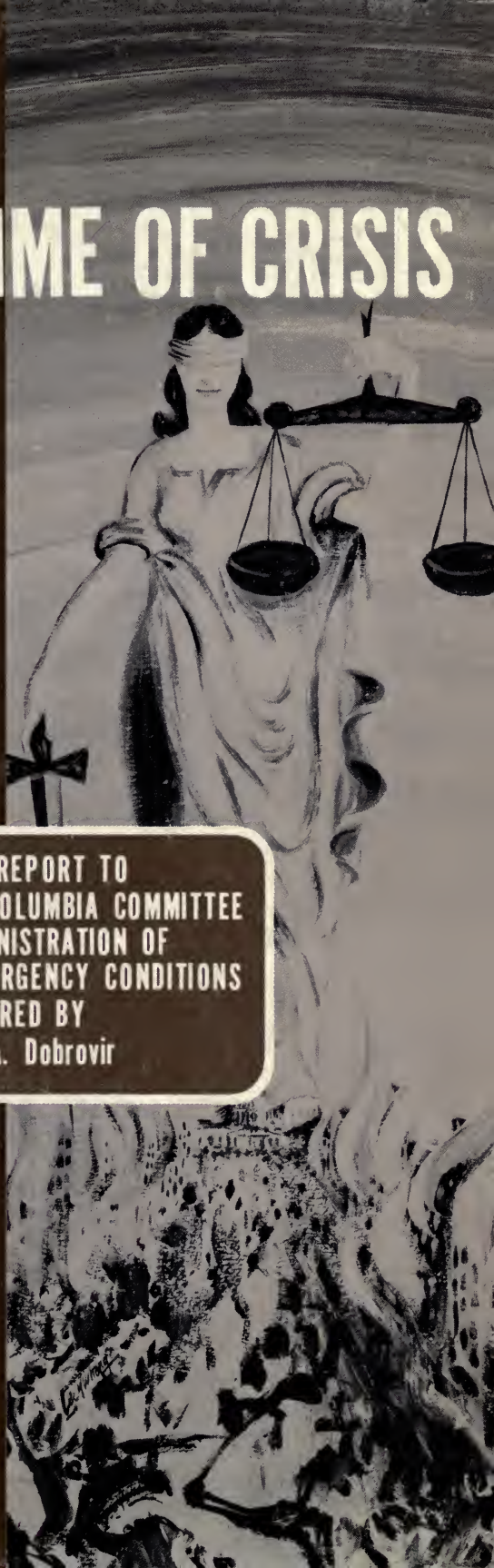
JUSTICE IN TIME OF CRISIS



A STAFF REPORT TO
THE DISTRICT OF COLUMBIA COMMITTEE
ON THE ADMINISTRATION OF
JUSTICE UNDER EMERGENCY CONDITIONS
PREPARED BY
William A. Dobrovir

DISTRICT OF COLUMBIA COMMITTEE ON THE
ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS
9th Floor
900 Farragut Building
Washington, D.C. 20006

Appointing Authorities
Mayor Walter E. Washington
Attorney General Ramsey Clark
Chief Judge David L. Bazelon
Chief Judge Harold H. Greene

Telephone
Code 202
296-8800

Committee
Lloyd N. Cutler,
Chairman
Alexander Benton
David G. Bress
Joseph M. Burton
Charles T. Duncan
Frederick H. Evans
Daniel J. Freed
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John Bodner, Jr.,
Executive Director

June 18, 1969

The Honorable Walter E. Washington
The Honorable John N. Mitchell
The Honorable David L. Bazelon
The Honorable Harold H. Greene

Gentlemen:

We are transmitting herewith the report of a special task force staff set up in August, 1968, by the District of Columbia Committee on the Administration of Justice Under Emergency Conditions. The task force was commissioned to probe more intensively several subjects discussed preliminarily in our interim report of May 25, 1968. The task force report, entitled Justice in Time of Crisis, was prepared by a staff of professionals under the supervision of William A. Dobrovir, Esq. It deals primarily with two aspects of the administration of justice during and after the civil disorders which followed the death of Rev. Martin Luther King, Jr. on April 4, 1968: (1) the setting of bail by the D. C. Court of General Sessions, and (2) the charging policy of the United States Attorney's office.

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The report details the burdens imposed on the judicial process during several tense days of burning and looting. Judges, prosecutors and defense lawyers worked around the clock to maintain a system of justice which would fairly balance individual rights and public safety. The efforts of accused persons and their lawyers to secure pretrial release came into conflict with the efforts of law enforcement authorities to insure that accused rioters would not return to the scene of the disorders. The desire of prosecutors to develop a charging policy which would effectively punish and deter looters came into conflict with the equally vital need of the court system as a whole to provide speedy criminal trials, minimize case backlogs and take appropriate account of the noncriminal backgrounds of most defendants.

The task force report contributes a wealth of factual data against which responsible officials and the bar can reassess their own roles now in preparation for any emergency that a mass arrest situation might create in the future. The Committee finds, on the basis of the task force report, that the Court of General Sessions, the United States Attorney's office and the defense bar contributed to a remarkably effective administration of justice considering the stress and turmoil of those early April days. In calm retrospect one year later, the Committee believes

that some changes in the bail system and in prosecution policy under riot conditions would be desirable should a system of emergency justice be needed in the future. The Committee believes, however, that in certain respects noted below, the task force appraisal of the system's 1968 performance is more critical, and its reform proposals more sweeping, than the situation warrants.

The Committee makes the following findings and recommendations, some but not all of which are in accord with those made in the task force report:

1. Bail. During the height of the April disorders the United States Attorney urged and most judges of the Court of General Sessions adopted a policy designed to prevent arrested persons from returning to the scene of the looting, as well as assure their appearance at trial. Money bond was set in the $300 to $1000 range unless a reliable third party custodian could be found. This amount was beyond the means of many defendants, particularly during a shortage of bondsmen, while the disorders together with the curfew also made it extremely difficult to produce reliable third party custodians. The result was often pretrial detention for several days until bail review could be held. Throughout

the same period, however, personal bond, particularly on condition of reliable third party custody, was set for many persons (approximately 43%) and enabled a significant amount of pretrial release.

Neither the literal language of the Bail Reform Act, nor a policy of preventive detention, was uniformly adhered to. Instead, the balance of release or detention tended to vary considerably among individual judges, between day and night, and in relation to the severity of the disorder prevailing at different times in the city. Overall, a higher proportion of arrested persons was released more quickly, without money bond, and on conditions designed to discourage return to the scene of the riot, than in nearly every other large city for which records are available.

The Committee finds this release policy to have worked well. Subsequent arrests of released persons were very few in number and mostly minor in charge. There is no evidence that the large number of releases contributed in any significant way to escalate the riot or impede police efforts to restore order. To the extent that the release policy in the Court of General Sessions was more generous than in other cities beset by disorder, it merits high praise for having fostered respect for justice and fairness without impairing public safety.

The illuminating data assembled by the task force affords no basis on which a policy or new statute countenancing more restrictive bail decisions, or preventive detention, in a civil disorder could be justified.

The question remains whether there was too much detention. The fact that substantial numbers of defendants were detained for up to several days prevents a clear cut judgment as to whether quicker release of more defendants might have had an adverse effect on the restoration of order. Much of this detention occurred prior to bail hearings, and was due solely to the fact that mass arrests overwhelmed the prosecutor and court processes during the first two days. The remedy for such detention lies mainly in more manpower to administer the agencies of criminal justice.

Once cases got into court, the task force report shows, judicial decisions to set high money bail resulting in detention were more frequent, and the court's rate of release at initial bail setting was lower, during the period of the escalation of the riot (April 5 and 6) than during its de-escalation thereafter. The Committee believes this pattern was neither unreasonable nor unlawful. It supports a judicial policy which requires firmer guarantees prior to release of an arrested person while a civil disorder is out of control

than if release comes during the comparative calm of everyday city life. Insisting on reliable third party custodians appears to be the best way to implement such a policy.

In the remarkable variations among bail decisions by different judges sitting at the same time, however, the record is sufficiently clear for the Committee to identify excessive detention which cannot be justified. The task force report discloses specific instances in which individual judges of the Court of General Sessions were substantially more severe than their brethren in denying release while operating under identical circumstances. In such instances, the statistical data and the transcripts suggest that several judges (1) seemed to equate a police charge with the accused's guilt; (2) refused to be influenced by the presentation by defense counsel of facts relevant to the charge, the likelihood of the defendant returning for trial and his willingness to remain under supervised release in the interim; and (3) adopted an across-the-board policy of imposing high financial bail on nearly every defendant without making an individualized inquiry. The Committee finds that such practices suggest a refusal to exercise judicial discretion that should not be condoned in emergencies

any more than in normal times.

The Committee believes that the discretionary setting of bail conditions on the basis of individual facts in each case, as the task force report shows most judges to have followed, represents the practice all judges should follow. The Committee urges a similar exercise of discretion by prosecutors. It suggests that the United States Attorney's office formulate its bail recommendations on the basis of the facts of each case and not, as it appeared to do in the April emergency, adopt a standard bail amount to recommend across the board in cases where no reliable third party was present.

Finally, the Committee concurs in the position stated by Chief Judge Greene that the Bail Reform Act and federal bail law are sufficiently flexible to accommodate the typical bail practice followed by most General Sessions judges during the emergency. We particularly applaud the imaginative way, as revealed by the task force report, in which several judges used the techniques of the Bail Reform Act to ensure maximum release with minimum risk to the community. The Committee disagrees with the task force view that the recent Court of Appeals opinion in the Leathers case forecloses such flexibility

in emergency situations. But we also concur in the recommendation made by the National and District of Columbia Crime Commissions, the American Bar Association and others that the Bail Reform Act be amended to authorize explicitly what was done here: to permit judges, at the time of release, to impose bail conditions which not only assure appearance but reduce the likelihood that a defendant considered risky may commit a serious crime while awaiting trial. Such authorization can of course make sense only if the Congress concurrently appropriates the funds necessary to establish a viable system of supervised pretrial release, and if it enables the appointment of enough additional judges, prosecutors and other personnel to guarantee a speedy as well as fair system of criminal justice.

The Committee does not believe that the record of the April disorders furnishes any evidence that would support the need for an amendment to the Bail Reform Act authorizing outright preventive detention of arrested persons in the course of a riot, as distinguished from the setting of appropriate conditions of release to prevent them from returning to the scene of the disorder.

2. Charging. Shortly after the emergency began, the United States Attorney and his staff developed a policy to guide the charging of persons arrested for looting. In general, the policy called for full-scale felony prosecution of looters where the reported circumstances of the offense fell within the broad definition of second degree burglary under the District of Columbia Code. Several days later, criteria were developed to govern Assistant United States Attorneys in their negotiations with defense counsel for pleas of guilty and dismissal of charges. Under these criteria, depending on the gravity of the evidence available, the most serious were to be prosecuted as felonies, those of lesser gravity were to be reduced to misdemeanors in the event of a plea, and those of the least gravity were to be reduced to misdemeanors regardless of a plea.

The Committee finds that the United States Attorney's policies were designed in good faith to facilitate an even-handed charging and disposition of cases involving defendants whose alleged offenses were the same. The policy constituted a not unreasonable exercise of prosecutorial discretion under difficult conditions. The Committee believes, however,

that the salutary objective of even-handedness in the ultimate disposition of cases might have been better served had the United States Attorney's policy been made public, rather than kept confidential, during the plea bargaining stage. In that way, defense attorneys would have been able to negotiate with Assistant United States Attorneys on the same basis of appeals to prosecutorial discretion which characterize the every day handling of criminal cases in the Court of General Sessions.

When the charging policy and its application are viewed in retrospect, the facts set forth in the task force report support the conclusion that too many cases proceeded to indictment and received full felony treatment. The task force believed that the large number of felony prosecutions was caused by the requirement that a defendant had to plead guilty to misdemeanors before felony charges would be dismissed. The Committee disagrees with this analysis. We find instead that the high rate of felony prosecutions was attributable not to the plea bargaining process (which comes after charging) but to the United States Attorney's initial decision to charge most looting as a felony. The United States Attorney found that looting fell within

the definition of second degree burglary, and believed that the disastrous effect of the riot and looting on property rights required felony prosecution. While there is much support in the community for a policy of strict prosecution, the Committee observes with the benefit of hindsight that such a policy does not necessarily result in effective law enforcement. When the delay in the processing of looting cases (particularly in light of the tremendous criminal backlog) and the nature of their ultimate dispositions by the District Court (mostly probation) are considered, they suggest that swifter justice on lesser charges would have been preferable.

This course would have been easier for the United States Attorney to elect in 1968 if there had been a carefully drawn looting statute which did not carry the breaking and entering connotations of burglary, and if felony and misdemeanor jurisdiction in the District of Columbia had been unified under an enlarged Court of General Sessions as is now proposed by the Ellison Committee (Judicial Council Committee on Administration of Justice). In any event, the policy of pursuing so many cases as felonies, while not inappropriate during and immediately after the April disorders, should have been reviewed and

modified as experience developed. This was confirmed by the fact that so many felony cases were disposed of by the District Court as misdemeanors.

To better prepare the system of justice for prosecution in a mass arrest situation, the Committee recommends:

(1) Enactment of a looting statute, with degrees of seriousness tied to the value of the goods taken and the surrounding circumstances, which avoids the burglary label. We understand that the United States Attorney's office has such a proposal, as well as a fire bomb statute, under active consideration; and

(2) Reformulation by the United States Attorney's office of plea bargaining guidelines for mass arrest situations based on an analysis of the prosecution and sentencing patterns which emerged from the April, 1968, disorders. This analysis may be materially aided by the assistance of the D.C. Department of Corrections, the Federal Bureau of Prisons and the United States and General Sessions Probation Offices, in light of the correctional perspective they can now bring to bear on the treatment of the various types of defendants convicted in the aftermath of the

April disorders. The guidelines so developed should be made public.

3. Conclusion. We concur, on the basis of the task force report, in the suggestion that the Metropolitan Police Department formulate written guidelines for handling future curfew situations.

To implement this and other suggestions in the task force report, as well as the Committee recommendations outlined in this letter and in the Committee's earlier reports, we recommend that the following steps be accomplished by Sept. 1, or as soon thereafter as possible:

1. That each court and agency of the criminal justice system mentioned in this report be requested (and that other interested persons be invited) to file with the appointing authorities a detailed response to each recommendation addressed to it;
2. That a committee consisting of the Chief Judge of the Court of General Sessions, the United States Attorney, the Director of the Legal Aid Agency and the Director of Public Safety, take responsibility for compiling, analyzing and, where appropriate, suggesting modifications in those responses; and
3. That the Director of Public Safety, as the principal official responsible for criminal justice system planning in this jurisdiction, publish for the guidance of the bench, the bar, law enforcement

authorities and the community an emergency justice plan for the District of Columbia and submit it (a) to the Law Enforcement Assistance Administration for funding, to the extent authorized by the Ominibus Crime Control and Safe Streets Act of 1968; (b) to the Congress for consideration of the legislative proposals and appropriation requests contained therein; and (c) to the Judicial Conference of the District of Columbia Circuit.

The Published plan should take account of each of the recommendations made in this letter, in the Committee's Interim Report dated May 25, 1968, its Supplemental Report of August 29, 1968, and its Second Supplemental Report dated October 1, 1968. The Public Safety Director's Report should include a summary of the action, if any, which has already been taken to carry out these recommendations.

Sincerely,

Lloyd N. Cutler

Lloyd N. Cutler
Chairman

Alexander Benton disagrees with the sentence on page 5 which states that "The Committee believes this pattern was neither unreasonable nor unlawful" and with the statement on page 10 that the Committee disagrees with the task force analysis which accounts for the large number of felony prosecutions. He takes no position with respect to the Leathers case referred to on page 7.

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William A. Dobrovir
Director

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JUSTICE IN TIME OF CRISIS

The Administration of Justice in the District of Columbia During the Civil Disorders of April, 1968, and in Riot-Related Prosecutions

A Report Submitted to the D.C. Committee on the Administration of Justice Under Emergency Conditions by William A. Dobrovir, Director of the Emergency Justice Project Task Force

April, 1969

PROJECT STAFF

William A. Dobrovir, *Director*

G. James Frick
Jerry J. Berman
Steven R. Rivkin

Murry J. Cohen
James Hart
James Paul
Ronald Plesser
Bruce Rabinowitz
Keith Sours
Eric Smith
Lloyd E. Tooks

Consultants to the Project: Harvey G. Friedman
Professor Sophia McDowell
John H. Treanor, Jr.

Mrs. Michael Solomon,
Administrative Assistant

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PREFACE AND ACKNOWLEDGMENTS

The study that follows was commissioned by the D.C. Committee on the Administration of Justice Under Emergency Conditions as an independent research project. The work was financed by contributions from the Lawyers Committee for Civil Rights Under Law, the Eugene and Agnes Meyer Foundation, and the National Commission on the Causes and Prevention of Violence.

The Committee and its chairman, Lloyd M. Cutler, enlisted for us the cooperation of the numerous agencies of the criminal justice system in the District of Columbia. John Bodner, Jr., executive director of the Committee, called together an advisory group to advise us and help focus our work. The chairman of the advisory group was Mrs. Patricia M. Wald; the members were Mrs. Barbara Bowman, William T. Davis, Esq., Dennis Flannery, Esq., Norman Lefstein, Esq., Professor John G. Murphy, Jr., Eugene Rhoden, Esq., John E. Vanderstar, Esq., and Charles R. Work, Esq. Daniel J. Freed, Esq., a member of the Committee, also participated in the work of the advisory group. None of the conclusions or judgments in the report are their responsibility, nor of course are any errors there may be.

Chief Judge Harold H. Greene of the District of Columbia Court of General Sessions, an appointor of the Committee, and Joseph Burton, Esq., Clerk of the court and a member of the Committee, made the facilities of the court available to us and permitted us to interview the judges. Chief Judge Edward M. Curran of the United States District Court for the District of Columbia and Robert M. Stearns, Clerk of that court, similarly gave us access to that court. David G. Bress, Esq., United States Attorney for the District of Columbia and Charles T. Duncan, District of Columbia Corporation Counsel, both members of the Committee, gave us freely of their time, made the facilities of their offices available and permitted us to interview their assistants. Chief John B. Layton of the Metropolitan Police Department and Inspector Aubrey Woodard, a member of the Committee, made the facilities of the Department available, arranged for us to interview police officers, and arranged for the Department itself to

do the tedious job of checking criminal records, relieving us of that burden. Kenneth Hardy, Director of the District of Columbia Department of Corrections, a member of the Committee, and Adam Zbignewich, in charge of records at the D.C. Jail, enabled us to compile data from the jail records. Robert Cecil, Deputy Director of the District of Columbia Bail Agency, made that agency's records available to us.

Assistant Attorneys General Fred M. Vinson and Stephen Pollak gave us of their time. Mr. William Calomiris, president of the Metropolitan Washington Board of Trade, made it possible for us to interview various business leaders in the District. Dr. Albert Biderman and Dr. Albert Gollin of the Bureau of Social Science Research gave us advice on interview methodology at the inception of our work. Sol Rubin, Esq., of the National Council on Crime and Delinquency, Harry Subin, Esq., of the Vera Institute of Justice, Michael Dontzen, Esq., Assistant to the Mayor of the City of New York, and Alan Reitman, Esq., of the American Civil Liberties Union, gave us generously of their time and advice. Robert Shohan and Edward Sherman of Control Data Corporation advised and assisted our data processing programs.

The Mayors, police departments and prosecutor's offices of a number of cities responded to our request for materials related to the administration of justice during civil disorders. The cities are: Akron, Ohio; Baltimore, Maryland; Buffalo, New York; Chicago, Illinois; Cincinnati, Ohio; Columbus, Ohio; Dallas, Texas; Denver, Colorado; Detroit, Michigan; East Orange, New Jersey; Fresno, California; Hartford, Connecticut; Houston, Texas; Kansas City, Missouri; Los Angeles, California; Milwaukee, Wisconsin; Minneapolis, Minnesota; New Haven, Connecticut; New York City; Oakland, California; Phoenix, Arizona; Richmond, Virginia; San Francisco, California; Seattle, Washington; Syracuse, New York; Tampa, Florida, and Wichita, Kansas.

The Lawyers Committee for Civil Rights Under Law is due mention not merely for its generous financial support. The Lawyers Committee housed us, provided bookkeeping services and general moral support, and a pleasant atmosphere, free of minor administrative concerns, that was conducive to our work. Robert L. Nelson, Executive Director and Charles J. Ryan, Special Assistant to the Executive Director, and the ladies of the Lawyers Committee's staff are due special thanks.

Finally, particular and separate acknowledgment is due to Mrs. Michael Solomon, Administrative Assistant to the project. She typed and retyped reports, drafts, research papers, corre-

spondence, questionnaires, drafts of portions and finally the complete typescript of this report; handled the details of management of the flow of papers, duplication, printing and publication, and generally kept an unruly group of full- and part-time staff, including the Director, under control. She is the one person without whom it would have been impossible for this report to have been produced.

Washington, D.C.
April, 1969.

William A. Dobrovir

SUMMARY

The following report describes the administration of justice by the courts and the prosecutors' offices in the District of Columbia, during the civil disorders of April 4-15, 1968, and in the criminal prosecutions arising out of those disorders. After discussing briefly issues arising out of police arrest and curfew enforcement practices, the report traces in depth and in detail the treatment of riot cases beginning with the initial charge by the prosecutor's office and then passing to the defendant's initial appearance in court for the setting of bail, and subsequent prosecution and disposition of the case by plea, preliminary hearing, indictment, trial and sentencing.

I.

During the first hours of the disorders, while concentrating on the restoration of order, the Metropolitan Police Department was unable to arrest all offenders; hence many of the more serious offenders, breakers, arsonists and instigators, escaped arrest altogether. Also, the disorder caused some police officers to charge offenders caught in looting or similar substantive offenses with curfew violation, an offense for which a penalty of a $25 forfeiture, without court appearance, was later imposed. In any event, of 6,230 riot-related arrests from April 4 through April 15, only 1,675 actually appeared before a magistrate, a judge of the District of Columbia Court of General Sessions. Prior to appearance, because of delays resulting from administrative tie-ups and the inadequacy of physical facilities, many defendants had already spent a night or twenty-four hours or longer in custody.

II.

As prisoners began to flow into the system, the United States Attorney for the District of Columbia, whose office prosecutes all offenses except petty misdemeanors—which during the civil disorders meant all offenses except disorderly conduct and curfew violation—determined that looters should be charged, at least for initial presentment, with second degree burglary (Burglary II), a felony punishable by from two to 15 years im-

prisonment. Of 1,137 persons initially charged by the United States Attorney's office with riot related offenses, 970 were charged with felonies, 904 of them with Burglary II. At the same time, the U.S. Attorney began to establish machinery and guidelines for review and possible reduction of charges after the restoration of order, when more information, including the eye-witness reports of police officers who were needed on the street and not in court during the height of the disorders, would be available.

III.

On Friday, April 5, as the initial charges were "papered," defendants began to appear before judges of the Court of General Sessions—for arraignment and setting a trial date if they were charged with misdemeanors; for presentment and setting a date for preliminary hearings if charged with a felony, and for appointment of counsel, advice of their rights and the setting of bail in all cases.

The major problem the court faced was the setting of bail—whether to release defendants with strong community ties (which many had) on personal recognizance, as required by the Bail Reform Act in force in the District of Columbia since 1967; or to attempt to set conditions calculated to prevent a feared return to the scene of and further participation in the disorders. On Friday afternoon, April 5, David Bress, the United States Attorney, advocated the second alternative in a meeting with Chief Judge Greene of the Court of General Sessions and in open court. At the same time reports began to reach the judges that defendants released on recognizance were seen "taking off from the court and heading in the direction of" the disorders and that some had been arrested a second time. Judge Greene decided to urge on the judges a policy of setting money bond for defendants charged with looting or other serious offenses unless a reliable third party was in court to assume custody of the defendant. The purpose of these conditions was to ensure the defendant's non-return to the disorders, as well as his reappearance for trial.

The rumors that defendants were returning to the disorder were never substantiated. Only one person released from court on Friday was rearrested that day—on the courthouse steps, for scuffling with a police officer.

The policy urged by Judge Greene was not followed uniformly. Some defendants were released on personal recognizance, even at the height of the riot, by some judges. Some were

released in third party custody. But many persons seemingly entitled to release on recognizance under the law were held to money bond and, either unable to find a bondsman or to post cash collateral, went to jail.

There was no agreement among the judges on how to pick out the rioters who were likely to return to the disorder. The judges were most uneven in their reactions; on Sunday evening, April 7, for example, one judge set money bond in every case before him, while another allowed immediate release from court on recognizance or third party custody in 90 percent of his cases.

The court set up bond review machinery immediately after order began to be restored, on Monday, April 8, and most of the defendants in jail were released, either by change of the bond to personal recognizance or by posting bond, by Friday, April 12.

The benefits of the restrictions on release remain a matter of conjecture. Only 46 individuals arrested for a serious offense during the riots were arrested a second time. The great majority of defendants were run-of-the-mill looters. Virtually no one charged with breaking, arson or other dangerous activities (a charge that might possibly justify detention to prevent repetition) was before the court. Against this must be weighed the possible injustice that resulted. The cases of nearly 40 percent of the persons initially remanded to jail with a money bond order have been dismissed or resulted in acquittal. There is indication that even a short incarceration affected the lives of some, causing loss of jobs or wages. In short, some persons paid the price of deprivation of liberty—fortunately, for most only for a short time—in circumstances of at best speculative justification.

IV.

For the anticipated review of charges in riot cases the United States Attorney established a set of guidelines for the four experienced assistants who, under the supervision of senior assistants, were designated to review all felony cases before preliminary hearing in the Court of General Sessions. The guidelines provided for no reduction, for reduction to misdemeanor charges only in exchange for a plea of guilty to the reduced charge, or for automatic reduction to misdemeanor charges, depending on the facts of the offense and whether the defendant had a prior criminal record. The guidelines were an effort to distinguish the more culpable from the less culpable offender.

A large number of felony cases were dropped altogether, for lack of evidence. About two-thirds of the rest fell into guideline categories in which a plea of guilty was demanded. Most of these defendants (or their lawyers) refused at that stage to plead guilty in exchange for reduction of the charge. So the cases were sent to the Grand Jury for indictment and trial in the United States District Court, which in the District of Columbia tries all felony cases. Had the charges been reduced to misdemeanors the cases would have been tried and finally disposed of in the Court of General Sessions.

The Grand Jury returned indictments against 510 defendants, 473 for Burglary II, the standard riot charge for accused looters. As of January 1, 1969, nearly two-thirds of these cases were still pending. Of those adjudicated, about 25 percent were dismissed or acquitted, about 17 percent were found guilty or pleased guilty to a felony, and the rest either pleaded guilty or were found guilty of only a misdemeanor.

The Court of General Sessions had disposed of about 90 percent of all cases to be tried there by the end of August, 1968; two thirds of all the felony cases in the District Court were still pending on January 1, 1969. Sentences on the other hand, have been about the same in the two courts: generally imprisonment suspended and probation.

Considering that most of the indictees were run-of-the-mill looters, that few (of those disposed of) have been convicted of felonies in the District Court, that most have received suspended sentences, that the riot cases have added considerably to the backlog and trial delay in the District Court where serious offenses are tried, and that these cases would doubtless have been tried more quickly in the Court of General Sessions, it appears in retrospect that too many felony indictments were sought and obtained. The main factor in this was the insistence by the U.S. Attorney's office on a plea of guilty before reduction to misdemeanor charges in the Court of General Sessions. There were other factors too; failure to reduce charges automatically in some of the small number of cases that fell in that category, and absence of a sufficiently varied arsenal of statutes for charging riot related offenses.

V.

The report recommends:

1. Detailed police guidelines covering arrest procedures and

curfew enforcement, to ensure more evenhanded treatment of rioters and curfew violators;

2. Reliance, in setting bail during a disorder, on third party custody, facilitation of this device, and rejection of the use of money bond to detain defendants;

3. A carefully worked out charging policy for disorders without relying on plea-bargaining, to prosecute only serious offenders as felons;

4. Enactment of statutes covering riot-related conduct, like looting, as part of the kind of revised Criminal Code contemplated by Title X of the D.C. Crime Reduction Act of 1967, but not yet funded by the Congress.

INTRODUCTION

The Interim Report of the District of Columbia Committee on the Administration of Justice Under Emergency Conditions, submitted to the Committee's appointing authorities on May 25, 1968, examined in detail many of the problems that arose in administering justice in the District of Columbia during the civil disorders that began in the District on the evening of April 4, 1968. The Interim Report concentrated largely on processing problems arising out of the number of arrests and prosecutions, far greater than the institutions in the criminal justice system handle in normal times. The Interim Report did, however, note that questions of substance were raised by the operations of the criminal justice system during the disorders that should be studied in greater depth. Those questions were listed under the headings Arrest, Detention, Charging, Bail, Adjudication and Sentencing.

The Committee budgeted $50,000 to carry out the further work recommended in the Interim Report, and a staff director was appointed and a task force organized to carry out this further work as an independent research project. The task force began work on August 1, 1968.

It became apparent after some exploratory work that the resources budgeted for the study were insufficient to cover in equal depth all five areas in which the Interim Report recommended further study. After discussion with the Advisory Group that had been constituted by the Committee to advise on the project as it progressed, and at the suggestion of a member of the Committee, the decision was made to concentrate on two major issues that could be studied in depth within the available resources. These issues were charging and bail.

Work had to be done on the other questions as well, however, in order to set the study of these two matters in context. Problems arising in connection with police arrest practices and interim detention affected both pre-trial release and prosecutorial charging policy. Adjudication and sentencing results are a necessary element in any study of prosecutorial policies.

Hence the report which follows is organized to follow riot defendants through the system. In Part I, within a discussion of the general context in which justice was administered during the emergency, information the project was able to gather about po-

lice arrest practices, prehearing detention, and enforcement of the curfew is set out. Part I concludes at the point where the judicial process began, with the initial charge of a felony or misdemeanor.

Part II follows the judicial process through initial appearance before a judge of the Court of General Sessions for the purpose of appointment of counsel, advice of the charge and of the defendant's rights, and the setting of bail. In this part the substantive question of provisional release of defendants before trial during the disorder is discussed in depth.

Part III continues at the point when, after order was restored, the United States Attorney's office began to move riot cases through the system. It concludes with the adjudication and sentencing results as of December 1 in the District of Columbia Court of General Sessions and January 1 in the United States District Court for the District of Columbia.

Part IV sets out the task force's recommendations with respect to any future disorder.

A number of appendices follow the report proper. These appendices set out in detail the statistics and other sources of information on which the report relies and the methods by which the statistics were compiled and other information gathered. In brief summary, the sources of the statistics were the records of the District of Columbia Court of General Sessions in civil disorder cases, as set out in various official computer print-outs furnished to the task force by the court's data processing unit (Appendices A, G); the records of the District of Columbia Bail Agency of interviews of civil disorder defendants (Appendix B); transcripts of initial appearances in the Court of General Sessions during the disorder (Appendix C); records of the District of Columbia Jail and the Women's Detention Center of prisoners remanded to custody after a judicial hearing during the disorder (Appendix D); records of the Metropolitan Police Department of civil disorder arrests, as set out in computer printouts furnished to the task force by the Department's data processing unit (Appendices E, F); records of the regular and special riot grand jury sections of the United States Attorney's office and records of the United States District Court for the District of Columbia in riot cases (Appendix G).

Another source of data was the transcripts of 107 preliminary hearings involving 158 riot defendants, held before judges of the Court of General Sessions. These transcripts, representing about one-third of all preliminary hearings held, were ordered by

the project from the court reporters. The court reporters were asked to furnish the project with a carbon copy of every preliminary hearing transcript otherwise ordered. This procedure was followed in order to save money, but there seems nothing in this procedure that would disturb the randomness of the sample. These transcripts were ordered transcribed by the District Court judges, or by the attorneys, in cases set down for pre-trial or trial in accordance with the calendaring system established after the first group of indictments was handed down (see Part III).

A most important source of information for the report was interviews: of the Chief of the Metropolitan Police Department and police officers, judges of the Court of General Sessions, judges of the United States District Court, the United States Attorney and some of his Assistants and former Assistants, officials of the Department of Justice, the District of Columbia Corporation Counsel and some of his Assistants, retail merchants in the District of Columbia, including some whose businesses were in the riot-torn area, bondsmen operating in the Court of General Sessions, persons arrested for curfew violation and defendants remanded to custody after initial appearance; and a questionnaire sent to defense attorneys. Descriptions of the methodology of these interviews and the questionnaire are set forth in Appendix H. Appendix I sets forth the text of the statutes commonly employed in charging riot defendants. Appendix J sets forth legal authorities on the question of bail and preventive detention.

* * * * *

In the following pages facts are described and judgments made of the operations of the agencies of the criminal justice system in the District during the emergency. It has been the project's intention to set down the facts as fully as possible, and to evaluate them fairly and objectively. Some of the judgments are critical. It is easy to be critical in hindsight. It should not be forgotten, in reading the pages that follow, that the police, the courts and the prosecutors performed a job that is difficult in normal times in conditions never before experienced. By and large, the job they did was superb. It is easy coolly to assess and criticize aspects of their work many months later. It may be said, nevertheless, that the pressures and difficulties facing these agencies and the men and women in them would have excused deviations from the ideal of justice far greater than those that may have occurred. The purpose of this study is not to criticize or

point any finger of blame. Rather, it is to tell the story of the operations of the criminal justice system in a time of crisis so that lessons can be learned that will be useful for improving performance of the system should major disorders recur in the District of Columbia or in other cities.

PART I. THE CONTEXT IN WHICH JUSTICE WAS ADMINISTERED DURING THE EMERGENCY

The civil disorders in the District of Columbia that began on Thursday night, April 4, 1968, when the news of the murder of the Reverend Martin Luther King, Jr. was broadcast, placed a tremendous strain on the criminal justice system in the District of Columbia. It is the purpose of this report to examine how the system reacted to that pressure. How the system managed to process the enormous groups of arrestees and defendants, for which it had not been prepared, has been told elsewhere.[1] The story of the riot as a social phenomenon also has been told elsewhere.[2] This report records a study of the operations of the judicial system and the prosecutor's office during the emergency and in emergency-related cases, the handling of cases once begun by the filing of the initial charge. Such a study would be incomplete, however, if it ignored the background and context in which the process operated. This part of the study describes the emergency measures adopted by the federal and D.C. executive authorities and the arrest practices of the police as they related to the contemporaneous and later actions of the courts and the prosecutor's office.

The Curfew

A curfew was in effect in the District of Columbia at various hours of the night from April 5 through April 14-15. In retrospect, the curfew was one of the most effective measures adopted for curbing the disorder. It tended to keep people off the streets and made anyone on the street, with certain exceptions, liable for immediate arrest whether or not he had committed or was committing any other substantive offense. Over the entire period of the disorder, 3,789 curfew arrests were made.[3] During the period April 5 through 7, 2,352 curfew arrests were made (Appendix F).

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[1]Interim Report, District of Columbia Committee on the Administration of Justice Under Emergency Conditions (1968).
[2]Gilbert, ed., Ten Blocks From the White House (1968).
[3]Interim Report 6.

In the Mayor's curfew proclamation, issued on Friday afternoon, April 5, exception to the curfew was made only for "law enforcement officers, firemen, physicians, nurses, and medical personnel, and employees of the D.C. Department of Sanitary Engineering." On the face of the proclamation, at least, no one else was to be on the street. It was clear nevertheless at the time the curfew was proclaimed that there would be other people with legitimate business who would be on the street after the hour of curfew; one obvious example was the lawyers acting as defense counsel during the night sessions at the Court of General Sessions, which sat virtually round the clock to process defendants through initial appearance. Another example, less obvious, would be persons like friends and relatives of defendants who might want to come to court to vouch for the defendant and, if it was so ordered, assume custody of the defendant (see Part II). Other examples were persons going to and from work whose jobs began or ended during the curfew hours and persons engaged in emergency food relief or other similar volunteer activities.

