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# Municipal Courts — Another Urban Ill

Lewis R. Katz\*

*"You sit on that bench . . . and you get this terrible sense that you can't help anyone who could be helped. Sometimes you look at a young man or woman and you feel that if someone could really get hold of them maybe something good could come of their lives."*

Judge Joel L. Tyler, Manhattan Night Court, City of New York  
N. Y. Times, Aug. 25, 1968, at 26, col. 1.

THAT SAGE MR. DOOLEY was once asked what chance he thought a poor man has in court. He quipped that a poor man has the same chance that he has outside: "He has a splendid poor man's chanst."<sup>1</sup> While he might be pleasantly surprised at some of the improvements made at some judicial levels,<sup>2</sup> Mr. Dooley would still be quite accurate in his comment if he were to apply it to today's municipal courts and their handling of indigents charged with misdemeanors. He could specifically single out the municipal courts of the State of Ohio.

This study of the municipal court system in Ohio consists of a three-pronged examination of the role poverty plays in the outcome of cases involving misde-

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<sup>1</sup> F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW at XXII-XXIII (E. Bauder ed. 1963).

<sup>2</sup> In the last decade the Supreme Court has done much to expand the concept of due process for rich and poor alike when charged with felonies or other serious crimes. In these areas the Court seems well on its way toward fulfilling the ideal of equal justice for all. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (due process requires the appointment of counsel at trial for all felony defendants who are unable to retain an attorney); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendant must be provided with assistance of counsel on first appeal as a matter of right); *Coppedge*

meanors. First, proceedings before municipal courts in urban centers throughout the state were observed, and these observations were recorded. Some suburban and rural courts were also observed in order to provide information for a comparison with what was found in the urban courts. Secondly, in depth interviews were conducted with many of the state's municipal court judges, attorneys who participate in those courts, and several persons who had appeared in the courts as defendants. Finally, data was gathered on more than 1000 Cleveland Municipal Court cases involving persons charged with violations of state misdemeanor statutes during a 4-month period in 1966.

The 1034 cases examined by no means represent all the cases handled in that court during these 4 months. The study does include all the cases arising out of violations of the more serious state misdemeanors.<sup>3</sup> Excluded are those cases involving violations of city ordinances such as traffic offenses which are filed under a city ordinance rather than a state statute so that the city keeps the fine money. In addition, other charges, such as vagrancy and prostitution, have not been included because they are usually disposed

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v. United States, 369 U.S. 438 (1962) (in forma pauperis application must be granted unless appeal is clearly frivolous); Burns v. Ohio, 360 U.S. 252 (1959) (filing fee for appeal must be waived for indigent defendant); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent defendant cannot be denied free transcript or the equivalent where it is a prerequisite to appeal).

<sup>3</sup> The sample contained the following:

<i>Offense</i>	<i>Number of Cases contained in this study</i>	<i>OHIO REV. CODE ANN. (Page)</i>
Assault & Battery	619	§ 2901.25
Conversion	44	§ 2907.39
Discharge of Firearm	3	§ 3773.21
Disturbance of Peace	3	§ 2923.41
Escape from Workhouse	6	§ 2917.23
Indecent Exposure	3	§ 2905.30
Drawing Check with Intent to Fraud	4	§ 1115.23(D)
(Page Supp. 1966), <i>repealed</i> , 132 OHIO LAWS 597 (1967).		
Malicious Destruction	38	§ 2909.01
Misuse of Credit Cards	2	§ 2907.21
Obtaining Property by False Pretenses	4	§ 2911.01
Harrassment in Telephone Communications	3	§ 4931.31
Operating a Motor Vehicle Without Owner's Consent	17	§ 4931.31(D)
Petty Larceny	225	§ 2907.20
Pointing & Discharging Firearms	14	§ 3773.04
Receiving Stolen Property	4	§ 2907.30
Resisting an Officer	27	§ 2917.33
Criminal Trespass	15	§ 2907.23
Throwing at a Person	3	§ 2901.251
(Page Supp. 1966)		

of summarily by the courts on pleas of guilty, a trial being a rarity.<sup>4</sup> The year 1966 was selected because many of the more recent cases were not disposed of at the time this study was conducted. Similarly, the months of January, July, August, and October were chosen because they represent possible seasonal variations in crime and, specifically, in Cleveland included the period of the racial disorder of 1966.

The information obtained from the court record of each case included: race of the defendant; charge; whether the defendant was represented by an attorney; whether there were delays in the disposition of the case; the number of times the case was docketed; pleas; verdicts; whether there was a jury trial; whether the defendant had a criminal record; original and actual jail sentences; costs assessed; original and actual fines; probation; restitution, and name of the judge. All this data was fed into computers at the Documentation Center at Case Western Reserve University. Each factor was cross-referenced against every other one and later some were grouped together, all in an effort to determine which, if any, seemed to have an effect on a case or if any seemed to dictate the results of a case. Only a few of the items of information proved to have causal relevance to how a given case is ultimately decided. However with those few factors that *do* bear significance, it is possible to predict with a high degree of accuracy the result in any given case and whether a particular accused will have to spend time in jail. Those factors which proved meaningful on the basis of these statistics are also those which appeared important during observations of various urban municipal courts — race of the defendant, the presence or absence of an attorney, and the number of delays granted in a case. It has been assumed throughout this study that the failure of a defendant to be represented by counsel when charged with a serious misdemeanor signifies his inability to pay for legal assistance, for in the urban municipal court, legal assistance is certainly not a luxury — it is a matter of survival.<sup>5</sup>

Most Americans have contact with their government through two agencies, the Internal Revenue Service and the traffic court.

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<sup>4</sup> See generally Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956), for a thorough discussion of the types of lesser offenses generally handled summarily. The article also discusses in historical perspective the continued use of summary procedure from the 15th century to its modern day abuse. Incidents are reported where defendants have been given 1- to 2-year sentences without the right to trial by jury.

<sup>5</sup> For a discussion of the vital importance of an attorney, see notes 43, 46, and 48 *infra* & accompanying text.

This is not true for the poor. The urban poor, especially, most often meet the government in welfare agencies and the inferior courts handling misdemeanors. These courts are playing a much greater role than is generally realized in determining how this nation will meet the present urban crisis which is rooted in poverty, despair, and lawlessness.<sup>6</sup> Unfortunately, it was found that these courts, by the very way they are operated, are helping to perpetuate and further entangle us in these conflicts.

The urban municipal court system today has become the epitomizing example of a rationing of justice.<sup>7</sup> Because of the seemingly endless numbers of people who must be serviced by these courts, each defendant gets only a small portion of what should be his "day in court." Faced with burgeoning dockets, judges feel pressed for time and transmit that feeling to all parties involved. An atmosphere of haste, indifference, and hopelessness prevades the courtroom.

Apparent during almost every visit to an urban court was the fact that most of the defendants are poor and black. Conversations with judges, prosecutors, policemen, and members of various legal aid societies repeatedly substantiated impressions gained from observations that the type of defendant most often seen is the poor black who represents the disillusioned, unemployed, and dislocated persons who presently haunt this country's urban centers. Reacting out of disillusionment and dislocation, they are more likely than any other group within the same society to break its rules and, hence, appear before its courts.<sup>8</sup>

The black defendant faces an almost exclusively white establish-

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<sup>6</sup> See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 183 (1968) [hereinafter cited as KERNER REPORT]; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 29 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS]. Both of these reports record the conclusion that: "No program of crime prevention will be effective without a massive overhaul of the lower criminal courts." *Id.*

<sup>7</sup> See generally W. SHERIDAN, URBAN JUSTICE (1964); H. SUBIN, CRIMINAL JUSTICE IN A MODERN METROPOLITAN COURT (1966); Foote, *supra* note 4; Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320 (1956); also cited in TASK FORCE REPORT: THE COURTS, *supra* note 6, at 29-36. All of the above sources contain deplorable examples of the speed and lack of decorum that has been observed in municipal court procedure throughout the country.

<sup>8</sup> See KERNER REPORT, *supra* note 6, at 128-35, especially its characterization of the ghetto as an environmental "jungle." *Id.* at 130. See also Wald, *Poverty and Criminal Justice*, in TASK FORCE REPORT: THE COURTS, *supra* note 6, at 139, for a good discussion of the vicious circle encountered by the urban poor. The author concludes: "Poverty breeds crime. The poor are arrested more often, convicted more frequently, sentenced more harshly, rehabilitated less successfully than the rest of society." *Id.* at 151.

ment seemingly unconcerned with his problems.<sup>9</sup> This attitude represents the inability of successful persons to understand the least successful members of the community and the problems which have brought them before these courts. Because of enormously crowded dockets, these defendants are herded through the judicial process like cattle and are rarely even extended the courtesy of being called by their full names. "Bill" or "Joe" who isn't given an opportunity to meaningfully present his side of a controversy in a white man's court isn't going to have much respect for that court and the law it represents.

One of the most regrettable factors in the failure of the municipal court system to dispense justice lies in the personalities of many judges and prosecutors. More than at any other judicial level, the judge in the municipal criminal court is autonomous in that he is better able to set the tone of his court without any appellate authority.<sup>10</sup> In his courtroom there is rarely an attorney involved — only one in every four cases — and seldom is there a transcript kept of the proceedings. Coupled with the scarcity of appeals emerging from this court, these conditions insure that the tenor of the courtroom is almost solely determined by the judge and the influence that he is willing to exert on the other public officials who participate in the process. If the judge shows contempt for the defendants and witnesses, he encourages similar attitudes and behavior from the court's other officials.<sup>11</sup>

All of this is a far cry from the reformers' vision of Ohio's first municipal court, created in Cleveland in 1912 as a result of an exposé of the corrupt practices abounding in the justice of the peace and police courts. Its purpose was to eradicate the corruption and bring forth *efficient disposal* of judicial business.<sup>12</sup> Based on recommendations of a study to determine the probable amount of business the new court would handle, the crusader court was staffed with seven judges including a chief justice. Cleveland then had a

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<sup>9</sup> See Johnson, *The Negro and Crime*, 271 ANNALS 93-104 (1941); reprinted in THE SOCIOLOGY OF CRIME AND DELINQUENCY 145 (M. Wolfgang, L. Savitz & N. Johnson eds. 1962), where the inherent potential for discrimination in urban courts is described as follows: "When a Negroe goes into the court he goes with the consciousness that the whole courtroom is in the hands of the 'opposite race' — white judge, white jurors, white attorneys, white guards, white everything . . ." *Id.* at 148.

<sup>10</sup> In 1966, there were 108,337 actual criminal cases heard and disposed of in the Municipal Court of Cleveland, Ohio, exclusive of all traffic violations. Only 23 were appealed, resulting in one reversal. 1966 CLEVELAND MUN. CT. ANN. REP. 5-6.

<sup>11</sup> See Note, *supra* note 7, at 323.

<sup>12</sup> See FIRST ANN. REP. MUN. CT. OF CLEVELAND 15 (1912).

population of slightly more than a half million people.<sup>13</sup> Although the city since then has grown by only 300,000 persons, the Cleveland Municipal Court has now doubled in size to 14 judges. Yet the number of judges sitting on that court today could not have been arrived at as a result of a study of its probable amount of business, for the amount of business has more than doubled since 1912<sup>14</sup> and the 14 judges are not capable of handling the quantities of cases that must be acted upon by an urban municipal court. The tremendously crowded docket of the Cleveland court exists in all urban courts in Ohio.

### I. KNOWING WHAT TO DO

The defendant facing criminal charges in a municipal court will be successful if he knows what to do.<sup>15</sup> The cardinal rule is not to plead guilty to the charges, a standard applicable to any court but especially so in a municipal court with a crowded docket. The plea of guilty, which forecloses the need for presentation of evidence and fact determination, is heartily welcomed in a court that is primarily concerned with disposing of its docket. Of the 1034 cases studied in the Cleveland Municipal Court, nearly 25 percent involved pleas of guilty. In most courts with jurisdiction of serious offenses a plea of guilty would be followed by at least a perfunctory attempt by the judge to determine the facts of the case and to ascertain whether the defendant had actually committed the act and that he understood the nature of his plea.<sup>16</sup> Probably because of the quantity of cases, this is not done in today's municipal courts. A total of 247 defendants entered pleas of guilty in the Cleveland Municipal Court during the course of this study; only eight of these received

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<sup>13</sup> In 1910, the population of Cleveland was 560,663. THIRTEENTH CENSUS OF THE UNITED STATES, U.S. BUREAU OF THE CENSUS 363 (1910).

<sup>14</sup> In 1912, the Criminal Branch of the Cleveland Municipal Court disposed of 7788 cases. FIRST ANN. REP., *supra* note 12, at 53. In 1966, the Criminal Branch of the Court disposed of 280,117 cases, 153,252 of which were traffic waiver cases which were not a problem in 1912. 1966 ANN. REP., *supra* note 10, at 5.

<sup>15</sup> See D. NEWMAN, CONVICTION — THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 212-13 (1966), where the author states that:

Even where plea negotiation is a common practice it is not automatic, that is, charge and sentencing concessions are not given to a defendant unless he actually negotiates for them. This gives an advantage to the sophisticated defendant who knows of the possibility of bargaining and can carry it out. Ignorant and more naïve defendants often plead guilty to charges where minimal negotiation would have resulted in downgrading.

<sup>16</sup> Compare Thompson, *The Judge's Responsibility on a Plea of Guilty*, 62 W. VA. L. REV. 213 (1960), with Foote, *supra* note 4, and Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951).

verdicts other than guilty. The importance of a defendant's plea is further understood when one realizes that less than 50 percent of those defendants who pleaded not guilty were convicted.

TABLE 1. — *Verdict According to Plea*

PLEA —	VERDICT				
	Nolle	Dismissed	Discharged	Guilty	Not Guilty
Not Guilty (Total 559)	29	193	48	266	23
Guilty (Total 247)	1	6	1	239	0
No Contest (Total 47)	2	1	3	40	1
No Plea (Total 181)	13	151	4	13	0

One of the shibboleths of the defenders of the urban municipal court system and of the premium that those courts place on guilty pleas is that if a man acknowledges that he has wronged society then one of the aims of the penal system has been accomplished and the court can be more lenient with him.<sup>17</sup> In practice, however, it is exactly opposite. The results of this study indicate that, as a matter of course, the judges of the Cleveland Municipal Court reduced the sentences of those misdemeanants convicted of the charges contained in this study. Although 483 of the 555 defendants convicted received jail sentences, the judges suspended the greatest number of these sentences so that only 185 of the 483 actually served a part of this sentence.<sup>18</sup> One would expect that those who acknowledged their guilt by way of a plea of guilty and were subsequently convicted of those charges would benefit most from the suspension policy and not have to serve any time.<sup>19</sup> In reality, however, this is not true. A greater percentage of defendants who plead guilty and are found guilty actually serve all or a part of their sentence

<sup>17</sup> See, e.g., D. NEWMAN, *supra* note 15, at 29. It is generally agreed that the guilty plea system rests on the assumption by the defendant that he will receive greater leniency if he does not "rock the boat" and put the state to its proof. Newman indicates that most judges feel that greater leniency should be given to defendants who plead guilty because of the "saving" to the state. *Id.*

<sup>18</sup> This number does not include those who had to serve time in lieu of fine but represents only the actual jail sentence imposed by that court.

