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Civil Disturbances, Mass Processing and Misdemeanants: Rights, Remedies and Realties

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CIVIL DISTURBANCES, MASS PROCESSING AND MISDEMEANANTS: RIGHTS, REMEDIES AND REALITIES

In the 1960s the United States experienced riots and other civil disturbances on a scale unparalleled in its history. Society's response to the stress of a serious civil disturbance is a prime indicator of its strengths and weaknesses. This paper will discuss one aspect of that response—the operations of the court system. Specifically it will deal with the treatment given persons suspected of having committed a misdemeanor or minor offense,[1] such as disturbing the peace,[2] disorderly conduct,[3] inciting to riot,[4] riot,[5] criminal nuisance,[6] or unlawful assembly.[7] These people, if convicted, will serve only a short sentence or pay a fine; they are, nevertheless, entitled to due process of law.[8] The problem is to ensure that the suspected misdemeanant be accorded due process during periods when the demands for expeditious processing of mass arrestees overtax judicial resources.

I. PROCEDURAL DIFFERENCES IN THE TREATMENT OF AN ACCUSED MISDEMEANANT AND AN ACCUSED FELON

In most jurisdictions there are substantial procedural differences in the treatment accorded accused misdemeanants and accused felons. The right to a preliminary examination to determine whether there is probable cause to believe that the defendant committed the crime is, in many jurisdictions, available only to the accused felon.[9] Moreover, the right usually given accused felons to prosecution by indictment[10] or information may not be accorded the accused misdemenant.[11] In addition, formal arraignment may not be necessary in misdemeanor cases,[12] or, if it is required, the presence of the defendant may not be mandatory as is usually the case with felonies.[13]

The Sixth Amendment right to counsel, applied to the states by the Supreme Court of the United States in *Gideon v. Wainwright*,[14] has not yet been held applicable in misdemeanor cases.[15] Also, the right to trial by jury, recently applied to the states by the Court in *Duncan v. Louisiana*, [16] is not applicable if the defendant is charged with only a "petty offense". Although the Court declined to draw the line between petty and serious offenses, it is clear that state designation of an offense as a "misdemeanor" is not determinative.[17] Some misdemeanor trials, therefore, must have a jury in absence of waiver by the defendant.[18]

[1] BLACK'S LAW DICTIONARY 1150 (4th ed. 1951) defines "misdemeanors" as "offenses lower than felonies and generally those punishable by fine or imprisonment other than in a penitentiary."

Statutes define what offenses constitute misdemeanors. *See e.g.*, CAL. PEN. CODE § 17 (West 1968 Supp.); ILL. REV. STAT. ch. 38, § 2-11 (1967).

[2] ARK. STAT. ANN. § 41-1401 (1964); CAL. PEN. CODE § 415 (West 1955).

[3] N.Y. PENAL LAW § 240.20 (McKinney 1967).

[4] CAL. PEN. CODE § 404.6 (West 1968 Supp.); GA. CODE ANN. § 26-5304 (1968 Supp.); N.Y. PENAL LAW § 240.08 (McKinney 1967).

[5] CAL. PEN. CODE § 405 (West 1968 Supp.); GA. CODE ANN. § 26-5302 (1953); N.Y. PENAL LAW § 240.05 (McKinney 1967) (riot in the second degree). In some jurisdictions this is a felony.

[6] N.Y. PENAL LAW § 240.05 (McKinney 1967).

[7] GA. CODE ANN. § 26-5301 (1953); N.Y. PENAL LAW § 240.10 (McKinney 1967).

[8] State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 893 (1967).

[9] ILL. REV. STAT., ch. 38, §§ 109-3(a), 109-1(b)(3); ch. 37, § 624(a) (1967).

[10] The fifth amendment of the Constitution of the United States requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury...." The term "infamous crime" has been construed to apply to any serious crime which carries an infamous penalty, *i.e.* one for which the accused is subject to possible imprisonment in a penitentiary. Mackin v. United States, 117 U.S. 348 (1886). This right has not been applied to the states under the fourteenth amendment. Hurtado v. California, 110 U.S. 516 (1884); Morford v. Hocker, 394 F.2d 169 (9th Cir. 1968).

[11] CAL. PEN. CODE § 682 (West 1956), § 1425 (West 1968 Supp.).

[12] N.Y. CODE OF CRIM. PROC. §§ 296, 4 (McKinney; 1958); *But see* Gouker v. State, 224 Md. 514, 528-29, 168 A.2d 521 (1961), applying the arraignment requirement to misdemeanor cases by rule.

[13] N.Y. CODE OF CRIM. PROC. § 297 (McKinney 1958).

[14] 372 U.S.335 (1963).

[15] *See* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968) and notes 43-78 *infra* and accompanying text.

[16] 391 U.S. 145 (1968). This decision does not apply retroactively. DeStefano v. Woods, 392 U.S. 631 (1968).

[17] 391 U.S. at 159, *citing* Cheff v. Schnackenberg, 384 U.S. 373 (1966).

[18] The Court in *Duncan* expressly refrained from

An accused misdemeanant, if convicted, will be branded with the stigma of a criminal record,[19] yet he may not be accorded the full complement of criminal rights.

II. The Criminal Process in Chaos

The following pattern was typical during the riots in Chicago in April, 1968, following the assassination of the Rev. Dr. Martin Luther King, Jr.[20] People were arrested in great numbers and brought to detention centers, where they were fingerprinted and processed to discover whether they had a criminal record. Since great numbers of arrests caused a slowdown in the search for records, those arrested remained in the detention centers for at least several hours until the fingerprints and processing came back from headquarters. During this period no further processing occurred. Counsel had trouble finding their clients. Moreover, lawyers, who had no clients but went to the jails because attorneys were needed, were not allowed to enter. At first, there were no bond hearings; or, if there were, they were held in mass; people accused of certain offenses had the same bonds set for them, irrespective of individual circumstances.[21]

Although Illinois statutes provide that counsel may petition for bond reduction hearings,[22] there was no opportunity to amass the information from those in custody necessary to support such petitions. In the beginning only lawyers from the Public Defender's Office were allowed in the courtroom. There were not enough attorneys, however, to assure every accused misdemeanant adequate representation.[23] Bonds were set high to keep people off the streets and most remained in jail. After several days, when the level of disturbances had diminished, the State's Attorney's Office eased the restrictions on allowing counsel into the detention centers. Also, volunteer counsel were then allowed to interview prisoners who had not contacted them previously. Bond reduction hearings were set for the following day (*i.e.*, seven days after the first arrests) when most arrestees had their bonds reduced[24] and were released. Because the preliminary examination[25] is not mandatory in misdemeanor prosecutions in Illinois,[26] most of those arrested and charged with misdemeanors were released and did not return to court until trial.[27]

The administration of justice during the riots in Detroit in the summer of 1967 followed a similar pattern.[28] People were arrested in groups and

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drawing the line between petty offenses and serious crimes. 391 U.S. at 161. The state decisions after *Duncan* which have attempted to draw the line have not been consistent. *See* United Farm Workers Organizing Com. v. Superior Court, 71 Cal. Rptr. 513 (Dist. Ct. App. 1968) (trial by jury mandatory where maximum penalty was 55 days in jail and $5500 fine); State v. Owens, 102 N.J. Super. 187, 245 A.2d 736 (1968) (1 year sentence and $1000 fine not serious crime); People v. Morgenbesser, 293 N.Y.S.2d 397 (Sup. Ct. 1968) (maximum penalty of 1 year, no jury trial required); People v. Bowdoin, 293 N.Y.S.2d 748 (Crim. Ct. N.Y.C. 1968) (maximum penalty of 1 year is a serious offense). For the effect that *Duncan* might have on offenses frequently associated with civil disturbances, *see* note 59 *infra* and accompanying text.

