status, educational level, roots in the community, etc.

In each city, this concerted effort to "keep them off the streets" included a pronounced hostility on the part of court authorities to those defense efforts which took place at the bail "hearings" to secure the release of defendants. Prosecution officials in all three cities insisted publicly that arrestees would be punished "to the limit of the law." Access to courtrooms was made difficult and in some cases impossible, and volunteer attorneys were not permitted to represent defendants at this stage of the proceedings. Motions for reductions of bond were routinely denied or ignored, and judges in each city refused to cooperate with volunteer efforts to interview defendants for the purpose of obtaining information requisite to eventual bail reduction. The result of this high bail-no reductions policy was that the effort of court authorities to "keep them off the streets" was entirely successful; thus for example in Los Angeles only 8 percent and in Detroit only 2 percent bailed out while the revolts were in progress.

Court authority abrogations of the guarantees of formal rationality were facilitated by a defense community response in all three cities which can only be described as moribund during the period of the revolt. Defense efforts at this stage in each city were undertaken almost exclusively by a relative handful of representatives of nonestablishment groups such as the ACLU or the local legal aid agencies, with representatives of the powerful establishment bar associations electing not to wield their prestige on behalf of formal rationality for black "rioters." Defense attorneys in all three cities admitted that even the "good liberals" were "outraged" and generally more concerned with a speedy end to the revolts than the rights of those arrested.

Thus during the early stages of the legal process—the period during which the revolts were in progress—the response calculus of court authorities tended to approach the calculus of pure force which is at the heart of the Hobbesian perspective on politics. Yet even during this period the abandonment of formal rationality was not a total one. Although the police and military response was often brutal and led to considerable destruction of life, there was no wholesale slaughter of the riot participants. Martial law was *not* declared, and *some* concern for the legality of the arrests was exhibited. Thus, although normal prosecution gate-keeping was largely abandoned, arrestees *were* prosecuted rather than simply detained without charges, and standard charges were employed in an effort to assimilate the riot activity under the general rubric of predefined, formally proscribed acts. Although bail was set at higher

levels than normally, bail *was* set, and the Writ of Habeas Corpus was not formally revoked. Finally, in all three cities a concerted effort was undertaken on the part of court authorities to adhere to normal statutory deadlines. In short, the ordinary criminal process *was* set in motion rather than abandoned in favor of an ad hoc procedure. This is not to say that this minimal commitment to formal rationality seriously hindered court authorities in their efforts to employ legal sanctions to help end the revolts, but rather simply that even when their interest in order was most compelling, the *form* of implementation of this interest was shaped by the dictates of formal rationality. Even at this stage, court authorities were acutely aware of their interest in formal rationality on which their long-run legitimacy rests, and therefore sought to strike a balance between it and their interest in order rather than completely subordinate the former to the latter. Such is the peculiar nature of repression in the liberal state: even the very effort of the sovereign to preserve its life is subject to rules which dictate the manner in which this effort may be accomplished.

The effort of court authorities in all three cities to “keep them off the streets” led to an unprecedented influx of prisoners into already overburdened detention facilities. In all three cities, but especially in Los Angeles and Detroit, these pressures threatened the stability of the entire detention system and carried with them the ever-present possibility of jail revolts. Once the “fires in the street” were “extinguished,” the need to relieve these detention pressures became a paramount concern of court authorities and forced them to react positively to mounting defense community pressures for bail release.

In all three cities nonestablishment groups played a crucial role in evoking the participation and support of the establishment bar association, thereby initiating in each city a loose and highly conflictual alliance for the purpose of effectuating a rapid reduction in bonds and the release of the several thousands of incarcerated arrestees. Although the participation of the establishment bar in bail reduction efforts served to moderate defense community demands and to discourage class actions in favor of informal negotiations with judges and prosecutors, these efforts and the public attention they engendered—combined with the continued and even mounting pressures on detention facilities—helped produce a radical change in bail policy. Thus the twin and reinforcing pressures of detention problems and defense community efforts led in Detroit to the release on recognizance of half of all felony defendants, in Los Angeles to the reduction to normal schedule of a somewhat smaller proportion of felony defendants, and in Chicago to the release on recognizance of the majority of curfew violators and somewhat later to bail reductions for virtually all defendants still in custody—all marked departures from normal practices.

As a consequence of these releases and reductions, and of a continued policy of reducing bond in individual, nonaggravated cases at the preliminary hearing stage, most felony defendants secured their release far sooner than do felony defendants charged with comparable offenses in nonriot times. Thus, for example, whereas normally in Los Angeles only between 40 and 50 percent of felony defendants bail out prior to coming to trial, following the revolt more than 70 percent were able to secure their release prior to trial. Similarly, whereas in Detroit in 1965 a full 26 percent of arraigned felony defendants were unable to bail out before their trials, following the July 1967 rebellion scarcely more than 1 percent of all felony defendants were in custody by the first day of the trials. Finally, in Chicago, whereas normally less than half the defendants charged with state offenses bail out within ten days of their arrest, almost two-thirds of this category of riot defendants secured their release within ten days. In each city, then, while bail releases were far less frequent during the first few days following arrest than normally, releases subsequent to this initial period were dramatically *more* frequent than normally.

This reversal reflected a dramatic shift in the order of priorities among the interests in order, formal rationality, and organizational maintenance. As we have seen, during the revolts the interest in order was paramount, and formal rationality and organizational maintenance were largely subordinated to the effort to "clear the streets" and end the revolts. With the end of the revolts, and with a consequent decline in the manifestness of the court authority interest in order, the overwhelming threat to organizational maintenance (created by its earlier subordination to the interest in order) along with increasing pressures to reestablish formal rationality combined to produce a concerted effort to "clear the jails." Just as a uniformly highly manifest interest in order produced a common response across all three cities during the period of the revolt, this combination of a highly manifest interest in formal rationality and an extremely manifest interest in organizational maintenance evoked in all three cities a postrevolt bail policy that was remarkably similar as well. Figure 5.1 graphically portrays the overall similarities in the detention flow pattern across all three cities following major revolts.

In each city the massive detention problems were matched by the pressure of thousands of largely unsupportable cases which required disposition within statutorily prescribed time limitations and which thus placed an almost unimaginable burden on court facilities and personnel. These cases carried with them, moreover, the implicit threat of disruptive jury trial demands which would render their disposition literally impossible: as we have observed, a mere 5 percent increase in jury trial demands in any metropolitan criminal court would be sufficient to bring the administration of justice to a complete halt. Consequently court authorities in each city sought to meet the threat of

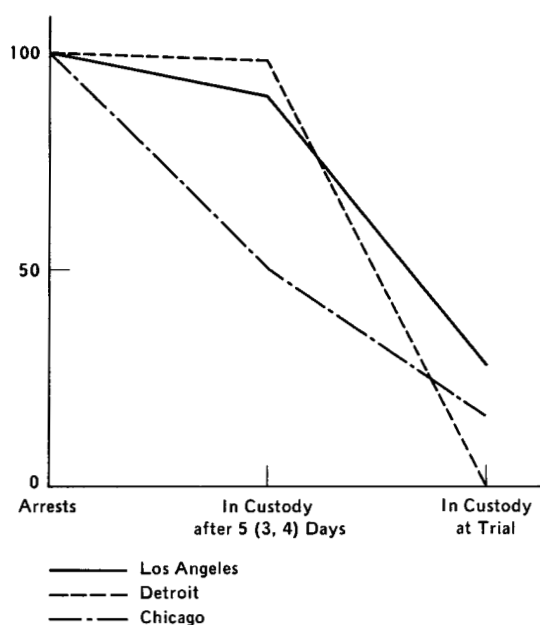


Fig. 5.1. Comparative Major Revolt Detention Flows

jury trial demands and other disruptive defense tactics which might cause widespread mandatory dismissals (due to failure to meet statutory deadlines) by ensuring through a variety of means that the defense of the rioters would rest firmly in the hands of defense attorneys upon whose cooperation in a rapid and efficient processing of cases they could rely. Thus, with the help of court authorities, in each city the public defender or his functional equivalent in Detroit, a group of police court lawyers known as the "Clinton Street gang," secured control of the defense operation, and effectively frustrated the effort of the relatively few nonestablishment attorneys who had hoped to develop a disruptive, jury trial strategy. With control of the representation process in "friendly hands," court authorities were able to secure continuances which rendered statutory time limitations nugatory and thus eliminated the threat of widespread mandatory dismissals.

