A STUDY OF THE FEDERAL CRIMINAL JUSTICE SYSTEM IN NORTHERN ILLINOIS

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PREFACE

This document is the final report of a study financed by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice, grant number 75-NI-99-0114. Chapter 1 is a summary of all major research findings on the flow of federal criminal matters in the Northern District of Illinois. Chapter 2 is a detailed analysis of the most critical stage of caseflow: the decision to initiate formal prosecution in United States District Court. Both chapters are based on quantitative analysis of a sample of criminal matters received by the U.S. Attorney for the Northern District during fiscal year 1974. We hope this research is a substantial contribution to basic knowledge of federal criminal justice administration.

CHAPTER 1

"Processing of Federal Criminal Matters in the Northern District of Illinois"

PROCESSING OF FEDERAL CRIMINAL MATTERS IN THE NORTHERN DISTRICT OF ILLINOIS

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I.

Introduction

Judging by the scholarly and popular literature on the subject, the American system of criminal justice is in serious trouble. The myriad low-visibility, seemingly arbitrary discretions at every level of the system have spawned a host of criticisms and reform proposals which have, as their common theme, the reduction of such discretion.[1] Yet, paradoxically, we have relatively little "hard data" on the specific operations of these decision-makers, despite a long series of "crime surveys."[2] This document reports on a study of the federal criminal justice system in the Northern District of Illinois--a group of agencies which, to our knowledge, have never before been studied comprehensively, as a "system." This is basic research, a first attempt to retrieve detailed case and defendant data from original documents and records. We are hopeful that our study will be replicated in other federal districts, that our methods will be improved upon, and our hypotheses more rigorously tested. At the same time, we are confident of the validity of our original premise: that there is much to be learned from systematic examination of the flow of cases through all stages of the criminal justice process.

Basic knowledge of the operations of a criminal justice system is a pre-condition to intelligent reform. Recent reform

1. See F. Zimring, "Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform" (Occasional Papers, from the University of Chicago Law School, No. 12), 1976.

2. See, e.g., R. Pound, "Criminal Justice in the American City--A Summary," pt. VIII of the Cleveland Foundation's Survey of Criminal Justice in Cleveland (1922); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (U.S.G.P.O. 1967).

efforts have included suggestions that criminal justice discretion be subject to greater administrative controls;[3] increased attempts to impose legal or constitutional constraints on administrative action;[4] and legislative proposals to sharply reduce, or abolish, certain areas of discretion.[5] A fundamental difficulty with many of these proposals is the failure to appreciate the pervasiveness of discretion within the criminal justice system and the strong likelihood that partial attacks on these problems will simply cause a shift in the locus of discretion.[6] The preoccupation with abuses of discretion also tends to obscure what is right with the current system, although the secrecy of traditional decision processes makes this difficult to appreciate. Finally, it seems that most crime surveys have studied the

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3. See K.C. Davis, Discretionary Justice: A Preliminary Inquiry (1969); K.C. Davis, Police Discretion (1975); K.C. Davis et al., Discretionary Justice in Europe and America (1976).

4. See, e.g., Wolff v. McDonnell, 418 U.S. 539 (1974) [due process in prison disciplinary proceedings; Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) [broad attack on penitentiary conditions and programs]; United States v. Falk, 479 F.2d 616 (7th Cir. 1973) [defense of discriminatory prosecution].

5. See, e.g., Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing (McGraw-Hill, 1976) ["mandatory" sentencing, with predetermined adjustments for certain "aggravating" and "mitigating" factors]; D. Fogel, We Are the Living Proof: The Justice Model of Corrections (W.H. Anderson, 1975) [abolish parole]; National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report: The Courts, ch. 3 (U.S.G.P.O. 1973) [abolish plea bargaining].

6. See generally, Zimring, supra, note 1.

administration of justice in its most inadequate form: the over-worked, under-financed, and politically compromised police and court systems of the largest urban centers. Systems that seem to be "working" are rarely examined, even though they may provide valuable ideas or perspectives for improving the courts in crisis.

