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DISCRIMINATION AGAINST NEGROES IN THE ADMINISTRATION OF CRIMINAL LAW IN MISSOURI

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Charges that Negroes are discriminated against in the administration of the criminal law have been heard for a century. The allegation which used to be made most frequently was that Negroes were discriminatorily excluded from grand and petit juries. Recently it has been argued that Negroes are the victims of other, more subtle, forms of discrimination—such as being required to post higher bail—which are hard to detect and harder to prove.

This article is a preliminary effort to determine whether it is possible to evaluate some of these charges. The data analyzed were collected in Missouri for the American Bar Foundation's 1962 "Nationwide Survey of the Defense of Indigents Accused of Crime." There are advantages and disadvantages to using these data. One of the disadvantages is that racial data were not easily available in some of the survey counties and, because the focus of the survey was on indigence rather than race, were not always gathered. Another is that some forms of discrimination—such as the classic one of jury exclusion—cannot be investigated because information concerning them was not called for in the survey. The survey data comprise a randomly selected sample of the total number of cases in which an information or indictment had been filed charging the commission of a felony.¹ No data, therefore, were collected concerning misdemeanor charges or city ordinance violations. Further, the data contain no information about prior convictions or any part of the criminal process before the filing of a formal felony charge, except the date of arrest. Therefore it is impossible to investigate some critical questions concerning black overrepresentation in the case

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1. For the detailed sampling procedure see Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U.L.Q. 270, 274 n.4. See also L. SILVERSTEIN, DEFENSE OF THE POOR 171-86 (1968) [hereinafter cited as SILVERSTEIN].

studies, such as whether there was more vigorous (*i.e.*, discriminatory) police activity, and, since total arrest figures also are unavailable, whether prosecutors engaged in discriminatory charging practices.

Nevertheless, large amounts of information are available, and there are some advantages to using the Missouri survey data for this preliminary inquiry. One is that the data are old enough to antedate the more recent charges of discrimination and, therefore, are unlikely to have been tampered with before collection to conceal discrimination if it existed. Another is that Missouri has two metropolitan areas, St. Louis and Kansas City (Jackson County), which at the time of the survey had different proportions of resident Negroes. Further, the St. Louis area was (and still is) divided into two political units, one (the City of St. Louis) wholly urban with a high proportion of Negroes, the other (St. Louis County) almost entirely suburban with few Negroes. Thus the state offered unique opportunities for comparing different environments.

Two types of information about the impact of race on the criminal process can be derived from the survey data. One type concerns the nature and extent of the different races' involvement in the process. This information is reviewed in Part I. Part II scrutinizes the data concerning the stages of the criminal process after the filing of the formal charge to determine whether Negroes were treated differently than whites. Part III contains a summary and some conclusions.

I.

Table 1 displays general information about the eight counties surveyed in 1962 and the docket studies taken in each. Immediately obvious is the difference between the proportion of Negroes in the total population (14 percent) and in the docket studies (32 percent). If the studies in which racial data were not available are eliminated, the latter proportion rises to 40 percent (133 of 333).² Three counties (Howell, Miller, and Putnam) had so few black residents at the time of the survey that drawing conclusions from data collected there would be hazardous.³

2. The racial percentages in the sample probably are very close to the actual percentages because the sample was randomly selected and only two races were represented.

The overrepresentation of Negroes on criminal dockets is not a new phenomenon. For a similar observation, and some suggestions as to why, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 44-45 (1967).

3. For a description of the criminal justice system in these counties see Note, *A Preliminary Study of Felony Defendants in Rural Missouri*, 1970 WASH. U.L.Q. 348.

None of the counties surveyed was in the southeast, or "boothel", part of the state, where there are higher proportions of Negroes. Some of these counties, and the proportions of Negroes in their

In two other counties (Audrain and Jasper), racial data were unavailable in more than 70 percent of the cases studied. Data from these five counties have therefore been eliminated from consideration in the remainder of this article.

TABLE 1

GENERAL INFORMATION ABOUT SURVEY COUNTIES

	1960 Population In 1000s*			Total Felony Def'ts 1962	Docket Studies			
	White	Negro	Total		White	Negro	No Data	Total
Audrain	24.4 (.94)	1.6 (.07)	26.0	120	12 (.24)	2 (.04)	36 (.72)	50
City of St. Louis	534.0 (.71)	214.4 (.29)	750.0	2,101	60 (.42)	83 (.58)	1 (.01)	144
Howell	22.0 (.99)	0.086 (.00)	22.0	95	20 (1.00)	0	0	20
Jackson	537.5 (.86)	84.0 (.13)	622.7	1,380	33 (.41)	34 (.42)	13 (.16)	80
Jasper	77.7 (.98)	1.0 (.01)	78.9	161	12 (.24)	0	38 (.76)	50
Miller	13.8 (.99)	0.02 (.00)	13.8	17	18 (1.00)	0	0	18
Putnam	7.0 (.99)	0.002 (.00)	7.0	14	11 (.92)	0	1 (.8)	12
St. Louis County	683.6 (.97)	19.0 (.03)	703.5	311	34 (.71)	14 (.29)	0	48
Total	1,900.0 (.86)	320.11 (.14)	2,223.9	4,199	200 (.47)	133 (.32)	89 (.21)	422

* Source U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK (1962). Discrepancies in the totals of numbers and percentages are caused by the presence of small numbers of other races, and by rounding errors.

Table 2 repeats the display in Table 1, except that these five counties are eliminated and that no data cases are disregarded in computing percentages. The proportion of Negroes in the docket studies in the City of St. Louis (58 percent) is twice their proportion in the total population (29 percent). In Jackson County, the difference between these proportions is almost four to one (50.5 percent to 13 percent). In St. Louis County it approaches ten to one (29 percent to 3 percent). Two

populations in 1960, were: Butler, 7.2%; Cape Girardeau, 2.8%; Mississippi, 23.9%; New Madrid, 20.2%; and Pemobscot, 26.9%. For a description of how the counties were selected, see SILVERSTEIN 175-77

problems are presented. One is the general overrepresentation of Negroes in the docket studies. The other is why the ratio of this overrepresentation varies from place to place. The available data are inadequate to justify anything but speculation about either of these problems. One unknown factor, for example, is how many of the Negroes charged with felonies by St. Louis County in 1962 actually resided in the County at that time. The County borders the City of St. Louis on every side away from the river, and it is probable that at least some of the Negroes charged in the County resided in the City. It would have been helpful to have had racial data from Audrain and Jasper Counties; on the assumption that black defendants in these counties probably were local residents, a comparison of the ratios of overrepresentation there with those in the three metropolitan counties might have been instructive. If the figures in Table 2 for the City and County of St. Louis are added together, the ratios derived (16 percent of the population; 51 percent of the docket studies) are close to those of Jackson County.