Those involved in drafting the curfew regulation, the Mayor and the Corporation Counsel, decided against a long list of exceptions for such people, relying upon judicious enforcement of the curfew by the Police Department. In any event, the only formal instructions issued by the Chief of Police to the Department with respect to persons who should or should not be arrested (as recorded in telex messages from headquarters to the precincts) was the instruction concluding announcement to the precincts of the proclamation of the curfew, "Officers will use good judgment and will make every reasonable effort to obtain compliance by citizens prior to making arrest" and a later instruction issued on Sunday evening, April 7, that "good judgment shall be exercised in relation to persons reporting for work prior to" the end of curfew at 6:30 a.m. on Monday, April 8.

Officials in the Corporation Counsel's office have stated that it was the intention of the executive authorities in establishing the curfew that curfew should be used only as a "last resort" arrest, after a failure of the individual to move on in response to a police order. But the police, it appeared to officials in the Corporation Counsel's office, made use of the curfew as a mass arrest device for controlling the civil disorder and charged defendants with curfew wholesale because this was a convenient way of clearing the streets.

The curfew was made applicable to the entire city. While the executive authorities felt that the curfew would probably be

unnecessary in the large areas of the city that were tranquil, they also felt that to impose curfew only in the part of the city in the grip of disorder might cause resentment against the authorities and against the fortunate citizens not subject to curfew and hence exacerbate the community tensions which at least in part were responsible for the riot.

Because of their expectation that only a limited number of curfew arrests would be made, some officials were surprised at the flood of curfew arrests (1,073 in the curfew hours after midnight Friday, April 5, through midnight Saturday, April 6) that filled the precinct cell-blocks to overflowing. In order to resolve this problem and avoid the pressure these cases would place on the already overburdened Court of General Sessions, it was decided at meetings on Saturday, April 6, in which representatives of the Department of Justice and of the District government participated, to release curfew arrestees with a summons to appear in court at a later date instead of holding them for arraignment in court the next day. Release would begin after the end of curfew the morning following the arrest, and arrangements for overnight detention were made at the workhouse in Occoquan, Virginia. Overnight detention was deemed by those who decided upon this measure to be a middle ground between holding all defendants until they could be brought before a judge (which would in normal times not occur until the morning following a night arrest) and immediate release by summons issued either in the street or in the station house. Given the situation in the city, it is not surprising that, as one of the participants in the decision recalled, no one argued very strongly for a policy of immediate release.

At the time of the establishment of the curfew there was no consensus on what an appropriate penalty might be for curfew violation. There was some apprehension that the legal basis for issuance of the curfew was shaky. After the substantial restoration of order, on Monday, April 8, it was decided that all curfew defendants who wished to would be allowed to post and forfeit $25.00 collateral—in effect, pay a $25.00 fine. Most did so. Because of the overnight detention policy, it seems fair to say that the penalty for violation of curfew was one night in jail and a $25.00 fine.

Police Arrest Practice and Enforcement of the Curfew

Some attention to police arrest practice is required for two reasons. First, as a background against which to place prosecutorial charging policy; second, to examine the exercise by police

officers of the broad "good judgment" discretion given them in enforcing the curfew.

It is estimated that the number of rioters was around 20,000.[4] The Metropolitan Police Department reported making 7,444 arrests during the period from April 4 through April 15, 1968. Subtracting traffic arrests and other non-riot-connected arrests leaves a total of 6,230 riot arrests, or less than one-third of the estimated rioting population. The major portion of these arrests, 3,956, were made from 9 p.m. Thursday, April 4 through midnight Sunday, April 7. Of these totals, 3,789 overall, and 2,352 from April 4 through April 7, were for violation of the curfew.[5]

The information upon which the following discussion is based is derived from interviews of 21 police officers and 25 persons arrested for curfew violation. Obviously, such samples are not statistically representative and hence no attempt has been made to draw figures from them. However, the impressions drawn from these interviews seem, on the basis of discussions with lawyers, prosecutors and other members of the community and journalistic reports of police operations during the disorder, to present a roughly accurate picture of what happened in the streets.

It seems to have been the general understanding of the police officers that their mission on Thursday night, early Friday morning and Friday was primarily to regain control of the streets and only secondarily to arrest persons caught in the act of committing criminal offenses. As a practical matter, the police did not have sufficient force available at the height of the disorder to both restore order and arrest all violators. Nevertheless, more arrests for non-curfew offenses were made between 9 p.m. on Thursday, April 4 and midnight Friday, April 5 than during any other comparable period (Appendix F). Non-curfew arrests dropped off rapidly after April 5; the peak of curfew arrests was reached on Saturday, April 6 and dropped off rapidly thereafter.[6]

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[4] "It is probable that the number of rioters in Washington in April was in the 17,600-22,800 range—roughly 20,000, or about one out of eight residents of the affected area." Gilbert, ed., Ten Blocks From the White House 224 (1968). The foregoing estimate is attributed to Washington Post reporters, said to be confirmed by the personal estimate of Mayor Walter E. Washington.

[5] Interim Report 6; Appendix F.

[6] Burglary II arrests are indicative. There were 432 on April 5, 279 on April 6, 86 on April 7, and only 22 on April 8, with the highest figure from April 9-14, 29, on April 12. Curfew arrests dropped from 1,073 on April 6 to 993 on April 7, 693 on April 8, 443 on April 9, 155 on April 10 and 152 on April 11.

This is some measure of the effectiveness of the police, with the assistance of National Guard and regular Army troops, in restoring order to the District. The troops, some officers said, provided the necessary manpower to control the streets and free officers to arrest violators. But because of the difficulties that beset the police on Thursday night and Friday, many of the more culpable rioters, those, for example, who initiated looting by breaking into business establishments on Thursday and Friday, may have escaped arrest.

Police Charging Practice

Most of the officers reported that they received no specific instructions about arresting and charging looters. Their practice varied greatly. Some officers arrested every violator; others arrested only those whom they caught with substantial amounts of merchandise. Early in the riot many officers simply chased looters instead of arresting them, and some officers would take goods away from looters, replace them in the store and send the looters home.

There was great variation in charging. A few officers stated that they always charged second degree Burglary (Burglary II), a felony, where the technical elements were present. Most said that they would charge a felony only in a case where the defendant was caught in a store with a substantial amount of merchandise. A number of officers said that they often charged looters only with curfew. The predilections of individual police officers, working long hours and under great pressure, could thus determine whether an individual would forfeit $25 and go free, or spend a year or more in the shadow of a felony charge with the probability of a sentence—suspended and with probation, to be sure—and a criminal record (see Part III).

Enforcement of the Curfew

All of the officers praised the curfew as a tool for restoring order. It enabled them to clear "troublemakers" from the streets and to prevent crowds from forming.

The officers were given few instructions with respect to enforcement of the curfew, and those instructions seemed to vary. Some reported being instructed not to arrest persons who could prove that they were going to or from work. Others stated that they were instructed not to arrest those who had "a valid reason"

for being on the street. Some officers stated that they were told only to arrest "potentially dangerous" violators. The only specific formal instruction from headquarters was to use "good judgment," and specific reference by way of exception was made only to persons going to work. The total impression is of an absence of guidelines and reliance within the Department on the individual discretion of the officers.

In enforcing the curfew, not unexpectedly, officers varied in determining whom to stop, and whom of those stopped to arrest. Some officers stopped everyone and questioned them. Others, in areas of major disorder, could only stop persons at random. Some officers indicated that they would not stop persons in quiet areas who did not look "suspicious." Some stopped pedestrians, but not automobiles.

In determining whether or not to arrest a person once stopped, the officers tended to develop a series of rough criteria. The most important was the individual's attitude. Any person stopped who gave the officer "back talk" was almost certain to be arrested. A respectful and contrite attitude, on the other hand, would greatly increase the likelihood of being let go. Some officers mentioned dress and general appearance as aiding them to identify a potential "troublemaker." Many officers were frank to admit that a black violator was much more likely to be arrested than a white violator. One black officer himself justified this, saying that the purpose of the curfew was to stop looting and rioting, and it was the blacks who were looting and rioting.

Within this framework, the officers tended to look for certain specifics. Anyone unable to produce a document to identify himself would be arrested without fail. A reason for being out that the officer deemed valid, if some proof could be produced, would often result in release. Depending on how busy the officer was, he might himself make a telephone call to check out the story. Among the reasons given, a claimed visit to relatives or girl friends would usually result in arrest; a claim of travel to or from work, if substantiated or if it sounded reasonable, would usually be accepted. Most officers would consider how close the defendant was to home and whether he was in a reasonably direct line between the place he said he was coming from and the place he said he was going. On the other hand, some officers said this was irrelevant and arrested "everything that moved." Officers reported seeing one man arrested while emptying his garbage in front of his house, another arrested while walking his dog and a

third arrested sitting on his front porch after he "sassed" an officer.

The interviews of curfew arrestees tended generally to confirm an impression of lack of uniformity in curfew enforcement. A number of people asserted that they were close to home, three "in front of my door" when arrested. One had driven home from Baltimore to escape the Baltimore curfew and was arrested as he got out of his car in front of his own home—which was unfortunately across the street from a liquor store. Another asserted that he was rushing across town to take his girl friend, who was about to give birth, to the hospital when he was arrested. Some arrestees reported that they were alone in the area when they were arrested; others saw other people in the same area who were not arrested and saw the police stop others and release them. Most of the arrestees admitted that they knew about the curfew and more than half of them were arrested in commercial areas, where stores had been broken into, but the same group felt that they were doing no wrong in violating the curfew because each of them felt he had a valid excuse for being out.

Detention Before Appearance in Court

The police made 1,604 non-curfew arrests from 9 p.m. Thursday, April 4 through midnight, Sunday, April 7. On April 5, 6, 7 and 8, 1,266 non-curfew defendants appeared before a judge of the Court of General Sessions. Non-curfew arrests through midnight, Friday, April 5, totaled 808; the total number of persons who appeared before a judge on Friday and Saturday, April 5 and 6 was 610. Any further day-to-day comparison would be misleading, because a person arrested during the night would not appear in court until the next day in any event. The two comparisons nevertheless indicate that many defendants spent more than one night, or even 24 hours, in custody before they appeared before a judge. This is confirmed by occasional reference in first appearance transcripts (Appendix C) to defendants appearing on Sunday, April 7 and Monday, April 8 who had been in custody for as long as 36 or 48 hours. A series of rough estimates by the Police Department is another indicator of the extent of this problem. At 8:30 a.m. on Saturday, April 6, the Department held 1,350 prisoners in custody. At 2:14 p.m. that day the Department telexed to all precincts an order to release all curfew arrestees on summons. By 5 p.m. the number in police custody has been reduced to 800. The curfew went into effect at 4 p.m.

that day; by 7 p.m. the number in police custody had risen to 1,200 and by 10 p.m. to 1,500. By 6 a.m. on Sunday, April 7, the number had risen to 1,700. Curfew arrestees were ordered released beginning at 6:30 a.m. on April 7 and by 5 p.m. the number in police custody had been reduced to 308.

There is no way of computing exactly the extent of detention before appearance in court but it seems fair to say that a substantial number of arrestees were detained for a substantial period of time. This may have had some effect on implementation of bail policy in the Court of General Sessions during the emergency. As judges became aware that many defendants had been held for 24 or 48 hours prior to appearance, they may have felt (as at least one judge did in one case, p. 43 *infra*) that the defendants had already been held long enough. They may have felt that the practical result of such detention made the judicial policy of greater restriction on pre-trial release than in normal times, adopted by the court with the intention of preventing alleged looters from returning to and further participating in the riot (discussed in Part II below) less necessary. In any event, the apparently substantial level of detention before appearance stands in the background of any assessment of the need for or justice of a judicial policy of restricted release.

The Judicial Process

The District of Columbia has a unique dual court, dual jurisdiction system for the prosecution of criminal cases. The D.C. Court of General Sessions is the nearest equivalent in the District to a state court of inferior jurisdiction. It has civil jurisdiction at law over cases where no more than $10,000 is at issue, small claims and domestic relations. It has criminal trial jurisdiction over traffic offenses and "D.C. offenses," violations of District police and other municipal regulations. It has criminal trial jurisdiction over all misdemeanors punishable under Title 22 ("Criminal Offenses") of the D.C. Code, the United States Code and the Federal Register, deemed offenses against the United States ("U.S." misdemeanors). Its judges have jurisdiction as committing magistrates for felonies against the United States punishable under Title 22, and the U.S. Code; trial jurisdiction over felonies is lodged in the United States District Court for the District of Columbia. The Court of General Sessions is, however, the usual point of intake into the judicial process of persons accused of crime.

A prosecution in normal times is often and in the disorders was almost always initiated by a police arrest on the spot. The usual procedure is for the arresting officer to record the facts of the offense and an indication of the statute violated, first on an offense form ("P.D. 251") and then, more fully, on a charge sheet ("P.D. 163"). After initial detention and booking at the precinct house, the officer takes the prisoner and the forms to the Court of General Sessions for the filing of charges.[7] If the arresting officer has characterized the offense as a "U.S. offense" he takes the papers to the United States Attorney's office in General Sessions for preparation of an information (in the case of a misdemeanor) or a "buck slip" to the Clerk's office directing that a complaint (in the case of a felony) be prepared. If the police officer has characterized the offense as a "D.C. offense" he takes the papers to the Corporation Counsel's office "across the hall." The officer is available to the prosecutor for discussion of the case, and the prosecutor then determines how to proceed in the light of the information the officer provides, other available witnesses and the defendant's record. Both prosecuting authorities have branch offices in the court's criminal building, on opposite sides of the same first floor corridor.

Defendants are then arraigned on misdemeanor charges or appear for presentment on felony charges before judges of the Court of General Sessions. At this first appearance, arrangements are made for the appointment of counsel and bail. If the defendant is charged with a felony, he is given an opportunity for preliminary hearing before a judge of the Court of General Sessions sitting as a committing magistrate, who determines whether probable cause exists to hold the offender for the grand jury. Should the accused be so held (or should he waive preliminary hearing), the U.S. Attorney may then bring the case to the grand jury for indictment and, upon indictment, to the United States District Court for the District of Columbia for trial.

The normal initial charging process broke down during the riots under the pressure of the great number of arrests. Police officers were needed on the street, not in court. Prisoners were brought to court for processing in large groups and without the arresting officer. The prosecutor therefore had nothing but the forms written by the officer to give him the information needed to prepare the charge. The P.D. 163's were sketchy where they

[7] In normal times some of the "elite" squads—homicide and robbery—of the Metropolitan Police Department bring charges directly to the United States Commissioner.

were available at all. Often the prosecutor had only the bare-bones P.D. 251. Moreover, because of problems of identifying and processing so many prisoners on short notice, the police were unable to provide prosecutors with prisoners' criminal records. In short, there was a critical absence of information on which to base discriminating decisions in the charging of offenders.

The impression emerged from police officer interviews that officers on the street, when they arrested a looter, might charge him with a minor, D.C. violation, disorderly conduct or curfew violation. This was especially true early in the disorder. The reasons given were to avoid the paperwork involved in writing up a felony charge, to avoid having to come in off the street (which the officer would have to do to record the charge and the facts in felony cases) where officers felt they were needed, and to avoid a later court appearance. Of course, many officers did not follow this practice; but interviews with Assistant Corporation Counsels indicate that, on the basis of fact statements that were available, the number of looters charged only with curfew violation was not insignificant.

The Deputy Chief of the Corporation Counsel's office, Criminal Division, has stated that when papers brought to his office by a police officer with a D.C. charge show a U.S. offense, the general policy of the Corporation Counsel's office is to send the case across the hall. A few of the Assistant Corporation Counsels feel on the contrary that it is exclusively the officer's responsibility to choose on which side of the corridor to file the case. During the disorders, in any event, the Corporation Counsel's office usually did not have the P.D. 163 but only the "van list" showing the name, the charge—usually curfew—and the place of arrest and hence knew no facts that would justify any charge except that listed.

What this meant was that many persons guilty of looting or still more serious conduct were prosecuted only as curfew violators. Particularly on Friday night, April 5, the police officers indicated, massive sweeps or dragnets would be used to clear the streets and wholesale curfew charges filed. In fact, many serious offenders were not arrested at all in the early hours of the disorder, as the police used their strength to clear riot-torn areas and gave arrests secondary importance until they could regain control over the streets.

As the papers began to flow into the U.S. Attorney's office in General Sessions Friday morning, April 5, and the precincts and court cell-block began to fill, the U.S. Attorney's office was

faced with the first of many important decisions it was to make in the civil disorder prosecutions. That was the decision what to charge individuals brought in for prosecution for looting. A spokesman for the office stated that it was decided Friday morning to charge all defendants initially with second degree Burglary ("Burglary II") wherever the facts then known showed the elements of that offense. This is the most severe charge the evidence in a typical looting case will support. Alternative charges available were unlawful entry where the offender was apprehended within a looted store without property in his possession; petty larceny or receiving stolen property where the looter was outside a store in possession of looted property, and engaging in riot (Appendix I).

It was specifically envisioned that after the riots subsided and additional information could be gathered by the prosecution, each case would be reviewed for possible change in the charges. Given the expectation of later review, the initial charge policy made sense. In the absence of enough information from the police about the offense and defendants' criminal records, "papering high" assured maximum flexibility for the prosecution in subsequent disposition of the case. It allowed the office, when more information became available, to proceed with the felony charge or "break down" to a misdemeanor; or to drop the charge if evidence could not be produced. Moreover, a case can be made that a general policy of filing felony charges, if disseminated to potential rioters, might deter them from looting or otherwise furthering disorder.

Given such review the initial charge would not matter a great deal. The objective was to get defendants processed promptly even in the absence of the police officer who in normal times is available at initial papering to furnish additional facts.[8] This objective was achieved. By the efforts and long hard work of the United States Attorney's office, the court and the defense bar all riot offenders had been processed by Monday night, April 8.

As the papers were prepared the defendants moved up from the cell-blocks for appearance in court. For many of them it was the first time they had ever appeared before a judge on a criminal charge.

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[8]A spokesman for the office said that neither the effect of a high charge on bail or on the office's subsequent plea bargaining position was a factor in initial charging. An individual Assistant stated in this connection that he prefers to lower a high charge rather than to have the embarrassment of having to raise a low charge.

PART II. APPEARANCE IN COURT; BAIL AND JUDICIAL ADMINISTRATION DURING THE EMERGENCY

The District of Columbia Court of General Sessions carried the burden of administering justice during the civil disorders of April, 1968. Virtually all defendants arrested and brought to court during the disorders appeared before a judge of that court. Except where charges were dismissed outright, the only decision of substance at those initial appearances was the determination of conditions of release—on money bail, in custody of others or on personal recognizance—for persons charged with riot-connected offenses. In the Court of General Sessions last April the setting of bail *was* the administration of justice.

Planning for the Emergency

On Friday morning, April 5, the problem of processing persons arrested in the disorder of Thursday evening prompted Chief Judge Greene to call a meeting of the judges assigned to the bench that day. There was yet little indication of how widespread the disorder would become or the number of arrests that would be made. Judge Greene set up a Special Assignment Court under Judge Edgerton to handle the additional burden. Otherwise, the court was to continue on a "business as usual" basis.

By that afternoon it was clear that the city was in the grip of a major disorder. Judge Greene, who was in touch with the Mayor and other city and federal officials coordinating efforts to restore order, passed information on to the other judges. But first-hand information was also available from the courthouse windows; many of the judges interviewed stated that their first awareness of the disorder came from seeing smoke in the sky and looting in the streets near the courthouse.

The Court of General Sessions had no detailed emergency plan. The court was put on around-the-clock operation until order could be restored and the flow of cases normalized. The judges cleared their regular calendars to make way for riot arrestees. Assignments were made for evening and weekend duty.

Guidelines were developed for the handling of disorder cases. In each case, the court would advise the defendant of the charge against him, warn him of his legal rights, appoint counsel

for his defense, and make a bail determination. While the court was ready and willing to conduct trials and preliminary hearings right away, such proceedings were impractical because witnesses were difficult to find in the confusion of the disturbance and police officers, who would have to identify the person charged and testify at the hearing or trial, were needed on the street to restore order. Hence, pleas and jury trial requests in misdemeanor cases were accepted but virtually all trials and preliminary hearings were continued.

The purpose of the guidelines, those responsible for them stress, was to strike a careful balance between the need to enforce the law to restore order and the need to protect the rights of individuals arrested. The judges were well aware of the criticism directed at the courts in other cities struck by major riots: the long delay in bringing arrested persons before a magistrate; the failure to give each defendant individual attention; the almost systematic denial of the assistance of counsel; the inadequate advice given individuals of their legal rights.[9]

By streamlining the judicial process during the disorder, including night and weekend operation, the court sought to avoid delay. By advising individuals of their rights and appointing counsel in each case, the judges sought to avoid the official hysteria and lawlessness which partly characterized the performance of the courts in other riot-torn cities. As Chief Judge Greene made the case for the procedures adopted in the District last April:

> "A mass arrest situation, like no other we are likely to be confronted with, is a test of our commitment to the rule of law. Every effort must be made to accord to the citizens involved in these situations their full and complete rights, just as at any other time. The courts, rather to [sic] participate in the symbolic burning of individual rights, should be islands of calm in the midst of the hysteria, the burning, the looting, and the violence. I know this will not be easy in time of crisis, but I venture to suggest to you that this is the proper role of the judiciary. Whenever American institutions have provided a hysterical response to an emergency situation, we have come later to regret it."[10]

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[9]See Greene, A Judge's View of the Riots, 35 D.C. Bar Journal 24, 29 (1968).
[10]*Id.* at 29.

"The central policy we determined was that, notwithstanding the cloud of smoke around us, our court would function as a court of law in the American tradition. If the disorder becomes so widespread that normal judicial processes break down, let those who have the power to do so declare martial law. But as long as the civil courts operate, they must operate as courts, not as adjuncts of the Police Department or the National Guard."[11]

The emergency procedures were substantially in force from the evening of Friday, April 5, 1968, through the evening of Sunday, April 7, 1968. The typical hearing during the weekend was conducted as follows:

1. The clerk read the defendant's name from the lock-up list.

2. The judge appointed an attorney present in the courtroom (usually volunteer "uptown" lawyers from firms with civil and federal practices, rarely Court of General Sessions "regulars") to represent the defendant at the hearing.

3. The attorney was given the opportunity to confer with the defendant in the cell-block in the court's basement or outside the court room.

4. When the conference was completed, the case would be called and the attorney and defendant would appear before the judge.

5. If the charge was a misdemeanor, the attorney would plead "not guilty," request a jury trial, and have a date set for trial. In felony cases, the lawyer would request a preliminary hearing, which would be continued to a definite date.

6. A bail determination would be made.

The record of the Court of General Sessions in providing procedural safeguards and individual treatment at the initial hearings last April is commendable. Compared with courts in other cities, that dealt out mass justice, the record is outstanding.

Bail Policy During the Civil Disorder

Applicable Law

No emergency bail legislation was in effect last April. The judges of the Court of General Sessions were therefore governed

[11] *Id.* at 30.

by the provisions of the Bail Reform Act of 1966.[12]

This statute was a response to criticism directed at the prior practice of relying on surety money bond posted by a professional bondsman for a premium as the best insurance against flight. Evidence indicated that money bond often discriminated against the poor defendant who, because of his inability to afford a bondsman's fee, often spent the pre-trial period in jail. Such detention, it was argued, violated the presumption of innocence, since the individual was deprived of liberty without a determination of guilt, and the right to counsel and to a fair trial, since detention inhibited discussion with counsel and the preparation of the defense. Several experiments had successfully demonstrated that persons with strong community ties could be relied on to return to trial without the threat of a possible bond forfeiture.[13]

The Bail Reform Act provides that, instead of money bond, the defendant shall

> ". . . be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."

If the judge feels that personal recognizance (a simple promise to return) or an unsecured appearance bond (a simple personal promise to pay a specified sum of money if he does not return), will not "reasonably assure the appearance of the person," he may "in lieu of or in addition to" these methods of release impose "the first of" or "any combination of" the following conditions:

1. Custody of the defendant in a third party;
2. Restrictions on travel, associations or abode;
3. A money bond with a cash deposit of not more than 10% paid into court as security;
4. A secured bail bond;
5. Other conditions, including return to custody at night.

The judge, in determining "which conditions of release will reasonably assure appearance," is required "on the basis of available information" to take into account

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[12] 80 Stat. 214, 18 U.S.C. § § 3146-3152.

[13] Freed and Wald, Bail in the United States: 1964, ch. 6 (1964).

> "the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

While the source of information in other federal jurisdictions may be the prosecutor, the police, the lawyer, or the defendant, and possibly all of them, in the District of Columbia express responsibility for gathering this information and presenting it to the court is placed on the D.C. Bail Agency, created by the D.C. Bail Agency Act.[14] The Agency is required to

> "secure pertinent data and provide for any judicial officer in the District of Columbia reports containing verified information concerning any individual with respect to whom a bail determination is to be made."

The Act specifies as pertinent data information about the defendant's "family, his community ties, residence, employment, prior criminal record if any, and. . .such additional verified information as may become available to the agency." To obtain this information the Agency is required "except when impracticable" to interview the defendant, "seek independent verification of information obtained," and is required to furnish this information to the judicial officer, the prosecutor and the defendant's lawyer. The Agency then may or may not recommend the defendant for any form of *non-financial* release. The Agency is not permitted to recommend financial bond.

To protect defendants incarcerated because of the setting of conditions of release other than personal bond, the Bail Reform Act provides for a review, on defendant's motion, of the initial bond determination by the same judicial officer after twenty-four hours. For persons whose first appearance is in the D.C. Court of General Sessions, if such review fails the defendant may appeal to the United States District Court if he is charged with a felony or to the D.C. Municipal Court of Appeals if he is charged with a misdemeanor, and then to the United States Court of Appeals.[15]

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[14] D.C. Code § 23-901 *et seq.*
[15] 18 U.S.C. § § 3146(d), 3147.

A defendant who fails to appear in court after being released forfeits any security posted. If he was released pending prosecution on a felony charge, he is subject to a fine of up to $5,000 and imprisonment of up to five years in jail. If the charge is a misdemeanor, he is subject to the maximum fine for the misdemeanor charge and imprisonment of up to one year in jail.[16]

The statute—the Bail Reform Act—in force last April, which the Court of General Sessions had been applying for nearly two years, provided only one standard for setting conditions of release—the likelihood of reappearance for trial. The information before the judge—the circumstances of the offense, the weight of the evidence, the defendant's community roots—was to be considered only as it bore upon the likelihood of reappearance. The statute made no provision for considering this information as suggesting the effect of the individual's release upon the continuation of a civil disorder, or as indicating the possibility of the defendant committing an offense if he were released.

The Policy Adopted

As the first defendants arrested in the civil disorders were processed through the Court of General Sessions on Friday, April 5, the question of bail policy became paramount.

On Friday afternoon, April 5, Judge Edgerton was sitting on special assignment. Both the Bail Agency and the volunteer attorneys appointed to represent the riot defendants were providing information on defendants' employment, years of residence in the District, family ties, and prior criminal record. In most cases, the Bail Agency was recommending that the defendants be released on their personal recognizance. In the great majority of cases, the agency and the attorneys were able to convince Judge Edgerton that the riot defendants were good risks to return to court. Most who appeared were released on personal bond. A few were released into the custody of third parties. Only a small minority of defendants were required to post a money bond, and only if no information could be verified or the defendant had previously violated the conditions of release imposed in connection with a prior offense.

But the Government feared that, even though the defendants had sufficient community ties to insure that they would return for trial, they would return to the scene of the riot and com-

[16] 18 U.S.C. § 3150.

mit further criminal acts. The Assistant U.S. Attorney assigned to Judge Edgerton's court argued that the court should take into account the "circumstances of the crime" and set money bond in order to detain individuals and prevent them from further participation in the disorder. Judge Edgerton, feeling bound by the Bail Reform Act, rejected such arguments, but not without stating the court's dilemma:

> "THE COURT: [U]nder the act of Congress under which we act we are told that we may not take into account the safety of the community.
> "[THE ASSISTANT U.S. ATTORNEY]: Your Honor, –
> "THE COURT: It's a very difficult dilemma that it places a judge in. All of the judges of this court feel that the burden of this–this restriction–
> "[THE ASSISTANT U.S. ATTORNEY]: Your Honor, I– I–
> "THE COURT: We are required to face the law. We do look out the window and see that we are having difficulty and trouble today, because we are not supposed to take this into account. I don't know how we are supposed to live through a period of this kind without opening our eyes."

The Assistant attempted to give the judge a way out by arguing that an individual charged with a civil disorder offense would be more likely to flee the jurisdiction and that setting money bond would be consistent with the Act:

> "[THE ASSISTANT U.S. ATTORNEY]: We think, Your Honor, that the present disturbances within the city are part of the total picture within which the crime is to be considered; and I think, Your Honor, that as there is community reaction to these disturbances, as further disturbances occur, the likelihood that a person will return for trial in a case of this nature, growing out of these circumstances, decreases; and the government merely suggests that Your Honor take cognizance of the present circumstances for that purpose, *not for the purpose of determining that the defendant is likely to commit the offenses again*, but merely for the purpose of determining whether the defendant is likely to appear there in court for trial." (Emphasis added.)

The attorney for the defendant argued that this was inconsistent with the law:

> "[DEFENSE ATTORNEY]: Your Honor, I would submit that this has to be done on an individualized basis, defendant by defendant, not on a citywide matter of public concern. This is the kind –"

The prosecutor's argument did not persuade Judge Edgerton:

> "THE COURT: I have been trying to weigh these matters all day, and just to treat this situation exactly as I have in other cases, other days, and tried to be as impartial and objective about it as I can.
>
> * * *
>
> "I released his co-defendant on personal bond, under the best lights as I could see it. I suppose I must also release this defendant. Of course, it's implicit in all of this that if these men go out and repeat this conduct and are again arrested, the next time in court it will go very much harder with them, and I think then we will certainly take into account their conduct."

In many cases, Judge Edgerton acknowledged the request of the prosecutor and imposed as a condition of release that the defendant be in his home after 7:00 p.m. Otherwise, he restricted his bail dispositions to those conditions which would assure him that the individual would return to court.

Between 5:00 and 5:30 p.m., Judge Edgerton heard the first rumors that some of the defendants he had released were seen returning to the riot area. He announced this in open court and indicated his extreme reluctance to continue releasing persons on personal bond.

> "THE COURT: Gentlemen, I have been increasingly disturbed as the day has worn on. Now, true, it is in the rumor stage and it's not essentially well-founded, it isn't probative evidence at this point, but at least suggestions have reached the Court and it has been drawn to the Court's attention that a number of the defendants which I have heretofore released on personal bond earlier in the day have been witnessed (a) immediately taking off from the court and heading in the direction of Seventh Street at a run, (b) have been seen to be

congregating outside of the court and leaving the vicinity of the courthouse in groups, and I have been seriously disturbed by these—I say they are rumors, not evidence. But, after all, I don't think the Court should shut its eyes to the circumstances; and if releasees are going back directly to the participation in this open civil disturbance, I think the Court in all conscience should take this into account. I can't ignore it, in other words. So I have become increasingly disturbed, as I say, as the day has gone on. My assignment is almost completed, but I'm getting more and more reluctant to release these people on personal bond."

As Judge Edgerton was speaking, the United States Attorney himself was meeting with Chief Judge Greene, Judge Tim Murphy, and Judge Dewitt S. Hyde. The U.S. Attorney, concerned over the reports that some released individuals had returned to the scene of the disorder and the possibility that others would do the same, urged the judges to discontinue releasing persons on personal bond, and urged a uniform policy of setting $1,000 bond in felony cases and $300 to $500 in misdemeanor cases unless a relative or other third party was willing to assume custody and could be relied on to keep the defendant out of the area of disorder. He argued that the Act permitted the judges to deny personal bond if the "nature and the circumstances of the offense" created a danger that the individual would return to the riot.

Judge Murphy did not agree that the Bail Reform Act allowed such a risk to be taken into consideration. Chief Judge Greene, on the other hand, thought that a riot was an "extraordinary" situation that could justify a policy of release conditions more restrictive than in normal times, of money bond instead of personal recognizance. In any event, he would favor such a policy until the "Court of Appeals told him otherwise." Chief Judge Greene then asked the U.S. Attorney to argue his case in open court, and he agreed.

As Judge Edgerton finished his announcement of the rumor that defendants were returning to the disorder and his doubts about releasing other defendants on personal bond, another case was called and the U.S. Attorney made his appearance in behalf of the Government.

"[ASSISTANT U.S. ATTORNEY]: If I may have a moment, Your Honor. [A pause.] Your Honor, Mr.

David Bress, the United States Attorney, is present in the courtroom.

"THE COURT: I am glad to hear from Mr. Bress.

"MR. BRESS: If Your Honor pleases, I did not inject myself into the prior hearing because I understood that Your Honor had heard part of that case before.

"THE COURT: Yes, sir.

"MR. BRESS: But I wanted to communicate to the Court that it is the policy of the United States Attorney's Office in felony cases, under the conditions that are extant in the city, to feel that in the absence of conditions of release under the Bail Reform Act which are proposed by the defendant, which would assure not only his appearance in court but assure a nonreturn to the kind of conduct that is involved in the charge, the United States Attorney recommends and urges the Court to require a bond not less than $1,000.

"And in this case it appears that shortly after midnight the defendant broke into the front showcase windows of a business establishment located at 2932 Fourteenth Street, leaving with an assortment of clothing. That kind of conduct, Your Honor, cannot be tolerated. That kind of conduct must be met with the full force of the law, and this kind of showing we believe that it is only reasonably to require that such a person post not less than a 1000-dollar bond."

[The attorney for the defendant established that the defendant was 18, had no criminal record, and was a life-time resident in the District. He could not verify his home address because there was no phone. He urged personal bond.]

"THE COURT: Do I understand that the government offers to prove that this defendant was seen breaking?

"MR. BRESS: Yes.

"THE COURT: This is the first case that I have had all day of the actual perpetrator of this breaking.

"MR. BRESS: Your Honor, the government offers to prove not that he broke, but that he was observed leaving the store with the assortment of clothing—

"THE COURT: All right.

"MR. BRESS: —after it had been broken into by others.

"THE COURT: That fits more nearly the pattern.

"MR. BRESS: It may be that the defendant is young. Nevertheless, Your Honor, in the absence of other conditions such as his parents being present and vouching that they would take care of him and see to it that he does not get involved in any further disturbance, we believe that a nominal bond would be $1,000.

"THE COURT: Very well. In view of the representation by the United States Attorney, I will fix bond in the sum of $1,000. If the counsel wants to draw to my attention additional considerations, the Bail Agency wasn't able to verify certain information, – "

The U.S. Attorney's urging had immediate results. Chief Judge Greene called a meeting of those judges handling riot assignments and requested that they follow a policy of setting a $1,000 money bond in all looting cases, unless a responsible person was present in court to vouch for the defendant and furnish assurance to the court not only that the defendant would return for trial but also that he would not further contribute to the disorder.

The purpose of the policy was not to "lock everyone up." As Judge Greene put it, it was felt that even though many defendants might make bond, enough would be detained to make a substantial contribution to the restoration of order. And, it was anticipated, as soon as order was restored bond review hearings would be held to release those defendants still detained on a money bond.

Judge Greene urged that policy, either personally or through the Clerk of the court, Joseph Burton, on every judge assigned during the disorder until Sunday afternoon, April 7, when, as Judge Greene said, the policy lapsed "spontaneously" with the return of relative order in the District.