The decisions are also inconsistent on the issue whether a juvenile offender subject to commitment to a reformatory for several years is entitled to a jury trial under *Duncan*. *See* DeBacker v. Brainard, 183 Neb. 461, 469–70, 161 N.W.2d 508, 512, 519 (1968) (no); People v. Morgenbesser, supra (yes); People v. Y.O. 2404, 57 Misc. 2d 30, 291 N.Y.S.2d 510, 514 (Sup. Ct. 1968) (no).

[19] *See* note 1 *supra*.

[20] The factual information in this section was acquired during a May, 1969 interview with Mr. Kermit Coleman, attorney for the Roger Baldwin Foundation, American Civil Liberties Union, and volunteer counsel during the Chicago disturbances in April, 1968, and during the Democratic Convention week, August, 1968.

[21] Ill. Rev. Stat., ch. 38, § 110-5 (1967) provides in part:

(a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;
(2) Not oppressive;
(3) Commensurate with the nature of the offense charged;
(4) Considerate of the past criminal acts and conduct of the defendant;
(5) Considerate of the financial ability of the accused.

See Ginsberg, *Volunteer Lawyers Retrieve Due Process in Chicago*, 26 Legal Aid Brief Case 207 (1968).

[22] Ill. Rev. Stat., ch. 38, § 110-6 (1967).

[23] Other lawyers who were present maintain that retained and volunteer counsel aside from the public defender's office were allowed in the courtrooms at all times. Interview with Mr. James B. Haddad, Assistant State's Attorney.

[24] The courts, while reducing the amount of the bonds, refused to release people on their own recognizance, which is statutorily permissible. Ill. Rev. Stat., ch. 38, § 110-2 (1967).

[25] *See* note 10, *supra* and accompanying text.

[26] *See* note 9, *supra*.

[27] Interview with Mr. Kermit Coleman, attorney for the Roger Baldwin Foundation, American Civil Liberties Union, and volunteer counsel during the Chicago disturbances in April, 1968, and during the Democratic Convention week, August, 1968. *See also* Ginsberg, *supra* note 21, at 207.

[28] For a thorough discussion of the events in Washington, D.C. after the King assassination, April 4–15, 1968, *see* Comment, *The Response of the Washington, D.C. Community and Its Criminal Justice System to the April 1968 Riot*, 37 Geo. Wash. L. Rev. 862 (1969).

herded into overcrowded and inadequate detention facilities.[29] Certain functions such as prosecutorial screening were oriented toward mass rather than individual justice.[30] Bail was originally set high and then lowered when disturbances in the streets had calmed down.[31] Counsel were not permitted to see prisoners unless they knew their names. When volunteer counsel were allowed into jail, their numbers were insufficient to provide individual representation.[32] When preliminary examinations were held, they were often cursory.[33]

It is significant that this pattern apparently did not prevail during the Democratic Convention week in Chicago, August 25–29, 1968. Although the situation in the streets was chaotic,[34] there was ample legal representation for all those arrested. Bonds were set at $25 or $50 for misdemeanor charges, and few people spent the night in jail against their will.[35] These procedures are customary in misdemeanor cases in Chicago,[36] although in felony cases bail is set high without regard to individual circumstances and few people are released quickly. This is true both in Cook County[37] and in other large metropolitan areas throughout the nation.[38]

The difference in treatment accorded accused misdemeanants during the Convention and during the other instances mentioned is probably due to the fact that only several hundred people were arrested in Chicago as a result of the Convention disturbances[39] while several thousand persons were arrested in the wake of the Chicago riot in April, 1968,[40] in the Detroit riot in July, 1967, and in Newark that same summer.[41] This suggests that even during periods of turmoil, the judicial system can operate in a competent and fair manner. It also suggests that there is a breaking point beyond which accepted judicial and administrative procedures are sacrificed for the sake of expediency. As will be discussed later, however, it appears that proper organization of the available resources can lessen the likelihood of this breakdown during disturbances of the same magnitude as those experienced in Chicago, Detroit or Newark.[42]

III. Critique of the Process

A. Right to Counsel for Indigent Misdemeanants

As already noted,[43] the right to appointed counsel, held applicable to state felony prosecutions in *Gideon v. Wainwright*,[44] has not been held applicable to misdemeanor prosecutions. State provisions concerning the right to counsel for indigents in misdemeanor cases vary. Some specifically restrict the right to counsel to felony cases;[45] others grant appointed counsel only in certain misdemeanor cases;[46] some states provide counsel in almost every case;[47] and one state seems to require that an indigent defendant be provided

[29] Report of the National Advisory Commission on Civil Disorders 341 (Bantam ed. 1968) [hereinafter referred to as the Kerner Commission Report]

[30] *Id.*

[31] *Id.* at 341–42; Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, 66 Mich. L. Rev. 1542, 1549-50 (1968); Sengstock, *Riots and Mass Criminal Justice: The Collapse of the Bill of Rights*, 26 Legal Aid Brief Case 201, 203 (1968).

[32] Kerner Commission Report, *supra* note 29, at 342; *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 31, at 1553.

[33] Sengstock, *supra* note 31, at 206.

[34] *See* Rights In Conflict, The Walker Report to the National Commission on the Causes and Prevention of Violence (Bantam Books 1968) [hereinafter referred to as the Walker Report].

[35] Interview with Mr. Kermit Coleman, *supra* note 20.

[36] Interview with Mr. Kermit Coleman, *supra* note 20.

[37] *See* Kamin, *Bail Administration in Illinois*, 53 Ill. Bar J. 674, 675 (1965); Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 Minn. L. Rev. 621, 626–27, 638 (1966).

[38] *See* Silverstein, *supra* note 37, at 626–27, 638; Foote, Markle and Wooley, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Note, *A Survey of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958).

[39] According to figures received in a telephone interview with Chicago Corporation Counsel's Office, the number arrested was 676.