<sup>19</sup> See D. NEWMAN, *supra* note 15, at 184.



than the percentage of defendants who entered pleas other than guilty and are found guilty.<sup>20</sup>

TABLE 2. — *Jail Sentence According to Plea*

	No Time Spent in Jail	1-10 Days in Jail	11-30 Days in Jail	More Than 31 Days in Jail
Plea of Guilty and Found Guilty	146	23	55	15
Plea Other Than Guilty But Found Guilty	229	40	44	6

It is obvious that the defendant who knows to plead not guilty stands a much better chance in court than the defendant who pleads guilty to the charges. Ideally, to equalize this situation, pleas of not guilty should automatically be entered for all defendants facing criminal charges and the state should be required to prove its case. This, however, is unthinkable under the present system because the courts are now so jammed with cases that they can hardly function. One explanation for the great number of cases nolleed, discharged, and dismissed is that the state is simply unable to go to trial in all of these cases. Sadly, the heavy percentage of guilty pleas is all that enables the urban municipal court to manage its current docket.

If the state were compelled to prove each case — which is its obligation under the law — the percentage of convictions would probably become much smaller and there would be a corresponding meteoric rise in the number of cases dismissed without a guilt determination.<sup>21</sup> The goal of the system is equal justice and neither the justice nor the equality aspect should take precedence over the other. To equalize each defendant's opportunity to manipulate the system — to stall and postpone<sup>22</sup> — clearly does not seem the proper answer to the questions raised by the system's existing inadequacies. Just as the Supreme Court has acknowledged that confessions properly secured have a rightful place in criminal law,<sup>23</sup> so does the

<sup>20</sup> While 93 of the 239 defendants who pleaded guilty and were found guilty spent time in jail representing 38.92 percent, only 90 of the 319 defendants (or 28.21 percent) who entered other pleas and were found guilty had to serve all or a part of their sentences.

<sup>21</sup> See D. NEWMAN, *supra* note 15, at 67-74.

<sup>22</sup> For a discussion of stalling tactics employed by attorneys in municipal courts, see text accompanying note 43 *infra*.

<sup>23</sup> *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

guilty plea.<sup>24</sup> The admission by an individual that he has committed a wrong, however, should not be limited to those defendants who do not understand the system or are too poor to retain a lawyer.

The set-up of the Cleveland Municipal Court offers an enticement to the poor person to plead guilty. A plea of not guilty generally results in a postponement of the determination — as it should because the noisy, crowded arraignment room is not a proper atmosphere for a trial. But it is the poor person who will most likely remain in jail pending trial because releases on recognizance are almost as infrequent as not guilty verdicts. Thus, the poor person who can not raise bail is likely to plead guilty and accept the conviction rather than being placed in jail to await trial.<sup>25</sup> His inclination seems logical when it is realized that only 32.79 percent of those convicted of charges contained in this study actually had to serve a part of their sentences. Few in this society are so individualistic as to maintain their innocence in the face of a certain period of time in jail even before there is a determination of guilt, when the alternative, a confession of guilt, carries with it a better than two-to-one chance that no jail sentence will attach. The bond substitute and summons in lieu of arrest are areas which can and must be immediately pursued by urban municipal courts.<sup>26</sup>

Aside from realizing that he will have a better chance in court if he pleads not guilty to the charges confronting him, a defendant will also fare better if he knows his rights and the alternative courses of action which are at his disposal. Unfortunately, some court officials are lax in defining those rights and privileges and some neglect to do so at all.<sup>27</sup> For example, in the Cincinnati Municipal Court the judge's first duty on the morning that court was observed was to inform a group of defendants collectively of their rights and of their choice of pleas. He also told them that in certain cases

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<sup>24</sup> See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 4-13, containing several good suggestions for reducing the possibilities of abuse that are currently prevalent in the guilty plea system.

<sup>25</sup> This coercive aspect of the traditional bail system has been generally acknowledged. See generally REPORT ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 71 (1963); Rankin, *The Effects of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Wald, *supra* note 8.

<sup>26</sup> The Vera Institute's Manhattan Bail Project and similar projects instituted in many cities around the country have demonstrated the practicability of this type of reform. "[T]hese projects have produced remarkable results with vast numbers of releases, few defaulters and scarcely any commissions of crime by parolees in the interim between release and trial." D. FREED & P. WALD, *BAIL IN THE UNITED STATES*: 1964, at 62 (1964).

<sup>27</sup> See Staff Study, *Administration of Justice in the Municipal Court of Baltimore*, in TASK FORCE REPORT: THE COURTS, *supra* note 6, at 121, 124.

they had a right to trial-by-jury but did not explain what those cases were. He further stated that if they desired a jury trial they should have an attorney with them, neglecting to add whether a legal aid defender could represent them. This scant explanation of rights was accomplished in the absence of those defendants who had been unable to meet bail and had spent the previous night in jail. This group of defendants was brought individually before the court during the same morning. The brief explanation of rights was not repeated for any of them.

In contrast to the judge in Cincinnati, the judge of the Toledo Municipal Court first ordered all defendants being held in the lock-up to be brought before the court, after which he carefully explained to them the procedure of the court. They were fully informed of their rights by the judge who also spelled out the differences in the three pleas of guilty, not guilty, and no contest. The defendants were told that they had a right to a continuance if they so desired in order to obtain an attorney and were further informed of the circumstances under which they might have a jury trial. After the court session, the judge explained in an interview that the procedure which he had followed has become the general method of conduct in Toledo because judges there were fearful that they might forget such explanations if they attempted to give them to defendants on an individual basis.<sup>28</sup>

On the days in which the Cleveland Municipal Court was observed, persons in the courtroom were given no explanation of their rights and no explanation of the procedure in that court other than being told that they might ask for a continuance and that there were three pleas available to them. Those defendants waiting in the lock-up were not given that much unless they hesitated before the judge when asked to enter a plea. If a defendant did hesitate, he was quickly told by the judge that the pleas were guilty, not guilty, or no contest, and that he could ask for a postponement to consult an attorney. At no time, however, was anyone given an explanation of the meaning and consequences of any of the various pleas. Those pleading not guilty were assigned a trial date. Those who had not raised bail, were sent back to jail to await trial. Cleveland, like most other cities in the state, does not have a formal

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<sup>28</sup> Recently, the Toledo Municipal Court was reversed for failure to inform a defendant charged with a misdemeanor of his right to have a continuance to retain counsel. *Frazier v. City of Toledo*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967). OHIO REV. CODE ANN. § 2937.02 (Page Supp. 1966), expressly requires that every accused be informed of his right to a continuance.

release in lieu of bail system for misdemeanants, even though the Cuyahoga County Common Pleas Court operates under a system based upon the Vera Foundation standards for the release of alleged felons.<sup>29</sup> Because judges do not have much time to spend on each case and because there is no adequate staff to check into the background and qualifications of these defendants, release on recognizance in lieu of bail is a rarity. Those defendants who have any familiarity with the system must be aware that if they cannot raise bail, their only chance for release on the day after arrest when they appear in court is to waive trial and plead guilty or no contest.<sup>30</sup>

At the beginning of a session of the Columbus Municipal Court, the judge explained to all assembled their constitutional rights. But the defendants in jail at the time were not brought into the courtroom then, nor were they informed of their rights later when they individually appeared before the court. The only semblance of an explanation was a card posted on the walls of the bullpen which outlined the rights. In Columbus the docket sheet used for each case contains a statement of the defendant's rights which the judge must sign. His signature on the docket is *prima facie* evidence that the accused was accorded the required explanation of rights. The docket sheet is always signed, even when the rights are not explained. One judge acknowledged that this practice is in itself illustrative of the entire process which operates to deprive the poor of their rights.

Another factor in Columbus which contributes to the defendant's deprivation of rights is that the legal aid defender in the municipal court becomes involved only when appointed by the judge or his assistance is expressly requested by the accused. Some judges never appoint the defender at all for persons charged with misdemeanors, and, as one attorney pointed out, a defendant really has to "know the ropes" to realize that he may have the defender's assistance if he requests it. Similarly, although many judges asserted that upon request they would grant releases on recognizance to persons charged with misdemeanors, such releases are rare. Again, the scarcity of releases is attributable to the simple fact that the judge does not

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<sup>29</sup> See note 26 *supra*. In Cleveland, as elsewhere, a personal interview is conducted and a questionnaire answered and verified to determine if the defendant meets the standard for release on personal recognizance. To be recommended for release a defendant needs: (1) a Cuyahoga County address where he can be reached; and (2) a total of five points from questions asked in the following categories: (a) prior record, (b) family ties in Cuyahoga County, (c) employment, (d) period of time located at residence.

<sup>30</sup> See note 25 *supra* & accompanying text.

inform the accused of the possibility of release and thus few first-offenders are aware of it.

At the entrance door to the Hamilton Municipal Courtroom is a box containing four-page pamphlets entitled "Your Bill of Rights in the Municipal Court, City of Hamilton, Butler County, Ohio, and Summary of Rules of Procedure." This commendable brochure was prepared and furnished by Judge Robert L. Marrs, who states in the preamble that the pamphlet is intended to serve as an introduction to the Municipal Court for individuals who are visiting or appearing in court for the first time.

Under the title "Your Rights as a Defendant" is an explanation of the right to counsel, trial by jury, the right of the defendant to know the charge against him and the name of his accuser, his rights at trial, and his right to an appeal. Under the statement concerning the right to counsel is a discussion of the procedure for securing an attorney and an explanation of the procedures and pleas utilized in the court. Also explained are the nature and ramifications of not only the three common pleas but also the "once in jeopardy" plea, including information on when it may be used. The booklet further states, "If you have any questions concerning your rights, do not hesitate to ask the court for advice and assistance. The court cannot read your mind and it is only by asking that you can receive help." A copy of this statement is also posted permanently on the entrance door.

The defendant's confusion resulting from not having his rights fully explained to him is likely to be compounded by the "circus" atmosphere that exists in some courts.<sup>31</sup> The chaotic conditions of the Cleveland municipal courtrooms on days they were observed serve as prime examples. Attorneys wandering in and out of the courtrooms and conversing quite vocally with each other were responsible for their share of the din and disruption of court proceedings. Occasionally a bailiff would shout across the room in greeting to a friend or other official.<sup>32</sup> In the last analysis, however, the real blame for disorderly courts rests with the judges.<sup>33</sup>

In the Cleveland Municipal Court a middle-age man was appearing before a judge on a charge of disturbing the peace. The com-

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<sup>31</sup> For a good example of such a circus, see Dash, *supra* note 16, at 386-87.

<sup>32</sup> See *id.* at 388-89, for a rather shocking report of conduct by bailiffs in the Chicago Municipal Courts which tends to give the impression that they dominate the proceedings.

<sup>33</sup> Cf. Reardon, *The Fair Trial — Free Press Standards*, 54 A.B.A.J. 343, 347-51 (1968).

plaint had been lodged by several of his female neighbors. Each woman was given the opportunity to tell her side of the controversy, a saga which included the defendant's barking dog, a backyard in a state of disorder, and finally — the incident that resulted in the court appearance — a phonograph that had been played all night long. Although the present charge was limited to the latter complaint, the judge permitted the women to discuss at length their previous complaints. While this case was being heard, a group of children on a class trip entered the courtroom. It was then that one of the woman complainants told her audience that the defendant "needed help," indicating what kind of help by pointing her finger to her forehead. This gesture proved hilarious to the audience and especially to the children. The judge eventually interceded to remind the woman to make all comments to the bench. The laughter had barely subsided when a local television news reporter strolled into the courtroom and stopped to pat the defendant on the back in greeting. The defendant interrupted his commentary to the judge in order to respond to the reporter who eventually perched himself behind the judge's bailiff. The reporter then gathered under his arm one of the young secretaries who had spent much of the morning in the courtroom. From his position to the immediate right of the judge, the reporter and his friend joked in tones heard all around the room. The judge said nothing. Meanwhile, the defendant pleaded no contest to the charge. However, upon being informed by the judge that such a plea required a trial, the defendant changed his plea to guilty. No effort was made to convince the defendant to have a trial. At this point the judge, apparently deciding that both sides of the controversy were hopelessly muddled and confused, referred the entire case to the Probation Department without making a finding.<sup>34</sup>

It was possible to find one courtroom, however, where interest and decorum ruled. In Hamilton, police officers and a group of defendants, mostly black, faced each other over charges stemming from a recent racial disorder. The police officers were instructed by the judge to refer to a defendant as either "Mr." or "The defendant." He, too, properly addressed the defendants and often interrupted witnesses when their testimony consisted of hearsay. The judge was notably firm with any attempts by the police officers to

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<sup>34</sup> Similar lack of control over the proceedings was observed in other cities. In Youngstown, a municipal court judge distinguished himself by barely paying attention to testimony. At one point he interrupted an attorney to discuss social arrangements for the evening with another person in the courtroom.

introduce information irrelevant to the case at hand. This courtroom was the only municipal court in the state that was observed to display a concern for rules of evidence.

At the other extreme was the Cincinnati Municipal Court where at no time was any defendant told anything about burden of proof or his right to remain silent. Here the prosecutor goaded the defendants when they stepped into the dock to give testimony and told defendants and witnesses who spoke out of turn to "shut up." One judge limited his remarks to announcing his verdict, the sentence and fine. The following morning another judge presided and dispensed with any modicum of dignity that may have existed within the courtroom the previous day. This judge seemed to encourage the prosecutor to hurl insults and jokes at the expense of defendants and witnesses. He repeatedly interrupted persons testifying and called many defendants "bums" and "liars." Even worse, he frequently stopped a defendant early in a testimony to announce, "I don't care what you have to say. I'm not going to believe you anyway."