The impact of the policy was felt immediately. In another courtroom, Judge Hyde also was conducting initial hearings for defendants arrested in the disorder. Judge Hyde was at first releasing nearly all defendants on personal bond, after satisfying himself that the defendants were good risks to return to court. At about the time of the meeting between himself, Judge Murphy, Chief Judge Greene, and the U.S. Attorney, the transcript of the hearing before Judge Hyde indicates that he made an abrupt change in policy. With few exceptions, defendants charged with felonies were required to post a $1,000 surety bond and defendants charged with misdemeanors were required to post a $500

surety bond. Judge Hyde gave the emergency as his reason for setting money bond in the face of evidence on the defendant's community ties. The following excerpt from the transcript is indicative:

"THE COURT: Is this for bond?
"THE DEPUTY MARSHAL: Yes, sir.
"THE COURT: Put what you want on the record.
"DEFENSE COUNSEL: I would like him released on personal recognizance. He has been a life-time resident since he was 18 years old. Steady employment and he has no record and lives with his family, his father and aunt.
"THE COURT: Let me say this. Because of the emergency the bond will be $500.
"THE DEPUTY MARSHAL: Your Honor, [Name].
"DEFENSE COUNSEL: Your Honor, I think they recommend personal bond in this case.
"THE BAIL AGENCY: Yes.
"THE COURT: What is this one?
"THE DEPUTY CLERK: Felony bond.
"THE COURT: Bond is $1,000.
"THE DEPUTY MARSHAL: [Name].
"THE DEPUTY CLERK: Felony, Your Honor.
"THE COURT: $1,000.
"THE DEPUTY MARSHAL: [Name], Burglary Two.
"THE COURT: Do you have anything to say?
"DEFENSE COUNSEL: Yes, I request that he be released on his personal bond. He is married, he is 49 years old and has a regular job. He has two sons. One is 18 years and the other is 20 and is in Vietnam. He has been a resident of the District of Columbia all his life.
"THE COURT: Because of the emergency situation in this city and the nature of these cases, the Court takes the position that personal bond would, in these cases, create a danger. $1,000 bond."

Bail Setting During the Disorder; Implementation of the Policy

A Statistical Analysis

According to official accounts of the civil disorder, the major outbreak of looting and destruction occurred on Friday, April

5, and Saturday, April 6, 1968. Substantial order had been restored by Monday, April 8. From Friday through Sunday, April 5-7, 951 bail hearings were held in the Court of General Sessions for non-curfew defendants.[17] Of these defendants, 42.7% were released on their own recognizance or in the custody of a third party. For the period April 5-10, non-financial conditions were allowed in 43.2% of 1,139 non-curfew bail determinations.

This, despite the announced policy of restricted release, is a higher proportion of release on non-financial conditions than in normal times. During its second year of operation (May 1967–May 1968) the D.C. Bail Agency reports that of 9,200 persons (including the riot defendants) who appeared before a judicial officer in the District of Columbia, 41.3% were released without financial conditions imposed.[18]

This apparent anomaly is explained by reference to statistics (Appendix B) compiled from Bail Agency reports of the 901 defendants interviewed by the Agency during the disorder. These statistics show non-financial conditions of release in 51.6% of the 628 cases in which information on disposition is available.[19] During the riot the Agency recommended non-financial release for 68.5% of the 901 defendants (72.9% of all those for whom information on recommendation was noted). The rate of recommendation during the two and one-half years of operation (1963–1966) of the D.C. Bail Project, the Bail Agency's forerunner, was 49%; during the Bail Agency's first seven months of operation (November, 1966–May, 1967), only 41%.[20]

The high rate of Agency recommendation during the riots reflects the fact that by usual Agency standards the riot defendants were excellent risks for non-financial release under the criteria established by the Bail Reform Act. Most of the defendants interviewed were residents of the District of Columbia (94.1%); had lived in the District for more than one year (90.0%); lived with members of their family (70.6%), and had some form of employment (84.0%). Only 7.1% had a serious criminal record; 28.9% had only a record of petty misdemeanors, and 40.8% had no criminal record whatsoever. The Agency had verified these

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[17]Appendix A.

[18]Dist. of Col. Bail Agency, Second Annual Report 6 (1968).

[19]The difference between this figure and the lower court figure is explained by the fact that a Bail Agency recommendation itself increased the chance of release on non-financial conditions (from 51.6% for all Bail Agency interviews to 60.6% for those recommended).

[20]Dist. of Col. Bail Agency, First Annual Report 6 (1967).

facts (with the exception of criminal records) in approximately two-thirds of all cases.

In setting bail during the disorder, on the other hand, the court followed the Agency recommendation in only 60.6% of the cases, a much smaller proportion than in normal times. In its two and one-half years of operation, the recommendations of the D.C. Bail Project were followed in 84% of all cases. In the Bail Agency's first seven months of operation, the Court of General Sessions released 90.6% of all recommended defendants on non-financial bail.

Thus, what happened is this: the Agency recommended a far higher percentage of defendants for release during the disorder than in normal times, but the court released twenty-five to thirty percent fewer recommended persons than in normal times. The difference was primarily the result of the policy of restricted release urged by the U.S. Attorney and by Judge Greene, a policy based on considerations other than the likelihood that riot defendants would return to trial.

This is confirmed by the treatment of individuals interviewed by the Agency who could be characterized as "model" defendants. These were persons who were recommended for release by the Agency, were District residents for one year or more, lived with spouse, parents or other family members, were employed for one year or more and had no record or a record only of petty misdemeanors. For the 98 (out of 137) such persons for whom information was available on conditions of release, a surety bond or percentage money bond was imposed in 37.0% of the cases.

On the other hand, the same statistics make it clear that the policy was far from uniformly applied.

The court records from which the overall figures are compiled do not distinguish between persons released on personal recognizance and persons released in the custody of a third party, or whether the money bond was a surety, cash percentage or the rare unsecured appearance bond.[21] The Bail Agency and other data indicate, however, that about 50%, or something more than 50%, of the non-financial releases were on personal recognizance.

The Bail Agency data (Appendix B) breaks down the 51.6% non-financial release orders into 18.5% third party custody and 33.5% personal recognizance or (3.1%) unsecured appearance

[21] A cash bond, set at a percentage (usually 10%) of the principal amount, has the advantage that the defendant may post it himself and need not find a surety.

bond. Statistics from transcripts of 415 bail hearings (Appendix C) indicate 41% non-financial conditions: 20% personal recognizance and 21% third party custody. The Bail Agency data for money bond breaks down into 38.5% surety bond and 9.6% cash percentage out of 48.1% money bonds. The transcript data breakdown for the 56.8% money bond is 34.3% surety and 22.5% cash.

Moreover, the judges were releasing defendants on personal recognizance as well as third party custody on each day of the civil disturbance. The court records show that 47% of non-curfew defendants were released on non-financial conditions on Friday, April 5; 32% on Saturday, April 6; 48.5% on Sunday, April 7, and 55% on Monday, April 8. The Bail Agency records show the hearing date in only 29% of all cases. This sample indicates, nevertheless, that judges were releasing persons on personal recognizance on every day of the disorder.[22] The sample of bail hearing transcripts also shows that judges were releasing persons on personal recognizance throughout the disorder period.[23]

A Day-by-Day Review

The statistics show that overall, but far from uniformly, the judges of the Court of General Sessions were following a policy of restricted release. Further analysis of the statistics, examination of transcripts and interviews with judges demonstrate that there was no uniformity in practice; that the treatment of defendants varied greatly from judge to judge, from day to day, and between day and night. The following pattern emerges:

(a) While some of the judges adopted a uniform money bond policy, others did not even though they may have weighed community safety in their case by case determinations.

(b) The judges who followed the policy were stricter during the night than in the daytime and about releasing persons on Friday and Saturday than on Sunday and Monday.

(c) Even judges who were strict at the start became more flexible when they realized that the riot arrestees had

[22]April 5, 24 out of 33; April 6, 23 out of 38; April 7, 30 out of 61; April 8, 18 out of 69 (Appendix B).

[23]April 5, 37% personal recognizance; April 6, 30.9%; April 7, 10.6%; April 8, 6.8% (Appendix C).

substantial community ties and relatively insignificant criminal records.

The most detailed complete picture of bail setting in the Court of General Sessions is in the transcripts of the bail hearings described in Appendix C. The following account of bail setting is based on those transcripts.

Judges did not always articulate their criteria for making determinations in particular cases. Often, the "statement of facts" in the case or the information and recommendation given by the Bail Agency are not on the record, since the judge often read this information without comment. Indications of a "policy" sometimes arise only from the pattern evident in a number of consecutively recorded hearings. The transcript picture itself therefore requires some interpretation. The picture drawn from the transcripts has been compared with, and checked against, the judges' own recollections of their bail-setting practices and the opinions of the lawyers who responded to the project's questionnaire.

Friday Afternoon, April 5

Before any restricted release policy was articulated, Judge Edgerton and Judge Hyde were releasing most civil disorder defendants on personal recognizance. A transcript of 22 of Judge Edgerton's hearings prior to the United States Attorney's argument for a uniform policy of money bond indicates that he was following the Bail Reform Act and rejecting any consideration of potential "dangerousness." Of the 22 defendants, 15 were released on personal bond, 10 with a curfew restriction; two were released in the custody of third parties; only five were required to post money bond.[24] In all five cases, the Bail Agency and defense counsel were unable to verify the community ties of the individuals. Similarly, Judge Hyde in nine recorded hearings released five on personal bond. In four cases, money bond was set at $500 (three) and $300 (one). In each, the Bail Agency and counsel were unable to verify community ties information.

Judge Edgerton left the bench soon after the United States Attorney's argument. In that case he set bond at $1,000. In the one last case on the transcript, Judge Edgerton released on personal recognizance a defendant with strong community ties where the information had been verified by the Bail Agency.

[24]One at more than $1,000, one at $1,000, two at $500 and one at $300.

Judge Hyde, on the other hand, citing the emergency as his reason, set money bond in five of the six remaining cases on the transcript. He set $1,000 bond for defendants charged with felonies (four) and $500 on a misdemeanor charge. In the last case on the transcript that afternoon, Judge Hyde made an exception and granted personal recognizance in a misdemeanor case in which the defendant had thirteen children, was employed and had no prior record.

Friday Night, April 5-6

On Friday evening, two of the three judges assigned to hear riot cases were committed to a uniform money bond policy. Judge Murphy, in open court, stated that it was the "unanimous view of all the judges. . ." to set money bond in looting cases:

> "THE COURT: A thousand dollar bond will be set on all looters, and we also have been advised that the District Court Judges will be present for habeas corpus petitions on all these cases. Nobody involved in looting is to be released on their personal bond. So, one thousand dollar bond in each case."

Judge Murphy set a $1,000 bond in 11 cases and a $2,500 bond in two out of 15 cases. He found the community ties of the defendant so strong in two cases that he allowed third party custody in one and personal recognizance in the other. In one of the cases, after the attorney pointed out that the defendant was employed, had no criminal record, and was recommended by the Bail Agency, Judge Murphy remarked: "This is what's wrong with automatic bond on looters." He passed the case, ruling that he would grant third party custody if a member of the family "can insure the Court that the boy is at home at all times until the trouble settles down." Judge Murphy made it a condition of release that defendants observe all curfews.

Judge Halleck cited the emergency as a reason for denying release on personal bond. In one case, the defense counsel argued that there was "no evidence of flight." Judge Halleck replied:

> "THE COURT: *I am not interested in that.* I am interested in all of the circumstances which the Bond Agency requires. I have to consider this man's past record, and the nature of the case and of the circumstances and *the facts that we are faced with* and they all lead me to reject your idea of personal recognizance in this case.

> And I am trying to set some sort of reasonable bond to insure his presence." (Emphasis added.)

Judge Halleck set money bond in 14 out of 22 cases.[25] There were no Bail Agency reports in most cases, although the lawyers usually represented that they had verified their clients' community ties. The representations of the lawyers about community ties persuaded Judge Halleck to grant personal recognizance or unsecured personal bond for eight defendants, five of them women with family responsibilities.

Judge Burka released seven defendants out of 10 on personal recognizance despite the Assistant U.S. Attorney's request for a $3,000 bond in every case:

> [THE ASSISTANT U.S. ATTORNEY]: The problem, Your Honor, is that a number of defendants earlier today were let out on personal bond and they have been brought back this evening picked up again for looting, the same charge they were charged with the first time."

Judge Burka set bond in three cases at $1,000, two where the Bail Agency was unable to verify information or recommend release, and one involving an alcoholic, stating that such a person was highly unreliable in keeping court appointments. Judge Burka made it a condition of release that defendants observe all curfews and warned each defendant that bond would be set at $50,000 if he was rearrested.

Saturday Daytime, April 6

Transcripts of only two judges' proceedings are available for Saturday during the day. Both of them seemed to be following the policy of restricted release. Judge Beard set a money bond (usually $1,000) in 20 out of 21 cases and released the remaining defendant in third party custody. Judge McIntyre released 9 out of 17 defendants, seven in third party custody and two on personal recognizance. Judge McIntyre set money bond in four cases, three at $1,000 and one at $500.

Judge Beard was primarily concerned with the statement of facts in each case and whether the defendant had a prior record. Bail Agency recommendations were unavailable in most cases but Judge Beard set a money bond even when they were. Judge

[25] Four $1,000; three more than $1,000; three $500; three $300.

Beard did allow 12 of the 14 defendants against whom a $1,000 bond was set to post 10% cash.

On the record, Judge McIntyre stated that he was concerned about the danger to the community posed by releasing the defendants arrested during the disorder and that he was taking this into consideration:

> "THE COURT: My concern right now is to be assured that these men don't get involved again, as well as the fact that they report back to the Court on their trial date."

The circumstance was, however, that in Judge McIntyre's courtroom relatives were often available to assume custody of the defendants. He had them undertake to see to it that the defendant obeyed the curfew and stayed away from the scene of disorder. Even if the Bail Agency recommended release, as it did in 8 out of 15 cases which came before him, Judge McIntyre would request a third party to assume control over the individual and if no one was available he set a $1,000 bond.

Saturday Night, April 6-7

The policy of restricted release was followed most uniformly on Saturday night. Transcripts of 133 hearings before four judges are available. Eighteen of the hearings were for curfew violators. The judges, Judge Hyde announced, had decided to release curfew arrestees on their own recognizance, and Judge Hyde released all 18. Of the remaining 115 defendants, only eight were released on non-financial conditions. Every judge stated in open court that the emergency situation was being taken into consideration in his bail determinations and that he was concerned with the possibility that defendants would return to the disorder and engage in further illegal acts.

Judge Hyde made the most explicit reference to the existence of an express policy:

> "THE COURT: I'm not going to release anybody on personal bond; not on the arrangement we have with the United States Attorney's office."

For attorneys who argued that the Bail Reform Act required release on personal recognizance, Judge Hyde was willing to make the record clear for any appeal.

"THE COURT: Because of the emergency situation in the city, of riots and widespread arson, and because of the fact that it has been reported to us that many people released on bond when they were in trouble originally, have started to return to the streets and engage in the same activities, and because of the representations made by the United States Attorney for the District of Columbia, the Court feels obliged to set bond in this case. Bond will be set at one thousand dollars. I think that makes the record sufficient for you if you wish to do something about it."

Judge Hyde applied the policy uniformly, without reference to the individual circumstances of each defendant. Substantial community ties were irrelevant:

"THE COURT: [I]n most all of these cases, the people where these appeals are made, do not have a record, have strong ties, and have had jobs."

* * *

"We don't, at the time we set these things, we can't make distinctions here from one, between the different persons that engage in this activity, when all of them—practically all of them, I should say—are in about the same position that your clients are in.

"The only difference is that you (the attorney in the case) have one difference with respect to the fact that your client, one of them, at least, I think you say is a District of Columbia employee, but that doesn't seem to me to alter the situation, whether he is a District of Columbia employee or an employee of the telephone company or the electric company, or B.C. Coal Company, or whoever they are employees of, I should say."

* * *

"We were criticized when the trouble first started for letting people loose and now we're being criticized for not following the Bail Agency Act."

Recommendation by the Bail Agency was irrelevant. "I know what the bail bond agency has recommended in this case, and probably what they will have to recommend, but we're in a state of emergency here." In 18 non-curfew hearings Judge Hyde set a

$1,000 bond in 13 cases and a $500 bond in the remaining five (three at 10%). In remarking on the $500 bond amount, set in cases where community ties were substantial and verified, Judge Hyde remarked: "That, in itself, is an exception."

Judge Halleck likewise made few exceptions. One hearing is illustrative:

> "THE DEPUTY MARSHAL: One-thirty-two: [Name]; charged with burglary in the second degree.
> "THE COURT: Would you like a preliminary hearing, Congressman?
> "CONGRESSMAN_____ : I would appreciate a preliminary hearing within the next week or two.
> "THE COURT: You can have it Thursday or Friday.
> "CONGRESSMAN_____ : I'll be available either day, Your Honor. I have familiarized myself with the story of [the defendant], and this seems to me a most marginal charge. He's regularly employed, and he's taking care of his two children. He's never been arrested or convicted. He's twenty-five years old.
> "THE COURT: The police officer saw him inside the Safeway Store looting. You ought to drive up and see what's left of the Safeway Store, Congressman.
> "CONGRESSMAN_____ : His story was that he was walking home from work, passing the store. It seems to me he's entitled to his day in court.
> "THE COURT: Oh, indeed so.
> "CONGRESSMAN_____ : I would hope that the bail can be fixed as low as possible. I would like to see him go back to work so he can provide for his children.
> "THE COURT: Bond is a thousand dollars. This will be set for Thursday.
> "CONGRESSMAN_____: I have ascertained from [the defendant] that he can raise fifty or seventy-five dollars. I would ask the Court to consider his unblemished record, and that a five percent be imposed.
> "THE COURT: Did you vote for the Bail Reform Act?
> "CONGRESSMAN_____ : Yes, sir; I voted for it.
> "THE COURT: All right. Five percent, on the condition that he goes home and stays there.
> "CONGRESSMAN_____: I'll make that part of my duties as his lawyer, Your Honor.
> "THE COURT: Very well."

Of 38 bond hearings on the transcript, only three persons were released, one, arrested for looting a Safeway store, on personal recognizance after his attorney represented that the defendant was a Safeway employee, and two in third party custody. In 18 cases, bond was set at a flat $1,000. In several cases where the attorneys attempted to argue for a reduction, Judge Halleck would threaten to raise the amount.

> "THE COURT: What was it you were moving for?
> "[DEFENSE ATTORNEY]: Ten percent.
> "THE COURT: Denied. Would you like me to raise the bond?
> "[DEFENSE ATTORNEY]: No, Your Honor.
> "THE COURT: All right. [The defense attorney], you ought to go up Fourteenth Street, or up Seventh Street, and take a look at some of the results of these civil disturbances."

The emergency was Judge Halleck's first consideration in determining bail:

> "THE COURT: The way things are now, I'd rather have a bondsman with a little something on the line looking for him. There's a report that they're getting ready to take Baltimore apart.
> "[DEFENSE ATTORNEY]: He's not going to Baltimore. Actually, it's difficult to make a $1,000 bond.
> "THE COURT: Do the best you can, and if you can't make it in twenty-four hours, then file a motion for reconsideration.
> "[DEFENSE ATTORNEY]: Would you consider ten percent?
> "THE COURT: I might reconsider anything when I get a little more information from you and things get quieted down a little; when we find out where people are and how we stand. As it stands now, things are a little indefinite."

An individual who could not make bond would be kept out of the riot area:

> "[DEFENSE ATTORNEY]: Your Honor, the defendant doesn't have any money at this time to make bond, and his folks can't possibly raise the money in light of the curfew; they can't seek out a bondsman and make collateral.

"THE COURT: Well, that will keep him out of trouble tonight.

"[DEFENSE ATTORNEY]: There's no indication that there will be any trouble tonight. The presumption of innocence is on the defendant until proven guilty.

Would Your Honor reduce the bond?

"THE COURT: I'll consider it in twenty-four hours."

If the defendant had strong community ties, the attorney would suggest personal recognizance. Judge Halleck's response was that "It might be the case on Wednesday; but not tonight." With the disposition seemingly predetermined in most cases, the bond hearing was often extremely abrupt:

"THE DEPUTY MARSHAL: Two-seventy-six: [Name].

"THE ATTORNEY: Your Honor, this is a matter for a preliminary hearing. I would request it be set for an early date.

"THE COURT: Thursday.

"THE ATTORNEY: I am advised by [the defendant] that he moved into the District of Columbia thirteen years ago.

"THE COURT: One thousand dollars."

At least on Saturday night, the presumption of innocence was not on the side of the defendants.

"THE ATTORNEY: He has no other record, Your Honor.

"THE COURT: He has a big one, now."

Judge Halleck set bond at $5,000 and 10% for one defendant; more than $1,000 for four defendants; $1,000 for 18 defendants; $800 for three defendants; $500 for seven defendants, and $1,000 and 5% for one defendant. One person was released on personal recognizance and two in third party custody.

On Saturday night, Judge Daly also thought the Bail Reform Act could not be followed and that the disorder had shown the fallacy in the Act:

"[DEFENSE ATTORNEY]: These are men who have family ties.

"THE COURT: They did it once, they were arrested for it. What is going to stop them from doing it a second time?

Now, the first twenty-five people they released on personal recognizance on Friday, five of them were arrested a second time for looting.

Now, what assurance can you give me?

"[DEFENSE ATTORNEY]: Your Honor, I can say that they have not been predisposed to get into difficulty with the law before. They have had one very bad experience with the law, and, I think, after my brief association with them, they are convinced that that is not the way to do things.

"THE COURT: That's the problem.

My understanding of the Bail Bond Act, is that we are supposed to be concerned with those things. They say that's not to be taken into consideration, but I don't know how you are going to do this. Maybe Congress will see how utterly foolish it was to write some act like that.

"[DEFENSE ATTORNEY]: But, may it not be equally foolish not to observe it.

"THE COURT: You're going to have a mandamus. It is going to be argued in the District Court on Monday."

Judge Daly set bond at $1,000 with a 10% cash deposit in 31 of his 38 cases, $300 in three cases, third party custody in three cases and committed one to St. Elizabeth's hospital.

Judge Ryan also expressly took the "situation" into account in setting bond.

"You have a city in flames and there are certain facts you deal with. You deal with facts in the order of their priority and so some people will have to languish in jail."

Of 21 cases on the transcript, the Judge ordered two released in third party custody, six to obtain a surety bond from $1,000 to $2,000, and 13 to post 10% collateral for bonds ranging from $500 to $2,500.

Sunday Daytime, April 7

The bail hearings on Sunday in the daytime show a decided shift away from money bond. Transcripts of 76 hearings before three judges are available. Money bond was set in only 18 cases. The majority, 56 defendants, were released in third party custody,

usually to a relative who was in court. Only one defendant was released on personal recognizance.

Judge Pryor favored money bond, setting money bond—but with a cash deposit—in 10 of 12 cases. Judge Pryor very carefully inquired into the community ties and prior criminal records of each defendant, but also considered the "civil disorder" as a factor. However, unlike the judges on the night before, Judge Pryor thought that his action was consistent with the Bail Reform Act:

> "THE COURT: I think a close reading of the Bail Act will indicate that the Court is entitled to take into consideration the nature of the circumstances of the offense charged *as well as* the question of fugitivity; and it is a fact that we are utmost concerned with whether the defendant will return to court. But I will take into account the nature of the circumstances of the offense charged." (Emphasis added.)

However, in contrast with the $1,000 bond policy enforced the night before, Judge Pryor set no bond higher than $500, even in felony cases. In seven cases, Judge Pryor set bond at $500 and in three cases, at $300. In every case he allowed a percentage deposit (ranging from 5% to 20%). Judge Pryor committed one person to a hospital and released one in third party custody.

In Judge Pryor's courtroom relatives to take third party custody were absent. In contrast, in Judge Alexander's courtroom, 42 fortunate defendants out of 50 had relatives in court to take custody of them. Judge Alexander made clear at the beginning that he favored third party custody and the lawyers in the courtroom made efforts to get their defendants' relatives down to court. When relatives were available, he would release the person in their custody, after carefully questioning all third parties to make sure they were familiar with the defendant, willing to keep him out of trouble, and see that he appeared later in court. If a third party was not available, Judge Alexander would allow the case to be passed without decision until someone who would take custody was brought into court. Judge Alexander expressly denied the existence of any uniform policy against personal recognizance in his court:

> "LAWYER: Your Honor, with respect to the bail. I was prepared to argue for personal recognizance; since there is nobody to whom he might be released, I am not allowed to.

"THE COURT: Well, I don't know from whom you understood such a policy as that.

"LAWYER: Well, then you have concluded—

"THE COURT: The Court hasn't announced such a policy and never has said counsel was not allowed to argue."

Whether or not Judge Alexander was aware of it, he was following the policy of restricted release established Friday afternoon. He set money bond for every person unable to produce a third party. In three of the five cases in which Judge Alexander set bond despite a favorable Bail Agency recommendation (one at $1,000, one at $1,000 and 10%, and one at $300 and 10%), it was clear on the record that relatives were unavailable to assume custody. In the other two (one at $1,000 and one at $300), the lawyers and the Bail Agency were unable to verify community tie information in addition to being unable to produce a third party willing to assume custody.

Judge Murphy's transcript records 14 hearings on Sunday, all for women, and he released 12 in third party custody. In almost every case, he asked if relatives were available to assume custody.

Sunday Nighttime, April 7-8

By Sunday evening Judge Beard, who earlier in the weekend had set money bond in most cases, was far more liberal in granting personal recognizance. On the other hand, Judge Malloy, who had not been assigned to the bench before Sunday, required a money bond in every case. Judge Atkinson, also on his first assignment, followed a similar but slightly less restrictive policy. Judge Korman released most persons on personal recognizance.

Judge Malloy set $1,000 surety bond in 15 out of 23 cases. In eight others, he imposed bond amounts ranging from $300 to $500. Judge Malloy repeatedly stated as his reason for denying personal recognizance that he had insufficient information about the defendants. However, at one point, an attorney asked the Judge if a Bail Agency recommendation would make a difference:

"DEFENSE COUNSEL: May I make the proffer to the Court, if the Ball Agency speaks to Mr. Johnson and does recommend personal bond for [the defendant], would the Court reconsider the matter?

"THE COURT: No, absolutely not; not at the present time; maybe at a later date we might; not at this time."

Judge Malloy ruled out any release in third party custody:

> "THE COURT: Well, I'll not release him in custody of anybody. If she doesn't have any more control over him for the next two weeks than she had over him during the last couple of days, I'll set bond at a thousand dollars. I think perhaps that would be more reasonable."

Judge Malloy was setting surety bonds of $1,000 for felonies and $500 for misdemeanors and was applying the guidelines of the restricted release policy established on Friday afternoon.

Judge Atkinson, likewise on his first assignment, was strict in requiring a surety money bond:

> "THE COURT: If we're going to turn these guys loose as soon as they get down here we're all wasting our time; we all might as well go home and go to sleep."

In some cases, the imposition of a bond seemed to be a form of punishment. When an attorney said it was unfair to keep his client in jail, Judge Atkinson remarked: "It's unfair to go over there and break in the liquor store and take the man's whiskey, too, if you're talking about what's unfair." In response, the attorney argued that a man is presumed innocent until proven guilty and that his client would lose his job if he did not get out. "Well," returned Judge Atkinson, "he should have thought of that before going in the store."

Judge Atkinson's position was that only a "bond" would insure that a person was "responsible." He readily agreed to a percentage bond in most cases. In many cases he would set bond at a sum the defendant's attorney said his client could afford. In only two cases was a surety bond set, one at $1,500 and another at $1,000. The rest were percentage bonds, one at $2,000 and 10%, four at $1,000 and 10%, and 14 at $500 and 10%.

In contrast Judge Beard released eight of 18 defendants in third party custody and two on personal recognizance. In all eight cases in which he set money bond the defendants had a prior record and there was no verification of community ties. For Judge Beard, prior criminal record was crucial.

> "THE COURT: I have no objection to letting these people go out with their folks when they've been in no trouble before. But if he's a convicted thief, no, thank you. Let him fight it out."

When it appeared, however, that some of the defendants had been in jail since Friday afternoon, Judge Beard was willing to release most of them. In one case, he remarked, "Okay. I guess he had time to quiet down and cool off, anyway." Judge Beard seems to have felt that the danger point in the disorder had passed and that he could follow a more liberal policy. By then Judge Beard seemed to be looking for signs of remorse, particularly given the usual type of riot defendant before the court:

> "THE COURT: Is there any remorse—any sign of remorse on these people. We have so many people here who have been respectable, law-abiding people for so long, and all of a sudden they find themselves here, faced with a criminal charge against them. He happens to be typical of the people coming in front of me. They don't seem to be frustrated people, but they seem to be responsible people for the most part. . . ."

The contrast in the judges' practice on Sunday night is shown sharply by Judge Korman's bail determinations. He announced from the bench that the Bail Reform Act would be followed in his court and proceeded to release 15 out of 24 defendants on personal bond, in every case following the advice of the Bail Agency on whether a defendant should be released. In five cases where a third party was available and willing to assume custoday, Judge Korman released the defendants in third party custoday. A curfew restriction was made a condition of release in all cases in which a money bond was not required.

Monday, April 8

The sample of transcripts for Monday is meager. Judge Pryor set bond at $300 and 10% for two defendants recommended by the Bail Agency and sent one defendant to St. Elizabeth's for mental observation.

On the other hand, Judge Kronheim set money bond in 15 out of 20 cases. In each case he would ask for a statement from the Bail Agency. Out of the nine cases where the Agency recommended personal recognizance, in four Judge Kronheim set bond at $1,000 and 10%, granted personal recognizance in three, and granted third party custody where a relative was available in two. If the Bail Agency was unable to recommend or had not compiled a report on the individual, he set a surety bond (seven at $1,000, two at $2,000, one at $3,000 and one at $5,000). At

one point, Judge Kronheim said that he had to "follow the formula." If this was a reference to the policy of restricted release then, at least for him, it was still in effect on Monday.

Tuesday, April 9

Preliminary hearings in riot cases began to be heard on Tuesday, but a transcript of bail hearings before Judge Beard is available. On Tuesday Judge Beard set money bond in 14 out of 18 cases, allowing a 10% deposit in nine. In some of these cases, no information about the defendant's community ties was available. In others, Judge Beard stated that he would not release a looter on his personal recognizance at this stage, "if he hasn't got somebody down here to speak for him." Judge Beard set a surety bond in a gun case, saying that this was his practice in normal times.

By the end of the day on Tuesday the Court of General Sessions had processed virtually all of the riot offenders, and on Wednesday the court returned to normal assignment court procedures. The last civil disorder offenders were processed the next day.

Variations in Treatment

The variations among the judges in their willingness to adopt the recommended policy of restricted release and in their own consideration of danger to the community, as we have seen, affected the conditions of release set for defendants. Variations in procedures and other varying factors likewise affected the results. The following statistics, derived from the records of the D.C. Bail Agency and the transcripts of 415 bail hearings, are set out fully in Appendices B and C.

Prosecution Recommendation. In 120 (28.9%) of the 415 Appendix C cases, the judges asked the Assistant United States Attorney in the courtroom for his recommendation on bond. The Assistant made a recommendation in 161 cases, 37.7%, and in all but four he recommended money bond, recommending $1,000 or more (or that the defendant be held without bond at all) in 136 cases or 84.5% of all cases in which a recommendation was made.

The Assistant in court was primarily responsible for the recommendation, although a recommendation was noted on the information by the Assistant who had "papered" the case downstairs. The United States Attorney, in an interview, stated that

no instructions were given to the Assistants to request or note any particular amount. An Assistant who had a supervisory position in the General Sessions section of the office confirms that there were no specific instructions but remembered indicating to the Assistants at a meeting that the burden for recommending bond would lie upon the Assistants in court; the reason was that the Assistant in court would have information not available to the Assistant downstairs. He recalled that a standard seemed to evolve as time went on, based primarily upon what information was available about the defendant. Another Assistant confirmed that there was no "iron-clad policy" on bail, but that he followed the practice of writing $1,000 on the informations that he was papering and he said that this policy "just grew as a consensus among the Assistants for the purpose of "keeping people in jail during the riot." A third Assistant recalled that on Friday afternoon one of the Assistants came into Judge Hyde's courtroom to recommend that a high bond be requested in every case because some defendants who had been released had been rearrested. The judge did not respond favorably to this argument and this reaction may have led to the United States Attorney's appearance in Judge Edgerton's courtroom. Still another Assistant recalled that in papering cases, he too wrote $1,000 as the bond recommendation, relying upon an "office rumor" that that was to be done. That same Assistant, when in court, continued to recommend money bond, but without objecting to allowance of a cash percentage bond, and the judge before whom he appeared set cash bonds in most of the cases before him,. The Assistant recommended money bond even though he himself believed that under the Bail Reform Act defendants were entitled to personal recognizance and believed further that to set a surety bond meant almost certain incarceration because he had seen no bondsmen available to write bonds. Nevertheless, he said, he "bucked" the decision to the judge.

The Assistant United States Attorney's recommendation, arrived at in this fashion, had considerable influence on the conditions set for defendants. Compared to an overall rate of release on non-financial conditions of 41% for the 415 cases, where the United States Attorney recommended no bond or money bond, release on non-financial conditions was allowed in only 21% (Appendix C).

The practices and results varied considerably among the judges. One judge asked the Assistant United States Attorney for a recommendation in 87.5% of the judge's cases, another in

82.1%. Three judges, on the other hand, never asked the Assistant for a recommendation.

The resulting dispositions likewise vary considerably. One judge followed the recommendation for a money bond (although not necessarily in the amount requested) in every case. Another judge rejected the recommendation and set non-financial conditions of release in 73.3% of the cases. (Appendix C).

Court's Interest in the Defendant. The judge's interest in the defendant (evidenced by his speaking to or questioning the defendant directly) was a factor of considerable significance in the determination of conditions of release. The judges spoke to or questioned the defendant in 141 cases, 34%. Compared to the overall non-financial release rate of 41%, non-financial conditions were set in 65.2% of the cases where the judge spoke to the defendant. The percentage of cases in which each individual judge spoke to the defendant varied from a high of 78.9% and 77.4% for two judges to 7.1% and 13.6% for two judges (Appendix C).

Other major variables were:

1. Sex; women were immediately released (on non-financial conditions) in 62.3% of 45 cases; men in 38.3% of 370 cases (Appendix C).

2. Presence of a third party in court resulted in immediate release in 81.6% of the cases where the person was a member of the defendant's family and 68.4% of the cases where the person was outside the family (Appendix C).

3. Which judge; immediate release varied from 90.4% for the judge with the highest rate of such release to zero for the lowest (Appendix C).

4. Whether the hearing was in the daytime or nighttime; 59.4% of the defendants were released immediately in the daytime, 29.6% at night (Appendix C).

5. Whether the information on community ties was verified; 63.4% immediate release where there was verification against 28.3% where there was not (Appendix C).

6. Indication in the fact statement that the defendant had been acting with others reduced the rate of immediate release to 16.5% compared with the norm of 41% (Appendix C).

7. Indication that the defendant had a gun reduced the rate of immediate release to 12.9% (23 cases out of 415; Appendix C).

8. A Bail Agency recommendation for release increased the rate of immediate release from an overall 51.6% to 60.6% (Ap-

pendix B; 452 cases)—or from an overall 41% to 55.9% (Appendix C; 95 cases).

9. Prior criminal record; the rate of immediate release was 62.4% where the defendant had no record (258 cases), 47.7% where the defendant had a record only of petty misdemeanors (174 cases) and 30.9% where he had a record of a felony or serious misdemeanor (68 cases); compared with the overall 51.6% (Appendix B; total, 500 cases).[26]

Release

The Results—A Brief Summary. Out of 1,340 bond orders in all civil disorder cases from April 5 through 10, and 604 money bonds set (Appendix A), 449 defendants were remanded to jail (Appendix D). Appendix A has daily figures for money bonds set and Appendix D has daily figures for prisoners committed. It would be misleading, however, to attempt to compare the daily figures because of the time lag probable in many cases between the date of hearing and the date of commitment. It is likely that those individuals whose hearings were held at night would not be committed to jail until the next day. But, subtracting the total of 449 who were committed from the 604 for whom money bond was set leaves 155 who were able to obtain release from court, either by posting cash or finding a bondsman to post surety bond.

The Professional Bondsmen. Myth must be unraveled from reality in discussing the effect of surety bond orders as a preventive detention device. Of 604 money bonds, 523 (87%) were set at $1,000 or less (Appendix A). This is the money bond commonly set in normal times for defendants who are not released pursuant to the Bail Reform Act.