[40] Ginsberg, *supra* note 21, at 209, says approximately 2000 were arrested. The latest available statistics show that there were 2574 arrested.

[41] There were 7231 arrested in Detroit and 1510 in Newark. Kerner Commission Report, *supra* note 29, at 339 n.3.

[42] *See* notes 144–154 *infra* and accompanying text.

[43] *See* note 15 *supra* and accompanying text.

[44] 372 U.S. 335 (1963).

[45] *See, e.g.*, Hawaii Rev. Stat. § 705-5 (1968); Neb. Rev. Stat. §§ 29-1803.01, 29-1804 (Supp. 1967); Tenn. Code Ann. §§ 40-2014 to 40-2018 (Supp. 1968).

[46] Conn. Gen. Stat. Ann. § 54-81(a) (1968) (in the court's discretion- "in the interest of justice"); Md. R. Proc. 719(b) (2) (Supp. 1969) (counsel shall be appointed when the maximum penalty is six months' imprisonment and/or $500 fine and "may" be appointed in other cases); Utah Code Ann. § 77-64-2 (Supp. 1969) (when there is a possibility of confinement for more than six months).

[47] People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965); People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965). It appears to be the rule in New York that counsel must be appointed in all but traffic prosecutions.

with counsel in every case.[48] These procedural differences raise the question whether the constitutional right to counsel should be held applicable to at least some misdemeanor prosecutions.

One argument why this right should be so applied is that the Sixth Amendment does not distinguish between felonies and misdemeanors and that such a distinction is unreasonable.[49] In other words, *Gideon*, which has been interpreted as applying only to felony cases,[50] should be extended. If counsel is necessary to ensure a fair trial, it is necessary in cases designated by the state as "misdemeanors".[51] If "... in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him ...," [52] then that defendant needs counsel as badly as an accused felon does.[53] This is particularly true in a civil disturbance situation, where the defendants are often from disadvantaged groups and not highly educated.[54] Furthermore, a misdemeanor charge arising out of a civil disturbance may not be easy to defend at trial. A disorderly conduct charge, for example, is difficult to defend because the statutory language is often vague.[55] Since it seems that in riot situations people are sometimes arrested and charged with disorderly conduct or other misdemeanors just to keep them off the streets,[56] there is a real danger that innocent people will be convicted if they are forced to defend themselves without the aid of counsel.

The reasoning in *Duncan v. Louisiana*[57] suggests that the right to appointed counsel for indigents should be extended to at least some misdemeanor prosecutions. In *Duncan*, the defendant was convicted of simple battery, a misdemeanor under Louisiana law, and sentenced to 60 days in prison and a $150 fine. The maximum sentence for this crime was two years' imprisonment and a $300 fine. Because the Louisiana Constitution grants jury trials only in cases where capital punishment or imprisonment at hard labor may be involved,[58] Duncan's request for a jury trial was denied. The Supreme Court of the United States held that the Sixth Amendment right to trial by jury is applicable to all state prosecutions, felony or misdemeanor, except those which are for "petty offenses" as opposed to serious crimes.[59] The

[48] *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); Blake v. Municipal Court, 242 Cal. App. 2d 857, 51 Cal. Rptr. 771, 773 (1966); *In re* Smiley, 66 Cal. 2d 606, 614, 427 P.2d 179, 184, 58 Cal. Rptr. 579, 584 (1967).

For a detailed summary of present state provisions concerning right to counsel for accused misdemeanants, *see* Junker, *The Right to Counsel In Misdemeanor Cases*, 43 WASH. L. REV. 685, 719–34 (1968).

[49] *See* Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942):

> The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of nonsupport of a minor child [a federal misdemeanor] as by a sentence to a year in jail for any other crime, however serious. And so far as the right to assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.

[50] Mempa v. Rhay, 389 U.S. 128, 134 (1967); denials of cert. in Winters v. Beck, 385 U.S. 907 (1966) and DeJoseph v. Connecticut, 385 U.S. 982 (1966).

[51]

> It is clear that there is no magic in the designation of a crime as a misdemeanor, or felony. We must look to the consequences of conviction of crime rather than classification. The impact on an accused who suffers loss of liberty by incarceration in a penal institution is the same no matter how the crime of which he was convicted was classified.

State v. Borst, 278 Minn. 388, 399, 154 N.W.2d 888, 895 (1967). *See also* Junker, *supra* note 48, at 687–93.

[52] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[53]

> A defendant in court on a charge defined as a misdemeanor is as helpless to defend himself as he would be if he were charged with a gross misdemeanor or felony.

State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 893 (1967).

[54] KERNER COMMISSION REPORT, *supra* note 29, at 352–54.

[55] *E.g.*, N.Y. PENAL LAW § 240.20 (McKinney 1967) provides:

> A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
>
> ... 2. He makes unreasonable noise. ...

[56] Interview with Mr. Kermit Coleman, *supra* note 20.

[57] 391 U.S. 145 (1968).

[58] LA. CONST. Art. VII., § 41.

[59] As noted above, *see* note 18 *supra*, the Court refused to draw the line between petty offenses and serious crimes. The Court did say, however, that "... the penalty authorized for a particular crime is of major relevance in determining whether it is a serious crime or not and may in itself if severe enough subject the trial to the mandates of the Sixth Amendment." 391 U.S. at 159. In light of the Court's reference to the fact that in the federal system petty offenses are those punishable by no more than six months in prison and a $500 fine (18 U.S.C. § 1 (1964)), and to the fact that most states provide jury trials for offenses punishable by more than six months' imprisonment, it appears that some offenses common to civil disturbances may be included in this test. *See, e.g.*, CAL. PEN. CODE § 405 (West 1968 Supp.) (riot-maximum penalty one year in prison and $1000 fine); GA. CODE ANN. §§ 26-5301 (1953), 27-2506 (1968 Supp.) (unlawful assemblies—maximum penalty one year in prison

rationale of the Court was that the presence of a jury is a valuable safeguard in assuring the defendant a fair trial and is fundamental to the American system of justice:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.... [T]he jury trial provisions of the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges....
> ...
> ...Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.[60]

Since the right to trial by jury has been considered fundamental to a fair trial and accordingly been applied to all serious crimes regardless of their designation as felonies or misdemeanors, it seems that the right of indigents to appointed counsel should also extend to all serious crimes.

> It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel.[61]

These considerations, when viewed in light of the fact that some "misdemeanors" carry extreme penalties,[62] provide a persuasive basis for arguing that the Sixth Amendment requires that counsel be appointed for all indigents accused of serious crimes.[63]

It also can be argued that denying the right to counsel to indigent misdemeanants violates equal protection[64] since the trials or appeals of two people should not vary in result solely because one can afford a lawyer and one cannot.[65] Thus, upon the first appeal of a felony conviction, indigents are entitled to appointed counsel,[66] who are required to act as advocates rather than *amici curiae*.[67] The equal protection guarantee also may provide the indigent with a free transcript of record pending appeal or other post-conviction proceedings.[68] Since defendants in civil disturbance situations are often poor members of minority groups, the equal protection argument for their right to counsel is highly persuasive.

and $1000 fine); N.Y. PENAL LAW §§ 240.05 (riot in the second degree), 240.08 (inciting to riot) (McKinney 1967) (both have maximum penalty of imprisonment for one year).