TABLE 2
 PROPORTIONS OF NEGROES IN POPULATION AND
 DOCKET STUDIES

	1960 Population In 1000s*			Docket Studies			
	White	Negro	Total	White	Negro	No Data	Total
City of St. Louis	534.0 (.71)	214.4 (.29)	750.0	60 (.42)**	83 (.58)	1	144
Jackson	537.5 (.86)	84.0 (.13)	622.7	33 (.495)	34 (.505)	13	80
St. Louis County	683.6 (.97)	19.0 (.03)	703.5	34 (.71)	14 (.29)	0	48
Total	1,755.1 (.85)	317.4 (.15)	2,076.2	127 (.49)	131 (.51)	14	272

* Source: U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK (1962).

** Studies which contained no racial data are disregarded in computing percentages.

Table 3 breaks down the data from the metropolitan counties by age and race. The numbers of defendants of each race were approximately equal. Negroes tended to be overrepresented in age categories below 30, whites in categories above 40. In spite of this difference in distribution, the table confirms the dictum that "crime is a young man's game."

Seventy-five percent of the whites (95 of 127) and 84 percent of the blacks (109 of 131) were under 40.

TABLE 3
AGE COMPARED TO RACE

	City of St. Louis			Jackson County			St. Louis County			Total		
	White	Negro	No Data	White	Negro	No Data	White	Negro	No Data	White	Negro	No Data
Under 18	3	9	0	3	1	0	1	2	0	7	12	0
18 - 20	12	13	0	4	8	0	7	3	0	23	24	0
21 - 24	11	14	0	5	7	0	5	3	0	21	24	0
25 - 29	11	17	0	6	7	0	6	3	0	23	27	0
30 - 39	10	15	0	5	6	0	6	1	0	21	22	0
40 - 49	5	9	0	8	2	0	6	0	0	19	11	0
50 - 59	6	4	0	1	1	0	1	1	0	8	6	0
Over 60	2	2	0	1	0	0	2	1	0	5	3	0
No Data (Age)	0	0	1	0	2	13	0	0	0	0	2	14
Total	60	83	1	33	34	13	34	14	0	127	131	14

The race and age of the defendants from the metropolitan counties were then compared with the offenses charged against them in the hope that this might help explain the difference in age distribution. The results are given in Table 4, which lists separately every crime of which four or more defendants were accused. (The "other" column includes a variety of miscellaneous charges, ranging from embezzlement to child molesting.) The comparison failed to give any insight into the difference in age distribution, but some features of the table are nevertheless interesting. More than half (15 of 26) of those charged with assault were 30 and older, and almost a third (8) were 40 and over. As might have been expected, 90 percent (25 of 28) of those accused of auto theft were under 30, and more than half (16) were 20 or less.

The numbers of white and black defendants again were almost equal. Looking only at offenses which were charged against ten or more defendants, whites constituted a majority in auto theft (17 to 11) and forgery (9 to 1), blacks in robbery (19 to 13), and about the same numbers of both races were charged with assault, burglary and larceny. Projection becomes riskier for offenses charged less than ten times; in those categories, whites were a majority in rape (4 to 2), blacks in gambling (6 to 2) and narcotics (4 to 2), and the same numbers of both races were charged with homicide.

TABLE 4
RACE AND AGE COMPARED WITH OFFENSES*

	Assault	Auto Theft	Burglary	Forgery	Gambling	Larceny	Murder & Mansl'gtr	Narcotics	Rape	Robbery	Other	Total
<u>Under 18</u>												
White	0	4	1	0	0	1	0	0	1	0	0	7
Negro	1	1	2	0	0	0	1	0	1	4	2	12
<u>18 - 20</u>												
White	1	5	8	1	0	2	0	0	1	4	1	23
Negro	1	6	8	0	0	2	0	1	0	4	2	24
<u>21 - 24</u>												
White	1	4	8	0	0	0	0	1	1	2	4	21
Negro	2	0	9	0	0	3	1	2	0	3	4	24
<u>25 - 29</u>												
White	2	3	5	1	0	3	2	0	0	3	4	23
Negro	3	2	6	1	0	5	0	1	1	3	5	27
<u>30 - 39</u>												
White	4	0	5	2	0	4	0	0	1	3	2	21
Negro	3	2	4	0	2	1	1	0	0	4	5	22
<u>40 - 49</u>												
White	1	1	5	4	0	1	0	1	0	1	5	19
Negro	1	0	2	0	2	1	1	0	0	0	4	11
<u>50 - 59</u>												
White	3	0	1	0	1	2	1	0	0	0	0	8
Negro	1	0	1	0	2	0	0	0	0	0	2	6
<u>Over 60</u>												
White	1	0	0	1	1	0	1	0	0	0	1	5
Negro	1	0	0	0	0	0	0	0	0	0	2	3
<u>No Data - Age</u>												
White	0	0	0	0	0	0	0	0	0	0	0	0
Negro	1	0	0	0	0	0	0	0	0	1	0	2
<u>Total</u>	<u>27</u>	<u>28</u>	<u>65</u>	<u>10</u>	<u>8</u>	<u>25</u>	<u>8</u>	<u>6</u>	<u>6</u>	<u>32</u>	<u>43</u>	<u>258</u>
White	13	17	33	9	2	13	4	2	4	13	17	127
Negro	14	11	32	1	6	12	4	4	2	19	26	131

* Omits studies lacking data as to race.

II.

The first step following the formal charge is the setting of bail. Table 5 displays five categories of increasing amounts of bail with the numbers of both races whose bails fell into each category. There were no significant differences in the proportions of blacks and whites in any category in the City of St. Louis and in the totals. The data from St. Louis County may reveal a slight bias in favor of blacks; 73 percent of the Negroes had bails of less than \$5,000 as compared to 63 percent of the whites. The reverse appears to be true in Jackson County. There, 54 percent of the whites had bails of less than \$5,000 as compared to 35 percent of the blacks; and 50 percent of the blacks had bails of between \$5,000 and \$9,999 as compared to 27 percent of the whites.