Even with the burden of time limitations essentially eliminated, however, court authorities were still faced with a dramatic increase in their normal workload which threatened to disrupt seriously the processing of normal, nonriot criminal cases for months if not years to come. The first response to this threat on the part of court authorities in each city was to evolve a policy of sentencing convicted misdemeanor defendants to the time they had already served awaiting trial and/or to minor fines or probation. In each city, court

authorities admitted that a conscious effort was made to "clear up the docket" and to avoid jury trials by assuring that in return for a plea of guilty or even for a bench trial sentences would be minimal. The result of this policy was in fact a rapid and efficient disposition of misdemeanor cases in all three cities.

The massive influx of felony cases confronting the three court systems, however, entailed a far more serious threat to their stability than did the influx of misdemeanor cases. Whereas the misdemeanor cases represented only a marginal increment to the total yearly misdemeanor quota of the respective court systems, the felony volume with which they were each confronted represented a substantial proportion of their normal yearly quota of felony cases—in Detroit nearly a six-month's quota of felony prosecutions, in Los Angeles almost a three-month's quota of felony prosecutions, and in Chicago almost a three-month's quota of felony indictments. Many of these cases, moreover, especially in Los Angeles and Detroit, were as we have seen relatively unscreened according to normal standards, carrying with them serious evidence problems which promised to make prosecution extremely difficult.

In Detroit and Los Angeles court authorities responded to this twin problem of a massive volume of cases and an unusual proportion of "bad" cases by increasing significantly the normal rate of dismissals first at the preliminary hearings and then at the felony trials. Thus in Los Angeles only 59 percent of those prosecuted, and only 77 percent of those indicted, were convicted, whereas normally some 75 percent of those prosecuted and almost 90 percent of those indicted, are convicted. Similarly, in Detroit only 54 percent of those prosecuted, and 75 percent of those indicted, were convicted whereas normally 78 percent of those prosecuted, and 85 percent of those indicted, are convicted. Thus we found in both cities a striking reversal of the standard model of the criminal process which posits a series of screens whose holes progressively diminish in size and from which the defendants thus find it increasingly difficult to escape; following the Los Angeles and Detroit major revolts, in contrast, the "holes" became progressively larger, and it was much easier to "escape" at the preliminary hearing and trial stages than it was at the earlier prosecution stage.

In order to ensure a smooth and efficient disposition of cases and to minimize the risk of jury trials, moreover, court authorities in Los Angeles and Detroit also were forced to reduce drastically the severity of charges confronting those defendants who did come to trial, making reductions far greater than those entailed in the normal process of "plea bargaining" in these cities. Thus, in return for a plea of guilty or even a bench trial felony defendants in each city were routinely convicted of misdemeanor charges; in Los Angeles some 60 percent were convicted of misdemeanors, compared to a norm of less than 10 percent, while in Detroit almost 100 percent were convicted of mis-

demeanors, compared to a normal reduction rate of 71 percent. In both cities, then, both the convictions rates (convictions/prosecutions and convictions/indictments) and the felony conviction rate (convictions on felony charges/total convictions in felony cases) *decreased* from nonriot to riot in proportion to the *increase* in the prosecution rate (prosecutions/arrests) from nonriot to riot, reflecting the twin impact of the volume of cases and the lack of police and prosecution screening accompanying them, and representing an effort on the part of both systems to compensate for it.

In Chicago this compensation did not take place. Since the proportion of "bad" cases was markedly lower than in Los Angeles and Detroit, due to an *increased* screening role on the part of the Chicago prosecution, both the conviction rate and the felony conviction rate approximated normal levels. The sheer volume of cases nevertheless compelled Chicago court authorities, as it did their colleagues in Los Angeles and Detroit, to offer lenient sentences in return for the assurance of a predictable and efficient disposition of cases. Thus, as Table 5.1 illustrates, sentences for convicted felony defendants in

TABLE 5.1. Comparative Sentence Distribution: Nonriot and Major Riot Felony Cases (in percentages)

	<i>Los Angeles</i>		<i>Detroit</i>		<i>Chicago</i>	
	<i>Nonriot</i>	<i>Riot</i>	<i>Nonriot</i>	<i>Riot</i>	<i>Nonriot</i>	<i>Riot</i>
Penitentiary (felony) sentences	30	3	33	1	59	9
Jail sentences	35	18	24	2	17	18
Committed	65	21	57	3	76	27

all three cities were minimal, entailing far less deprivation than normally is imposed on those charged with comparable crimes. Despite the character of the initial court response—bail set so as to ensure preventive detention, hostility to defense efforts, and judicial and prosecutorial assertions that law-breakers would be punished as severely as the law allows—in each city only a small minority of felony defendants served any time in jail following the determination of their guilt. Moreover, even these few were rarely committed for more than one year (i.e., received felony sentences), and probationary and fine sentences were far less severe than normally.

Thus postrevolt formal sanctioning policy, like postrevolt bail policy, was characterized by a dramatic reversal which reflected a radically altered calculus among the interests in order, formal rationality, and organizational maintenance. Whereas during the revolt the overriding interest in order led court authorities to prosecute virtually all those arrested and to do so on

serious charges, in the weeks and months following the revolts the combined dictates of formal rationality and organizational maintenance produced convictions on less serious charges and sentences which can only be described as minimal. We have seen that under "normal" conditions the effort to balance formal rationality against organizational maintenance evokes a cooperative process of "plea bargaining" in which state and defense systematically violate the spirit of formal rationality while publicly adhering to its letter; that a game is played in which the outcome is rigged from the outset but in which "success" depends upon convincing the defendant he is getting a break so that his "voluntary" acquiescence (and thus the overt commitment to formal rationality) may be secured. Following major revolts the object of this game remained the same, but "successful" playing was a far more difficult and precarious enterprise. The mass arrests and the abandonment of prosecution gate-keeping produced by the early effort of court authorities to end the revolts—i.e., by the implementation of their interest in order—dramatically increased the normal threat to organizational maintenance. Given the overwhelming volume of cases, and the serious evidence problems attached to them, it became more imperative than ever to avoid full-scale adversary proceedings. At the same time, it was as necessary as ever for court authorities to avoid any overt abandonment of formal rationality which might serve to undermine their long-run legitimacy. Under these conditions, the "price" which court authorities were compelled to pay in order to ensure a rapid and efficient disposition of cases without a public abandonment of formal rationality—the reduction in charge and sentence which the defendant is persuaded to see as a "break"—increased far above its normal level, with the result that formal sanctions in all three cities were far below their normal level. Thus in all three cities the initial subordination of formal rationality and organizational maintenance to order radically conditioned the entire subsequent court response. Although court authorities in the liberal state may temporarily disregard the constraints of formal rationality and organizational maintenance, they may not ignore them for very long or without suffering serious consequences.

Figure 5.2 presents a visual comparison of the three major revolt felony case flows from point of arrest through final disposition and sentencing. With the single exception of Chicago's unique ability to maximize convictions through advance planning, the remarkable similarity in the slope of each case flow represents a dramatic graphic confirmation of the decisive commonalties which we have ascribed to the court response to major revolts across all three cities. The existence of these commonalties, moreover, suggests that the intercity variations in the cohesion of authority organization and the cohesion of the defense community which define the structural relationship between court system and the local polity were relatively insignificant determinants of the court response to major revolts.

