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William F. Crowley's report on the Montana Plan

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REPORT TO THE JUDICIARY COMMITTEE OF THE
MONTANA CONSTITUTIONAL CONVENTION

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by: William F. Crowley

One of the most important features of the Montana Plan is the integration of all legal affairs below the Supreme Court level into a single court of general jurisdiction, the district court.

This involves placing all civil and criminal proceedings in the district court, including those carried on in the present justice of the peace, police courts and the unused municipal courts, and creation of a new judicial office, district court magistrate.

The most discussed feature of this part of the proposal is the transfer of the functions of the present justice of the peace and police courts to the district courts. It is one of the most important features of the entire plan and goes to the heart of the integrated court system proposal. It is not based upon personal criticism of the present justices of the peace and police judges. Rather, it is based upon the demonstrated inadequacies of the system we have provided for this level of our judicial system. The proposal grew from a very substantial body of evidence that the system is not working and cannot work as it was intended to.

Police courts are municipal offices, set up by city councils and perform almost completely criminal law functions.

Justices of the peace are township offices. The township is a subdivision of the county that is set up specifically to employ two justices of the peace and their constables. It has no other officers and no other public function.

Justices of the peace are made judicial officers and constitute part of our judicial system under our present constitution but they are not judicial officers or part of the judicial system in any true sense. Justices' offices are created by county commissioners when they create a township. Justices of the peace are elected on partisan political tickets. They are not answerable to nor under the supervision of the district courts of their district. Theoretically they are supervised by the Supreme Court but, since no machinery exists for reporting or supervision, they are, in the final analysis, answerable to no one.

As a matter of actual fact not even the existence of justice of peace offices is required to be known to the Supreme Court. The Court does not have any record of the number of townships, the number of justices of the peace, the number of constables, the compensation of these offices or any facts about the way the courts are conducted or the kind or volume of business handled. The only public agency in Montana that has even a list of existing justice of the peace offices and the names and addresses of incumbents is the Montana Highway Patrol, the largest user of the services of these courts. (There are no listing or reporting requirements for police courts either. The only complete list of police courts and incumbents is kept by the Montana League of Cities and Towns, a private organization.)

The only real reports filed by police and justice courts are financial. The police courts report to their respective municipalities. Justices of the peace report their collections of fees, fines and forfeitures to their respective counties and to those state agencies, the Fish and Game Commission and the Highway Patrol, to which portions of fines collected are payable. The State Examiner notes the financial

status of the justice courts in reports on the 56 counties. These fragmentary financial recordings are the only records of these courts at the state level.

By the same token there is no flow of information or help from higher levels of the court system down to these courts. They have no responsibility to the courts above them in the judicial system and no recourse to these courts for judicial expertise or assistance.

The isolated nature of justice and police courts in our system was illustrated by a survey taken by the Montana Supreme Court in 1966, the only attempt to assess the operations of these courts in our modern judicial history. The Supreme Court did not even have a list of these courts; it had to resort to the records of the Highway Patrol and the Montana League of Cities and Towns to determine what and where they were. The Court's findings give the only "birdseye view" of these courts presently available.

It revealed that the justice of the peace courts, particularly, had strayed very far from the concept of "poor man's courts" or "common man's courts" that they were established to be in medieval England and in the state of Montana in 1889.

These courts were intended to be a tribunal for the handling of misdemeanor criminal offenses and the preliminary stages of felony proceedings. In the field of civil litigation they were intended to be "...a forum servable to the people, where litigation may proceed without the aid of attorneys..." (Reynolds v. Smith, 48 Mont. 149, 135 Pac. 1190).

Since the Constitutional Convention met in 1889 and even since the Montana Supreme Court discussed the civil function of the justice of the peace courts in the Reynolds case in 1913 the courts have so changed as to be almost unrecognizable. Although, in theory, the justice courts

still serve the same purpose they did in 1889, the survey showed that these courts have become principally traffic courts for highway offenses. Many of them handle no other criminal matters and most of them handle no civil cases at all. Those courts which do handle civil cases restrict themselves almost entirely to uncontested garnishment or attachment actions for collection of debts. When a civil matter is contested justices of the peace almost invariably refuse to preside unless one or both sides are represented by attorneys. The idea of "...a forum servable to the people, where litigation may proceed without the aid of attorneys..." has almost completely disappeared.