[60] 391 U.S. at 156–58.

[61] State v. Borst, 278 Minn. 388, 398, 154 N.W.2d 888, 894 (1967). In this case defendant, charged with a misdemeanor, requested the court to appoint counsel for him and the court refused, although defendant claimed he was indigent. Defendant was convicted and sentenced to a $100 fine or 30 days in the county jail. The Supreme Court of Minnesota held, not as a matter of constitutional law but rather in the exercise of its supervisory power, that counsel must be provided in any case, felony or misdemeanor, in which the court is empowered to impose a jail sentence, even if the sentence is the alternative to the payment of a fine, where the defendant is indigent.

Several lower federal court decisions have held the right to counsel applicable to misdemeanor prosecutions where imprisonment was imposed on sixth amendment grounds. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967).

[62] *See, e.g.*, N.J. REV. STAT. § 2A:118-1 (1952) (life imprisonment for kidnapping, a high misdemeanor).

[63] It is sometimes said (*see, e.g.*, Junker, *supra* note 48) that just as Mapp v. Ohio, 367 U.S. 643 (1961) has not been restricted to felony cases even though *Mapp* itself involved a felony (*see* Schmerber v. California, 384 U.S. 757 (1966)), neither should *Gideon*, which involved a felony, be so restricted. The analogy is imperfect and the reasoning does not follow. *Mapp*, which held that evidence illegally obtained under the fourth amendment is inadmissible in state prosecutions, was not concerned with the right to a fair trial as was *Gideon*. In *Mapp* the Court was motivated by what it considered to be unconscionable invasions by the government of one's privacy and by the necessity of maintaining the dignity and integrity of the court in not receiving unconstitutionally obtained evidence. The classification of a crime as a felony or misdemeanor is irrelevant to these policy considerations. *See Mapp* at 657, 659, and *Schmerber* at 767. In the right to counsel situation the argument can be made that supplying counsel in misdemeanor cases would place too great a burden on the state and that penalties for misdemeanors are too light to require the state to assume the burden.

[64] *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. California, 351 U.S. 12 (1956).

[65] *See* Junker, *supra* note 48, at 693–95.

[66] Douglas v. California, 372 U.S. 353, 356 (1963).

[67] Anders v. California, 386 U.S. 738 (1967).

[68] Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956), *cf.* Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959) (filing fees for writ of habeas corpus and on appeal). *But see* Norvell v. Illinois, 373 U.S. 420 (1963); Mack v. Walker, 372 F.2d 170 (5th Cir. 1966).

See Williams v. Oklahoma City, 395 U.S. 458 (1969), which seems to hold that an indigent defendant convicted of a petty offense is constitutionally entitled to a free transcript where the state law provides him an appeal as a matter of right. This is a 2-page per curiam opinion, however, with no dissents and one concur-

There are difficulties, however, with arguing that equal protection requires appointed counsel for indigent misdemeanants. First, since the equal protection argument can be extended literally to most situations, it is difficult to determine what is actually a deprivation of equal protection. For example, is a state constitutionally required to appoint a psychiatrist for an indigent who wishes to plead insanity?[69] Is it required to pay for a private investigator for an indigent defendant because a more wealthy defendant might have employed one?[70] The provision of either a psychiatrist or a private investigator might affect the outcome of a trial as significantly as might the presence of counsel. Yet, especially in the case of the private investigator,[71] it does not seem reasonable to require the state to procure such services for the defendant. The state is financially incapable of eliminating all differences between the rich and the poor.

The second difficulty is that the argument is unnecessary. The constitution has a specific provision covering the point: the Sixth Amendment right to counsel. The arguments that the right should apply to state misdemeanants should if possible be based on that provision, rather than on the vague and troublesome Equal Protection Clause of the Fourteenth Amendment. This approach avoids the difficulties encountered above.

A final argument for applying the right to counsel to misdemeanants is that since the right applies to any "critical" pretrial stage,[72] it should apply to misdemeanants because in the investigatory stages it is impossible to tell with what the suspect will be charged, if anything.[73] The argument has particular force in a civil disturbance situation, where people are arrested in masses and where in the confusion one is liable to be charged with almost anything. It is unclear in this approach, however, why the right to counsel should apply once the case is conclusively treated as a misdemeanor.

The main argument against applying the right to counsel in misdemeanor cases, as implied above, is that the requirement of appointing counsel for indigents in those cases would place too great a burden on the administration of criminal justice, that too many attorneys would be needed and that the cost to the state would be too great. The Constitution, the argument goes, requires a balancing of the interests of the state and the individual. Since misdemeanors usually carry light penalties, it is claimed that the interest of the accused misdemeanant in having counsel appointed for him is not sufficient to outweigh the interest of the state in preventing the financial expense necessary to provide counsel.

If bar associations were sufficiently mobilized, especially in civil disturbance situations, to effectively cooperate with the courts in providing counsel, the expense should not be overwhelming. Also, it is questionable whether the burden of appointing counsel for all indigent defendants charged with serious misdemeanors would be greater than the burden of providing jury trials for them, which burden did not seem to bother the Supreme Court of the United States in the *Duncan* decision.[74] In any event, speedy and inexpensive criminal justice administration does not justify an unfair trial.[75]

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rence, by Mr. Justice Black, without opinion. The Court cites equal protection cases, such as Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353; Lane v. Brown, 372 U.S. 477; Draper v. Washington, 372 U.S. 487; and Rinaldi v. Yeager, 384 U.S. 305, among others. The Court holds that the fact that an indigent under Oklahoma law cannot get a transcript while one who can afford it can, is "an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make." 395 U.S. at 460. No discussion, however, is addressed to the fact that the defendant was convicted of only a petty offense.

[69] A request for funds by an indigent for conducting an independent psychiatric examination was denied in Houghtaling v. Commonwealth, 209 Va. 309, 163 S.E.2d 560 (1968). In Foster v. Commonwealth, 209 Va. 297, 163 S.E.2d 565 (1968), the court refused to provide an independent chemical examination of physical evidence where the FBI tests were available for his inspection.

[70] A request for an investigator at state expense was denied in San Miguel v. McCarthy, 8 Ariz. App. 323, 446 P.2d 22 (1968).

[71] It is conceded that a strong argument may be made that the state does have to furnish an impartial psychiatrist where an indigent defendant wishes to plead insanity.