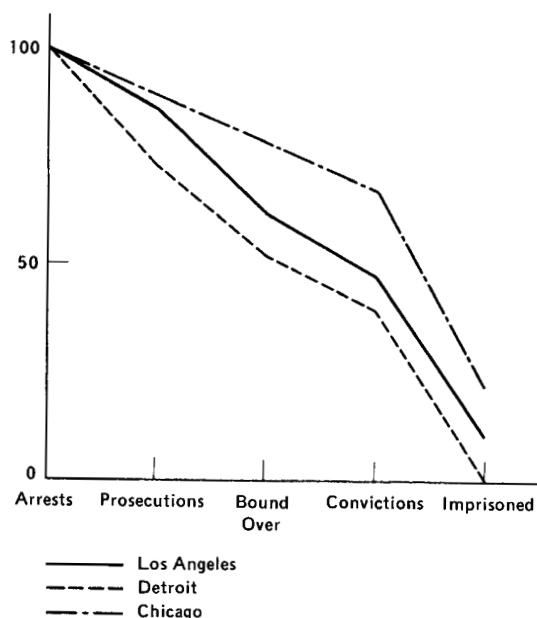


Fig. 5.2. Comparative Major Revolt Felony Case Flows

Thus in all three cities the strategy and actions of court authorities were similar in decisive respects despite wide variations in the organizational cohesion of political authorities. In both Chicago, where the machine provides a high degree of organizational cohesion among court authorities, and in Los Angeles, where extreme formal decentralization exacerbated by fragmented political parties creates extremely low organizational cohesion, for example, court authorities united initially to an equal extent in the name of riot control (order) and subsequently to an equal extent in the name of a balance between formal rationality and organizational maintenance. Similarly, despite wide variations in the organizational cohesion of the defense community across the three cities, the structure of defense community alliances and their policies were remarkably similar. Thus both in Detroit, where the predominance of labor-oriented white lawyers allied with black legal groups produces high defense community cohesion, and in Los Angeles, where due among other things to corporation lawyer predominance defense community cohesion ranks lowest, nonestablishment defense groups were joined by establishment defense groups to protest the high bail policy primarily through informal negotiations with court authorities, and later acquiesced in, and joined, the cooperative process by which "state" and "defense" achieved a smooth and efficient disposition of the huge volume of cases. In short, we ob-

served a remarkably similar court response in all three cities despite major differences in political dimensions commonly cited as critically important determinants of the behavior of local political actors.

The one important exception to this common pattern, moreover—Chicago's unique ability to maximize convictions and avoid reductions—was not a product of political characteristics peculiar to Chicago, but rather of a learning experience to which only Chicago was privy prior to its major revolt. In fact, we have seen that plans calling for procedures virtually identical to those worked out in Chicago were evolved in both Los Angeles and Detroit following their respective major revolts. Because Chicago court authorities had access to such plans prior to the outbreak of its major revolt, they were able to achieve a somewhat easier and more effective "harmonization" of their contradictory interests in order, formal rationality, and organizational maintenance than their brethren in Los Angeles and Detroit.

COURT RESPONSES TO MINOR REVOLTS

In no sense did the minor revolts we have reviewed confront court authorities in our three cities with problems comparable to those with which they were confronted during and following major revolts. To begin with, in all three cities the criminal process began *after* the minor revolts had been contained if not ended, so that there was little or no pressure on court authorities to wield legal sanctions on behalf of the goal of ending the violence. At the same time, there was no widespread public scrutiny of the legal process. Finally, the relative handful of arrests added only negligibly to the volume pressures with which the courts are daily confronted. In and of themselves, in other words, the minor revolts failed to produce highly manifest interests in order, formal rationality, and organizational maintenance. Under these conditions, as we shall see, the manifestness of these interests and thus the balance struck among them depended radically on the structural relationship between the court system and the broader local political system of which it is a part, with the result that the court response varied greatly from city to city.

Detroit

Following the Detroit "Kercheval" minor revolt of 1966, police and prosecution collaborated in a careful effort to isolate members of two east side militant organizations, prosecuting them but releasing many of those not affiliated with either organization. Thus only 48 percent of those arrested, compared to almost 75 percent the following July, were prosecuted; in con-

trast to the following July, then, police and prosecution gate-keeping was not abandoned.

The prosecutor's charging policy apparently was based on a determination to destroy or at least seriously weaken the militant organizations which police had determined were a threat to order in Detroit's east side ghetto. Thus, despite the lack of serious damage to life or property arising from the riot, virtually all the arrestees were charged with felonies carrying with them potential five-year prison terms—common law riot and conspiracy to disturb the peace, instead of simply disturbing the peace or disorderly conduct. Nevertheless the arraignment judges, who apparently did not perceive a threat as great as that perceived by the police and prosecution, set either normal bond or released arrestees on their own recognizance. In fact, 41 percent were released on their own recognizance (as compared to a nonriot norm of about 30 percent), whereas only 2 percent were so released the following July. Median bond for the others was \$1,000; as a result, most were back on the streets within one or two days.

A group of lawyers—largely black but including several white guild lawyers—formed the Metropolitan Defense Committee (MDC), which provided free and complete representation for all those prosecuted. These attorneys were unwilling to play by the normal “rules of the criminal court game,” refusing to waive preliminary hearings and to plead their clients guilty, and in many cases demanding jury trials. Despite an obvious prosecution effort to deal harshly with the defendants—indicated by the use of rather contrived and serious charges—only fifteen were convicted, or only 40 percent of those prosecuted and 52 percent of those brought to trial. The MDC lawyers successfully challenged the legality of many of the counts, forcing the dismissal of all conspiracy charges. They felt, in retrospect, that they “were able to beat the system,” and that “the impact of their defense effort in '66 as compared to '67 was like the difference between night and day.” Nevertheless, of the fifteen convicted, eleven were given probation for at least two years (six for three years or more), and two defendants receiving probation also were fined \$500 each. The remaining four were incarcerated, with three of them sentenced to from one to five years in the state penitentiary. In all then, some 27 percent of those convicted were incarcerated, as compared to only 3 percent following the major revolt one year later, and 20 percent of those convicted received penitentiary sentences as compared to less than 1 percent the following July.

Chicago

Following each of four minor incidents in Chicago in the summer of 1967 virtually all those arrested were prosecuted; moreover, they were multiply

charged with from two to four offenses. One particularly vague charge which virtually made it illegal for two people to congregate on the street, and which carried with it a maximum penalty of one year in prison, was used extensively. Judges set bonds ranging from \$5,000 to \$20,000 for offenses for which the normal maximum bond would be \$1,000. The public defender did not object, and those volunteer attorneys who did—including some black attorneys and some ACLU attorneys—were met by extreme hostility from court authorities. Judges refused to hear, or routinely denied, habeas corpus petitions, and bond reductions did not take place, if at all, for several weeks, since cases were automatically continued over the objections of defense attorneys. Bail was thus set and remained sufficiently high to ensure that presentence detention time averaged between two and four weeks, depending on the incident, and if not for volunteer efforts following several of the incidents which finally succeeded in obtaining bail reductions it is likely that presentence detention would have been even higher.

The twin pressures of multiple charging and prolonged presentence detention—along with a relatively unorganized defense effort which did not provide representation at the trials—combined to produce unusually high conviction and guilty plea rates. Thus the conviction rate averaged over 75 percent for the four incidents, while the guilty plea rate averaged a full 85 percent, both far higher than the normal rate in misdemeanor court in Chicago. Bulking together all those convicted in the four incidents, 17 percent were incarcerated following their conviction, or approximately the normal rate of imprisonment for ordinance violations. While few sentences were for more than thirty days in jail, extensive and extraordinary use was made of probationary sentences, so that anyone rearrested during the summer would automatically be assured of imprisonment.

Los Angeles

On the eve of the third anniversary of the Watts revolt of 1965, violence flared briefly again in Watts and resulted in the arrest of some thirty-five adults. The Los Angeles County prosecutor rejected 60 percent of the police requests for felony complaints, as compared to a rejection rate of only 14 percent during the major Watts revolt, and approximating the normal rate of prosecution screening in Los Angeles. The majority of the rejections were recommended to the city attorney for prosecution as misdemeanors, but only about half of these were actually prosecuted by the city attorney, who also did not prosecute all of the ten adults originally booked on misdemeanor charges. Thus in Los Angeles, as well as in Detroit (but in marked contrast to Chicago), following the minor revolt the prosecution performed its normal gate-keeping function.

Rejecting a prosecution motion for a denial of bail, judges set both felony and misdemeanor bail at or around normal levels and on an individualized rather than a uniform basis. Although several people bailed out within three days, detention time for all defendants averaged fifteen days, and a quarter of them spent at least four weeks in jail—a distribution closely approximating normal, nonriot presentence detention.