The ways in which pleas were obtained also left much to be desired. In Cincinnati if a defendant hesitated when asked to enter a plea, the prosecutor quite often suggested, "let's make it no contest for now," or "let's try no contest." The judge made no attempt to explain the pleas. Both the judge and prosecutor unquestionably increased the speed with which they were disposing of cases as noontime approached, and the prosecutor suggested to many prosecuting witnesses that they forget about the matter and drop the charges. The highpoint of their morning came when a black couple living under a common law arrangement appeared before the court on the woman's affidavit charging her common law husband with assault. After the prosecutor ascertained the relationship between the parties, the judge took over the questioning, apparently finding great amusement in the couple's relationship and their inability to coexist. No finding was made on the defendant's plea of not guilty — at least no finding was announced — but the judge ordered the defendant to pay the hospital bill (even though the defendant had denied striking the woman) "so that the people of Cincinnati don't have to."

This is the face of justice at the lower judicial levels in urban America. While it is true that nothing really comparable to the scenes in the Cincinnati courtroom was witnessed in any of the

other courtrooms in Ohio, in too many respects Cincinnati epitomizes the problems which exist in varying degrees in all large cities.

In summation, then, the defendant who knows his rights, knows how to plead, and knows how to conduct himself in court — even when that court may be carnival-like — stands a better chance of obtaining justice. Chances are that that defendant is the one who is represented by an attorney.

## II. THE ROLE OF THE ATTORNEY IN MUNICIPAL COURTS

One immediate benefit discernible to defendants represented by counsel in the municipal courts is the dispatch with which their cases are handled.<sup>35</sup> In courtroom after courtroom, the defendant with an attorney is heard first and does not face missing a half or full day's work, a factor quite important to the majority of defendants and witnesses. Moreover, one might surmise that missing a day of work may be even more important to the defendant who does not have the funds to secure a lawyer for he, most probably, can less afford any engagement which results in a loss of pay.<sup>36</sup>

On the basis of actual courtroom observations and personal interviews with practicing attorneys, it is apparent that the unrepresented defendant appearing in municipal court is accorded an inferior brand of justice. When an unrepresented defendant fails to make a court appearance, judges invariably issue a bench warrant for his arrest, something which does not happen to the defendant with counsel. When a represented defendant fails to appear on time, his attorney usually asks the court to call the case again in a short time; if the defendant still does not appear, the lawyer is quite often able to obtain a continuance of the case.

In general, judges, prosecutors, and police officers are more polite to and seem to lend more credence to the person with a law-

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<sup>35</sup> Another technique that produces discernible benefits to defendants represented by counsel, but must evoke less favorable reactions in those unrepresented and waiting to be called, is "the steady flow of lawyers into the judge's office immediately before opening court." Note, *supra* note 7, at 327-28.

<sup>36</sup> There is, of course, another side to this argument. If attorneys were forced to wait all morning in court for their cases to be called, their fees would probably skyrocket and make legal assistance prohibitively expensive for even a greater segment of the population. In addition, there is a good chance that an attorney may have to appear in more than one courtroom during the course of a morning, and having to wait in one would delay the orderly transaction of business in the other. One solution presently being used in some localities is to instruct defendants to come at different hours of the day, rather than ordering everyone to appear in court at 9:00 A.M. Delays would still occur with staggered trial times, but with less inconvenience.



yer.<sup>37</sup> Cincinnati attorneys, among others, stated that the rules of evidence are not followed — or not followed as well — in cases involving a defendant without an attorney.<sup>38</sup> The court, they contend, also tolerates admissions of irrelevant statements when counsel is not present. They attribute this to the fact that a judge works daily with police officers and the prosecutor and is understandably eager to maintain good relations with them, thereby tending to give them greater leeway when there is no attorney present to represent the defendant.<sup>39</sup>

Almost without exception the represented defendant has the facts of his case presented more articulately and convincingly.<sup>40</sup> Also, of course, attorneys know the law and have been professionally trained to introduce relevant information which can help their client's case.<sup>41</sup> During one court session, a judge dealt leniently

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<sup>37</sup> Characteristic of the short shrift given defendants without attorneys in the Cleveland Municipal Court was the treatment accorded an unrepresented defendant who pleaded not guilty to a charge of assault and battery on his wife. The practice in the Cleveland court is to set cases in which not guilty pleas are entered for trial on another date and in a courtroom less hectic than the atmosphere existing in the arraignment room. Not guilty pleas from unrepresented defendants are such a rarity, however, that this one was entirely overlooked. The judge listened while a short argument transpired between the defendant and the complaining witness. The judge then lectured the defendant's wife, explaining that the criminal court could not be used as a domestic court and that he would not order the defendant to remain out of her house. None of the participants was sworn during this entire proceeding, and at the end of the argument the judge passed sentence on the defendant, just as he did in all cases where the defendants pleaded guilty or no contest. Without making a verbalized finding of guilt, the judge sentenced the defendant to 3 days in jail.

<sup>38</sup> All rules were ignored in the Columbus Municipal Court when a black defendant who pleaded not guilty to a charge of petty larceny was convicted and sentenced to 30 days in the workhouse and fined \$25. The guilt determination was made on the testimony of two clerks from a local supermarket who testified without ever having been sworn. The defendant was not asked if he had any questions to put before the clerks nor was he asked whether he wished to make a statement or introduce any evidence on his behalf. When the two clerks completed telling their story, the judge found the defendant guilty and sentenced him.

<sup>39</sup> For examples of judicial placation of the police, see Note, *supra* note 7, at 348.

<sup>40</sup> One of the directors of the Legal Aid Society in Cincinnati stated that it was his belief that there are no differences in the sentences handed out to represented and unrepresented defendants, and that therefore a person charged with a misdemeanor has no real need for an attorney. He did state, however, that a defendant with an attorney has an advantage in that the facts of his cases are generally presented in better form by an attorney.

<sup>41</sup> The quality of the lawyers whose practice is centered in the urban municipal court is seldom praised, but as one report concludes:

Attorneys operating regularly in these courts rarely appear in other courts. Often they seem to be more concerned with extracting a fee from their clients than defending them. They operate on a mass production basis, relying on the plea of guilty to dispose of cases quickly. Frequently these lawyers are unprepared . . . [and] make little effort aside from the plea bargaining session to protect their interests or to secure a favorable disposition. For all

with a defendant facing driving-while-intoxicated charges after the defendant's attorney filed a motion to mitigate based on his client's family and job. Even though the defendant had already been sentenced to the workhouse on a plea of guilty, the judge modified the sentence allowing the defendant to serve his time on weekends so as not to affect his employment. The defendant who appears unrepresented probably would not know to inform the court of such mitigating circumstances.

One complaint frequently voiced by the police in criticism of lawyers is that attorneys manage to postpone a case time and time again until witnesses fail to appear or until the arresting officer fails to show up. Statistically the participation of an attorney does substantially increase the length of time required to dispose of a case, and similarly, adds to the number of scheduled hearings.<sup>42</sup> It was found that of the 1034 cases studied in the Cleveland Municipal Court, only 264 defendants were represented by counsel — scarcely more than one out of every four cases, or 25.58 percent. In cases involving an unrepresented defendant, 63.7 percent were disposed of immediately and 84.59 percent of all cases involving unrepresented defendants were concluded within 1 month. Of the cases involving a defendant with an attorney, only 7.95 percent were disposed of immediately, with little more than one-third, or 34.47 percent, of the total being concluded within a month. Furthermore, only 1.82 percent of those cases not involving an attorney extended beyond 3 months, while 13.67 percent of cases where the defendant had counsel lasted more than 3 months. Similar results are also obtained when the number of scheduled hearings in cases involving a lawyer is compared with the number of hearings scheduled for unrepresented defendants. Nine times as many unrepresented defendants (64.23 percent) have their cases handled within one court appearance than do defendants with attorneys, of whom only 7.95 percent have their cases completed within one court appearance. The figure for those defendants requiring three or more scheduled appearances is 4.83 percent for those without attorneys and 33.71 percent for those who are represented. From these statistical find-

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the shortcomings of these attorneys who regularly operate in the lower courts, however, probably most defendants are better off with them than without any lawyer at all. TASK FORCE REPORT: THE COURTS, *supra* note 6, at 32.

<sup>42</sup> For discussion of large disparities uncovered in the treatment of represented and unrepresented defendants facing driving-while-intoxicated charges in Cleveland, see note 48 *infra*.

ings, it is clear that the complaints of the police with respect to delays occasioned by the presence of an attorney are not unfounded.<sup>43</sup>

Since the cardinal rule is to plead not guilty to charges in municipal court, one would expect to find the unrepresented, and therefore uninformed, defendant violating this rule more frequently than defendants with attorneys. This expectation is indeed borne out by this statistical study — whereas only 4.5 percent of the defendants with attorneys pleaded guilty, 25 percent of the total cases studied involves pleas of guilty. Moreover, of the total 247 defendants who did plead guilty, only eight received verdicts other than guilty, and all eight were represented by counsel.

The importance of having an attorney and knowing what to do is best illustrated by looking at the conviction rate. Charges were brought against 1034 defendants which resulted in 558 convictions, producing an overall conviction rate of 53.9 percent. Guilty verdicts were returned in 30.85 percent of the cases where the defendant entered a plea other than guilty and the remainder of the number found guilty, 23.12 percent, was based upon verdicts entered on pleas of guilty. Ninety-four of the defendants represented by counsel were convicted, a percentage of 35.6 percent, while 60.26 percent of the unrepresented defendants were convicted. The extraordinary disparity between the two percentages is accounted for by the great number of guilty pleas entered by those defendants who do not have the assistance of counsel. When the verdicts in those cases are taken out, the percentage of guilty verdicts for the unrepresented defendants who entered pleas other than guilty is 42.8 percent, still higher than the percentage of guilty verdicts for defendants with attorneys but nonetheless more in line. The key to suc-

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<sup>43</sup> The success of the techniques employed by a defense lawyer in aid of his client's cause is grounded on his ability to circumvent the normal flow of judicial business by delay. A defense lawyer from the Detroit metropolitan court system has outlined several methods commonly used to control the timing in a case: (1) Adjournments, or continuances as they are called in Ohio, are used to stall, or to avoid unfavorable judges. (2) Reassignment or steering to a particular judge is practiced by attorneys through contact with clerks and bailiffs for disposition before a favorable judge, that is, one whose past record indicates leniency in sentencing and liberal use of probation. (3) Pleading not guilty before a severe judge to get bound over to a sympathetic one is used either in combination with (1) and (2) above or when (1) and (2) are not likely to achieve the desired results. D. NEWMAN, *supra* note 15, at 210-11. Obviously, any of these techniques either used alone or in combination will prolong the final disposition of a case. Other techniques are not uncommon. One such technique, used when the arresting officer is the prosecution's only witness, is to obtain continuances until the arresting officer must take his turn on the night shift. In such a situation he is less likely to appear in court in the morning. It has also been reported that attorneys sometimes utilize the continuance for the purpose of exerting pressure for payment of legal fees. Note, *supra* note 7, at 343.

cess, then, in the municipal court is to know what to plead, and the defendants who do not have attorneys are generally uninitiated into the process and lack the requisite knowledge.

Although 53.97 percent of the cases resulted in guilty verdicts, it should not be assumed that the remainder of the defendants were found not guilty. The not guilty verdict is a rarity in urban municipal courts, and in no court observed during the course of this study was such a verdict returned in any case. Of the 1034 cases included in the statistical survey, there were only 80 (7.74 percent) not guilty verdicts and discharges on merits. Thirty-nine of the defendants were represented by counsel and 41 were unrepresented. The remainder of the cases were disposed of without a determination of guilt on the merits.

The two entries used to indicate a disposal other than on the merits are *nolle prosequi* and dismissal. One clerk in the municipal court indicated that there is a distinction between the two dispositions: a *nolle* is initiated by the prosecutor and requires the consent of the judge, while a dismissal is entered by the court when there is a deficiency in the evidence or the state fails to come forward to prosecute the case. Most attorneys contend that the two are used interchangeably without any distinction intended. However, a nolle charge, which may be reinstituted, hangs over the defendant's head. Almost four out of every 10 cases filed in the municipal court are nolle or dismissed (395 out of 1034, or 39.17 percent). Charges are dropped by *nolle* or dismissed when there is insufficient evidence to proceed with the case, the prosecuting witness has had a change of heart, the arresting officer is unavailable, or for any other reason the prosecution or the court decides that it does not wish to proceed with the case.<sup>44</sup> Here again the presence of an attorney is well worth the fee, for the person whose case is disposed of by dismissal or *nolle* has no criminal record and is not subject to fine or imprisonment. Nearly half of the cases involving an attorney were disposed of in this manner. One hundred thirty-one, or 49.62 percent, of all the cases in which the defendants were represented by counsel resulted in nolle or dismissals.<sup>45</sup> On the other hand, only 34.28 percent of the cases involving unrepresented

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<sup>44</sup> One reason that so many cases are dismissed is the failure of the police to exercise discretion when making the decision to arrest someone, or the use of arrest for purposes other than prosecution. See, W. LAFAYE, *ARREST — THE DECISION TO TAKE SUSPECT INTO CUSTODY* 437-49 (1965).

<sup>45</sup> Defense attorneys who "know the ropes" and are aware of the high number of cases that are handled in this manner may be justified in employing some of the techniques mentioned in note 43 *supra* and D. NEWMAN, cited therein.

defendants were nolleed or dismissed. The percentages are almost reversed when it comes to guilty verdicts: 35.61 percent of the defendants with attorneys were found guilty, while 60.26 percent of the defendants without attorneys were convicted. Again, these discrepancies are attributable to the great number of unrepresented defendants who plead guilty.

TABLE 3.

*Comparison of Verdicts — Defendants With and Without Attorney*

## Defendants With Attorneys — 264

## Verdicts

Guilty .....	94	35.61%
Not Guilty plus Discharged .....	39	14.77%
Disposed without a determination of the merits .....	131	49.62%
[Nolle prosequi     25]		
[Dismissed         106]		
	<hr/>	<hr/>
	264	100.00%

## Defendants Without Attorneys — 770

## Verdicts

Guilty .....	464	60.26%
Not Guilty plus Discharged .....	41	5.32%
Disposed without a determination of the merits .....	264	34.29%
[Nolle prosequi     20]		
[Dismissed         244]		
No record of disposition .....	1	0.13%
	<hr/>	<hr/>
	770	100.00%

The importance of an attorney representing a defendant as a factor in determining whether that defendant must serve part of the jail sentence is apparent from the statistics, though not as obvious as the role of the attorney in determination of the verdict. As previously indicated, judges regularly dispense jail sentences as part of the punishment for a convicted misdemeanor. It was found that 87.24 percent of the convicted defendants with attorneys and 86.42 percent of the convicted defendants without attorneys were ordered to jail as part of the original sentence. However, less than one out of four (22.34 percent) convicted defendants with an attorney actually had to spend time in jail, while one out of three (33.71 percent) of the convicted defendants without the assistance of counsel were actually remanded to jail. Disregarding the conviction figure for the moment, of all defendants appearing with-

in the municipal court in the purview of this study, only 7.95 percent of those with attorneys actually had to spend time in jail, while 21.17 percent of those without attorneys were eventually incarcerated.