This is a study of one such system, which appears to function at a high level of consistency despite vast areas of seemingly "uncontrolled" discretion. It is a federal, not a state or city criminal justice system, but one should not assume that these systems are necessarily non-comparable. It is true that the "typical" federal, state and city offenses are quite different and will remain so for the immediate future; however, there is already a sizable overlap in criminal jurisdiction, and the functional similarities in these systems are many. In any case, one value of a study such as this is to document more precisely what federal criminal justice administrators do; given the traditional secrecy of their operations and the paucity of empirical studies of federal law enforcement, the degree of comparability to state systems is an open question.

Our approach is quantitative and "longitudinal." We have relied primarily on written (mostly non-public) records, rather than on interviews or official policy statements, in an attempt to discover what federal officials do, not just what they say or believe they do. Quantitative measures also permit more precise description of specific policies and analysis of the complex timing and interaction of many variables. The research design described below is essentially a "flow" analysis--an

attempt to trace a representative sample of federal offenses from the earliest stages of investigation to final disposition (with or without formal prosecution). We were not able to study the entire law enforcement process--much initial police activity, and the treatment of sentenced offenders by correctional authorities, had to be excluded--but we believe we have examined a larger fraction of total system functioning than any prior study.[7] This permits us to see the similarities in the way certain cases are handled at different stages of processing; different dimensions of the process (i.e., disposition of charges, bail-setting, and time-spans) can also be compared.[8] The existence and complexity of the interactions between these different stages and dimensions serve to demonstrate the danger of attempting to analyze or reform any single point or stage of procedure.

The Federal Criminal Justice System. Before presenting the specific research methodology and findings, it may be helpful to outline the general nature of federal criminal justice. As indicated above, there are many federal offenses which find no counterparts in state criminal codes (e.g., immigration laws), and some federal charges have state counterparts which are rarely prosecuted (e.g., tax fraud). Table 1 summarizes the most common

7. Compare, for example, Greenwood et al., Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective (U.S.G.P.O. 1973), which traced defendants from the point of arrest to final disposition. Our study included misdemeanors and also covered a large number of defendants who were investigated but never arrested. See Figure 3A, infra.

8. For a discussion of the advantages of "longitudinal" data, see C.E. Pope, Offender-based Transaction Statistics: New Directions in Data Collection and Reporting (U.S.G.P.O. 1975).

Table 1

Criminal Cases Commenced in 94 Federal District Courts, by Offense, Fiscal Years 1971 through 1975[1/]

Offense Category	No. of Cases Filed (excluding transfers) 1971	1972	1973	1974	1975	5 yr. total No.	%
violent[2/]	3069	3698	2595	2656	3383	15401	7.4
mail theft/embezzlement[3/]	1038	553	451	394	367	2803	1.4
other mail theft	1295	1374	1373	1398	1798	7238	3.5
theft from interst. shipm't	1040	981	736	771	948	4476	2.2
theft of U.S. property	532	507	533	523	662	2757	1.3
interstate auto theft	2408	2350	1960	1790	1591	10099	4.9
other burglary/larceny	1300	1237	1143	1144	1629	6453	3.1
marihuana	2530	3002	3519	2868	2680	14599	7.0
narcotics & other drugs	2149	3756	5298	4506	4651	20360	9.8
mail fraud	450	603	626	605	743	3027	1.5
tax fraud	780	945	1285	1292	1275	5577	2.7
other fraud	832	1200	1165	1176	1648	6021	2.9
embezzlement[3/]	1212	1257	1120	1218	1503	6310	3.0
interstate forgery[4/]	1092	949	898	923	1014	4876	2.4
other forgery	2426	2677	2568	2932	2977	13580	6.5
counterfeiting	724	1059	638	505	616	3542	1.7
weapons & firearms	2036	2377	2224	2911	3165	12713	6.1
escape/bail jumping	1245	1415	1377	1505	1497	7039	3.4
Selective Service	4539	5142	3043	1008	274	14006	6.8
immigration laws	5027	5904	2208	1921	1947	17007	8.2
liquor tax	1171	1254	901	641	349	4316	2.1
all other[5/]	4395	4803	4706	4980	6391	25275	12.2
Total	41,290	47,043	40,367	37,667	41,108	207,475	100%

1/ Source: Annual Report of the Director, Administrative Office of U.S. Courts, FY 1975, table D-2.

2/ Includes homicide, robbery, assault, rape, and kidnapping.