Some attorneys in court on Friday night and Saturday were disturbed at what they perceived to be a policy of setting surety bonds expressly as a preventive detention device because, the rumor ran in the Court of General Sessions, there were no bondsmen available to write the bonds. Some judges also stated this as their impression; others, to the contrary, reported seeing bondsmen at the court. It was speculated, as the reason for the bondsmen's supposed absence, either that they had fled from the neighborhood of the Courthouse because of the disorders, and probably would not return until order had been restored; or as one

[26] It is worth noting that in many instances there was no verification of criminal record information, which came from the defendant himself.

judge commented in court while reviewing bonds on Tuesday, when the case load "swells to hundreds and hundreds of such cases in the last few days, most of the bondsmen have probably exceeded their limit and can't take out bonds."

It is nevertheless clear that someone was writing some bonds at court during the disorders. The official court computer printout (see Appendix A) shows 148 bonds written in civil disorder cases. Information on the date and method of release is available for only 413 of the 449 riot defendants who went to jail. Of those 413, 97 were released by making surety bond (Appendix D). Even if all the remaining 36 for whom no release information was available were released on surety bond after remand to jail (most unlikely), the maximum total of surety bonds for defendants remanded to jail would be 133, leaving at least 15 surety bonds that must have been written at court.

A large majority of surety bonds (91 out of the 148) were written by the Stuyvesant Insurance Co., only one out of ten bondsmen and bonding companies regularly writing bonds in the Court of General Sessions. The Stuyvesant Insurance Co. is represented in the District of Columbia by one Mickey Lewis, who is the only Negro bondsman.

The significance of this figure is clarified by the results of interviews of six of the ten bondsmen, including Mr. Lewis.

As a normal matter, the bondsmen indicated, they prefer to write bonds for "prior customers." Because the bondsmen's primary concern is with appearance in court, they look for a record of reliability in appearance; theoretically, at least, the bondsman is subject to forfeit of the amount of the bond should the defendant fail to appear.[27] Hence, as a normal matter, an individual with a prior criminal record—but who has faithfully met his court appearance appointments—finds it easier to have a bond written by a professional bondsman than a first offender.

But, the bondsmen said, there were very few prior customers among the riot defendants for whom bond was set. Mr. Lewis stated specifically that while there were a few persons whom he knew as repeaters, by and large most of the defendants for whom he wrote bonds had no record of previous arrests as far as he knew. Thus without his normal indicia of reliability, Mr. Lewis operated as a kind of informal D.C. Bail Agency in satisfying himself of the defendants' community ties and employment. He would accept as evidence of residence a D.C. driver's license; he

[27] Apparently, the forfeiture penalty is rarely imposed.

would accept as evidence of employment a building pass or other employee identification. And he would rely upon a third party, either a family member or a responsible friend, for further verification.

The other bondsmen, however, were most reluctant to write bonds for riot defendants. They tended to identify themselves with the white middle class businessmen who, they felt, were bearing the brunt of the disorder and destruction. They frankly expressed the view that the people who were responsible for burning and looting should be put in jail and kept there. They were as reluctant to write bonds in court as for prisoners who had been remanded to custody. The only exceptions were for those prisoners whom they knew as prior customers. The white bondsmen it appears, were engaging in their own limited program of preventive detention.

The appearance record of those for whom bonds were written has been exemplary. Mr. Lewis reports only one non-appearance of those for whom he wrote bonds.

Cash Bonds. Little more is to be said about the problems in obtaining release on cash bond beyond the information in the Interim Report (p. 89). There it was pointed out that either cash or a certified check was required; that from Friday evening through Monday morning the banks were closed, inhibiting the ability of defendants or their relatives to obtain the necessary cash from their bank accounts, if they had bank accounts. Finally, it appears to be police procedure to sequester arrestees' personal property at the station house; hence defendants who might have had enough cash in their possession to post bond immediately were detained until an attorney or a relative could, amid the difficulties of the disturbance, go to the station house, reclaim the defendant's wallet, return to court and post the necessary deposit.

Bond Reviews. An essential part of the policy of restricted release recommended for the judges of the Court of General Sessions was provision for prompt review of money bonds.[28]

As it began to appear that the disorder was waning, Chief Judge Greene designated two judges of the court to hear all bond review motions beginning on Monday, April 8. (The procedure provided under the Bail Reform Act is that the judge who originally sets the conditions of release, unless unavailable, must hear

[28]Such review, 18 U.S.C. Sec. 3146(d), is usually referred to as "24-hour review" because of the requirement of a lapse of 24 hours after the initial conditions of release have been set before a petition for review may be filed.

the 24-hour review petition; attorneys of course could and some did resort to the original judge, but the special procedure provided additional judicial manpower to speed disposition of motions made by defendants who had been remanded to custody.) As a matter of fact, a number of informal bond review hearings on oral motion were held, sometimes in chambers, during the course of the weekend. By such informal review one defendant (of the 413 whom release information is available) seems to have obtained release on personal recognizance from the D.C. Jail on Saturday, April 6, and five on Sunday, April 7 (Appendix C).

Judges who reported in interviews reviewing bonds either on motion or at preliminary hearings stated almost uniformly that, with order being restored and more information available on community ties, they felt that they could be, and were, more lenient than during the riot weekend. It has been impossible to obtain reliable figures on the bond review proceedings themselves. The Interim Report (p. 91) shows that 85 bond review petitions were formally filed; others were made orally before the two designated judges. As the Report goes on:

> "Student observers of 40 bail review hearings on Wednesday and Thursday, April 10-11, reported that in 17 cases petitions were denied; 11 were released on personal recognizance or in third-party custody; 7 had bonds reduced or 10% deposit allowed; several were passed for further verification."

The records of the D.C. Jail show that of the 413 out of 449 prisoners for whom information was available, 96 were released on personal recognizance from April 8 through April 11: 22 on April 8, 40 on April 9, 24 on April 10 and 10 on April 11 (Appendix D). It is unknown how many of these releases were the result of formal bond review hearings, because preliminary hearings began to be held on those same days and the judges used those hearings as a bond review device. A number of defendants in custody on money bond may have obtained release on personal recognizance at their preliminary hearings. Moreover, as noted, some lawyers did not report to the two judges expressly designated to hear bond reviews but presented bond review motions to the judge who had set the initial conditions of release. Hence, statistics of bond actions by the two designated judges, even if available, would be an unreliable indicator of bond review results.

Transcripts of only a handful of bail hearings before the two judges could be obtained—of three hearings before Judge Murphy and two before Judge Hyde on Monday, April 8. In two of the

three hearings before Judge Murphy, the Judge insisted upon a third party custodian before consenting to change money bond. As he said, "My general rule, across the board, except to unusual circumstances, is on looters that I have to have a third party custodian." Hence in one case where a relative was in court, the defendant was released; in the other, where the defendant's mother was ill and could not appear, change in conditions was denied. (The defendant eventually obtained release by posting cash bond on April 11.) In the third case the Judge refused to change conditions of release because the defendant was on parole for a homicide conviction.

Judge Hyde released two defendants in the third party custody of relatives. The proceedings show some of the difficulties still present in obtaining release. In the first case the attorney reported to the court that despite having visited the Police Department earlier, he had been unable to obtain any verification of the defendant's statement that he had no prior criminal record. Then, after ordering release, the judge advised the defendant's counsel of the difficulties that might be involved in effecting release after issuance of the order changing conditions:

> "THE COURT: When this can be processed I don't know. The clerical facilities of the Court are absolutely inundated. What had to be done, of course, is that this notification of this action will be communicated to the Clerk's office. We will make a notation on the copy of the application that you have filed. We will make up a release or at least we will—first, what has to be done—is that the—what they call 'come-up' order has to be made out just to have him brought up here from the Jail. And then after he is brought up he has to appear before us to take his oath on his personal recognizance. And then we have to sign a release order in order for him to be finally released. . . .
>
> . . . I hope that this can be processed so that he can be out of there within the next day or so. . . .
>
> "[COUNSEL]: Is there anything that counsel can do?
>
> "THE COURT: No. Unfortunately, there isn't anything you can do. My clerk here will have to see that the thing gets over to the Clerk's Office, and we will sign the necessary papers. We can do everything we have to

do right here within a few minutes. But how long it will take to process it, I don't know. . . ."

The judge made a similar comment to the attorney in the next case before him—and, the attorney reported, because of the administrative delays that the judge predicted, the defendant, whose third party custody order had been signed on Monday, was not brought back to court and released until Wednesday.

In any event, by the end of the day on April 10, out of 449 defendants remanded to custody, no more than 172 (and possibly as few as 136) remained in custody.[29] By April 25 this had been reduced to 67 (Interim Report, p. 91) and by July 26, 1968, to 16.

These 16 cases were the subject of a study by the American Civil Liberties Union released on September 10, 1968. The reasons for the continued incarceration of these 16 people illustrate some of the inequities in a system—whether adopted for emergencies or in effect in normal times—that relies on money bail. A number of them had been neglected by their attorneys; one had never had an attorney appointed for him. Vigorous representation and the pursuit of bail review procedures might have freed these prisoners. In one case the Bail Agency—on May 16—had not had time to check into the case. In one a defendant, in jail on a $500, 10% order had remained in custody for over four months for want of $50; and in one case a defendant with strong community ties, for whom a $1,000, 10% order had been set, was denied personal recognizance by a District Court judge who felt that his inability to raise $100 in cash showed him to be a poor risk.

Statistical Summary[30]

How Many Defendants Went to Jail. Between April 5 and April 10, 1,616 riot defendants were processed through the Court of General Sessions. The cases against 235 were dismissed, nolle prossed or no papered (or in a few cases the defendant was acquitted) at the first appearance, the defendant "walking out." In 41 cases the defendant was adjudged guilty and sentenced forthwith. Most curfew violators were released on personal recogni-

[29]The difference, 36, is the number of prisoners about whom release date information is unavailable.

[30]The complete figures are in Appendices A and D.

zance. Personal recognizance or third party custody release was ordered in 493 non-curfew cases (43.2%) and money bond (surety or percentage deposit) was set in 596 non-curfew cases (52.2%).

Of the 1,616 defendants, 449 were actually remanded to jail. This is 28% of all processed, 33% of all who had bail hearings, and 75% of all who had money bond set.

Subtracting the 449 who went to jail from the 604 (including curfew defendants) for whom money bond was set leaves 155, or 26% of all defendants for whom money bond was set who obtained immediate release because they or their friends or relatives had funds available and found a bondsman or deposited money with the court. Adding them to the 664 released on non-financial conditions leaves 819 (61% of all who appeared before a magistrate and had bail set) who were released without having been in custody longer than the time between their arrest and their hearing.

How Long Did They Stay in Jail. The D.C. Jail records (Appendix D) contained information about release, indicating the length of time individuals spent in jail between the date of commitment and the date of release, for 413 of the 449 persons who were sent to jail after hearing. (There is no way of computing accurately how long defendants stayed in jail before a hearing. As Part I suggests, it was not inconsiderable for many defendants.) There was often, however, a time lag between hearing and commitment. An unknown number of persons may have spent a day or more in the cell-block awaiting transportation to jail.

More than half of the 413 prisoners were released after spending less than three days in jail. 15.7% (64) were released the same day they were committed. 19.7% (89) spent one day in jail. 15.2% (63) spent two days in jail. 11.4% (47) spent three days in jail, a total of 62.0% of all defendants, or 260 defendants.

Another 24.1% (100) spent from four to ten days in jail, and 12% (50) spent more than ten days in jail.

How Did They Get Out of Jail. One hundred twenty-four prisoners (29.9% of 413) posted a percentage bond with the court. Ninety-seven (23.5%) made surety bond. One hundred twenty-nine (30.7%) were released on their personal recognizance. Finally, 63 (15%) were released when their cases were dismissed, nolle prossed, no-papered, or in a few instances, after serving a thirty or sixty day sentence.

Evaluation of Bail Setting

The Court of General Sessions, like other courts which have had to deal with civil disorder situations, thought it was necessary to adopt a restrictive bail policy in the emergency. With part of the city in flames, the action of the court was understandable in the circumstances. The judges heard reports, relayed by police officers and by the United States Attorney, that people being released were returning to the scene of the disorder. They felt that this could not be tolerated and that something had to be done. Hence they set conditions of release of defendants pending trial based not only on the likelihood of the conditions set to assure the return of the defendant for trial, but also on the likelihood of the conditions to prevent the defendant from returning to and participating further in the riot. Where the conditions set were money bail, this was expected to lead to the jailing of the defendant for at least a day or more, effectively isolating him from the disorder.

In the following pages this policy of restricted release and its implementation is measured first against applicable legal standards, and then against its results. What benefits, if any, did the community or the criminal justice system gain from the policy? What harm, if any, did it do? What lessons, if any, does it teach?

1. *Conformity of the Policy to Law*

The Bail Reform Act, in effect in the District of Columbia last April, provides that conditions of release are to be set in order to ensure that the defendant will return for trial. Various legal arguments have been offered in support of the policy of setting conditions (including money bail expected largely to result in incarceration) designed to prevent future misconduct. Conformity with legal standards and constitutional principles is an important measure of the actions of courts and judges. The results of research into the legal issues raised by the April bail policy are set forth in Appendix J.

To summarize the issues: It is said that the Bail Reform Act provision that the court shall take into account "the circumstances of the offense" supports restrictions on release for the purpose of preventing future criminal conduct, because the "circumstances" included the general context of civil disorder. Under the Act, however, the circumstances of the offense, like the other items the court is to take into account, bear only upon the likelihood of the defendant to reappear for trial. Moreover,

comparison of the sections of the Act providing for bail after trial and in capital cases, which expressly allow the court to consider the defendant's potential dangerousness, with the sections providing for bail before trial in non-capital cases which make no such provision, and the legislative history of the Act, indicate that Congress considered and rejected providing in the Bail Reform Act for conditions designed to prevent future criminal conduct.

In any event, the question whether the Act can presently be interpreted as allowing conditions of release to be set for any purpose except "appearance of the person for trial" has been laid to rest by the Court of Appeals in the District of Columbia. On April 17, 1969, that court held:

> "The Bail Reform Act specifies mandatorily that conditions of pretrial release be set for defendants accused of noncapital offenses. When imposing these conditions, the sole concern of the judicial officer charged with this duty is in establishing the minimal conditions which will 'reasonably assure the appearance of the person for trial. . . .' The structure of the Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released."[30a]

Supreme Court decisions interpreting the Eighth Amendment and lower federal court decisions both before and since enactment of the Bail Reform Act have uniformly held, with one exception, that the only function of bail or release conditions is to insure the return of the defendant for trial. The exception is where the conduct of a defendant, clearly evidenced to the trial judge during the course of a trial, indicates that the orderly progress of the trial and the administration of justice will be impeded by his continued release. The cases are limited to those involving tampering with or intimidation of witnesses, but the existence of this exception suggests that others, including the use of bail to keep offenders detained during civil disorders, might be within the constitutional limits. The only test of the court's policy was an action filed against the judges during the riot weekend by the American Civil Liberties Union claiming

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[30a] *United States v. Leathers*, U.S. Ct. App. D.C. Cir, Nos. 22,816, 22,818 (April 17, 1969); slip opinion 3-4.

violation of the Bail Reform Act. The action was dismissed by the District Court and the dismissal was not appealed. The dismissal is not a precedent on the merits of the claim; it was based on the ground that the prompt action of the Court of General Sessions to provide 24-hour review of bail conditions made any intervention by the District Court unnecessary.

The weight of existing statute and judicial precedent is against using bail conditions as a means of detaining defendants to prevent them from endangering the community. The common law grows, however, by changing to meet conditions not yet provided for. The succeeding sections examine the evidence for and against the court's policy of restrictive release.

2. *Need for and Utility of a Policy of Restricted Release*

The hearsay that triggered adoption of the policy of restricting release for the purpose of preventing further participation in the riot, that people released at court were returning to the riot, announced as a rumor by Judge Edgerton, was repeated in many forms. One judge expanded the few into "many." One Assistant U.S. Attorney stated that "a number of defendants" let out earlier had been arrested again for looting (p. 33, *supra*). Judge Daly pinned down the rearrests to "five" of "the first twenty-five people they released on personal recognizance on Friday." None of this was ever substantiated. A check of those persons who appeared in court on Friday, April 5, shows that only one was rearrested that same day. The defendant, after release, scuffled with a policeman outside of court, was arrested again and charged with disorderly conduct.

The principal justification given for a policy of restriction on release during a disorder is that it must be assumed that suspected looters are likely to return immediately to the scene of the looting to continue their former lawlessness.[31] This has been offered in justification of the policy of the Court of General Sessions in April. This speculation has prompted the response of a commentator reviewing release policies in Detroit that it

> "ignores the fact that prior to release there has been an arrest with its attendant formalities, a period of detention, and an appearance before a judge who undoubtedly impressed upon the accused the possible consequences of rein-

[31] See, *e.g.*, Comment, The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967, 66 Mich. L. Rev. 1542, 1549, 1550, 1565 (1968).

volvement in the lawlessness. Such exposure to the criminal system may be sufficiently sobering for the defendant to lead him to conclude that for him the party is over. This would seem to be partially true in regard to those persons who became involved in the first place only because of the excitement and novelty of the disorder."[32]

The only available empirical basis for assessing the necessity or utility of a policy of restricted release is the rate of re-arrest of rioters.

Of the 6,230 civil disorder arrests reported by the Police Department from April 4-15, 193 persons were arrested twice for any combination of offenses, including two curfew arrests (Appendix E). This is 3.1% of all persons arrested during the civil disturbance. Out of 1,604 non-curfew arrests on April 4-7, 46 (2.9%) were rearrested either then or later, their first arrest having been for a felony or U.S. misdemeanor. Only 21 were arrested twice during the April 4-7 period (1.4% of the 1,604 arrests) and 15 of these were arrested the second time only for curfew violations, leaving six arrested twice for serious offenses from April 4-7. While, as we have seen, some persons guilty of serious misconduct were charged only with curfew, there remain something less than 21 persons demonstrated as having made a second contribution to disorders. Of these 21, nine had been released on personal recognizance, seven had money bond set but apparently made it at court, one appeared in court but there is no record of what bond was set and five do not appear in the court records at all.

A low rearrest figure, of course, does not demonstrate that many persons did not return to the disorder who escaped arrest. If, as the Washington *Post* estimated, there were 20,000 rioters, the chance of being arrested was no more than one in three. There conceivably were others who were arrested only once but participated in unlawful activity again. Moreover, a low rate of rearrest may evidence the perspicacity of the judges in picking out, for restrictive release conditions, precisely those who would have been likely to return to the riot.

The figures: total number of rioters, total arrested, total brought to court and number arrested twice, do demonstrate, however, how limited is the opportunity of a court even in a major disorder to restrain those posing a danger to the community.

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[32] *Id.* at 1565-66; see also *id.* at 1574.

The 1,340 persons for whom the court had the opportunity to set bail from April 5-10 is only 6.7% of the estimated rioting population. Further, to restrain the 21 arrested twice between Thursday, April 4 and Sunday, April 7, the "proven" dangerous, by a blanket policy of preventive detention (which the court did not adopt) would have required the detention of all the 406 persons who were released at court on non-financial conditions on April 5, 6 and 7 (Appendix A).

Had the court been faced with more than a handful of instigators of disorder, breakers, arsonists or violent rioters, this fact would have supported the argument that restricted release was necessary. But such "hard core" offenders were not before the court.

Few of the looters were actual breakers. Early in the disorder, Judge Edgerton observed: "We are getting a lot of, apparently, hangers-on in this thing; we haven't had many actual perpetrators." When the United States Attorney made his argument for a money bond policy, Judge Edgerton asked if the prosecution was going to show that the defendant was actually breaking. When the United States Attorney said no, but that the prosecution would prove that the defendant was inside or coming out of a store, Judge Edgerton remarked that "that fits more nearly the pattern." Only three of 415 transcribed bail hearings (Appendix G) indicate on the record that the defendant was actually breaking into a store; most defendants were seen inside or coming out of stores already broken into. The transcripts of preliminary hearings of 158 persons (35% of all defendants who had preliminary hearings) show only five defendants against whom there was evidence of breaking. In the aftermath, judges of the United States District Court thought that most of the cases bound over to the grand jury for indictment were not cases involving serious criminal acts. Judges admitted in open court that although they were following a policy against release they found most defendants to have been "respectable," "law-abiding" people before their arrest in the disorder, and stated in interviews that most of the riot defendants seemed to be more stable and reliable than the normal defendant. The Bail Agency recommended a higher percentage of riot defendants for non-financial release than it does for the usual defendant population; and one of the reasons bondsmen refused to write bonds during the emergency was that so few of the defendants were "prior customers."

It is apparent that virtually no instigators, fire-setters and breakers were caught. According to the Washington *Post* ac-

count,[33] arrests were made block by block as order was restored to that particular area. The dangerous participants had by then moved on or ended their activity. The hangers-on, people who joined the crowds in the street to "get something" and failed to avoid arrest (perhaps because of their relative inexperience at lawlessness) were caught in the dragnet. If the "hard core" were deterred and restrained from further criminal activity, it was not by preventive detention but by the police, National Guard and Army.

Of the 1,340 persons before the court for bond hearings only 29 were charged with felonies arguably indicating a dangerous potential: three for arson, eight for assault on a police officer, six for assault with a gun or knife or other dangerous weapon, four for destroying property and six for robbery. In addition, 69 were charged with gun misdemeanors and seven with possession of the implements of crime (the charge used against those carrying molotov cocktails).

Nor, apparently, were many of these offenders detained in custody. The 449 remanded to jail included only 17 charged with the dangerous felonies listed above and 29 gun misdemeanor defendants.

There is, then, no evidence that the policy of restricted release did or did not make any contribution to the quelling of the disorder. This is not to say that the policy had no value. It may have calmed the anxiety of the community, by letting it be known that the court was doing all it could to prevent further disorder. Police morale may also have been lifted by a belief that the judges were not immediately releasing through a "revolving door" persons the police had just arrested and brought off the street. If knowledge of the policy reached the riot areas, some potential looters may have been deterred.

In conclusion, however, the courts had at best only a very limited opportunity to act as an agent in the restoration of order. That task is better left to the police, the National Guard and the military if necessary. The courts' task is to dispense justice. As Chief Judge Greene has pointed out, "as long as the civil courts

[33]Gilbert, ed., Ten Blocks from the White House (1968).

operate, they must operate as courts, not as adjuncts of the Police Department or the National Guard."[34]

3. *The Policy in Action—A Comparison*

There is no question that bail-setting procedures were more humane and implemented with greater regard for individual liberties in Washington, D.C. in April than in any other large city in the grip of a major disorder.

Accounts of bail setting in other cities in similar disorders are typified by the comment made in the study of the civil disorder in Baltimore last April:

> "Very few defendants were released on their own recognizance, and rarely was there time or inclination on the part of the judges to hear a defense plea for a bail geared to the circumstances of the individual defendant."[35]

In Chicago, last April, money bond was set in nearly every case, ranging from $1,000 for disorderly conduct to $5,000 as the minimum for a looting charge. Some bonds were set as high as $100,000. There "was little individual variation in the setting of bonds . . . the magistrates were acting upon the recommendation of the state's attorney . . . magistrates [were unwilling] to allow a rioter to be free, under a nominal bond, to return to the scene of the riots." And it was apparently not until a *mandamus* action was filed and the Cook County (the black) Bar Association put pressure on the Chief Judge of the Circuit Court of Cook County that the court began grudgingly to hold bond review hearings.[36]

In Detroit in July, 1967, 74% of the bonds were higher than $5,000: ". . . the judicial policy during the early states of the disorder was to set extremely high bail." The public prosecutor

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[34]Greene, a Judge's View of the Riots, 35 D.C. Bar J. 24, 30 (1968). See also Comment, The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967, 66 Mich. L. Rev. 1542, 1576:

> "an independent judiciary capable of overseeing police action is essential even in—perhaps especially in—a civil disorder situation. When a court compromises its position as the impartial arbiter between the individual (or masses) and the state, it is at best a tacit admission that the law enforcement agencies cannot adequately maintain order on their own." (Footnote omitted.)

[35]Report of the Baltimore Commission on the Administration of Justice Under Emergency Conditions 48 (1968).

[36]Report of the Chicago Riot Study Committee 87-94 (1968).

"stated that his office would ask for bonds of $1,000 and up on all persons arrested 'so that even though they had not been adjudged guilty, we would eliminate the danger of returning some of those who had caused the riot to the street during the time of stress.' "

One Detroit judge was quoted as saying: "We will, in matters of this kind, allocate an extraordinary bond. We must keep these people off the streets. We will keep them off."[37]

As one judge who dissented at the time from the policy later wrote, there was "a wholesale denial of the constitutional rights of everyone who was arrested during that disturbance.[38] He unequivocally ascribed the harsh procedures to race prejudice.[39] Furthermore:

> "The truth of the matter is that in the overwhelming majority of the cases the police and the prosecutor simply charged more than they could possibly prove. And I am of the view that much of this was racially motivated that it was done for the purpose of having a prohibitive bond placed against the black defendants so they could be detained in prison pending their examination and trial."[40]

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> "Black citizens of Detroit find it difficult to understand a system of criminal justice that charges 3,230 persons with felonies and then, after imprisonment for days and the payment of thousands of dollars in attorney fees, disposes of the first 1,630 of these felonies with 961 dismissals, 664 pleas to misdemeanors (trespass, petty larceny, and curfew violations) and only *two* convictions after trial on the original charge!"[41]

In the Los Angeles Watts riots in August, 1967, bond on rioters arrested was set at a minimum of $3,000.[42]

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[37]Comment, The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967, 66 Mich. L. Rev. 1542, 1549-50 (1968).

[38]Crockett, Recorder's Court and the 1967 Civil Disturbance, 45 Journal of Urban Law 841 (1968).

[39]*Id.* at 842.

[40]*Id.* at 844.

[41]*Id.* at 847. Emphasis in original.

[42]Report by Evelle J. Younger, District Attorney, Los Angeles County, to the Governor's Commission on the Los Angeles Riots 16 (1965).

To sum up, as the Kerner Commission noted, "No attempt was made in most cases [in the 1967 summer riots] to individualize the bail-setting process."[43]

What happened in the District of Columbia is in strong contrast.

The practice of giving individual consideration to each case and attempting to act fairly in spite of distress at what was happening outside was, in one judge's view, responsible for cooling the tempers in his courtroom. For many present, defendants and their relatives and friends, it was their first time in a courtroom; for them the system was on trial. They were, the judge felt, distrustful of the court until the hearing process convinced them that the judge was attempting to act fairly and to release as many persons as he felt he could.

The judges were generally willing to be flexible. Not only did they release 43.2% of the riot defendants on non-financial conditions but released many on personal recognizance. Most judges gave each defendant individual consideration, listened to information from the Bail Agency and the representations of the defendants' attorneys. By following the procedure of the bail hearing in normal times, judges became aware of the fact that many riot defendants were reliable citizens with substantial community ties and no prior criminal records. This put the judges in a position to make exceptions to the policy, based on the individual circumstances of each defendant.

As we have seen, some judges declined to adopt the policy. A few judges followed the Bail Reform Act consistently, releasing on personal recognizance persons who had substantial community ties that could be verified. These judges might condition release on compliance with the curfew, warning the defendant that if he violated these conditions he would face new criminal charges.

For most of the judges (with one notable exception—see p. 42, *supra*) who followed the policy, the third party custody device saved the results from being more restrictive than they might have been. They were willing to rely on the persuasion of a responsible relative to keep the individual out of trouble, and to impress on him that the court was "taking a chance" in releasing him because somebody was willing to speak for him and promise that he would keep out of trouble.

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[43]Report of the National Advisory Commission on Civil Disorders 185 (1968).

It may even be true that the relatively high quality of the administration of justice in the District of Columbia during the April disorders was a factor contributing to the restoration of order. The Kerner Commission stated as one of the goals of the administration of criminal justice during a disorder the provision of "fair judicial hearings for arrested persons under conditions which do not aggravate grievances within the affected areas."[44]

It was speculated, with respect to Detroit, that "it is at least plausible that as to many of the arrestees fair treatment by the court and release on bond with appropriate judicial admonitions would have been a sufficiently sobering experience to prevent reinvolvement."[45] The result of Detroit's harshness seems to have been

> "that police-Negro tension in our City today is almost as high as it was immediately after last summer's events. The simple truth is that Detroit's black community has no confidence in the administration of justice in their city; they believe that the temple of Criminal justice is sagging, is tottering. They feel the beams resting upon their necks. What is particularly disturbing is the refusal of the Establishment to open its eyes to the fact and take corrective measures before it is *too late*."[46]

4. *The Policy in Action—The Results*

Given its stated objective, not of detaining all arrestees but of reducing substantially the number who might return to the scene of disorder, the policy of restricted release adopted and as it was implemented in Washington, D.C. in April was fairly effective. 75% of the persons on whom money bond was imposed were remanded to custody. Virtually no one was released before Monday, April 8, when relative tranquility had been restored to the city. Many were effectively isolated at least for the duration of the disorder.

As we have seen, however, there is no evidence that the incarceration of these individuals did or did not make any contribution to the restoration of order. On the other hand, the strongest argument against money bail or any other device that results in

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[44]Report of the National Advisory Commission on Civil Disorders 184 (1968).
[45]Comment, The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967, 66 Mich. L. Rev. 1542, 1574 (1968).
[46]Crockett, *op. cit. supra*, p. 83, n. 2 at 847.

pre-trial detention is the number of persons so detained whose cases do not result in conviction. These are persons who remain presumed innocent but who have nevertheless served time in prison. Information on the disposition of the cases of 410 of the 449 prisoners is available (Appendix D). One hundred and ten were convicted. Three, curfew violators, forfeited collateral. But the cases against 158, or 38% of those for whom there is information, were dismissed or resulted in acquittal. These are persons who, so far as the law and the judicial process is concerned, are presumed innocent of any wrongdoing. This figure, indeed, will probably increase. The cases of 139 were pending (as of January 1, 1969), almost all on felony indictments in the United States District Court, and the rate of acquittals and dismissals in that court (see Part III, *infra*) has been running at about 25%.

Inequality of Treatment. A crucial test of the administration of justice is whether persons similarly situated receive equal treatment. This is the plain meaning of the phrase in the Constitution, "equal protection of the laws." We have already noted (p. 44, *supra*) the variations in treatment of defendants depending upon various factors. The kind of inequalities evident in the administration of the restricted release policy can be divided into three categories.

First are inequalities inherent in the nature of the restricted release policy and its implementation. Thus, persons who had community roots and who could find third party family members or others to come to court and vouch for them or take third party custody could obtain release; others with community roots whose friends or family could not get to court because of the curfew, illness, the need to care for children or the like, were likely to have money bond imposed. This was compounded where a defendant happened to be brought up for his hearing in the evening or night hours, when it was much more difficult for a third party to come to court. The employment of money bond as a detention device discriminates between the poor and the not-so-poor; where a surety bond was set, release at court often would depend upon the chance of encountering a (or the) bondsman in or near the Courthouse, and the availability of a friend or relative, or the willingness of the defense lawyer, to seek out a bondsman.

Second are inequalities inherent in the judicial system in normal times or necessarily resulting from the state of disorder, that would have resulted even without a policy of restricted release. Judges were much more sympathetic to women, granting to them release on non-financial conditions much more often

than to men. Administration of the Bail Reform Act depends upon verification; the Bail Agency's lack of facilities and personnel and the confusion in the court and in the city made verification difficult. As we have seen, if the facts of a defendant's community ties were verified he had a much greater chance of obtaining release on non-financial conditions.

Finally are inequalities resulting from the administration by more than a dozen different judges, with varying philosophies and predilections, of a vague and ill-defined standard of community safety or the potential dangerousness of the defendant. One of the judges sitting on Sunday evening, April 7, released 90% of the defendants before him on non-financial conditions; another, sitting at the same time, imposed money bond in every case. See Appendix C for how different factors affected dispositions by the 13 judges there listed.

There seemed to have been no agreement among the judges as to what might make a person dangerous. If a defendant had a record of convictions of serious crimes, his chances of release on non-financial conditions were substantially reduced; nevertheless, some defendants with such records were so released. If a defendant was arrested with a weapon in his possession, or if his offense involved a weapon or violence, his chances of release on non-financial conditions were reduced; nevertheless, some defendants so charged were released. If a defendant was charged with having acted in concert with others, his chances of release on non-financial conditons were reduced; nevertheless, some defendants so charged were released.

Nor does there seem to have been any agreement on what factors insured a defendant's harmlessness to the community. The rate of release on personal recognizance for the 98 "model" risks (p. 29, *supra*) was 37.8%, considerably higher than the overall rate of 30.4%; nevertheless, 36.7% of these people were ordered to make money bond or to go to jail.

This difference in result and variation in interpretation of a standard of "dangerousness" is not surprising. The different factors judges did or would rely upon in determining dangerousness were brought out in interviews. Some judges believe that they could tell intuitively whether or not a person was dangerous. One judge likened the procedure to playing a violin. One judge referred to the "dark glasses, green pants," the "fourteenth street crowd." Another judge relied on the defendant's attitude, whether he seemed to show remorse. Still another judge based

his determination on whether he thought the defendant was telling the truth.

Most judges said that they would look at a defendant's prior criminal record to see if it evidenced "dangerous proclivities." The criminal records reported by the Metropolitan Police Department for the 46 repeaters who might have been detained by the court (Appendix E) suggest that even this, perhaps the most objective of the standards proposed for preventive detention decisions, is unreliable. Of those 46, 26 had no prior criminal record at all.

Most of the judges also would look at the nature of the offense charged to see if it evidenced dangerousness. To the objection that the charge was not yet proved, one judge replied that in that context the presumption of innocence was "madness," that it is a procedural matter for trial but should not affect the court's decision on pre-trial release.

Finally, as one judge remarked, the possible detention of innocent persons is the price that "we" must pay for order.

5. *The Role of the Prosecutor*

Considerable information is available about the administration of justice in three major riots—Chicago in April, 1968; Detroit in July, 1967, and Watts (Los Angeles) in August, 1965. In each of them the courts adopted a draconian bail policy admittedly intended to effect wholesale preventive detention. (See pp. 60-61, *supra.*) In each of them the initiative for the policy came from the prosecutor's office.

In Los Angeles, the District Attorney reported, he "took the position that to release a large number of these arrested persons on bail could result in their returning to the riot area and increasing the difficulty of control,"[47] and attempted to persuade the court not to set bail at all. In Detroit the District Attorney stated that:

> "When it became clear on Sunday night that a full scale riot was in process, I publicly announced that I was recommending a $10,000 bond on all those arrested for looting. The courts generally followed that recommendation, and some criticism ensued in the form of statements to the effect that the riot was extraneous to the individual consideration of

[47] Younger Report, p. 61 n.42 *supra*, at 15.

bond and to the point that it was considered by some to be excessively high. I felt then, and I still feel, that the court's response to my recommendation was justified."[48]

In Chicago the high bail policy was in part the result of

"the kind of political pressures under which the judiciary was operating. On Saturday night, April 6, an assistant public defender was in the midst of a bond hearing when the Corporation Counsel, Richard Elrod, came up to the judge and told him that no bonds were to be set below $1,000. The public defender assumed that the word had come from 'on high' and noted that after that no bonds were set at below $1,000, whereas previously some variation in the bonds had been evident and some individual consideration given."[49]

In the District of Columbia in April, also, as we have seen, the policy of restricted release was initiated at the instance of the prosecutor, the United States Attorney. As he put it in open court,

"in the absence of conditions of release under the Bail Reform Act which are proposed by the defendant, which would assure not only his appearance in court but assure a nonreturn to the kind of conduct that is involved in the charge, the United States Attorney recommends and urges the Court to require a bond not less than $1,000."

His initiative was effective, as we have seen. It is understandable, too, that in a time of emergency judges may have interpreted his position to an extreme. As one judge seems to have understood it,

"The United States Attorney for the District of Columbia, as much as is possible for a man in his position to do so, with the Court, practically insisted that money bonds be set in these cases, regardless of the Bail Agency Act. I won't go into all the details about how strongly that was put."

The United States Attorney was of course acting in accord with his duty as he saw it. He felt that the policy he urged was imperative to help restore order and he acted on the basis of information available to him in a time of confusion. There is a

[48]Cahalan, The Detroit Riot at 3-4 (unpublished).

[49]Platt, The Administration of Justice in Crisis: Chicago, April, 1968 at 7 (unpublished).

question, however, whether a prosecutor should properly view his role as that of an agency for the restoration of order. Doubtless, some prosecutors and the United States Attorney for the District of Columbia do so view their job.