TABLE 5
FINAL BAIL BY RACE*

	<u>Less than \$1,000</u>	<u>\$1,000 to \$2,999</u>	<u>\$3,000 to \$4,999</u>	<u>\$5,000 to \$9,999</u>	<u>\$10,000 to \$14,999</u>	<u>Over \$15,000</u>	<u>Total</u>
<u>City of</u>							
<u>St. Louis</u>							
White	0	43	0	4	3	4	54
		(.80)		(.07)	(.06)	(.07)	
Negro	0	59	3	7	2	4	75
		(.79)	(.04)	(.09)	(.03)	(.05)	
<u>Jackson</u>							
White	0	10	8	9	3	3	33
		(.30)	(.24)	(.27)	(.09)	(.09)	
Negro	0	9	3	17	3	2	34
		(.26)	(.09)	(.50)	(.09)	(.06)	
<u>St. Louis</u>							
<u>County</u>							
White	1	12	4	7	1	2	27
	(.04)	(.44)	(.15)	(.26)	(.04)	(.07)	
Negro	0	7	1	3	0	0	11
		(.64)	(.09)	(.27)			
<u>Total</u>							
White	1	65	12	20	7	9	114
	(.01)	(.57)	(.10)	(.18)	(.06)	(.08)	
Negro	0	75	7	27	5	6	120
		(.62)	(.06)	(.23)	(.04)	(.05)	

* Omits studies lacking data as to race or final bail.

To be wholly reliable, such comparisons must be made of specific crimes. To show that a black armed robber had a \$10,000 bail and a white burglar one of \$5,000 is as likely to indicate a prejudice against armed robbers as against blacks. Table 6 was prepared to rectify this shortcoming of Table 5. It compares the bail of blacks and whites for the five crimes which appeared in the data most often. Table 6 confirms that Jackson County set higher bail for blacks, but only for the crime of auto theft; both blacks, but only one of four whites, had bails of \$5,000 or above for that crime. On the other hand, the table reveals a slight bias in favor of Negroes charged with robbery in Jackson County and the City of St. Louis. Since the data did not include the race of the victims of the crimes, it is impossible to say whether that was a factor in either of these phenomena.

The amount of bail is only one side of the coin, however. The other is whether the defendant was actually released from custody pending trial so that he could continue at his job and more easily help in the preparation of his defense.⁴ Table 7, which is less formidable than it appears at first glance, compares the relationship between indigence and release before trial for both blacks and whites. The table reveals a correlation between proportions of indigence and of defendants not released. The degree of correlation varies considerably, however. For example, the City of St. Louis had a higher proportion of indigent defendants than Jackson County (54 percent to 45 percent),⁵ but a lower proportion of defendants who remained in custody (63 percent to 68 percent). Table 7 also reveals that a higher proportion of whites than blacks was released in all three counties; the difference was 3 points in the City of St. Louis (39 percent to 36 percent), 19 points in Jackson (42 percent to 23 percent) and St. Louis (55 percent to 36 percent) Counties, and 12 points overall (44 percent to 32 percent). It is clear that this difference between release ratios for the different races cannot be ascribed to "indigence." In the City of St. Louis, 57 percent of the whites were indigent as compared to 52 percent of the blacks—the only county in which a higher proportion of whites than blacks was indigent.

4. For a discussion of the plight of the defendant not able to make bail, *see* D. FREED & P. WALD, *BAIL IN THE UNITED STATES*: 1964.

5. The figures in the text are not taken from the table directly; they are derived by adding the numbers of indigents, whites and blacks:

City of St. Louis: 32 white plus 39 black equals 71 indigents, of 131 studies;

Jackson Co.: 10 white plus 18 black equals 28 indigents, of 62 studies.

TABLE 6
FINAL BAIL, SELECTED CRIMES, BY RACE*

	\$1,000 to \$2,999		\$3,000 to \$4,999		\$5,000 to \$9,999		\$10,000 to \$14,999		Over \$15,000		Total	
	White	Negro	White	Negro	White	Negro	White	Negro	White	Negro	White	Negro
<u>City of</u>												
<u>St. Louis</u>												
Assault	5	3	0	1	—	—	—	—	—	—	5	4
Auto Theft	12	9	—	—	—	—	—	—	—	—	12	9
Burglary	8	13	0	1	—	—	0	1	1	1	9	16
Larceny	7	8	—	—	—	—	—	—	1**	1**	8	9
Robbery	2	5	—	—	1	3	3	1	1	0	7	9
<u>Jackson</u>												
Assault	1	2	—	—	1	3	1	1	0	1	3	7
Auto Theft	2	0	1	0	1	2	—	—	—	—	4	2
Burglary	2	6	5	1	4	3	—	—	—	—	11	10
Larceny	—	—	0	1	1	0	—	—	—	—	1	1
Robbery	1	0	0	1	1	7	1	1	2	0	5	9
<u>St. Louis</u>												
<u>County</u>												
Assault	0	1	—	—	2	0	—	—	—	—	2	1
Auto Theft	—	—	—	—	—	—	—	—	—	—	—	—
Burglary	5	3	2	1	2	1	—	—	—	—	9	5
Larceny	2	1	—	—	0	1	—	—	—	—	2	2
Robbery	—	—	—	—	—	—	—	—	1	0	1	0
<u>Total</u>												
Assault	6	6	0	1	3	3	1	1	0	1	10	12
Auto Theft	14	9	1	0	1	3	—	—	—	—	16	12
Burglary	15	22	7	3	6	4	0	1	1	1	29	31
Larceny	9	9	0	1	1	1	—	—	1**	1**	11	12
Robbery	3	5	0	1	2	9	4	2	4	0	13	17
<u>Grand Total</u>	47	51	8	6	13	20	5	4	6	3	79	84

* Omits studies lacking data as to race or final bail.

** Had previously "jumped" bail.

Yet 39 percent of the whites were released, as compared to 36 percent of the Negroes. Further, the treatment of defendants found to be indigent was virtually identical regardless of race: the proportions of those not released were roughly 90 percent for both races in all counties, except St. Louis County, where the absolute numbers were so small as to make the difference in percentages insignificant.

TABLE 7
RELATIONSHIPS BETWEEN INDIGENCE AND
RELEASE, BY RACE*

	White					
	Cases		Indigent		Not Indigent	
	#	%	#	%	#	%
<u>City of</u>						
<u>St. Louis</u>	56	(.43)	32	(.57)	24	(.43)
# released	22	(.45)	2	(.09)	20	(.91)
% released	(.39)		(.06)		(.83)	
# not released	34	(.42)	30	(.88)	4	(.12)
% not released	(.61)		(.94)		(.17)	
<u>Jackson</u>	31	(.50)	10	(.32)	21	(.68)
# released	13	(.65)	1	(.08)	12	(.92)
% released	(.42)		(.10)		(.57)	
# not released	18	(.43)	9	(.50)	9	(.50)
% not released	(.58)		(.90)		(.43)	
<u>St. Louis</u>						
<u>County</u>	27	(.71)	8	(.30)	19	(.70)
# released	15	(.79)	1	(.07)	14	(.93)
% released	(.55)		(.12)		(.74)	
# not released	12	(.63)	7	(.58)	5	(.42)
% not released	(.45)		(.88)		(.26)	
<u>Total</u>	114	(.49)	50	(.44)	64	(.56)
# released	50	(.57)	4	(.08)	46	(.92)
% released	(.44)		(.08)		(.72)	
# not released	64	(.45)	46	(.72)	18	(.28)
% not released	(.56)		(.92)		(.28)	

* Omits studies lacking data as to race, release or indigency.