No mobilization of the defense community occurred; the public defender handled the bulk of the cases, with one ACLU lawyer handling only one case. Consequently there were no jury trial demands, and the great majority of defendants pleaded guilty. Convictions were forthcoming in 80 percent of the cases which came to trial, higher than the overall conviction rate in August 1965 and approximating the normal rate. Most felony defendants who were convicted, moreover, were convicted on the original charges, as is the norm in Los Angeles. Three out of the twelve convicted—or 25 percent—were incarcerated, as compared to 21 percent following the major revolt. Fines and probationary sentences, finally, were markedly more severe than following the major revolt, and tended to approximate the normal sentence distribution.

Figures 5.3 and 5.4 compare respectively the minor revolt detention and case flows across all three cities, illustrating wide variations in the court responses to minor revolts. These variations, it should be clear, reflect the radically different balances struck among order, formal rationality, and organizational maintenance in each city. In Detroit, a sustained effort on the part of a committed defense group which refused to play by the normal “rules of the game” compelled court authorities to engage in adversary proceedings and to sacrifice their normal interest in organizational maintenance in favor of the dictates of formal rationality. In Chicago, on the other hand, the dictates of formal rationality and organizational maintenance were subordinated to highly manifest interests in order until the very end of the legal process, at which time they began to assert themselves in plea bargaining and sentencing. Finally, in Los Angeles the normal balance between organizational maintenance and formal rationality was struck, with the result that proceedings there approximated more closely than elsewhere the ordinary criminal process.

The nature of the balance struck in each city, and thus the nature of the court response, moreover, was intimately related to the intercity political structure variations which were outlined in Chapter 1 and which, as we have seen, failed to play a determining role following major revolts. In fact, the two variables which together define the structural relationship between the court system and the local polity as a whole—the cohesion of local authorities and the cohesion of the defense community—respectively determined the nature of the effort undertaken by each party to the court conflict.

Thus, for example, in Chicago, where a strong political party produces an

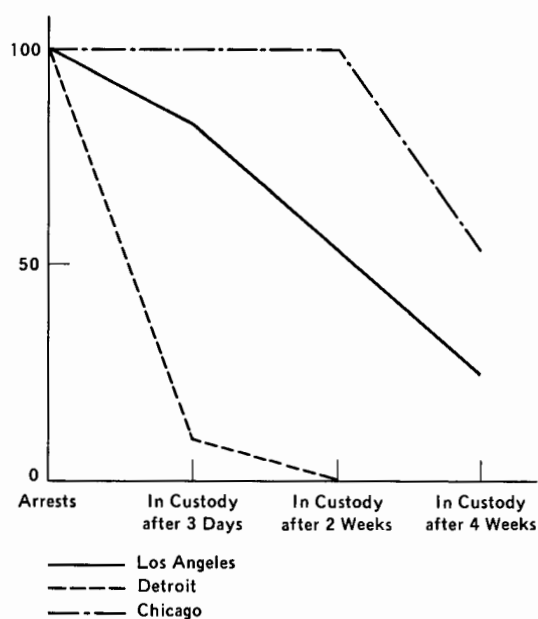


Fig. 5.3. Comparative Minor Revolt Detention Flows

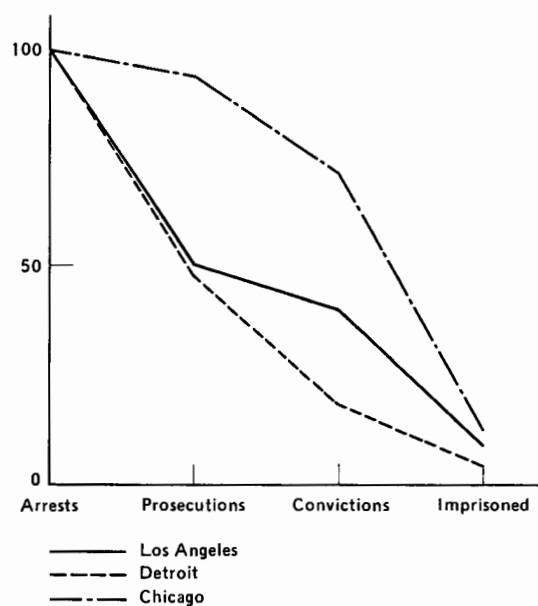


Fig. 5.4. Comparative Minor Revolt Case Flows

extremely cohesive organization of local authorities, all the court actors—police, prosecution, judges, detention officials, and public defender alike—united to prosecute virtually all those arrested, to ensure their prolonged incarceration by means of extraordinarily high bonds and automatic continuances, and to achieve the highest possible conviction rate. As we have seen, Chicago court authorities were in fact acting on the basis of a coherent plan, carefully elaborated at the highest levels within the party, to manipulate the judicial system so as to further Mayor Daley's overall violence prevention strategy. A complete explanation of the unusually severe and repressive Chicago court response would therefore require a detailed analysis of the origins and evolution of this strategy, e.g., an analysis of why even minimal violence was perceived as a serious threat to the Chicago political regime during the summer of 1967. What is clear, however, is that whatever the mayor's perceptions, they could not have been *implemented* as policy in the absence of coherent channels of communication to and control over the actors in the court system. In this sense, then, extreme authority cohesion is a *necessary* if not sufficient determinant of such a punitive—order-oriented—court authority response at low levels of violence.

In Los Angeles, in contrast, where cohesion of local authorities is lowest, no such coordinated and unified court authority effort took place. In fact, the normal amount of intra-authority conflict occurred: the prosecution played its normal gate-keeping role, rejecting at least half of the police requests for felony prosecutions, and judges rejected the prosecution request for a denial of bail. In Detroit, finally, where there is intermediate cohesion of local political authority organization, police and prosecution collaborated in an effort to deal harshly with the militant arrestees (of all the nonprosecutions only one was the result of prosecution denial of a police complaint), but their efforts were frustrated by judges who set bond at or below normal levels.

Similarly, the cohesion of the defense community accounted for the strength of the efforts undertaken by defense attorneys on behalf of formal rationality for the "rioters." Thus in Detroit, where cohesion of the defense community is highest, a group of both black and white attorneys evolved a unified defense strategy and refused to play by the normal "rules of the game," with the result that criminal proceedings there approximated much more closely than elsewhere the traditional adversary model of criminal justice. In Los Angeles, in contrast, where defense community cohesion is lowest, no mobilization of the defense community took place, with the public defender monopolizing the defense effort. In Chicago, finally, where defense community cohesion is intermediate between that of Detroit and Los Angeles, volunteer efforts were undertaken but were largely confined to the initial bail hearing stages.

If each structural variable separately accounts for the respective sanction efforts of the two parties to the court conflict, and the respective efforts deter-

mine the outcome of the conflict, then the two variables combined should accurately account for the sanction outcomes. Table 5.2 ranks the three cities ordinally in terms of both authority and defense community cohesion as a prelude to this "combining" operation. Since the authority cohesion score indexes the structural potential for court authority unity, and the defense community cohesion score indexes the structural potential for coordinated effort

TABLE 5.2. Authority and Defense Community Cohesion

	<i>Los Angeles</i>	<i>Detroit</i>	<i>Chicago</i>
Authority cohesion	1	2	3
Defense community cohesion	1	3	2
Conflict balance score	$1/1 = 1$	$2/3$	$3/2$

among defense attorneys, by dividing the authority cohesion score by the defense community cohesion score we can create a rough composite index which measures the relative structural advantage which one party to the court conflict has over the other. The result of this operation is a "conflict balance" ranking (which increases as the balance moves in favor of court authorities) of $2/3$, 1 , and $3/2$ for Detroit, Los Angeles, and Chicago, respectively, a ranking which, it turns out, correlates positively with the severity of their court sanctions, illustrating the combined explanatory power of our two structural variables.

Thus in Chicago, where the conflict balance score is weighted most heavily in favor of the authorities, a concerted authority effort to deal severely with the defendants, combined with a relatively unorganized defense effort, produced sanctions far more severe than normally. In Detroit, on the other hand, a relatively uncoordinated authority effort was confronted with a coherent and rigorous defense effort, with the result that sanctions resulting from full-scale adversary proceedings were less severe than for comparable nonriot offenses. In Los Angeles, finally, which ranks midway between Chicago and Detroit on the conflict balance index, an uncoordinated authority effort matched by the almost total absence of a defense community effort produced court sanctions more severe than in Detroit but less severe than in Chicago, sanctions which in fact closely approximated the normal, nonriot level in Los Angeles.