TABLE 4.

*Original and Actual Jail Sentences — Defendants With and Without Attorney*

Defendants With Attorney (264)			
Found Guilty and Receiving			
Jail Sentence -----	82 out of	94	(87.24%)
Found Guilty and Actually			
Serving Time in Jail -----	21 out of	94	(22.34%)
Total Defendants with Attorney			
Actually Serving Time in Jail	21 out of	264	( 7.95%)
Defendants Without Attorney (770)			
Found Guilty and Receiving			
Jail Sentence -----	401 out of	464	(86.42%)
Found Guilty and Actually			
Serving Time in Jail -----	163 out of	464	(33.71%)
Total Defendants without Attorney			
Actually Serving Time in Jail	163 out of	770	(21.17%)
Total Defendants without			
Attorney — No Indication ---	4 out of	770	( 0.52%)

The disparity in jail sentences did not carry over into fines. Identical percentages were obtained for convicted defendants with attorneys and convicted defendants without attorneys who actually had to pay fines. Fifty-four percent of the guilty defendants in each classification had to pay fines as a part of their sentence. When the conviction figure is disregarded, only 19.3 percent of all defendants with attorneys paid fines while 32.6 percent of all unrepresented defendants paid fines. Of course, this discrepancy is attributable to the disparity in the percentages of each who are convicted, a figure which is largely based upon the great percentage of unrepresented defendants who plead guilty.

A recurring theme in almost all discussions with practicing attorneys and judges in Cleveland and the rest of the state was that convicted defendants who are represented by attorneys receive much lighter sentences and fines than those not represented.<sup>46</sup> Sev-

<sup>46</sup> Some attorneys go so far as to claim that even though the defendant has to pay the attorney's fee, his costs of litigation will be less than for the unrepresented defendant who has only the fine to pay. Another practice which has been less publicized surrounds the *ex parte* motion. In some courtrooms where there is no overt distinction between penalties given to defendants with or without attorneys, judges are willing to

eral judges volunteered that they did hand out lighter sentences and fines to defendants with attorneys because they are aware that the defendant has already committed himself to pay a substantial fee to the attorney, a fact which they felt should be taken into consideration in assessing the fine. These judges explained this practice as a carry over from their days as practicing attorneys and their realization of the difficulties encountered by an attorney attempting to make a substantial living while concentrating his practice in the municipal court. Several of these judges stated further that they rarely make a defendant with an attorney actually serve any days in jail. This statement was corroborated by most of the attorneys who discussed the matter and many indicated that they have no reluctance in telling a prospective client that if he retains the attorney, he will not have to go to jail even if convicted.<sup>47</sup> While a greater percentage of unrepresented defendants who are convicted do actually go to jail, this statistical survey of the Cleveland Municipal Court did not disclose as great a disparity as attorneys would have one believe.<sup>48</sup>

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entertain *ex parte* motions in mitigation in their chambers and are often willing to reduce the sentence at that time. One attorney reported a case in which the defendant's family was able to scrape enough money together to retain him, but only after the defendant had been convicted and sentenced to the workhouse for several months. The attorney filed an *ex parte* motion in mitigation several days after the defendant had begun to serve the sentence. The motion was granted and the balance of the sentence suspended.

<sup>47</sup> It is interesting to note that this self-laudation, as described above, and other more direct forms of solicitation that take place right in the courtroom, are probably violative of Canons 27 and 28 of the A.B.A. Canons of Professional Ethics. See, e.g., Dash, *supra* note 16, at 387, for an eyewitness account of direct solicitation of clients in front of a judge. Even more interesting is the fact that seldom, if ever, are charges brought against this practice by the bar associations. It would seem that the organized bar is not too concerned with the "ethics" or rather the competitive aspects of the profession at the municipal criminal court level. At any rate, this study seems to indicate that they may also be guilty of misrepresentation in their advertising!

<sup>48</sup> The disparity in disposition and sentencing appears most noticeably in the drunken driving cases. A common complaint of police officers in Cleveland is that the represented defendant who is charged with drunken driving will not be convicted of that offense, but will be permitted to plead guilty to a lesser offense — usually loss of physical control or reckless driving. The police charge that if an attorney is unable to arrange a satisfactory deal, attorneys stall the case and are permitted to do so by the judge until the prosecutor is willing to reduce the charge. On the other hand, the defendant who appears without an attorney receives the full measure of the law which includes a mandatory jail sentence, suspension of driver's license privileges, and the subsequent cost of high-risk insurance.

The charge of driving-while-intoxicated is also said to be the area in which the lawyers known as "fixers" operate. They have easy access to the jail, are informed by some policemen as to which of the persons being held in the lock-up had a substantial amount of money in their pockets when arrested. They also have constant dealings with the prosecutors. Much of their clientele comes to them on a referral basis from attorneys who do not wish to get involved in this side of the practice but

It was virtually impossible, however, to keep a record of the names of the attorneys, which might have shown that certain attorneys who practice regularly before this court have a near-perfect batting average as far as sentencing is concerned. Furthermore, although this study revealed no disparity in the frequency with which some fine was imposed upon represented and unrepresented defendants, it was statistically impossible to record the relative amounts of the respective fines. Such information might have revealed a discrepancy supporting the general assumption that represented defendants receive lighter fines.

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who have clients who need help. The "fixer," on the other hand, knows everyone involved in the criminal process at this level and is able, through his contacts, to secure not only a reduction in charges but often he is able to get to the jail soon enough to prevent charges from being filed.

In order to check the validity of these claims, a separate study was made of all cases involving charges of driving-while-intoxicated arising out of violations of the municipal ordinance which were filed over a 4-month period, April 1 to June 30, 1967, in the Cleveland Municipal Court. This involved a total of 238 cases of which only 190 had been disposed of by the middle of September, 1967. The dispositions in nine of these cases were totally in favor of the defendants; three were nolle, five dismissed, and one resulted in a verdict of not guilty. All but one of the nine defendants were represented by counsel. In the one case involving an unrepresented defendant where the charge was dismissed, the affidavit failed to allege that the defendant was driving while intoxicated, alleging only that the defendant was intoxicated. With one exception, in those cases involving attorneys which resulted in nolle or dismissals there were recorded three or four continuances. In the exceptional case, there were only two continuances. Most of these cases were finally disposed of without a determination of guilt because of the failure of the arresting officer to appear when the defendant finally claimed that he was ready for trial.

In the remaining 181 cases, 66 were represented by counsel and 115 had no attorney. Sixty-one of the 66 defendants represented by an attorney, or more than 90 percent, had the charges reduced. At the same time only 46 of the 115 defendants without legal counsel, or 40 percent, had their charges reduced to a lesser offense. The reduced charges carry substantially lower penalties and it is quite possible that the defendant who appears by himself and pleads guilty to drunken driving suffers a greater financial loss than the defendant who retains an attorney and must pay his fee.

Two cases that arose and were concluded during this period help to illustrate the difference in results. Both cases involved similar fact situations in which the defendants were charged with drunken driving after they were found asleep in a drunken stupor in their respective cars while the car motors were running. One defendant, who appeared with an attorney, had 16 previous traffic convictions, four of which involved driving while intoxicated. The charge against him was reduced to loss of physical control and he was fined \$100 and given a suspended jail sentence. The other defendant, appearing without counsel, had a substantial previous record of 12 traffic offenses, four of which were driving-while-intoxicated. He was convicted of the charge, sentenced to 10 days in the workhouse, fined \$200 and his license was suspended subject to compliance with the state financial responsibility law. It is not submitted that the latter defendant should have been let off as lightly as the defendant who was represented by counsel. These cases are presented only to illustrate the existing inequities in the system. Surely, if the second defendant deserved a stint in the workhouse, a greater fine and the additional cost of high-risk insurance to meet the financial responsibility law, the represented defendant merited as severe a penalty, notwithstanding the fee he paid the attorney.



## III. RACE

The first reaction that a visitor to any urban municipal court or police court is likely to have is that black men are being tried by white men. The impression is vivid and unavoidable because one sees that the vast majority of defendants are black and the establishment — judges, prosecutors, and attorneys — is white. The data accumulated on the 1034 cases in the Cleveland Municipal Court indicates that a little more than half the defendants in these cases were black (52.61 percent). However, this figure does not adequately communicate the picture on race which one acquires from visiting any one of the urban courts in Ohio. When those Cleveland Municipal Court cases not indicating race or national background are set aside, the number of cases involving black defendants approaches 60 percent of the remaining total, yet even that percentage seems short of what the situation appears to be.

TABLE 5.

*Race or National Background*

Black .....	544	52.61%
White .....	364	35.20%
Puerto Rican .....	5	0.49%
Not Indicated .....	121	11.70%
	<hr/>	<hr/>
	1034	100.00%

Fewer than one out of three whites (30.5 percent) was represented by counsel before the municipal court, while the figure for black defendants was less than one out of four (23.7 percent). The pleas entered by the defendants did not vary significantly by race, but, as in the general statistical survey, the plea was determined by whether the defendant was represented by counsel.

TABLE 6.

*Pleas Entered by Defendants With and Without Counsel by Race*

Pleas Entered By Defendants With Counsel By Race				
	White			Black
Not Guilty ----	95	85.59%	107	82.94%
Guilty -----	3	2.70%	5	3.88%
No Contest ----	5	4.50%	7	5.43%
No Plea Entered	8	7.21%	10	7.75%
	<hr/>	<hr/>	<hr/>	<hr/>
	111	100.00%	129	100.00%

## Pleas Entered By Defendants Without Counsel By Race

		White		Black
Not Guilty ----	118	46.64%	180	43.37%
Guilty -----	72	28.46%	118	28.44%
No Contest ----	18	7.11%	10	2.41%
No Plea Entered	45	17.79%	107	25.78%
	<u>253</u>	<u>100.00%</u>	<u>415</u>	<u>100.00%</u>

There is a disparity between the races in the percentages of defendants whose charges are nolleed by the prosecutor or dismissed by the court without a determination of the merits of the case. Forty-three percent of the cases involving black defendants are nolleed or dismissed, while the figure for white defendants is 38.5 percent.

TABLE 7.

*Cases Disposed of Without A Determination of The Merits,  
By Race, Counsel, and Plea*

	Total Percentage	With Attorneys	Without Attorneys	Total Minus Guilty Pleas
White	38.46%	49.55%	30.36%	48.44%
Black	43.00%	53.48%	39.76%	55.58%

One explanation for the greater number of black defendants whose cases are disposed of without reaching a determination of guilt was offered by a black attorney whose practice centers around the Cleveland Municipal Court. In many instances, he claimed, these defendants would never have been arrested had they not been black. In most cases, the facts are patently inadequate on their face to justify court action. He contended that these black defendants have simply been harrassed by police officers, with arrest and detention being the ultimate harassment.<sup>49</sup> This study tends to con-

<sup>49</sup> Although many examples and allegations of these police practices have been documented, one commentator supplies a very plausible reason. He concludes that:

The police custom of arresting Negroes on slight suspicion or of staging mass "roundups" of Negroes is definitely related to the Negro's lack of security and his inability to exert pressure against such abuses. Police pretty generally feel that in making arrests, handling witnesses, and obtaining confessions they can use brute force against Negroes with impunity. Johnson, *supra* note 9, at 148.

Disparity in the treatment of blacks and whites in later stages of the criminal process has also been documented. See DEP'T OF LABOR, OFFICE OF PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION*, 38 (March 1965), where it is mentioned that "Negroes . . . are arraigned much more casually than are whites." A general indictment of the administration of justice appears in a

firm the attorney's explanation of why charges against black defendants are dismissed more frequently. The greater number of cases involving black defendants which are disposed of without a determination on the merits explains the greater percentage of white defendants who are found guilty. However, when one considers only those cases disposed of on the merits, the percentage of white defendants found guilty (86.16 percent) is almost identical with the percentage of black defendants who are found guilty (86.45 percent).

TABLE 8.

*Verdict By Race*

	White	Black
Guilty -----	193 53.02%	268 49.27%
Not Guilty & Discharged ----	31 8.52%	42 7.72%
No Determination on the merits -----	140 38.46%	234 43.01%
Totals -----	364 100.00%	544 100.00%

TABLE 9.

*Verdict By Race and Attorney*

	White & Attorney		White W/O Attorney		Black & Attorney		Black W/O Attorney	
Guilty -----	38	34.23%	155	61.27%	41	31.78%	227	54.70%
Not Guilty & Discharged	18	16.22%	13	5.14%	19	14.73%	23	5.54%
No Determination on the Merits -----	55	49.55%	85	33.59%	69	53.49%	165	39.76%
Totals -----	111	100.00%	253	100.00%	129	100.00%	415	100.00%

recent book centered upon an incident that occurred during the Detroit riot of 1967. The author concludes:

There are four main causes of racial violence: unequal justice, unequal employment opportunities, unequal housing, unequal education. This book to put it in perspective, deals only with the first. I believe that is the one that should be attacked first, because it is at the cutting edge of irritation in the inner cities; because it is the prime cause of the deep anger of those without whom there would be no summer rebellions, the young black males; and because, to be practical about it, its remedy would not cost a cent. The remedy is in the minds of men. Unequal justice is experienced by the black populace at two points: what happens with the cop in the street, and what happens with the prosecutor and lawyer and judge in court. J. HERSEY, *THE ALGIERS MOTEL INCIDENT* 29-30 (1968).

See also E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY*, (7th ed. 1966), where it is stated: "A number of studies have shown that in the United States, Negroes are more likely to be arrested, indicted, and convicted than are whites who commit the same offense." *Id.* at 146.

The ultimate and only real concern of the layman who appears as a defendant in a criminal court is whether he will have to spend time in jail. Since the single goal of the individual defendant is to remain free, he is not concerned with how his case is terminated, and he is not really concerned whether he has a criminal record, so long as he is able to stay out of jail. It is on the question of a defendant going to jail or remaining free that the statistical survey showed a marked difference in the races. A black defendant's chance of spending time in jail once convicted of a crime in the Cleveland Municipal Court is twice as great as his white counterpart.<sup>50</sup> Of the total number of defendants brought before the court, without regard to disposition, only a little more than one out of 10 whites (11.2 percent), while one out of five blacks (20.7 percent) actually had to spend time in jail. The percentages and actual disparity become greater and more apparent when other factors are included.

