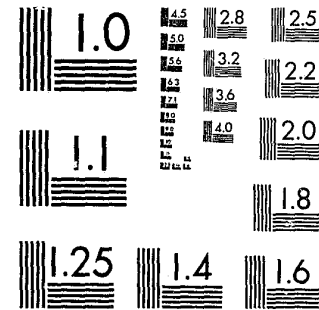


National Criminal Justice Reference Service

ncjrs

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on this frame may be used to evaluate the document quality.



MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504.

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U. S. Department of Justice.

National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

6-8-83

American Bar Foundation **research journal**

Volume 1981
Spring
Number 2

The Historical Context of Small Claims Courts
Eric H. Steele

Middlemen of the Law: An Ethnographic Inquiry into the English Legal Profession
John Flood

Legislation of Felony Arrests

Perceptions Questionnaire: Development and Some Pilot Findings
Hedegard

Articles

Reading the Mental Health Law Literature: Three Recent Books
Jan Brakel

Review of Niblett's Legal Protection of Computer Programs and
and v. Diehr and Some Thoughts on Patenting Computer Programs
A. Sprowl

Reviews by J. Randolph Block and Steven A. Meyerowitz

ABF

82165-
82166

NCJRS

FEB 19 1982

ACQUISITIONS

American
Bar
Foundation **research
journal**

Volume 1981
Spring
Number 2

The Historical Context of Small Claims Courts 293
Eric H. Steele

Middlemen of the Law: An Ethnographic Inquiry into the English
Legal Profession 377 82165
John Flood

The Disposition of Felony Arrests 407
Hans Zeisel 82166

The Course Perceptions Questionnaire: Development and Some Pilot
Research Findings 463
James M. Hedegard

Review Articles and Book Reviews 533

Review Articles 535

Sampling the Mental Health Law Literature: Three Recent
Books 535
Samuel Jan Brakel

**A Review of Niblett's Legal Protection of Computer Programs and
Diamond v. Diehr and Some Thoughts on Patenting Computer
Programs 559**
James A. Sprowl

Book Reviews 571

**Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial
Power 571**
Reviewed by J. Randolph Block

**Rembar, The Law of the Land: The Evolution of Our Legal
System 579**
Reviewed by Steven A. Meyerowitz

U.S. Department of Justice
National Institute of Justice

82165

This document has been reproduced exactly as received from the
person or organization originating it. Points of view or opinions stated
in this document are those of the authors and do not necessarily
represent the official position or policies of the National Institute of
Justice.

Permission to reproduce this copyrighted material has been
granted by
American Bar Foundation

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permis-
sion of the copyright owner.

U.S. Department of Justice
National Institute of Justice

82166

This document has been reproduced exactly as received from the
person or organization originating it. Points of view or opinions stated
in this document are those of the authors and do not necessarily
represent the official position or policies of the National Institute of
Justice.

Permission to reproduce this copyrighted material has been
granted by
American Bar Foundation

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permis-
sion of the copyright owner.

The Disposition of Felony Arrests

Hans Zeisel

Contents

| | |
|---|-----|
| I. INTRODUCTION | 409 |
| II. CRIMES AND ARRESTS | 410 |
| A. Amount of Crime | 410 |
| B. Rates of Arrests | 415 |
| C. Who Is Arrested | 418 |
| III. DISPOSITION | 422 |
| A. Disposition Pattern for Felony Arrests | 422 |
| B. Reasons for Dismissal | 426 |
| C. Withdrawal of the Complaining Witness | 428 |
| D. Disposing of Felony Arrests in the Misdemeanor Court | 432 |
| E. Plea Bargaining: Charge Reduction | 437 |
| F. Plea Bargaining: Sentence Promise | 441 |
| G. The Offer That Cannot Be Refused | 444 |
| H. Trial—Failure of Plea Bargaining | 449 |
| IV. CONCLUSION | 462 |

The Disposition of Felony Arrests

Hans Zeisel

While we know a great deal about the disposition of felony arrests that reach the trial stage, we know little about the details of the dispositions reached without trial. And yet, this latter category forms as a rule over 90 percent, in New York City 98 percent, of all dispositions. Basing his analysis on a study done in the early 1970s, the author describes and presents data on the various stages in the process from arrest to final disposition through plea bargaining, trial, or dismissal of the case. For the first time, this usually opaque disposition pattern prior to trial emerges in the clarity of 23 graphs that illustrate the analysis. Of particular interest are some new insights into the mechanism of the plea bargaining process.

I. INTRODUCTION

In 1973, when I was associated with the Vera Institute of Justice, I began a study of the law enforcement operations of New York City.¹ A probability sample of 1,888 felony arrests (referred to here as the "2000 sample") was traced on its itinerary through the system to final disposition. For a subsample of 369 cases (referred to here as the "400 sample"), interviews were conducted with the arresting police officer, the assistant district attorney, the defense counsel, and the judge about the respective part each played in the process that culminated in the disposition. The data permit a close-up view of the system as it operates in the largest metropolitan court system in the United States.

The study will be published in *The Limits of Law Enforcement*.² The present article is a prepublication of the two chapters of the book that give an overview of the crimes that come to the attention of the police, of the arrests that follow or do not follow, and of the ways the criminal court system disposes of these arrests.

We know a great deal about the dispositions through trial, especially

Hans Zeisel is Professor Emeritus of Law and Sociology and Research Associate, Center for Studies in Criminal Justice, University of Chicago; and Consultant, American Bar Foundation.

1. The study was financed by the New York State Division of Criminal Justice Services, the state funding branch of the Law Enforcement Assistance Administration of the U.S. Department of Justice.

2. (Chicago: University of Chicago Press, 1981?).

through jury trial. But we know relatively little about the dispositions without trial, although they constitute the overwhelming bulk of all dispositions, 98 percent in New York City.³

The study follows a distinguished scholarly tradition that began with the 1920 study *Criminal Justice in Cleveland*, by Felix Frankfurter and Roscoe Pound,⁴ and the subsequent volumes of the Wickersham Commission.⁵ Further insights into the disposition process come from the monumental effort of the American Bar Foundation under the directorship of Frank Remington.⁶ The present study attempts to round out these efforts by combining qualitative insights with the quantitative aspects of the longitudinal statistic that covers the case itinerary from arrest to disposition.

II. CRIMES AND ARRESTS

A. Amount of Crime

Measuring the amount of crime is more difficult than it might appear at first glance. The most widely used measure is the number of crimes reported to the police and in turn by the police to the public. Not all crimes, however, are reported to the police. Some crimes, such as violent crimes within the home, or shoplifting, or embezzlement, are often privately settled and not reported. The so-called victimless crimes, such as violations of the narcotics and gambling laws, are practically never reported; they come to light only by police surveillance or undercover work followed by an arrest. Also certain types of victim crimes often remain unreported because they remain undetected, primarily white-collar crimes (such as tax evasion or other frauds) and, for technical reasons, many acts of arson. Finally, there is the occasional awkwardness that a police department, in order to look good, will not report out all the crimes that have been reported to them. There is little one can do about determining the true number of victimless crimes. But ways have been found to estimate the number of unreported victim crimes. The "dark"

3. For the country as a whole, the average percentage for felony prosecutions reaching trial is closer to 10 percent.

4. (Cleveland, Ohio: Cleveland Foundation, 1922).

5. National Commission on Law Observance and Enforcement (George W. Wickersham, chairman), Reports, Nos. 1-13, in 7 vols. (Washington, D.C.: Government Printing Office, 1931).

6. Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody* (Boston: Little, Brown & Co., 1965); Donald W. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown & Co., 1966); Lawrence P. Tiffany, Donald M. McIntyre, & Daniel Rotenberg, *Detection of Crime: Stopping and Questioning; Search and Seizure; Encouragement and Entrapment* (Boston: Little, Brown & Co., 1967); Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little, Brown & Co., 1969); and Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* (Boston: Little, Brown & Co., 1969).

crime figures are determined through so-called victimization surveys, public opinion polls that inquire whether and how often the respondents have been victims of any crime.

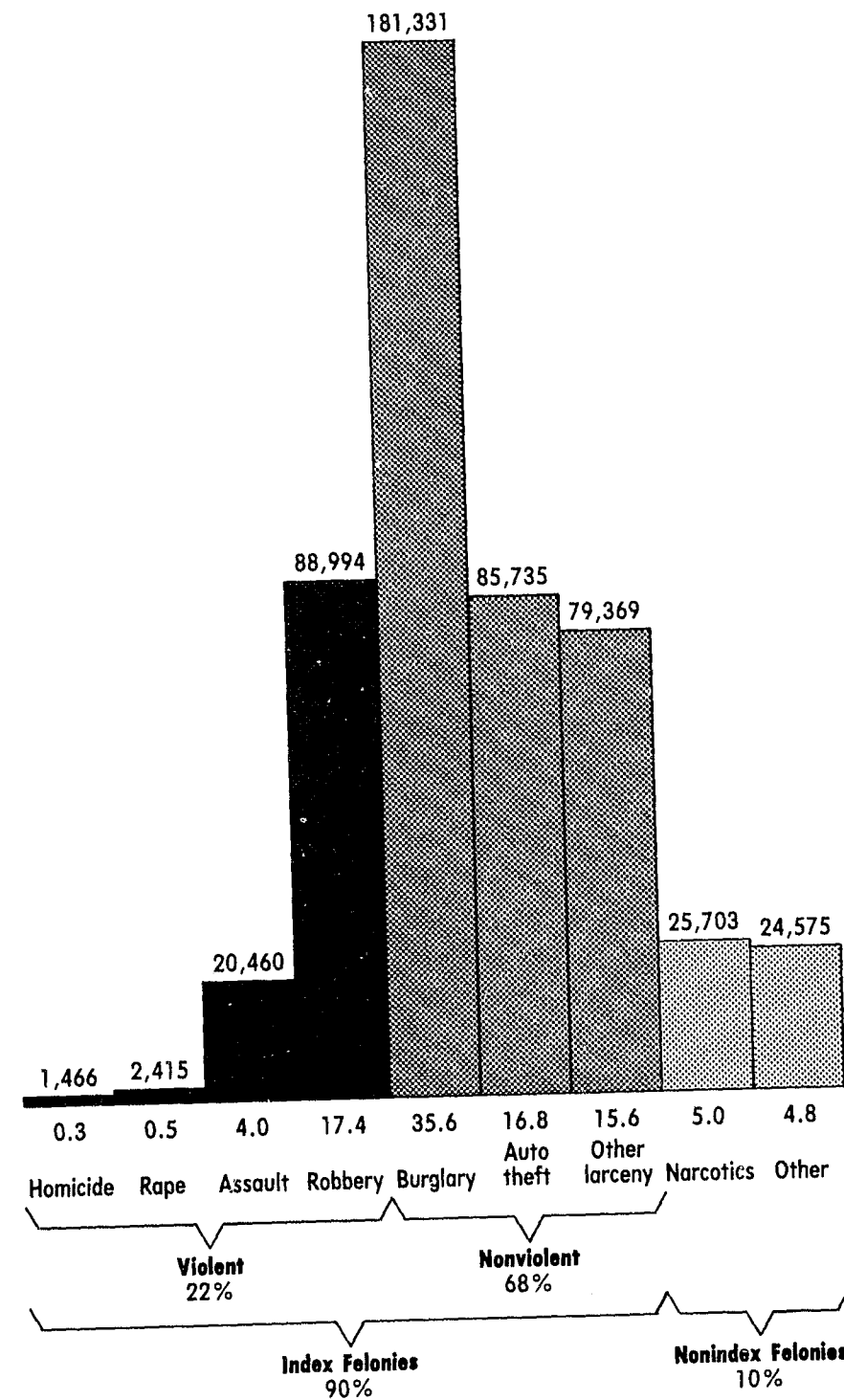
In spite of its shortcomings, the number of crimes reported to the police has, for good reasons, remained the basic measure of crime. Such a statistic, the number of felonies committed in the City of New York during one year, broken down into the various broad crime categories, is presented in figure 1. The year is 1971 because that was the most recent year offering complete and available records from which we could draw the arrest sample for our study. During that year, 510,048 felonies—the major crimes in contrast to misdemeanors and lesser violations—were reported to and by the police, approximately 1 for every 16 of the roughly 8 million residents of New York City. The crimes are presented in three broad groups. The first two—violent crimes against the person and nonviolent property crimes—form the index crimes, so named because they are the crimes counted in the Justice Department's Uniform Crime Reports, the standard measure of crime in the United States.⁷ The third group is not part of the index crimes. It is formed primarily by the victimless crimes, so called because they have victims only in a figurative sense—narcotics and gambling—or in a potential sense—illegal possession of a weapon. The category "other" crimes contains also a few victim crimes, such as arson, a crime that was excluded from the index crimes not because it is not a serious crime but because its count is unreliable, it being rarely identified with certainty unless an arrested suspect confesses.⁸

The shares of the various crime categories come perhaps as a surprise. The two most feared and most publicized crimes, homicide and rape, together account for less than 1 percent of all reported felonies, and assault accounts for 4 percent. As in most cities, burglary is the most frequently committed crime in New York; it accounts for over one-third of all reported felonies; auto theft and other larcenies account together for another third; and robbery accounts for about one-sixth of the reported felonies.

We gain some perspective on these New York crime figures by looking at them in the context of the crime figures reported by other large cities in

7. For a description of the index crime categories see U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States*, 1977, at 1-5, 304-5 (Washington, D.C.: Government Printing Office, 1978), or U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, *Sourcebook of Criminal Justice Statistics*, 1978, at 750-53 (Washington, D.C.: Government Printing Office, 1979).

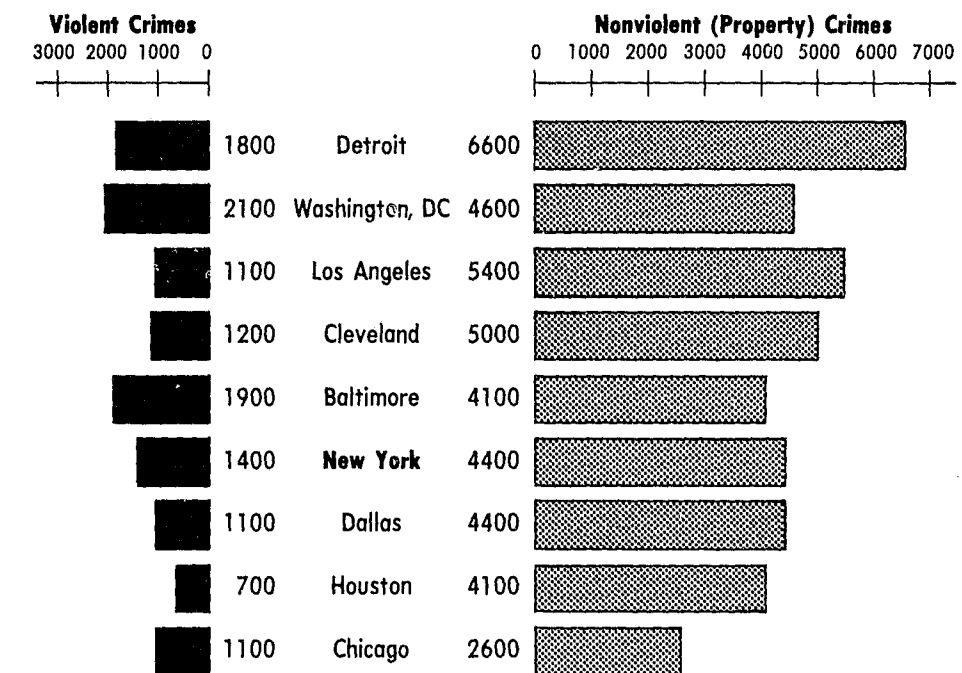
8. Congress, in its doubtful wisdom, has now ordered the inclusion of arson in the group of index crimes.



Source: FBI Uniform Crime Reports, 1971.

Fig. 1. Felonies reported to New York City police in 1971

the United States. Figure 2 shows the index crime rates per 100,000 population for nine of the ten largest cities in the United States.⁹ Counting all index crimes, New York held sixth rank; but even in assaults it ranked only fifth. The rates are given separately for violent and nonviolent crimes. For all violent crimes New York ranked fourth, being topped by Washington, D.C., Baltimore, and Detroit, in that order; for all property crimes it was tied with Dallas for fifth, being topped by Detroit, Los Angeles, Cleveland, and Washington, D.C.



Source: FBI Uniform Crime Reports, 1971.

Fig. 2. Reported index felonies per 100,000 population in nine of the ten largest U.S. cities in 1971

Criminologists the world over have known for a long time that the number of crimes reported to the police are only a fraction of the number of crimes actually committed. The United States was the first country to explore systematically the "dark" crime figures. An exploratory study undertaken at the behest of President Johnson's Commission on Crime and Violence suggested that the proportion of unreported crime might be substantial.¹⁰ Following up on this suggestion, the Law Enforcement Assistance Administration, in cooperation with the U.S. Bureau of the Cen-

9. Philadelphia is omitted because the reliability of the data reported by that police department is suspect. See Hans Zeisel & Ellen Fredel, *The Secret of the Philadelphia Police*, paper read before the 1978 meeting of the American Statistical Association (prepared for publication).

10. U.S. Office of Law Enforcement Assistance, *Criminal Victimization in the United States: A Report of a National Survey*, by Philip H. Ennis (Washington, D.C.: Government Printing Office, May 1967).

sus, undertook the first major search for the real crime figures by interviewing in each of several cities a probability sample of potential victims—individuals, households, businesses, and institutions—about the incidence of crimes committed against them during the 12-month period preceding the interview.¹¹

An effort was made, of course, to link the crime figures reported in these victimization surveys to the crime figures reported to and by the police through the question, "Did you report this crime (of which you have informed us now) to the police?" If the answers to this question had matched the figures recorded by the police as reported to them, the link between the two measures would have been established. If the victim survey showed 100,000 crimes, of which 60 percent were reported to the police, and the Uniform Crime Reports showed 60,000 reported crimes, all figures would fall into place. For a variety of reasons the figures do not match.¹² It is nevertheless possible to make a reasonable estimate of the number of crimes not reported to the police.