[72] Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

[73] See Junker, *supra* note 48, at 695–96.

[74] See notes 57–62 *supra* and accompanying text.

[75]

> We are persuaded that the possible loss of liberty by an innocent person charged with a misdemeanor, who does not know how to defend himself, is too sacred a right to be sacrificed on the alter of expedience. Any society that can afford a professional prosecutor to prosecute this type of crime must assume the burden of providing adequate defense, to the end that innocent people will not be convicted without having facilities available to properly present a defense.

In addition, under recidivist statutes, which many states have,[76] a subsequent misdemeanor may be elevated to the status of a felony because of a prior misdemeanor conviction. It has been held in at least two cases that where an accused was not afforded counsel at his prior misdemeanor conviction, such conviction could not be used to elevate the status of his subsequent misdemeanor conviction to a felony and still be valid under the Sixth Amendment.[77] On an administrative level (i.e. giving effect to recidivist statutes without risking reversals and new trials on right to counsel grounds), as well as on a constitutional level, it therefore seems desirable that the right to counsel be applied to all but petty offense cases.[78]

B. Bail

In the federal system an accused, under the Bail Reform Act of 1966,[79] and the Federal Rules of Criminal Procedure,[80] has a right to be released on bail before trial if charged with any crime other than a capital offense. The Bail Reform Act requires that bail be set no higher than that necessary to assure the defendant's presence at trial.[81] In determining this amount the judicial officer must consider the individual circumstances of the accused, such as his employment, family ties, and length of residence in the community.[82] These provisions are a codification of the decision of the Supreme Court of the United States in *Stack v. Boyle*,[83] which held that bail set higher than an amount reasonably calculated to assure the presence of the defendant at trial is "excessive" under the Eighth Amendment.[84]

The Supreme Court of the United States has never held the Eighth Amendment bail provision applicable to the States, although some courts have assumed its application.[85] Most commentators agree that the bail provision should and will be applied to the states because pretrial detention may prejudice a defendant at trial[86] and because pretrial detention is incarceration before the determination of guilt, and is therefore inherently opposed to the fundamentals of the American system of justice.[87]

Most states have the same statutory standards as the federal system concerning the right to bail[88] and the level at which bail is to be set,[89] but these standards are often disregarded.[90] Under existing standards, there is little justification, even during a civil disturbance, for setting bail at one thousand dollars or more in misdemeanor cases.[91] Since the maximum punishment for most misdemeanors is not heavy, it is doubtful that many accused misdemeanants will jump bail and risk a possibly serious penalty.[92]

Even if the accused can afford a lawyer, the tasks of locating witnesses and documenting alibis are time-consuming and costly. The accused misdemeanant may decide that it does not pay to spend several hundred dollars in legal fees to avoid paying a small fine. He should not be put in the position of having either to hire a lawyer or plead guilty. Moreover, aside from the question of finances, pretrial detention may prejudicially affect

State v. Borst, 278 Minn. 388, 399, 154 N.W.2d 888, 894–95 (1967).

[76] IOWA CODE ANN. § 747.2 (1969 Supp.); N.J.S.A. § 2A:85-12 (1968 Supp.).

[77] State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968); Garcia v. State, 7 Ariz. App. 524, 441 P.2d 559 (1968). *But see Ex parte* Carpenter, 425 S.W.2d 821 (Tex. Crim. App. 1968).

[78] One might ask why petty offense cases should be exempt from the requirement. Admittedly the distinction is arbitrary. Nevertheless, it would seem that requiring that counsel be appointed for an indigent in every case, including traffic offense cases, would so tie up the court system and create such substantial docket backlogs that fair trials could not be obtained (e.g. witnesses may die) and the purpose of imposing the right to counsel would be defeated. See Peterson, J., concurring, in State v. Borst, 278 Minn. 388, 401, 154 N.W.2d 888, 896 (1967); People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965).

[79] 18 U.S.C. § 3146(a) (Supp. II; 1964).

[80] FED. R. CRIM. P.46(a).

[81] 18 U.S.C. § 3146(a) (Supp. II, 1964); FED. R. CRIM. P.46(c).

[82] 18 U.S.C. § 3146(b) (Supp. II, 1964).

[83] 342 U.S. 1 (1951).

[84] *Id.* at 4–5.

[85] Reeves v. State, 411 P.2d 212, 215 (Alaska Sup. Ct. 1966); Mastrian v. Hedman, 326 F.2d 708, 711 (1964); Pilkinton v. Circuit Court of Howell County, Missouri, 324 F.2d 45, 46 (8th Cir. 1963).

[86] *See* note 104 *infra* and accompanying text.

[87] *See* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 1125 (1964); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 39–46 (1964); Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621, 644 (1966).

[88] FLA. CONST. DECLARATION OF RIGHTS § 9; ILL. REV. STAT., Ch. 38, § 110–4 (1967); MISS. CONST. Art. 3, § 29.

[89] People *ex rel* Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930); People v. McDonald, 233 Mich. 98, 206 N.W. 516 (1925); Johnson v. State, 30 Ala. App. 593, 10 So. 2d 298 (1942); *Ex parte* Stegman, 112 N.J. Eq. 72, 163 A. 422 (1932).

[90] *See* notes 119–143 *infra* and accompanying text.

[91] *See* note 31 *supra* and accompanying text.

[92] In federal cases the punishment given an accused misdemeanant for jumping bail is a fine up to the maximum provided for such misdemeanor and/or one year in prison. 18 U.S.C. § 3150 (1969).

the accused at trial, for witnesses may never be found and alibis may never be able to be documented.[93]

In addition, of course, where it can be shown that the accused is a trustworthy, employed family man,[94] he should be released so that he can earn a living during the pretrial period. Keeping the accused in jail when there is no good reason to do so will only encourage disrespect and contempt for the law, especially among those minority groups that are often involved in civil disturbances.[95]

Aside from the amount of bail to be imposed to assure the presence of the accused at trial, there are two key issues concerning the administration of bail. The first is whether the bail system itself is constitutional when applied to indigents; the second is whether a system of pretrial detention should be substituted for or superimposed upon the present bail system. The first issue is beyond the scope of this paper.[96] Preventive detention, however, must be considered because the considerations relevant to a system of preventive detention are especially prevalent in a civil disorder and because judges sometimes use the present bail system in an attempt to effect the purposes of preventive detention.[97]

It should be noted that most proposals for preventive detention affect only those accused of crimes of violence, such as murder, rape and arson; and those crimes are usually felonies.[98] In a civil disorder, however, certain misdemeanors, such as inciting to riot and even disorderly conduct, may under some circumstances lead to violence. Therefore, the possibility that the present proposals for a system of preventive detention will be expanded to include certain misdemeanors should not be overlooked.