Four hundred sixty-one of the 908 white and black defendants were convicted — 193 white and 268 black. Of those convicted, only 63 were not given any days in jail in the original sentence, but 41 of this number were white and only 22 black. The original sentence imposed by the court, however, means little. Suspensions are not a rarity and, thus, the only real meaning of the figures on sentences is found in the relationship between race and the actual jail sentence served.<sup>51</sup> The pattern that appeared in the previous tests continues unbroken when the criterion is actual jail sentences served. The number of whites who were convicted and actually had to serve jail sentences totaled 41. This figure represents 21.24 percent of the total number of whites who were convicted. Thus, once convicted, the white defendant's chances of remaining free are eight out of 10. On the other hand, the black defendant reaching this stage of the proceedings is much less likely to leave the court-

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<sup>50</sup> In all likelihood much of this disparity is due to the inherent bias and the weakness within the existing system of municipal court justice which by its nature thrusts the poverty stricken ghetto dweller into the "vicious circle" much more readily than his more affluent neighbors. See generally authorities cited note 8 *supra*. At this time it would appear that the urban courts are capable of doing little to insure that the cycle will not repeat itself in all its futility. See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 31.

<sup>51</sup> Since the number of suspensions is so great, it would appear that the stiff original sentence frequently imposed is meaningless, serving as a mere showpiece for the community seeking harsh penalties for law breakers. However, although judges generally are sensitive to charges of coddling criminals, it is submitted that a large number of the suspended sentences are attributable to guilty pleas resulting from pre-trial plea bargaining. Cf. D. NEWMAN, *supra* note 15, at 42-52.

room a free individual. Of the 268 black defendants convicted, 113 (42 percent) actually went to jail, a percentage *twice* as large as that for whites. Thus, once convicted, the black defendant's chances of remaining free are six out of 10. Furthermore, there was some disparity in the number of days that the black defendant would actually serve. While all of the white defendants who were originally sentenced to more than 30 days in jail either had the entire number of days or part of those days reduced, only half the black defendants received similar treatment. Thus, no white defendant served more than 30 days in jail, while 16 black defendants did.

TABLE 10.

*Jail Sentence By Race*

	Receiving a Jail Sentence (Percent of Total)	Actually Serving Time in Jail (Percent of Total)	Convicted and Receiving a Jail Sentence	Convicted and Actually Serving Time in Jail	Convicted Serving More Than 30 Days
White	152 out of 364 (41.81%)	41 out of 364 (11.26%)	152 out of 193 (78.76%)	41 out of 193 (21.24%)	0 out of 193 (0.00%)
Black	264 out of 544 (45.22%)	113 out of 544 (20.77%)	246 out of 268 (91.79%)	113 out of 268 (42.16%)	16 out of 268 (5.97%)

By considering two additional factors, past criminal record and the assistance of an attorney, the discrepancy in the sentencing of the races may be further explored. The percentages are almost identical for convicted defendants of both races who do not have previous criminal records and who were actually ordered to jail: 16.67 percent for black defendants and 15.31 percent for white defendants. The presence and assistance of an attorney played a role for those defendants without criminal records. Of the nine convicted white defendants without criminal records and who were represented by an attorney, none actually served jail sentences, while only two of the 18 black defendants without criminal records and represented by counsel were sentenced to jail.

The great disparity between the races appears again when those with criminal records who were convicted are considered.<sup>52</sup> Black defendants with criminal records were ordered to jail in 52.44 percent of the cases after conviction, while the figure for white defendants with criminal records was only 32.84 percent. The greatest number in each category were, of course, those unre-

<sup>52</sup> The "vicious circle" theory's impact is more readily perceived when the cycle is repeated and a defendant with a prior record is to be sentenced. It is here that the futility of the system is all too apparent.

represented by legal counsel. Those with criminal records who were represented by counsel fared much better. Even though the influence of the attorneys is the most obvious factor in any determination, the inherent bias against members of the black community is equally apparent. One out of every two black defendants who is convicted in the municipal court and who appeared without an attorney but with a previous criminal record spent at least a part of his sentence in jail, while only three out of 10 white defendants similarly situated joined their black counterparts.

TABLE 11.

*Jail Sentence By Race, Attorney, and Criminal Record*

	With an attorney	Without an attorney
<i>White</i> defendants convicted, having a previous criminal record who actually spent time in jail	3 out of 13 (23.08%)	19 out of 54 (35.19%)
<i>Black</i> defendants convicted, having a previous criminal record who actually spent time in jail	8 out of 24 (33.33%)	78 out of 140 (55.71%)

It is apparent that at every stage of the proceedings both race and wealth play overwhelming roles in determining the outcome of any particular case. Members of the black community, it is believed, are more casually arrested and charged with crime. If they are without the funds to seek legal assistance, they will probably plead guilty and have a criminal record. When the cycle repeats itself, that previous criminal record will play a substantial role in the determination of whether that individual goes to jail. The imposition of a jail sentence, then, may result in loss of employment and the black man's dilemma is compounded. The poor white is not in a much better position, except for the advantage that he appears to have in what can only be called the subconscious prejudices of the judge.

#### IV. THE NEED FOR REVISION AND REFORM OF THE MUNICIPAL COURTS

The municipal courts have been ignored and forgotten too long. While vast changes, mainly imposed by the United States Supreme Court, have occurred throughout the entirety of the American system

of justice, almost all have dealt with phases of the system other than the municipal or police court. The forces protecting the rights of the individual vis-à-vis the police and the courts of greater jurisdiction have neither been directed toward the municipal court level nor have they had any appreciable effect at this level. The spokesmen for change and reform have also directed insufficient attention to these courts.<sup>53</sup> It stands to reason, then, that these courts dispense the same justice as they did 50 years ago although today they do so in an even more harried manner because the number of cases handled in these courts has increased by leaps and bounds.

It is understandable why these courts have escaped the careful scrutiny of both the firebrand and the reformer, for even the Supreme Court has virtually abdicated from any supervision of this level of justice. Thoughts of extending the *Gideon*<sup>54</sup> requirement (providing for the mandatory appointment of counsel for indigent felons) to all those persons charged with misdemeanors truly staggers the imagination.<sup>55</sup> In all but one case where this question has

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<sup>53</sup> Thus, today we have two separate court systems of disparate quality. The division of the courts has tended to focus community attention on the higher courts where felonies are prosecuted. It is rare that community funds are committed to improve the administration of criminal justice, but even when funds are made available, the lower municipal courts, lacking in articulate spokesmen, are usually ignored. Other reasons have also been submitted for the disparity:

[S]uch attention as is directed to problems of court administration tends to be focused on the higher courts, in which more prominent judges and more experienced prosecutors are far more likely to take initiative than their counterparts in the lower courts. The absence of defense counsel in many lower courts, apart from the "regulars" in the courthouse who often have vested interests in the status quo, also eliminates a source of initiative for reform.

See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 32-33.

<sup>54</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). This case held that the sixth amendment right to the assistance of counsel was binding on the states, and that counsel must be provided for all indigent defendants charged with felonies. It left unresolved the issue as to whether the sixth amendment right also extends to those charged with misdemeanors. The case itself involved a defendant who had received a 5-year prison sentence.

<sup>55</sup> In at least one city in the United States, Portland, Oregon, private counsel is appointed for *every* unrepresented defendant charged with a misdemeanor. In an unreported decision of the Multnomah County Circuit Court, it was held that the sixth amendment right to counsel extends to misdemeanors. Consequently, the Portland Municipal Court now goes down the roster of attorneys appointing counsel in every case. Attorneys serve without compensation.

Five states require the appointment of counsel for defendants charged with misdemeanors where a conviction may result in the imposition of a prison sentence. The five are Massachusetts, New York, and Texas through statutes, and Michigan and Oklahoma through court decisions. In dictum, the Lucas County Court of Appeals, in *Frazier v. City of Toledo*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967), stated that there was no constitutional obligation to provide counsel for an indigent defendant charged with a misdemeanor. For a discussion of the misdemeanorant's right to counsel and the *Frazier* case, see Recent Decision, 19 CASE W. RES. L. REV. 367 (1968).

been raised, the Court declined to consider the possibility.<sup>56</sup> The one case where the Supreme Court did extend *Gideon* to a "non-serious" crime, it did so without opinion and in that case a Maryland court had sentenced the defendant to two years imprisonment.<sup>57</sup> In the absence of a federal constitutional requirement, the states, and least of all the urban municipal courts, are unlikely to do anything. What has been done in Hamilton, Ohio, where the municipal court appoints counsel for misdemeanants, is a rarity and could be done there only because it is not a crowded court. Furthermore, the judge in Hamilton exercises discretion and does not appoint counsel for all persons accused of misdemeanors who claim to be without funds. In general, the courts will oppose broad appointment of counsel at this level because it would most certainly slow the docket.<sup>58</sup> As evidenced in the statistical survey, lawyers mean fewer guilty pleas and more drawn-out cases.

As a matter of course, no record is kept of the proceedings in the municipal courts. As a result, very few cases are appealed — certainly not those involving unrepresented defendants — and thus there is little likelihood of landmark appellate decisions affecting these courts, bringing the publicity that is always attendant upon such decisions.<sup>59</sup>

The public, while today generally restive and unsatisfied with courts in general, is not aware of the brand of justice being meted out by the municipal courts. If ever involved in the municipal courts, that part of the public with influence will be represented by an attorney and will receive favorable treatment. In any event, those with influence will rarely be in a municipal court.<sup>60</sup>

<sup>56</sup> For cases where the Supreme Court declined considering this question, see *De Joseph v. State*, 3 Conn. Cir. 624, 222 A.2d 752, *appeal denied*, 220 A.2d 771 (Conn.), *cert. denied*, 385 U.S. 982 (1966); *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966).

<sup>57</sup> *Patterson v. Warden*, 372 U.S. 776 (1963), *vacating and remanding mem.* 227 Md. 194, 175 A.2d 746 (1961).

<sup>58</sup> See, e.g., *Fish v. State*, 159 So. 2d 866 (Fla. 1964); *State v. Thomas*, 249 La. 742, 190 So. 2d 909 (1966); *State v. Zucconi*, 93 N.J. Super. 380, 226 A.2d 16 (App. Div. 1967); *Sherron v. State*, 268 N.C. 694, 151 S.E.2d 599 (1966); and cases cited note 56 *supra*. But see *State v. Blank*, 241 Ore. 627, 405 P.2d 373 (1965); *City of Tacoma v. Heater*, 409 P.2d 867 (Wash. 1966), as examples of state courts holding that there is a constitutional right to be provided counsel in misdemeanor cases.

<sup>59</sup> See note 10 *supra* & accompanying text.

<sup>60</sup> It is astonishing that 50 years ago Charles Evans Hughes recognized this fact as he admonished, "[t]he Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand in the most need of justice." Address by Charles Evans Hughes at the 42d Annual Meeting of the New York Bar Association (1919), in TASK FORCE REPORT: THE COURTS, *supra* note 6, at 29.



In all probability the evolution that is transforming criminal justice for felons would eventually filter down to the municipal courts. However, that filtration process will take decades. In the meantime, the municipal courts are literally palaces of injustice where a man's fate is dependent less upon the facts of his particular case than upon the color of his skin and the amount of money he has in his pocket. Because it has final jurisdiction in all of the less serious offenses, the municipal court is second only to the police in its direct effect upon the public. Almost all charges arising out of racial disorders originate and conclude in the municipal courts, and it is the justice existing in these courts that has the greatest impact on society.<sup>61</sup> For these reasons, then, the urban municipal criminal courts provide the area most in need of overhauling.

The changes that are required are by no means easy ones. Adding a judge or two is not the answer. Changing the personnel — something needed and desirable, perhaps — will not solve the problems because the problems are largely structural. Although the municipal court was originated to provide a forum for the people, with less formality and easier access among its features, it no longer serves that function, if it ever did.<sup>62</sup> As an institution it has fallen

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<sup>61</sup> See, e.g., Lindsay, *Bar Faces Moment of Truth*, TRIAL, June-July 1968, at 26, where Mayor Lindsay stated:

The administration of criminal justice very nearly broke down under severe, unpredictable pressures during the riots in the cities last summer. In those extraordinary days, our judicial system dealt primarily in volume; it possessed no demonstrable ability to deal with individuals. . . . [Y]et in these same courts, hundreds of thousands of our least fortunate citizens first confront their government and first experience the application of that government's laws to them. . . .

Here is where . . . justice in America fails the ideals of the Bar.

<sup>62</sup> The need for reform of the lower criminal courts especially in the large urban centers has long been echoed. As early as 1929 the *Illinois Crime Survey* commented on the lack of justice and the vaudeville atmosphere that pervaded the Municipal Court of Chicago. 1929 ILLINOIS CRIME SURVEY 404. In 1931 the National Commission on Law Observance and Enforcement, the Wickersham Committee, which drew upon no less than 20 other crime surveys in compiling its 14 volume report, indicated that the lower courts were the least effective and most neglected in the administration of criminal justice. Since then many other reports and studies have exposed the inadequacies, inequities, and injustices that occur every day in the urban municipal courts across the country. See generally Dash, *supra* note 16; Foote, *supra* note 4; Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 5 J. CRIM. L.C. & P.S. 215 (1962); and sources cited note 7 *supra*. Sadly, the President's Commission on Law Enforcement and Administration of Justice has reported that these warnings have gone largely unheeded:

No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts . . . . Practices by judges, prosecutors, and defense counsel which would be condemned in the higher courts may still be found in these courts. TASK FORCE REPORT: THE COURTS, *supra* note 6, at 29.

into such disrepute, especially among the people most affected, that a new institution is needed.<sup>63</sup>

## V. A PROPOSAL FOR REFORM

The following proposal is two-fold: (1) remove most original criminal jurisdiction except for traffic offenses from the municipal courts in communities over 75,000, and (2) vest the remainder of that jurisdiction in a system of lay courts known as Community Councils which would have jurisdiction over a population of 5000 and whose members would be chosen by that population.

### A. *Limiting the Jurisdiction of the Urban Municipal Criminal Court*

The urban municipal court should have its criminal jurisdiction curtailed for many reasons, certainly not the least of which is "the municipal court mentality." That state of mind is quite common among judges and one can turn to a former judge for a description of the syndrome.