6. *Impact of the Policy and its Potential Dangers*

Separation from relatives and incarceration in jail is not a cherished experience, especially if a person was never in trouble before or was innocent of the charge or was entitled to release under applicable law. Many defendants who had bond set spent ten or more days in jail. A few were still in jail in July because judges refused to reduce amounts set or because attorneys failed to pursue such review as was possible under law. Such detention can mean the loss of a job for a marginal man and the further disruption of his family life. Even a short detention for women arrested in the disorder results in their separation from children, many of them infants.

The fourteen defendants who went to jail who were interviewed (see Appendix H) cannot, of course, be considered a representative sample. Yet, of the fourteen, five said that they lost wages in time away from work, from one day to one week, and four said that they lost their jobs because they were unable to report for work. Two found new jobs only after a month; the other two said they were still unemployed.

Some advocates of preventive detention during civil disorder like to argue that the policy is reasonable since people only go to jail for a "few days." But is "a few days" a legitimate price for any person to pay, if his detention is neither supported in law nor shown to be necessary in terms of the general community goal of restoring order? And not all riots are guaranteed to end in "a few days."

It has been argued, in a similar vein, that any detention last April was not serious because it only lasted through the weekend. It has been suggested that if the courts had been closed, as they are in normal times, defendants would have spent the weekend in jail anyway. But that argument does not justify detention ordered by a court that was open on the weekend, detention that was hence a consequence of judicial decision. And not all riots are guaranteed to occur on weekends.

PART III. THE PROSECUTION; PROCEEDINGS AFTER THE EMERGENCY

The U.S. Attorney's Guidelines

Preliminary hearings for felony defendants to determine whether probable cause existed to hold them for the grand jury began shortly after order was restored.[50] The office of the United States Attorney began preparation of a detailed set of guidelines to govern the disposition of the principal kinds of looting cases. The United States Attorney has furnished us with the substance of the guidelines; he did not make available the written memorandum in which they are recorded. The substance of the guidelines was:

1. If the defendant was seen breaking and entering, the Burglary II charge (which carries a penalty of from 2 to 15 years imprisonment) would not be reduced.

2. If the defendant was seen in, going in or coming out of a store, and had merchandise of more than a nominal amount, and had a criminal record involving moral turpitude,[51] the Burglary II charges would not be reduced.

3. In the circumstances of paragraph 2, except that the defendant had no record, the Burglary II charge would be reduced, but only for a plea to charges of petty larceny, unlawful entry and riot. If the charge of riot was not appropriate, the plea would be to attempted burglary and petty larceny. (These offenses carry a penalty of a maximum of one year imprisonment.)

4. In the circumstances of paragraph 3, except that the defendant had no merchandise in his possession, the Burglary II charge would be reduced to attempted burglary, and riot where

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[50] Preliminary hearings are not necessary to indictment. The U.S. Attorney may bring a defendant directly to the grand jury as an "original."

[51] Useable for purposes of impeachment under D.C. Code 14-305 (1967) and called a "*Luck*-type" record after Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), which established ground rules for the exercise of the District Court's discretion in allowing use of prior record for impeachment. The law seems now to be that only convictions of offenses for which a jury trial may be demanded are useable, Pinkney v. United States, 124 U.S. App. D.C. 209, 363 F.2d 696 (1966), and convictions of crimes of "violent" or "assaultive" conduct that do not evidence dishonesty, and records of old convictions, are "generally" not to be used. Gordon v. United States, ___ U.S. App. D.C. ___, 383 F.2d 936 (1967).

appropriate, without demanding a plea. The defendant would be allowed to plead guilty to one of these two charges in exchange for dropping the other.

5. If the defendant was seen only on the street, but with merchandise in his possession, Burglary II would be reduced without demanding a plea to petty larceny, receiving stolen property, and riot where appropriate; where the property exceeded $200 in value, grand larceny would be charged.

Aiders and abettors would be charged as principals, and special consideration could be given to age, sex and other mitigating factors.

The United States Attorney has said that the guidelines were drawn in order to differentiate the treatment of defendants of different degrees of culpability, measured by whether the defendant had initiated looting or made off with property of a significant value, considered in the light of his background as shown by any prior criminal record. The use of the criminal record for impeachment purposes was not considered. (In the typical one-witness riot case, depending on sometimes uncertain police identification of defendants and of allegedly looted merchandise, the possibility of introduction of a criminal record to keep a defendant from testifying in contradiction to the officer could make the case.)

According to one Assistant who had a supervisory position in the General Sessions section, in drawing the guidelines the number of cases that might be disposed of without a trial in the District Court and the problem of the court backlog were not considered as determinants.

The guidelines did not deal with cases in which charges were to be dropped entirely. All charges in the Court of General Sessions against 371 individuals, 38% of those originally charged with felonies, were dropped altogether. Of these 343 had been charged with Burglary II, 38% of all so charged. (Appendix G, Table I). These were cases in which it was felt that no case could be made, as, for example, where the arresting officer could not remember the defendant, or where the officer could remember the defendant but not connect him with any specific place, or where the property found on the defendant had been lost. Examples of such cases reported in defense attorney's questionnaires include cases where defendants were caught up in a sweep or dragnet and the charges made could not be substantiated; cases where the officer failed to appear at the preliminary hearing; cases where the court ordered an in-court lineup or production of

the P.D. 163 and the prosecutor nolle prossed (see p. 80, *infra*), and one case where charges were dropped against a defendant in exchange for agreement to become an informer. Some of the persons whose charges were thus dismissed were later indicted as grand jury originals. (See Appendix G, Table II, *infra.*)

If a case fell within the guidelines, however, Assistants in the office had no authority to drop it. In one illustrative case reported by an attorney a Burglary II charge had been broken down to three misdemeanors in exchange for a plea. At sentencing, however, the defendant insisted upon his innocence and the court set aside the guilty plea. The case was then set down for trial on the misdemeanors. On the day of trial, however, the police officer told the defense attorney that he remembered that the defendant had made an exculpatory statement at the scene of the arrest which, the attorney said, corroborated the defendant's story. At an immediate disposition conference with one of the supervising Assistants in the General Sessions branch of the United States Attorney's office, the Assistant said that the exculpatory statement made no difference and that he had no discretion to drop the case or to try it as a misdemeanor but was compelled to send it over to the grand jury.

The Guidelines in Action

The guidelines were issued in written form (as a memorandum marked "confidential" and given very limited circulation within the office) on April 11, 1968; but the office was already operating in accord with their substance. One of the Assistants then assigned to the General Sessions branch recalls that the United States Attorney and his chief subordinates held a meeting with all of the General Sessions Assistants on Monday, April 8, to give them the substance of the guidelines. The instructions were oral; the Assistants wrote them down. They were instructed to keep the guidelines confidential in order to allow flexibility in disposing of cases that, while falling within one of the guidelines, had elements that, in the United States Attorney's words, "reasonably warranted" different treatment. According to one Assistant the defense lawyers who were General Sessions "regulars" or who handled more than a few cases apparently soon understood the pattern.

The office established, as a mechanism for administering the guidelines, a special team of four Assistants to handle all reviews, with exceptions and ambiguous situations to be determined by

the Chief or Deputy Chief Assistant in the General Sessions branch, and ultimately by the U.S. Attorney himself. Review in each case was to take place on the day the preliminary hearing was scheduled, when the officer would be available and when the defense attorney would ordinarily be expected to seek a disposition conference.

The intended effect of the guidelines was to provide even-handed disposition of similar situations, while at the same time avoiding "mass-produced justice" by considering the cases one at a time and fitting them into the appropriate category. The possible desirability of disposing of cases without trial, it was stated, was not a factor and the results of the implementation of the guidelines bear this out. The records (Appendix G, Table I) show 111 instances—12% of the individuals charged with Burglary II and 25% of all Burglary II cases not dismissed altogether—where Burglary II charges were broken down to misdemeanors. In 74 of the cases guilty pleas to the misdemeanor charges were entered, presumably in exchange for reduction of the charge (Appendix G, Table I).

There seem to be two main factors that influenced this rate of prehearing disposition.

1. As in normal times, the initiative for obtaining reduction was on the defense attorney. While charges were to be reduced automatically in category 4 and 5 cases whether or not the lawyer sought a conference with one of the four designated Assistants, in the nature of things and faced with his workload the reviewing Assistant would focus more carefully on the facts of the case if a defense lawyer were present to argue for reduction. Cases may have slipped through the review process where the lawyer did not seek a conference. Whenever possible the office urged lawyers to seek conferences, but in the confusion many failed to learn of this.

The pressure of the case-load decided the office to dispense altogether in riot cases with informal "hearings." Such hearings, held only occasionally in normal times, are a kind of pre-trial with witnesses before an Assistant U.S. Attorney, usually held in the library of the office. As it happens only one request for such a hearing was made at the General Sessions level in riot cases. The office refused this request; the reason was a fear that attorneys—particularly the many "uptown" lawyers not used to working within the system—would demand such hearings wholesale and put an intolerable burden on the office's limited manpower.

2. In category 3 cases disposition depended on the defendant's willingness to enter a plea of guilty to one or more misdemeanors; the familiar practice of "plea bargaining." This works in most criminal courts throughout the country by placing high or multiple charges against a defendant, posing the threat of severe penalties.[52] In exchange for agreement by the defendant to plead guilty to one or more lesser offenses involving lesser penalties, the prosecution then agrees to reduce the original charges. In the Court of General Sessions the practice is encouraged by the opportunity available to the defense attorney to pick a judge known to be lenient in sentencing before whom to plead his client.

The office made efforts to inform the defense bar—which in the riot cases included many "uptown" lawyers who had never practiced in the Court of General Sessions—of the availability of reduction in exchange for a plea. Some "uptown" attorneys nevertheless appeared unaware of the possibilities of plea bargaining or unsure of its value. Many appraised prospects of conviction on "thin" felony charges before sympathetic juries as so unlikely that they passed up opportunities to negotiate, did not seek negotiations, or after negotiation failed to result in reduction without plea, advised their clients to refuse to plead. In some cases defendants refused to follow advice to plead and maintained their innocence.

In cases with two or more co-defendants, the office would ordinarily not accept any pleas if any defendant refused to plead.

In order to test the implementation of the guidelines we examined transcripts of the preliminary hearings of 158 defendants charged with felonies, about one-third of all defendants for whom preliminary hearings were held.

Of the 158, 22 (14% of the sample) were arrested in or coming out of a store but without merchandise, circumstances in which guideline No. 4 provided for automatic reduction if the defendants had no record, acceptance of a plea if defendants had a record. Of this group 11[53] had no criminal record but the charge

[52]An Assistant United States Attorney has stated in this connection that the office never files charges against a defendant that the facts do not support and will go to trial on all charges if no plea is entered. "A policy of deliberately overcharging defendants with no intention of prosecution on all counts simply in order to have chips at the bargaining table would . . . constitute improper harassment of the defendant." *Scott* v. *United States* U.S. Ct. App. Dist. Col. No. 20,954 (February 13, 1969), slip opinion at 22.

[53]Source: Metropolitan Police Department.

was not reduced. After examination of the case files the office found nothing in the cases of eight (six of them co-defendants) of the 11 justifying failure to break the cases down. In the others circumstances like an indication of dangerousness (*e.g.*, where the defendant had a gun or a brick) dictated deviation from the guideline.

One hundred twenty-one were arrested in or coming out of a store with merchandise, circumstances in which guideline No. 3 provided for acceptance of a plea to misdemeanors if the defendant had no record. Of this group 104,[54] (86% of 121 and 66% of the whole sample) had no criminal record, but the defendant apparently either did not avail himself of the opportunity to take a plea or was not offered one.

The failure of the guidelines to result in more reductions of charges has two sources. First, and numerically much less significant, is the apparent failure of the office to reduce charges automatically in some of the guideline No. 4 cases. Second—but numerically very significant—is the failure of defendants to take advantage of the opportunity to plead to misdemeanors in guideline No. 3 cases—66% of the sample.

One specific example of failure of the screening process in guideline No. 4 cases is a case in which the preliminary hearing was held before Chief Judge Greene on April 22, 1968. The officer testified that the defendant was found inside a liquor store. The defense attorney brought out on cross-examination that the officer at no time saw any merchandise in the defendant's hands. The defense attorney then cited to the court an article in the Washington *Post* quoting the United States Attorney as having said "persons who were arrested for burglary inside a looted store but without any stolen goods in their possession could not be indicted for burglary."[55] The court remarked, "I see no purpose that could be served by holding somebody for the Grand Jury, if the United States Attorney has no intention of presenting his case to the Grand Jury. . . ." and summoned the Chief Assistant United States Attorney for the General Sessions branch.

When the Chief Assistant appeared, he admitted that if the U.S. Attorney's policy was as he had been quoted, there would not be "any point in this court holding people for the Grand Jury." But, he continued, he had not been informed by the

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[54] *Ibid.*

[55] The defense attorney's statement was a not-quite-accurate paraphrase of the *Post* story.

United States Attorney that that was his policy, that the United States Attorney had "set up certain guidelines and we have no alternative than to follow his guidelines." The guideline applicable in this case, he went on, was that

> "if a person is found in a place which has been burglarized during this period of time and he does not have any goods on him and he further does not have a criminal record, for the purpose of a plea, the case will be broken down, but he confines the breaking it down condition upon the man entering a plea to a lesser offense."

The Chief Assistant then went on to describe a disposition conference that had been held by the defense attorney and one of the Assistants

> "who has been delegated the authority to specialize in these cases for the purpose of seeing if they can be broken down; to conduct hearings; and [that Assistant] has conducted such a hearing and has indicated this was not the type of case to be broken down, unless the defendant was ready to plea, and in the opinion of [that Assistant], apparently, according to the defense counsel, this case should go for a preliminary hearing."

He then offered to inquire of the U.S. Attorney what the policy would be, and the case was continued until that afternoon. When the case resumed the Assistant United States Attorney handling that courtroom told the court,

> "the Government's position on these cases is that where there is somebody that has been caught inside a store and the person does not have anything on him—any of the goods, and there is no criminal record involving moral turpitude in these cases, we'll break them down to attempted burglary, and that's what has been done in this case."

He then asked the court to certify the case back to Assignment Court so that a misdemeanor charge could be filed.

What is especially surprising about this sequence of events is that on April 22, eleven days after issuance of the memorandum establishing the five guidelines (p. 71, *supra*), there seemed to be a misunderstanding, even by a senior member of the U.S. Attorney's office, of the content of one of the guidelines. The Chief Assistant's recital incorrectly stated guideline No. 4 as requiring a plea when, as the Assistant in court later correctly stated it, the guideline provided for automatic reduction. This misunderstanding

may well explain the apparent partial failure of guideline No. 4.

The subsequent proceedings in the case are still more surprising. The case was papered as Attempted Burglary II. On the first continued date in Assignment Court the Government was not ready and the court continued the case. On the next continued date, the Government was still not ready but the court, over the Government's objection, dismissed the case for want of prosecution. The United States Attorney's office then presented the case to the grand jury and an indictment for Burglary II was returned. On July 22, the defense attorney attempted to persuade the United States Attorney's office to have the indictment dismissed, but, failing, filed a motion to dismiss the indictment, on the theory that any prosecution was barred by dismissal of the misdemeanor charge in the Court of General Sessions. On August 9, 1968, after argument, the District Court granted the motion to dismiss, apparently on the theory that dismissal for want of prosecution over the objection of the Government was dismissal with prejudice.

What is shown in the preliminary hearing transcripts is confirmed in part by the answers to defense attorney questionnaires. They include information on 117 burglary defendants, 13% of those processed in the Court of General Sessions. This is what they show.

1. In one case, involving three defendants caught breaking and entering (guideline No. 1), the Assistant offered to break down a burglary charge if all three defendants, as well as several others arrested at the same time, would plead guilty to misdemeanors. The defendants refused; the case was nolle prossed at the preliminary hearing when the government refused to submit to a line-up. The defendants were never indicted.

2. There are no cases indicating deviation from guideline No. 2 denying reduction where the defendant was in, entering or leaving the premises, and had merchandise and a prior record.

3. In no case where the defendant was in, entering or leaving the premises, had merchandise but no useable record, did the office refuse to break down for a plea. However, in some cases no plea was sought by the defense attorney and hence the defendants were prosecuted for felonies.

4. The guideline requiring reduction, without plea, in cases where the defendant was in, entering or leaving the premises, had no record and had no merchandise, appears to have been followed except in cases where one of the co-defendants had a record, and did not qualify for automatic reduction. This is given as the ex-

planation for failure to break down in those cases; it would seem to elevate administrative convenience (in disposition of co-defendants together) above individual handling.

5. The guideline calling for automatic reduction without plea in cases where the defendant was arrested on the street with goods and was not seen in a store was followed only imperfectly. Out of 14 cases which fell within this category, four cases were broken down without a plea. Four more were broken down in exchange for a guilty plea to misdemeanors. In one case a plea was offered by the office but refused by the defendant. Three cases were nolle prossed by the office and two were dismissed by the court at the preliminary hearing, one for no probable cause and the other for no identification of the defendant.

Preliminary Hearings

Under present law the committing magistrate (here a judge of the Court of General Sessions) may not dismiss even a weak case as long as probable cause of the offense has been shown; charging is, under the constitutional doctrine of separation of powers, exclusively the prerogative of the U.S. Attorney. The judges were sometimes disturbed at the poor quality of the available proof, but nevertheless had to hold the defendant for the grand jury. More than one judge has emphasized the judges' lack of control over charges, citing two recent decisions of the District of Columbia Court of Appeals overturning General Sessions rulings that seemed to usurp the prosecutor's prerogative, *United States* v. *Shaw*, 226 A.2d 366, and *United States* v. *Foster*, 226 A.2d 164.[56]

[56] In *Shaw*, the defendant had been arrested without a warrant for assault with a dangerous weapon, but charged with simple assault, a misdemeanor. The court denied the Government's motion for a continuance until the complaining witness could recover, and dismissed the case for want of prosecution, objecting to the reduction of the charge. Overturning the judge's ruling, the Court of Appeals said:

> "The trial court should remember that the District Attorney's office is not a branch of the court, subject to the court's supervision.... On the District Attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute." 226 A.2d at 368.

In *Foster*, the trial court had ordered the Government to go to trial when a witness was not available after two continuances. The Government nolle prossed the case to preserve the option to file new charges, and the court dismissed for want of prosecution. Vacating the judgment, the appeals court stated:

> "We further believe that the administration of justice can best be served if trial judges confine themselves to their judicial duties and refrain from ex cathedra attempts to 'reform' those practices of the office of the United States Attorney which have been sanctioned by appellate tribunals [citing *Shaw*]." 226 A.2d at 166.

The following colloquy between one judge and an Assistant U.S. Attorney at a preliminary hearing held on April 9, is illustrative:

> "THE COURT: I know this is going to be back but I will bind him over for the action of the grand jury.
> "[THE ASSISTANT U.S. ATTORNEY]: And in the meantime, Your Honor, I will find out what the heck is going on over at our place.
> "THE COURT: All I can say is that I think your office ought to set up some kind of screening now, before they all start going over there.
> "[THE ASSISTANT U.S. ATTORNEY]: Yes, Your Honor.
> "THE COURT: Of course, maybe they are going to let the grand jury do that job. I don't know.
> "[THE ASSISTANT U.S. ATTORNEY]: I think what will happen is that they will probably be screened by our people in the grand jury office.
> "THE COURT: Uh-huh.
> "[THE ASSISTANT U.S. ATTORNEY]: I imagine they are going to be quite busy for the next couple of days or the next couple of weeks."

The evidence in that case—that the defendant was never inside the store (although, the officer testified, he saw him partly in the broken window) and had no merchandise, and the fact that the defendant had no record, qualified the case for automatic reduction under guideline No. 4. One explanation for failure to reduce the charge is that the Assistant who reviewed the case "downstairs" may not have had the guidelines fully before him; although oral instructions embodying the guidelines were given on April 8, the guidelines were not formally promulgated in written form until April 11. The defendant was indicted for Burglary II and the case was pending in the District Court on December 31, 1968.

In another case the court, in ruling on the defendants' motion to dismiss, said:

> "I would have hoped the U.S. Attorney would have gotten the full flavor of this case, and it is his authority and his jurisdiction to decline. He has [sic] seen fit to do so. That's unfortunate.
>
> "I'm inclined to believe that no Grand Jury in this city would hold these people for any felony charge; but on the

other hand, it is not for the Court to waive the sufficiency of the evidence."

The court found probable cause to hold the defendants, and they were later indicted for Burglary II and engaging in riot; this case was still pending on December 31, 1968.

* * *

Most defense attorneys insisted on their defendant's right to a preliminary hearing; only nine were waived.

Often the lawyer tried to use the preliminary hearing as a discovery device; some judges allowed them wide latitude in cross-examination and ordered the prosecutor to produce the officer's written statement of facts (the P.D. 163) for inspection by the defense; others, quite to the contrary, cut off the defense as soon as, in the court's view, the bare elements of the Burglary II had been shown and insisted that the P.D. 163 could not be inspected until the trial.[57] In many cases lawyers requested in-court lineups, suspecting that the arresting officers might not be able to identify the defendant. Some judges permitted this; others refused to allow it.

"Despite all that stuff the Court of Appeals says" (in one judge's words) about the importance of the preliminary hearing in preparation of the defense, the value of the hearing to the defendant varied widely depending on which judge he drew. Moreover, the variations in rulings, especially the lineup question, may have caused substantially unequal results in ultimate adjudication. One judge commented at a preliminary hearing (where no lineup had been requested),

> "the officer is getting another good look at the defendant and he isn't going to forget him when it goes to trial. Nobody will ever know, not even the officer will ever know whether he is identifying the man at trial because he saw him today or because he saw him in the clothing store."

The lineup may thus have been key to defense of some cases, although the identification problem was probably less important than it might have been because the Government could usually show an interrupted chain of custody of the defendant after his arrest.

[57] The *Jencks* Act, 18 U.S.C. § 3500, expressly provides that such items are not to be disclosed before trial. It was argued by the defense in a riot case (but the court never decided the point) that the *Jencks* decision (Jencks v. United States, 353 U.S. 657) at least empowers a court to order production of the P.D. 163.

In one case, however, before a judge notable for the short shrift he gave to attorneys' attempts at cross-examination, attempts to argue the issue of probable cause and requests for lineups (in one case he instructed the Assistant United States Attorney to "get them to identify the defendants as quickly as you can"), the officer, even after the court refused to allow a lineup, could not identify the defendant; the court, much to its strongly expressed outrage, dismissed the charge.

The office, feeling that in-court lineups were likely to be unfair to the Government, offered to hold lineups at police headquarters under the usual conditions, and in the presence of the defense attorney. Some judges nevertheless required lineups and a number of cases were dismissed after a lineup in which the police officer could not identify the defendant. In several cases the United States Attorney's office nolle prossed the case rather than submit to a lineup in court.

The Grand Jury

A second opportunity to review felony cases was available at the grand jury stage. A special riot grand jury was empaneled and sat from May to July, and the United States Attorney set up a special riot grand jury section in his office. The special grand jury considered charges against 545 persons, indicted 495, ignored 21 and referred 29 back to the Court of General Sessions. As far as is known, 15 riot indictments were also returned by the regular grand jury. Of a total of 510 indicted 473 were indicted for Burglary II, 24 for "forging and uttering"[58] and 13 for other riot-related offenses (Appendix G, Table II).

The procedure in the riot cases closely followed the usual procedure. After the defendant was ordered held by the committing magistrate, the police officer reported to the special grand jury section of the United States Attorney's office. There he was given a date to appear for presentation of the case to the grand jury. The scheduling of all riot cases was controlled by the head of the special section. Before the date for appearance the officer was to have brought into the special section all papers that had been prepared on the case. In riot cases these usually consisted of no more than the P.D. 251 or P.D. 163 forms. The usual

[58]These were usually people charged with involvement in schemes to pass off money order blanks stolen during the disorder.

fuller follow-up reports were rarely available, and where they were available they were very brief.

On the date for presentation the officer would discuss the case with an Assistant United States Attorney or one of the administrative personnel in the section, who would take down his statement. Before presentation all files were reviewed by the head of the special section. At this point a few cases were screened out, usually because of serious holes in the evidence, such as the officer's inability to identify the defendant. The basis of review was the same as in ordinary cases; no special guidelines like those for the General Sessions section were applicable.

The cases, in the view of the Assistant who headed the special grand jury section, were in some ways stronger and in some ways weaker than the usual felony case; stronger because the arrests were ordinarily contemporaneous with the offense and the police officer's on-the-spot testimony was available; weaker because recollections of overworked police officers were often hazy, property found in the defendant's possession had not been retained, and the absence of any prior criminal record in many cases created the probability that the defendant would testify in contradiction to the officer.

In determining whether to present cases to the grand jury the section gave some consideration to the circumstances of the riot. An offense committed early or at the height of the riot, where many others were present who might have been influenced to do the same thing, was considered to be a more serious matter than a similar offense committed in ordinary times. On the other hand, an offense committed in the waning hours of the disorder, entry into an already gutted store, for example, would probably be thought less serious. Each case was examined individually and the decision to seek indictment made individually. The volume of cases was not permitted to influence the decision to seek an indictment. The responsible people in the United States Attorney's office felt, and feel, that the indictments were justified by the facts of the cases.

Proceedings in the District Court

As the riot indictments were returned, an effort was made by the judges of the court, in coordination with the United States Attorney, to provide a mechanism for the speedy disposition of riot cases. The Chief Judge designated (by lot) five judges to devote all their time free of other cases to process the riot cases to

disposition. By agreement with the United States Attorney, reached at a meeting on July 2, 1968, the court set up a special summary calendar with each judge controlling his own calendar, an experiment in improving scheduling long desired to be tested. The United States Attorney agreed to assign two Assistants to each judge to be available full time. Each judge was assigned one-fifth of all the riot cases. This arrangement was intended to allow the sitting judge to control the flow of cases so that they could be tried in succession with the two prosecutors responsible for a continuing flow. Pre-trial conferences were to be held in all cases.

After a month or two the special calendar system was abandoned (although the assigned five judges still heard all riot cases), apparently because the United States Attorney's office did not have the manpower to keep two Assistants permanently assigned to each riot judge. Also, the United States Attorney said, other judges of the court kept calling for the specially assigned attorneys to try non-riot cases that had been assigned to them. Nevertheless, by year's end one judge had held to the special calendar system and had completed his assignments and two had completed a significant fraction of their assignments; the remaining two had disposed of only one or two cases each.

It came as some surprise to the office that, as the first cases were tried, they were not "well received" by the judges or by the juries. It became clear that, despite the feeling that the indictments were justified, juries were not going to convict for felonies in the run-of-the-mill looting case, the case of a person who did not break but entered a store and perhaps did or perhaps did not obtain some property. At this point the decision was made to accept pleas to lesser offenses in such cases, which make up the great majority of cases. In determining whether or not to offer a plea in a case, the office took into account the facts, the defendant's background, any evidentiary problems which might have arisen subsequent to indictment and whether in view of the seriousness of the offense appropriate punishment was available given the suggested disposition.

As of the year's end 169 defendants, 26% of those brought to the District Court on Burglary II charges, had been processed. As now appears likely to judges and the U.S. Attorney alike, the last riot case may not be disposed of before the end of 1969.

At the July 2 meeting reference was made to the kinds of cases in which indictments had been returned. Three of the five District judges recall that the United States Attorney indicated

that only serious offenders with prior records of serious crimes had been indicted. The judges were dismayed when it appeared, they said, that most of the offenders who came to trial had no serious criminal record and were not those who broke and entered and who initiated looting, but those who came by later. The United States Attorney's recollection differs. He recalls that he indicated that only the more serious cases would be tried, and gave only as an example the case where the defendant had a prior record. This is consistent with the recollection of one judge that when he later queried the United States Attorney about his July 2 statement, the United States Attorney recalled that he had said, or meant, that only the serious cases would go to trial, that run-of-the-mill defendants would have the opportunity to plead guilty to lesser offenses.

As the cases moved up for trial, defense attorneys filed motions challenging generally various claimed infirmities in the indictments. Challenges were made to the method of selecting grand jurors and to the failure to submit the text of indictment to the grand jury for a vote; challenges were made to the standard wording of indictments for Burglary II and grand larceny. These motions were rejected by Judge Gesell in memorandum opinions. Judge Gesell granted, however, a motion to sever for separate trials the cases of three defendants joined in one indictment, on the ground that

> "The defendants indicted for Burglary II are not involved in the same 'transaction' or 'series of transactions' simply because they are accused of looting the same store at about the same time. In the ordinary burglary case, they would presumably be acting in concert under these circumstances and the aiding and abetting instruction would apply. Looting cases during the April disturbances present a different situation which the Court cannot ignore. Individuals having no connection with each other whatsoever have been arrested while looting the same establishment at or about the same time and later indicted together. This is too loose a standard, particularly in view of the other counts of the indictment which cover two different offenses."[59]

The United States Attorney wished to appeal the ruling but was refused permission to do so by the Solicitor General; the four

[59]United States v. Jeffries, et al., U.S. Dist. Ct., D.C., Crim. No. 623-68 (Mem. Op., August 20, 1968).

other judges have not followed Judge Gesell's practice of severing cases.

In the same case the court construed the District of Columbia riot statute strictly, to save it from a challenge to its constitutionality as void for vagueness. He construed the statutory definition of riot as "a public disturbance involving as assemblage of five or more persons" as meaning a disturbance "taking place in the general vicinity where the defendant is claimed to have engaged in the public disturbance . . . tumultuous and violent conduct within the general awareness of the defendant"—although not necessarily "pursuant to an agreement or plan."[60]

Adjudication and Sentencing Results

Estimates of the number of individuals participating in the April disorders are in the neighborhood of 20,000.[61] Less than 10% of this number, 1,675, were processed by arraignment or presentment in the Court of General Sessions. Complete statistics are in the tables in Appendix G. The following is a summary of the figures.

Dispositions in the Court of General Sessions

Felony Charges. Of the 1,675 defendants, of whom 1,137 were charged by the United States Attorney's office, 970 (58%) were initially charged with felonies. Of these, 904 (54%) were charged with Burglary in the Second Degree ("Burglary II"), the most serious charge applicable to a looting-type crime, carrying as penalty imprisonment ranging from not less than two to not more than 15 years. Other felony offenses charged were: arson (3), assault with intent to commit robbery (2), assault on a police officer (8), assault with a deadly weapon (6), destroying property (4), destroying stolen property (2), grand larceny (10), receiving stolen goods (15) and robbery (6).

Burglary II. Of the 904 individuals charged with Burglary II, 436 (49%) were bound over to the grand jury either after hearing or after waiving hearing. All charges were dismissed (either by the prosecution or by the court) against 343 (38%). The other 111 (12%) were recharged in the Court of General Sessions with misdemeanors; 74 of them pleaded guilty, presumably pursuant

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[60] United States v. Jeffries, et al., U.S. Dist. Ct., D.C., Crim. No. 623-68 (Mem. Op., August 13, 1968).

[61] P. 8, *supra.*

to a bargain. Of 37 defendants who pleaded not guilty, the charges against 28 were dropped by the prosecution, five were convicted and one acquitted after trial.

Misdemeanor Charges. The balance, 705 individuals (40% of the total of 1,675) were charged with misdemeanors. Five hundred thirty-eight were charged with D.C. offenses: disorderly conduct, violation of curfew or both. One hundred sixty-seven were charged with U.S. offenses, sometimes coupled with a D.C. charge. U.S. misdemeanor charges were: attempted larceny, attempted burglary, carrying a deadly weapon, narcotics, destruction of property, petty larceny, receiving stolen goods, unlawful entry, possession of a drug, attempted burglary and engaging in riot. The cases of only 69 misdemeanor defendants remained pending as of December 1, 1968.

Dispositions in the United States District Court

Indictments. The special grand jury handed down 272 indictments of riot-related defendants; the regular grand jury handed down three, including the first riot defendant indicted. The total number of individuals indicted by both grand juries was 510, of whom 473 were indicted for Burglary II, often combined with grand larceny, petty larceny and engaging in riot, 24 for forging and uttering, one for interfering with a police officer, one for robbery, one for arson, one for unauthorized use of a vehicle, two for assaulting a police officer, three for destroying property and four for receiving stolen property (some combined with grand larceny and petty larceny). Of the persons indicted, 407 had been held, waived or certified to the grand jury in the Court of General Sessions; 56 persons were "originals" never charged in General Sessions, 68 had had all charges against them in General Sessions dismissed, and the charges against 15 were either pending or had been the subject of some other action in the Court of General Sessions (see Appendix G, Introduction and Tables I and II).

Burglary Cases. The cases of 304 (63%) of the 473 Burglary II riot defendants in the District Court were still pending as of December 31, 1968, almost nine months after the disturbances. The cases of 169 (37%) had been adjudicated.

Forty-four defendants were acquitted or dismissed on all charges. Twenty-four were found guilty of a felony after trial and five pleaded guilty to a felony (11% of all cases adjudicated). Twelve were found guilty after trial of lesser included misde-

meanor offenses or misdemeanors named in the indictment and 84 pleaded guilty to misdemeanors.

Sentencing

By December 1, 1968, 78 persons whose charges had been reduced from felonies to misdemeanors and 69 originally charged with misdemeanors had been sentenced in the Court of General Sessions. By December 31, 93 persons indicted for Burglary II had been sentenced in the District Court.

Appendix G, Table IV, shows the comparative time to disposition by sentencing in cases in the Court of General Sessions and in the District Court. Approximately 90% of all defendants processed in the Court of General Sessions had been sentenced by the end of September, 1968. Aside from the 57 D.C. offenders whose cases are still pending, who are probably delinquent curfew violators, only 15 U.S. misdemeanor defendants' cases were still pending in the Court of General Sessions as of December 1, 1968.

In the District Court, on the other hand, as of January 1, in Burglary II cases 304, or 63% of the defendants' cases, had not yet been adjudicated.

In view of the disparity in time of disposition between the two courts, the similarity in sentencing patterns becomes significant. In the District Court, 79% of Burglary II defendants had all imprisonment suspended. In the Court of General Sessions, in cases broken down from Burglary II in exchange for a plea, 73% of defendants sentenced had all imprisonment suspended. Of the District Court defendants, only 18% were sentenced to serve any actual time in prison; in General Sessions, 14%. In the District Court the average sentence to be served was 7.3 months, the median 6 months. In General Sessions in guilty plea cases the average sentenced to be served was 5.4 months, the median 6 months.

Five out of the six defendants who pleaded not guilty but were convicted in General Sessions, on charges reduced to misdemeanors from Burglary II, were sentenced to imprisonment.

Of 51 defendants who were charged originally with misdemeanors and pleaded guilty, 54% had all imprisonment suspended and 26% were sentenced to serve time in prison; the average sentence was four months, the median 90 days. For those who pleaded not guilty but were convicted, 52% had all time suspended, 35% were sentenced to serve time, an average term of 4.6 months and a median of 90 days.

Impact of the Riot Cases on Court Backlogs

The District Court's criminal calendar was already seriously clogged before the disorder, although marked progress had been made in the immediately preceding months. In the year immediately preceding the April disorders, the District Court backlog of triable cases had been reduced by 18%. It increased by 22% over an April 1967 base and 60% over an April 1968 base during the five months immediately after the disturbance. Except for the riot cases, the increase in new cases brought to the District Court had been fairly constant before 1968. In 1968, the rate of increase in new cases (38%) more than tripled the average rate of increase of the three prior years (11%); 275 riot cases were more than half the 1968 increment (517 cases).

The backlog problem is also acute in the Court of General Sessions. A total of 2,133 riot-related criminal prosecutions were filed, out of 17,400 cases filed by the U.S. Attorney in fiscal year 1968, which represented a 42% increase over the 12,309 criminal cases filed the previous year. Hence, the increase in the court's backlog from 1967 (45%) was roughly proportionate to the increase in new cases brought (42%); riot cases constituted roughly 42% of the 1967-68 increase in new cases.

Evaluation of the Prosecution of Riot Cases

The principal criticism, by judges, defense attorneys, citizens and some prosecutors, of the prosecution of riot cases has been that "too many felonies" were charged. Various reasons have been given for this criticism.