LEVELS OF VIOLENCE, INTERCITY POLITICAL STRUCTURE VARIATIONS, AND COURT SANCTIONS

We are now in a position to specify the rather complex interrelationship which our research uncovered among the variables which have formed the

organizing paradigm for this study: levels of violence, intercity political structure variations, and court sanctions. To begin with, although we described a virtually uniform court response across all three cities following major revolts, following minor revolts we observed wide variations in the nature and severity of court sanctions. The preceding discussion has established that these variations are indeed related to the intercity political structure variations which have been the focus of the study of American local politics and which (we have seen) fail to account for sanctioning behavior at the major revolt level. The data thus suggest a differential impact of intercity political structure variations at different levels of violence. More precisely, they inspire the following proposition: *the importance of intercity political structure variations varies inversely with the level of violence.*

The general implications of this finding for the study of American local politics are considerable. In general, the question which has framed the nature of the growing debate concerning the impact of local political structures on policy outcomes has been: "In what way do local (or state) political structures affect the quality and quantity of policy outcomes?"¹ Our research suggests that this question is insufficient, and that it must be supplemented by the question: "What are the conditions which determine the relative impact of political structure variations on policy outcomes?" In other words, we must be sensitive to the possibility that the impact of local or state political structures on policy outcomes may vary depending on certain conditions, and we must begin to specify what these conditions are. Our own analysis suggests that under crisis conditions the impact of local political structure variations on policy outcomes is virtually nil, whereas under conditions more approximating "normalcy" their impact is considerable. During major revolts, for example, it scarcely mattered whether a judge was handpicked by the chairman of the local political party or selected by the governor of the state, or whether a prosecution official was selected by a party committeeman or recruited through civil service: in both cases judges and prosecutors attempted to aid political authorities generally in putting down the revolts as quickly and efficiently as possible. Following minor revolts, however, it *did* matter whether these officials were recruited by means of, and situated within, "reform" or "machine" political structures: In machine cities court authorities were more able to overlook the constraints of formal rationality and organizational maintenance than were court authorities in reform cities.

An analysis which assumed that local political structure variations were all-important, and focused on them as an exclusive explanatory variable, would have been utterly unable to account for the virtually uniform court response following major revolts across three cities radically different in terms of those structural dimensions. At the same time, an analysis which proceeded from the assumption that local political structure variations were utterly insignifi-

cant, and neglected them totally, would have been at a loss to explain the substantial variation in the court response across the three cities following minor revolts. Clearly the more valuable assumption is that under certain conditions the impact of local political structures on policy outcomes is minimal, whereas under others it may be considerable. In the case of policies of legal repression, our analysis suggests that one such condition is the sheer magnitude of the collective violence which is the object of repression.

This has obvious implications for dissidents who seek to pursue strategies which involve the use of collective violence. Radicals should avoid both the assumption that local political structural differences are all-important and the assumption that they are totally unimportant, and instead should be sensitive to the conditions under which their importance is likely to vary. More specifically, insofar as their choice of "target" cities is at all influenced by considerations of probable elite response strategies, they should be aware that in the case of minor violence the character of legal repression is likely to vary depending on the nature of local political structures, whereas in the case of major violence which produces a generalized crisis the character of legal repression is likely to be more or less uniform despite variations in these structures. Thus if the violence they are contemplating is likely to be minimal and to entail a relatively small number of participants, they should expect to be treated differently in the courts of a machine city like Chicago than in a reform city like Los Angeles. The capacity to anticipate accurately the nature of elite repression, in other words, depends critically on the adequacy of an understanding of the conditions under which and the way in which local political structures affect the complex calculus among the interests in order, formal rationality, and organizational maintenance which elites in the liberal state are forced to undertake. And to the degree that the ultimate success of the dissident movement depends on this anticipatory capacity—on the ability to predict, and thus exercise a measure of control over, elite response strategies—it is incumbent on radicals to incorporate a theory of local political structures into their overall understanding of the liberal state.

The second major finding which emerges from our research is that, with a vast increase in the magnitude of the violence, there is certainly no corresponding increase in the severity of court sanctions. Indeed, Table 5.3, which compares the severity of both preconviction and postconviction sanctions across all three cities at both levels of violence, tends to confirm the impression of an *inverse relationship between the magnitude of revolts and the severity of court sanctions* imposed on participants. Thus following Detroit's minor revolt a significantly higher proportion of those convicted were incarcerated than following the major revolts in all three cities. In Los Angeles, average presentence detention time following its minor revolt was somewhat greater than following the major Watts revolt, and the proportion incarcerated

TABLE 5.3. Levels of Violence and Preconviction and Postconviction Sanctions*

<i>Level of Violence</i>	<i>Detroit</i>		<i>Los Angeles</i>		<i>Chicago</i>	
	<i>Pre</i>	<i>Post</i>	<i>Pre</i>	<i>Post</i>	<i>Pre</i>	<i>Post</i>
High	5-7 days	3%	14 days	21%	3-4 days	15%
Low	2 days	27%	15 days	25%	14-28 days	17%

* Preconviction sanctions = average detention time for all prosecuted defendants. Postconviction sanctions = percent imprisoned of those convicted. In Detroit and Los Angeles, percent imprisoned refers to percent felony defendants imprisoned, since in both cities following both major and minor revolts felony charges predominated. In Chicago, percent imprisoned refers to percent misdemeanor and felony defendants imprisoned, since misdemeanors were used extensively along with felonies. These decisions were based on a desire to achieve the highest possible degree of comparability.

following conviction was greater than following any of the three major revolts. In Chicago, finally, although postconviction deprivation following its minor revolt was only slightly greater than following its major revolt, preconviction deprivation in the form of presentence detention time was up to ten times greater than following its major revolt and more prolonged than following the major revolts in Los Angeles and Detroit.

Neither of the respective measures of preconviction and postconviction deprivation utilized in Table 2.3, moreover—average detention time and the proportion convicted who were incarcerated—is an entirely satisfactory overall index of deprivation, and other indicators would tend to support even more strongly the above hypothesis. Thus for example average detention time obscures the extremes of presentence detention, and fails to reveal that following minor revolts in Los Angeles and Chicago there was a much greater proportion of defendants in custody over thirty days and at the time of trial than following major revolts in all three cities. Similarly, the proportion imprisoned needs to be supplemented by other measures of sentence severity. For example, probationary and fine sentences following the Los Angeles minor revolt were more severe than following the major Watts revolt, and the proportion of those convicted who received penitentiary sentences following Detroit's minor revolt was far greater than following any major revolt. The introduction of additional measures, then, tends to confirm the general hypothesis of an inverse relationship between size of revolt and severity of sanctions.

Data from other minor revolts not discussed in the descriptive chapters also tend to confirm this proposition. Thus in Chicago detention time—both the average and the extremes of detention time—following a minor revolt in January 1967 was far more prolonged than following any major revolt, and sentences

—both in terms of the proportion of convicted defendants who were imprisoned and the proportion of penitentiary sentences—were also markedly more severe than following the Chicago major revolt of 1968. We thus have five cases of Chicago minor revolts—January 1967, and four incidents in the summer of 1967—whose court responses were more severe than following the Chicago major revolt. Similarly, incomplete data on a March 1966 minor Los Angeles revolt not presented in Chapter 2, suggest that the sentence distribution following this revolt was somewhat more severe than following the massive 1965 Watts revolt, and that presentence detention was significantly more prolonged. Finally, fragmentary data in the author's file on Detroit's response to a minor revolt in the spring of 1968 (also not discussed in Chapter 3) reveal that a far greater proportion of defendants were incarcerated prior to conviction for lengthy periods of time than following the major rebellion of July 1967. These additional data tend to confirm the proposition that, despite wide variations in court sanctions at the minor revolt level, court sanctions following minor revolts were generally *more* severe than those following major revolts.