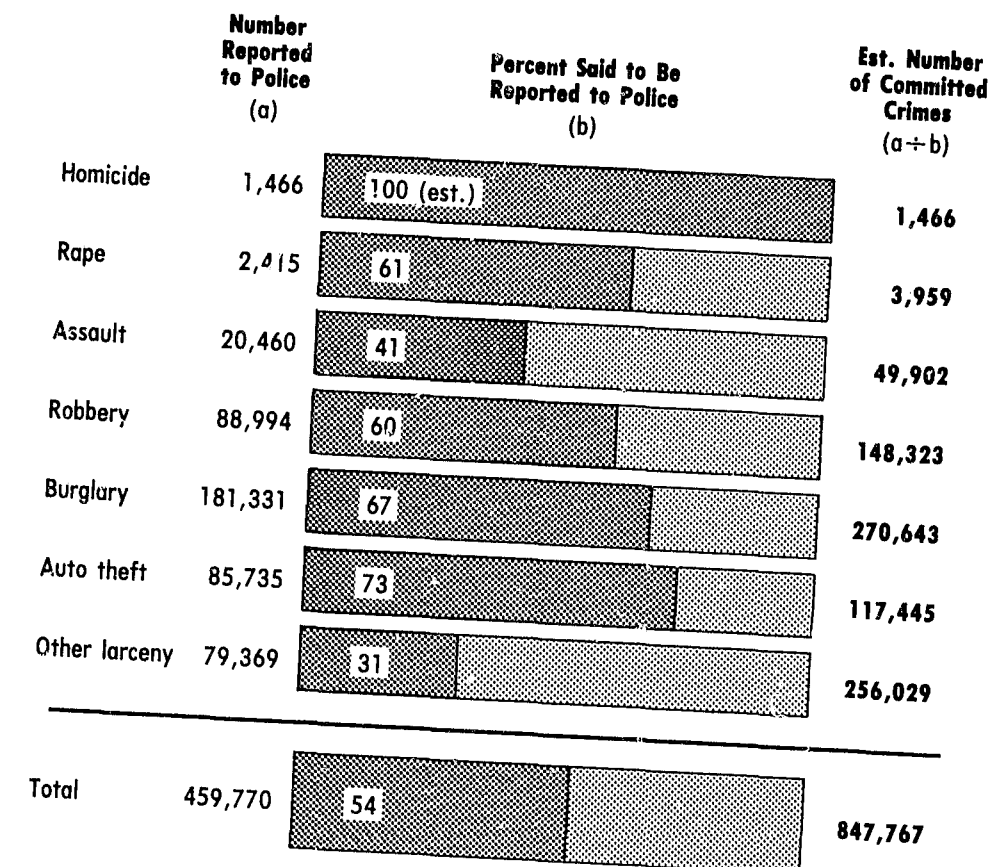
We can show how this estimating procedure applies for New York City, since a special victimization survey was conducted there in the spring of 1973.¹³ For our analysis we have accepted two sets of figures—the crimes reported to the police and the rate at which persons said they had reported or failed to report to the police the crimes of which they had been the victims. From these two sets we have estimated the number of committed crimes, as shown in figure 3. Except for the number of homicides,¹⁴ which we assume is not significantly understated, all major crime categories are underreported to some extent. Auto theft, burglary, and robbery are the crimes most frequently reported to the police, partly because these losses are often insured and require proof of report. Assault and larcenies other than auto theft are the crimes least often reported. On the average, 54 percent of these major crimes are reported to the police; 46 percent are unreported. As against the reported number of some 460,000 index felonies in 1971 in New York City, the true figure is likely to be around 850,000.

11. U.S. Department of Justice, Law Enforcement Assistance Administration, Criminal Justice Information and Statistics Service, Criminal Victimization Surveys in the Nation's Five Largest Cities: National Crime Panel Surveys: Chicago, Detroit, Los Angeles, New York, and Philadelphia (Washington, D.C.: Government Printing Office, April 1975).

12. The victimization surveys cover the resident population; the crime statistics include also crimes against commuters and transients. Victimization surveys ask for the respondent's recall over a time period; crimes committed shortly before the beginning of that period are often reported as having fallen within the period. And crime victims, especially in the lower socioeconomic strata, are generally difficult to locate for survey purposes. Even the U.S. Bureau of the Census has encountered these difficulties.

13. "The surveys . . . were carried out during the first quarter of 1973 and covered criminal acts that took place during the 12-month period prior to the month of the interview, a time frame roughly comparable to the calendar year 1972." See report cited in note 11 *supra*, at iii.

14. For obvious reasons, homicide is not one of the crimes covered by a survey that interviews victims.



Sources: for (a), FBI Uniform Crime Reports, 1971
for (b), LEAA Victimization Surveys

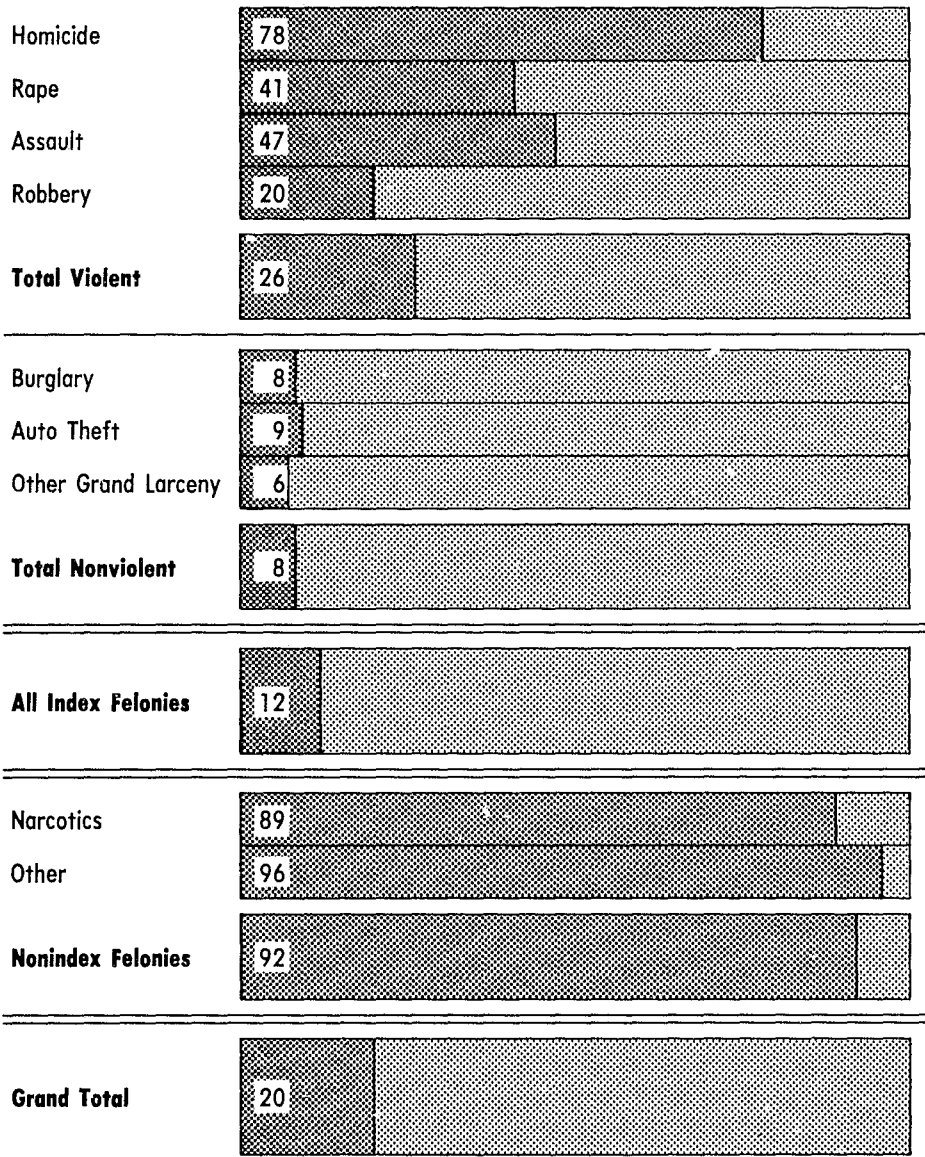
Fig. 3. Index felonies reported and committed in New York City

B. Rates of Arrests

We have estimated that somewhat more than half of all committed crimes are reported to the police. We now turn to these reported crimes and the arrests they have engendered. The rate of arrests, the ratio of arrests to the number of reported crimes, is a figure of some importance. It is a rough measure of the risk a criminal runs and, within limits, also a measure of police effectiveness. However, unless read with care, arrest rates tend to convey misleading information.

Of the 510,048 felonies reported in 1971 to the police, 102,148 resulted in an arrest, an average arrest rate of 20 percent, 1 arrest for every 5 reported felonies. The arrest rates for the various crime categories, as figure 4 shows, differ widely around this average, from 6 percent for larceny

other than auto theft to over 90 percent for the victimless (nonindex) crimes. The arrest rate for homicide, 78 percent, is high for two reasons. The police allocate comparatively more resources to the investigation of this most serious crime, and suspects are more easily found because in the majority of homicide cases the offender in one way or another was related to the victim. Similar reasons account for the relatively high arrest

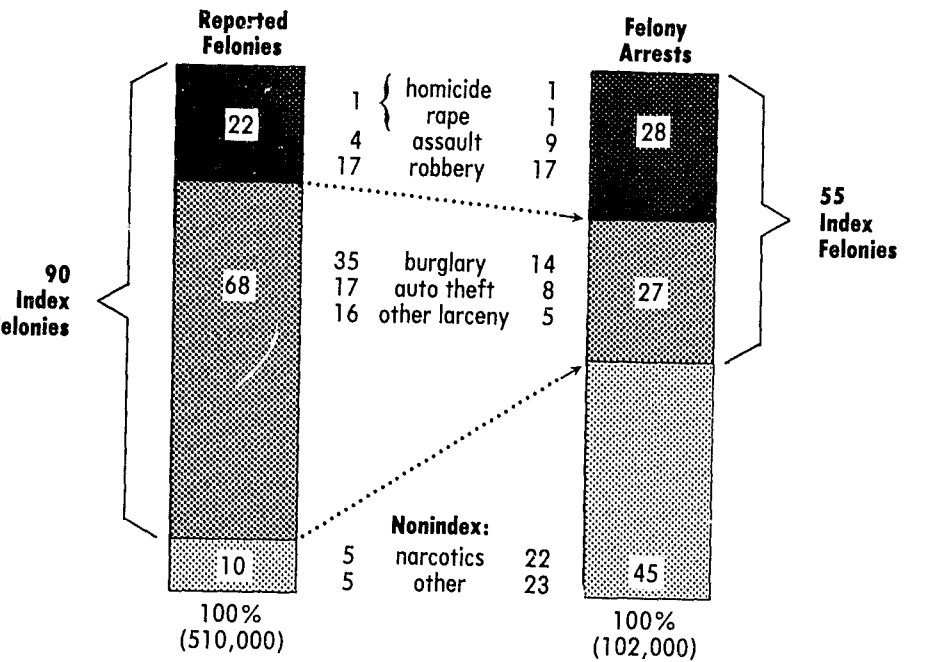


Sources: N.Y. City Police Department and 2000 Sample
Fig. 4. Arrest rates (as percent of reported crimes) for major crime categories

rates for assault and rape. The arrest rate for robbery is lower (20 percent) because the crime is normally committed by strangers and often with but one witness, the victim, making it difficult to trace the perpetrator. The average arrest rate for violent crimes against the person is 26 percent; for nonviolent property crimes, it is 8 percent. The arrest rate for all index crimes, combining both these categories, is 12 percent.

This average contrasts sharply with the arrest rates for narcotics and "other" crimes, in which the arrest rate is close to 100 percent (89 and 96). This contrast does not reflect higher police efficiency or higher risks on the part of the criminal. For the victim crimes, the arrest normally follows the report to the police that a crime has been committed. For the victimless crimes it is as a rule the police arrest that causes the crime to be entered as "reported to the police." The same is true for violations of the weapons laws or for such clear victim crimes as arson: as a rule it is only after somebody is arrested for arson or for illegal possession of a weapon that the police will enter those crimes into the list of "felonies reported to the police." We have no way of knowing the true number of committed narcotics crimes or of illegal possessions of a weapon. Thus, the arrest rates for these crimes are meaningless as measures of police effectiveness and must be excluded from all average arrest rates.

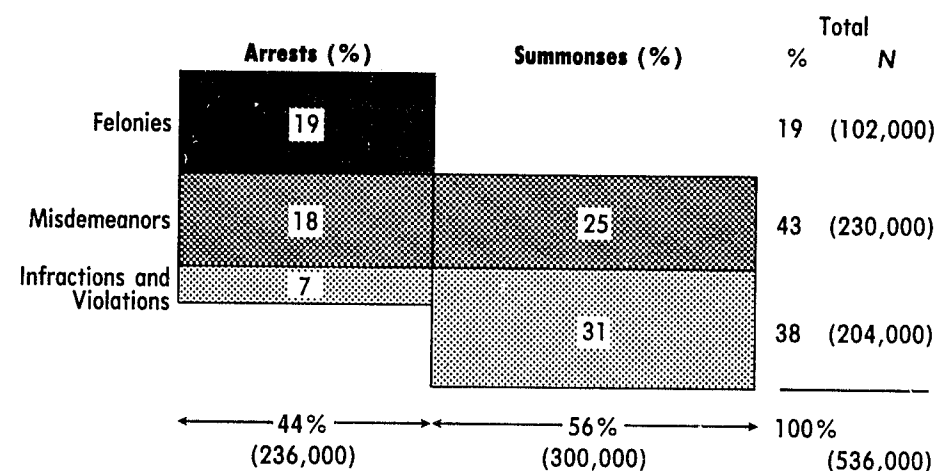
Figure 5 shows another aspect of the relationship between arrests for



Sources: N.Y. City Police Department and 2000 Sample
Fig. 5. Reported felonies and felony arrests (percent)

index crimes and for victimless and "other" crimes. The index crimes constitute 90 percent of all crimes reported to the police, but only 55 percent of all police arrests. The 10 percent narcotics and "other" crimes account for 45 percent of all police arrests.

Felony arrests, however, as figure 6 shows, are only part of the enforcement activity of the New York police department; they account for less than half of all the arrests made by the police. The remainder are arrests for misdemeanors and for what the law calls violations and infractions. Moving traffic violations, which far outnumber crimes proper, are not included. In addition, the courts obtain cases through police summonses, which may be issued in lieu of arrests to persons charged with no more than a misdemeanor. The majority of the prosecutions for lesser offenses are initiated by a summons. In this wider context, felony arrests account for less than 20 percent of all processed cases.



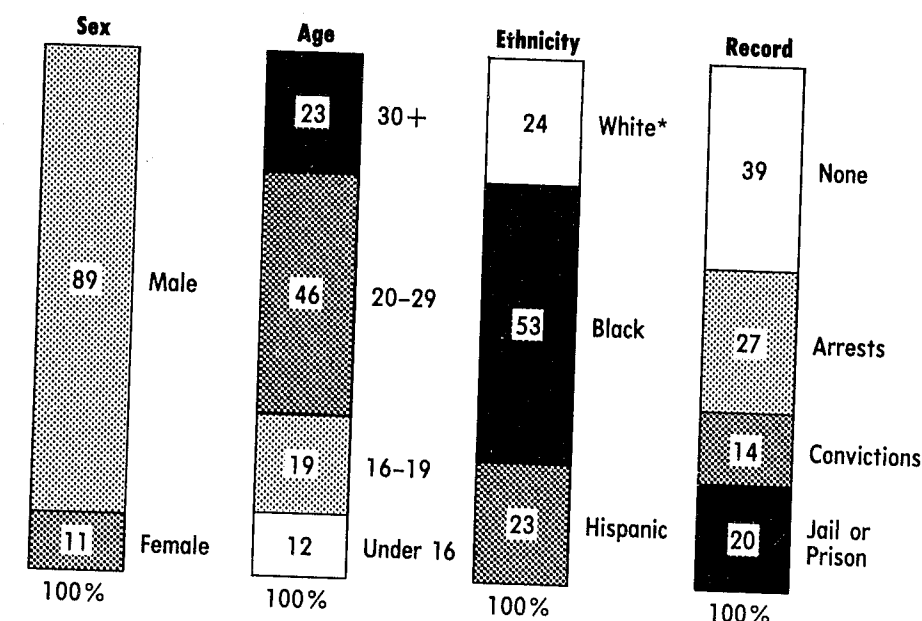
Source: N.Y. City Police Department

Fig. 6. Police apprehensions for all penal code violations

C. Who Is Arrested?

The statistics about the persons arrested and charged with a crime provide most of our knowledge about who commits the crimes. We record the age, sex, ethnic background, and other demographic characteristics of the persons we arrest and take that collection of facts to represent by and large the population of persons who commit these crimes. Such projection rests on a number of tenuous assumptions about which we will have more to say later on.

Figure 7 gives the demographic profile, by sex, age, ethnicity, and criminal record of the persons arrested on a felony charge. The vast ma-



*More precisely, "white and other than Blacks or Hispanics." The latter group, however, constitutes less than one percent of the arrested defendants.