1. For these defendants and for what they did felony prosecution was inappropriate:

a. Most of the defendants are not "criminal types," but persons with clean records and a stable place in the community;

b. The usual kind of conduct amounts at bottom to no more than petty thievery and unlawful entry;

c. Most of these defendants would never have become involved but for the temptations of a "Mardi Gras" atmosphere.

2. The evidence in many of the cases is too weak to support a felony conviction:

a. The cases are typically "one witness" cases, with the testimony of a police officer alone against the defendant's testimony (if he has no useable record); these are usually weak cases;

b. The cases are replete with hazy identification of the defendant and of the property (where property was recovered and where it has not been lost).

3. The plethora of riot indictments has put an intolerable burden on the District Court, seriously increasing its backlog:

a. Trial of serious crimes of violence, robbery and the like, is still further delayed, greatly to the danger of the community;

b. The delay in disposition of the riot cases themselves virtually destroys the deterrent and exemplary effect of conviction and punishment;

c. The Court of General Sessions seems better able to dispose of these cases expeditiously and indeed has done so.

4. Measured by the felony conviction rate, the policy of seeking indictments has been a failure:

a. The rate of conviction for felonies is low, 11%; juries prefer to convict for lesser offenses if at all;

b. The U.S. Attorney's office seems willing, indeed eager, to accept a plea of guilty to misdemeanors in the District Court; further efforts should have been made to do this before indictment.

5. Measured by the sentences meted out to date, obtaining felony indictments has been useless:

a. A valid reason to prosecute for felony is that the severe penalties applicable should be imposed; but only a small minority of defendants have been sentenced to imprisonment and only one to more than a year in prison;

b. The percentage of defendants sentenced to imprisonment is virtually identical in the District Court and the Court of General Sessions; all District Court sentences of imprisonment but one have been for one year or less, within the one year limit on General Sessions sentencing jurisdiction.

Views are by no means unanimous on any of these points, and there is evidence on both sides.

1. There is no dispute that the vast majority of defendants are persons without records of serious crimes and are relatively solid citizens. There is no dispute that the vast majority of defendants were not those who broke into stores, smashed windows and initiated looting but those who, passing by after a store had been broken open, were tempted, entered and attempted to take or took merchandise; persons who, in one judge's view, would never have done anything of the sort in normal times. One judge of the Court of General Sessions, with colorful exaggeration,

characterized the cases before him as generally involving drunks "scavenging for booze in gutted liquor stores."

There is substantial dispute, however, about whether such persons were properly prosecuted as felons. One side takes the view that if a felony has been committed it should be prosecuted as a felony and that other circumstances are irrelevant. Others take the view that defendants without criminal records who have committed this kind of an offense should have been kept in the Court of General Sessions and the District Court's resources concentrated on serious offenders. The prevailing opinion among the judges of both courts seems to have been that while the run-of-the-mill looter was not a normal "burglar," the responsibility for charging was the United States Attorney's, and they adjudicate the case before them on the facts and the law. The judges will take into account in sentencing the nature of the conduct and the kind of person the defendant is.

There is substantial dispute over whether the riot should be considered an aggravating or mitigating circumstance. Views seem about evenly divided. One group feels that the riot created a "Mardi Gras" atmosphere, that the situation was highly charged emotionally; and the view was expressed that the riot flatly was a reaction to oppression of the black community. The contrary view echoes the words of the District Attorney of Los Angeles in reporting on the Watts riot:

> "I take the position that any crime occurring during the riots became more serious because of that fact alone. I believe that those who committed crimes during those 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 during the course of the riot is even more serious than that same burglary occurring at a different time and place, because any 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."[62]

2. The contention that the evidence in many of the cases is too weak to support a felony conviction seems largely correct. There can be little argument with the low 11% rate of conviction for felonies in the District Court. Appraisals by the trial assist-

[62]Report by Evelle J. Younger, District Attorney of Los Angeles County to the Governor's Commission on the Los Angeles Riots 19-20 (1964).

ants of the first batch of cases show that defendants were acquitted or cases dismissed because of inability of the officer to identify the defendant or the place where the alleged offense occurred, or no proof that the defendant had any property. One case report ends with the notation:

> "No verdict. Case insufficient to go to the jury or to get beyond our case. [The Judge] held evidence did not make out a grand jury case of either Engaging in Riot or Burglary. He was right."

Most of the judges feel that the juries have been doing their duty and that they themselves would have decided the case in about the same way. Only a very small minority suggests that black juries will favor black defendants against white police officer witnesses, either for outright racial reasons or because many of the jurors themselves were involved in rioting but escaped arrest. Almost all of the judges in both courts, black and white, feel that such a claim is unfounded.

3. The fact of the increase in the District Court backlog cannot be denied, even though the special calendar system did contribute to minimizing the backlog. The United States Attorney's office made a conscious choice of priorities, determing that the deterrent effect of charging felonies upon recurrence of disorder outweighed the effect of the flood of cases on the District Court's calendar. One judge of the Court of General Sessions agrees; in his view light charging would have contributed to the atmosphere of "permissiveness" already current in the city, which would have promoted further disorder. On the other hand the backlog problem is a serious matter to the court and the community. It is charged that individuals on bail awaiting trial are responsible for much of the increasing violent crime in the District of Columbia. Yet any effort to reduce the criminal backlog by concentrating resources on criminal cases increases the civil backlog.

One view lays the blame for the riot case backlog on defense attorneys who have refused to plead their clients. While understandable as the viewpoint of a judge or prosecutor concerned about the backlog of cases, it seems beyond dispute that each lawyer is individually responsible for advising his client where his best interests lie, and in view of the low rate of felony convictions and the lenient sentences being imposed, it would be captious to criticize the judgment of a lawyer who advises his client to stand trial.

There is no dispute, however, that the delay in prosecution of the riot cases (like delay in normal times) has seriously weakened the deterrent effect of prosecution. Indications are that there would have been substantial community support for a policy resulting in speedier disposition of cases. In interviews of 25 businessmen, including the presidents of some large businesses in the District, by a heavy margin the businessmen favored speedy disposition of cases with lighter punishment over delayed disposition with heavier punishment, feeling that speedier disposition was a more effective deterrent to crime.

More than eight months have passed from the disorders in April to December 31, 1968, the statistical cutoff date for District Court dispositions. Thirty-four percent (304) of all initial Burglary II prosecutions (904) were then still pending. Available information from Detroit and Los Angeles (Appendix G) indicates that in Los Angeles, as of June 30, 1966, less than ten months after the August, 1965, Watts disorders, all but 4% of the burglary (felony) prosecutions had been disposed of and that in Detroit, as of April 30, 1968, nine months after the July, 1967, disorders, only 25% of the felony cases were pending. On the other hand, the quality of justice in those cities seems to have fallen well below that in the District of Columbia. In the District Court 29% (36 out of 125) of the defendants found guilty were tried; in Detroit only 9 out of 1,211 defendants were found guilty after trial, evidencing a prosecution practice of dismissing cases wholesale if a plea could not be obtained.

4. The felony conviction rate and the decision of the United States Attorney's office to accept pleas to misdemeanors in the District Court, after it was seen how difficult it was going to be to obtain felony convictions, do, with hindsight, support the view that too many indictments were returned. How this should affect the action of the office in a future emergency is problematical. Expectation that the juries would react the same way again would suggest many fewer indictments; on the other hand, juries after a second major disorder might well be more willing to convict for felonies.

5. With respect to sentencing, the judges almost unanimously stated that the same standards should be and were being applied in riot cases as would be applied in normal times in sentencing defendants who had done the same kind of act and who had the same kind of background. This means, in the large majority of cases (characterized by one judge as no more than "petty thievery"), where the defendant is a first offender, sentence will be

suspended and the defendant placed on probation. The record, of course, confirms this. Only one judge indicated that perhaps stricter sentences should be imposed as a deterrent measure against these persons participating in a disorder. From the prosecutor's point of view (a view supported by our sample of the business community) the relative absence of jail sentences is troubling.

The relative leniency of sentences is not surprising, however. The tendency of courts to sentence riot defendants lightly was noted (and deplored) by Senator Mundt (R., Neb.) in the Senate Government Operations Committee riot hearings.[63] Moreover, Appendix G shows that in Los Angeles, 60% of burglary defendants received probation, and nearly all of the jail terms were for six months or less. In Detroit, only slightly over 3% of the defendants were sentenced to jail terms, of which, again, nearly all were for six months or less.

Why "Too Many Felonies"

There seem to be several reasons for "too many felonies."

First, had the guidelines not required a plea of guilty in order for charges to be reduced, many fewer cases would have been prosecuted as felonies.

As we have seen, two-thirds of the sample of cases in which preliminary hearings were held in the Court of General Sessions were cases that fell within guideline No. 3—a defendant found in a store with merchandise but without a criminal record whose charge would have been reduced from a felony to a misdemeanor if he had been willing to plead guilty to the misdemeanor. In the 104 cases in the sample the defendant was presumably unwilling to plead guilty and hence the cases were to be sent to the grand jury. If no plea had been required and the cases automatically reduced, if our one-third sample of defendants is representative, two-thirds of the 436 defendants bound over to the grand jury would never have been indicted—an important reduction in the District Court's backlog. Of course, they would have tended to increase the backlog in the Court of General Sessions. The percentage effect (given the much larger number of criminal prosecutions filed and processed in the Court of General Sessions) would of course have been much less; and the Court of General Sessions,

[63]Hearings, Senate Committee on Government Operations, Permanent Subcommittee on Investigation: Riots, Civil and Criminal Disorders 1316 (1967).

unencumbered by the need for a grand jury indictment, for example, generally disposes of cases in much less time than does the District Court. Because of the opportunity to pick a lenient judge in the Court of General Sessions, many of these defendants might have pleaded guilty in any event, although many defense attorneys, feeling that a defendant without a criminal record was unlikely to receive a prison sentence from most of the judges in the Court of General Sessions, might well have decided that the defendant ran little risk in going to trial.

One reason for the many refusals to plead in guideline No. 3 cases is the difference between plea bargaining in normal times and in the riot cases. In normal times, plea bargaining is a sophisticated process in which prosecutor and defense attorney weigh the evidentiary and legal strength of the case and the consequent risks of going to trial, and the probable sentence that will be imposed on the defendant given his personal characteristics and previous criminal record. The defense attorney weighs the probable sentence in terms of the defendant's own interest in as light a sentence as he can reasonably expect; the prosecutor weighs the sentence as it may appropriately serve the interest of society in punishment and deterrence.

In the riot situation, the guideline pigeonholes were, according to the United States Attorney's office, based primarily on a determination of the degree of culpability of the defendant in light of the facts then known to the prosecutor. A defendant caught in a store with merchandise who had no criminal record was deemed a person less likely to have been an instigator or leader than a person caught in a store with merchandise who had no criminal record. Hence, the former would be allowed to plead guilty to a misdemeanor; the latter would be prosecuted on a felony charge.

The facts of the cases fell into uniform categories, and the evidence—the testimony of the arresting officer at the scene—was much the same in most cases. So in the riot situation there was little of the usual give and take of plea bargaining; under the guidelines reduction in exchange for a plea was on a "take it or leave it" basis.

The major objection to plea bargaining in these circumstances is this: if the standard for reduction to a misdemeanor is based on the prosecutor's determination of what is a just result, then it would seem improper to require, as the price for the reduction to which under the prosecutor's standard the defendant is justly entitled, that he give up his right to trial.

A second criticism is that, as seen, the plea bargaining feature was itself responsible for a majority of the cases being referred to the grand jury. In the riot context, therefore, the major advantage of plea bargaining was lost. That advantage, as several studies have pointed out, is that it conserves the time of the courts and of the prosecutors and reduces the trial backlog and the average delay in criminal prosecutions. (It has also been defended on the grounds, already mentioned, that a plea agreement eliminates the risk of litigation and offers an alternative to bringing a hopeless case to trial.)[64]

With its failure to serve this function, the criticisms often levied at plea bargaining bear much weight and offer a further argument against its use under the rules adopted by the office for the April riot cases.

The practice has been condemned as encouraging overcharging by the prosecution, to put itself in a better position for negotiation (a factor which representatives of the United States Attorney's office have stated was not considered in the charging policy adopted in the disorders, contrary to the beliefs of several judges); and as making the volume of business a factor, inducing possibly more lenient treatment by the prosecution. The practice may induce pleas in cases where a defendant is, or firmly maintains, that he is not guilty. Even the courts have begun to recognize that a guilty plea may properly be entered where the probable testimony indicates that a conviction is the likely result of trial, even though the defendant refuses to admit his guilt.[64a] What this sometimes meant in the civil disorder cases was that after conferring with the officer and/or prosecutor defense attorneys would tell a defendant that, despite the defendant's assertion of innocence, the jury was more likely to believe the officer's testimony than his, and advise him therefore to plead guilty to a lesser offense.

Plea bargaining has been criticized as substantially weakening the possibilities of rehabilitation by convincing the defendant that he can "beat the system."[65] The practice has been most elo-

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[64] *See, e.g.*, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9-13 (1967); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty 60-68 (1967); Subin, Criminal Justice in a Metropolitan Court 42-50 (1966).

[64a] Griffin v. United States (U.S. Ct. App. D.C. Cir. (Nov. 21, 1968)).

[65] Medalie and Wolf, Eds., Crime—A Community Responds, Proceedings of the Conference on the Report of the President's Commission on Crime in the District of Columbia 93 (1968) (remarks of Miss Sylvia Bacon).

quently attacked as destroying community respect for the judicial system:

> "The fact is . . . that people who are poor and have been charged with crime are literally advised by their defense counsel to plead guilty to crimes which they claim they didn't commit. And the reason they tell their clients this is a very practical reason. They say, 'If you plead guilty, you will get a fine or forfeit collateral. If you go to trial, on the other hand, you may end up with a higher fine or in jail. Don't take the risk.'
>
> "Now, what is the impact of that kind of system on a man who says, 'I'm innocent. I want to go to trial.' And his counsel tells him, 'You're a fool if you go to trial. It's the stupidest thing you can do.' On his record, the defendant, therefore, not only has an arrest, he had a conviction. . . . Yet I would suggest that none of us are really ready to face the problem of what happens if judges stop giving lower sentences for pleas of guilty. The [D.C. Crime] Commission recommends that, but I think it's fair to say that that would result in an enormous increase in the number of cases tried in the District of Columbia. I think we must face that problem and decide that we're either going to give people trials and not to try to bribe them into giving up their right to a fair trial, or we're going to have to change our whole attitude about what our criminal justice system is about."[66]

Second, to at least some degree, and in a numerically much less significant class of cases, the guidelines did not always work. There seems to have been at least some confusion in the office at General Sessions about their content and meaning. Disposition before trial in many cases depended upon the defense attorneys, many of whom either were unaware of the opportunity or advised their clients to forego it. Several judges referred to the "inexperience" of the Assistants in General Sessions as a problem, suggesting that they bring cases on for preliminary hearings that a more experienced prosecutor would reduce. There is no way of assessing whether this was a contributing factor, although the mechanism for administering the guidelines, employing four of the most mature and experienced Assistants in General Sessions, under constant supervision, makes it unlikely.

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[66] *Id.* at 88-89 (1968) (remarks of Bruce J. Terris, Esq.).

Third, the statutory arsenal available to the prosecutor in April may have been too procrustean a bed into which to fit the cases. For example, the only charge available against people cruising around with molotov cocktails in their automobiles—potentially dangerous offenders—was Possession of the Implements of Crime, D.C. Code 22-3601, a misdemeanor ordinarily used to charge narcotics addicts arrested without narcotics but with a syringe.

Even a quick review of the statutes available for riot-related offenses (Appendix I) reveals the inaptness of the antiquated statutory language not only to an emergency but indeed to crime in normal times in A.D. 1969. A commission to revise Title 22 (the Crimes title) of the D.C. Code was established by Congress in 1967,[67] and the Commissioners appointed. But Congress has not yet appropriate funds for the Commission and it has been unable to begin its work. Other jurisdictions abound in statutes better drafted to deal with the kinds of conduct that initiate, exacerbate and continue a civil disorder. See, for example, Cal. Pen. Code § 452, penalizing possession of "fire bombs," defined to include a typical molotov cocktail, or the similar provision of 18 Penna. Stat. § 4417.

Likewise, a statute to punish looting during a proclaimed emergency would not be difficult to draw. One suggestion, by a District Court judge, was for degrees of severity, graduated depending upon whether the defendant was in a premises closed for business in the day or night, with or without merchandise in his possession, alone or acting in concert with others and whether or not he was the first to break or enter a theretofore unlooted establishment.

[67]P.L. 90-226, 81 Stat. 7341 (1967).

PART IV. CONCLUSIONS AND RECOMMENDATIONS

Considerable temerity is needed to make recommendations for—or against—changes in the criminal justice system for a possible future riot (that all hope will not occur), based on the last riot. The next riot may be quite unlike the last in its genesis, spread or severity. It may last one night, or two weeks. Martial law may be imposed (which would eliminate most worries for the civilian agencies, at least until martial law is lifted). But, from the events of last April and their aftermath, a few matters stand out for comment.

A. *The Police*

Part I records absence of adequate instructions to officers on arrest policy, what charges to use, and curfew enforcement. The consequence was a wide disparity among the officers and resulting unequal treatment of rioters. Many guilty of serious offenses may have been charged only with curfew; and the arrest of a person in the street after the hour of curfew may often have depended on factors like attitude and dress that should have no bearing on a decision to arrest.

First, instructions about charging during a disorder should be given to officers. It should not be left to the individual officer to determine, on the basis of a necessarily snap judgment in the street, whether an offender who has certainly committed, say, unlawful entry, should be charged only with a curfew violation carrying a minimum penalty or instead with Burglary. Adoption of a graded looting statute (see Part III) would go far towards solving the problem, allowing the officer to charge "Looting," set out the facts and let the prosecutor determine the appropriate degree of charge.

There is an obvious need for a clear articulation from the policy-makers of the purpose of curfew. Should it be used, as some officers felt, as a convenient street clearing tool? Or is its purpose, as an official of the Corporation Counsel's office thought, to screen out only those who have no legitimate business on the streets? The executive authorities and the Congress (if it enacts any of the curfew legislation proposed in the Supplemental Report of the D.C. Committee on the Administration of Justice Under Emergency Conditions) have responsibility to

answer these vexing questions.[68] This requires some hard thinking about the curfew. It is, of course, a limitation on liberty. Whether it is a justifiable limitation depends upon application of the minimum restraint consistent with the restoration and maintenance of order.

Given a clear policy lead, the Department should develop a set of guidelines covering curfew arrests, giving officers guidance as to the standards they should employ in deciding whether to stop a curfew violator and whether to make an arrest or send him on his way. Much will still have to be left to the officer's discretion, but that discretion would be aided and more intelligently exercised within the framework of simple, clear guidelines.

Translated into enforcement policy, the minimum restraint standard suggested above would dictate guidelines designed to reduce the number of curfew arrests to the lowest level consistent with the restoration of order. This would mean warning violators to get home, not arresting them, in quiet areas; turning back, not arresting, those apparently headed towards an area of disorder; careful screening, with vehicle search if appropriate and lawful, of those leaving an area of disorder, arrest where there is evidence of a crime, like looted goods, but release of those headed away from the disorder area who are not subject to arrest for a substantive offense.

The drafting of guidelines or the content of specific instructions is beyond the scope and resources of this study. Interesting examples of police guidance manuals are included in Schwartz and Goldstein, *Police Guidance Manuals* (1968). Guidance Manual No. 10 covers "Demonstrations, Picketing, Riots," and the short section on riots provides a good starting point for the kind of guidelines and instructions that would be appropriate.

B. *The Courts; Pre-trial Release*

The facts related at length in Part II cast considerable doubt on the wisdom of the policy of restricted release. That it was not a major blunder *a la* Detroit or Chicago is thanks to the good sense and sensitivity of most of the judges—and to the existence in the District of the Bail Reform Act and machinery for its implementation.

[68] As one former Assistant Attorney General has commented with hindsight, fairness alone requires the authorities to announce their policy in advance. Pollak, Some Unresolved Issues in the Administration of Justice During and After a Civil Disorder (address to the Institute of Continuing Legal Education, University of Michigan, July 20, 1968).

The District of Columbia Bail Agency, operating under tremendous handicaps, shorthanded and without sufficient facilities—even enough telephones—to handle the flood of cases, was able to obtain and verify information about community ties and recommend for release two-thirds of the 901 persons they interviewed. The defense attorneys supplemented the Bail Agency's efforts and obtained and verified information themselves in cases that the Bail Agency was unable to handle, and brought this information to the attention of the judges setting bail. As a result some judges, finding evidence of strong roots in the community qualifying many defendants for release under the Bail Reform Act, felt themselves able to release many such people on personal recognizance.

This suggests one obvious recommendation; the facilities of the Bail Agency should be organized to permit immediate expansion in an emergency. Even in an emergency telephones can be installed on short notice; provision should be made to obtain and make use of additional interviewers and verifiers, many of whom could be volunteers—law students or U.S. Government-employed lawyers, for example. In connection with this, arrangements need to be made to get other important information—like criminal records—to the Agency and before the court.

A unique aspect of the policy of restricted release as it was implemented in the District of Columbia in April was the use of the third party custody device provided in the Bail Reform Act. In a future disorder, there should be more reliance upon and facilitation of the use of third party custody. Better arrangements should be made to permit third parties to come to court to vouch for defendants and take them home.

As we have seen, the number of defendants released at court was higher in the daytime than at night, because of the general inability of third parties to get to court at night. If bail hearings were held only in the daytime, this cause of unequal treatment would be eliminated. On the other hand, this would result in longer pre-appearance incarceration for some defendants. A better solution would be to ensure that any defendant who appears at night and is not released be given the opportunity to contact his friends or relatives and have another appearance promptly the next morning.

The conclusion drawn from the facts in Part II is that no amendment to the Bail Reform Act to provide for preventive detention in an emergency is justified. The Hart Committee has urged legislation "with appropriate safeguards" authorizing judi-

cial officers "to deny release entirely for persons charged with certain riot connected offenses for the duration of the officially declared emergency."[69] Senator Tydings, in testimony delivered in hearings of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on January 22, 1969, endorsed "the concept of suspending the Bail Reform Act during times of riot and widespread disorder."

The Hart Committee also indicated, however, that further factual study was desirable. The facts recorded here fail to support the need and the utility of such amendment.

One further word must be said about the current public clamor to amend the Bail Reform Act and provide for some form of preventive detention for persons judges conclude are "dangerous" and likely to commit new crimes if released awaiting trial. Part II shows the kind of disagreement about what makes a defendant "dangerous" and the variations in applying such a standard even during a civil disorder. Better predictability can hardly be expected in normal times.

The difficulty in formulating standards for gauging dangerousness is illustrated by a recent decision on post-conviction release, an area that does not raise the serious constitutional questions of pre-trial detention. In *United States* v. *Blyther*, U.S. Dist. Ct., Dist. Col. No. 1559-67, the trial judge denied bail pending appeal to a defendant convicted of carrying a dangerous weapon on the ground that the defendant had "an extensive criminal record involving numerous acts of violence." On motion to the Court of Appeals, two judges noted that the defendant's record did not seem to them to show "acts of violence."

On remand, the District Court dryly noted that "it is apparent that there is a difference of viewpoint as to what constitutes an act of violence." The acts were: carrying an unlicensed loaded revolver in company with an armed criminal companion; a juvenile yoke robbery, and contributing to the delinquency of a minor. The defendant had also been twice convicted of unauthorized use of a motor vehicle.

The point is not who is correct; the point is rather that three experienced jurists can differ so about what constitutes a crime of violence evidencing a dangerous propensity. In short, until the art of predicting future criminal conduct has been substantially improved, a preventive detention statute would, to paraphrase

[69]Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act (May, 1968).

Professor Alan Dershowitz in the Bail Reform Act hearings cited above, allow blindfolded men to throw darts at a dart board.

C. *The Prosecutor's Office*

Part III of this report, after describing the charging, charge review and riot case prosecution policies of the United States Attorney's office, and the results to date in riot prosecutions, concludes with the judgment that prosecutorial policies resulted in an excess of felony prosecutions pending in the District Court. That judgment was reached taking account only of factors internal to the criminal justice system—time to final disposition, severity of sentences, and the effect of increasing the backlog in the District Court compared with the Court of General Sessions.

It was beyond the resources of this project to attempt to learn what effect this charging and prosecution policy had on the different segments of the Washington, D.C., community. One tentative judgment was suggested: that the delay now involved in processing felony cases, including riot cases, in the District Court almost certainly weakens the deterrent effect of whatever punishment is eventually meted out. On the other hand, this may have been outweighed in April by the hoped-for immediate deterrent effect of charging felonies at the outset.

Delay tends to weaken public respect for law and for the judicial process, not only by the defendants who are the subjects of the process, but by the rest of the community whom the process is designed to serve and protect. Of course any riot will add to the backlog, but a prosecutorial policy that increases delay, to be justified, must bring compensating or outweighing visible benefits. This study has uncovered none.

Hence it would be wise in future, should a civil disorder occur again, for the prosecutor's office to give some weight to the problem of clogging the courts. Unless reasons more persuasive than have been advanced counsel seeking large numbers of felony indictments, it would be wise to reserve such treatment for the truly serious offenses, and dispose of run-of-the-mill looters' cases more expeditiously.

In the concluding sections of Part III the practice of plea bargaining was dwelt upon at length. At the risk of belaboring this time honored device, a recommendation that it not be relied on in future disorders seems in order. Plea bargaining was an essential element in the review process as established by the United States Attorney's office. Yet whatever may be the justification for the practice in normal times as conserving judicial and

prosecutorial resources, reliance upon it seems to have had the contrary effect in the riot cases. Without this counterweight to the contempt for the legal process almost certainly engendered in defendants and in the community by the realization that one can bargain with the law and pick a lenient judge, the practice of plea bargaining loses its rationale. And sometimes, as in riot cases, it "may actually operate . . . to burden the docket rather than lighten it."[70] If the many cases in which the United States Attorney's guidelines dictated reduction only for a plea had been reduced by the office without demanding a plea, the District Court's docket would have been lightened of the bulk of the riot cases.

Criticism has been levied at the office for attempting to establish fixed guidelines. In a riot situation, however, such a procedure seems wise as a means to do what the office hoped to do, give equal treatment to defendants similarly situated. The content and the application, not the existence of the guidelines was at fault.

The insistence on keeping the guidelines secret worked against their very purpose. Had they been publicized, defense attorneys and defendants could have made an informed decision about what to do, and very likely more disposition conferences would have been sought and more cases broken down.

Most important, thought must be given to policy in the future, given the possible varieties of disorder and criminal conduct that may occur.

The inadequacy of Title 22 (Criminal Offenses) of the D.C. Code to the civil disorder context, as well as to crime in normal times, has been mentioned. In view of the current public outcry over crime in the District of Columbia, and the attention focussed on it by the President, it is modest enough to suggest that the Commission to revise Title 22 be given the necessary funds and begin its work. Within that framework appropriate riot statutes can be drafted as part of a general revision and modernization of the Code.

Finally, let this study add another voice to those urging at the very least improvement in the administration of the courts, and addition to judicial, prosecutorial, defense lawyer, bail agency and other criminal justice manpower. There is no doubt that the

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[70]Scott v. United States, U.S. Ct. App., Dist. Col. No. 20,945 (February 13, 1969) slip opinion at 26.

community will support expenditure for these purposes. The businessmen interviewed not only were disturbed about the courts' backlog and delay in prosecution and favored the provision of more judges and improved physical plant, but overwhelmingly expressed willingness to pay higher taxes if necessary to pay for these improvements. Indeed, new taxes might not be necessary. In fiscal 1968 the Court of General Sessions was probably the only agency of the District of Columbia that turned a profit. The court's income from fines, forfeitures and the like exceeded the expenses of running the court by $1,089,232.[71]

[71] Report of the Chief Judge of the Court of General Sessions for Fiscal Year Ending June 30, 1968, p. 5.

APPENDIX A

Tables I and II record bail orders and other dispositions of civil disorder initial appearances in the Court of General Sessions, April 5-10, 1968. The tables were prepared from an official court computer printout run on April 15, 1968. Non-civil disorder cases (principally traffic) shown on the printout were eliminated in counting.

The printout did not distinguish among surety, cash deposit and unsecured money bonds. All are shown as money bonds. It does not distinguish between personal recognizance and third party custody, listing both as "P.R." A check of the court docket shows that both personal recognizance and third party custody are there also lumped together as "P.R."

Table I. All Defendants Excluding Curfew Defendants

April	5		6		7		8		9		10		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Money Bonds (Surety, Cash and Unsecured)	92	46.9	203	64.7	209	47.4	42	37.6	26	59.1	24	75.0	596	52.5
Over $1,000	11		27		20		7		7		6		78	
$1,000	39		106		106		17		18		9		295	
$500 – 999	21		49		57		10		1		6		144	
$300	20		21		17		6		0		1		65	
$100 – 299	1		0		9		2		0		2		14	
Under $100	0		0		0		0		0		0		0	
Personal Recognizance/ Third Party Custody	92	46.9	100	31.8	214	48.5	62	55.4	18	40.9	7	21.9	493	43.2
No Information on Bond	12	6.2	11	3.5	18	4.1	8	7.1	0	0	1	3.1	50	4.3
Total Bail Hearings	196	100	314	100	441	100	112	100	44	100	32	100	1,139	100
Dismissed or Acquitted Forthwith	52		28		69		29		5		9		192	
Guilty Forthwith	20		0		3		2		6		6		37	
Grand Total	268		342		513		143		55		47		1,368	

Table II. All Defendants Including Curfew Defendants

April	5		6		7		8		9		10		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Money Bonds (Surety, Cash and Unsecured)	92	46.1	209	41.5	209	47.3	43	37.7	27	58.7	24	80.0	604	45.1
Over $1,000	11		30		20		7		7		6		81	
$1,000	39		106		106		17		18		9		295	
$500 – 999	21		50		57		10		1		6		145	
$300	20		22		17		7		1		1		68	
$100 – 299	1		1		9		2		0		2		15	
Under $100	0		0		0		0		0		0		0	
Personal Recognizance/Third Party Custody	95	47.6	265	52.7	215	48.6	62	54.4	19	41.3	8	26.7	664	49.5
No Information on Bond	12	6.3	29	5.8	18	4.1	9	7.9	0	0	1	3.3	72*	5.4
Total Bail Hearings	199	100	503	100	442	100	114	100	46	100	33	100	1,340	100
Dismissed or Acquitted Forthwith	55		61		71		31		5		12		235	
Guilty Forthwith	20		3		3		2		6		7		41	
Grand Total	274		567		516		147		57		52		1,616*	

*Figures includes three where dates could not be read

APPENDIX B

The project examined the 901 available interview forms prepared by the Bail Agency during the disorder, and recorded 20 items of information, which were coded by the Project's personnel and key-punched and processed by Control Data Corporation.

There were a number of difficulties in carrying out this project. Many of the forms did not list the charge, the judge, the interview date or the date of the hearing. There often was no clear indication whether or not the person was recommended for release by the Agency. The Bail Agency interviewers had many different ways of indicating whether the information given was verified. In some there was no indication, but "recommend" was written across the top of the form, or the box at the bottom indicating that the information had been verified was checked. In these cases the defendant is listed as having been recommended. In other cases there were check marks beside the separate items of information indicating that it had been verified, but there was no definite indication that the defendant was recommended at the top of the form or in the appropriate box. In such cases there was no choice but to list this as a blank.

There was no way to determine whether the defendant's statement about his prior criminal record had been verified. If the defendant is recorded as having admitted to a record, he is listed as having a record. If the form shows that the reply was negative to all questions about criminal record, the defendant is listed as having no record. If the form indicated that the interviewer had not asked all the questions, then the defendant's record is listed as a blank. Similarly, if the interviewer merely wrote "defendant says none" across the bottom without having checked any of the boxes, the defendant's record is listed as blank. Since there was virtually never any indication that the Bail Agency had verified criminal records, we were forced to eliminate verification of record as one category.

In most of the cases there was no information on the date of disposition or the judge. In the cases where a copy of the disposition sheet was included in the file, the information is usually complete. However, many times either the judge failed to sign the sheet, or the date was omitted. In the cases where no copy of the sheet was included in the file, we had to rely upon what was

written on the form. This was often unreadable, crossed out and written over. This accounts for the many blanks in these categories.

Generally, the forms were sloppy and hard to read. Different interviewers and verifiers had different ways of filling out the forms. There often was difficulty in even reading the defendant's names or in telling which were the first and which were the last names. In several cases there were duplicate forms which could not be matched either by charge or by interview date. In these cases, the most complete of the two forms was used (unless it looked as if the defendant had been arrested twice, in which case he was listed twice).

I.

In 95.3% of the cases (859) information on the charge was available. The charges were:

	No. of Cases	*Percentage*
Burglary II	677	75.1
Other Felony	31	3.3
Possession Weapons or Implements of Crime	60	6.6
Petty Larceny	8	0.9
Unlawful Entry	12	1.3
Receiving Stolen Property	26	2.9
Destroying Property	11	1.2
Curfew and Disorderly	11	1.2
Other	23	2.5
	859	95.0% (of 901)

The date of the interview was missing in 27.3% (246). Otherwise:

April 5	3	0.3
5	186	20.6
6	185	20.5
7	203	22.5
8	68	7.5
9-17	10	1.0
	655	72.4% (of 901)

The Agency recommended personal bond in 68.5% of the cases (617).

The conditions of release ordered were missing in 26% (234), 3.8% (34) were dismissed or passed and .6% (5) resulted in hospital confinement. In the remaining 628 cases the results were:

	No. of Cases		*Percentage*
Personal Recognizance	191		30.4
Third Party Custody	116		18.5
Personal Bond[73]	17		2.7
No Bond	2		.2
Surety Money Bond	242		38.5
Cash or Percent Money Bond (nearly all 10%)	60		9.6
	628	=	100%

Hence the overall chance of immediate automatic release (personal recognizance, third party custody and personal bond) without having to find a bondsman or post cash was 51.6%.

The judge's name was missing in 68.6% (618) of the cases, and the date of disposition was missing in 71% (640) of the cases. No breakdown by judge is given. The breakdown by date is as follows:

April 5	*No. of Cases*		*Percentage*
Personal Recognizance	24		72.7
Third Party Custody	8		24.2
Personal Bond	1		3.3
No Bond	0		0.0
Surety Bond	0		0.0
Percentage Bond	0		0.0
	33	=	100%

[73] *I.e.*, unsecured appearance bond in a specified amount.

April 6	*No. of Cases*		*Percentage*
Personal Recognizance	23		60.5
Third Party Custody	11		31.1
Personal Bond	1		2.6
No Bond	0		0.0
Surety Bond	2		5.3
Percentage Bond	1		2.6
	38	=	100%

April 7	*No. of Cases*		*Percentage*
Personal Recognizance	30		49.2
Third Party Custody	15		24.6
Personal Bond	2		3.3
No Bond	0		0.0
Surety Bond	10		16.4
Percentage Bond	4		6.6
	61	=	100%

April 8	*No. of Cases*		*Percentage*
Personal Recognizance	18		26.1
Third Party Custody	19		27.4
Personal Bond	6		8.7
No Bond	0		0.0
Surety Bond	19		27.4
Percentage Bond	7		10.1
	69	=	100%

After April 8	*No. of Cases*		*Percentage*
Personal Recognizance	17		32.7
Third Party Custody	9		17.3
Personal Bond	1		1.9
No Bond	0		0.0
Surety Bond	23		44.2
Percentage Bond	2		3.8
	52	=	100%

II. Community Ties and Verification

Of the 901 defendants, 94.1% (848) said they were D.C. residents and for 71% (640) this was verified by the Agency.

These persons said they lived with their families, or others or alone, as follows:

	No. of Cases		*Percentage*
Information Missing	41		4.6
Living with Spouse, Including Common Law	301		33.4
Living with Parent(s)	181		20.1
Living with Other Family or Relatives	154		17.1
Living with Others	101		11.2
Living Alone	123		13.7
	901	=	100%

This information was verified by the Agency for 67.5% (608).