We are left, then, with the seemingly paradoxical conclusion that a participant in a full-scale ghetto revolt involving widespread participation and destruction of life and property is likely to incur *less* concrete deprivation from the criminal courts than one arrested for a comparable offense during “normal” conditions (as we saw in Chapters 2 through 4) or for a comparable offense during a minor revolt which entails only a tiny fraction of the scope and destructiveness of the major revolt. I label this result “paradoxical” because it is not easily explicable in terms of either of the three “theories” of state repression outlined at the end of Chapter 1. The Hobbesian perspective, which emphasizes the calculus of naked force, leads one to expect that the severity of the elite response would be proportional to the magnitude of the threat confronting the elite, i.e., that the state is far more likely to respond severely to a major revolt which engages the energies of the entire state repressive apparatus than to a minor revolt which entails a far less serious challenge to that apparatus. That our result was precisely the opposite of this one indicates the inadequacy of any approach which attempts to reduce the elite repression calculus to a calculus of sheer force and which thereby neglects the critical role which the legitimating interest in formal rationality and the interest in organizational maintenance play in this calculus in the liberal state. Such approaches—including the simplistic radical view of legal repression as “fascist core”—simply fail to account for the reason why so much attention was paid to the dictates of formal rationality and organizational maintenance throughout the criminal process.

At the same time, a pure liberal perspective which focused exclusively or even mainly on formal rationality as an explanatory variable would likewise

fail utterly to come to grips with the results we have observed. Indeed, an exclusive focus on formal rationality would lead one to expect that, insofar as comparable offenses were involved, there would be *no* difference in the character of the court response at different levels of violence. Because an ideal-typical formal-rational system responds only to the question of whether or not a generally proscribed act has been committed, and not to such "externalities" as the magnitude of the threat to the political regime or to the stability of the court organization, the behavior of such a system would not be expected to vary according to the magnitude of the revolt. Yet we have seen that the magnitude of violence was indeed an important determinant of the court response, and that, in fact, serious inroads against the principles of formal legal rationality were an integral part of that response. Thus on the one hand we observed in all three cities during major revolts systematic and intentional violations of civil liberties undertaken in the name of the interest in order, and on the other in all three cities following major revolts massive if covert abrogations of adversary norms undertaken in the name of the interest in organizational maintenance. To the extent that the liberal perspective fails to incorporate these interests as an integral part of its "theory" of legal repression, it comes no closer than the Hobbesian perspective to an adequate understanding of the dynamics of the court response to the ghetto revolts of the 1960s.

Finally, the Michelsian perspective, which focuses primarily on the dictates of organizational maintenance as an explanatory variable, is also manifestly inadequate to the task of comprehending these dynamics. It is certainly true, as we have observed, that the constraints of organizational maintenance played a crucial role in shaping the nature of the court response, and that the intensity of the threat to this interest following major revolts was an important determinant of the rather minimal sanctions. Yet a focus on organizational maintenance alone would obscure the reasons why this interest became so manifest following major revolts. For one, it was precisely because it was deemed necessary to adhere as closely as possible to the dictates of formal rationality that the stability of the court bureaucracy became so endangered. If, for example, the massive number of cases did not have to be disposed of within existing statutory deadlines, and according to existing procedures, then the threat which these cases presented to the equilibrium of the court organization would scarcely have been as great or as imminent as it was. Similarly, if the effort of court authorities to implement their interest in order had not produced an abandonment of normal police and prosecution screening, neither detention facilities nor the courts would have become so flooded. Indeed, court authorities initially acted in such a manner as to deliberately *increase* the threat to the equilibrium of their own subsystem when faced with a threat to their interests as political authorities generally. Thus for example the abandonment of normal gate-keeping functions on the part of the authorities of a

Detroit court system confronted with over *eight* times the normal weekly amount of arrests led to the prosecution of *twenty-seven* times the normal weekly number of felony cases. Similarly, in Los Angeles court authorities were initially faced with *five* times the normal weekly number of police requests for felony complaints, but by abandoning normal screening they allowed *ten* times the normal weekly quota of felony cases to be prosecuted. Finally, a Chicago court system confronted with only a *three* weeks' normal quota of felony prosecutions responded by producing an *eleven* weeks' normal quota of felony indictments. In each case, then, court authorities following major revolts increased by at least a factor of two the stress on their own sub-system, and only after the threat to their interests as political authorities generally was eliminated did the court system begin to respond to the dictates of organizational maintenance. Any analysis which interpreted court authorities as acting above all to preserve the equilibrium of the organization for which they have immediate bureaucratic responsibility would have obscured the crucial fact that it was precisely actions undertaken by court authorities themselves that were a major determinant of organizational disequilibrium, and thus would have obfuscated a central dynamic of the court response.

In the light of the theoretical considerations advanced in the body of the first chapter, however, our findings lost their paradoxical character. Whereas an analysis which focuses exclusively on one of the three core interests of political elites in the liberal state—or any two of them—necessarily fails to account for the dynamics of the responses we have detailed, an analysis which bases itself on the dialectical interrelationship among the interests in order, formal rationality, and organizational maintenance is well able to explicate our findings. Indeed, the rather minimal sanctions following major revolts were a necessary, perhaps inevitable consequence of the extremely complex effort to manage the intensely manifest contradictions among these three interests. Given the complexity and importance of this effort, there simply was *no alternative* to a policy of minimal concrete sanctions. Once the interest in order had been implemented, producing along with it not only a massive influx of cases but also a massive influx of cases which were largely unsupportable in terms of the ordinary canons of evidence, there was no way that a policy of severe sanctions could have been implemented unless court authorities had been willing to ignore the combined dictates of formal rationality and organizational maintenance. Only if they had been willing to abandon totally their legitimating interest in legality could they have ignored the overwhelming evidence problems which normally militate against convictions on serious charges, or the statutory deadlines which made it virtually impossible to bring thousands of defendants to trial. And even if they had been willing to abandon their interest in legality, their interest in organizational maintenance would have militated against a policy of severe sanctions which would have

necessarily entailed bringing thousands of defendants to trial and the total disruption of the ordinary criminal calendar. A policy of severe sanctions, in short, would have required that court authorities sacrifice one or both of two core interests of political elites in the American liberal state.

Our analysis suggests, then, that a distinguishing characteristic of legal repression in the American liberal state may well be that massive outbreaks of collective violence which evoke widespread participation necessarily engender rather minimal concrete sanctions. Under these conditions a successful policy of repression by means of formal rationality requires that legal authorities maintain a precarious balance among their highly manifest interests in order, formal rationality, and organizational maintenance, and such a balance can only be maintained through a policy of minimal sanctions. American political authorities are thus forced to pay a price for their effort to adapt normal sanctioning mechanisms to the challenge of collective revolts, the price being minimal deprivation inflicted on the participants. But this is a price willingly paid, since the use of ordinary sanctioning mechanisms permits political authorities to define the revolts as "ordinary crime." And, as the analysis in Chapter 1 suggests, this definition is consistent with their long-run interest in maximizing their legitimacy and minimizing the revolutionary potential of the revolts.

Thus we have seen that, once within the arena of the ordinary criminal courts, it became extremely difficult indeed to otherwise define the collective revolts, and virtually impossible for proposals based on an alternative definition to gain a hearing. Few if any amnesty demands were made following the revolts, and certainly none received any support from the defense community. Similarly, we have observed that many otherwise sympathetic attorneys felt that class actions and affirmative suits were "too radical" within the arena of the criminal court. Thus even those attorneys who did view the disorders as political revolts felt obliged to play by the normal rules of the criminal court "game," later regretting that they had thereby lent legitimacy to the authorities' efforts to treat the revolts as ordinary crime.

Similarly, long after the revolts court authorities in all three cities continued to deny emphatically their extraordinary political significance. In Los Angeles, for example, a survey conducted by this writer revealed that a full 100 percent of assistant city attorneys, 81 percent of assistant district attorneys, and 78 percent of superior court judges who responded defined the revolts either as "massive outbreaks of common criminality" or as "senseless and purposeless violence," with only a tiny fraction acknowledging that they were an "expression of protest."² A policy of repression by formal rationality, in short, entailed precisely the depoliticizing consequences which we ascribed to it in Chapter 1.