The argument in favor of preventive detention is that there are certain defendants who constitute such a threat to society that they should not be released at any bail: if released they are likely to commit further crimes or interfere with the processes of justice. A formal preventive detention hearing, it is argued, will give the defendant a chance to clear his name and will be at least as trustworthy and more open than a judge's instinct that a defendant is a threat to the community.[99] In a civil disturbance situation, one's potential for disruption and violence is enhanced and the detention of certain people may help in quelling the disturbance.[100]

Those opposing preventive detention have advanced numerous arguments. It is difficult if not impossible to establish meaningful standards and criteria for deciding who should be detained. Moreover, it is difficult if not impossible to predict who will commit a serious crime during the period of pretrial release.[101] Furthermore, judges almost always overpredict how many are bad risks for release.[102] In addition, fact finding takes time, sometimes weeks, during which the accused is incarcerated. Appellate review is, in fact, inadequate and habeas corpus is slow.

> Taken together, experience with these comparable proceedings gives no reason for optimism that it would be possible to develop procedures for adequate hearing on preventive detention and administer them with sufficient dispatch to avoid serious complications.[103]

[93] *See* note 104 *infra* and accompanying text.

[94] This assumes that the magistrate will take the accused's personal situation into account. Such an assumption may be incorrect when a serious civil disturbance is in progress. *See* notes 21 and 31 *supra*.

[95] KERNER COMMISSION REPORT, *supra* note 29, at 352–54.

[96] For thorough discussions of the bail system, see the authorities cited in note 87 *supra*. The arguments that the bail system is unconstitutional as applied to indigents are that by not being able to post bail and so forced to remain in jail, the indigent is being punished by imprisonment before trial in violation of substantive due process; he is adversely affected at trial and so is deprived of a fair trial in violation of procedural due process; he is denied pretrial liberty only because of his indigence in violation of equal protections requirements; and he is being denied his right to bail under the Eighth and Fourteenth Amendments (assuming the Eighth Amendment grants a right to bail and that it applies to the states) because for him, any bail is "excessive." *See* Foote, *supra* note 87, at 1135.

[97] *See* notes 120–124 *infra*, and accompanying text; Packer, *supra* note 87, at 45.

[98] *See, e.g.*, Note, *Preventive Detention*, 36 GEO. WASH. L. REV. 178, 187 (1967).

[99] *Id.* at 179–80.

[100] *See* Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, 66 MICH. L. REV. 1542, 1564–65 (1967).

[101]

> All of the criteria which might be used as standards for preventive detention share this characteristic of being statistically infrequent. Probably we know least about the degree of probability that a defendant during the period of pretrial release will commit a crime. Here we have no data at all, but it is inconceivable that the probability is higher than five percent and more likely it is considerably lower. The other criteria noted—that the defendant will intimidate witnesses or jurors or injure a complainant—are apparently very rare, statistically well below one percent.

Foote, *supra* note 87, at 1170.

[102] *Id.* at 1172.

[103] *Id.* at 1179–80.

Finally, pretrial detention, preventive or otherwise, jails one who has not been convicted of a crime and thus impedes the preparation of his defense by restricting his access to his attorney and his ability to track down witnesses.[104] Meanwhile earning capacity is cut off, pretrial confinement may break down one's will to resist and innocent people may plead guilty; all this before one is convicted of a crime.[105]

The arguments against preventive detention are perhaps best expressed by Professor Foote:

> The addition of the label "preventive" does not cleanse detention of its vices: pretrial punishment and impairment of a fair trial. The overwhelming objection to such detention is that the kinds of precise prediction of future conduct which it requires cannot be made with significant reliability even under the best of fact finding and diagnostic circumstances.[106]

[104] These impediments were apparent in the cases following the Detroit riots. KERNER COMMISSION REPORT, *supra* note 29, at 350 n.18. *See also* Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 227 (1962).

A sample study of defendants arraigned in Manhattan Magistrate's Felony Court between October 16, 1961, and September 1, 1962, shows a definite correlation between detention and unfavorable disposition at trial.

TABLE 1

RELATIONSHIP BETWEEN DETENTION AND UNFAVORABLE DISPOSITION

Disposition	Bail (%)	Jail (%)
Sentenced to prison.....	17	64
Convicted without prison.....	36	9
Not convicted.....	47	27
Number of defendants.....	(374)	(358)

Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 642 (1964).

> These findings provide strong support for the notion that a causal relationship exists between detention and unfavorable disposition.... The results as they now stand ... do add strong support to the argument that pretrial detention increases a defendant's chance of receiving a prison sentence.

Id. at 655.

[105]

> Imprisonment to protect society from unpredicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it....

Jackson, J., sitting as Circuit Justice, in Williamson v. United States, 184 F.2d 280, 282 (2d. Cir. 1950).

[106] Foote, *supra* note 87, at 1182–83.

This paper will not attempt to resolve the preventive detention controversy. It is suggested, however, that the best way to deal with accused misdemeanants[107] is to administer the present bail system fairly.

C. Preliminary Examination

As noted earlier,[108] an accused misdemeanant may not have a right to a preliminary examination. There is no federal constitutional requirement that such an examination be held.[109] The question is, therefore, whether an accused misdemeanant should be accorded the right to a preliminary hearing as a matter of state policy.[110]

It is arguable that this right ought to be applied to accused misdemeanants as well as accused felons since probable cause must be established in either case.[111] The importance of the preliminary examination is attested to by the fact that in some cases it has been held a "critical stage," making the right to counsel at that time applicable in felony cases.[112] If the danger exists in civil disturbances "... that innocent bystanders will be swept into the process and prosecuted without distinction from those arrested with them...," [113] then in theory it is important that in civil disorders an accused misdemeanant be accorded a preliminary hearing, since the determination of probable cause may not be available through an indictment.[114]

On the other hand, in civil disorders the preliminary examination is in fact often hurried and not probative and does not afford real protection from mistaken prosecution.[115] In some states it can be adjourned for a certain length of time without the accused's consent, during which time he is either incarcerated or bailed.[116] One's primary con-

[107] *See* note 36 *supra* and accompanying text.

[108] *See* note 10 *supra*.

[109] Lem Woon v. Oregon, 229 U.S. 586, 590 (1913); Worts v. Dutton, 395 F.2d 341, 342 (5th Cir. 1968).

[110] The preliminary examination dealt with here is not the same as the bail hearing, to which both accused felons and accused misdemeanants are usually entitled.

[111] *See* note 9 *supra*.

[112] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961). *See* Hunwald, *The Right to Counsel at the Preliminary Hearing*, 31 MO. L. REV. 109 (1966).

[113] Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 100, at 1609.

[114] *See* note 11 *supra* and accompanying text.

[115] Interview with Mr. Kermit Coleman, *supra* note 20; Sengstock, *supra* note 31, at 206; *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 100, at 1609.