They said that their length of residence in the District was as follows:

	No. of Cases		*Percentage*
Information Missing	12		1.3
Under 6 Months	33		3.7
Six Months–1 Year	45		5.0
One Year–2 Years	14		1.6
Two Years	24		2.7
Two Years–5 Years	110		12.2
Five Years–10 Years	122		13.5
Over 10 Years	256		28.4
Ten Years–Life	285		31.6
	901	=	100%

Length of residence was verified by the Agency in 68.7% of the cases (619).

The defendants gave the following information on employment:

	No. of Cases		*Percentage*
Information Missing	92		10.2
Unemployed	114		12.7
Under 6 Months	216		24.0
Six Months	28		3.1
Six Months–1 Year	82		9.1
One Year	49		5.4
One Year–2 Years	38		4.2
Two Years	50		5.5
Two Years–5 Years	121		13.4
Over 5 Years	111		12.3
	901	=	100%

This information was verified in 523 cases, 74.8% of those who said they were employed.

The defendants gave the following information about their prior criminal records:

	No. of Cases		*Percentage*
Information Missing	184		20.4
No Prior Record	367		40.7
Record of Petty Misdemeanors Only	260		28.9
Record of Felonies, Serious Misdemeanors	90		10.0
	901	=	100%

None of this information was verified.

III.

The court did seem to distinguish between the classic or Burglary II looter, and the armed or violent offender. Compared to an overall immediate release rate of 51.6%, the rate for Burglary II defendants was 51.5% and for weapons or violent defendants went down only a few points, to 47.7%.

Conditions of release were set in 478 cases (information missing, 174 cases; dismissed or passed, 80; hospital confinement, 5), where the charge was Burglary II. They were:

	No. of Cases	*Percentage*
Personal Recognizance	151	31.6
Third Party Custody	88	18.4
Personal Bond	8	1.7
		(51.7%)
No Bond	0	0.0
Surety Money Bond	178	37.2
Cash or Percentage Money Bond	53	11.1
	478 =	100%

In 65 cases involving weapons or violence (*e.g.*, assault) where information on conditions of release was given the results were:

	No. of Cases	*Percentage*
Personal Recognizance	19	29.2
Third Party Custody	9	13.8
Personal Bond	3	4.6
		(47.7%)
No Bond	2	3.1
Surety Money Bond	30	46.1
Cash or Percentage Money Bond	2	3.1
	65 =	100%

The Bail Agency's recommendation made a substantial difference in conditions of release, increasing the chance of immediate release from court from the overall 51.6% to 60.6% in the 452 cases where information is available and conditions of release were set.

	No. of Cases		*Percentage*
Personal Recognizance	160		35.4
Third Party Custody	102		22.6
Personal Bond	12		2.6
			(60.6%)
No Bond	0		0.0
Surety Money Bond	134		29.6
Cash or Percentage Money Bond	44		9.7
	452	=	100%

The kind of prior criminal record the defendant had had the following effects on conditions of release:

No Record

	No. of Cases		*Percentage*
Personal Recognizance	92		35.7
Third Party Custody	63		24.4
Personal Bond	6		2.3
			(62.4%)
No Bond	1		0.4
Surety Money Bond	69		26.7
Cash or Percentage Money Bond	27		10.5
	258	=	100%

Petty Misdemeanors Only

	No. of Cases		*Percentage*
Personal Recognizance	50		28.7
Third Party Custody	27		15.5
Personal Bond	6		3.5
			(47.7%)
No Bond	0		0.0
Surety Money Bond	74		42.5
Cash or Percentage Money Bond	17		9.8
	174	=	100%

Serious Crimes and Indeterminate

	No. of Cases		*Percentage*
Personal Recognizance	13		19.1
Third Party Custody	5		7.4
Personal Bond	3		4.4
			(30.9%)
No Bond	0		0.0
Surety Money Bond	39		57.4
Cash or Percentage Money Bond	8		11.8
	68	=	100%

Thus the chance of immediate release (51.6% overall) was increased to 62.4% where the defendant had no record, was reduced to 47.7% where the defendant had a record of petty misdemeanors, and to 30.9% where the defendant had a serious record.

Of the 901 interviewed defendants, 137 were characterized as "model" risks. These were persons who were recommended for release by the Agency, were District residents for one year or more, lived with spouse, parents or other family members, were employed for one year or more and had no record or a record of petty misdemeanors. For the 98 of these for whom information was available on conditions of release, the chance of immediate release was increased from 51.6% overall to 63.3%:

"Model" Risks

	No. of Cases		*Percentage*
Personal Recognizance	37		37.8
Third Party Custody	23		23.5
Personal Bond	2		2.0
			(63.3%)
No Bond	0		0.0
Surety Money Bond	24		24.5
Cash or Percentage Money Bond	12		12.2
	98	=	100%

Where there is no indication that the "model" risk was recommended for release by the Agency and where the information on community ties was not shown as verified (207 cases, compared with 137 recommended), the chance of immediate release was reduced slightly, in the 151 cases where information on conditions of release was available, to 60.9%—still substantially better than the 51.6% norm.

	No. of Cases		*Percentage*
Personal Recognizance	52		34.4
Third Party Custody	35		23.2
Personal Bond	5		3.3
			(60.9%)
No Bond	0		0.0
Surety Money Bond	44		29.1
Cash or Percentage Money Bond	15		9.9
	151	=	100%

APPENDIX C

STATISTICS FROM PRESENTMENT TRANSCRIPTS

The project ordered from the court reporters of the Court of General Sessions transcripts of presentments on April 5, 6, 7, 8 and 9 to provide the basic material for study of bail setting during the emergency. The reporters were asked to prepare transcripts of each judge's work during that period by transcribing the first 40 pages, then eliminating the next 40 pages and transcribing the third group of 40 pages, and so forth. The reporters were to eliminate other matters like appointments of counsel. We expected to obtain approximately 50% of the presentment transcripts, or about 800 out of 1,616 riot defendants who appeared in court on April 5-10, but the reporters were unable to complete the entire order.

We received transcripts of presentments of 415 persons, for 411 of whom bail was set, representing the work of 13 judges. Transcripts of hearings before two judges, described in Part II of the report, were received too late to be included in the data processing program. This figure, 411, is 31% of the total of 1,307 defendants who the records of the Court of General Sessions show had bail hearings on April 5-9.

An extensive code for the transcript material was designed by project personnel, specifying approximately 100 separate items of information. The transcripts were coded by project personnel and the completed code books were then key-punched by Control Data Corporation (CEIR) and processed to provide answers to various questions involving combination of the separate items of information. This report sets forth principal results of the data processing program.

The number of presentments coded, by date:

Date	*No. of Cases*		*Percentage*
April 5	56		13.5%
April 6	126		30.4%
April 7	171		41.2%
April 8	44		10.6%
April 9	18		4.3%
Total	415	=	100%

The number of presentments for each judge:

Judge	*No. of Cases*	*Percentage*
Halleck	60	14.5%
Edgerton	22	5.3%
Burka	10	2.4%
Hyde	56	13.5%
Pryor	14	3.4%
Korman	21	5.1%
Malloy	22	5.3%
McIntyre	15	3.6%
Beard	56	13.5%
Daly	39	9.4%
Murphy	28	6.7%
Alexander	53	12.8%
Kronheim	19	4.6%
Total	415 =	100%

The principal charges:

Charges	*No. of Cases*	*Percentage of 415*
Burglary II only	281	67.7%
Burglary II and another charge	3	0.7%
Attempted Burglary II only	8	1.9%
Petit larceny only	2	0.5%
Curfew only	20	4.8%
Gun misdemeanor only	13	3.1%
Destroying property only	5	1.2%
Grand larceny only	9	2.2%
Two charges, exclusive of Burglary II	14	3.4%

From the transcript it appears that the following were before the court in the respective number of presentments:

	No. of Cases	*Percentage of 415*
Police statement of facts	151	36.4%
Prosecution report of facts	100	24.1%

	No. of Cases	*Percentage of 415*
Lawyer's version of facts	106	25.5%
Bail Agency recommendation	123	29.6%
Prosecution bond recommendation	167	40.2%
Attorney's bond recommendation	260	62.7%
Defendant's prior criminal record	163	39.3%

In 10 cases, 2.4%, the defendant was at liberty on another pending charge or was on probation.

The presentment transcripts show the following with respect to the facts of the offenses charged:

	No. of Cases	*Percentage of 415*
Defendant was outside of store	29	7.0%
Defendant was inside or coming out of store	76	18.3%
Defendant was breaking and entering	3	.7%
Defendant had merchandise in his possession	69	16.6%
Defendant was acting with one or more others	115	27.7%
Defendant was armed	24	5.7%

There was a conflict on the record respecting the facts of the offense in 64 cases, 15.4%.

With respect to the proceedings, the presentment transcripts show the following:

	No. of Cases	*Percentage of 415*
The judge asked the U.S. Attorney for a bond recommendation	120	28.9%

	No. of Cases	*Percentage of 415*
The Assistant U.S. Attorney made a bond recommendation	161	38.8%
The Assistant U.S. Attorney argued against release	77	18.5%
The Bail Agency recommended either personal recognizance or third party custody	95	22.9%
The defense attorney requested personal recognizance or third party custody	226	54.4%
The defense attorney requested cash deposit in lieu of surety bond	60	14.5%
Defense attorney's request for cash deposit granted	29	7.0%
Defense attorney argued vigorously against money bond	129	31.1%
Defense attorney argued in perfunctory manner against money bond	175	42.2%
No defense attorney argument	111	26.7%
The court spoke to or questioned the defendant during the hearing	141	34%
Member of defendant's family willing to assume custody	129	31.1%
That person was present in court	103	24.8%
A non-family person was willing to assume third party custody	28	6.7%
That person was present in court	19	4.6%
The defendant had no criminal record	97	23.4%
No mention made of criminal record	217	52.3%
No criminal record information available	49	11.8%

The following information on community ties was available:

	No. of Cases	*Percentage*
Resident in the District more than one year	132	31.8%
No information	190	45.8%
Defendant was employed	196	46.7%
No information	175	42.2%
Defendant was married	114	27.5%
No information	267	64.3%
Defendant was living with some family member or relative in the District of Columbia	140	33.8%
No information	248	59.8%
Defendant male	370	89.2%
Defendant female	45	10.8%
Information on community ties verified	150	36.1%
Information on community ties not verified	265	63.9%

II.

The data was processed by combining different information items in order to see how various factors affected the breakdowns of conditions-of-release orders in the 415 cases.

In Table I, column A shows the breakdown of all cases. Forty-one percent of all defendants were released immediately either on personal recognizance or in third party custody. Fifty-nine percent were ordered to post either a surety or cash money bond; their release depended upon the ability to find a bondsman willing to write a surety bond, or having the necessary cash—usually 10%. (The breakdown for defendants charged only with Burglary II (281 cases) is not significantly different.) Where the individual had a gun (column B), however, conditions of release were much stricter, as they were where the defendant was acting with anyone else (column C). A Bail Agency recommendation for personal recognizance (column D) was of substantial help to the

Table I

	A.	B.	C.	D.	E.
	All Defendants (415)	Defendant Had Gun (23)	Defendant With Others (115)	Bail Agency Recommendation (95)	No Bail Agency Recommendation (314)
Surety Bonds	34.3%	59.4%	38.2%	26.5%	38.6%
Over $1,000	4.1	8.6	2.6	1.1	4.8
$1,000	20.3	29.1	24.3	19.0	23.3
$500	7.7	17.4	8.7	4.3	8.5
$300	2.2	4.3	2.6	2.1	2.0
Cash Deposit	22.5%	26.0%	45.2%	16.9%	24.8%
Over $1,000	.5	–	–	–	.6
$1,000	15.6	4.3	33.9	11.6	17.2
$500	4.3	21.7	9.6	3.2	4.8
$300	2.1	–	1.7	2.1	2.2
Personal Recognizance	20.0%	8.6%	13.1%	32.7%	16.2%
Alone	10.6	4.3	3.5	11.6	10.5
With conditions*	9.4	4.3	9.6	21.1	5.7
Third Party Custody	21.0%	4.3%	3.4%	23.2%	20.1%
Alone	6.3	–	1.7	11.6	4.8
With conditions*	14.7	4.3	1.7	11.6	15.3
Other/No Information	2.2%	.7%	.01%	.07%	.03%

*Typical conditions were observation of the curvew (3.9% of all cases), to be home by a certain time (3.9%), stay out of the area of disorder (6.7%), travel to and from work only (1.2%) or a combination of the above (10.1%).

defendant; the conditions of release were much more favorable than in cases where there was no recommendation (column E).

Whether the defense attorney made an argument, or the strength of his argument, seemed to make a significant difference only in encouraging release on third party custody; this is probably accounted for, however, rather more by the presence of a third party custodian than by the defense attorney's argument (Table II).

Table III shows the effect of other factors. The absence of a criminal record (column A) had no appreciable effect on the disposition breakdown. Women were treated far more leniently than men. Compared to a rate of immediate release at court of 41% for all defendants, women were so released in 62.3% of the 45 cases (column B). Whether or not the court was sufficiently interested in the defendant or his case to speak to or question him made a substantial difference. Immediate release was granted in 65.2% of the 141 cases where the judge spoke to the defendant (column C).

Whether or not the information on community ties was verified made a substantial difference (Table IV, column A). In the 150 cases where such information was verified, 63.4% of the defendants were released immediately. A request for money bond or no bond by the Assistant United States Attorney (column B) reduced the chance of immediate release to 21% (156 cases). The effect of the United States Attorney's recommendation was reversed, however, in the 33 cases where both the defense attorney and the Bail Agency requested release on personal recognizance or third party custody, resulting in a rate of immediate release of 48.5% (column C). Finally, where the United States Attorney's office recommended no bond or money bond, a request by the defense attorney for a cash percentage bond, in the 38 such cases, changed the ratio of cash bonds set from 47.1% to 63.1% (column D).

Perhaps the most important single factor was the presence in court of a third party willing to take custody of the defendant (Table V). Where the third party was a member of the defendant's family (103 cases), the rate of immediate release was 81.6%. Where the third party was not a member of the defendant's family (19 cases), the rate was 68.4%.

Table II

	No Defense Attorney Argument (111)	Vigorous Defense Attorney Argument (129)	Perfunctory Defense Attorney Argument (175)
Surety Bonds	36.9%	32.9%	33.1%
Over $1,000	5.4	1.6	5.1
$1,000	20.7	19.4	19.4
$500	9.9	7.0	6.9
$300	.9	4.9	1.7
Cash Deposit	17.1%	31.1%	20.1%
Over $1,000	1.8	–	–
$1,000	14.4	17.9	14.9
$500	.9	10.1	2.3
$300	–	3.1	2.9
Personal Recognizance	27.9%	27.2%	9.7%
Alone	20.7	10.1	4.6
With conditions	7.2	17.1	5.1
Third Party Custody	14.4%	9.3%	33.8%
Alone	2.7	3.9	10.3
With conditions	11.7	5.4	23.5
Other/No Information	3.7%	–	3.3%

Table III

	A.	B.		C.	
	No Criminal Record (97)	Male (370)	Female (45)	Judge Spoke to Defendant (141)	Judge Did Not Speak to Defendant (274)
Surety Bonds	29.9%	36.9%	11.1%	19.7%	42.0%
Over $1,000	–	4.1	–	2.1	5.1
$1,000	21.6	22.2	6.7	12.0	24.8
$500	4.1	8.4	2.2	3.5	9.9
$300	4.2	2.2	2.2	2.1	2.2
Cash Deposit	29.8%	23.8%	17.8%	14.1%	27.1%
Over $1,000	–	1.0	–	–	.7
$1,000	21.6	15.7	15.6	8.5	19.4
$500	8.2	4.6	2.2	2.1	5.5
$300	–	2.5	–	3.5	1.5
Personal Recognizance	20.5%	19.7%	22.3%	20.6%	19.8%
Alone	9.2	11.1	6.7	7.8	12.1
With conditions	11.3	8.6	15.6	12.8	7.7
Third Party Custody	19.5%	18.6%	40.0%	44.6%	8.8%
Alone	7.2	5.9	8.9	11.3	3.7
With conditions	12.3	12.7	31.1	33.3	5.1
Other/No Information	.3%	1.0%	8.8%	.1%	2.3%

Table IV

	A.		B.	C.	D.
	Verified (150)	Unverified (265)	U.S. Attorney Recommended No Bond or Money Bond (156)	(33)	(38)
Surety Bonds	16.8%	36.5%	30.7%	21.2%	36.8%
Over $1,000	.7	6.1	4.5	3.0	10.5
$1,000	10.7	26.1	19.8	15.2	23.7
$500	5.4	9.0	3.8	0	2.6
$300	–	3.4	2.6	3.0	0
Cash Deposit	18.7%	25.0%	47.1%	30.3%	63.1%
Over $1,000	–	.8	.6	0	2.6
$1,000	11.3	18.1	35.2	18.2	52.6
$500	4.7	4.2	8.7	9.1	5.3
$300	2.7	1.9	2.6	3.0	2.6
Personal Recognizance	20.7%	19.6%	12.2%	30.3%	0
Alone	6.0	13.2	5.8	18.2	0
With conditions	14.7	6.4	6.4	12.1	0
Third Party Custody	42.7%	8.7%	10.8%	18.2%	0
Alone	12.0	3.0	7.0	15.2	0
With conditions	30.7	5.7	3.8	3.0	0
Other/No Information	–	–	–	–	.1%

Table V

	Family Member Present (103)	Non-Family Member Present (19)
Surety Bonds	13.4%	26.4%
Over $1,000	1.0	–
$1,000	4.9	21.1
$500	3.9	–
$300	3.6	5.3
Cash Deposit	8.8%	5.3%
Over $1,000	–	–
$1,000	4.9	–
$500	3.9	5.3
$300	–	–
Personal Recognizance	8.8%	5.3%
Alone	3.9	5.3
With conditions	4.9	–
Third Party Custody	72.8%	63.1%
Alone	22.3	10.5
With conditions	50.5	52.6
Other/No Information	–	–

Table VI shows the disposition breakdown by date.

Table VI

	April 5 (56)	April 6 (126)	April 7 (171)	April 8 (44)	April 9 (18)
Surety Bonds	59.0%	35.0%	25.0%	47.7%	22.3%
Over $1,000	8.9	4.0	1.8	9.1	–
$1,000	30.4	16.7	17.9	31.8	22.3
$500	16.1	9.5	4.7	6.8	–
$300	3.6	4.8	.6	–	–
Cash Deposit	0	26.2%	22.8%	27.2%	55.6%
Over $1,000	–	1.6	–	–	–
$1,000	–	21.4	12.3	15.9	55.6
$500	–	2.4	7.0	6.8	–
$300	–	.8	3.5	4.5	–
Personal Recognizance	37.5%	30.9%	10.6%	6.8%	11.1%
Alone	17.9	22.2	1.8	2.3	11.1
With Conditions	19.6	8.7	8.8	4.5	–
Third Party Custody	3.6%	6.4%	39.2%	18.2%	11.1%
Alone	–	.8	11.1	9.1	11.1
With Conditions	3.6	5.6	28.1	9.1	–
Other/No Information	–	1.5%	2.4%	.1%	–

III.

The remaining breakdowns are intended to show the variation among the judges in conditions of release set, as that variation was affected by various factors. Since the numbers of cases are small, an attempt to show complete disposition breakdown might be misleading; therefore, in all following breakdowns figures are shown only for immediate release (personal recognizance, third party custody) and money bond (surety or cash).

Dispositions for all defendants, by judge:

Judge	*No. of Cases*	*Money Bond, %*	*Immediate Release, %*
Korman	21	9.6	90.4[1]
Alexander	53	13.1	79.3
Edgerton	22	22.6	77.3
Burka	10	30	70
McIntyre	15	33.4	60
Hyde	56	48.1	50[2]
Murphy	28	50	46.5
Kronheim	19	73.8	26.3
Beard[3]	56	73.1	25
Halleck	60	81.9	18.4
Pryor[4]	14	84.7	14.2
Daly[5]	39	92.4	7.7
Malloy	22	100%[6]	None

[1] Nearly all third party custody.

[2] This figure is perhaps misleading. Eighteen of Judge Hyde's cases were curfew cases.

[3] Probably misleading with respect to Judge Beard's strictness. Like Judge Pryor, Judge Beard favored cash deposits and third party custody.

[4] This figure is perhaps misleading with respect to Judge Pryor's strictness; all of the money bonds he set were cash bonds, none over $500; on the other hand, he released no personal recognizances. All of his immediate releases were in third party custody.

[5] 79.5% of Judge Daly's cases were $1,000, 10% cash bonds.

[6] Almost all surety bonds.

All of the judges were affected to some degree by the several factors listed in Part II as affecting disposition. The numbers of cases involved in each judge's sample are so small, however, that it seems unwise to attempt to draw any general conclusions. The

following tables, however, show how the several judges' dispositions were affected by different factors.

Where the Bail Agency recommended personal recognizance or third party custody:

Judge	*No. of Cases*	*Money Bond, %*	*Immediate Release, %*
Edgerton	11	None	100.0
Korman	7	None	100.0
Alexander	2	None	100.0
Burka	6	16.7	83.4
Beard	9	22.2	77.8
McIntyre	13	30.8	61.6
Kronheim	10	50.0	50.0
Hyde	13	61.6	38.5
Halleck	6	66.7	33.4
Daly	12	91.6	8.3
Malloy	4	100.0	None
Pryor	1	100.0	None
Murphy	1	100.0	None

Where the defense attorney requested personal recognizance or third party custody:

Judge	*No. of Cases*	*Money Bond, %*	*Immediate Release, %*
McIntyre	3	None	100.0
Edgerton	15	6.7	93.3
Korman	12	8.3	91.7
Alexander	11	27.3	72.8
Burka	6	33.3	66.7
Hyde	20	70.0	30.0
Beard	14	71.4	28.5
Halleck	25	72.0	28.0
Kronheim	5	80.0	20.0
Pryor	7	85.7	14.3
Malloy	8	100.0	None
Murphy	8	100.0	None

Where a member of the defendant's family was present to take third party custody:

Judge	*No. of Cases*	*Money Bond, %*	*Immediate Release, %*
Halleck	6	None	100.0
Korman	4	None	100.0
McIntyre	4	None	100.0
Edgerton	1	None	100.0
Burka	1	None	100.0
Alexander	37	2.7	97.3
Beard	14	14.2	85.7
Murphy	13	15.4	84.6
Kronheim	5	20.0	80.0
Pryor	3	33.3	66.6
Daly	7	57.1	42.9
Malloy	4	100.0	None
Hyde	4	100.0	None

Judges' and United States Attorneys' Recommendations

The judges asked the Assistant United States Attorney for a recommendation in 120 cases, 28.9% of the 415. Each judge asked the Assistant for a recommendation in the following percent of his cases:

Judge	*% of His Cases*
Halleck	0
Edgerton	54.5
Burka	30.0
Hyde	14.3
Pryor	21.4
Korman	14.3
Malloy	40.9
McIntyre	0
Beard	87.5
Daly	82.1
Murphy	0
Alexander	0
Kronheim	5.3

Bail Orders of Individual Judges in Cases Where the Assistant United States Attorney Recommended Money Bond

Judge	*No. of Cases*	*Money Bond, %*	*Immediate Release, %*
Halleck	–	–	–
Edgerton	15	26.7	73.3
Burka	–	–	–
Hyde	5	60.0	40.0
Pryor	10	90.0	10.0
Korman	3	33.3	66.7
Malloy	19	100.0	0
McIntyre	–	–	–
Beard	45	80.0	20.0
Daly	33	90.9	9.1
Murphy	5	80.0	20.0
Alexander	2	50.0	50.0
Kronheim	6	81.2	18.8

APPENDIX C-2

Breakdown of Conditions of Release for Night and Day, by Hand Count of Transcripts of Hearings Before 15 Judges

	Day		Night	
	No.	*%*	*No.*	*%*
Surety	36	23.5	108	42.0
Over $1,000	9	5.9	8	3.1
$1,000	15	9.8	71	27.6
$500–999	8	5.2	19	7.4
$300	3	2.0	10	3.9
$100	1	0.7	–	
Percentage	26	17.0	73	28.4
Over $1,000	1	0.7	11	4.1
$1,000	13	8.5	41	16.0
$500–999	7	4.6	20	7.8
$300	4	2.6	1	0.4
$100	1	0.7	–	
Under $100	–		–	
Personal Recognizance	25	16.3	54	21.0
Third Party Custody	66	43.1	22	8.6
Total	153	99.9	257	100.0

	Day	*Night*
Money Bond	40.5%	70.4%
Non-Financial Conditions	59.4%	29.6%

APPENDIX D

Defendants Remanded to D.C. Jail or Women's Detention Center After Hearing, April 5-10

I. Date of Remand

	No. of Persons		*Percentage*
April 5	32		7.1
April 6	111		24.8
April 7	143		31.7
April 8	91		20.4
April 9	56		12.4
April 10	16		3.5
	449	=	100%

II. Results of Cases

	No.	*% of 410*[1]	*% of 449*
Dismissed or Acquitted	158	38.5	35.2
Allowed to Forfeit Collateral (Curfew Violators)	3	0.7	0.7
Convicted	110	26.8	24.4
Pending	139	33.8	30.8
No Information	39		8.9
	449	99.8%	100%

Information on how and when riot prisoners were released is available for only 413 of the 449.

[1]Those for whom information is available; 39 persons are listed neither on the official Court of General Sessions print-out of riot-related cases nor on the grand jury lists of riot indictments.

Released, All Methods

Release Date	*Number*	*Percent of 413*
April 5	0	0.0
6	4	1.0
7	37	9.0
8	98	23.7
9	82	19.9
10	56	13.6
11	23	5.6
12	31	7.5
13	7	1.7
14	0	0.0
15	5	1.2
16	5	1.2
17	9	2.2
18	10	2.4
19	5	1.2
20 or later	41	9.9
	413 =	100%

Released by making surety bond: 97; 23.4% of 413 and 21.6% of 449:

Release Date	*Number*	*Percent of All Releases This Method*	*Percent of Entire Sample*
April 5	0	0	0.0
6	0	0	0.0
7	4	4.1	1.0
8	31	32.0	7.5
9	22	22.7	5.3
10	9	9.3	2.2
11	3	3.1	0.7
12	8	8.2	1.9
13	4	4.1	1.0
14	0	0	0.0
15	0	0	0.0
16	0	0	0.0
17	0	0	0.0
18	2	2.1	0.5
19	2	2.1	0.5
20 or later	12	12.4	2.9
Total	97	100.1	23.5

Released by posting collateral: 125; 30.2% of 413 and 27.8% of 449:

Release Date	*Number*	*Percent of All Releases This Method*	*Percent of Entire Sample*
April 5	0	0	0.0
6	3	2.4	0.7
7	28	22.4	6.8
8	38	31.2	9.4
9	13	10.4	3.1
10	13	10.4	3.1
11	8	6.4	1.9
12	8	6.4	1.9
13	2	1.6	0.5
14	0	0	0.0
15	1	0.8	0.2
16	2	1.6	0.5
17	0	0	0.0
18	0	0	0.0
19	1	0.8	0.2
20 or later	7	5.6	1.6
Total	124	100.0	29.9

Released on personal recognizance: 129; 31.2% of 413 and 28.5% of 449:

Release Date	*Number*	*Percent of All Releases This Method*	*Percent of Entire Sample*
April 5	0	0.0	0.0
6	1	0.8	0.2
7	5	3.9	1.2
8	22	17.1	5.3
9	40	31.0	9.7
10	24	18.6	5.4
11	10	7.8	2.4
12	9	7.0	2.2
13	1	0.8	0.2

Continued on page 137

Release Date	*Number*	*Percent of All Releases This Method*	*Percent of Entire Sample*
14	0	0.0	0.0
15	3	3.0	0.7
16	2	1.6	0.5
17	1	0.8	0.2
18	2	1.6	0.5
19	0	0.0	0.0
20 or later	9	7.0	2.2
Total	129	101.0	30.7

Otherwise released[2]: 63; 15.1% of 413 and 14.1% of 449.

Release Date	*Number*	*Percent of All Releases This Method*	*Percent of Entire Sample*
April 5	0	0.0	0.0
6	0	0.0	0.0
7	0	0.0	0.0
8	7	11.3	1.7
9	7	11.3	1.7
10	10	16.2	2.4
11	2	3.2	0.5
12	6	9.7	1.4
13	0	0.0	0.0
14	0	0.0	0.0
15	1	1.6	0.2
16	1	1.6	0.2
17	8	12.9	1.9
18	6	9.7	1.4
19	2	3.2	0.5
20 or later	13	20.9	3.1
Total	63	101.6	15.0

[2]In court, served sentence, case dropped, etc.

Time Spent in Jail–413 Prisoners

	No.		*% of 413*
Released on Date of commitment	64		15.5
1 day	89		21.5
2	63		15.2
3	47		11.4
4	46		11.3
5	21		5.1
6	13		3.2
7	1		0.3
8	8		1.9
9	5		1.2
10	6		1.5
11	15		3.6
12	8		1.9
13	15		3.6
14	5		1.2
15 or more	7		1.7
	413	=	100%

APPENDIX E

Individuals Arrested Twice

The Interim Report listed a total of 6,230 civil disorder arrests in the period April 4-15. A Metropolitan Police Department computer printout of an alphabetical list of persons arrested contains the individual's name, the charge, the time and date of arrest, his age, sex, race and marital status. To identify persons arrested twice, those with identical (or substantially similar) names were chosen, and the other information respecting those named compared. In view of the confusion of record keeping and the possible tendency of individuals arrested twice to give variations on their names, ages and other identifying characteristics, in preparing the first list persons with identical last and first names but different middle initials were considered to be double arrestees, as were persons with identical last names for which full names and corresponding nicknames were given. "Jr." was disregarded altogether, *i.e.*, John Smith and John Smith, Jr. were initially identified as the same person. Race and sex were not helpful; virtually all arrestees were identified as "Colored, Male." Marital status had likewise virtually to be disregarded. Age was helpful. John Smith and John Smith, Jr. both "26" were listed as a double arrestee. In considering age as an identifying characteristic, the rough rule of thumb of 10 years' difference was used. Where the ages given for individuals with the same or similar names differed by more than 10 years, they were eliminated.

Further eliminations were made of those cases where the time and date of the arrest were identical, indicating that the individual had been charged with two offenses at the same time, and where the time difference between the two arrests was so small that it was virtually certain that the individual first arrested was in custody at the time of the second arrest and that therefore the second arrest must have been of another individual. Further elimination was based upon the records of the D.C. Jail; individuals arrested and not released until after the second arrest were eliminated. Occasionally also, the date of arrest appearing in the Police Department computer printout differed from the date on the Court of General Sessions computer printout. For example, a defendant was shown on the police printout to have been ar-

rested on April 13 but the court printout shows that the charge was filed on April 7. In this case we followed the court printout.

The elimination procedure errs in favor of inclusion and when the information was ambiguous or incomplete, the person was included.

The list was broken down into four categories:

1. Those arrested twice, each time for a "U.S. offense" (a felony or a serious misdemeanor)	6
2. Those arrested first for a "U.S. offense" and second for a "D.C. offense" (curfew or disorderly conduct)	40
3. Those arrested first for a "D.C. offense" (curfew or disorderly conduct) and second for a "U.S. offense"	17
4. Those arrested twice for "D.C. offenses"	130
	193

The significance of the breakdowns is: Those arrested twice for U.S. offenses were not deterred by their first arrest from going out and becoming involved in serious criminal activity a second time. Those arrested for a D.C. offense after a U.S. offense were similarly not deterred, but at least as far as the record shows, only from a minor infraction of the public peace. Those arrested for a U.S. offense after a D.C. offense probably would not have been subject to any policy of preventive detention, since it was not thought to detain longer than overnight any persons arrested for curfew violation. Those arrested for two D.C. offenses likewise would not have been detained, as well as seeming not to demonstrate sufficient evidence of dangerousness to justify preventive detention (except where, as we will never know, the arrestee was charged with curfew violation despite more serious criminal conduct).

The breakdown by date of initial arrest:

1. Those arrested twice, each time for a "U.S. offense" (a felony or a serious misdemeanor)

April 4	0
April 5	5
April 6	1
April 7 or later	0

2. Those arrested first for a "U.S. offense" and second for a "D.C. offense" (curfew or disorderly conduct)

April 4	3
April 5	19
April 6	16
April 7	2
April 8 or later	0

3. Those arrested first for a "D.C. offense" (curfew or disorderly conduct) and second for a "U.S. offense"

April 4	1
April 5	4
April 6	4
April 7	6
April 8	2
April 9 or later	0

Totals, by day, categories 1 and 2, April 4 through 7.

April 4	3
April 5	24
April 6	17
April 7	2
	46

The bonds set on the 46 rearrestees were:

Personal recognizance	21
Bond	14
Name not on court printout	6
No information on bond	3
"No papers," immediate release	2

Those category 1 and 2 arrestees arrested, April 4 through 7, whose second arrest also occurred on April 4, 5, 6 or 7:

April 4	2
April 5	11
April 6	8
April 7	0
	21

The bonds set on the 21 rearrestees were:

Personal recognizance	9
Money Bond	7
Name not on court printout	4
No information on bond	1

The last total, 21, is the number of persons who, arrested for an offense that would have brought them before a magistrate to set bail (and hence would have been in custody under a blanket policy of preventive detention) were arrested again during the height of the disorder. Of the 21, the second arrest of 15 was for violation of curfew.

APPENDIX F

Arrests by Date and Charge

	April 4-5	*April 6*	*April 7*	*Total*
Robbery	10	1	0	11
Agg. Assault	4	4	3	11
Larceny	13	7	1	21
Other Assaults	12	1	0	13
Arson	0	3	1	4
Stolen Property	33	33	6	72
Vandalism	21	2	5	28
Weapon	19	31	24	74
Disorderly	250	159	144	553
Poss. of Impl. of Crime	3			3
Incite to Riot	0	1	0	1
Taking Property Without Right	0	1	0	1
Unlawful Entry	11	4	0	15
Burglary II	432	279	86	797
Sub-Total	808	526	270	1,604
Curfew	286	1,073	993	2,352
Total	1,094	1,599	1,263	3,956

APPENDIX G

The following tables set forth information gleaned from the records of the Court of General Sessions and of the District Court with respect to the processing and disposition of riot prosecutions. Table I records the action in the Court of General Sessions with respect to all riot offenders identified in the official court computer printout of riot cases as having been prosecuted there. The printout was run early in December and is believed to record all dispositions as of about December 1. The data is stored in the court computer on a case-by-case and not on a defendant-by-defendant basis; therefore, the cases recorded on the printout had to be compared by hand to eliminate double charges and consolidate actions on different days in the case of the same person. This tedious process was particularly important in determining what persons had felony charges reduced to a misdemeanor, either without or in exchange for a plea of guilty.

Table II summarizes the actions of the grand juries in riot cases. The United States Attorney's office furnished us with lists of all indictments handed down by the special grand jury, and gave us information about riot-related indictments handed down by the regular grand jury. The names were then compared with dispositions in the Court of General Sessions to distribute the persons indicted among the several categories in Table II. The purpose of this procedure was to attempt to trace the flow of cases from the Court of General Sessions to the United States District Court. The difficulty of attempting to trace cases through the system has already been noted[1]; the project's experience confirms this. For example, we found that, while 545 persons had been presented to the special grand jury, six of those persons had apparently been presented twice, four of them indicted twice for Burglary II and two referred back twice to the Court of General Sessions. These persons were only counted once in our computation.

A puzzling disparity is the figure of 466 defendants shown as referred to the grand jury by the records of the Court of General Sessions, while the records of the District Court show only 407 referred defendants who were presented to either the special

[1]Subin, Criminal Justice in a Metropolitan Court 157 (1966).

or regular grand jury. Another is the number of indictees whose cases are shown as pending in General Sessions on Burglary II charges (7) or on misdemeanor charges (4), or who have been sentenced on misdemeanor charges in General Sessions (2).

Table II was prepared by checking the District Court files of Burglary II indictees for disposition information, as of December 31, 1968.

Tables IV and V compare sentencing data in the two courts.

Tables VI, VII and VIII are prepared from information supplied to the project by the office of Chief Judge Curran of the United States District Court.