Prolonged service on the criminal side of the municipal court, the judge said, produces in each judge a sense of frustration from repeatedly hearing the same minor claims and offenses and realizing that any action taken in the courtroom will probably have negligible, if any, effect on the lives of the participants. He said that this point is driven home by the fact that judges, even in the largest metropolitan courts, see many of the same people back before them time after time. This, he contends, hardens the attitudes of the judges, breeds contempt for the defendants, and encourages a lack of concern for why these defendants are before the court and what will happen to them in court. After years of people with the same old problems, judges "tune out" and "turn on" to the numerous people who have no business to transact in court but who come

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<sup>63</sup> See, e.g., KERNER REPORT, *supra* note 6, at 183. First hand information was gathered in the courthouses and ghettos of the cities by members and staff of the Commission on Civil Disorders and their recorded conclusions are:

Some of our courts . . . have lost the confidence of the poor . . . . The belief is pervasive among ghetto residents that lower courts in our urban communities dispense "assembly-line" justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequalities. We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders. *Id.*

to the court each day to watch it in action.<sup>64</sup> At this point the judges begin to concentrate on "entertaining" this audience of spectators, even when the jibes and asides are at the expense of defendants and witnesses. He theorized that judges do this not only to break the tension and boredom within themselves, which results from hearing the same problems continuously, but also as a political gesture and a method of campaigning. The judges make themselves personalities to the spectators, personalities who will be remembered in the voting booths.

Compounding the atmosphere and the attitudes of the court is the lack of social service agencies connected with the municipal court.<sup>65</sup> The lack of adequate social services in the municipal courts is attributable to the absence of any meaningful community commitment for funds to inquire into the social causes of crime.<sup>66</sup> Instead, the middle-class community and its representatives, the judges, tend to believe that crime is the intrinsic problem, instead of crime being a manifestation of deeper problems within the community.<sup>67</sup> Operating under this delusion, the courts should not be surprised to see the same people before them repeatedly.

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<sup>64</sup> For additional examples of the municipal courtroom "audience," see, Dash, *supra* note 16, at 386; Foote, *supra* note 4, at 606.

<sup>65</sup> While most modern jurisdictions will have adult and juvenile probation facilities for their felony courts manned with well-trained staffs that have relatively light case-loads, approximately one third of the municipal courts in the country do not have probation services at all. Even where probation facilities are provided in municipal courts, their effectiveness is diminished by high caseloads and under-trained and under-paid staffs. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, 72-76 (1967). Although the Cleveland Municipal Court has its own probation department, it has only 19 probation officers on the staff and thus would seem subject to the above criticism. It should be noted that probation is generally used very infrequently in municipal courts. Even in New York, which has well administered probation services, probation is used in less than 2 percent of the misdemeanor cases. Judges commonly use fines or suspended sentences as a substitute. *Id.* at 75.

<sup>66</sup> Although it may be admitted that the need for improvements in the corrections aspect of the administration of justice is difficult to see, it has been suggested that society is reluctant to look at this need. This reluctance is due to the fact that people on probation or involved in other corrective programs are the most troublesome and troubling members of society: "The misfits and the failures, the unrespectable and the irresponsible. Society has been well content to keep them out of sight." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 159 (1967) [hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY].

<sup>67</sup> For generations, Americans have taken comfort in the view that crime was the vice of a handful of people, and that, therefore, controlling crime was for a handful — the police, the courts, and the correction agencies. But today we know that the "prevention of crime covers a wide range of activities," and that "crime cannot be controlled without the interest and participation of schools, businesses, social agencies, private groups, and individual citizens." The deep-rooted social conditions causally related to crime must be ameliorated. *Id.* at V-VI.

To expect concrete positive results from present judicial attitudes is, at best, naive. Especially tragic is the alcoholic who appears repeatedly before these judges and has often appeared in other municipal courts throughout the state. Transient alcoholics are treated in a way that is reminiscent of American frontier justice: they are simply ordered to leave town. Repeaters are made sport of in the courtroom and often instructed by a judge or prosecutor to choose the number of days themselves that they will be sentenced to the county farm. While apropos of an O'Henry short story, these practices should be offensive to a 20th century society that unjustifiably prides itself on protecting the dignity of its citizens through the court system. These practices are likely to continue because of a recent Supreme Court decision which reversed a trend growing in lower courts and held that conviction and imprisonment of chronic alcoholics for public drunkenness does not violate the eighth amendment's prohibition against cruel and unusual punishments.<sup>68</sup> Finally, the judges themselves — who they are, whom they represent, their attitudes and concerns — make the development of the municipal court mentality inevitable.

Municipal court judges in most urban centers are chosen neither because they have demonstrated great legal talent nor for their compassion. On the contrary, they are chosen by partisan political machines for their faithfulness to the party and their past work on behalf of the party. From the overall lack of quality judges, one might surmise that the bar association recommendations carry little weight with the voters. Many of the lawyers willing to accept these posts have not been too successful in the private practice and find a judge's salary — though certainly not high — both attractive and secure.<sup>69</sup> Whatever their career backgrounds, the municipal court judges soon become callous toward the people who come before them. Rarely is a judge concerned with mitigating circumstances, and often he refuses to hear them at all. Too often these judges seem to forget that they are dealing with human beings whose prob-

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<sup>68</sup> *Powell v. Texas*, 392 U.S. 514 (1968). *But cf.* *Robinson v. California*, 370 U.S. 660 (1962), where the court struck down as cruel and unusual punishment a statute making it a misdemeanor to be addicted to narcotics and subjecting addicts to a mandatory jail sentence of 90 days.

<sup>69</sup> The present salaries for municipal court judges in Cleveland range from \$15,000, received by four judges, \$18,000, received by eight judges, and \$19,000 received by the Chief Justice. Interestingly, an equalization pay proposal is now pending whereby all judges would receive \$23,000 per annum with the Chief Justice receiving \$24,000. The median income of the individual lawyer in 1966 was approximately \$13,000 nationally. M. MAYER, *THE LAWYERS* 16 (1967). That figure is probably a good approximation for Cleveland.

lems have brought them before the court. The one consuming concern is to run the docket and dispose of the cases. Congestion, however, should not serve as an excuse for the municipal court mentality, because it does not explain the blatant racism exhibited by some of the judges.<sup>70</sup>

The white municipal court judge is representative of the white, middle-class community, and he is too often responsive only to that community. Consequently, he reflects the white community's uneasiness with the black community's restiveness, and he is more concerned with charges that the court is coddling criminals than he is with charges that the courts treat blacks unfairly. Finally, the municipal court judge deals constantly with the police and is concerned with maintaining a good working relationship with them. Unfortunately, the police departments that acknowledge good working relationships with the municipal court judges are generally those that have pretty free reign in those courts. As a result of all of this, many municipal court judges do not even make a pretense of impartiality when hearing a case.<sup>71</sup> The police officer's word is rarely doubted unless an attorney is representing the defendant and in six out of 10 cases involving lawyers, the case will not get far enough to have the policeman's assessment of the situation challenged.<sup>72</sup> The prosecutors, who do not get the physical and mental relief that the judges do from alternating between the civil and criminal sides of the court,<sup>73</sup> become the epitome of the municipal court mentality. In the great majority of cases they become masters of ceremony hurrying the various performers on and off the stage.

More than 100,000 criminal cases, not including minor traffic offenses, flow through the Cleveland Municipal Court every year.<sup>74</sup> When one compares this with the more than 5 million arrests yearly in the United States,<sup>75</sup> most of which are at least processed

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<sup>70</sup> The condescending way in which one judge and a prosecutor in Cincinnati called all black men by their first names and repeatedly made jokes at their expense, set the tone of that courtroom.

<sup>71</sup> It has been reported many times that the full extent of a hearing in a municipal court will consist of the magistrate's query to the defendant, "Well, what do you have to say for yourself." See, e.g., Note, *supra* note 7, at 331; Foote, *supra* note 4, at 603. Unfortunately, the Ohio procedures observed were not lacking in this type of disposition.

<sup>72</sup> See note 45 *supra* & accompanying text.

<sup>73</sup> It is the customary practice in the Cleveland Municipal Court and most other municipal courts in Ohio to rotate the judges each term between the civil and criminal divisions. Rotation of assignments usually occurs within each division.

<sup>74</sup> 1966 CLEVELAND MUN. CT. ANN. REP. 5.

<sup>75</sup> THE WORLD ALMANAC AND BOOK OF FACTS 1968, at 903. See also THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 66, at 1-2.

through, if not terminated in some form by a municipal or police court, the burdens on these courts and their personnel become clearer. When it is fully realized that the number of arrests and charges signifies that one out of every 40 Americans passes through the criminal process yearly — the figure is much higher if traffic arrests are included — it should be obvious that a deliberate and considered method of disposing of these matters is impossible. The burdens imposed by such a caseload make the docket the ultimate concern. Under these circumstances, it is also easy to understand why fairness, fact finding, and problem solving become much lesser concerns.

Survival of the municipal criminal courts is predicated upon maintaining conditions as they presently exist — conditions consisting of uninformed poor people appearing before the courts, confessing to their misdeeds by a plea of guilty and receiving inequitable punishment. Those who know better, or who can afford to retain someone whose business is to know better, fare better. Putting the state to its proof, its obligation under our system of law, and forcing the state to present its case within the bounds provided by the rules of evidence, creates chaos and the system falls apart. Only 27 of the more than 1000 cases tabulated in the Cleveland Municipal Court involved requests for jury trials. Only five guilty verdicts resulted from these jury trials, while there were seven not guilty verdicts returned by the juries, and in 15 of these cases the state threw in the towel and the charges were nolle or dismissed.

At the heart of the American legal system is the concept of due process of law. Implicit in the meaning of this term is its underlying notion: *fairness*. Fairness dictates that, above all, the government deals evenly with its citizens, does not attempt to victimize the citizenry even at the expense of disrupting the machinery, and, finally, insures that the citizens are apprised of both rights and obligations so that the functioning of the government or any of its component parts is not dependent upon the citizenry remaining uninformed. To the extent that maintenance of the municipal court system is dependent upon continuing unequal administration of justice, victimizing a substantial part of the community and perpetuating an ignorance of how the system actually functions, it is repugnant to the concept of due process.

Drastic reforms are needed to convert the municipal courts into an integral part of a democratic system of government. One

approach would be to apply those specific provisions of the Bill of Rights, currently applicable to persons charged with serious offenses, to all persons charged with any crime. Principally, this would mean the appointment of an attorney for every person charged who claims that he is financially unable to obtain counsel. Since it would be administratively impossible to verify the claims, the appointment would be automatic. The administrative task of notifying private attorneys to represent all indigents would likewise be impossible, not to mention the prohibitive cost of such a system. It would require the establishment of enormous public defender staffs in every urban center just to handle the traffic in the municipal courts. It is questionable whether there are even enough lawyers to handle this task. A minimum of 10 lawyers per 100 cases would be required in each courtroom per day, and this would be sufficient only to handle the initial counseling and entering of pleas. Vast additional legal talent would be required for actual trial work.<sup>76</sup> Law students provide an untapped resource which could be mobilized for much of this work, and there is no reason why law students should not be incorporated into the practice of law in intern programs comparable to those for medical students. Law students are for the most part interested in public service, dedicated to the improvement of this country's legal institutions, and are presently questioning the relevance of much of their legal training. Pilot programs involving law students have demonstrated their maturity, ability, and the high quality of their work.<sup>77</sup>

The problem of providing massive legal assistance will be acute in localities where there are no law schools or where there are insuf-

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<sup>76</sup> See, e.g., Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, in TASK FORCE REPORT: THE COURTS, *supra* note 6, at 152.

<sup>77</sup> As of 1967, at least nine states permitted third-year law students to represent indigent defendants charged with misdemeanors. The successes of law student involvement in the legal process have been widely acclaimed. See Hackin v. Arizona, 389 U.S. 143, 146 (1968) (dissenting opinion); Woodruff & Falco, *The Defender Workshop: A Clinical Experiment in Criminal Law*, 52 A.B.A.J. 233 (1966); Cleary, *Law Students in Criminal Law Practice*, 16 DEPAUL L. REV. 1 (1966). Many law schools have instituted programs through which students can gain practical experience in virtually every stage of the administration of criminal justice from pre-arraignment interviewing to post-conviction relief. See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 61-63, for a survey outlining the major aspects of the various programs now in effect at Boston University, Harvard, University of Chicago, Georgetown, University of San Francisco, University of Pennsylvania, University of Utah, and the University of Kansas. See also Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445 (1965); Spangenberg, *The Boston University Defender Project*, 17 J. LEGAL ED. 311 (1965). In view of these well documented successes, it would seem that some of the far from ideal conditions observed in the Ohio Municipal Courts could be alleviated were Ohio to join the growing number of forward-looking states now permitting third-year law student representation of indigent misdemeanants.

ficient numbers of advanced law students to participate in this work. In any event, the introduction of legal assistance for all defendants would in all likelihood sound the death knell for the present system the very existence of which is dependent upon its ability to dispose summarily of its massive docket. When defendants are apprised of their rights, it is doubtful that the great numbers of guilty pleas will continue, a situation which will then require trials or dismissals. Once this occurs, and the municipal courts are unable to summarily dispose of hundreds of cases a day, the system will come to a complete halt. Any attempt to substitute a single representative to counsel all those who desire it will be of no value because of the number who need counseling, as evidenced by Cincinnati where the presence of the Legal Aid Defender has had no visible effect as far as misdemeanants are concerned.<sup>78</sup> Implicit in any plan to permanently station lawyers in the municipal courts to assist any defendant who desires their help is the danger that repeated exposure to that court may develop in the lawyers the same callousness that presently signifies the municipal court mentality. Finally, it is doubtful that the presence of public defenders would guarantee a greater equality in sentencing than presently exists because the reasons many attribute, perhaps erroneously,<sup>79</sup> to the discrimination in sentencing between defendants with attorneys and those without — a realization that the defendant must pay a substantial legal fee to the attorney — would not abate. The discrimination could conceivably become greater if the municipal court lawyers, who jealously guard their prerogatives, and their allies felt the presence of competition.

The former judge of an urban municipal court who discussed the municipal court mentality indicated that one cure-all for the most recurring abuses would be to require a verbatim transcript of all municipal court sessions. Such an innovation could be effective

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<sup>78</sup> One national survey interviewed 49 public defenders from cities across the country. Thirty-four defenders indicated that they were handling some kinds of misdemeanor cases, while 15 replied that they did not handle misdemeanors at all. From this survey it also appeared that a public defender system, with traditional staffs, could not have any real effect in the municipal courts because of the tremendous volume of cases that must be handled. In cities where the public defender does represent indigent misdemeanants, such as San Francisco, Los Angeles, Cincinnati, and Columbus, they handle only 20 percent or less of all misdemeanor cases filed. See L. SILVERSTEIN, *DEFENSE OF THE POOR* 123-36 (1965).