Source: 2000 Sample

Fig. 7. Demographic profile of felony arrests (percent)

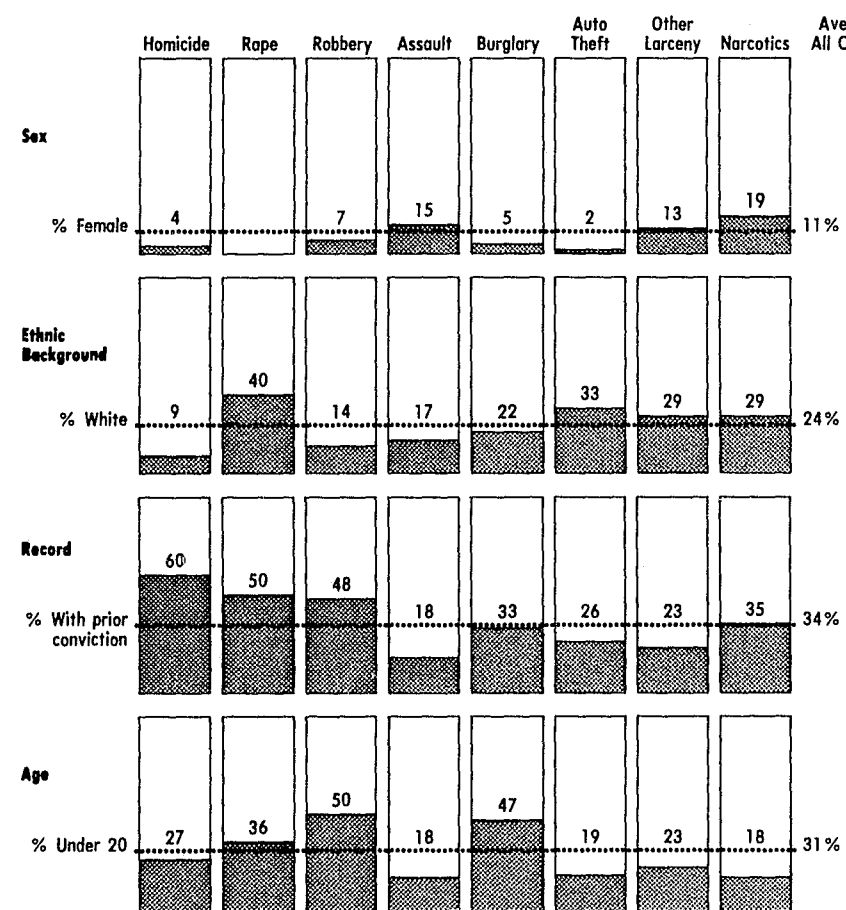
majority of these persons were male. Thirty-one percent were under 20 years old; 12 percent were under the age of 16, and therefore by New York law did not come under the authority of the criminal courts; 19 percent were between 16 and 19 years. Almost one-half of all arrested persons were in their twenties; fewer than 10 percent were over 40. The distribution by ethnic background was approximately one-quarter Hispanic, one-quarter white, and one-half black. Thirty-nine percent of the defendants had never been arrested before; 27 percent had been arrested but not convicted; 14 percent had been convicted but had not served time in jail or prison; 20 percent had served time. Thus, approximately 60 percent of the persons arrested for a felony had at least an arrest record.¹⁵

Crime, it appears, is a preoccupation of men, of young men at that, and often of young black men. This demographic statement fails to consider two important stratifications, information for which is unavailable, those by income and by education of the parents. Ethnicity is largely a stand-in for the distribution by income and education of the parents. If

15. There are serious problems about considering arrests that did not end in conviction as part of a criminal record.

we had these arrest rates, we very probably would have concluded that crime is a preoccupation of the young men from poor and hence uneducated families.

We now consider in figure 8 the demographic profile as to sex, ethnic background, criminal record, and age for each of the eight major crime categories. The eight crime categories are listed across the top. Under each heading four bars represent the distribution of the arrestees by sex, ethnic background, criminal record, and age. To simplify the picture, we have made each of the four distributions dichotomous, female/male, white/nonwhite, prior conviction/no prior conviction, under 20 years/20 years and older. Only one of the alternatives is shown (in the shaded section); the other occupies the space difference to the 100 percent level. Thus, if the first bar shows that 4 percent of the persons charged at arrest with homicide were female, this means that $(100 - 4 =) 96$ percent were



Source: 2000 Sample

Fig. 8. Demographic profile of arrests made for the commission of a felony (percent)

male. The dotted line across each of the four sets of eight bars represents the average sex, ethnic, etc., distribution for all arrests, taken from figure 7. These lines facilitate the visual analysis by allowing us to see how far each crime category deviates from the average for all crimes. Thus, the bars can be read vertically or horizontally. Vertically, they show the four profiles for each crime. For instance, of the persons arrested for homicide, only 4 percent are female (the average for all crimes is 11 percent); only 9 percent are white (the average for all crimes is 24 percent); but the frequency of a criminal record is 60 percent, almost twice the average of 34 percent; the proportion of teen-agers is 27 percent, slightly below the average of 31 percent.

Reading the top row of eight bars across, we learn that the share of female arrestees is far below average for homicide and auto theft, and still below average for robbery and burglary. The female share is above average for assault, for larceny other than auto theft, and for violation of the drug laws. Eleven percent of all persons arrested for a felony are female.

Reading ethnicity across: the share of white arrestees is above average for rape and below average for the other three violent crimes; it is close to the average for burglary and above the average for auto theft, other larceny, and narcotics violations. Reading the third row across, we see that persons arrested for homicide, rape, and robbery have a record far more often than the average of 34 percent, in contrast to assault, where only 18 percent of the arrestees had a record. The age distribution of homicide and rape is not far from the average; the share of teen-agers in robbery arrests reaches a record high of 50 percent; the teen-ager share in assault is relatively small, 18 percent.

Figure 8 can also be read vertically. Thus, persons arrested for homicide are predominately male, black, have a record, and are slightly older than the average. Persons arrested for rape are white in higher proportion than the average for all crimes, have a criminal record more often than the average, and are teen-agers slightly more than average. Burglary shows a relatively low share of females, an average share for whites and for persons with prior convictions, but a near-record 47 percent share of teen-agers.

An important caveat for reading these arrest statistics is in order. The arrest rates per 100,000 are just that: the number of arrests made during one year per 100,000 population. They do not denote the number of *persons* arrested, because some of these arrestees will have been arrested more than once during that year. The number of arrested persons, therefore, is smaller than the number of arrests. Data collected for Washington, D.C., suggest that because of that duplication, the number of *persons* arrested for a felony charge is around 20 percent smaller than the number of such arrests.¹⁶ It follows that the arrested persons are there in

proportion to the frequency with which they have committed crimes; the more crimes a person has committed, the more likely he will be found among the arrested. Moreover the chances of being arrested may not be the same for all lawbreakers. The police might arrest differentially more persons of certain subgroups of the population. And in turn, professional criminals may know better than amateurs how to avoid arrest. The few data concerning such differences are insufficient to make prompt numerical adjustments. It seems, for instance, that robberies by blacks are more often reported to the police than robberies by whites; the opposite is true for assault.¹⁷

In the absence of hard figures that would allow us to correct the projection from arrest figures to committed crimes, the demographic profile figures of the arrested persons are being used as best approximation to the profile of all offenders.

III. DISPOSITIONS

A. Disposition Pattern for Felony Arrests

The New York Penal Law distinguishes nine classes of crimes of differing severity and establishes for each the legal sentencing frame—the minimum and maximum sentence—within which the imposed sentence must fall. Table 1 summarizes the classification at the time of our study. Conviction for an A felony brings a minimum sentence of 15 years and can bring a sentence of life. For all convictions below class C felony the law prescribes practically no minimum sentence. The judge is free to grant probation, except after convictions for an A felony. He may even discharge the defendant without sentence unless the crime is a narcotics crime. While minimum sentences thus hardly differ, the maximum sentences are steeply graded: life for an A felony, 25 years for a B felony, 15 years for a C felony, down to 4 years for the lowest felony, E. The maximum sentence for a conviction below the felony level is 1 year. One of the options open to the sentencing judge at the time of this study (but not now) was to send an offender convicted of a felony, if he was a certified narcotics addict, to the Narcotics Addiction Control Commission (NACC) for a period of 3 to 5 years.

We shall now look more closely into the disposition structure of the felony arrests brought to the courts of New York City. Figure 9 shows first that 20 percent of the arrests did not reach the criminal court system:

16. Unpublished data from the Institute for Law and Social Research (INSLAW) in Washington, D.C. See also Brian Forst, Judith Lucianovic, & Sarah J. Cox, What Happens After Arrest? A Court Perspective of Police Operations in the District of Columbia, PROMIS Research Project Publication no. 4, at 9-10 (Washington, D.C.: Institute for Law and Social Research, 1977).

17. Michael J. Hindelang, Race and Involvement in Common Law Personal Crimes, 43 Am. Soc. Rev. 93 (1978).

13 percent went into the family court, either because the arrested person was under 16 years of age or because the crime involved a juvenile in a family setting; 6 percent of the arrest cases did not reach the courts within the study interval because the defendant jumped bail; and 1 percent of the cases were abated because of the defendant's death or for other

TABLE 1
Sentencing Frames for Crime Classes of New York
Penal Law

| | Maximum Sentence | Minimum Sentence | Alternatives Allowed |
|-------------------------------|----------------------------|------------------|--|
| <i>Felonies</i> | | | |
| A | life ^a | 15 years | |
| B | 25 years | 1 year | probation (no discharge or fine only) |
| C | 15 years | 1 year | probation & discharge ^b (no fine only), drug treatment ^c |
| D | 7 years | 1 day | probation, discharge, ^b fine, drug treatment ^c |
| E | 4 years | | |
| <i>Misdemeanors</i> | | | |
| A | 1 year | none | all alternatives permitted ^c |
| B | 90 days | | |
| <i>Violations^d</i> | 15 days | none | conditional discharge, fine (no probation) |
| <i>Infractions</i> | (as specified in the code) | | conditional discharge, fine (no probation) |

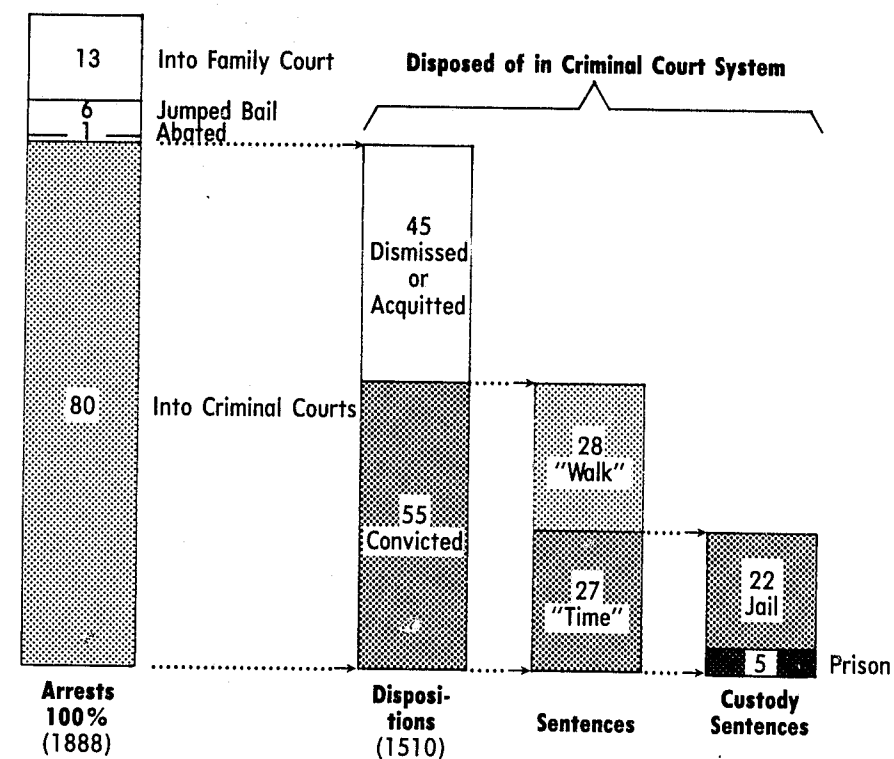
NOTE: Table 1 reflects the New York law as it stood prior to September 1973. The main changes enacted since are as follows: Class A felony was split into classes A-I and A-II, with murder-1 being a special class of A-I. The death sentence to follow conviction for murder in the first degree was made mandatory, but that provision was held unconstitutional in *People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456 (1977). For class A-II, the minimum sentence must be not less than 3 years and not more than 8½ years; the maximum is life. Classes B through E were divided into violent and non-violent felonies. The maximum sentence for all class B crimes remains 25 years, with the minimum revised to at least 6 years for violent and 3 years for nonviolent crimes; the minimum for B violent must be one-third the maximum but may go as high as one-half the maximum. For all of class C the maximum sentence has remained 15 years. For violent crimes in class C and for some enumerated nonviolent ones, sentence must be at least 4½ years, and for all other C crimes at least 3 years. For all crimes the minimum sentence is one-third the maximum. Imprisonment is mandatory for conviction in classes A-I (except murder-1) through C-violent and for some enumerated crimes in lower classes, with the exception that lifetime probation is permitted in return for the defendant's material assistance in connection with a drug felony in specified categories. (New York Penal Law §§ 55:00-85:15, 125.27 (McKinney 1975 & Cum. Supp. 1980-1981)).

^aIndeterminate sentences are not allowed for A felonies; all other felonies permit indeterminate sentences, in which the courts can set minimums as well as maximums. If the court fails to set a minimum, the Parole Board may consider release after one-third the maximum is served.

^bExcept for narcotics crimes.

^cDrug treatment in closed institution (NACC) optional for certified addicts on felony conviction, mandatory for misdemeanor conviction. (Sentence no longer available.)

^dParking violations and the bulk of traffic violations are technically not criminal and are handled by the Parking Violation Bureau, an administrative agency, not a court.



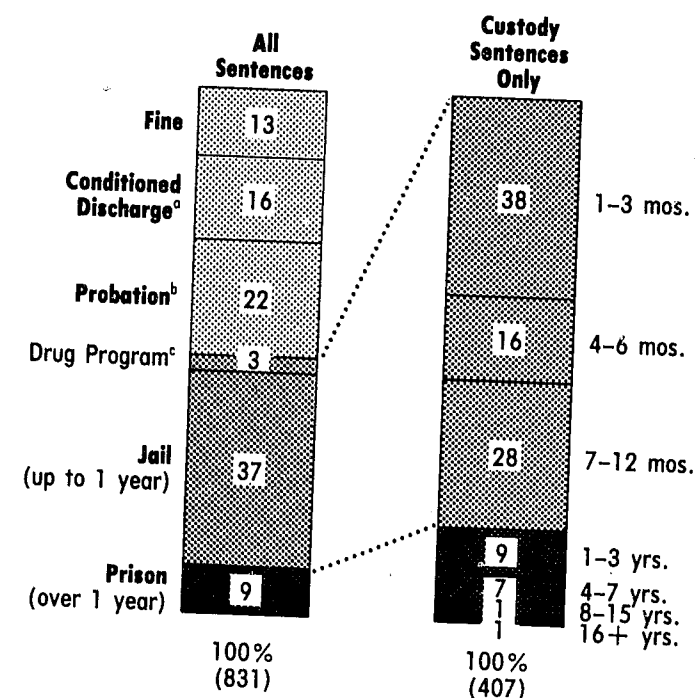
Source: 2000 Sample

Fig. 9. Dispositions as percent of all felony arrests

reasons. This leaves 80 percent of the felony arrests that were disposed of in the criminal justice system. Of these, 55 percent were convicted; the remaining 45 percent of the cases ended in dismissals or acquittals. Of the 55 percent convicted defendants, slightly more than half (28 percent) obtained a "walk" sentence, 27 percent a custody sentence. Of these, 22 percent were jail (or drug treatment) sentences (up to one year), and 5 percent were prison sentences of one year and more.

The proportion of felony arrests going through the courts that do not end in a conviction—45 percent—is not peculiar to New York City. It is approximately of the same magnitude in all legal systems that distinguish between the amount of proof sufficient for arrest and the amount of proof required for conviction.

Figure 10 shows the sentences received by the convicted defendants. As the left-hand bar shows, about half of those defendants (51 percent) received a "walk" sentence, so called because the defendant is allowed to walk out of the courthouse. The three "walk" sentences are: fine, conditional discharge, and probation. The latter two are "walk" sentences on-



^aDefendant was discharged under a specified condition, e.g., not to revisit a home, not to get drunk, etc.

^bDefendant was allowed to remain free under the standard provisions of probation (reporting to the probation officer, etc.), for either a 3- or 5-year term. If he violates any rules, especially if he commits another crime, the court may resentence him for the crime for which he was paroled.

^cDefendant who was a narcotics addict was committed for a specified time to the custody of Narcotics Control Commission (NACC) for a rehabilitation program then in operation.

Source: 2000 Sample

Fig. 10. Sentences of those convicted after a felony arrest (percent)

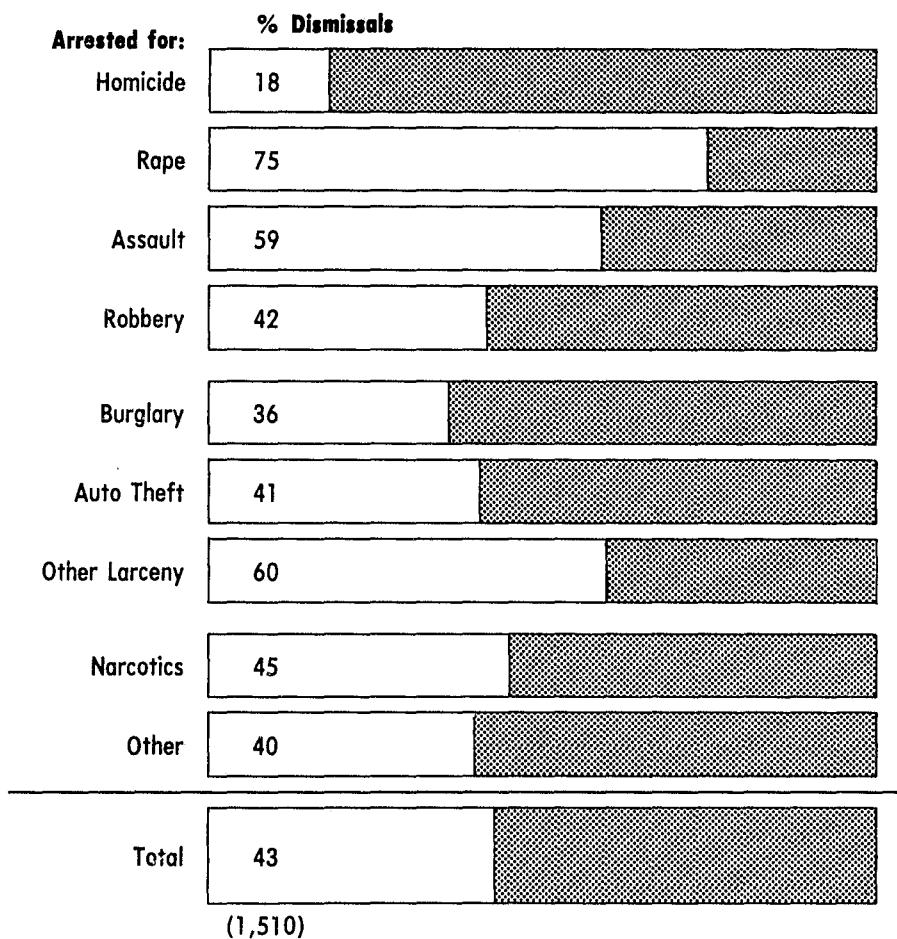
ly conditionally, provided the defendant behaves well during the prescribed time period. The other half of those convicted received custody sentences. A small fraction (3 percent) were sent to a drug-treatment program which involved custody of sorts.¹⁸ The remaining convicted defendants (46 percent) received jail or prison sentences; only sentences that exceed the one-year limit are served in the state prison. Slightly less than one out of five custody sentences are prison sentences. Slightly less than half of all jail sentences do not exceed six months.