The planning efforts which we have reviewed also become comprehensible in the light of a perspective which focuses on the interplay among the com-

peting interests in order, formal rationality, and organizational maintenance. In fact, the planning which followed the major revolts in each of our three cities was aimed precisely at a more perfect harmonization of these three interests than was achieved during and immediately following the major revolts. As we have seen, in each city emergency plans focused almost exclusively on the technical and logistical problems of expediting "riot control" and the arrest process in particular, on the one hand, and minimizing the disruptive consequences of a massive influx of cases into the criminal courts on the other. None of these plans, nor any of the various recommendations in the publications we have reviewed, embodied even the slightest hint of a suggestion that the ordinary criminal courts and standard criminal procedure should be abandoned. Similarly, none of the judges or other court authorities interviewed by this writer expressed any doubts that the ordinary criminal courts can, and should, sanction participants in collective ghetto revolts. Most, in fact, were surprised that such a question should even arise, i.e., that one might even consider the possibility of an alternative means of sanctioning participants in ghetto revolts, and experienced a great deal of difficulty orienting themselves to the question. The problem to which court authorities addressed themselves, in other words, was not the problem of the wisdom of a policy of repression by means of formal rationality, but rather the problem of reconciling as much as possible the dictates of formal rationality with their interests in order and organizational maintenance. To put it another way, court authorities were preoccupied with the problem of minimizing the costs of "criminalizing" future ghetto revolts, and thus attempted to raise the "threshold point" beyond which it would no longer be possible to "criminalize" without incurring unpalatable costs.

CONCLUSION: CONTRADICTION, CONSCIOUSNESS, AND MARXIST DIALECTICS

In Chapter 1 we stressed the complexity of the task confronting political elites faced with collective violence of managing and harmonizing their contradictory interests in order, formal rationality, and organizational maintenance. In the light of that analysis, the most striking aspect of the response of the American criminal justice system to the black ghetto revolts of the 1960s was the relative ease and success with which court authorities accomplished this task. The revolts *were* put down speedily and effectively, a semblance of legality *did* prevail throughout the sanctioning process (although serious abrogations occurred, as we have seen, especially during the initial stages), and the equilibrium of the court organization was *not* seriously or permanently disrupted. In short, although repression by formal rationality is a precarious mode of repression "beset by internal contradictions," it was neverthe-

less an effective response strategy, both in terms of the short-run elite concern with order and its longer-run preoccupations with legitimacy and organizational maintenance.

What accounts for this success? Why were American court authorities able to achieve such a (from their perspective) happy balance among their contradictory interests and thereby to render these contradictions nonexplosive? To begin with, the factor of race cannot be ignored, and should not be underestimated. Given the fact that the "rioters" were black, the interest of court authorities—as well as the defense community—in formal rationality was simply not as manifest as it would otherwise have been, with the result that court authorities had somewhat more "leeway" than they otherwise would have had to pursue their interests in order and organizational maintenance. All my impressionistic interviews suggest that the blatant abrogations of legality which did occur during and immediately following the major revolts would have been far more difficult to justify, and therefore far less likely to have occurred, had whites rather than blacks been the object of the sanctioning process. Given that blacks are considered by many, including court authorities, to be "animals," and that their violent behavior was viewed by many as a confirmation of their animality, flagrant violations of formal rationality were far less delegitimizing than they would have been had they been committed against whites. It is simply the case—and no survey data are necessary to demonstrate this thesis—that Americans are far more likely to tolerate the incarceration of blacks for prolonged periods of time under inhuman conditions than they would be to tolerate similar indignities visited on whites.³

Similarly, given the color of the defendants, it is undoubtedly also true that defense community pressures on behalf of formal rationality were somewhat less intense than they would have been had whites been involved. We have seen that during the period of the revolts the establishment bar largely "stayed home," expressing more concern for a swift end to the revolts than with the rights of arrested participants, and that even the "good liberals" were shocked and angered. Thus during initial court proceedings—the period during which the court authority interest in order was most manifest and the most flagrant violations of formal rationality occurred—few if any powerful voices were raised on behalf of the rights of the "rioters." Had whites been involved, we might expect that such voices would have been raised, and that court authorities would have been forced to pay more attention to the constraints of formal rationality.⁴ Similarly, we may presume that in a racist society predominantly white defense attorneys would be more likely to pressure for "plea copping" in the case of blacks than in the case of whites.

The probable consequence of white racism was thus to render the court authority interest in formal rationality less manifest than it otherwise might have been. This does not mean that court authorities were able to ignore with

impunity the constraints of formal rationality; rather simply that the risks of delegitimation entailed in abrogations of it were somewhat lower than had whites been involved. Under these conditions, during the crucial period of the revolt court authorities were less constrained than they otherwise would have been to employ court sanctions in an effort to achieve a swift and efficient end to the revolts. Similarly, it is probably also true that, given the color of the defendants, departures from formal rationality in the name of organizational maintenance were somewhat easier to effect. That the impact on race of the sanction process is difficult to measure is not to be denied, but then neither is the fact that it played an important role.

Yet the success of court authorities in harmonizing their contradictory interests was not entirely due to the fact that the complexion of the defendants rendered their task somewhat easier. Even if we grant the impact of racism, it remains true that black defendants, along with their spokesmen and attorneys, could have rendered the task of court authorities far more difficult than it turned out to be. Had civil rights leaders demanded amnesty, had the defendants themselves refused to "cooperate," and had their attorneys refused to play by the ordinary rules of the cooperative criminal court game, court authorities would probably have been unable to achieve a favorable balance among their interests in order, formal rationality, and organizational maintenance. One crucial reason why court authorities *were* able to achieve such a balance, in other words, was precisely that *they encountered no sustained effort to prevent them from doing so* on the part of the "rioters" and/or their political and legal spokesmen.

Thus no major civil rights leader of the period challenged the very effort to "criminalize" the revolts; no significant voices were raised challenging the legitimacy of the effort of American political elites to treat the revolts as if they were "ordinary crime." For example, and as we have seen, no amnesty demands were made. Instead, the voices which were raised largely addressed themselves to the problem of assuring that rioters were afforded the same rights normally afforded the ordinary criminal suspect.

Moreover, once within the arena of the criminal courts the great majority of attorneys were even unwilling to pursue strategies which entailed a complete commitment to formal rationality (and thus a real threat to organization maintenance), and instead were only too willing to bend its constraints in return for a "break" for the defendants. At the same time, those few attorneys who did favor a full-blown adversary strategy found that the defendants themselves were generally unwilling to pursue such a strategy. Few if any of the defendants evinced the consciousness and commitment required to pursue a strategy which entailed the very real risk of severe sanctions, preferring instead to content themselves with convictions accompanied by minimal sentences in return for their "cooperation." In short, no one, neither the defend-

ants nor their representatives, challenged the very logic of the court authority effort—their very definition of the situation—with the result that the court authority effort to “resolve” its contradictions met with no opposition.

To have done otherwise—to have challenged the very logic of repression by formal rationality—would of course have required that rioters and their representatives sacrifice their short-run interests in the name of a consciousness of a broader, longer-run class interest. That such a consciousness was lacking is the ultimate reason for the relative ease with which American court authorities were able to maintain a favorable balance among their competing and compelling interests. This is not meant as a reproach; rather simply to suggest “what might have been.” Had such a consciousness been present, the task of court authorities would have been far more complex than it was, and might well have necessarily entailed a complete sacrifice of one or more of their core interests. Yet such a consciousness was not present, for reasons which relate to the very character of the Black Movement in the period from 1964 to 1968 during which the revolts took place.

This was still a period in which the struggle was primarily one for “equal rights.” Although both cultural nationalism and a version of Marxism began to emerge during this period, every available survey indicates that at this time the overwhelming majority of the black population identified most strongly with integrationists such as Martin Luther King, Roy Wilkins, and Whitney Young, for whom the very struggle for political equality was of central and overriding importance.⁵ Given this focus on political equality—on equality before the law—it is hardly surprising that black political leaders were preoccupied during and after the revolts with the problem of “equal justice”—formal rationality—for the rioters. Lacking a conception of blacks as either part of an economically exploited class or as a culturally oppressed “nation,” black political leaders had no grounds on which to oppose a policy of repression by formal rationality.