The difference in release ratios must be sought in the handling of those defendants who were found not to be indigent, and here the figures in Table 7 are revealing. In the City of St. Louis, only 17 percent of the white non-indigents remained in custody as compared to 30 percent of the black. In Jackson County, the figures were 43 percent of the whites and 62 percent of the blacks. This pattern may have been reversed in St. Louis County, where the figures were 26 and 20 percent, but, again, the

Negro						
<u>Cases</u>		<u>Indigent</u>		<u>Not Indigent</u>		<u>Total Cases</u>
#	%	#	%	#	%	
75	(.57)	<u>39</u>	(.52)	<u>36</u>	(.48)	<u>131</u>
27	(.55)	2	(.07)	25	(.93)	49
(.36)		(.05)		(.70)		(.37)
48	(.58)	37	(.77)	11	(.23)	82
(.64)		(.95)		(.30)		(.63)
31	(.50)	<u>18</u>	(.58)	<u>13</u>	(.42)	<u>62</u>
7	(.35)	2	(.29)	5	(.71)	20
(.23)		(.11)		(.38)		(.32)
24	(.57)	16	(.67)	8	(.33)	42
(.78)		(.89)		(.62)		(.68)
11	(.29)	<u>6</u>	(.55)	<u>5</u>	(.45)	<u>38</u>
4	(.21)	0		4	(1.00)'	19
(.36)				(.80)		(.50)
7	(.37)	6	(.86)	1	(.14)	19
(.64)		(1.00)		(.20)		(.50)
117	(.51)	<u>63</u>	(.54)	<u>54</u>	(.46)	<u>231</u>
38	(.43)	4	(.10)	34	(.90)	88
(.32)		(.06)		(.63)		(.38)
79	(.55)	59	(.75)	20	(.25)	143
(.68)		(.94)		(.37)		(.62)

absolute number of blacks in the non-indigent category—five—makes that conclusion dubious.

What accounts, then, for the higher proportion of non-indigent Negroes who remained in custody pending trial? Two observations are in order before an answer is attempted. First, a finding that a person was not an indigent did not necessarily mean that he could afford both a bail bond and a lawyer. A defendant with enough cash either to post bond or to hire an attorney may have been forced to choose. Indeed, evidence was

uncovered in the 1962 survey that some judges made the choice for the defendant in favor of the lawyer: some judges made a practice of revoking the bail of a defendant who had been released and who appeared at arraignment without an attorney. Second, the standards for determining indigence varied from one county to another, and from one judge to another within counties. No two judges used exactly the same set of standards, or assigned the same weight to any one standard, except the few who used the released-on-bail equals not-indigent test mentioned above.⁶ Hence the only characteristic which it is certain was shared by all defendants in the non-indigent category is that judges believed they were not so poor that lawyers ought to be appointed to represent them.⁷ At the time of the survey, appointed attorneys received no compensation and were not even reimbursed expenses. This condition, which still exists in the state courts, made judges reluctant to find indigent a defendant who had any money at all to pay his lawyer.

There are at least five possible explanations for the difference in release ratios between white and black non-indigents. One is that many non-indigents decided not to spend the money for bail because they planned to plead guilty, and that Negroes made this decision more often than whites. This seems unlikely because it fails to explain why the proportions of non-indigents who were not released varied from county to county; one would assume that the proportions of defendants making this decision would be approximately equal regardless of locale. In the City of St. Louis, 18 percent (15 of 82) of the defendants not released were found not to be indigent; in St. Louis County it was 32 percent (6 of 19), and in Jackson County 40 percent (17 of 42). Another possibility is that judges were using an informal "preventive detention" program by setting bail high enough to make release unlikely for the non-indigent blacks. Investigation showed, however, that bails for specific offenses were no higher for non-indigents than for indigents, and that the bails set for non-indigent blacks were the same as for non-indigent whites.⁸ A

6. See Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U.L.Q. 270, 300-04, for a discussion of the standards of indigence which were employed at the time of the survey.

7. Compare Table 12 for evidence that the appointment of an attorney and a finding of indigence were equivalents.

8. An examination of the final bail set for black and white indigents and non-indigents charged with the crimes of assault, burglary, and robbery indicates that bail was not set higher for those found not to be indigent. For example, for the crime of burglary, 8 of 14 non-indigent whites and 3 of 8 non-indigent blacks had bail set at over \$3,000; 5 of 14 indigent whites and 6 of 22 indigent blacks had bail set at over \$3,000. This indicates that informal "preventive detention", if it was being practiced, was not being practiced frequently enough to appear in the sample.

third possible explanation is that Negroes found it harder to locate professional bondsmen willing to post the bail, or were charged higher premiums than whites. A fourth possibility, related to the third, is that whites were more likely than Negroes to have friends who owned real estate and who were willing to post property bonds. The fifth possibility is that judges required proof of greater destitution from Negroes than whites—that is, they discriminated against Negroes.⁹ The data provide no basis for concluding whether any of the latter three explanations is more than simply a theoretical possibility, or for determining the extent to which they influenced the difference in release rates if they are more than possibilities.

The next significant stage of the criminal process is the preliminary hearing, at which the judge determines whether there is probable cause to believe the defendant committed the crime of which he is accused and, therefore, whether to force him to trial. This stage was theoretically significant because, in Missouri in 1962, the preliminary hearing was the only practical discovery device available to an indigent defendant. Whether it was a real advantage to him, however, is debatable. A previous study has suggested that it was highly useful in Jackson County and worse than useless in the City of St. Louis.¹⁰ One reason for this uncertainty is that an indigent defendant was not entitled to have an attorney appointed for the preliminary hearing until quite recently.¹¹ Further, it is known that attorneys were not assigned in the City of St. Louis and St. Louis County, and the public defender did not appear in the City, until the preliminary hearing had been either held or waived. The practice in Jackson County at the time of the survey is not known. Just how valuable a preliminary hearing was to a defendant at the time of the survey is, therefore, impossible to say. In any event, the question is moot for present purposes. The data reveal that the same or a higher proportion of blacks as whites received preliminary hearings. As Table 8 shows, this was true for every category of crime except narcotics, where both whites got preliminaries but none of the four blacks did. Overall, 51 percent of the Negroes had preliminary hearings compared to 43 percent of the whites.