Tables IX and X record such information as is publicly available with respect to disposition and sentencing of defendants in two other riots, the Los Angeles (Watts) riot in August, 1965, and the major riot in Detroit in July, 1967.

Table I

Total Defendants			1,675
A. Defendants charged with felonies			970
Referred to grand jury		466	
Dismissed, no new charges[2]		371	
Reduced to misdemeanor		117	
Pleaded guilty	76		
Guilty after trial	6		
Dismissed[2]	31		
Acquitted	1		
Pending	3		
Felony still pending		16	
B. Defendants charged with Burglary II			904
Referred to grand jury		436	
Dismissed, no new charges[2]		343	
Reduced to misdemeanor		111	
Pleaded guilty	74		
Guilty after trial	5		
Dismissed[2]	28		
Acquitted	1		
Pending	3		
Burglary II still pending		14	

[2]"Dismissed" as used here includes dismissed for want of prosecution, nolle prosequi and "no papers."

Table I—Continued

C. Defendants charged only with misdemeanors			705
1. U.S. offenders[3]		167	
Pleaded guilty	51		
Guilty after trial	17		
Dismissed[2]	83		
Acquitted	4		
Pending	12		
2. D.C. offenders		538	
Guilty	211		
Dismissed[2] or acquitted	270		
Pending	57		

[3]Includes U.S. offenders also charged with D. C. offense.
[2]After plea or trial; includes forfeiture of collateral.

Table II

Grand Jury Action

Total Presented to Special Grand Jury			545
Riot Indictments, Regular Grand Jury			15
			560
Held, Waived or Certified by General Sessions			407
Indicted		371	
Indicted, Burglary II[4]	369		
Ignored		15	
Referred back to General Sessions		21	
Charges Dismissed, Nolle Prosequi or No Papers in General Sessions			73
Indicted		68	
Indicted, Burglary II[4]	61		
Ignored		2	
Referred back to General Sessions		3	
No File in General Sessions			63
Indicted		56	
Indicted, Burglary II[4]	28		
Ignored		4	
Referred back to General Sessions		3	

Table II–Continued

Charges Pending on Some Apparent Final Disposition in General Sessions		17	
Indicted		15	
Indicted, Burglary II[4]	15		
Ignored		0	
Referred		2	
Total Indicted			510
Burglary II[4]		473	
Forging and Uttering		24	
Other		13	

[4]Often with other offenses as well.

Table III

District Court Action (As of Dec. 31, 1968)

Total Defendants Indicted for Burglary II					473
A. Defendants awaiting trial				304 (63%)	
B. Defendants adjudicated				169 (37%)	
1. Indictment dismissed, or acquitted on all charges			44		
2. Guilt adjudicated			125		
a. After trial		36			
(1) Felony	24				
(2) Misdemeanor(s)	12				
b. On pleas		89			
(1) Felony	5				
(2) Misdemeanor(s)	84				
C. Individuals sentenced				93	
Awaiting sentence				(32)	
				125	

Table IV

Date of Disposition of Riot Cases

	Court of General Sessions										*U.S. District Court*	
	1.		2.		3.		4.		5.		6.	
	Felony Charges Reduced to Misdemeanors; Date of Sentence, Convictions[5]		Felony Charges Reduced to Misdemeanors; Date of Disposition, Non-Conviction		U.S. Misdemeanor Originals; Date of Sentence, Guilty Plea		U.S. Misdemeanor Originals; Date of Sentence, Convicted After Trial		D.C. Offenders Convictions; Date of Court Disposition		Burglary II Defendants; Date of Sentence	
	%		%		%		%		%		%	
April	7	8.5	9	28.1	3	5.9	1	5.9	32	32.7	0	0.0
May	8	9.8	10	31.3	14	27.5	3	17.6	33	33.7	0	0.0
June	42	51.2	4	12.5	7	13.8	2	11.8	4	4.1	0	0.0
July	12	14.6	2	6.3	15	29.4	6	35.3	13	13.3	0	0.0
August	4	4.9	6	18.8	5	9.8	1	5.9	10	10.2	4	3.2
September	3	3.7	0	0.0	1	2.0	2	11.8	3	3.0	8	6.4
October	1	1.2	0	0.0	2	3.9	1	5.9	2	2.0	33	26.4
November	1	1.2	1	3.1	0	0.0	1	5.9	1	1.0	22	17.6
December	0	0.0	0	0.0	1	2.0	0	0.0	0	0.0	26	20.8
Pending Sentence	4	4.9	–	–	3	5.9	–	–	–	–	32	25.6
Total	82	100.0	32	100.1	51	100.2	17	100.1	98	100.0	125	100.0
Pending Trial	3		–		–		12		–		44	Acquitted
Total	85		32		51		29		98[6]	211	304	Pending Trial
											473	

[5]Includes 6 guilty after trial: 1 sentenced in April, 4 in June, 1 in November.
[6]Does not include *113* collateral forfeitures.

Table V

Sentences Imposed

A. Court of General Sessions, Burglary II Defendants After Reduction; Plea of Guilty				
Total (at December 1, 1968)				76
Total sentenced			72 (100%)	
Imposition suspended and probation		14 (19%)		
Execution suspended and probation		39 (54%)		
Up to 180 days	5			
181 days – 1 year	30			
Fine and time	4			
Youth Corrections Act		1		
Work Release Act		7		
Imprisonment		10 (14%)		
30 days (+ $100 fine)	3			
90 days (+ $100 fine)	1			
180 days	4			
360 days – 1 year	2			
Pending sentence		4		
B. Court of General Sessions, Burglary II Defendants After Reduction; Plea of Not Guilty, Convicted After Trial				
Total (at December 1, 1968)				9
Total sentenced			6 (100%)	
Imposition suspended and probation		1 (17%)		
Imprisonment		5 (83%)		
30 days (+ $100)	1			
60 days	1			
360 days – 1 year	3			
Pending sentence		3		
C. Court of General Sessions, Misdemeanor Originals, Plea of Guilty				
Total (at December 1, 1968)				51
Total sentenced			51 (100%)	
Imposition suspended and probation		13 (26%)		
Execution suspended and probation		14 (28%)		
Up to 180 days	6			
181 days – 1 year	7			
Fine and time	1			
Fine only		4		
Work Release Act		4		
Imprisonment		13 (26%)		
30 days	3			
30 days ($500)	1			
31 - 60 days	2			
90 days	2			
180 days	3			
180 days ($250)	1			
360 days – 1 year	3			

Table V—Continued

D.	Court of General Sessions, Misdemeanor Originals, Pleaded Not Guilty, Convicted After Trial			
	Total (at December 1, 1968)			29
	Total sentenced		17 (100%)	
	Imposition suspended and probation	4 (25%)		
	Execution suspended and probation	5 (29%)		
	30 days (+ $100)	1		
	360 days	4		
	Youth Corrections Act	1		
	Fine only	1		
	Imprisonment	6 (35%)		
	8 days	1		
	90 days	3		
	180 days	1		
	365 days	1		
	Pending	12		
E.	District Court, Burglary II			
	Total (at December 31, 1968)			125
	Total sentenced		93 (100%)	
	Imposition suspended and probation	55 (59%)		
	Time only, suspended	50		
	Time suspended, $100 fine (probation from 6 mos. to 3 yrs.)	5		
	Execution suspended and probation	19 (20%)		
	Time only suspended (from 6 mos. to 2 yrs. minimum, to 2 yrs. to 10 yrs. maximum, probation from 1 to 3 yrs.)	14		
	Time suspended, $100 fine and/or restitution	5		
	Fine only	2		
	Imprisonment	17 (18%)		
	Up to 6 mos. minimum	10		
	6 mos. – 1 yr. minimum	6		
	20 mos. – 5 yrs.	1		

Table VI

District Court Criminal Backlog

	Total Cases	*Cases Ready For Trial*
April 1, 1967	1,243	990
April 1, 1968	1,266	703
July 1, 1968	1,351	882
October 1, 1968	1,594	1,131

Table VII

New Criminal Cases, District Court

	New Cases	*Increase over Prior Year*	*% Increase*
1964	1,172	–	–
1965	1,335	163	14%
1966	1,483	148	11%
1967	1,601	118	9%
1968	2,118	517	38%

Table VIII

Court of General Sessions Criminal Backlog
(Jury Cases)

	Total Cases
December 31, 1966	2,065
June 30, 1967	1,329
June 30, 1968	2,031

Table IX

Disposition and Sentencing, Los Angeles 1965 (Watts) Riot

Source: Bureau of Criminal Statistics, Department of Justice, State of California, *Watts Riot Arrests, Final Disposition* (1966).

Disposition	Total Prosecutions			3,089
	Felony Prosecutions		2,433	
	Burglary		2,254 (100%)	
	Dism./acq.	704 (31%)		
	Convicted	1,454 (65%)		
	Pending (6/30/66)	96 (4%)		
	Misdemeanor Prosecutions			556
	Dism./Acq.	104 (19%)		
	Convicted	452 (81%)		
Sentences	Burglary		1,454 (100%)	
	Not sentenced	12 (–1%)		
	Fine and/or jail	478 (33%)		
	Jail and probation	61 (4%)		
	Probation	879 (60%)		
	Youth Authority–CYA	19 (+1%)		
	Prison	5 (–1%)		
	Misdemeanor		452 (100%)	
	Fine and/or jail	288 (64%)		
	Probation	164 (36%)		

Superior Court Sentences

1. *Felony*			
Jail		158	
Up to 1 month	65		
1 – 3 months	46		
3 – 6 months	35		
6 – 9 months	4		
9 – 12 months	7		
No information	1		
2. *Misdemeanors*		189	
Up to 1 month	87		
1 – 3 months	77		
3 – 6 months	24		
No information	1		

Table X

Disposition and Sentencing, July, 1967, Detroit Riot

Source: Hearings, Senate Committee on Government Operations, Permanent Subcommittee on Investigations: Riots, Civil and Criminal Disorders, 1238-40, 1345-46, 1584-87 (1967-68).

Total Riot Defendants				4,260
Felonies			3,227 (100%)	
Guilty		666 (21%)		
Plea	664			
Trial	2			
Acquitted		0		
Dismissed		961 (30%)		
Pending (2/23/68)		1,600 (50%)		
Misdemeanors			1,030 (100%)	
Guilty		642 (62%)		
Acquitted		173 (17%)		
Dismissed		125 (12%)		
Pending (1/19/68)		90 (9%)		
Detroit: Total Felony Defendants (as of 4/30/68)				3,230 (100%)
Dismissed			1,198 (37%)	
Guilty			1,211 (38%)	
Plea		1,202		
Trial		9		
Not Guilty			8	
Mental Health Commitment			3	
Pending			810 (25%)	
Awaiting arraignment		3		
Awaiting trial		480		
Non-appearance		303		
Unserved warrants		24		

Sentences–666 Defendants		
Suspended Sentence		379 (55%)
Probation		151 (23%)
Fines		114 (17%)
Detroit Jail		19 (3%)
30 days	6	
60 days	3	
90 days	6	
120 days	4	
180 days	2	
1 year	1	
State Prison		3 (–1%)
1½ – 2½ years	2	
1 – 15 years (armed robbery)	1	

APPENDIX H

Interviews Conducted and Methodology

The interviews that provided much of the factual information, as well as important insights into the operations of the criminal justice system reflected in the report, fall into two categories: open-ended and unstructured interviews with policy-making officials and more highly structured interviews with lower-level personnel in the system and with persons outside the system.

I.

In the first category fall interviews with Chief John B. Layton and Inspector Aubrey C. Woodard of the Metropolitan Police Department; Honorable Charles T. Duncan, District of Columbia Corporation Counsel, Robert H. Campbell, Esq., Chief, Law Enforcement Division, and Thomas H. Johnson, Assistant Corporation Counsel; Honorable David G. Bress, United States Attorney for the District of Columbia and his principal Assistant Alfred L. Hantman, Esq.; Honorable Fred M. Vinson, Jr., then Assistant Attorney General in charge of the Criminal Division of the Department of Justice; Honorable Stephen J. Pollak, then Assistant Attorney General in charge in the Civil Rights Division of the Department of Justice; Honorable Harold H. Greene, Chief Judge of the District of Columbia Court of General Sessions; Honorable Edward M. Curran, Chief Judge of the United States District Court for the District of Columbia. The purpose of these interviews was to obtain information about policy decisions made by these officials and judges in the course of performing their duties during the emergency and its aftermath, and to provide background for the preparation of interview materials for the more extensive interview programs.

II.

We were fortunate to have, in connection with the more structured interview programs, the guidance of Dr. Sophia McDowell, Professor of Sociology at Howard University. Dr. McDowell reviewed drafts of our interview guides and schedules

and helped us sharpen our questions and define more precisely the information we were seeking. The interview programs, roughly in chronological order as conducted, were as follows:

1. *Police Officers.* From a list of curfew arrests, by officer, furnished the project by the Metropolitan Police Department, the project selected two officers in each precinct who were listed as having a great number of arrests. These names plus eight names selected by the Department furnished a list of 30 officers whom the Department contacted, requesting them to contact us to arrange an interview. Twenty-one officers were interviewed. The standard for choice, many arrests, was chosen to insure that the officers interviewed were those who had a substantial amount of time on duty during the riot and were active, particularly in making arrests; it was felt that these would be the officers who had the greatest opportunity to exercise discretion in the street. A possible bias resulting from this standard is that the officers with many arrests listed might tend to be those who were more likely to make an arrest rather than not. The limitations of time and budget that made it important to seek out those officers who might have the most to tell us seemed to us to outweigh the possibility of bias. Actually interviewed were three officers from Precinct No. 2, three from Precinct No. 6, two each from Precincts No. 1, 3, 5 and 8, one each from Precincts No. 4, 7, 10, 11, 12 and 13, and one officer from the Canine Corps.

The interviews were conducted using a uniform interview guide that focused on the areas of police instructions, understanding of police functions and criteria employed in making stops and arrests. The interviews were held in the offices of the project and were conducted by staff members of the project.

2. *Curfew Defendants.* From the list of persons arrested for curfew, furnished by the Police Department as noted in paragraph 1, 50 names were selected at random from the names of persons arrested by the officers whom we interviewed. This seemed to be as effective a random method of choosing a small number out of the approximately 4,100 curfew arrestees as any other. One project staff member conducted all the interviews and was able to complete 25 interviews, by evening and weekend visits to the addresses of the arrestees. A detailed interview schedule, with precise questions, was drafted by the project staff, and pre-tested on two curfew arrestees. After pre-test the schedule was revised and the remaining 23 interviews conducted. The interviews focused on the circumstances of the arrest, including where, when, condition of the area and number of people in the

area; the interviewee's understanding of the curfew; the conduct of the officer in making the arrest and the conduct of the interviewee when arrested; where the interviewee was taken, how long he remained in custody, and the disposition of his case; the effect of the experience on the interviewee in terms of deterrence, and, what the interviewee saw and felt about others whom he knew to have been arrested for curfew violation.

3. *Assistant Corporation Counsels.* With the permission of the Corporation Counsel, five Assistant Corporation Counsels were interviewed by two members of the project staff. The purpose of the interviews was very narrow, and focused on the question of procedures followed with respect to curfew charges against persons who may have been involved in more serious criminal conduct.

4. *Businessmen.* Twenty-five businessmen were interviewed, including four who are executives of major businesses in the District of Columbia. The remaining 21 were merchants owning or operating retail and wholesale establishments in those portions of the city most severely affected by the riots—Seventh Street and Fourteenth Street, N.W., and H Street, N.E. This latter group was selected at random, the interviewer simply walking into the establishment and asking for the privilege of an interview. A detailed interview schedule was prepared by the project staff, and pre-tested on two businessmen by the single interviewer who conducted all 25 interviews. The interviews focused on the attitude of the businessmen with respect to bail policy during the disorders, preventive detention, charging policy, sentencing policy, plea bargaining, and the need for additional judicial resources.

5. *Judges of the Court of General Sessions.* Interviews were conducted with 14 judges of the District of Columbia Court of General Sessions who presided over riot-connected offenses from the period of April 5 through April 12. Interviews were conducted using a detailed interview schedule prepared by the project staff. The schedule was tested by three members of the staff on one of the General Sessions judges, who agreed to be interviewed first and agreed to offer us suggestions about the schedule. The schedule was revised after this interview and was used in the other 13 interviews.

With only one or two exceptions, two members of the project's staff conducted each interview, one asking questions and the other taking notes. Immediately after the interview, the note taker wrote a complete report of the interview which was re-

viewed, edited and corrected as appropriate by the other interviewer.

The interviewers told each judge that they were the project staff of the District of Columbia Committee on the Administration of Justice Under Emergency Conditions appointed by Mayor Washington, Judge Bazelon, Judge Greene and the then Attorney General, Ramsey Clark. The judge was told that all comments that he would make would be kept confidential, and if referred to in our report would not mention his name. Each judge was told that our primary areas of inquiry were bail and charging policy during the riot. The interview schedule covered the following topics:

1. Assignments to the bench April 4 through 12—hours of assignment, nature and types of cases handled.
2. Judge's awareness of the emergency—sources of information, reliability of information.
3. Bail considerations during assignments.
   a. General considerations.
   b. Specific considerations—prior criminal record, community ties, conduct of arrestee, availability of third party custodians.
   c. Sources of information—the prosecutor, D.C. Bail Agency, attorneys, defendant's relatives, police, the defendant.
4. Specific influence of riot on bond decisions.
   a. Effect of situation outside
   b. Likelihood that any individual defendant would return to riot area.
   c. Dangerousness of the individual to the community or to other individuals.
   d. Nature of facts before judge.
5. Considerations in reviewing bond.
6. Suggestions on how the Bail Act should be amended to allow:
   a. Preventive detention without bond.
   b. High bond for preventive detention.
   c. Justification for preventive detention.
   d. Constituionality of preventive detention.
7. Charging policy of U.S. Attorney's office.
   a. Justification for charging Burglary II.
   b. Effect of charging on bond.
   c. Effect of charging on finding of probable cause.
   d. Effect of charging in reducing disorder.
   e. Effect of charging on ultimate disposition of the case.

f. Effect of charging on individual defendants.

g. Relationship between high charging and plea bargaining.

We recognized that bail policy of the Court of General Sessions was a sensitive issue with all of the judges. Special efforts were made by the interviewers to conduct the interviews in a non-critical and non-argumentative manner so that the judges would feel the greatest amount of freedom in giving their opinions. All the judges freely gave their opinions and cooperation in these interviews.

6. *Judges of the United States District Court.* The five judges of the United States District Court who were assigned to hear riot cases were interviewed under much the same procedure as were the judges of the Court of General Sessions. The interviews were rather more open-ended, however, and questions focused almost exclusively on charging and sentencing of riot offenders.

7. *Assistant United States Attorneys.* The project staff initially prepared an interview questionnaire that inquired both generally and specifically about the charging policy adopted by the U.S. Attorney's office very early during the riot and the role of the U.S. Attorney's office in bail setting in riot-connected cases. We had intended to interview a number of the Assistant U.S. Attorneys who had handled riot cases both in the Court of General Sessions and in the District Court.

After preparation of the interview schedule, a conference was held with two Assistant United States Attorneys, representing the United States Attorney, Mr. Bress. The interview schedule was submitted to the representatives at their request. We took the position with Mr. Bress' representatives that we would be willing to discuss any criticisms of the questionnaire which Mr. Bress or they might have, but in the last analysis it would have to be the choice of the project as to what questions would be asked of the Assistants in any interviews.

We were later informed by Mr. Bress that we would not be permitted to interview line Assistants; we were permitted to interview the United States Attorney himself, Mr. Bress, one of his principal Assistants in the Criminal Division of the Court of General Sessions, Mr. Charles Work, and the head of the special riot grand jury section of the office, Mr. Harold Sullivan. We were told that the U.S. Attorney's office had no objection to our interviewing Assistants no longer associated with the office of the

United States Attorney and three such former Assistant United States Attorneys, who participated in the handling of riot-connected cases, were interviewed.

Because of the restrictions thus imposed the interviews were of necessity rather more open-ended than we originally intended, in order to obtain as much information as possible. The Assistants and Mr. Bress were asked about bail, what standards or policies were adopted by the office, who was responsible for the adoption of those policies, what were the justifications for the policies, and finally who was responsible for carrying out the policies so adopted.

As to charging, questions were asked about the policies adopted in deciding the initial charge against an individual, why such policies were adopted by the U.S. Attorney's office, how such policies differed from normal policies, and finally, how such policies were carried out by individual Assistants. Inquiry was made into review of cases after the riot had subsided. More specifically, those interviewed were asked under what circumstances and on what grounds initial charges would be broken down, pleas be accepted, or cases would otherwise be handled.

As with the judges, interviews were conducted by at least two members of the project's staff, one asking the questions while the other took notes.

8. *Defendants Remanded to Jail Pursuant to a Bail Order.* The records of the D.C. Jail showed the addresses of only 413 out of the 449 riot-related defendants who were remanded from custody from April 5 through April 10. In extracting information from the jail records, the staff members working on this project used a standard sheet designating spaces for information on date of remand, date of release, method of release, original bond set, any later bond set, any information on case disposition, and the address of and any available personal information about the prisoner.

A detailed interview schedule was prepared by the project staff to be used in interviewing jailed defendants. Two interviewers were given copies of the project jail record sheets described above, and instructed to seek out and attempt to interview the defendants. The interview schedule focused on the defendant's experience in court, his experience in jail, how long he spent in jail, how he got out (information subject to check against the jail record sheet), employment, effect of imprisonment on employment, effect of criminal record on employment,

effect of his experience with the law on his personal life, and various questions designed to elicit information about the possible deterrent effect of the experience.

In the course of a two-week period, the time the project could devote to this effort, the two interviewers, working evenings, were able to make 84 stops. Fourteen interviews were completed. The results at the other stops, illustrating the difficulty of conducting a comprehensive interview program on a specifically limited population, is as follows: moved, 28; no answer, 23; interviewee not home, 16; interviewee not known at address, 8; interviewer could not gain access to apartment building, 4; no habitable building at address, 8; interviewee known but not a resident at address, 2; interviewee in jail, 2; otherwise unable to locate, 4; persons at address refused to admit interviewer, 3.

9. *Questionnaire for Defense Attorneys.* The first information gathering effort of the project was not an interview program, but the transmittal of a written questionnaire to defense attorneys who had represented defendants during the civil disorder period, or who had represented civil disorder defendants later. From various lists of attorneys compiled from official and non-official sources, and from names of attorneys appearing in transcripts available to the project, we were able to identify the names of 326 attorneys who appeared to have been active in riot-related cases. A detailed questionnaire was sent to each attorney. The questionnaire was in two parts, first, general information about the attorney, his law school and his experience; second, separate identical questionnaires for each case the attorney handled. Each attorney was sent three copies of the case questionnaire, since we had no information about how many cases an attorney might have handled. Where more than one attorney in the same firm or office was sent a questionnaire, the attorneys were requested to pass any extra questionnaires around to other lawyers who might need them. In a covering letter, each attorney was assured that the information gathered by the project would remain confidential, and that the portion of the questionnaire containing the attorney's name and information about him would be removed and kept separate from the individual case questionnaires. In addition, each separate case questionnaire had a separate sheet on which the name of the defendant was to appear; the attorney was assured that that sheet likewise would be removed from the case questionnaire form and the questionnaire form given a numerical designation; hence, only project staff members directly concerned with collating the information from the questionnaires would

have access to the names of the defendants or the names of the attorneys.

Responses were received from 119 attorneys. A number of them informed us that while they had spent time in the Court of General Sessions, they had been assigned no cases; many expressed annoyance at this. Forms for 157 individual cases were returned; 117 of these were of cases where the original charge was Burglary II. With very few exceptions, the lawyers responding to the questionnaire were those who could be characterized as members of the "up-town" bar, lawyers with a largely Federal government and/or local civil practice, with little experience in criminal cases. There were only a few responses from Legal Aid Agency lawyers and virtually none from Court of General Sessions "regulars." This undoubtedly accounts for the high proportion of the lawyers who expressed dismay at the confusion they found in the Court of General Sessions during the riot weekend, at the actions and expressions of some of the judges, at the judges' policy of restricted release and at the (as they characterized it) high charging practice of the United States Attorney's office.

The questionnaire was designed to elicit information about the processing of the attorney's case, the bail hearing before the initial judge, the facts of the case as known to the attorney, the results of any disposition conferences with Assistant United States Attorneys, the results of the preliminary hearing, the attorney's opinion of the actions of the court and of the United States Attorney's office, and any information about intermediate or ultimate disposition of the case.

III.

As the description of information gathering and statistical methodology in Appendices A through H shows, the limitations on the project's resources (especially in connection with interview programs), the difficulties of hand processing and correlating statistical information from the three principal sources—the Police Department, the Court of General Sessions and the United States District Court, and problems necessarily involved in some of the information gathered (such as, for example, that many of the General Sessions "regulars" have no offices and hence no address to which a questionnaire could be sent) necessarily meant that our information in some ways might be incomplete and in others might have a bias of which we were unaware. There were

two principal checks to avoid this. First, drafts of the sections of the report dealing with charging (the prosecutor's office and the District Court) and bail (the Court of General Sessions), and a complete draft of the final report, were submitted to the Advisory Group (see Acknowledgments) for comment and corrections. The Advisory Group held meetings from time to time during the course of the project. Its members included an Assistant United States Attorney who had been the Deputy Chief of the General Sessions section of the office during the disorders, an attorney from (now the head of) the Legal Aid Agency, a Georgetown University Law Center faculty member who works with the Georgetown Legal Intern Program, and other persons knowledgeable about various aspects of the administration of justice during the emergency, including lawyers who had spent a good deal of time in the Court of General Sessions during the riot weekend. The group made numerous corrections and suggestions for changes in the report.

Second, a complete draft of the report was submitted directly to Chief Judge Harold H. Greene and to the United States Attorney, Mr. David Bress, in his capacity as a member of the Committee. Comments and suggested corrections were received from both Judge Greene and Mr. Bress and corrections made to reflect factual inaccuracies pointed out by them.

The staff of the project is confident that by this method the accuracy of the facts in this report is assured. On the other hand, the evaluation, suggestions and recommendations in the report are those of the staff alone, and neither the Advisory Group, Judge Greene, Mr. Bress, or the Committee, is in any way responsible for them.

APPENDIX I

Title 22, District of Columbia Code

§ 22-401. Definition and penalty.

Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years.

§ 22-403. Malicious burning, destruction, or injury of another's movable property

Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his own, of the value of $200 or more, shall be fined not more than $5,000 or shall be imprisoned for not more than ten years, or both, and if the value of the property be less than $200 shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

§ 22-1121. Disorderly conduct—Generally.

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby—

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police; . . . shall be fined not more than $250 or imprisoned not more than ninety days, or both.

§ 22-1122. Rioting or inciting to riot—Penalties.

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than one year or a fine of not more than $1,000, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than one year or a fine of not more than $1,000, or both.

(d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than ten years or a fine of not more than $10,000, or both.

§ 22-1801. Burglary—Penalties.

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel or other watercraft, or railroad car or any yard where any lumber, coal, or other goods of chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree

shall be punished by imprisonment for not less than two years nor more than fifteen years.

§ 22-2201. Grand larceny.

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

§ 22-2202. Petit larceny—Order of Restitution.

Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in this sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

§ 22-2205. Receiving stolen goods.

Any person who shall, with intent to defraud, receive or buy anything of value which shall have been stolen or obtained by robbery, knowing or having cause to believe the same to be so stolen or so obtained by robbery, if the thing or things received or bought shall be of the value of $100 or upward, shall be imprisoned for not less than one year nor more than ten years; or if the value of the thing or things so received or bought be less than $100, shall be fined not more than $500 or imprisoned not more than one year, or both.

§ 22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person

convicted thereof shall suffer imprisonment for not less than two years nor more than fifteen years.

§ 22-3102. Unlawful entry on property.

Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court.

§ 22-3105. Placing explosives with intent to destroy or injure property.

Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding ten years.

§ 22-3601. Possession of implements of crime—Penalty.

No person shall have in his possession in the District any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement. Whoever violates this section shall be imprisoned for not more than one year and may be fined not more than $1,000, unless the violation occurs after he has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be imprisoned for not less than one nor more than ten years.

APPENDIX J

A Legal Analysis of the Judicial Policy of Restricted Release

As was noted above at p. 21, the Bail Reform Act, in force in the District of Columbia in April, provides that conditions of release may be based only upon the likelihood of the defendant to return for trial. Various arguments have been advanced in support of a legal basis, both within and without the Act, for the policy of restricted release.

1. It is argued that the reference in the Act to "the circumstances of the offense" as a factor that the court may consider in setting conditions of release provided a legal basis for the policy, allowing the judges to consider the danger to the community caused by the riot as such a "circumstance." The express words of the Act, however, are that in determining the conditions that "will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused. . . ."[1] The text of the statute is clear in making the likelihood of reappearance the only touchstone for conditions of release in non-capital cases before trial. In 18 U.S.C. § 3146, which governs "release in non-capital cases prior to trial," that is the only standard included. In 18 U.S.C. § 3148, on the other hand, which governs "release in capital cases or after conviction," the judge, in addition to considering the likelihood of conditions to "assure that the person will not flee" is expressly empowered also to consider the likelihood that he will "pose a danger to any other person or to the community."

The legislative history of the Bail Reform Act confirms that the only standard for setting bail before trial is the likelihood of the conditions to assure reappearance, and not any possibility that the accused might commit additional crimes if released.

> "This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because

[1] 18 U.S.C. § 3146 (b).

of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. *It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.*"[2] (Emphasis added.)

The House Report also points out that Section 3148 "treats those accused of capital offenses and convicted persons differently from persons accused of non-capital offenses."

The United States Court of Appeals for the District of Columbia Circuit has held:

> "The Bail Reform Act creates a strong policy in favor of release on personal recognizance, and it is *only* if 'such a release would not reasonably assure the appearance of the person as required' that other conditions of release may be imposed. Even then, the statute in 18 U.S.C. § 3146 creates a hierarchy of conditions, one of the last favored of which is a requirement of bail bond."[3] (Emphasis added.)

Another Court of Appeals has held, construing the Bail Reform Act, that "conditions of release in non-capital cases must be for the *sole* purpose of reasonably assuring the presence of the defendant at trial."[4] (Emphasis added.)

The distinction between release before conviction under Section 3146 and release after conviction under Section 3148 is pointed up by decisions on the same day by the same United States District Court in *United States* v. *Erwing*, 268 F. Supp. 877 and 268 F. Supp. 879 (D.C. Cal. 1967). The same defendant was before the court on motions relating to bail in two separate proceedings—one an appeal from a conviction of a narcotics violation, and the other pending trial on a narcotics violation committed while on bail before trial on the first conviction.

The court granted the motion of the Government to revoke bail pending appeal of the conviction, on the ground that under Section 3148 it could take into account the danger the defendant

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[2]H.R. Rep. No. 1541, 89th Cong., 2d Sess. (1966).

[3]Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968). See also United States v. Leathers, quoted and cited at p.55, *supra.*

[4]Brown v. United States, 392 F.2d 189 (5th Cir. 1968).

posed to the community, finding that as a narcotics peddler he did pose such a danger. The court, on the other hand, granted the defendant's motion to reduce bail pending trial on the second charge. It held that Section 3146 provides that "the purpose of bail in non-capital cases prior to conviction is to insure the defendant's personal appearance at court proceedings." Upon the Government's concession that there was little risk of flight by the defendant, the court held that "the only reason for the $50,000 bail in this case is to keep defendant in custody and, of course, such a purpose is improper in light of defendant's appearance record."

2. It is argued that, with or without respect to the provisions of the Bail Reform Act, a court has an inherent power, in extraordinary circumstances, to set conditions of release based upon considerations other than the risk of flight. The answer to this proposition generally is that the United States Supreme Court has construed the eighth amendment to the Constitution, which provides that "excessive bail shall not be required," as meaning that "bail at a figure higher than an amount reasonably calculated" to assure the presence of the defendant at his trial "is excessive under the Eighth Amendment." Hence "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[5] The Supreme Court based its holding upon the constitutional presumption of innocence: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"[6] and as Mr. Justice Jackson noted in a concurring opinion, the "spirit" of bail "is to enable [defendants] to stay out of jail until a trial has found them guilty."[7]

Reliance for the propriety of setting conditions of release on some basis other than likelihood of reappearance has sometimes been placed on one narrow exception to this principle. The exception is that a defendant may be remanded to custody in the course of his trial where it clearly appears that his continued freedom would impede the orderly progress of the trial. Application of this exception has been confined to cases involving conduct—

[5]Stack v. Boyle, 342 U.S. 1, 5 (1951); Corwin, ed., The Constitution of the United States of America, Analysis and Interpretation 1027-18 (1964).
[6]342 U.S. at 4.
[7]342 U.S. at 8.

usually tampering with or intimidation of witnesses—in court or out of court while the trial was in progress.[8]

The narrowness of this exception is illustrated by a unanimous *per curiam* decision of the Supreme Court, *Bitter* v. *United States*, 389 U.S. 15 (1967), in which the trial court remanded to custody a defendant who had been tardy in returning to court after a recess. The Court reversed the defendant's conviction on the basis of the certiorari papers alone. The Court held, citing *Fernandez* and *Carbo*:

> "A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial."[9]

Finally, the impropriety of using bail for any purpose other than assuring reappearance is illustrated by a District Court decision before enactment of the Bail Reform Act.[10] Bail had been set for the defendant in the amount of $50,000, conditioned upon his remaining in the Northern District of Illinois. He left the jurisdiction, flew to Los Angeles and there was arrested for larceny. The surety applied for remission of the forfeiture. The Government opposed, including as expenses incurred because of violation of the conditions the cost of investigating the Los Angeles offense. The court refused to allow this element in computing the amount to be forfeited, holding:

> "If a purpose of the clause limiting travel was to insure against future criminal conduct, it could easily have read with more clarity toward that end. More important, however, is that such a purpose would be utilizing bail for a function which, historically, it was never intended."[11]

3. It is argued that the dismissal of an action brought by American Civil Liberties Union lawyers against the judges of the

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[8]Fernandez v. United States, 81 Sup. Ct. 614 (1961) (Harlan, Circuit Justice); Carbo v. United States, 288 F.2d 282 (9th Cir. 1961), 300 F.2d 889 (9th Cir. 1962), 302 F.2d 456 (9th Cir. 1962), 82 Sup. Ct. 662 (1962) (Douglas, Circuit Justice).

[9]389 U.S. at 6.

[10]United States v. D'Argento, 227 F. Supp. 596 (N.D. Ill. 1964).

[11]227 F. Supp. at 602.

Court of General Sessions, the United States Attorney and the police and executive authorities of the District of Columbia, asking injunctive relief against the judges' denial of "release on personal recognizance in almost all cases where felony charges are involved, regardless of community ties. . . ."[12] supports the legality of the policy of restricted release and its "self-evident reasonableness . . . under the circumstances."[13] The dismissal of the action does support the reasonableness of the procedures adopted in the Court of General Sessions to insure prompt review of all bail orders. The District Court found that at the time of argument of a motion for temporary restraining order and preliminary injunction, on Monday, April 8, the judges of the Court of General Sessions "were then prepared to consider 24-hour review applications under 18 U.S.C. 3146(d) as to such persons who remained detained." The District Court's action does not, however, support the legality of the policy. The District Court, in its order filed April 19, dismissed the action "for want of equity" on the ground that the legal remedy of 24-hour review was "adequate" and hence the District Court "should not, in the present posture of this matter, interfere with the operation in due course of the judicial process of the District of Columbia Court of General Sessions."

4. It is argued, finally, that the disorders in the District of Columbia in April were in the nature of a civil insurrection justifying departure by the court from the legal norms in force in order to protect the community. The authorities, however, are not without remedy in such a situation. As Judge Greene wrote, "If the disorder becomes so widespread that normal judicial processes break down, let those who have the power to do so declare martial law."[14]

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[12]Barnett, et al. v. Greene, et al., U.S. Dist. Ct., D.C., Civil Action No. 856-68.
[13]Greene, A. Judge's View of the Riots, 35 D.C. Bar J. 24, 30 (1968).
[14]Green, A Judge's View of the Riots, 35 D.C. Bar J. 24, 30 (1968).

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