It is also important to remember that this was a period during which the most highly respected black political leaders were still firmly wedded to the concept of nonviolent protest. Given this commitment, the ghetto revolts of this period were necessarily occasions for embarrassment and defensive reactions on the part of such leaders rather than opportunities for voicing political demands. Thus, as Fogelson has noted, “almost without exception the Negro leaders disapproved of the riots. No one spoke for the rioters as Martin Luther King and the Montgomery Improvement Association spoke for the Montgomery bus boycotters. Whatever the meaning of the riots, it has to be sought in the rioting itself. . . .”⁶ The commitment to nonviolence, in other words, like the focus on political equality, militated against the capacity and inclination of black political leaders to oppose the court authority definition of the situation as one of “ordinary crime.”

At the same time, the commitment to nonviolence, and the general lack of a tradition of black violent protest, militated against a growth of consciousness on the part of the rioters themselves.

The absence of a tradition of violent protest makes it . . . hard for lower- and working-class Negroes to express the meaning of the riots. Except in Harlem and Boston, where the rioting erupted after organized demonstrations against police brutality and welfare abuses, nowhere did the rioters prepare a formal statement of grievances. And whatever the meaning of "Burn, Baby, Burn" and "Get Whitey," the slogans of the Los Angeles riots, surely no one can argue that they are readily understood. . . . [I]t is no mean task for Negroes to describe the problem and explain the rioting.⁷

Lacking such an "explanation," the rioters had no basis on which to refuse to cooperate with court authority efforts. Although many have unjustifiably and even viciously minimized the consciousness of the participants in the ghetto revolts of the 1960s,⁸ it is probably fair to say that few participants possessed coherent ideologies which might have served to explain or justify their participation.⁹ In the absence of such ideologies, the participants themselves were susceptible to a definition of their activities as "ordinary crime," or, at the very least, had little basis on which to oppose such a definition. Indeed, the nature of the revolts themselves—without organization, leaderless, and generally unaccompanied by far-reaching political demands—testifies to this general lack of ideological coherence. Under these conditions, it was not surprising that riot participants pursued their short-run interest in minimal sanctions and, in so doing, accepted the court authority definition of the situation.

Thus the lack of consciousness on the part of the riot defendants, and consequently the relative ease with which court authorities rendered their contradictory interests nonexplosive, is in part attributable to peculiar characteristics of the Black Movement during the 1960s and prior to that time. Yet these characteristics—the lack of class consciousness, the lack of understanding of the political meaning of collective violence—are themselves intimately related to the unique nature of the American consciousness as such. Thus Tocqueville and more recently Louis Hartz have emphasized the decisive way in which the American "liberal consensus" conditions American political life by militating strongly against the recognition of any common interests which transcend immediate, narrow self-interest.¹⁰ If it is true that Americans are generally more likely than others to fail to perceive the nature of collective interests, then it follows that they are more likely also to fail to understand correctly the nature of those actions taken on the basis of collective interests which do occur. Thus within the American polity violent collective acts are more likely than elsewhere to be defined as the sum of the individual acts comprising

them, i.e., as "massive outbreaks of common criminality," rather than as political revolts based on common interests. The success of American political elites in harmonizing their contradictory interests, and thus their success in pursuing a policy of repression by means of formal rationality during and following the black ghetto revolts of the 1960s, in other words, was ultimately related to the intensely individualistic American political consciousness itself.

That American political elites were able to achieve a favorable balance among their core interests despite the fact that we have characterized these interests as "contradictory" raises serious questions concerning the status of the theoretical category of "contradiction" and of a Marxist methodology which relies on this category. Insofar as court authorities were able to "manage" or "harmonize" their contradictory interests, the category of "contradiction" cannot be understood as implying any mechanical inevitability, any necessary breakdown. Our very language suggests, in other words, that Marxist dialectics cannot and should not be understood as a deterministic analysis. What then do we mean by "contradiction," and what is the theoretical status of a Marxist dialectic based on this category?

It is not enough to say that the category of "contradiction" emphasizes the extraordinary complexity of balancing elite interests in the bourgeois liberal state, since such an interpretation would utterly deprive this category of any distinctive meaning and would tend to suggest that one might just as easily speak of "conflicting" or "differing" interests. Clearly the category of "contradiction," if it is to have any meaning consistent with the distinctively critical intentions embodied in all of Marx's concepts, must embrace the possibility, the potentiality, that *under certain conditions* the conflicts among elite interests necessarily become unmanageable, produce a "breakdown," and hence the possibility of revolutionary transformation. Thus dialectical analysis asserts the possibility of an alternative future, but asserts it only as a *possibility*, not as a necessity or inevitability.

The critical condition for the realization of this possibility is the development of consciousness. In the absence of consciousness on the part of dissidents, elites will always be able to render their contradictions nonexplosive. This insight is one of the lasting theoretical contributions of Lukács to the problem of revolution:

Whatever position capitalism may find itself in there will always be some "purely economic" solutions available. The question is only whether these solutions will be viable when they emerge from the purely theoretical world of economics into the reality of the class struggle. For capitalism, then, expedients can certainly be thought of in and for themselves. Whether they can be put into practice *depends, however, on the proletariat*.¹¹ (Italics in the original.)

In the absence of proletarian consciousness, in other words, the economic contradictions of capitalism will never produce revolution and may not even produce a mere "breakdown." Similarly, our analysis has suggested that even under conditions of extreme crisis, contradictions in the political-legal "superstructure" will not become explosive unless dissidents develop a consciousness of these contradictions and of alternative possibilities. And the development of this consciousness, and of proletarian consciousness generally, in turn, is never a matter of mechanical determinism.

Here dialectical analysis can and must play a positive role. By asserting and clarifying the possibility of an alternative future, dialectics itself can contribute to the growth of consciousness required for the realization of this possibility. The effort to expose and elaborate on the contradictions among elite interests, moreover, serves to focus the attention of dissidents on those areas where the potential for creative praxis—a praxis which might prevent the elite from achieving a favorable "resolution" of these contradictions—is greatest. By laying bare the contradictions confronting the political elites who faced the ghetto revolts of the 1960s, we have, in fact, attempted to contribute to the development of the consciousness and praxis of those who would seek to challenge the American political order. It is this task which serves as the ultimate justification of this work, and the success of my enterprise should be judged according to the degree of intelligence with which this task has been carried out.

NOTES TO CHAPTER FIVE

1. A good sample of this burgeoning literature appears in James Q. Wilson, ed., *City Politics and Public Policy* (New York: Wiley, 1968).

2. From the files of this writer.

3. In this light, consider the far more humane treatment accorded whites who participated in the May Day protests in Washington, D. C. See "The Biggest Bust," *Newsweek* 77, no. 20 (May 17, 1971): 24–29.

4. Thus following the May Day arrests the majority of charges were dropped, the majority of bonds were refunded, and the circulation of arrest records was restricted by order of the Federal District Court. *New York Times*, October 11, 1971.

5. "The Negro in America—1965," *Newsweek* 65, no. 7 (February 15, 1965): 27; "The New Negro Mood," *Fortune* 77, no. 1 (January 1968): 148 and 146–151; *New York Times*, August 16, 1966; *New York Times*, July 27, 1964.

6. Robert M. Fogelson, "Violence as Protest," *Urban Riots: Violence and Social Change* ed. Robert H. Connery (New York: Vintage Books, 1969), pp. 37–38.

7. *Ibid.*, pp. 36–37.

8. See for example Edward C. Banfield, "Rioting Mainly for Fun and Profit" in *The Unheavenly City: The Nature and Future of Our Urban Crisis* (Boston: Little, Brown, 1970), chap. 9.

9. Fogelson, "Violence as Protest." According to a study of the Los Angeles County Probation Department, almost 75 percent of those convicted following the Watts major revolt reported that they had become involved "through curiosity or incidentally," and few if any offered an ideological explanation for their participation. Although the fact that these opinions were elicited by probation officers may well have operated to minimize the willingness of rioters to voice their ideology, these findings nevertheless suggest strongly a general lack of ideological coherence.

10. Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955).

11. Georg Lukács, *History and Class Consciousness* (Boston: M.I.T. Press, 1971), p. 306.

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