9. A similar phenomenon of not allowing bankruptcy discharges, to insure that Negroes do not become "irresponsible", has been noted in the south. See, M. MAYER, *THE LAWYERS* 388 (Dell ed. 1966).

10. See Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U L Q. 270, 284-86.

For another report of the various forms preliminary hearings may take, see F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 64-82 (1969).

11. *Coleman v. Alabama*, ___ U.S. ___, 90 S. Ct. 1999 (1970).

TABLE 8
RELATIONSHIP BETWEEN OFFENSES AND PRELIMINARY HEARINGS, BY RACE¹

	Assault	Auto Theft	Burglary	Forgery	Gambling	Larceny	Murder & Mansl'gtr	Narcotics	Rape	Robbery	Other	Total
Preliminary Hearing Held?												
<u>Yes</u>	<u>17</u>	<u>12</u>	<u>34</u>	<u>3</u>	<u>0</u>	<u>14</u>	<u>0</u>	<u>2</u>	<u>2</u>	<u>17</u>	<u>16</u>	<u>117</u>
White	7	5	17	3	0	6	0	2	1	7	4	52
Negro	10	7	17	0	0	8	0	0	1	10	12	65
<u>No, waived</u>	<u>2</u>	<u>15</u>	<u>29</u>	<u>7</u>	<u>0</u>	<u>8</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>10</u>	<u>13</u>	<u>85</u>
White	2	12	15	6	0	4	1	0	0	5	7	52
Negro	0	3	14	1	0	4	0	0	0	5	6	33
No, grand jury²												
<u>jury²</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>8</u>	<u>2</u>	<u>7</u>	<u>3</u>	<u>3</u>	<u>2</u>	<u>8</u>	<u>38</u>
White	2	0	0	0	2	2	3 ⁴	0	2	0	2	13
Negro	2 ³	1	0	0	6	0	4 ⁴	3	1	2 ³	6	25
No, reason												
<u>unknown</u>	<u>2</u>	<u>0</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>2</u>	<u>7</u>
White	1	0	0	0	0	1	0	0	0	0	1	3
Negro	1	0	1	0	0	0	0	1	0	0	1	4
<u>Total Cases</u>	<u>25</u>	<u>28</u>	<u>64</u>	<u>10</u>	<u>8</u>	<u>25</u>	<u>8</u>	<u>6</u>	<u>5</u>	<u>29</u>	<u>39</u>	<u>247</u>
yes #	17	12	34	3	0	14	0	2	2	17	16	117
%	(.68)	(.43)	(.53)	(.30)		(.56)		(.33)	(.40)	(.59)	(.41)	(.47)
no #	8 ³	16	30	7	8	11	8 ⁴	4	3	12 ³	23	130
%	(.32)	(.57)	(.47)	(.70)	(1.00)	(.44)	(1.00)	(.67)	(.60)	(.41)	(.59)	(.53)
White												
<u>yes #</u>	<u>7</u>	<u>5</u>	<u>17</u>	<u>3</u>	<u>0</u>	<u>6</u>	<u>0</u>	<u>2</u>	<u>1</u>	<u>7</u>	<u>4</u>	<u>52</u>
%	(.58)	(.30)	(.53)	(.33)		(.46)		(1.00)	(.33)	(.58)	(.28)	(.43)
<u>no #</u>	<u>5</u>	<u>12</u>	<u>15</u>	<u>6</u>	<u>2</u>	<u>7</u>	<u>4⁴</u>	<u>0</u>	<u>2</u>	<u>5</u>	<u>10</u>	<u>68</u>
%	(.42)	(.70)	(.47)	(.67)	(1.00)	(.54)	(1.00)		(.67)	(.42)	(.72)	(.57)
Negro												
<u>yes #</u>	<u>10</u>	<u>7</u>	<u>17</u>	<u>0</u>	<u>0</u>	<u>8</u>	<u>0</u>	<u>0</u>	<u>1</u>	<u>10</u>	<u>12</u>	<u>65</u>
%	(.77)	(.64)	(.53)			(.67)			(.50)	(.59)	(.48)	(.51)
<u>no #</u>	<u>3³</u>	<u>4</u>	<u>15</u>	<u>1</u>	<u>6</u>	<u>4</u>	<u>4⁴</u>	<u>4</u>	<u>1</u>	<u>7³</u>	<u>13</u>	<u>62</u>
%	(.23)	(.36)	(.47)	(1.00)	(1.00)	(.33)	(1.00)	(1.00)	(.50)	(.41)	(.52)	(.49)

1. Omits cases without data as to offenses, preliminary hearings, or race.
 2. All but four of these cases—identified by notes 3 and 4—come from the City of St. Louis.
 3. One assault and one robbery—total two cases—from Jackson County.
 4. One white and one black charged with homicide—total two cases—from St. Louis County.

Table 9 displays data concerning the adjudication of guilt or innocence. It shows that a higher proportion of blacks than whites was

TABLE 9
DISPOSITIONS BY RACE¹

	City of St. Louis		Jackson County		St. Louis County		Total	
	White	Negro	White	Negro	White	Negro	White	Negro
Total Cases	<u>60</u>	<u>83</u>	<u>33</u>	<u>34</u>	<u>34</u>	<u>14</u>	<u>127</u>	<u>131</u>
Without trial:								
Nolle pros.	5	4	13	12	4	1	22	17
%	(.08)	(.05)	(.39)	(.35)	(.12)	(.07)	(.17)	(.13)
Demurrer, etc.	0	3	0	0	0	0	0	3
%		(.04)						(.02)
P/G, prin. off.	43	57	10	9	18	6	71	72
%	(.73)	(.69)	(.30)	(.26)	(.53)	(.43)	(.56)	(.55)
P/G, lesser off.	7	12	9	7	10	5	26	24
%	(.12)	(.14)	(.27)	(.21)	(.29)	(.36)	(.20)	(.18)
By Judge:								
Guilty	0	1	0	0	0	0	0	1
%		(.01)						(.01)
Not Guilty	0	0	0	1	0	0	0	1
%				(.03)				(.01)
By Jury:								
Guilty, prin. off.	1	4	0	3	1	2	2	9
%	(.02)	(.05)		(.09)	(.03)	(.14)	(.02)	(.07)
Guilty, lesser off.	0	1	0	0	0	0	0	1
%		(.01)						(.01)
Not Guilty	3	1 ²	1	2	0	0	4	3
%	(.05)	(.01)	(.03)	(.06)			(.03)	(.02)
Other disposition	1 ³	0	0	0	1 ³	0	2	0
Total Guilty	<u>51</u>	<u>75</u>	<u>19</u>	<u>19</u>	<u>29</u>	<u>13</u>	<u>99</u>	<u>107</u>
%	(.85)	(.90)	(.57)	(.56)	(.85)	(.93)	(.78)	(.82)
Total Not Guilty	<u>8</u>	<u>8</u>	<u>14</u>	<u>15</u>	<u>4</u>	<u>1</u>	<u>26</u>	<u>24</u>
%	(.15)	(.10)	(.43)	(.44)	(.15)	(.07)	(.22)	(.18)