18. The custody was meant for at least one year or more but in fact ended much earlier. This disposition was abolished in 1975.

B. Reasons for Dismissal

One of the more perplexing aspects of the disposition statistics is the high proportion of felony arrests that end in dismissal. No law enforcement system can be expected to operate without failures; what surprises is the magnitude of the failure rate. The problem, as figure 11 shows, pervades all crime categories. Dismissal rates range around the average of 43 percent from 18 percent for homicide charges to 75 percent for rape charges. These variations become understandable as we explore just what the main evidentiary problems were that prompted the dismissals.

We have asked prosecutor and defense counsel for each dismissed case why the case was dismissed. Their reasons refer in the main to evidentiary



Source: 2000 Sample

Fig. 11. Percent dismissals by type of crime

difficulties, some already apparent at the time of arrest, others developing later. Table 2 shows that the major reason for dismissal is the withdrawal of the complaining witness, a problem we will consider more closely in the next section. Also nonevidentiary circumstances occasionally affect the decisions to dismiss, albeit always in conjunction with evidentiary consideration.

Table 2 lists the grouped reasons for the 66 dismissals for which we

TABLE 2
Reasons for Dismissal

| 1. Evidentiary Reasons | No. of Cases |
|---|--------------|
| General | |
| Complaining witness withdraws | 33 |
| Complaining witness lacks credibility | 8 |
| Gave conflicting testimony | 3 |
| Weak identification | 1 |
| Was prostitute | 4 |
| Codefendant assumed responsibility | 1 |
| Codefendant, tried separately, was acquitted | 1 |
| Cross-complaints | 1 |
| Specific | |
| Delayed return of rented car (criminal intent doubtful) | 6 |
| Mentally incompetent | 2 |
| Consent to rape | 1 |
| Possession or ownership difficult to prove | 6 |
| Did not fire gun | 1 |
| Self-defense | 2 |
| Had bill of sale | 1 |
| Only a rider | 2 |
| Only a joke | 1 |
| Total | 66 |
| 2. Managerial Reasons | |
| Defendant was tried on a more serious charge elsewhere | 1 |
| Defendant was arrested as courtesy to out-of-town police | 1 |
| Total | 2 |
| 3. Personal Considerations (in conjunction with evidential reasons) | |
| First offense | 6 |
| Made restitution | 4 |
| Employed | 1 |
| Family responsibilities | 5 |
| Old age | 1 |
| Student | 1 |
| Very young | 1 |
| Minor crime | 3 |
| No injury | 1 |
| Family relationship; domestic dispute | 8 |
| Performed well in drug rehabilitation program | 1 |
| Served some time in pretrial detention | 1 |
| Victim partially culpable | 1 |
| Total | 34 |

were able to determine reasons. They are but a fraction of the 159 dismissed cases in the 400 sample. They nevertheless illuminate the problem. The evidentiary reasons are conveniently classified into general and crime-specific or idiosyncratic reasons. In half of all cases (33 out of 66) the dismissal was prompted by the withdrawal of the complaining witness. Doubts about the complaining witness's credibility are frequent. In two cases the codefendant prompted dismissal, in one by assuming sole responsibility for the crime and in another by obtaining an acquittal in a separate trial, thus demonstrating the weakness of the case. At times, formal considerations inform the dismissal—a dismissal that does not free the defendant from prosecution but delivers him to another case or another jurisdiction. The decision to dismiss a case is at times helped along by the fact that either the defendant or the alleged crime, or both, were not particularly dangerous.¹⁹

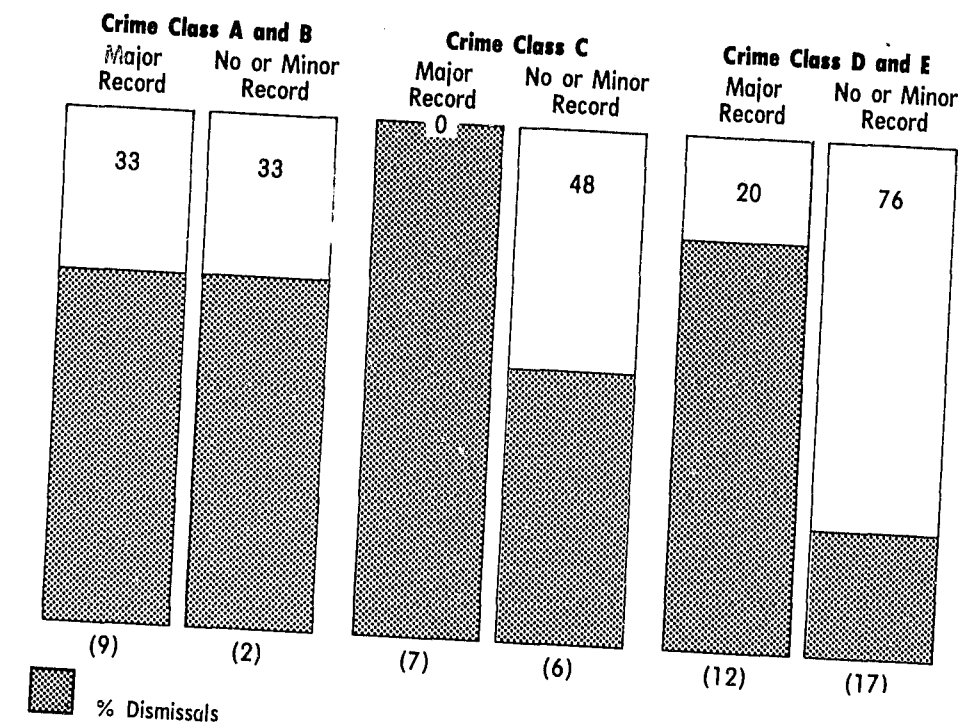
Figure 12 brings into sharper focus the fact that occasionally the presence of other than evidential reasons affects the decision to dismiss. If the defendant had been arrested for a class A or B crime,²⁰ the dismissal rate remained unaffected by the defendant's criminal record. But if he was arrested for a lesser felony, having no record or only a minor record facilitated dismissal. Defense lawyers know this happens. As one of them, defending on a minor felony charge, put it: "If my client is a first offender, I try to get a dismissal."

C. Withdrawal of the Complaining Witness

Withdrawal of the victim from the prosecution is the major reason for the dismissal of cases. It occurs primarily when victim and offender had been living together, or at least had known one another, had an altercation which led to the arrest, and subsequently decided to make up. The prospect that this may occur is one of the considerations that may guide the police officer's decision on the scene about whether to make an arrest. At times, withdrawal is due simply to the great burden put on a complaining witness by the need for repeated court appearances, a burden aggravated by waiting time. In theory, a witness can be forced to testify, but a reluctant witness sharply reduces the prospects of a successful prosecution. The great majority of the arrests for victim crimes are initiated by the complaint of the victim, who then, as a rule, becomes the key witness in the case. Yet before the case reaches disposition, as we saw in the preceding section, many complaining witnesses stop cooperating, either by simply failing to appear in court or by formally withdrawing the

19. Peter W. Greenwood and Marvin Lavin reported a similar finding from California: "The likelihood of conviction is not significantly affected by the arrestee's prior record, although those with less serious records are more likely to be released without formal court proceedings." (The Disposition of Felony Arrests: Prosecuting and Sentencing Policies in California and Their Effects on Crime. RAND Publication 10061-1-DOJ mimeographed, 1977, at 59.)

20. See table 1 and accompanying text *supra*.



Note: The percentages are not always natural fractions of the number of cases because they come from a stratified, and correspondingly weighted, sample.

Source: 400 Sample

Fig. 12. Dismissal rates by defendant's record for cases in which complaining witness did not withdraw.

complaint. Such withdrawal weakens the prosecutor's case and often brings about its dismissal.

Table 3 shows the distribution of reasons that led to the withdrawal of the complaining witness. In some cases these reasons were given to defense counsel who reported them to us; in some cases we inferred them. The most frequent reason for the victim's withdrawal is the existence of a prior bond between victim and offender: they may have been friends, or lovers, or even members of the same family. Some victims lose interest in the prosecution of a property crime because restitution has been made, or of a violent crime because the first wave of anger has subsided. In some cases, it appears that withdrawal occurs because the victim has been "reached" and discouraged from further prosecution by friendly or not so friendly intervention. On occasion the motive for withdrawal is the threat of a counter-complaint, very much as civil suits and countersuits are occasionally abandoned by consent. In a number of cases the complaining witness simply refused to testify, citing fear of self-incrimination; it is dif-

TABLE 3
Reasons for Withdrawal of Complaining Witness

| | Percent |
|--|---------|
| Victim and defendant related in some way (family, ex-lovers, etc.) | 25 |
| Victim and defendant companions (drinkers, junkies, etc.) | 9 |
| Rape not by a total stranger | 6 |
| Cross-complaint (washout), fear of self-incrimination | 15 |
| Victim was "reached" | 12 |
| Restitution was made | 9 |
| Victim was a "John" | 6 |
| Victim took pity | 3 |
| Victim resides out of town | 3 |
| No reason discovered | 12 |
| | 100% |
| | (N=98) |

difficult to determine in these cases whether this fear is real or merely a legal excuse for abandoning prosecution for other reasons.

In a considerable number of cases we could find no specific reason for abandoning prosecution.²¹ We know, however, from other studies²² that many of these complaining witnesses give up simply because their interest wears thin and at some point is no longer sufficient to sustain the considerable burden of being a witness. The following descriptions provide some of the illuminating details of the circumstances that led to withdrawal. Here, first, are some cases that illustrate the withdrawal in a family setting.

The defendant and his common-law wife had lived together for 10 years. They had their share of quarrels and sometimes these got rough. One night the defendant had been drinking and he and his wife fought over money. When she refused to give him her pay check, he hit and injured her. She called the police; the defendant became frightened. Convinced he would go to jail, he offered the police \$20. They charged him with robbery 1, assault 2, and bribery. The complainant was taken to the hospital, where she received stitches for a cut on her head. In court, she requested that the charges be dismissed. The prosecutor insisted on a plea to bribery, a misdemeanor, and the defendant was sentenced to a conditional discharge. The judge explained, "They were standing arm in arm. She told me he was a good man and a good provider. They had been together 10 years and they had every appearance of staying together another 10."

The probation department had recommended discharging the defendant on condition that he stay away from the complainant. "They don't understand what's going on," the legal aid lawyer said, "to recommend that they stay away when it would be impossible to separate them."

(case 53)

21. It must be remembered that in this study we did not talk to the complaining witnesses.

22. Frank J. Cannavale, Jr., & William D. Falcon, eds., *Witness Cooperation: With a Handbook of Witness Management* (Lexington, Mass.: D. C. Heath & Co., Lexington Books, 1976).

A "family" crime may be a "property" crime as in the following two cases.

A grandfather returning home found his son and grandson ransacking his apartment; outraged, he called the police. Although the son had 25 arrests, the case was dismissed at the preliminary hearing when the complainant withdrew.

(case 101)

Two young men were caught by a policeman appropriating several hundred pairs of stockings from a moving van; they were charged with grand larceny. But the owner of the merchandise, who was the father of one of the defendants, refused to sign the complaint and never came to court.

(case 311)

Neighbors and acquaintances have a propensity to withdraw after the heat of battle has cooled.

The defendant and her husband, homeowners, had fought with their neighbor for years. One summer evening the feud erupted into battle. The defendants charged into the neighbor's yard spraying mace, and the complainant retaliated with a baseball bat. The police who were called in attempted to calm things down, but the irate complainant, in an "exhilarated state," stole one of the officers' guns intending to use it against the defendant. Everyone was arrested. In the end there was a private settlement assuring dismissal for both parties.

(case 86)

A cross-complaint seems to be a potent motive for withdrawal.

Two women were fighting, apparently over a man. Both had to be hospitalized. The legal aid attorney reported, "The police officer made sure both women filed complaints, knowing that these complaints would then be dismissed."

(case 97)

Prosecutors for property crimes are likely to stall because the victim has lost any financial interest in the prosecution.

In the course of a routine checkup, a defendant's fingerprints were found to match those found at the scene of a burglary committed 2 years earlier in a clothing store. In spite of the fingerprints, the case was dropped because the store owner, probably reimbursed by his insurance company, had no interest in prosecuting.

(case 66)

Car thefts are primary examples of such withdrawal after restitution; several such cases involved auto rental companies. Once the car is returned and the rental fee paid, the complainant urges dismissal of the charges. Remarkd the prosecutor: "The company is using the court as a collection agency."

The 12 percent of the withdrawals in which the complaining witness was reached may not involve more than a plea by the defendant or his family.²³ But it may involve more.

23. I know of a case (not connected with this study) in which a woman in New York who had

A man had kept his former girl friend secluded for 12 hours against her will and beat her, fractured her nose and some of her teeth. When his apartment was searched, a gun and gambling slips were found. A motion to suppress was denied. He was charged with kidnaping, assault, possession of a dangerous weapon, and possession of gambling records. The woman was so reluctant a witness that she was kept in civil jail as a material witness before appearing. She refused to testify saying she was threatened. The man was allowed to plead guilty to an E felony (the lowest grade) with a promise of probation. The probation report, according to the judge, was very favorable and described the defendant as "a very likable person." When it was found that he was on probation on a federal court sentence, the sentence was changed to a conditional discharge. (case 25)

According to the complainant, four defendants had beaten him and taken his welfare check; two days later they were arrested. The complainant did not show up for subsequent appearances and notified the welfare department "not to tell the police when he registers." The police thought the complainant witness had been "reached."²⁴ (case 12)

Finally, there is the case of a woman for whom it was clearly not worth returning to the city (probably more than once) in order to help the prosecution.

According to the complaint, the defendant, unemployed and drunk, allegedly jostled a woman from out of town as she emerged from Macy's, and tried to snatch her purse. The woman suffered minor injuries and called a detective, who charged attempted robbery 3, assault 2, and public intoxication. The complainant agreed to sign a complaint at the station house but never showed up in court. She probably left town shortly after the incident. The case was reduced to public intoxication, for which the detective's testimony sufficed. (case 247)

Occasionally, the prosecution's case survives withdrawal of the complaining witness. Often a gradual realization that the complaining witness may not reappear in court provides time for a negotiated settlement.

D. Disposing of Felony Arrests in the Misdemeanor Court

Few felony arrests ever reach the supreme court, which alone can convict a defendant of a felony. This section examines where, on their way through the court system, felony arrests are disposed of and convictions are obtained.

Felony arrests, as a rule, are made by the city's police department, a

been robbed of her purse by some juveniles was urged by their families and social workers to drop the complaint.

24. The *New York Post* (Sept. 15, 1974) reported that in the Queens Criminal Court robbery charges against two youths were dismissed when the restaurant's night manager and waitress failed to appear. Shortly after the two suspects were arrested, an unidentified teen-ager had entered the restaurant and told the manager: "I hear that you are supposed to go to court. I don't think it would be a good idea for you to show up."

centralized agency that covers the entire city. Its chief, the commissioner of police, is appointed by and responsible to the mayor. Occasionally an arrest is made by one of the other police agencies in the city, the Housing Authority Police, the Transit Authority Police, and the Port Authority Police.

In contrast, the city's criminal court system is decentralized and consists of two tiers. There is one central citywide criminal court with divisions in each borough (each borough being also a county), and five separate supreme courts, one in each of the boroughs: Manhattan (New York County), the Bronx (Bronx County), Brooklyn (Kings County), Queens (Queens County), and Richmond (Richmond County). Each county has its own elected district attorney, an autonomous official answerable to the electorate.

The itinerary of a felony arrest through the courts may be long if the case goes all the way to trial; it may end, however, as early as a few hours after the arrest (at the police station), or at arraignment, or anywhere along the way to trial. The criminal court, the lower court, arraigns the arrested defendant and decides on bail, conducts as a rule a preliminary hearing to determine whether a felony charge should be bound over to the grand jury. The criminal court judge has jurisdiction to try and dispose of misdemeanors; the maximum sentence he may impose is, therefore, one year in jail.²⁵ The supreme court has sole jurisdiction over felony indictments, although it too, of course, can convict of the lesser crime usually included in felony charges.

The process begins with the police officer's report of the arrest to the precinct station house or to a central booking unit, where formal arrest charges are leveled. Under the law, the police may drop the arrest charge at booking, but this rarely happens.²⁶

From the station house, the arresting police officer brings the case to the complaint room, a branch of the district attorney's office, where an assistant district attorney draws up the legal charges. The complaint room offers the office of the district attorney its first opportunity to review the charges, discuss the case with the arresting officer, and talk with the complainant and other witnesses. The assistant district attorney who at this point writes up the charges is empowered to raise, reduce, or dismiss the charges drawn by the police, except in Queens, where this reviewing decision is left to the clerk of the court. In 85 percent of the cases in our study, the police charges were accepted without change; in 12 percent of the cases they were reduced; in less than one-half of 1 percent of the cases

25. See table 1 *supra*.

26. We did not sample the frequency of this event but others have done so. See Floyd F. Feeney & James R. Woods, A Comparative Description of New York and California Criminal Justice Systems: Arrest Through Arraignment, 26 Vand. L. Rev. 973 (1973).

the charges were dismissed outright; in only 3 percent of the cases were they increased.