The handling of those criminal matters which the courts do take also leaves much to be desired. The Supreme Court's survey indicated that less than 30 percent of the justices of the peace did business in a courtroom. Others "held court" in grain elevators, stores, railroad depots, pool halls, bar rooms or their homes. These locations hardly assist the dispensation of justice or allow the people involved to feel that justice is really being done. They lead to the type of proceeding cited in a Montana Legislative Council study of 1959 in which a justice of the peace, who was an automobile mechanic, held a session of his "court", heard the case, and found the defendant guilty without ever emerging from underneath the automobile he was repairing.

The Court's study also showed that approximately 85 percent of the justices of the peace in Montana receive no salary but are compensated by fees payable only when they handle some legal matter. Several of the reporting justices complained of a widespread and widely known abuse created by this fee system. Since the constitution requires two justices of the peace in every township an arresting officer or prosecuting attorney almost invariably has a choice of one of the two justices to whom he may

take the case. Only the judge he selects receives a fee for the case. A strong incentive is thus provided for the justice to do exactly what the officer or prosecutor wants in each case. If he does not he may receive no more cases and no more income. A defendant whom an officer wants convicted has little or no chance of acquittal under this system. Several justices complained to the Supreme Court that exactly this had happened to them and they were suffering financially because they did not permit the prosecution to dictate the results of cases in their courts.

The same condition applies to the civil debt collection actions which are almost the only civil actions handled by that minority of justices of the peace who handle any civil cases at all. Unless the creditor gets his money in every case, regardless of the facts, future fees will probably go to the other justice of the peace of the township, because the creditor or collection agency will take his case there.

There are other difficulties of the system which were not inquired into and were not revealed in the Supreme Court survey. Although that survey showed clearly that most justices of the peace do nothing but collect traffic fines all justices have other important functions which they may be called on to exercise at any time.

Justices of the peace issue warrants of arrest for and handle all proceedings through and including trial and judgment in misdemeanor cases. They may also receive complaints and issue warrants of arrest in felony matters. In addition, they may issue search warrants, preside at the initial appearance of a felony defendant, set bail, and hold a probable cause hearing to determine whether a person accused of a felony shall be held for trial in the district court.

Although a person relatively untrained in law is capable of setting and forfeiting bond in traffic cases or of advising a defendant of his rights in a misdemeanor or felony case (there is a form and manual especially prepared for these proceedings by the Montana Criminal Law Commission which, if followed, can prevent any difficulty in these proceedings) other duties are not as easy. Assessment of probable cause for the issuance of felony arrest or search warrants, determination whether there is probable cause to hold for a felony trial, or even the trial of a misdemeanor case may require decisions on legal questions of great complexity. A wrong determination on the issue of probable cause for an arrest or search warrant can lead to complete destruction of prosecution's case no matter how guilty the accused may be. It can also lead to unlawful invasion of the rights of innocent citizens and to civil judgments against the officers executing the warrant. Wrong decisions in a misdemeanor trial can completely taint the result. The possibility of error in justice and police trials is so great that an appeal from these courts is tried all over again by the district judge on appeal as though the justice court trial had never happened.

Experience has amply demonstrated that in determining probable cause and trying cases of any kind the law has become too complex for the untrained justice of the peace.

Some of these criticisms do not apply to proceedings in police courts because the jurisdiction of police courts is less. These courts have no civil jurisdiction and their trial jurisdiction is limited to breaches of city ordinances. They may, however, issue search warrants and try these small cases. Because of the much higher percentage of police judges who are attorneys the difficulties have been less, but where the judge has no legal

training the same problems appear.

The constitutional and statutory framework of the office almost guarantee that justice of the peace offices will be staffed by untrained, part-time people. The pay is too small to attract full-time people unless they are retired and have some other income. This creates a branch of the judiciary staffed inevitably by elderly retired people with little or no legal training. It is particularly attractive to retired law enforcement people whose natural inclination is to treat it as a part of the prosecution process. This kind of personnel and the effects are clearly observable in Montana.

The Montana Plan has been designed with these specific structural problems in mind. It seeks to correct them by integrating all the present functions of the justice of the peace and police courts into the district courts. It authorizes the creation of the new office of magistrate. The magistrate will be an officer of the district court exercising district court powers within the limitations provided by the constitutional article and the rules of the district court in which the magistrate's office is situated. He may be a full-time or part-time officer, or he may be appointed to handle only a single legal matter. A magistrate may be brought in from outside the district if no qualified person can be found within the district.