<sup>79</sup> It should be recalled that this statistical study of Cleveland Municipal Courts revealed no significant difference in the frequency of fines imposed upon represented and unrepresented defendants. Fifty-four percent of both the represented and unrepresented defendants found guilty were required to pay a fine. A study of the relative accounts of the respective fines was, however, not feasible.



only if the transcripts were read daily by an agency with the authority to reverse verdicts, correct and amend sentences, and censure the judges. Its immediate benefit would be improvement of courtroom decorum and elimination of the constant flow of derision that emanates from some judges. However, although such a system of review might cure some of the present abuses, there is no adequate reviewing agency in existence at the present time — certainly the existing appellate court could not handle the job with the requisite regularity.

Finally, the basic deficiency of the existing municipal courts in urban centers is that they are white men's institutions handling black men's problems. Just as the number of black defendants in the municipal courts is disproportionately higher than that group's percentage of the total population, the number of black officers of the court — whether police, attorneys, prosecutors, and especially judges — is disproportionately lower than the percentage of blacks in the community. There are numerous reasons for both facts. The reasons for the greater percentage of black defendants has often been explained and belabored.<sup>80</sup> The reasons for the disproportionately low number of black police, black attorneys, black prosecutors, and black judges are equally self-revealing. Destructive discrimination in job and educational opportunities, although lifted in these areas in the past decade, has taken its toll in frustration and a rechanneling of both goals and values. Second-class education in de facto segregated schools continues to disqualify great numbers from advancement, and, as 7 years of college and graduate school grows more costly each year, it becomes more out of reach for impoverished families. Moreover, there was even less financial assistance available in the past when most of the lawyers practicing today were educated.<sup>81</sup>

The lack of communication between the white and black communities which is being magnified across this country reaches tragic proportions in the urban municipal criminal courts where the black man appears most often as the accused. Certainly, under these conditions, meaningful dialogue is precluded. Mutual distrust exists between the black defendant and the white establishment, foreclosing any meaningful attempt to reach the core of the individual's problem which results in anti-social conduct. Few, if any, whites can empathize with the black Americans of the second-

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<sup>80</sup> See KERNER REPORT, *supra* note 6, at 123-41, and notes 9, 49 & 50 *supra*.

<sup>81</sup> See M. MAYER, THE LAWYERS 79-80, 97 (1967).

half of the 20th century, and surprisingly, few of those entrusted with the task of the administration of criminal justice actually sympathize with the black man's problems or the black community's aspirations.<sup>82</sup> When a judge sitting in a court of law cannot recognize the most basic demand, that of being addressed like a human being,<sup>83</sup> any more ambitious expectations, such as fairness, are utopian.

There are solutions to many of the personal problems, but they are not to be found for black defendants in white municipal courts. The people who can understand the defendant's problem, secure his confidence, and possibly assist him towards finding a solution are those in his own community, sharing many of his own experiences. The power must be transferred to the source of the solution and the creation of Community Councils represents the first step.

### B. *The Formation of Community Councils*

At least 30 percent of the 1034 Cleveland Municipal court cases studied during this project could be assigned to Community Councils, neighborhood courts staffed by laymen,<sup>84</sup> to settle issues and disputes of a local nature. Of the 1034 cases studied, 619 involved charges of simple assault and battery — by far the most common offense. In an effort to determine how many of these assault cases arose between members of a single family, the cases

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<sup>82</sup> See KERNER REPORT, *supra* note 6, at 183.

<sup>83</sup> See note 70 *supra* & accompanying text.

<sup>84</sup> The proposed Community Council should not be confused with or analogized to the outdated counterpart of the urban municipal court — the justice of the peace court. These lay-manned, fee-paid courts have fallen into as much or more abuse in the rural areas as have the urban courts. The justice of the peace courts were originated long ago because travel and communication were troublesome. They placed arbitrary decision-making power in one individual with little or no judicial or administrative review, and were based on a fee system which often meant that the justice did not receive remuneration unless a conviction and fine were imposed. See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 34-35. The Community Councils, although manned by a board of laymen, contain none of these aspects for potential abuse. Instead, these Councils are predicated upon a look backward to the old common law lay jury system where neighbors applied the law to their neighbors in the context of a fact situation that occurred within their neighborhood.

Lay participation in the decision-making process is not uncommon in civil law countries. In Germany, for example, criminal jurisdiction over minor crimes is vested in the *Amtsgericht*, a court composed of a single professional judge and two laymen, called *Schoeffen*. Unlike the contemporary Anglo-American lay jury, the *Schoeffen* are not confined to determining issues of fact alone, but are responsible to hear and examine witnesses, weigh the evidence, and decide legal issues. At the conclusion of a trial the laymen and the judge deliberate and vote on issues of guilt and penalty, with a two-thirds vote of the joint tribunal required. Sweigert, *The Legal System of the Federal Republic of Germany*, 11 HASTINGS L.J. 7, 12 (1959).

where the surname of the prosecuting witness was the same as the defendant's were separately classified. By this process of selection 214 cases were classified as arising in a domestic situation. In addition, it is probable that many of the cases involving charges of disturbing the peace, harassment, malicious destruction of property, pointing firearms, trespass, and throwing stones also arose in the home neighborhood. The remainder of the serious misdemeanors could be tried in the municipal courts. Since one of the chief problems of the urban municipal court is its overcrowded docket, the elimination of at least 30 percent of its criminal caseload<sup>85</sup> would have a positive effect on the administration of justice. The municipal court should, however, retain its jurisdiction over civil matters and traffic offenses and serve as the appellate court for the Community Councils.

But why form Community Councils?<sup>86</sup> Basically, the answer is that so many misdemeanors are in essence neighborhood dilemmas and if solutions to the *causes* of these crimes are to be found, they will probably best be determined within the neighborhood.<sup>87</sup>

<sup>85</sup> This percentage represents to this author the bare minimum of caseload reduction that would be effectuated if the proposal herein were adopted.

<sup>86</sup> While there is little disagreement that reform is needed in our municipal criminal courts, admittedly, there is no consensus as to what form it should take. Thirty-three years ago something akin to the proposed Community Council concept was recommended as a solution to the problems inherent in the civil side of the Magistrate's Courts in Philadelphia.

The Commission supported the concept of "local community courts" and rejected proposals which would have required that magistrates be members of the bar. The reasoning of the Commission was directed wholly at civil suitors who "have no clear conception of the legal aspects of their problems. . . . Their need is less for a determination of their technical legal rights, than for a wise adjustment of their difficulties with their neighbors and others." COMMISSION APPOINTED AT THE RECOMMENDATION OF THE SPECIAL GRAND JURY OF 1935 TO STUDY AND RECOMMEND IMPROVEMENTS IN THE LAWS RELATING TO MAGISTRATES AND MAGISTRATES' COURTS IN THE CITY OF PHILADELPHIA, REPORT, *as cited in* Foote, *supra* note 4, at 646 & n.163.

On the other hand, the President's Commission on Law Enforcement and Administration of Justice recommends the unification of the misdemeanor and felony courts so that all criminal cases would be handled in one court by judges of equal status. All cases would then be processed under comparable and generally formal procedures, with stress on procedural regularity and careful consideration of dispositions. It is also generally recommended that all judges be lawyers, chosen for their demonstrated competence, with counsel assigned to the indigent whenever possible, and with court administration in the hands of trained professionals. See TASK FORCE REPORT: THE COURTS, *supra* note 6, at 33; CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 66, at 129.

<sup>87</sup> Even among liberal social-political theorists, there is an apparent trend toward emphasis on decentralized government. No doubt the Negroes' alienation and unrest amidst the sprawling federal bureaucracy, and the ever-increasing anonymity of life in the urban metropolis, have had their effect on this trend away from centralization. The National Advisory Commission on Civil Disorders stated categorically that: "No

Additionally, the present method of "supermarket justice" as dispensed in the municipal courts has simply not worked, and an alternate means for providing justice must be devised.

For purposes of forming Community Councils, every city with a population greater than 75,000 should be divided into communities of 5000. It is obvious, however, that artificial community lines would not provide the structure envisioned for Community Councils because the people within each subdivision must have a natural mutuality of interests, concerns, and, when possible, similar backgrounds. The Councils would function best, then, in those neighborhoods that existed — and still exist in many cities — where people with similar national origins naturally group together. But the concept of Community Councils extends also to suburbia or the non-ethnic, integrated, middle class areas, for while perhaps not sharing similar backgrounds, the people of these areas today share what may be even more essential — common aspirations for the future and common difficulties with the present. Uniting these people today in a "natural" neighborhood are the problems of deteriorating neighborhoods, zoning interests, fear in the streets, school issues, and many other common concerns.

In the inner city, the neighborhood concept of government would have the effect of bringing some power into the community and organizing it. In the ghetto, the Community Council will have the additional benefit of providing elected leaders from small population centers who can serve as the voice of that community. More important than one-man-one-vote at this level of government is the concept of natural neighborhood divisions. In that respect, then, deviations of 2500 from the 5000-person community figure should be permitted if necessary to define a natural community. Unnatural gerrymandering, to exclude a racial or ethnic group for instance, would be fairly evident and should not be permitted.

Restoring to ethnic, racial, and economic divisions to create

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democratic society can long endure the existence within its major urban centers of a substantial number of citizens who feel deeply aggrieved as a group, yet lack confidence in the Government to rectify perceived injustice and in their ability to bring about needed change." KERNER REPORT, *supra* note 6, at 149. Thus, the *Kerner Report* looks to the ghetto neighborhood and its residents for a meaningful solution to this dilemma, while calling on local governments to effectuate procedures through which these neighborhoods can be heard. The Commission recommends the pursuit of a comprehensive strategy which includes the establishment of neighborhood action task forces, neighborhood city halls, neighborhood multi-service centers, among others, to bring about more effective communication between local government and the ghetto. As the Economic Opportunity Act of 1964 suggests, self-determination and community control for and within the ghetto neighborhood seem to be a means of alleviating the urban crisis. *See id.* at 147-55.

these communities might be viewed derogatorily as a kind of racism.<sup>88</sup> That brand of thinking, however, is not consonant with existing conditions in American cities. If America is a melting pot, as far as the residents of the inner cities are concerned, it stopped melting when it came to them. Nor is social and economic mobility as fluid as it once may have been, as is evidenced by the families now in their third generation on welfare subsistence.<sup>89</sup> One of the few genuine points of understanding in this decade has been that people cannot lift themselves up unless they have the power to do so. The Councils provide a vehicle through which the necessary power can be restored to the community. Moreover, power placed within the community will be in the hands of people who share common problems and not in the hands of distant theoreticians who are unfamiliar with the real needs and concerns of the people.<sup>90</sup> The creation of Councils in the suburbs may activate the melting operation because it will bring people together through a working organization which can stimulate communication and understanding. While there are differences among people in the suburbs, they are generally not caused by racial or religious differences.

The Community Council should be composed of three members, whose sole qualifications are that they be of voting age and residents of the voting district. The absence of other qualifications would encourage the political novice into the field and also encourage a great number of women and younger people. All of this would be beneficial because women are most intimately concerned with the daily problems of their neighborhood and involved young people act as catalysts for change and are vociferous exponents for reform. Councilmen should be selected in a nonpartisan election held at a time different from the general election and party primaries. Separate elections would help to elevate purely local issues and distinguish them from other state and city-wide problems.

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<sup>88</sup> See, e.g., Moynihan, *The New Racism*, ATLANTIC MONTHLY, Aug. 1968, at 35.

<sup>89</sup> See generally C. SILBERMAN, CRISIS IN BLACK AND WHITE 45, 68 (1964), where the author comments on a common misconception among whites that the collapse of the melting pot upon black migration is traceable to black hate for whites: "Hatred of the white man . . . does not explain why Negroes whose families have been living in the city for three or four generations are still mired in the slum — uneducated, unskilled, and unaspiring."

<sup>90</sup> Whatever the merits or disadvantages of Mayor Carl B. Stokes' decision during the Cleveland riot last summer to withdraw police and National Guard units and commit the protection of the Glenville community to the black leadership, the Community Council concept is not predicated upon the same principles. The interjection of "leaders" into a crisis situation which has already erupted bears no resemblance to this proposal where the leaders are selected by the people through elections and have continuous contact with the people throughout the year.

The election process must be carefully policed and a strictly enforced limit should be placed on the amount of money that each candidate is permitted to spend or that may be spent on his behalf. Any time a candidate and his supporters exceed that limitation, he should be disqualified as a candidate. Similarly, each candidate must run individually and not as a part of a ticket. Violation of this requirement should also result in disqualification. The reasons for the monetary limitation and the prohibition against tickets are threefold. First, it is essential to make the Councils function as truly representative so that the councilman campaigns on his own personality and personal record and that three candidates not be permitted to piece together achievements that would be popular to one-third of the electorate. Prohibiting tickets would prevent the organization of local party movements which might also deemphasize the personal nature of the job and the election. Second, by limiting the amount of money that can be spent on any candidate — perhaps equivalent to the cost of one general mailing to the constituency — those without great financial means, who may be more representative of the community as a whole, will not be discouraged from entering the race. This would make soliciting of contributions unnecessary and prevent a candidate from being obligated to any interest within the community. Finally, the spending restriction would encourage a personal, door-to-door campaign which works in the interest of the Community Council concept. Candidates would have to meet nearly everyone in the community this way, would become familiar with the problems of the voters, and the voter would feel more secure in approaching the Council when a problem develops. This is the essence of any good judicial system and should distinguish the Community Council from the present municipal courts. Operating on a wise-man principle, the people should have confidence in the judgment of the councilmen and feel that the Council is their own court.

Terms of office should be 12 months and no Councilman should be permitted to serve more than four consecutive terms in office. While the wise-man principle might dictate that a popular Councilman be permitted to serve as long as the voters continue to indicate their approval of his judgment and conduct, there are competing values involved in this determination. It is essential to prevent the development of a municipal court mentality on the part of the councilmen, an attitude which could occur if year after year councilmen are faced with the same problems

and people. The object is to have an interested tribunal rather than one whose members have a chance to become insensitive to the problems of the people appearing before it. The 4-year limitation would have the additional advantage of bringing other citizens into the public arena, acquainting them with the problems and needs of their neighbors and society, and generally getting them involved.<sup>91</sup>

There is no need to establish a bureaucratic structure around the Community Councils, nor is it necessary to attach great salaries to the jobs. Council duties will not be so great that the position cannot be part-time and the remuneration modest. The most feasible time for the Council to hold sessions would be in the evenings and on weekends, thereby permitting people to appear with the least amount of dislocation. Valuable time would not be lost from jobs. Interested citizens could observe with the least amount of inconvenience. One full-time employee, a clerk of the Council, should be retained who should be responsible for assisting citizens coming forward so that their problem is in presentable form. The clerk would also issue subpoenas, prepare the agenda for the Council, and prepare the reports that the Council will be required to submit to a supervising authority. The office of clerk should be a civil service position and persons holding the position should be fully trained by the city. Again it becomes important to insure that the clerk does not become entrenched so that he wields too much power in the community and influences the Council. To meet that need, the clerks should not serve in any community for more than one year, but should be transferred to a different Council at the end of each term.