If the suspect is under the age of 16, the case is transferred automatically to the family court; cases of child neglect or child abuse may start in the criminal court and be transferred later to family court, and so may felony charges originating in disputes among adult family members. Assault or attempted assault, disorderly conduct, harassment, or reckless endangerment between spouses, between parent and child, or between members of a family or a household may be transferred to the family court unless the complaint (1) is withdrawn within three days, (2) has originated in family court and been transferred to criminal court, or (3) is dismissed for legal insufficiency. On weekends, when the family court is closed, family felony cases are arraigned in criminal court and later routed to the family court. Thirteen percent of the 1971 felony arrests found their way into the family court.²⁷

From the complaint room the case is sent to criminal court arraignment, where the charges are read and bail is set. In addition to the charges, the judge usually has before him at that time the defendant's criminal record, transmitted from Albany via teletypewriter, and the release on recognizance (ROR) report prepared by the court's pretrial service.

Here in the criminal court, as at any later stage, the case may be disposed of by dismissal or by a guilty plea to a misdemeanor or lesser violation. Unless the case is thus disposed of, the judge decides on bail. The defendant may be released on recognizance, that is, without bail, or the judge may set bail, at an amount he deems appropriate. In some instances the law allows the judge to hold the defendant without bail.²⁸

The next stop on the itinerary through the court is the preliminary hearing before a judge of the criminal court, to determine whether there is "probable cause" to bind the defendant over for indictment to the grand jury. That hearing must be held within 72 hours of the arrest if the defendant is in custody. If the defendant is not in custody, the hearing is likely to be held within a few weeks of arrest, depending on the calendar and availability of witnesses. The preliminary hearing is part of the many-tiered process designed to weed out cases that would not justify felony conviction or possibly any conviction. It provides prosecutor, judge, and defense counsel another opportunity to review and evaluate the case, to dismiss it, or if the prosecutor consents, to dispose of it by guilty plea to a misdemeanor. No preliminary hearing is held if the prosecution moves directly for indictment by the grand jury, or if the defendant waives his right to the hearing because he is certain that the case will move to indictment and he wants to speed up the process.

27. See fig. 9 *supra*.

28. See Hans Zeisel, *Bail Revisited*, 1979 A.B.F. Res. J. 769, at fig. 1 and accompanying text.

The grand jury (an arm of the supreme court) as a rule will indict the defendant, but it has the option of reducing a felony charge to a misdemeanor charge, thereby returning the case to criminal court, or of dismissing the charge outright. If the grand jury indicts, the case is arraigned in the supreme court. A pretrial conference is then held, and from there the case moves to trial.

At any one of these stages the case may be disposed of without trial either by dismissal or by the defendant's pleading guilty. Figure 13 gives a quantitative overview of the stages at which the criminal court system disposes of its felony arrests.

In the complaint room only a small fraction of the cases, 0.4 percent,

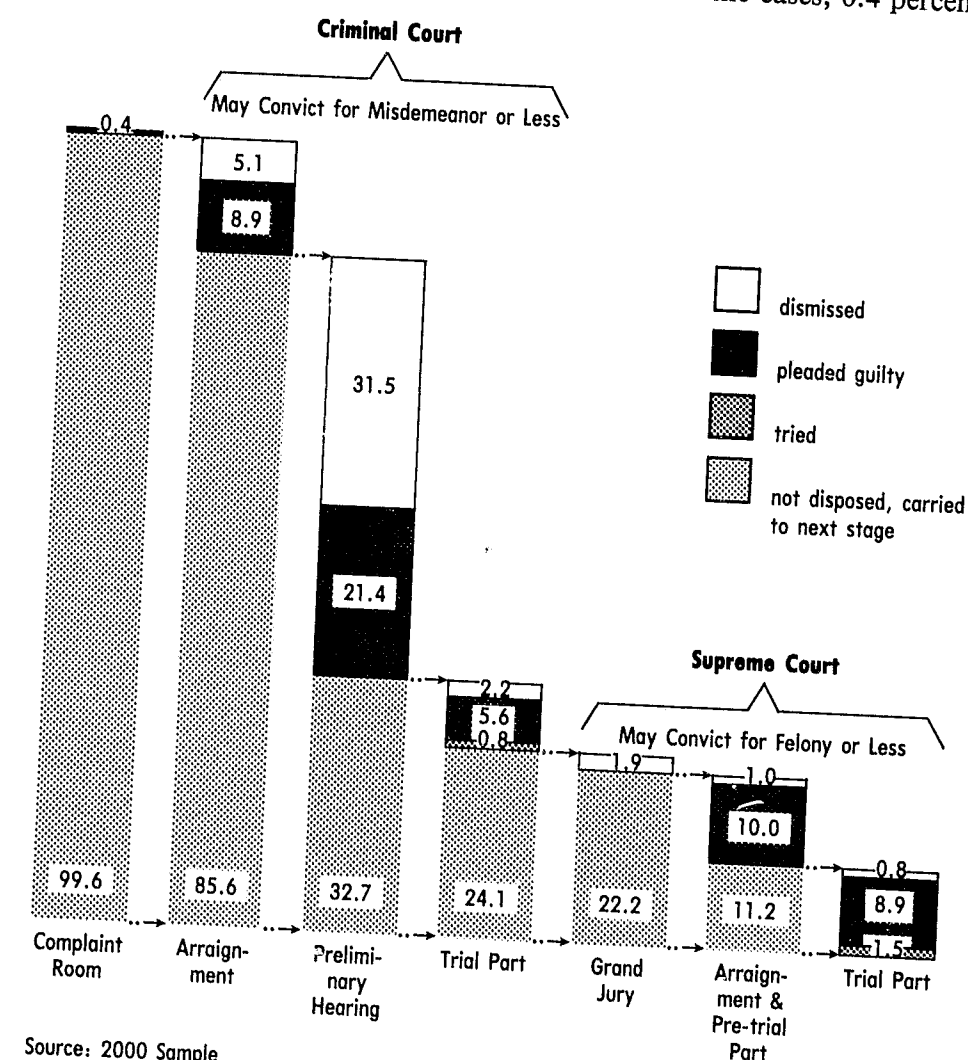
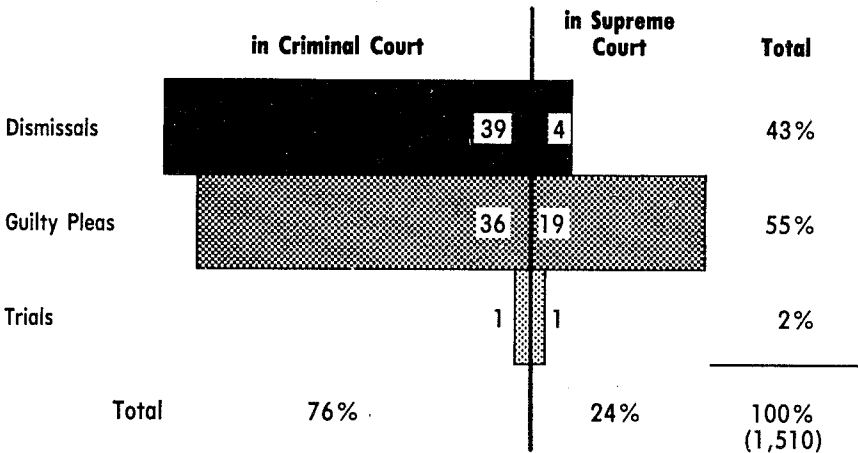


Fig. 13 Stages at which felony arrests are disposed of (percent of all dispositions)

were disposed of by dismissal. At arraignment (5.1 + 8.9 =) 14 percent of the cases were disposed of, two-thirds of them by guilty plea to a misdemeanor or less. More than half of all dispositions (31.5 + 21.4 =) 53 percent took place at preliminary hearing; the ratio of dismissals to guilty pleas there was about 3 to 2. Almost 9 percent of the cases, cases in which the charge had been reduced to a misdemeanor or less, were disposed of in the trial part of the criminal court, although only 0.8 percent were actually tried. Once a case is indicted by the grand jury (which dismissed 2 percent of the cases), the chance of dismissal is greatly reduced. Only 2 percent of the cases were dismissed thereafter; most of the remaining 20 percent were pleaded guilty in the felony court but by no means all to a felony; only 1.5 percent of the arrests reached trial in the supreme court.

Figure 14, with decimals rounded off, summarizes the data found in



Source: 2000 Sample

Fig. 14. Frequency and type of dispositions in the two courts (percent)

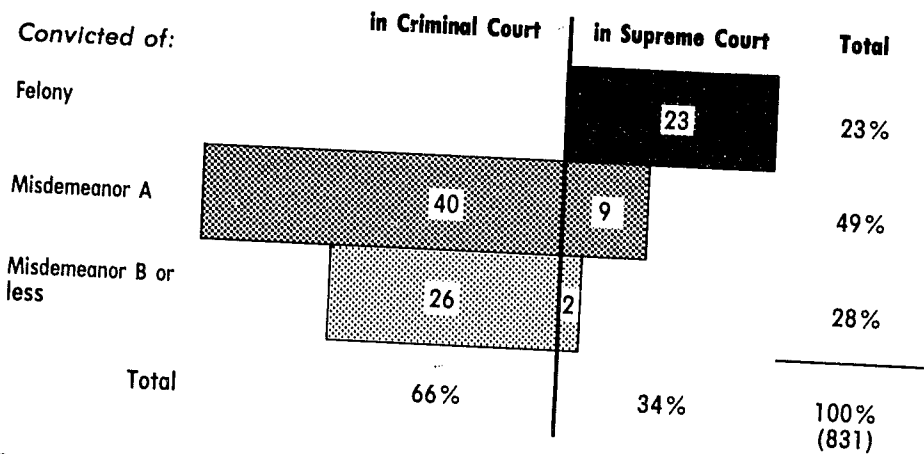
figure 13 with respect to the type of disposition and the court in which the disposition was made. Seventy-six percent of all felony arrests are disposed of in the criminal court; (39 out of 43 =) 91 percent of all dismissals take place there, but only (36 out of 55 =) 66 percent of all guilty pleas. The few trials are divided about evenly between the two courts.²⁹

The many convictions in the criminal court raise intriguing questions: Are so many cases convicted in the criminal court because they were meant to end in less than a felony conviction? Or were some of these

29. Of the 2.3 percent of cases disposed of through trial, 1.5 percent ended in acquittal, 0.8 percent in conviction.

cases disposed of as misdemeanors because there was a managerial desire to limit the number of cases "going up" to the highly congested supreme court?

Our data allow at least a partial answer to that question. If cases were pleaded down to the criminal court level only to prevent their clogging the supreme court, one would expect the guilty pleas to be for the highest crime class for which the criminal court can convict—an A misdemeanor. Figure 15 shows that a considerable portion of criminal court convictions are below that level; (26 out of 66 =) 39 percent of all convictions in the criminal court were for less than A misdemeanors. If one considers in addition that about one-third of all guilty pleas in the supreme court were for less than a felony, the conclusion is inescapable that the pattern of reduction of the original charge is largely independent of the court in which it happens to take place. The reductions are primarily determined by the prosecutor's judgment as to the appropriate disposition of the case.



Source: 2000 Sample

Fig. 15. Crime class of conviction by type of court (percent)

E. Plea Bargaining: Charge Reduction

Plea bargaining is a paradoxical institution. It is an important, integral part of our court procedures, but the average citizen has a hard time appreciating its merits; he cannot understand how bargaining and justice can mix. All he is told is that trying every case would be too expensive, would in fact bring the law enforcement system to a standstill. And some scholars tell us that such bargained justice negotiated between prosecutor and defendant or his counsel even has merit because it replaces the rigid letter of the law by more flexible, and often more "just" arrangements. Be that as it may, the United States Supreme Court has declared plea bar-

gaining necessary, beneficial, and legal. The fact remains that it is a peculiarly American institution, without parallel anywhere in the world. The following analysis does not discuss the merits of the plea bargaining system; it merely sheds some light on the substance and the form these bargains take in the New York City courts.

Plea bargaining potentially involves two types of concessions: a reduction of the crime charges and a reduction of the expected sentence. This section begins the description of the bargaining process by presenting the first of these two concessions.

Figure 16 shows the distribution of the charges for the 98 percent of all convicted offenders who pleaded guilty. On the left-hand side are the charges at the time of arrest, on the right-hand side the charges to which these defendants pleaded guilty. At the time of arrest ($2 + 13 + 21 =$) 36 percent of these offenders had been charged with either an A, a B, or a C felony. At the time of disposition, only 4 percent of the defendants were convicted of one of these major felonies. Only 26 percent were convicted of any felony. Three-fourths of all convicted defendants originally arrested on a felony charge were convicted of only a misdemeanor or less.

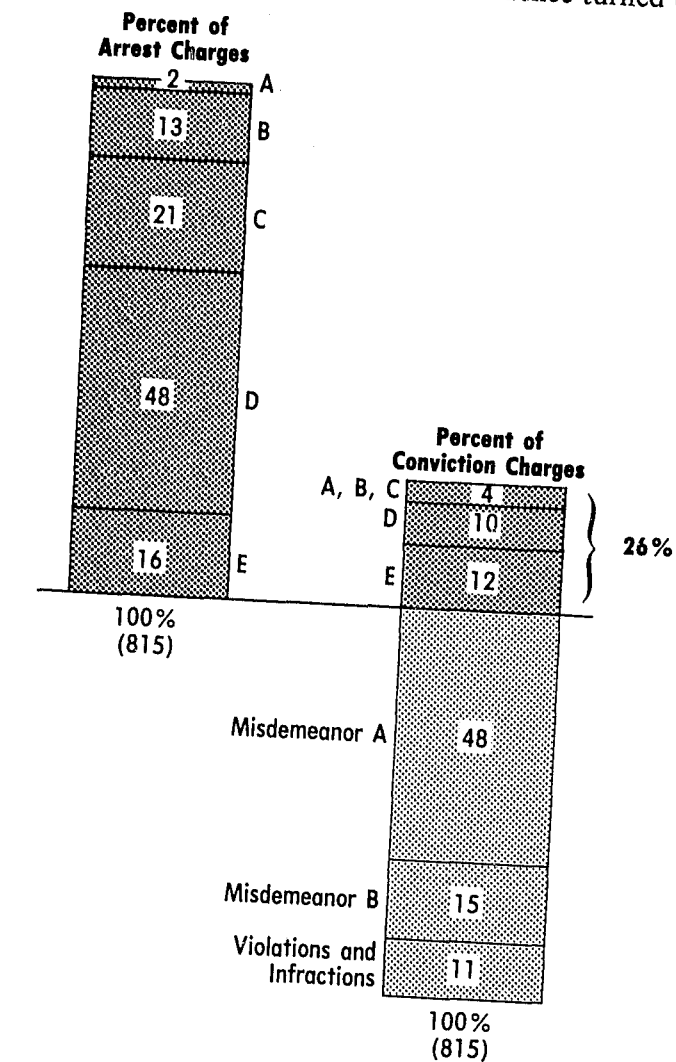
Figure 17 shows the downgrading of the charges between arrest and conviction separately for each of the five felony classes charged at arrest, for persons convicted after pleading guilty. Of the defendants charged at arrest with a class A felony who eventually pleaded guilty, only 11 percent were allowed to plead guilty to a misdemeanor or a lesser offense. As the crime class descends, the proportion of guilty pleas below the felony level (marked by the horizontal line on the graph) increases rapidly. Those originally charged with a D or E crime show 85 and 87 percent guilty pleas below the felony level.

The average for all defendants pleading guilty (the summary bar at the right-hand side) shows the same distribution as the right-hand bar in figure 16, with one difference. Figure 17 shows what share of the felony guilty pleas was for the crime class originally charged. Of all defendants pleading guilty, of whom those charged with class A crimes form only a tiny fraction, only 7 percent pleaded guilty to the crime class with which they had been originally charged. But notice that for class A crimes that proportion was 31 percent.

The bottom row of numerals in figure 17 indicates the average class reduction between arrest and guilty plea. On the average, the arrest charges for the convicted defendants are reduced by 2.3 classes. The amount of reduction is again related to the severity of the arrest charges. Arrest charges of class A crimes are reduced, on the average, by 2.1 classes; class B charges by 3.0 grades, declining from there to a reduction of 1.5 classes of E felony arrests. The decline is likely to be due to the fact that the

lower the arrest charge, the smaller the number of remaining classes to which the charge can be reduced. The relatively higher percentage of "no charge reduction" after an E felony arrest is due to the fact that if the prosecutor is unwilling to allow a plea for less than a felony, he has no felony class left to which he can reduce the charge.