[116] CAL. PEN. CODE § 861 (West 1956); WIS. STAT. ANN. § 954.05 (1958).

cern after his arrest is to resume his normal life as quickly as possible. Any extra appearance in court will only further restrict his freedom.

The burden on the state in providing preliminary examinations must also be considered. Counsel for the prosecution must be provided. Witnesses for the state often have to testify,[117] which in a civil disorder situation means the arresting officer will have to testify. This takes him off the streets. In normal times, it is inconceivable that a state should have to provide a preliminary examination for one charged with a traffic offense: the state would spend more money than it would take in on the ticket.

A distinction might be drawn between petty offenses and serious crimes, as in the jury trial area.[118] But perhaps the best answer for both the state and the accused is to release the accused on bail, have his lawyer try to negotiate with the prosecuting attorney and in absence of agreement as to plea, proceed directly to trial.

D. Lack of Remedies

It is painfully apparent that in a riot situation, where one's legal rights are violated either before or during his arrest by the police, he may as a practical matter be remediless.[119] Likewise, where mass processing leads to the violation of one's legal rights after his arrest, he may in fact have no recourse.

As noted above, in many instances judges seem to set bonds high with the express purpose of keeping people off the streets.[120] In fact, during the Detroit riots of 1967, one judge, Judge Robert J. Colombo, publicly stated that this was the purpose of the high bond:

> What we're trying to do here is keep them off the streets. And apparently we're being successful at that. If we let them back on you know what would happen.... In a way we're doing what the police didn't do.[121]

This policy, which was also carried on in Chicago in the riots of April, 1968,[122] was often in violation of statute,[123] even as the statute is interpreted by the chief judge of the local court.[124]

The problem was to find a way to have the bond reduced before several days had passed. It was difficult to quickly petition for bond reduction hearings because of the early restrictions on counsel allowed in the courtroom and because magistrates were not disposed to hold bond reduction hearings immediately.[125] There were often not enough attorneys to file habeas corpus petitions. When such petitions were filed, the local court often held them for several days before returning them.[126] Where petitions could have been filed in the appellate courts for writs of superintending control,[127] lawyers did not file them because they felt they would do no good.[128] The next step was to petition the federal district court for writs of habeas corpus; but federal courts will not grant the writs unless state remedies have been exhausted or unless such remedies are "... ineffective to protect the rights of the prisoner."[129] Furthermore, if they had been filed and the exhaustion hurdle had been overcome, the issue might have been moot by the time the federal court was prepared to hear it.[130]

> Since the process of proceeding from one court to another, presenting motions and petitions, attending hearings, and waiting out possible adjournments is apt to be quite time-consuming, the problem during the disorder would have been to obtain adequate review before

[117] *See, e.g.*, ARIZ. R. CRIM. P. 22; CONN. GEN. STAT. § 54-76a (1968); W.S.A. § 954.08 (1958).

[118] *See* notes 16-18 *supra* and accompanying text.

[119] *See generally*, WALKER REPORT, *supra* note 34.

[120] *See* notes 27 and 31 *supra* and accompanying text.

[121] The Detroit News, July 26, 1967, § A, at 12, col. 6. *See* Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 100, at 1550.

[122] Interview with Mr. Kermit Coleman, *supra* note 20.

[123] *E.g.*, ILL. REV. STAT., ch. 38, § 110-5(a), *see* note 21. *supra*

See also Ginsberg, *infra* note 124, at 207.

[124] Boyle, *Bail Under the Judicial Article*, 17 DE PAUL L. REV. 267 (1968). *See also* Ginsberg, *Volunteer Lawyers Retrieve Due Process in Chicago*, 26 LEGAL AID BRIEF CASE 207 (1968).

[125] Interview with Mr. Kermit Coleman, *supra* note 20.

[126] Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 100, at 1577-78.

As Professor Sengstock has said,

> If the object in setting a bond was to keep an individual in jail, the honest way of accomplishing this would have been to deny bond altogether and to let the denial be tested with a writ of habeas corpus.

Sengstock, *Riots and Mass Criminal Justice: The Collapse of the Bill of Rights*, 26 LEGAL AID BRIEF CASE 201, 203 (1968).

[127] *See* Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 102, at 1582.

[128] Sengstock, *supra* note 126, at 204-05.

[129] 28 U.S.C. § 2254(b) (1968).

[130] Sengstock, *supra* note 100, at 204-05.

the issue was mooted by a reduction of bail or trial.[131]

Obtaining adequate review was almost impossible and the arrestee often remained in jail for a week before the court voluntarily held a bond reduction hearing and reduced the bond. The hearings usually took place after most of the trouble in the streets had subsided.[132]

If the accused is subsequently convicted, the fact that bail was refused or excessive will not be grounds for reversal unless he can show not only that his detention was illegal but that he was prejudiced at trial because of it.[133] As a practical matter this may be impossible to prove,[134] especially since trial may not be held for months after the accused is released.[135] This delay would seem to give a defendant ample time to locate his witnesses, even though because of his detention he may never be able to do so. He will have to prove that it was his illegal detention, and not his own inefficiency, that prevented him from locating his witnesses in light of the fact that he had several months to do so.

Generally a civil action for false imprisonment will lie for unreasonable delay in bringing an arrested person before a magistrate.[136] The action may be directed at the arresting officer,[137] or any other person who is responsible for the officer's failure to take the party before a magistrate without unreasonable delay.[138] A false imprisonment action will also generally lie against an arresting officer[139] or another who is responsible for the wrongful denial of the opportunity to give bond.[140] An action will not be successful against the judge if he had jurisdiction to set the amount of bail.[141] Furthermore, once the judge exercises his discretion in setting or refusing bail, the arresting officer is probably relieved of any liability thereafter.[142] And even if the other obstacles could be overcome, plaintiff would have to prove that the officer's delay in bringing him before a magistrate was unduly long or that the magistrate's refusal to grant bail which the plaintiff could meet, was unreasonable.[143] In light of the fact that a civil disturbance was in progress at the time, with the result that the arresting officer was unusually busy and the judge probably had more arrestees than usual with which to contend, proof of a claim of false imprisonment will not be easily established.

IV. What Can be Done

When a lawyer who viewed the process first hand was asked what could be done to help the situation, his response was "Very simple, follow the recommendations of the *Kerner Commission Report*, Chapter 13."[144] In the *Report*, the Kerner Commission in summary recommended the following: that the lower criminal courts be reformed to

[131] Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July, 1967*, *supra* note 100, at 1582.

[132] Interview with Mr. Kermit Coleman, *supra* note 20.

[133] Fitts v. United States, 335 F.2d 1021 (10th Cir.), *cert. denied*, 379 U.S. 979 (1964); Spaulding v. United States., 279 F.2d 65, 66 (9th Cir) *cert. denied*, 364 U.S. 887 (1960).

[134] Interview with Mr. Kermit Coleman, *supra* note 20.