1. Omits studies lacking data as to disposition or race.
2. By reason of insanity.
3. One case in City of St. Louis pending; one in St. Louis County granted change of venue.

determined to be guilty everywhere but in Jackson County, where the ratios were substantially equal. The table reveals that this higher conviction rate did not result from the "invisible" part of the

process—that which occurs prior to trial. Seventeen percent of the whites (22 of 127) and 15 percent of the blacks (20 of 131) were dismissed by *nolle prosequis* or on motion, a difference which would appear insignificant. Further, approximately equal proportions of both races pleaded guilty. Indeed, slightly higher proportions of Negroes were permitted to plead to lesser offenses in the City of St. Louis and St. Louis County; the reverse was true in Jackson County. Of cases disposed of without trial, then, 73 percent of the Negroes (96 of 131) had been determined to be guilty compared to 76 percent of the whites (97 of 127). By the end of the process, however, this relationship had been reversed; the proportion of Negroes adjudged guilty had risen nine points, from 73 to 82 percent, while that for whites had gone up only two points, from 76 to 78 percent.

Thus it is clear that the explanation for the higher conviction rate for Negroes must be sought in cases disposed of by trial. Table 10 repeats in slightly different form the data from Table 9 concerning jury verdicts; since only two cases were tried to judges without juries (resulting in one conviction and one acquittal—see Table 9), they were not included. The figures in Table 10 are disconcerting. Juries convicted 10 of 13 blacks compared to only 2 of 6 whites. The City of St. Louis is particularly

TABLE 10
JURY VERDICTS BY RACE*

	City of St. Louis		Jackson County		St. Louis County		Total		
	White	Negro	White	Negro	White	Negro	White	Negro	Both
Total cases tried to jury:	<u>4</u>	<u>6</u>	<u>1</u>	<u>5</u>	<u>1</u>	<u>2</u>	<u>6</u>	<u>13</u>	<u>19</u>
Guilty, prin. off.	1	4	0	3	1	2	2	9	11
Guilty, lesser off.	0	1	0	0	0	0	0	1	1
Total Guilty	<u>1</u>	<u>5</u>	<u>0</u>	<u>3</u>	<u>1</u>	<u>2</u>	<u>2</u>	<u>10</u>	<u>12</u>
% Guilty	(.25)	(.83)		(.60)	(1.00)	(1.00)	(.33)	(.77)	(.63)
Not Guilty	<u>3</u>	<u>1**</u>	<u>1</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>4</u>	<u>3</u>	<u>7</u>
% Not Guilty	(.75)	(.17)	(1.00)	(.40)			(.67)	(.23)	(.37)

* Data taken from Table 9.

** By reason of insanity.

remarkable. Juries acquitted only 1 of 6 blacks, and that one by reason of insanity, but freed 3 of 4 whites. This is remarkable because the City had the highest percentage of resident Negroes of the three counties and, therefore, was the place, presumably, where blacks were most likely to be found on petit juries. By contrast, juries in Jackson County, with a lower proportion of Negroes in the population, acquitted 2 of the 5 blacks who went to trial.

The final stage of the process which can be evaluated for evidence of discrimination is the imposition of sentence. Table 11 divides sentences into three categories—prison, fine and probation—and compares the sentences imposed upon blacks and whites for specific crimes. For the crimes of homicide and rape, everyone convicted was sent to prison. For burglary, equal proportions of blacks and whites were sent to prison and put on probation. For every other crime, a higher proportion of blacks than whites received penitentiary sentences. The differences in these proportions are sometimes startling. For auto theft, for example, 56 percent of the whites were granted probation, but 82 percent of the Negroes were sent to prison. For larceny, 82 percent of the blacks went to prison compared to only 54 percent of the whites. Substantially higher proportions of Negroes than whites were sentenced to prison for assault and robbery. Overall, 75 percent of the convicted blacks went to prison compared to 61 percent of the whites. Even more remarkable is the fact that the ratio of those granted probation was almost twice as high for whites as for Negroes (37 percent to 19 percent).

The overall figures conceal some dismaying statistics from individual counties. In St. Louis County, for instance, of the 29 whites convicted of felonies, 16, or 55 percent, were granted probation; of the 12 Negroes convicted, 9, or 75 percent, were sentenced to prison, and only 2 were granted probation. Five persons were convicted of larceny in St. Louis County, 3 white and 2 black; all three whites were granted probation, both blacks went to prison. Another example came from the City of St. Louis: 13 whites and 9 blacks were convicted of auto theft; 7 of the 13 whites were granted probation compared to 2 of the 9 blacks.

Since the major differences in the treatment of whites and blacks occurred at the trial and sentencing stages, it might be thought that these differences were reflections of a difference in the quality of legal representation afforded the different races, and that this difference in quality was, in turn, a reflection of whether the attorneys were retained, assigned, or public defenders. Table 12, 13, and 14 were prepared to