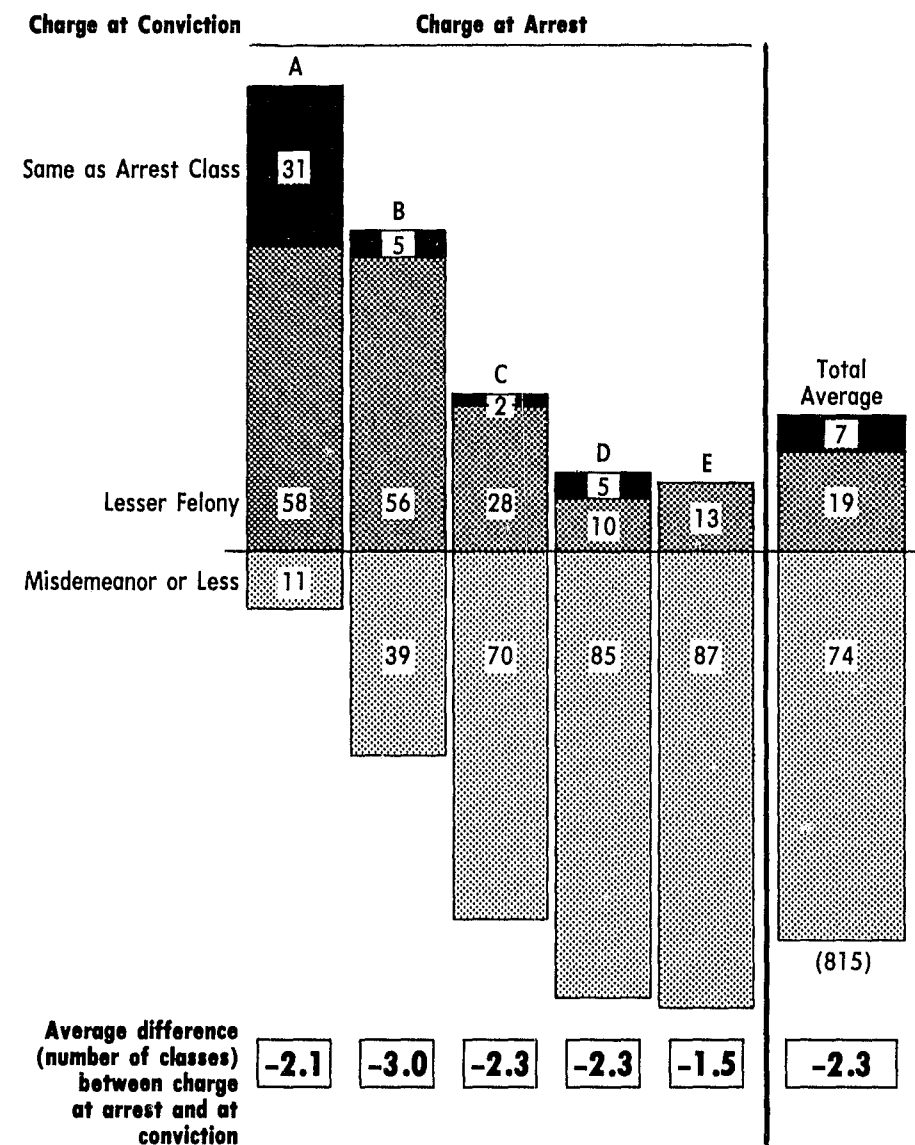
Through our interviews about the cases in the 400 sample we could see in which cases the evidence adduced at the time of arrest held up at the time of disposition and in which cases the evidence turned out to be less



Source: 2000 Sample

Fig. 16. Crime class at arrest and at conviction (percent of convicted who pleaded guilty)

than expected. The crime class reduction between arrest and conviction for the latter group was 2.3 classes. For the group of cases in which there was no deterioration of the evidence it was 1.6 classes, which we took to be the best estimate of the average charge reduction in return for a guilty plea.³⁰



Source: 2000 Sample

Fig. 17. Charge reductions at guilty pleas by crime class of arrest (percent of convicted defendants who pleaded guilty).

F. Plea Bargaining: Sentence Promise

Charge reduction is one of the concessions offered to a defendant if he pleads guilty; a negotiated assurance of the length of the sentence, as a rule, is the other part. That assurance may go as far as specifying the sentence, or it may take the form of assurance on an upper limit. When the charge has been reduced to a misdemeanor or less, the reduced legal ceiling serves as effective assurance; the maximum sentence for a class A misdemeanor is one year in jail; for a class B misdemeanor, it is 90 days. The role of the judge in these negotiations varies: he may simply agree to the sentence negotiated between prosecutor and defense counsel, or he may more or less actively participate in the negotiation.

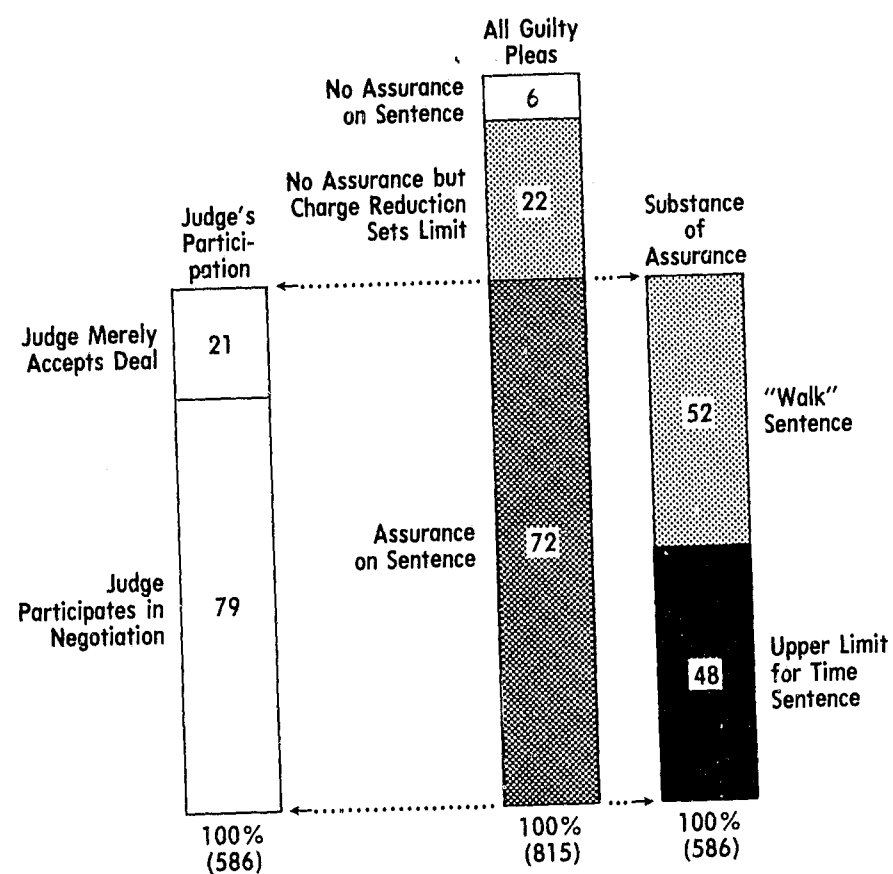
Figure 18 shows the extent to which a sentence is part of the plea bargain. In 21 percent of the negotiated sentence assurances, the judge merely accepted the deal worked out between prosecutor and defense counsel; in 79 percent of these cases the judge took part in the negotiation process.

In 72 percent of the guilty pleas, the defendant had some assurance as to what his sentence would be. In the remaining 28 percent of the cases, the defendant did not have precise assurance of his sentence. But in the 22 percent in which he was allowed to plead guilty to a misdemeanor or a lesser offense, he thereby knew the much reduced upper limit of the sentence—one year in jail if the plea was to an A misdemeanor, 3 months if it was to a B misdemeanor.³¹ In 52 percent of the cases the promise involved the assurance that there would be no custodial sentence; and in 48 percent of the cases, the agreement involved an upper limit on a custodial sentence.

So much for form and substance of the sentence promise. We now turn to the factors that shape the length of the sentences. Two factors emerge as powerful determinants: the severity of the crime and the convicted offender's criminal record, if any. Figure 19 shows the relationships. Each of the 25 bars represents a group of defendants identified by the class of crime they were charged with (across the top) and by the seriousness of their criminal records (down the left-hand margin). Thus, the upper left bar gives the sentence pattern for defendants with a jail or prison record and arrested on a class A or B felony charge. The top row of bars represents all offenders with a jail or prison record; the second row, the of-

30. See fig. 22 *infra*. Since one cannot exclude the possibility that occasionally our inquiries may have missed weaknesses which the prosecutor saw, the figure could be slightly on the high side.

31. In principle, also a reduction to a lesser felony gives some information on a reduced upper sentence limit; but since felony sentences hardly ever reach the upper limit, little information is in fact conveyed by the mere reduction of the felony class, unless a "sentence tariff" prevails and is known to counsel.

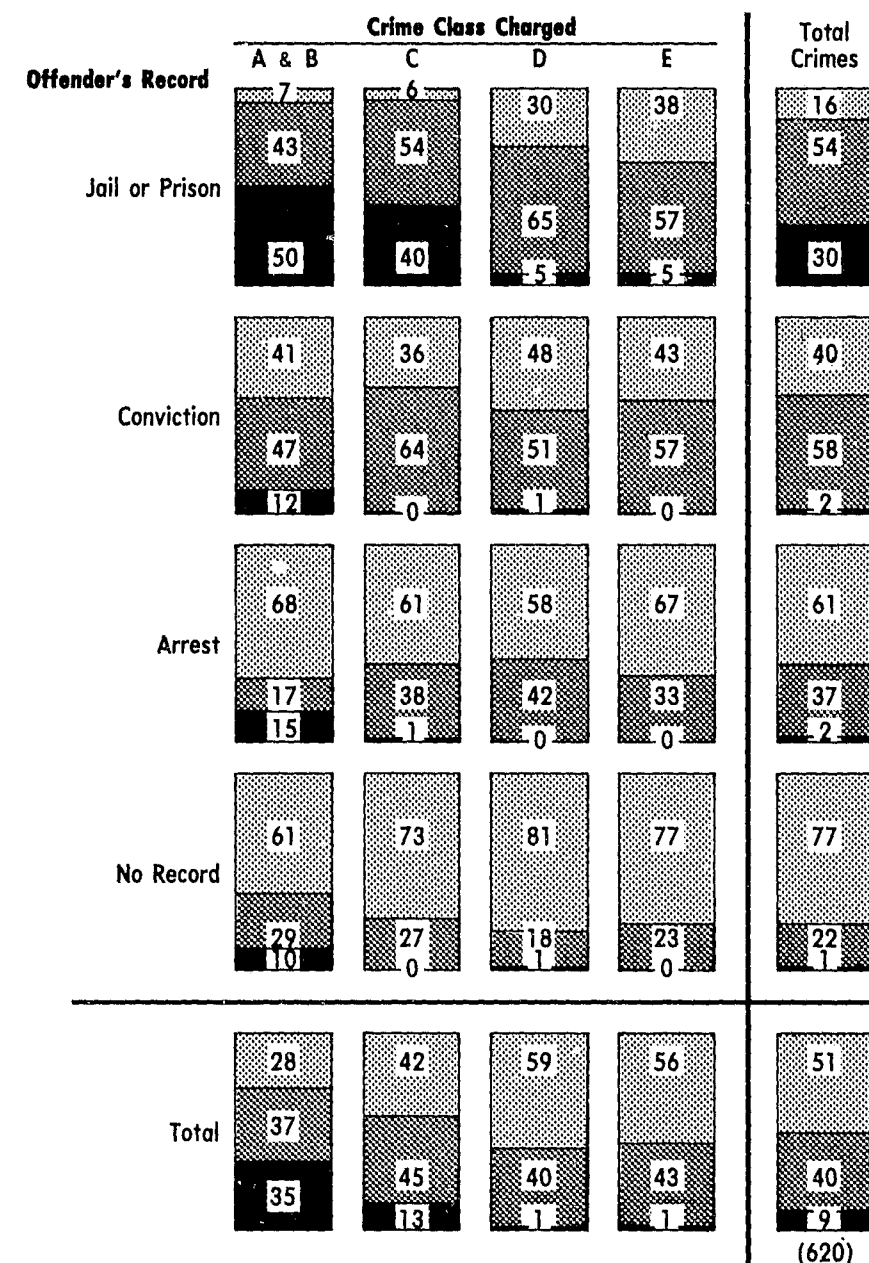


Source: 2000 Sample

Fig. 18. Sentence assurance as part of guilty plea (percent)

fenders whose record showed at least one conviction for a felony or misdemeanor but no record of a jail or prison sentence; the third row, the defendants whose record showed no more than arrest; the fourth row, the offenders who had no record, for whom this arrest was their first encounter with the criminal law.

The first column represents the defendants arrested on a class A or B charge, the two classes being combined because either one alone had too few cases in the sample. In the second column are the class C arrests, with class D and E columns following. The total column at the right comprises all offenders with the specified record, disregarding the differences of arrest classes. The total row at the bottom comprises all offenders arrested for the specific crime class, disregarding the differences in offenders' records. The bar in the lower right-hand corner represents all convicted defendants irrespective of record or arrest charge.



Source: 2000 Sample

% walk
 % jail
 % prison

Fig. 19. Sentence by severity of arrest charge and of criminal record

Each bar contains three numbers. The white area represents the percentage of defendants who received a "walk" sentence. The gray area represents the defendants who received a jail sentence up to one year, including the small proportion of defendants sentenced to NACC, the custodial drug treatment program. The dark bottom area represents the defendants sentenced to felony time, prison for at least one year.

As we look first at the distribution of prison sentences (the dark areas) we note that only two types of defendants have a substantial risk of receiving such a sentence: those arrested for an A or a B felony, and those offenders arrested for a C felony who have a prior record of jail or prison sentences. For all other charge/record combinations the likelihood of receiving a prison sentence is small. The division between a "walk" and a jail sentence is on the whole more dependent on the offender's record than on the severity of the crime charge at arrest; the proportion of "walk" sentence increases more sharply from top to bottom (with lesser offender's record) than from left to right (with lesser arrest charge).

The crime class of arrest is one index of the severity of the committed crime; the crime class of conviction is another index. Given the practice of extensive charge reduction as a reward for a guilty plea, one cannot be certain which of the two crime classes is more relied upon by prosecutor and judge in setting the sentence. We therefore show in figure 20 also the sentence pattern for the crime classes the offenders were convicted of.

The relationship between sentence and conviction crime class, not unexpectedly, is more pronounced than that between sentence and arrest crime class, shown in the bottom row of figure 19. Sentences of one year or more in prison decline with each successively less severe crime class, and so do the jail sentences up to one year. This sharper profile is partly the result of having nine crime classes in figure 20, as against only five classes in figure 19. Since all arrest charges in our study were by definition felonies, only the five felony classes appear in figure 19; since many convictions were for offenses less than felony, figure 20 includes also the four lesser categories.³²

G. The Offer That Cannot Be Refused

The workload of a criminal court is primarily determined by the number of cases it must try. Time spent on cases that are pleaded guilty is measured in hours, often in fractions of an hour; trials are measured in days or weeks, even in months. For the prosecutor who must also count the time needed for preparation of the trial, the contrast is even greater. Aside from avoiding trial, the guilty plea gives the prosecutor another advantage—it assures him of a conviction, since a trial always involves

32. See table 1 *supra*.

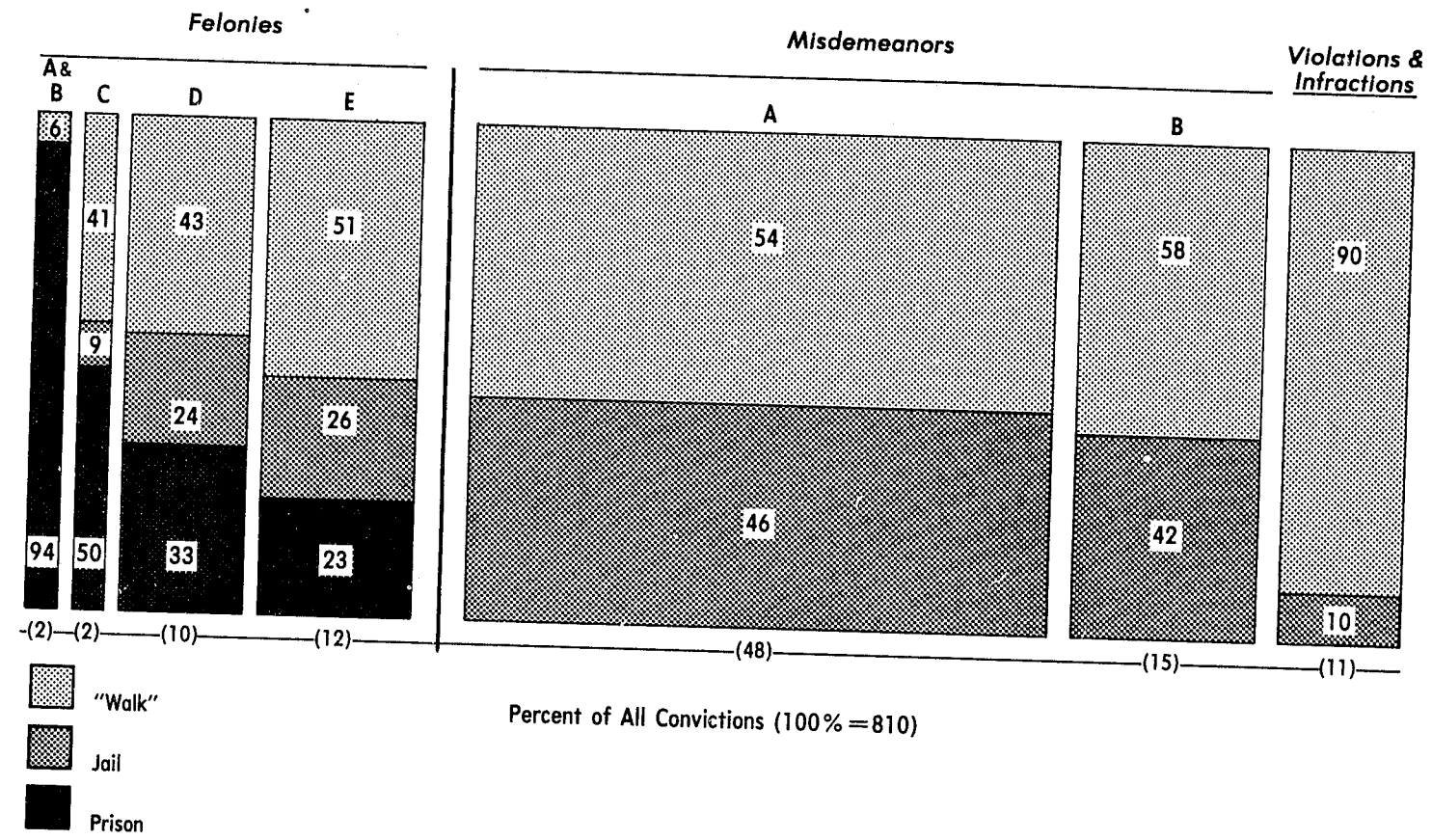
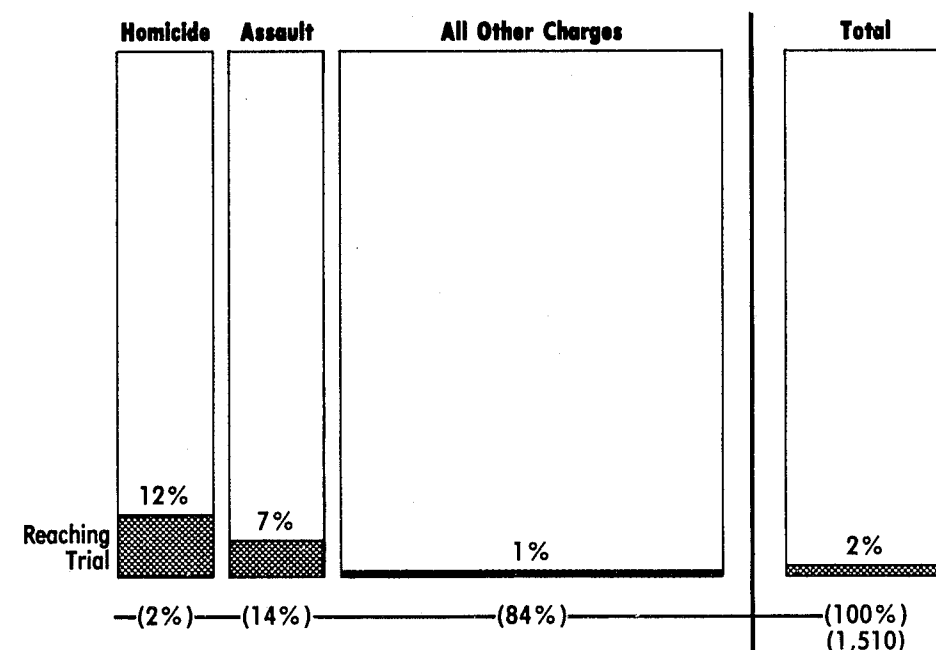


Fig. 20. Sentences by severity of convicted crime (percent)

some risk. To some extent the number of cases requiring trial can be controlled by widening or narrowing the gap between what the defendant may expect after trial, and what he is offered at the plea negotiation stage. The greater the gap, the greater the likelihood that the defendant will plead guilty.