[135] As of February 6, 1969, according to Chicago Corporation Counsel's Office, 226 cases were still pending out of 676 arrested during convention week in Chicago.

[136] Thurston v. Leo, 124 Vt. 298, 204 A.2d 106 (1964); State v. Maldonado, 92 Ariz. 70, 373 P.2d 583 (1962); Lincoln v. Grazer, 163 Cal. App. 2d 758, 329 P.2d 928 (1958); Great Americam Indem. Co. v. Beverly, 150 F. Supp. 134 (D.C. Ga. 1956) (applying Georgia law).

Under certain circumstances an action may lie for the violation of one's federal civil rights under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (1964). That act has served as the basis for damage actions against police officers for jailhouse beatings, Hughes v. Smith, 389 F.2d 42 (3rd Cir. 1968); illegal searches and seizures, Monroe v. Pape, 365 U.S. 167 (1961); and illegal arrests, Funk v. Cable, 251 F. Supp. 598 (M.D. Pa. 1966); among other actions. Problems of proof are no easier here than at common law, however. For an introduction into this complicated field, *see* Comment, *Civil Action for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1015 (1967); Comment, *Exhaustion of State Remedies in Suits Under the Civil Rights Act*, 68 Colum. L. Rev. 1201 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Basista v. Weir, 340 F.2d 110 (5th Cir. 1963); Antelope v. George, 211 F. Supp. 657 (D. Idaho 1962).

[137] Dragna v. White, 45 Cal. 2d 469, 289 P.2d 428 (1955).

[138] Garvin v. Muir, 306 S.W.2d 256 (Ky. Ct.App. 1957); Cannon v. Krakowitch, 54 N.J. Super. 93, 148 A.2d 213 (1959).

[139] Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745 (1947); Jackson v. Thompson, 188 S.W.2d 853 (Mo. App. 1945).

[140] Anderson v. Spencer, 229 Iowa 595, 294 N.W. 904 (1940); Jackson v. Thompson, 188 S.W.2d 853 (Mo. App. 1945).

[141] At common law judges are immune from liability for acts committed within their judicial jurisdiction even if the acts were committed maliciously and corruptly. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). This common law immunity was not abolished by the Civil Rights Act, 42 U.S.C. § 1983 (1964). Pierson v. Ray, 386 U.S. 547, 554 (1967).

[142] Smith v. Lott, 73 Idaho 205, 249 P.2d 803 (1952).

[143] Cases are collected in 98 A.L.R.2d 966.

[144] Interview with Mr. Kermit Coleman, *supra* note 20.

ensure fair justice for all individuals; that communities work out a plan, with all segments of the community participating, for administering during riots, which plan should specify certain police procedures such as alternatives to arrest and should make provision for additional counsel and court personnel; that multiple-use processing forms and station house summonses be used instead of present arrest and processing procedures; that the bar be mobilized to provide adequate representation of riot defendants; that alternative conditions to release be used rather than the present system of setting high bails to keep people off the streets;[145] and that indictments, arraignments and sentencing be conducted on an individual basis rather than in mass.[146]

There is a good deal of evidence to substantiate the Commission's conclusion that lack of planning has played an important role in the breakdown of the administration of justice during civil disturbances. Correction facilities were not equipped to handle mass arrests, partly because they are overcrowded even in ordinary times.[147] Police planning was either lacking completely or deficient.[148] Court congestion added to the problem.[149] There were inadequate numbers of prosecution and defense counsel on hand.[150] Finally, even if there had been adequate planning with respect to one part of the criminal justice system, the system as a whole failed because the parts were not sufficiently coordinated to deal with the great number of arrests.[151]

If those responsible for the administration of justice plan their emergency procedures in advance, there would be a greater chance that when the emergency arises justice will be administered in a fair and orderly manner rather than haphazardly and in mass. If such plans were in effect, it seems less likely that courthouses would fall victim to mob psychology and that judges would feel that their primary function in civil disorders is to "keep them off the streets" and do "what the police didn't do."[152]

Further legislation and application to misdemeanor prosecutions of constitutional rights will help, but they are not the complete answer.[153] What is needed, as the *Kerner Commission Report* points out, is concentrated, coordinated efforts by legislatures, police administrators, bar associations and courts to assure that justice does not depend upon what is happening in the streets outside. There must be an attempt to conduct business as usual in the courts even if business is far from usual in the streets. The exact procedures to be followed will of course vary according to the logistics of the particular city. The *Report* therefore gave few details concerning its recommended plan, yet the basic idea of establishing a plan is sound.[154]

V. Conclusion

We are told that due process is the cornerstone of American jurisprudence. Yet while an accused misdemeanant arrested during a civil disturbance sees his rights trampled, he has, in effect, no pretrial or post-trial criminal remedy and whatever civil remedy he might enjoy is almost impossible to realize. Much of the time laws exist to protect his rights. What is needed is a change in attitude on the part of those whose duty it is to enforce and apply the law. Implementations of the recommendations of the Kerner Commission should be a useful first step in changing those attitudes.

[145] For a short but striking presentation of how bail is set mechanically and used to keep people off the streets, *see For the Record-Bail in Chicago*, 3 Crim. L. Bull. 665 (1967).

[146] Kerner Commission Report, *supra* note 29, at 344–57.

[147] Report of the United States President's Commission on Crime in the District of Columbia 421 (1966); *Vera Institute Report on Overcrowded Jails*, 161 N.Y.L.J. 1 (1969).

[148] The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 49 (1967); Leary, *Law Enforcement and the Crisis in the Cities*, 156 N.Y.L.J.4 (1966).

[149] The President's Commission Task Force Report, *supra* note 148, The Courts, Chapter 7.

[150] Dodds and Dempsey, *Civil Disorders: The Impact of Mass Arrests on the Criminal Justice System*, 35 Brklyn. L. Rev. 355, 361–63 (1969).

[151] The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 280 (1969); Report to Mayor elect John V. Lindsay by the Law Enforcement Task Force 12 (1965).

[152] *See* note 121 *supra* and accompanying text.

[153] The state laws regarding bail, for instance, may be quite adequate, but in practice they are sometimes ignored. *See* notes 119–124 *supra* and accompanying text.

[154] Several cities have adopted plans which follow many of the Commission's recommendations. One such city is New York, which has established the Criminal Justice Coordinating Counsel, a multi-agency body. An ad hoc Counsel Committee on the Administration of Justice During Emergency Conditions was formed and made recommendations. Legislation of various kinds was enacted and a plan was developed. The plan is designed to cover arrest and booking procedures; issuance in some cases of station house summonses; simplification of forms; transportation of police and arrestees; dissemination of information concerning the location of arrestees; detention facilities; mobilization of lawyers, judges and non-legal personnel; preliminary hearing; and bail policy and procedures. For a more thorough analysis, *see* Dodds and Dempsey, *supra* note 150, at 375–91.