The Article tries to encourage the use of fully trained attorneys whereever possible but recognizes that these people are not always available. It therefore authorizes the appointment of nonlawyers, with the approval of the Supreme Court, when trained people cannot be found.

Section 9 of the proposal provides that district judges may, with the approval of the Chief Justice of the Supreme Court, create as many

magistrates' offices as are necessary to serve the judicial needs of their districts. The section authorizes district judges to appoint the magistrates and ~~perscribe~~ PRESCRIBE their duties. A magistrate may be assigned to do anything that the district judge can do except try felony cases. A district judge may give the magistrate as much or as little authority as he finds necessary. He may assign him to specialized duties, such as juvenile or probate matters or may authorize him only to handle highway traffic fines in a small town. The scope of each magistrate's duties and the amount he is to be paid will be determined by the district judge.

One of the purposes of this provision is to give the district judge the duty of being thoroughly familiar with the judicial needs of his district, of making full provision for satisfying those needs, and supervising the conduct of the magistrates of his court on a continuing basis. This is perhaps the most important provision for integrating all matters into the district court and providing a proper district court level of justice for them.

Section 12 provides a method of appointing magistrates who are not lawyers where needed and provides age and residence requirements similar to those for district judges.

Section 13 brings the magistrates within the Supreme Court's power of retirement, censure and removal.

Section 14 preserves the present system of allocating the cost of this part of the judicial system. District judges shall be paid by the state as at present and the costs of the magistrates' system, and the revenues generated by its use, shall be allocated to the cities and towns served as they are now.

The Montana Plan, while tailored specifically to the judicial needs of this large and thinly populated state does not vary enormously from proposals made in other states for solving the same problems. The difficulties faced in setting up a true and even-handed system of civil and criminal justice are much the same throughout the United States. The proposals made in other states have differed in emphasis and in degree from the Montana Plan but are usually based on the same principles simply because the problems to be faced and solved are very much alike.

In other states and in Montana alternative solutions to the type of change here proposed have been raised. Few or none of these propose the complete preservation of the present system without change -- the deficiencies are too glaring and too apparent for that.

The least degree of change proposed has usually been to preserve the present system but upgrade the services with higher qualifications for justice and police court offices and special training for those elected or appointed. (A bill defeated in the 1971 legislature was typical of this approach. It would have up-graded the qualifications of justices of the peace to require high school graduation and a license to practice law in the courts of Montana or completion of a two day special training course.)

The defects of this approach are obvious. High school graduation does not qualify a person for judicial office nor does two days of training. A physician or engineer can not be made out of a high school graduate in two days, neither can a judge. The present problems are built into the existing system and they can not be cured without a substantial change in that system.

A second proposed solution is to leave the problem to the legislature. What this means is that the public will never have the opportunity to express itself directly on the form of the judicial system. It merely

represents the delegation of the solution to another body.

A variation of the proposal to send the problem to the legislature is to make provision for the Supreme Court and District Courts in the constitution but leave to the legislature the question whether there should be a third level of courts and what that level of courts should do. This has been urged by some people who feel that there will be little controversy about anything the Convention may do about the higher courts but that disposition of the justice of the peace courts could create difficulties. This approach would have the same effect as leaving the entire matter to the legislature--the public would be barred from voting on the very part of the plan they are alleged to feel strongest about. Further it would be open to the criticism that the public is being asked to authorize a new system without knowing what it might be. This was one of the principal criticisms made of a proposed constitutional amendment offered in 1961 which would have abolished the constitutional status of justice and police courts without specifying what might replace them. Many people who favored the elimination of these courts were not willing to vote for the proposal which would give them no voice in deciding what the replacement would be.

Another proposal would be to separate the question of eliminating justice and police courts from the rest of the judicial article for a separate vote. Such a division would destroy the unified two level concept of the Montana Plan and would be totally inconsistent with any plan that contemplates unification, centralized administration, and consolidation of judicial functions.

The Montana Plan has been the subject of five years of intensive study by the Citizens Conference for Court Improvement, by many judges and attorneys, and has had the contributing influences of many draftsmen and many drafts. It may be, and probably is, capable of refinement and

improvement. The drafters do not claim perfection; only that the present plan is the best that a combination of many legal and judicial minds could devise.

We submit that no particular form is of outstanding importance but that the principles of unification, uniform administration and a higher level of judicial competence throughout the system are important. If these principles are placed solidly in the constitution they will furnish not only an improvement in the present Montana judicial system but a solid base for a businesslike, efficient, economical and expanding court system for many years to come.