Altogether, only 2.3 percent of the felony arrests were disposed of by trial, an exceptionally low proportion by any comparison. Figure 21



Source: 2000 Sample

Fig. 21. Percent of arrests reaching trial by type of crime charged

shows how this average varies with the type of crime charged. Homicide cases were most likely to go to trial, followed by charges of assault. In all the remaining crime categories (84 percent of the felony arrests), the frequency of disposition by trial remained below the average of 2 percent. What caused trial to be such a rare event?

As a rule, as we have seen, in order to obtain a guilty plea the prosecutor offers to reduce the charges and makes a sentence offer. The defendant and his counsel must then decide whether to accept the offer or to reject it and go to trial. The calculus involved in this decision—provided it is rational, which it isn't always—compares what is offered for a guilty plea with what is expected after trial.³³ The comparison involves three elements: (1) the likelihood that the trial will end in the defendant's con-

33. Another consideration is the cost of going to trial, although there may be some problem as to whose cost interests will prevail in the frequently occurring case involving an indigent defendant.

viction as charged; (2) a comparison of the pending charge with the reduced charge offered for a guilty plea; and (3) a comparison of the sentence promised, or likely to be imposed after a guilty plea, with the sentence likely to follow conviction after trial.

What kind of verdict to expect after trial is a calculation the defendant and his counsel will base primarily on the evidence they foresee. If the defendant considers his chances of acquittal very good, points (2) and (3) will have little weight. He will refuse to plead guilty and will go to trial, unless, of course, the prosecutor subsequently dismisses the case. But if there is some likelihood that he will be convicted after trial, he will be inclined to consider an offer for a guilty plea that involves a charge and a sentence lower than the one he would face if convicted after trial. In such a situation the magnitude of the difference between the expected verdict and the offered plea will be important. Efforts to measure these differences have been hampered by the difficulty of comparing conviction and sentences at guilty plea and at trial for a comparable group of cases. The cases that go to trial are different in kind from the cases that are disposed of by guilty plea.

Our data allowed us to eliminate these difficulties to a certain extent, and thereby measure more accurately the amount of charge and sentence reduction offered in exchange for a guilty plea. Through our interviews we were able to separate the cases in which the evidence expected at the time of arrest *did* materialize, that is, the cases in which there was no deterioration of the evidence. Whatever charge reduction from arrest to guilty plea occurred in these cases was the reward given by the prosecutor for the defendant's guilty plea. On the average, as figure 22 shows, that charge differential is 1.6 crime classes (compared to 2.3 crime classes for the larger group of cases with deteriorated evidence). In the individual case, the defendant and his counsel will of course know that difference. It is more difficult for the defendant as well as for the investigating scholar to learn the corresponding *sentence* differential. Experienced counsel might have a good guess, and there is ample lore among the bar as to the size of that difference.

Our interviews are replete with references to the magnitude of the sentence differential:

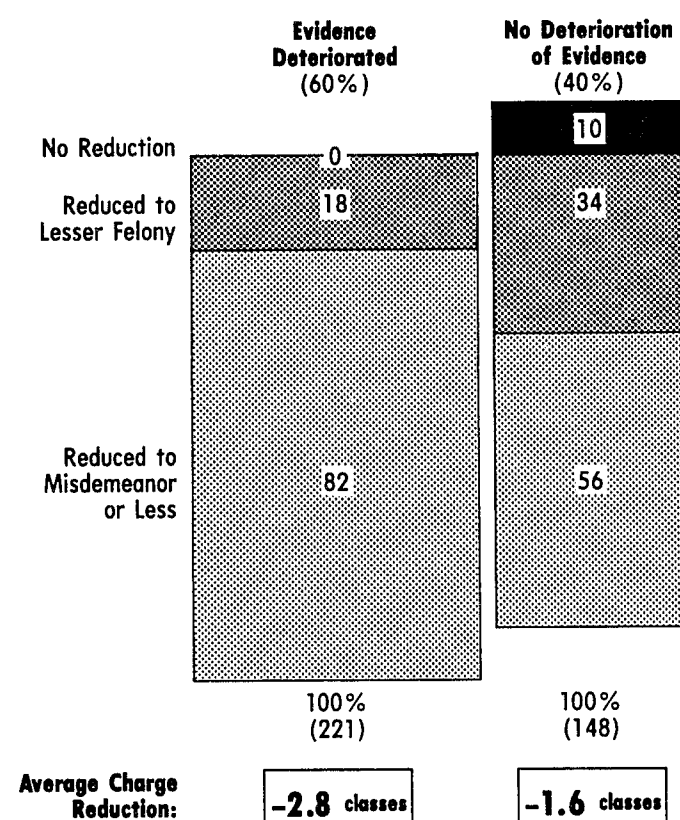
After the trial jury was hung, I guess I'd rather have gone to trial again, but my lawyer said I faced up to 8 years if I was convicted. So I took the offered plea to a misdemeanor.

(defendant, who at the time of interview happened to be at his counsel's office—case 195)

For jostling, you can get 90 days at arraignment. After trial you would get 1 year.

(defense counsel in case 69)

On the whole, the greater the difference between the offered sentence and



Source: 400 sample

Fig. 22. Charge reduction at conviction in cases with and without deteriorating evidence

the sentence expected after conviction at trial, the more defendants will plead guilty and avoid trial. The danger is that if the threatened sentence differential is very large, the defendant may elect to plead guilty even though he considers it unlikely that he would be convicted at trial. Referring to the sentence offers in one particular courtroom, a legal defense attorney remarked, "In that part guys were taking pleas even if they stood a good chance at trial. Even those out on bail pleaded."

That sentence differential, therefore, is a figure of importance. It determines the proportion of defendants who will demand trial; it also determines the sentencing level of the system. Yet the size of that sentence differential is at best known only intuitively to judges, prosecutors, and lawyers in the system; it is never publicized and has never been measured with any precision.

Our data provided an unusual opportunity for measuring the difference with precision. In 7 of our cases that went to trial on a felony charge

and ended in conviction, the prosecutor had made an offer during the plea negotiations which the defendant had rejected. Figure 23 compares for these 7 cases the sentences offered in return for a plea and the sentences eventually imposed after trial. In 5 of these cases, both the offered and the eventual sentences were custody sentences and hence provided a natural scale (time) for comparison. In these 5 cases the average sentence increase was 42 percent. For the 2 cases in which the offer of probation had to be compared with a prison sentence, the point scale of the Administrative Office of the United States Courts had to be used. In these 2 cases the percent increase was 325 percent. The average increase for all 7 cases was 123 percent.

Note that these cases form a biased sample for estimating the sentence differential for all cases, inasmuch as some of these defendants went to trial *because* the difference between the sentences possible for the offered guilty plea and the expected sentence after trial was relatively small. This means that the sentence differential we found is likely to be on the low side, as compared to the average sentence differential for all cases. To know that average we would have to include also the sentences the offenders who pleaded guilty would have received, had they gone to trial.³⁴

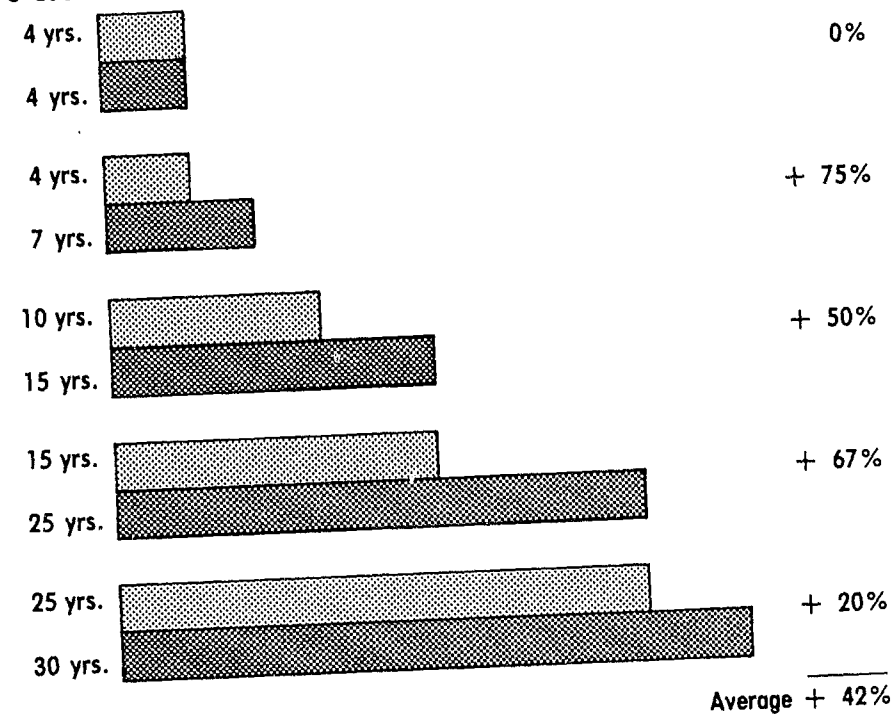
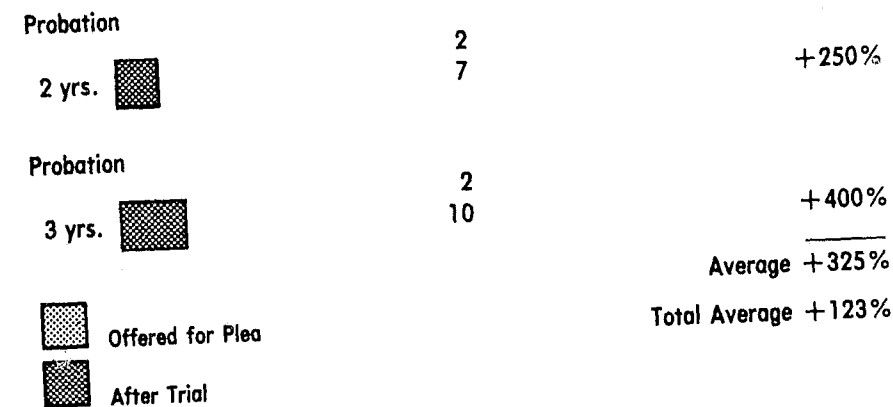
The rationale for evaluating the prosecutor's offer is even more complicated by the cases in which the sentence offered by the prosecutor was more severe than the zero sentence that obtains after the defendant is acquitted.

H. Trial—Failure of Plea Bargaining

Every defendant has the choice between pleading guilty and going to trial. The rational calculation for making the choice would weigh the conditions of the offered guilty plea against the expected sentence after trial, modified by the likelihood that the trial would end in acquittal. Also the costs of going to trial may enter the calculation. This section explores the details of this decision process for the defendants who took the rare step of deciding for trial in New York in 1973, who refused the offered guilty plea or did not even explore the possibility of such an offer. The analysis, based on the trial cases in the 400 sample, for which we

34. There is a potential method, albeit an indirect one, of estimating the differential between the sentence after guilty plea and after trial for a general sample of cases, not only for those that go to trial. One would have to ask experienced lawyers, prosecutors, and judges what they would estimate the sentence to be if the case had gone to trial. A tentative effort we made in that direction failed. The defense lawyers tended to overstate the size of the differential in order to magnify their achievement; prosecutor and judge had the opposite tendency because too large a differential seemed difficult to justify. A better way of obtaining a realistic estimate of the sentence after trial would be to ask the question with respect to a particular case, but not of the immediate participants in the case and not by comparing it with the sentence after guilty plea. Prosecutors, defense lawyers, and judges should be asked: "If in this case the jury would find the defendant guilty—what sentence would he get?"

5 Cases Where Plea Offer Was a Custody Sentence:

2 Cases Where Plea Offer Was Probation:
Severity Points*

*Scale used by the Administrative Office of the U.S. Courts.

Source: 400 Sample

Fig. 23. Sentence offered (and refused) for guilty plea compared to sentence after trial

have detailed information, offers the opportunity of comparing the motivations that actually determine the decision process with the rational model. The results, interesting by themselves, also throw some light on the general relevance of rational decision models.

Table 4 summarizes the relevant information for the 20 cases in the 400 sample in which the defendants went to trial.³⁵ The table arranges the cases in three groups, according to the main motive for going to trial. In group I are the seven defendants who, for a variety of reasons, thought they had a reasonable chance of being acquitted or of being at least partially acquitted; in group II are eight defendants who thought the offered guilty plea was insufficient, either because the specific goal of the defendant (e.g., avoiding a felony conviction) would not be met or because the sentence after conviction at trial could not be much worse; in group III are two defendants who went to trial for extraneous reasons (9a out of loyalty for her codefendant, 18 because his mother insisted) and four defendants whose decisions to go to trial we were unable to discover.

In the first of these cases, the defendant was fairly certain that he would be acquitted because he knew that the complaining witness, the only witness in the case, would not testify. He had made sure of it by filing a cross-complaint, which he then withdrew.

(1)

W was found in his car with a knife wound in his chest. The police arrested the defendant, who W claimed had been the assailant. The defendant filed a cross-complaint, claiming he had stabbed in self-defense when W had pulled a gun on him; a gun was found in W's car. As the judge reports it: "It was a very short trial; both sides withdrew their complaint. Nobody testified. There was nothing to do but acquit the defendant. There never was an offer to plead guilty."

In the second case, the defense was so much better prepared than the prosecution that the defendant must have considered his chances for acquittal to be high.

(2)

The defendant worked in a building in which an office equipment company had been burglarized. When, a few days after the burglary, he returned the keys to a rented truck that contained some of the missing merchandise, he was arrested. The defendant claimed he had returned the truck for another man, X. The rental contract was in the name of X, but the truck owner testified it was the defendant who had signed the name. X was never produced, but 2 witnesses said they knew him and that he resembled the defendant. Two out-of-town witnesses provided an alibi for the defendant.

35. The proportion of defendants reaching trial in the 400 sample was 6 percent; in the 2000 sample, it was 2 percent.

TABLE 4 Synopsis of Reasons for Going to Trial

| Likelihood of Acquittal | Verdict | Perceived Difference Between Offered and Expected Sentence | Actual Sentence (Offered Sentence) | Remarks |
|---|---------------------------------|--|--|---|
| Group I: Reasonable Chance of at Least Partial Acquittal | | | | |
| (1) good | acquittal | — | — | Had made certain that complaining witness would not testify; cross-complaint. |
| (2) good | acquittal | — | (?) | Well prepared; had superior defense and knew prosecution was ill prepared. |
| (3) some | acquittal | small | — | Defendant war veteran without criminal record. |
| (4) some | as charged | considerable | (probation) | Had been acquitted elsewhere of similar charge. |
| (5) good for lesser offense | misdemeanor conviction | small | 5 years (probation) probation | Not clear why case was tried in supreme court. |
| (6) good for lesser offense | lesser offense conviction | — | (?) | Complaining witness did not appear at trial; defendant possibly knew she would not. |
| (7) poor | lesser charge conviction | some | 15 days (?) 4 years (D felony—4-year maximum) | Realistic hope for partial acquittal. |
| Group II: Guilty Plea Offer Insufficient | | | | |
| (8) some | acquittal | small | — (E felony with probation) | Felony plea would have meant loss of job. No criminal record plus good defense preparation. |
| (9) some | as charged | small | 25 years (?) | Hoped to benefit from the refusal of codefendant to plead guilty. |

TABLE 4—Continued

| Likelihood of Acquittal | Verdict | Perceived Difference Between Offered and Expected Sentence | Actual Sentence (Offered Sentence) | Remarks |
|--|--------------------------------|--|--|---|
| Group II—Continued | | | | |
| (10) good for lesser offense | lesser felony conviction | considerable | probation (?) | Only goal was avoiding felony conviction (which meant job loss). Plea offer insisted on felony. |
| (11) poor (charge reduced to mis- demean- or) | as charged | small | 10 months (approx. 1 year) | No sentence assurance after plea because of long record. |
| (12) poor | as charged | small | probation (plea to misdemeanor or without assur- ance of no jail sentence) | Avoiding jail was the only goal; defendant, who had no record, felt he could not be worse off at trial. |
| (13) poor | as charged | relatively small | 15 years (10 years) | |
| (14) very poor | as charged | small | 30 years (25 years) | |
| (15) very poor | as charged | small | 15 years (B felony—no sentence assurance) | Defendant hoped for judge's sympathy since he had granted motion to suppress (later reversed). |

TABLE 4—Continued

| Likelihood of Acquittal | Verdict | Perceived Difference Between Offered and Expected Sentence | Actual Sentence (Offered Sentence) | Remarks |
|---|------------|--|--|---|
| Group III: Other, or No Discernible Reason | | | | |
| (16) poor | as charged | relatively small | 25 years (15 years) | Irrational; even an erroneous earlier offer of 4 years had been rejected. |
| (17) poor | acquittal | small | — (10 years) | During trial unexpected defense offered itself. |
| (18) poor | as charged | considerable | 2-7 years (C felony—no sen- tence assurance) | "Powerhouse" mother of defendant in- sisted on trial. |
| (19) very poor | as charged | considerable | 7 years (max. 4 years) | No discernible reason. |
| (20) very poor | as charged | considerable | 3 years (E felony—no assurance) | No discernible reason. |
| (9a) some | as charged | considerable | 2 years (probation) | Refused to plead guilty out of loyalty to (lover) codefendant. |

An early effort to obtain a plea failed; the defendant insisted on trial. On the day before the trial, the DA, sensing the weakness of his case, asked the judge for a postponement so that a handwriting expert could examine the signature on the rental contract. The judge declined: "I refused to let him do it; he should have done it earlier. In any event, if I had allowed him to call an expert, the defense would have called one too."