TABLE 11
SENTENCES FOR OFFENSES, BY RACE*

	Assault	Auto Theft	Burglary	Forgery	Gambling	Larceny	Murder & Manslaughter	Narcotics	Rape	Robbery	Other	Total
White	<u>7</u>	<u>16</u>	<u>28</u>	<u>8</u>	<u>2</u>	<u>11</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>11</u>	<u>10</u>	<u>99</u>
Prison	4	7	22	4	0	6	1	0	3	8	5	60
%	(.57)	(.44)	(.79)	(.50)		(.54)	(1.00)		(1.00)	(.73)	(.50)	(.61)
Fine	0	0	0	0	2	0	0	0	0	0	0	2
%					(1.00)							(.02)
Probation	3	9	6	4	0	5	0	2	0	3	5	37
%	(.43)	(.56)	(.21)	(.50)		(.46)		(1.00)		(.27)	(.50)	(.37)
Black	<u>9</u>	<u>11</u>	<u>27</u>	<u>1</u>	<u>4</u>	<u>11</u>	<u>4</u>	<u>3</u>	<u>2</u>	<u>13</u>	<u>19</u>	<u>104</u>
Prison	7	9	21	1	1	9	4	3	2	11	10	78
%	(.78)	(.82)	(.78)	(1.00)	(.25)	(.82)	(1.00)	(1.00)	(1.00)	(.85)	(.53)	(.75)
Fine	1	0	0	0	2	0	0	0	0	0	3	6
%	(.11)				(.50)						(.16)	(.06)
Probation	1	2	6	0	1	2	0	0	0	2	6	20
%	(.11)	(.18)	(.22)		(.25)	(.18)				(.15)	(.32)	(.19)
Total	<u>16</u>	<u>27</u>	<u>55</u>	<u>9</u>	<u>6</u>	<u>22</u>	<u>5</u>	<u>5</u>	<u>5</u>	<u>24</u>	<u>29</u>	<u>203</u>
Prison	11	16	43	5	1	15	5	3	5	19	15	138
%	(.69)	(.59)	(.78)	(.56)	(.17)	(.68)	(1.00)	(.60)	(1.00)	(.79)	(.52)	(.68)
Fine	1	0	0	0	4	0	0	0	0	0	3	8
%	(.06)				(.67)						(.10)	(.04)
Probation	4	11	12	4	1	7	0	2	0	5	11	57
%	(.25)	(.41)	(.22)	(.44)	(.17)	(.32)		(.40)		(.21)	(.38)	(.27)

* Omits studies lacking data as to offense, race or sentence.

investigate this possibility. Table 12 simply shows the proportions of cases handled by each of the three types of attorneys in the three counties. At the time of the survey, only the City of St. Louis had a functioning public defender, and he was limited by law to representing first offenders, and by custom to representing only defendants who wished to plead guilty. These limitations account in part for the dismal statistics in Table 13.¹²

12. For further information on the functioning of this office, see Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U.L.Q. 270, 289-93, 306-12, 318-21.

TABLE 12
TYPE OF ATTORNEY COMPARED TO RACE*

	City of St. Louis		Jackson County		St. Louis County		Total	
	White	Negro	White	Negro	White	Negro	White	Negro
<u>Total Cases</u>	<u>55</u>	<u>75</u>	<u>31</u>	<u>30</u>	<u>28</u>	<u>11</u>	<u>114</u>	<u>116</u>
Retained	23	37	22	12	20	5	65	54
%	(.42)	(.49)	(.71)	(.40)	(.71)	(.45)	(.57)	(.47)
Assigned	7	10	9	18	8	6	24	34
%	(.13)	(.13)	(.29)	(.60)	(.29)	(.55)	(.21)	(.29)
Public Defender	25	28	0	0	0	0	25	28
%	(.45)	(.37)					(.22)	(.24)

* Omits studies lacking data as to race or type of attorney.

Table 13 breaks down dispositions by race and by type of attorney. For dispositions without trial, the statistics are inconclusive. Assigned attorneys were able to procure nolle prosequis for a higher percentage of black defendants than were retained attorneys, and they did as well in bargaining for pleas to lesser offenses. For dispositions after trial, the figures indicate that the assigned lawyers did as well as the retained attorneys. Five cases were tried by assigned attorneys, resulting in 2 acquittals; 12 were tried by retained attorneys, resulting in 4 not guilty verdicts. In view of the small numbers involved, the difference in percentages (40 percent versus 33 percent) is believed to be insignificant.

Table 14 breaks down sentences by race and by type of attorney. All attorneys were more successful in representing whites than Negroes. Unlike the situation respecting dispositions, however, this comparison shows that retained attorneys were clearly superior to the other kinds in securing lighter sentences.¹³ They were successful in obtaining probation for their clients 39 percent of the time, as compared to the assigned lawyers' 17 percent and the public defender's 13 percent.

III.¹⁴

The data revealed that a larger proportion of the black population was

13. A similar situation was observed in rural areas with respect to retained and assigned attorneys. See Note, *A Preliminary Study of Felony Defendants in Rural Missouri, 1970* WASH. U.L.Q. 348. See also Gerard, *A Preliminary Report on the Defense of Indigents in Missouri, 1964* WASH. U.L.Q. 270, 320-321.

14. The conclusions drawn in this section are based upon an analysis of a sample drawn at random from all cases in which an indictment or information was filed in the three designated

TABLE 13
DISPOSITIONS COMPARED TO TYPES OF ATTORNEY, BY RACE*

	<u>Retained</u>		<u>Assigned</u>		<u>Public Defender</u>		<u>Total</u>	
	White	Negro	White	Negro	White	Negro	White	Negro
<u>Total Cases</u>	<u>65</u>	<u>54</u>	<u>24</u>	<u>34</u>	<u>25</u>	<u>28</u>	<u>114</u>	<u>116</u>
<u>Without trial:</u>								
Nolle pros.	14	7	2	6	0	0	16	13
%	(.22)	(.13)	(.08)	(.18)			(.14)	(.11)
P/G, prin. off.	37	25	12	18	20	27	69	70
%	(.57)	(.46)	(.50)	(.53)	(.80)	(.97)	(.61)	(.60)
P/G, lesser off.	10	12	9	7	4	1	23	20
%	(.15)	(.22)	(.38)	(.21)	(.16)	(.04)	(.20)	(.17)
<u>By Judge:</u>								
Guilty	0	1	0	0	0	0	0	1
%		(.02)						(.01)
Not Guilty	0	1	0	0	0	0	0	1
%		(.02)						(.01)
<u>By Jury:</u>								
Guilty, prin. off.	1	6	0	2	1	0	2	8
%	(.02)	(.11)		(.06)	(.04)		(.02)	(.07)
Guilty, lesser off.	0	1	0	0	0	0	0	1
%		(.02)						(.01)
Not Guilty	3	1	1	1	0	0	4	2
%	(.05)	(.02)	(.04)	(.03)			(.04)	(.02)
<u>Totals</u>								
Guilty	<u>48</u>	<u>45</u>	<u>21</u>	<u>27</u>	<u>25</u>	<u>28</u>	<u>94</u>	<u>100</u>
%	(.74)	(.83)	(.88)	(.79)	(1.00)	(1.00)	(.82)	(.86)
Not Guilty	<u>17</u>	<u>9</u>	<u>3</u>	<u>7</u>	<u>0</u>	<u>0</u>	<u>20</u>	<u>16</u>
%	(.26)	(.17)	(.13)	(.21)			(.18)	(.14)

* Omits studies lacking data as to race, type of attorney or disposition.

charged with the commission of felonies than of the white population, and that this disparity between the races was most pronounced at young ages and tended to diminish or disappear at ages of 40 and above.¹⁵ The

counties of Missouri in 1962 charging the commission of a felony. The conclusions are statements about the sample and not about the total number of felony defendants.