One of the long hard-fought battles in the annals of Anglo-American jurisprudence was to secure to an individual the right to be represented in a court appearance by an attorney.<sup>92</sup> As for persons able to retain an attorney, that battle is over. For those who do not have funds, the battle continues. But the criminal side of the municipal courts has evolved into a place of privilege for the attorney class. Lawyers do not serve as officers of those courts, cognizant of their responsibility to the process. On the contrary,

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<sup>91</sup> To insure adequate responsiveness to the community, further provisions might be added which would place the office of Councilman subject to recall. However, this recall would not be an essential if, as proposed, the term of office is of relatively short duration.

<sup>92</sup> For an excellent historical account of the right to counsel in England and early America, see W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-26 (1955).

they have become manipulators of the process. If this is permitted to happen in the Community Council, it will no longer be a people's tribunal and will not serve its proposed purposes. Since the Council is envisioned primarily as a conciliatory agency without the power to incarcerate citizens, it is submitted that attorneys should not be permitted to appear before the Council in any capacity other than as a party to a dispute. Obviously, there is no way to prevent people from consulting with lawyers prior to their appearance before the Council, nor is there any way, or need, to bar attorneys from attending the proceedings, but the need exists to permit citizens freedom from the rules of evidence in order to explain their positions to lay judges and to permit those judges to reach an equitable solution. To some this may appear as a reactionary attempt to dilute the constitutional protections of citizens, but before that conclusion is reached the following question should be asked: Is this notion truly repugnant to American constitutional precepts or is it simply questionable because we as a people are not conditioned to doing it this way? The entire concept of conflict resolution by lay judges deciding these matters purely on the basis of common sense is radical to 20th century notions about justice.<sup>93</sup> The breakdown of the present system of administering justice, however, demands radical innovations. There will be safeguards provided to prevent a "Star Chamber" atmosphere from arising, more so than under the present municipal court structure, and there is nothing in the basic ingredients of lay justice that would make the Council system repugnant to concepts of due process. Certainly, criticism from the practicing bar will be suspect, for they have a vested interest in maintaining the present structure and are responsible for many of its crippling abuses.<sup>94</sup> The American public is extremely disenchanted with the present deficiencies of

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<sup>93</sup> There is nothing inherent in the concept of lay justice that makes it unfair and consequently a violation of due process. Countless courts of inferior jurisdiction throughout the country remain staffed by judges or justices of the peace who do not have legal training. In its most recent attempt to delineate how far down the judicial ladder the specific guarantees of the Bill of Rights incorporated into the 14th amendment extend, the Supreme Court once again used the "serious" as opposed to "petty" offense distinction. *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the Court said, "we hold no constitutional doubts about . . . prosecuting petty crimes without extending a right to jury trial." *Id.* at 158. Furthermore, the Court seemed to ratify the federal standard which requires jury trial for offenses punishable by more than 6 months in prison and carrying more than a \$500 fine. The Community Councils, which will not have the authority to order incarceration and will serve as a conciliatory agency, would not run afoul of these requirements.

<sup>94</sup> See note 53 *supra*.



the judicial system, and it is doubtful that it is indissolubly wed to the present institutions.

There is no reason why the arresting officer or the complainant cannot appear before the Council, present his side of the controversy, and request that subpoenas be issued to bring in witnesses who can contribute to the Council's understanding of the problem. The same holds true for the party against whom the complaint is made. Certainly, the defending party may remain mute if he chooses, in which case the Council could render its decision on the basis of only one side of the controversy.<sup>95</sup> Observation of the municipal courts, however, indicates that defendants often have something to say in their defense, but when unaccompanied by an attorney they rarely have the opportunity. Councils should be granted the power to subpoena witnesses. These subpoenas should be issued in the name of the supervisory court, and that court should have the power to enforce them.

Resolving disputes will be the principal function of the Community Councils, not punishing law breakers. To this end, the Councils will be expected to ascertain the facts of each dispute in detail and attempt to reach an agreement with the parties which would resolve the conflict. Operating within a small community, they should not experience the same difficulties that courts with a much larger jurisdiction seem to encounter. Similarly, with constituencies of 5000 people, the Councils will not be overwhelmed with so many cases that they are unable to devote a sufficient amount of time to any one dispute. The fewer cases the less prone the judges are to become callous and handle the matters by rote. Finally, within a small, somewhat homogeneous community of which the lay judges are an integral part, it will be easier for them to dig out facts, find witnesses and generally get to the crux of a controversy.<sup>96</sup> Functioning this way, the Councils will be able to learn the reasons for antisocial behavior and should have the full means of the city at their disposal to alleviate oppressive condi-

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<sup>95</sup> The presumption of innocence in the Anglo-American system of jurisprudence which dictates that the burden of proof rests upon the state is virtually non-existent in the urban municipal courts. Along with the presumption has been lost the privilege against self-incrimination. No explanation is given to the uncounseled defendant as to what the procedure is in determining guilt or innocence and it is not at all uncommon for a judge to address a defendant and ask him what he has to say for himself. Often the response from the uninformed defendant is the only evidence against him and results in his conviction. The Council system's ability to take time to discover the facts of the controversy is one of its greatest advantages over the present system.

<sup>96</sup> See generally Foote *supra* note 4.

tions.<sup>97</sup> Councilmen should be continuously trained in the social and welfare services that are available in the city, and they should have direct access to city employment agencies, welfare agencies, guidance centers, and domestic counselors. Individualized treatment of problems is the only way to solve the revolving door complexion of our present criminal courts and jails. A few days, weeks, or months in jail does not solve the problems that lead individuals to commit the acts for which society punishes. The alarmingly high rate of recidivism among people who commit petty crimes indicates that a more individualized approach is required, one which would be the function of the Community Councils.<sup>98</sup>

In the area of neighborhood squabbles, the Council's job would be to assist the participants in reaching an agreement to restore peace to the neighborhood. Most people would be amazed how many petty disagreements among neighbors over noise, children, dogs, and the general maintenance of property are escalated until they result in municipal court charges of malicious destruction of property, petty larceny, or assault.<sup>99</sup> As evidenced by the discus-

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<sup>97</sup> This would mean full community support in providing the Councils with the traditional probation and parole services, as well as the development of other special community programs such as guided group interaction programs and prerelease guidance centers, to mention a few.

<sup>98</sup> Studies have shown that a high proportion of misdemeanants are repeatedly convicted of criminal offenses. A survey in New York of five county misdemeanor penitentiaries indicated that "half the men committed in 1963 had prior commitments and a fifth had been committed 10 times or more." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 74 (1967). The Councils, without the power to incarcerate, should be able to curb this increasing recidivism, as it has been said: "There is little doubt that the goals of reintegration are furthered much more readily by working with an offender in the community than by incarcerating him." *Id.* at 28.

<sup>99</sup> Under the present system a large proportion of urban marital arguments and neighborhood quarrels are not settled at home or in the backyard or in church, but are litigated before a municipal criminal court of first instance. A typical example is the assault-and-battery charge with the wife as complainant. This type of case and others like it now consume much of a municipal court's time and patience, but ironically these courts can do little in this area for the charges basically are not criminal in nature. These people seek the aid of an arbitrator who has the time to come to a reasonable disposition or compromise for their present difficulty; they rarely get either time or a reasonable disposition from a heavily docketed municipal court. A good example of the municipal courts' inadequacies in this area can be seen in the typical assault-and-battery complainant described above, who is almost always shocked by a magistrate's suggestion that her spouse be sent to jail. These problems do not belong in an urban municipal court, unless of course they are permitted to continue and create tension which may result in true criminal conduct, but could effectively be handled by the Community Councils. Early dispositions of these private disputes, plus the possible use of the peace bond, a deposit guaranteeing future good conduct, would do much to obviate future misconduct of a more serious nature. See Note, *supra* note 7, at 338-40.

sion of the neighborhood dispute that arose in the Cleveland Municipal Court,<sup>100</sup> there is no opportunity to find out the facts and generally the participants become objects of levity in the courtroom and are sent home disgruntled. Rather than using the traditional criminal process to resolve these disputes, the Community Councils would be in an excellent position to ascertain the true facts and serve as conciliators.

As incarceration has not proved to be the answer as far as petty crimes are concerned, there is no reason to vest the Councils with this power. Their primary power should be to work out equitable arrangements with which the parties could live, and which would be binding upon the parties. The Councils should have the authority to order restitution for property damaged by wrongdoers, to order a party to pay the bills occasioned by his wrongdoing, or to work for a certain period of time to undo the damage which he did. Probably, many disputes would be considered by the Councils long before there is serious escalation, so that the rulings would be on minor matters such as directing a party not to play a phonograph after a certain hour, to leash a pet, to clean out the garbage from a yard, or to make sure that children are home at a certain hour. These are the disputes that fester until a criminal act is committed.<sup>101</sup> The present judicial structure has neither the authority nor the time to handle the disputes at an incipient stage, but the Community Councils would. They would also be in a position to continue supervising the arrangement and, if it is unsuccessful, to modify their determination. Knowing the participant becomes all important at this stage. The Councils will be in an advantageous position because of their ability to judge credibility and operate with the continuing support of the neighborhood.

The closeness of the Community Council to the people of the neighborhood, and the pressure of the general community's support for the Council in most instances will insure compliance by the parties with its orders. Arrangements must be made, however, for those parties who are either dissatisfied with the Council's determination and order, or who simply fail to comply with the order. Thus, an appellate procedure must also be created to cope with these cases, but the system devised for appeals should be tailored to the Community Council system. Appeals should be heard in the next highest court which should also maintain some supervisory powers

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<sup>100</sup> See text accompanying note 34 *supra*.

<sup>101</sup> See note 99 *supra* & accompanying text.

over the Councils. If the municipal courts are retained for civil and traffic cases, and criminal cases too serious for the Councils to handle, the appeals should be handled there. If the municipal court does not retain this jurisdiction, the general trial court should be assigned the appellate responsibility.<sup>102</sup> The deemphasis on law that exists in this proposed structure for the Councils should also carry over into the appellate procedure. Instead of an appeal as that term is generally used in the law, the proceeding in the "appellate" court should be handled as a trial de novo where all of the factual issues are presented and the court makes its own findings of fact. If the findings are the same as those of the Community Council, then that body's judgment should be entered as the judgment of the appellate court, assuming the Council's order is equitable. The Council's order should take precedence, because the Council is closer to the problem and better able to determine what corrective measures are suitable.<sup>103</sup>

The failure of a party to a dispute to comply with an order of the Community Council presents a more difficult question than the appeal. The Council should be responsible for determining whether there has been satisfactory compliance, and in the event compliance is not forthcoming a report should be made to the city prosecutor who could issue a complaint in the municipal court based upon the failure to comply. Even though the person charged in the municipal court failed to appeal the Council's order, the facts in issue in the case should include the original facts in dispute. If the municipal court determines that the Council's findings of fact are substantially correct, the Council's order should be reinstated. It would be wise at this point to empower the reviewing court to add a penalty, including a jail sentence, as punishment for the failure

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<sup>102</sup> As previously mentioned, The President's Commission on Law Enforcement and Administration of Justice believes the best way the problems of the lower courts can be met is unification of the criminal courts and abolition of the lower courts as presently constituted. The commission points out that, "procedural and administrative differences in the processing of petty offenses may lead some jurisdictions to follow the pattern set by Detroit, where an integrated court handles all phases of criminal cases but a special branch of that court deals with petty offenses." TASK FORCE REPORT: THE COURTS, *supra* note 6, at 34. Implementing the commission's sensible suggestions, especially with respect to the abolition of the lower courts, would not at all conflict with the Community Council concept, for the Councils would merely assimilate the function of the special branch of the Detroit court that handles the neighborhood-type petty offense. Of course, since the lower courts would no longer exist under such a system, appeal from Council would be taken to the unified criminal court of first instance.

<sup>103</sup> Although the emphasis would be on factual questions, rather than issues of law, the procedure whereby an order of Council is appealed would resemble the usual proceedings before an appellate court to review the order of an administrative agency.

to comply. Similarly, if a Council has repeated trouble from one member of the community, it should have the power to waive its jurisdiction and have the person charged and tried in the municipal court.

Although procedures are recommended to provide for appeals and those cases where individuals fail to abide by the decisions of the Community Councils, the Council's authority to settle disputes actually stems from its closeness to its constituency. It should, therefore, benefit from the natural support of the community. There will emerge pressures from within — family, neighbors, and associates — to abide by the decisions of the Council. It is submitted that this natural support, coupled with the mechanism to resolve conflicts at an early stage, will insure that the failure to comply is not an extensive problem.

No doubt there are those who would argue that a lay council could easily become an instrument through which a small, but highly vocal, segment of the community would seize control and manipulate the system to serve the minority's own purposes. The net effect of such a minority takeover would simply be the substitution of an internal tyranny for the externally imposed tyranny that presently exists. Inherent in the Community Council concept, however, are certain structural controls which will insure that the Councils do not become a vehicle for minority control. Review by a duly constituted court is provided, and the mechanism by which councilmen are elected each year provides the means whereby the citizens of the community can protect themselves from a new tyranny. In any event, the argument that an articulate, militant minority will control the Councils is characteristic of the conservative and paternalistic attitude of the existing power structure, an attitude largely responsible for the municipal courts' present inability to help black people solve their problems. In light of this failure, is it unreasonable to suggest that the citizens of the inner city communities be given an opportunity to solve their own problems?

Restoring power to the people is not the panacea for all this society's ills. In the area of maintaining order and preventing petty crime, however, it is a solution that has been too long neglected. If the Council concept proves pragmatic at this level, there is no reason why it cannot be considered in landlord-tenant disputes and other litigation-producing relationships. It is not inconceivable that it may even be found that the best way to maintain

order in a modern community is by borrowing from the past and having local constables, drawn from the community, and backed up — but not directed — by modern police departments.

In any event, perhaps the sickness in our cities calls for a home, or neighborhood, remedy.