During the trial only the rental car owner testified for the prosecution. The jury acquitted, and the judge commented caustically, "On the evidence they did the right thing."

The interesting point about this case was that the original arrest was the result of information obtained from the defendant's wife and a man who claimed that they had seen the defendant put the stolen merchandise into the truck. The informants refused to testify in the trial, saying they were afraid of the man, and the prosecution did not force them to testify.

In the third case, the felony charge had been reduced to a series of misdemeanors and the defendant had been offered probation if he pleaded guilty. Since he had no criminal record, he probably did not risk a more severe penalty if convicted after trial. He refused to plead, and after a six-day trial in the criminal court he was acquitted.

(3)

Alerted by a radio call, the police stopped an allegedly stolen car. The man driving it, subsequently the defendant, had a stab wound and was "rambling incoherently." The complaint was that the man had jumped into the open car while the owner was outside and had driven it away, trying to run over the owner. The charge, theft and assault, was reduced to a misdemeanor by the grand jury. ("Theft of a 5-year-old car does not deserve supreme court treatment.") The defendant nevertheless refused to plead guilty, insisting that the complainant had attacked him and, to save his life, he had jumped into the car and driven away.

At the trial both complainant and defendant testified. The judge had dismissed the assault charge; the jury acquitted the defendant, a 22-year-old Vietnam veteran with 7 medals and no criminal record.

Then there is the man accused of fraud who had some grounds for expecting an acquittal. A short time earlier, in a neighboring county, he had been acquitted of a very similar charge. It turned out that he misjudged his prospects; he was convicted and sent to prison.

(4)

The defendant was an elderly insurance broker, charged with filing fictitious claims for hospital and medical bills totaling over \$30,000. The offer was for a plea to an E felony, which the DA thought would not have resulted in a custody sentence. The defendant refused the offer, his confidence bolstered by his recent acquittal on a similar charge in a neighboring county. Here, however, he was convicted and sentenced to 3 years in prison by a judge who explained, "I thought of deterrence, which is particularly important in white-collar crimes."

There are three cases where the defense must have considered the chances for partial acquittal to be reasonably good. The first of these is the rare case of an indictment for attempted burglary.

(5)

The complainant was startled from his sleep by 2 youths rummaging on his porch. He testified that he saw them trying to get into his house "using a bar of some sort to pry open the window." The defendant was arrested by the police a block away. He admitted trying to steal a chair from the porch but denied burglary. He had no prior record and no bar was found.

The case was indicted for attempted burglary and only a felony plea was offered. The defendant, on advice of his counsel, refused. The complainant's testimony did not suffice to sustain the burglary charge, and the jury convicted only of the B misdemeanor of attempted petty larceny; the sentence was probation.

In view of the prevailing practice, one does not quite understand how this case, in which nothing was in fact stolen, against a man without a record, got all the way to an overloaded supreme court.

The second of these cases developed from a fracas with two security guards, a situation which typically results, as it did here, in an overcharge by the police.

(6)

The case developed from a visit of 2 friends to a prostitute's apartment in a housing development that had its own security guards. For some reason the woman wanted the men to leave; they refused. The guards came and removed them with handcuffs and nightsticks. In the process the defendant, one of the men, spit at the guard and threw a brick, but not at the guard. The original charge was for aggravated assault, harassment, and trespass.

At the preliminary hearing the aggravated assault charge was reduced to the misdemeanor charge of simple assault. The defendant refused to plead guilty. At the jury trial in the criminal court, the defendant, insisting on his innocence, was acquitted of the assault charge, and the trespass charge was dropped because the complainant failed to appear. He was convicted of harassment; the sentence was 15 days, of which 8 had been served in pretrial custody.

This case was tried in the lower (criminal) court because the felony charge had been replaced by a misdemeanor charge.

In the third of these cases, the defendant had some ground for believing that he could win at trial and actually did win a partial acquittal. The sentence, however, was close to what he could have expected after a guilty plea.

(7)

The police testified that the defendant was observed carrying a gun. He

fled in a car. When he was arrested, drugs and a gun were found in the car. The defendant claimed the police had put the drugs and gun on him a second time, because in an earlier arrest he had convinced a judge that the police had tried to frame him. The assistant DA offered a D felony plea with a 4-year maximum sentence. The defendant refused and was tried in narcotics court. He was acquitted on the gun charge and convicted on the D felony drug charge. The sentence was 4 years.

The eighth case (table 4, group II) went to trial because the prosecutor insisted on plea to a felony, which the defendant refused because a felony conviction would mean automatic loss of his job.

(8)

Defendant and a codefendant, who subsequently jumped bail, were charged with robbing an elderly woman in the hallway of her apartment building. The defendant, a Vietnam veteran with a family, had no criminal record. The prosecutor offered the defendant a plea to an E felony with probation. The defendant was prepared to plead to a misdemeanor but not to a felony, which would have cost him his job.

At the trial, the defendant came up with the surprising defense that he was trying to dissuade his codefendant from committing the robbery and apparently convinced the jury. The judge commented, "The assistant DA did not expect this defense and was no match for it."

There are the two defendants charged with a number of heinous crimes who went to trial out of a variety of motives. The female codefendant, who played a minor role, refused to plead guilty out of loyalty to her lover, the main defendant. He refused to plead guilty, one may infer, because with his codefendant refusing to testify against him, he had some hope. More important, although we do not know whether a sentence offer had been made, it could not have been an attractive one.

(9)

Two women had come to the city to sightsee over the weekend. In the park they met a man and his girl friend, who became the defendants in this case. They persuaded the women to come into their apartment, where they were offered drugs. Then the women were forced to perform deviant sex acts with each other, after which the man raped both of them with the help of his girl friend. Eventually the women escaped and went to the police.

The man claimed the women had been "high" when he met them in the park and that all their activities had been voluntary.

The woman codefendant (9a, whose case also fell into the sample) was offered a plea for a minor offense and probation if she would turn state's witness against her codefendant. She refused, and since he too refused to plead guilty, they both were tried and convicted on all counts: rape, assault, sodomy, and coercion. The man was sentenced to 25 years in prison; the woman to 2 years.

In the next case, the decision to go to trial turned on the expected sen-

tence. Conviction of a felony would have meant for this defendant, a subway train operator, the loss of his civil service job. When the prosecutor refused to accept a plea below the felony level, the defendant, who had no criminal record, went to trial.

(10)

The charge in this case developed from a bedroom scene in the man's apartment. With a knife he had ripped the woman's clothes off and slashed her buttock. Also a gunshot was fired but not aimed at her. The woman ran naked into the wintry street and was eventually sheltered and clothed. There were 2 versions of what happened. His was that he told her their affair was at an end. Hers was that he demanded that he pimp for her. He was charged with attempted murder, assault, robbery, and larceny.

In the trial all charges but the aggravated assault were thrown out. The jury convicted of the felony charge; the judge gave probation. The DA explained, "This assault was more serious than those we sometimes reduce to a misdemeanor when there was a prior relationship and no criminal record."

For the remaining 11 defendants, the prospects of a favorable verdict ranged from poor to very poor. The motive for going to trial, therefore, had to lie elsewhere. In 7 cases, the difference between the sentence offered during the guilty plea negotiations and the reasonably expected sentence after conviction was small. In this context it is important to remember that the pronounced sentence is not the sentence the convicted defendant will likely have to serve. As a rule, it is the parole board that makes the final sentencing decision. And for the parole board, differences between long prison sentences are less important than the difference in years appears to indicate, because its decisions are more dependent on how its members judge the convict's rehabilitation prospects.

In the first of these cases the charge had been reduced to a misdemeanor, but no particular sentence was offered for a guilty plea. The defendant, who had a long record, could be reasonably certain that the sentence would be close to the maximum misdemeanor sentence of 1 year.

(11)

The defendant was found in a 3-year-old car, stolen 24 hours prior to the arrest. He claimed a friend, who could not be located, had asked him to park it. The car owner lived in Westchester County, which apparently created difficulties. In exchange for the defendant's stipulation that he drove the car without the owner's permission, the charge was reduced to the A misdemeanor of unauthorized driving.

Since the defendant had a long list of auto theft incidents—11 arrests and 1 conviction—the prosecutor refused to give any assurance about the size of the sentence. The defendant apparently feared that because of his record the sentence after a plea would be close to, if not at, the maximum of 1 year. So he decided to go to trial, was found guilty and sentenced to 10 months.

In the other relatively minor case, the plea offer was refused because it did not include the assurance that the defendant would not go to jail. Since the plea offer was for a misdemeanor and the defendant had no record—a combination that hardly ever brings jail—it is puzzling why he was not offered a "walk" sentence.

(12)

A fairly new Buick, on which the serial number had been altered, was found registered in the name of the defendant. The car had been stolen; the defendant claimed he had bought it for cash from a third party. The charge was forgery and unauthorized possession of a stolen vehicle, a D felony. The prosecutor offered an A misdemeanor but would not agree to probation. Thereupon the defendant insisted on a trial, was convicted, and sentenced to probation.

The typical case that goes to trial appears to be the one which involves a major crime and a major sentence. If in these cases the prosecutor does not offer attractive conditions for a guilty plea, the defendant may decide to go to trial even if he sees only a slim chance of a favorable verdict. There are five such cases (13 through 17), all ending in conviction and sentences of more than ten years. In the first one, it seemed the defendant and his counsel had some real hopes, which disintegrated as the trial proceeded.

(13)

The defendant and 2 other men were charged with attempted robbery of a store at gunpoint. A radio alarm had brought the police in time. Some shots were fired, and one of the men was killed by the police. The defendant was found tied up, but the prosecution claimed he himself had done this to mislead the police. The original charge was attempted murder of a police officer and robbery.

A plea offer of 10 years was refused. The defendant, protesting innocence, would have accepted a plea for an E felony. In this he seemed to have been backed by his attorney, who thought he had a chance of winning an acquittal. ("He disappointed me. He was one of the most articulate clients I ever had. . . . Unfortunately, when he got on the stand, he froze. I could not understand it, he had practiced so much, he had told the story so many times. We had rehearsed the whole thing—how he was to say that . . . etc.") Apparently, he had a number of outstanding similar robbery cases. There was some talk about a Robin Hood crusade against store owners who fronted for the narcotics trade. The defendant belonged to a religious militant sect; his minister and wife attended the trial. The sentence was 15 years.

In the following case the likelihood of a favorable verdict must have looked small, but apparently so did the difference between the plea offer of 25 years and what the defendant could expect after trial.

(14)

The defendant, who had a long criminal record, was charged with 45 counts of rape, sodomy, robbery, and sexual misconduct against 6 women in 4 separate incidents. The DA's offer was a plea to the major count, a B felony, and 25 years. The defendant refused; the maximum sentence he faced after conviction at trial (if concurrent sentences were imposed) was 30 years. An alibi defense failed; the movie he claimed to have watched was not on at the time. He was convicted and sentenced to 30 years.

In the next case the plea offer did not specify the sentence. But since it was a trial in narcotics court and the defendant had a felony drug record, he must have known what to expect.

(15)

The police were informed that the defendant was a dealer in drugs and had a large amount of heroin in his possession. When the police arrived, they found 19 envelopes of heroin. The defendant, to protect his wife, said "Don't take her; this is all my stuff." His sole defense was that the search warrant was not signed by the police. The motion to suppress was granted, but the decision was reversed. Meantime, the defendant, who had been out on bail, was arrested on another drug possession charge.

The offer was a plea to a B felony to cover both indictments, without any sentence promise. The defendant refused and went to trial. He waived a jury, because he had received a break from a judge (on the motion to suppress) and was also afraid that the large amount of heroin found would prejudice the jury. He was found guilty and sentenced to 15 years. It appears that on a B guilty plea, since he had a felony drug record, he would not have received less.

The following case offered hardly any hope at trial (see table 4, group III). For reasons unknown, the defendant rejected a very favorable plea offer, made before the prosecutor learned of the defendant's long criminal record.

(16)

The defendant, a man in his fifties, had lured a 9-year-old girl into his apartment (he was the superintendent of the building) and raped her. The medical report corroborated the charge, and neighbors said they had seen the girl leaving the man's apartment disheveled and crying.

The first offer for a plea was an E felony with 4 years. This offer was made and rejected before the defendant's record was discovered, which included child rape and rape. After that, a C felony, with 10 years, was offered. The defendant refused and kept repeating "only D with 4." During the trial a last offer was made: C, with 15 years. At this point the defendant accepted, but the judge refused. The record did not come out in the trial, since the defendant did not take the witness stand, but the judge had it before him at sentencing. The jury, after hours, found the defendant guilty of all charges: rape, sexual abuse, sexual misconduct, and endangering the welfare of a child. The sentence was 25 years.

In the last of these five trials of major crimes the defendant's decision to go to trial was rewarded when the codefendant's testimony offered an unexpected escape.

(17)

The testimony was that the defendant and 2 other men entered a store, pulled guns, and took \$150. A plainclothesman nearby heard the commotion and arrested 2 men on the run. They had no money and no guns. The third man got away. The 2 men were booked for attempted murder, armed robbery, and possession of a gun. The attempted murder charge was dismissed at the preliminary hearing. When the legal aid attorney discovered there were 2 other armed robbery indictments against this defendant, he asked the court to assign counsel. Defendant had a record of 7 prior arrests, including robbery, burglary, and a pending weapons charge.

The DA offered 10 years for this one case. The defendant declined. He was then offered 15 years for all robbery cases pending against him. Again he declined, although counsel advised him that the chances for acquittal at trial were minimal. On the other 3 charges counsel saw some chance for acquittal because of identification problems. During the trial, as defense counsel described it, an unexpected defense developed: "For some reason, the codefendant told something I believed was a lie. He said he did not know my client. It was a man named Joe with 2 other men who proposed to rob the store. He did not know where Joe was. But with the help of his testimony and some contradictions in the other evidence, I suggested to the jury that my client was merely a junkie who happened to be in the store at the time of the robbery. It created enough reasonable doubt for the jury to acquit. So my advice to him had been wrong after all."

The prosecutor had estimated that conviction, if it occurred, would bring a sentence of 7 to 20 years. The defendant had been prepared to plead guilty had the charge been reduced to a misdemeanor.

The last four cases also involved major crimes. They all ended in conviction and prison sentences ranging from two to seven years. In the first of these cases the likelihood of acquittal was slim and the expected sentence differential large. In this case it was the defendant's mother, "a powerhouse of a woman," who insisted on the trial of her "innocent" son.

(18)

The defendant, with 2 other men, had gained admittance to the residence of a man whom he had known from earlier business dealings. The 2 men, on instructions from the defendant, pulled knives, and eventually the 3 left with cash and jewelry without hurting anybody. The defendant was an addict and in spite of his youth (he was only 19) had a long record of arrests, including a pending case for an earlier robbery.

Efforts to obtain a plea—a C felony had been offered—were thwarted by the defendant's mother, a "powerhouse of a woman." The defendant was convicted of the original B felony and sentenced to 2-7 years in prison.

In two cases we have no hint as to why the defendant refused to plead guilty. Both prosecutors and defense attorneys tell us that such cases are not rare; defendants at times insist on trial for irrational reasons that they cannot articulate and their counsel cannot perceive.

(19)

To all but the defendant it seemed an open-and-shut case of purse snatching. The defendant was arrested after the police had heard "stop the thief" cries and observed a tug of war between him and the victim.

The defendant was offered a reduction from robbery D to robbery E (maximum 4 years). Claiming he found the bag after some children had thrown it away, the defendant refused to plead guilty, against the advice of his legal aid counsel. He was convicted and sentenced to the maximum of 7 years.

(20)

The defendant was arrested with two others in a car that was slowly cruising in a high-crime area. The policemen claimed they found a gun between the feet of the defendant. (There is legal presumption, rebuttable by the defense, that a gun found in a car is in the possession of riders.) A motion to suppress because the search was illegal was denied. An offer to plead guilty to an E felony without promise of time was refused. After a trial in which the defendant, who had a long criminal record, did not take the stand, the jury convicted of the possession charge, a C felony. The sentence was 3 years.

IV. CONCLUSION

The detailed analysis of the rare cases that reach trial concludes the presentation of the disposition process of felony arrests in New York City. We have seen, first, the various ratios of arrests to the number of crimes known to the police and thereby have learned the efficiency level of police operations or, seen from the offender's side, the risks he takes when he commits a crime. And we have seen the remarkable attrition process in the courts following the police arrests. We also have seen the basic structure of the plea bargains that are the main determinants in the disposition picture. Finally, we have seen the outwardly small but intrinsically important function of the trial, which sets the standard against which the plea bargains are negotiated.

The overall attrition pattern as it emerges from this 1973 study has not changed substantially in the years that have since elapsed. Nor is that pattern unique for New York. Except for the sentencing levels, which vary substantially between states and even at times within a state, the disposition pattern as it emerges from this study is typical of much of American law enforcement.

END