15. In Missouri, persons 17 years old and under are within the jurisdiction of the juvenile court, MO. REV. STAT. ANN. ch. 211 (Vernon 1959), not the circuit court; therefore, these people do not appear in the sample. However, MO. REV. STAT. ANN. § 211.071 (Vernon 1959) provides that any person over 14 years old who commits an offense which would be a felony if he were an adult may be certified to be tried as an adult in the discretion of the juvenile judge. There was no way of determining the proportion of juveniles certified. Therefore the "Under 18" figures may not be representative.

TABLE 14
SENTENCES COMPARED TO TYPES OF ATTORNEY, BY RACE*

	<u>Retained</u>	<u>Assigned</u>	<u>Public Defender</u>	<u>Total</u>
<u>White</u>	<u>48</u>	<u>21</u>	<u>25</u>	<u>94</u>
Prison	21	16	21	58
%	(.44)	(.76)	(.84)	(.62)
Fine	2	1	0	3
%	(.04)	(.05)		(.03)
Probation	25	4	4	33
%	(.52)	(.19)	(.16)	(.35)
<u>Black</u>	<u>45</u>	<u>26</u>	<u>27</u>	<u>98</u>
Prison	28	22	24	74
%	(.62)	(.85)	(.89)	(.76)
Fine	6	0	0	6
%	(.13)			(.06)
Probation	11	4	3	18
%	(.24)	(.15)	(.11)	(.18)
<u>Total</u>	<u>93</u>	<u>47</u>	<u>52</u>	<u>192</u>
Prison	49	38	45	132
%	(.52)	(.81)	(.87)	(.69)
Fine	8	1	0	9
%	(.09)	(.02)		(.05)
Probation	36	8	7	51
%	(.39)	(.17)	(.13)	(.27)

* Omits studies lacking data as to race, type of attorney or sentence.

ratio of black overrepresentation—that is, the ratio between the proportion of Negroes in the docket studies and their proportion of the total population—varied from county to county. It was impossible to determine whether, or to what extent, black overrepresentation was a feature of an urban environment because racial data from non-urban counties were inadequate for comparison. It may be significant that the sum of the figures from the City of St. Louis and St. Louis County, which are urban and suburban respectively, approximated the figure from Jackson County, which is both.

Among persons of both races accused of felonies, Negroes were no more likely to commit crimes of violence than whites. The races were equally represented in charges of assault and homicide; whites predominated in charges of rape, Negroes in robbery. Forgery, which included bad check offenses, was indicated to be a crime almost exclusively of whites.

The data failed to disclose evidence of discrimination in the setting of bail. So far as could be determined, the same bail was set for the same offense regardless of the defendant's race. The data did reveal, however, that a smaller percentage of Negroes than whites was released from custody pending trial. The difference occurred wholly among defendants who had been found not to be indigent. Hence, unless it is assumed that some Negroes voluntarily remained in custody while their white counterparts did not, it appears that setting equal amounts of bail does not guarantee that equal proportions of non-indigent whites and blacks will be released. The use of a schedule to fix the amount of bail has two advantages: (1) it gives the appearance of equality, for everyone accused of the same crime has the same bail; and, (2) it is fast and easy to administer. Whether the present criminal process, with its overloaded dockets, could be altered to provide for individual determinations of the amount of bail is a debatable question. In both the long and the short runs, the statistics showing that blacks were treated differently than whites in terms of pretrial release may say more about the inherent deficiencies of the bail system than about discrimination based upon race, for more than half the whites remained in custody, too.

Nowhere in the survey data was evidence uncovered that prosecutors discriminated against Negroes. Roughly equal proportions of both races were dismissed out of the process prior to trial. Roughly equal proportions of both races were permitted to plead guilty to lesser offenses. Roughly equal proportions had preliminary hearings, with the edge, if there was one, favoring the Negroes.

Yet the data clearly showed that Negroes were treated less favorably than whites. Grossly disproportionate percentages of them were found guilty by juries. This is not to say either that guilty whites were acquitted or that innocent blacks were convicted. It is to say only that juries did not treat the whites and Negroes evenly, unless one is willing to assume that a much greater proportion of guilty Negroes than whites insisted upon trials. This is an especially disconcerting statistic because much of the data came from the City of St. Louis, the county where Negroes were most likely to be found on juries because of their proportion of the population. No data were available to determine whether Negroes were systematically challenged off of juries, which might help account for the difference in treatment. On the other hand, it is also possible that black jurors shared with their white counterparts whatever biases went into the verdicts; if so, a legitimate question is whether that would be true today. Whether this disparity in treatment was due to a difference in the quality of black representation could be neither proved nor disproved. All types

of lawyers—retained, assigned and public defender—were less successful representing blacks than whites. But whether this was because they were consciously less concerned, or because unconscious biases affected their conduct, or because juries discriminated irrespective of the quality of representation, is unknown. The conclusion may be that the only way a Negro can hope to have his guilt determined as though he were white is by waiving his right to a jury trial. Nothing in the data would justify the belief that this situation will be changed by any conceivable improvement in the quality of representation.

A slightly different picture is presented with respect to sentencing. Like the situation with jury verdicts, the data showed that all types of lawyers were less successful in securing probation for Negroes than for whites, and the same imponderables are involved in trying to determine why this was so. This may be one point at which the inability to identify the truly indigent makes a difference. The typical standards for probation require the defendant to have a job and a stable home. Such standards work to the particular detriment of the impoverished defendant who has had to remain in custody while his case was being disposed of. So the difference in sentences may have been at least partly a function of pre-trial release, and therefore only indirectly one of race, rather than of outright discrimination. Nevertheless, the fact is that only half the proportion of blacks as whites was granted probation. And unlike determinations of guilt, here no alternative procedures are available to the Negro.

But there is another difference. In clear contrast to their performance before juries, which was on a par with that of retained attorneys, appointed lawyers and the public defender were significantly less successful in securing probation for their clients than were the retained attorneys. A previous study concluded that one reason for this was that assigned lawyers and the public defender felt no responsibility to try to influence the sentence on behalf of their clients.¹⁶ It is possible, therefore, that better training of lawyers will do something to reduce or eliminate this particular disparity in treatment.

16. See Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U.L.Q. 270, 320-21.