3/ Thefts and embezzlements by postal service employees are classified as "theft" in this study; in the Administrative Office report cited above they are labelled "postal embezzlement."

4/ Interstate transportation of forged securities, 18 U.S.C. § 2314.

5/ No other offense accounted for more than 1% of total cases filed. Includes, inter alia, bribery, drunk driving, extortion, gambling, perjury, denial of civil rights, and miscellaneous federal regulatory statutes (e.g., food and drug laws).

federal offenses prosecuted during fiscal years 1971 through 1975.[9] The majority of "violent" offenses were robberies of federally-insured banks, whereas other violent offenses generally occurred on federal property (e.g., a military base). A large proportion of the prosecuted federal offenses involve interstate movement, and offenses that jeopardize special federal interests or agencies are also common (e.g., mail thefts, frauds against the government, embezzlement from a federally-insured bank, forgery of a U.S. Treasury check or postal money order). On the other hand, the federal drug laws are not limited to offenses involving government employees, property, or interstate movement; the possession or distribution of marijuana, narcotics, or other "controlled substances" is a federal offense wherever and however it occurs. Federal firearms statutes also overlap substantially with state and local laws.

Table 1 is based on court filings because there are no reliable statistics prior to that stage; no agency records the number of federal arrests or "crimes reported." In part this may be due to the fact that there are several dozen federal agencies which regularly investigate criminal matters.[10] Although

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9. Comparable nationwide data from state and local courts is not available, but see FBI, Crime in the United States--1975 -- Uniform Crime Reports (U.S.G.P.O. 1976), table 22, showing the disposition of 1,556,071 defendants "formally charged" by local police during 1975.

10. E.g., the Federal Bureau of Investigation; the Drug Enforcement Administration; the Immigration and Naturalization Service; the U.S. Postal Service; the Customs Bureau; the Income Tax and the Alcohol, Tobacco and Firearms Divisions of the Internal Revenue Service; and the Secret Service Bureau.

the FBI has long served as a national clearinghouse for statistics on state and local crime and police activity, it does not perform the same function for federal law enforcement, and federal offenses are not separately listed in the FBI's "Uniform Crime Reports." Thus, the first point at which federal offenses are uniformly recorded is when they are referred to the local United States Attorney.[11/]

Most federal prosecutions are initiated and controlled at the local level. Each of the 94 federal judicial districts has a United States Attorney, who is appointed by the President for a four-year term. Although he is subject to limited supervision by the Department of Justice in Washington, the local U.S. Attorney generally has complete control over the type of charges, if any, to be filed in his district. Such charges may be filed initially with a U.S. Magistrate or in U.S. District Court. Magistrates are appointed for a term of eight years, and have limited duties and jurisdiction in both civil and criminal matters. As to the latter, they issue arrest and search warrants, hold bail hearings, and review arrests (if made prior to filing in district court) for "probable cause."

Formal prosecution requires the filing of an indictment or prosecutor's "information" in district court, and felonies must be prosecuted by grand jury indictment (unless waived by the defendant). Federal district judges are appointed for life by

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11. The specific offenses involved in these referrals are reported annually; see United States Attorneys' Offices Statistical Report, FY 1975, table 3. However, the offense categories used, and the lack of written instructions for local clerks, cast doubt on the reliability of this information.

the President, with Senate approval, and they hear both civil and criminal cases. Other important federal criminal justice agencies include the U.S. Marshal's Service, which makes some arrests, protects witnesses, and transports federal prisoners to and from jail or prison; the Federal Defender Program (appointed counsel); the U.S. Probation Service; the U.S. Bureau of Prisons; and the U.S. Parole Commission. As noted elsewhere in this report,[12] there are no federal jails for pretrial detention in most districts; detainees are "boarded" in local county or city jails, under the supervision of the U.S. Marshal.

Figure 1 summarizes the estimated "flow" of criminal matters in all 94 federal districts, starting at the point of referral to local U.S. Attorneys.[13] The extent to which federal law enforcement agencies screen and eliminate cases or defendants prior to referral is unknown, but it is clear that the U.S. Attorneys exercise considerable selectivity in choosing cases for formal prosecution. It should also be noted that the majority of defendants in non-prosecuted matters are never arrested; U.S.

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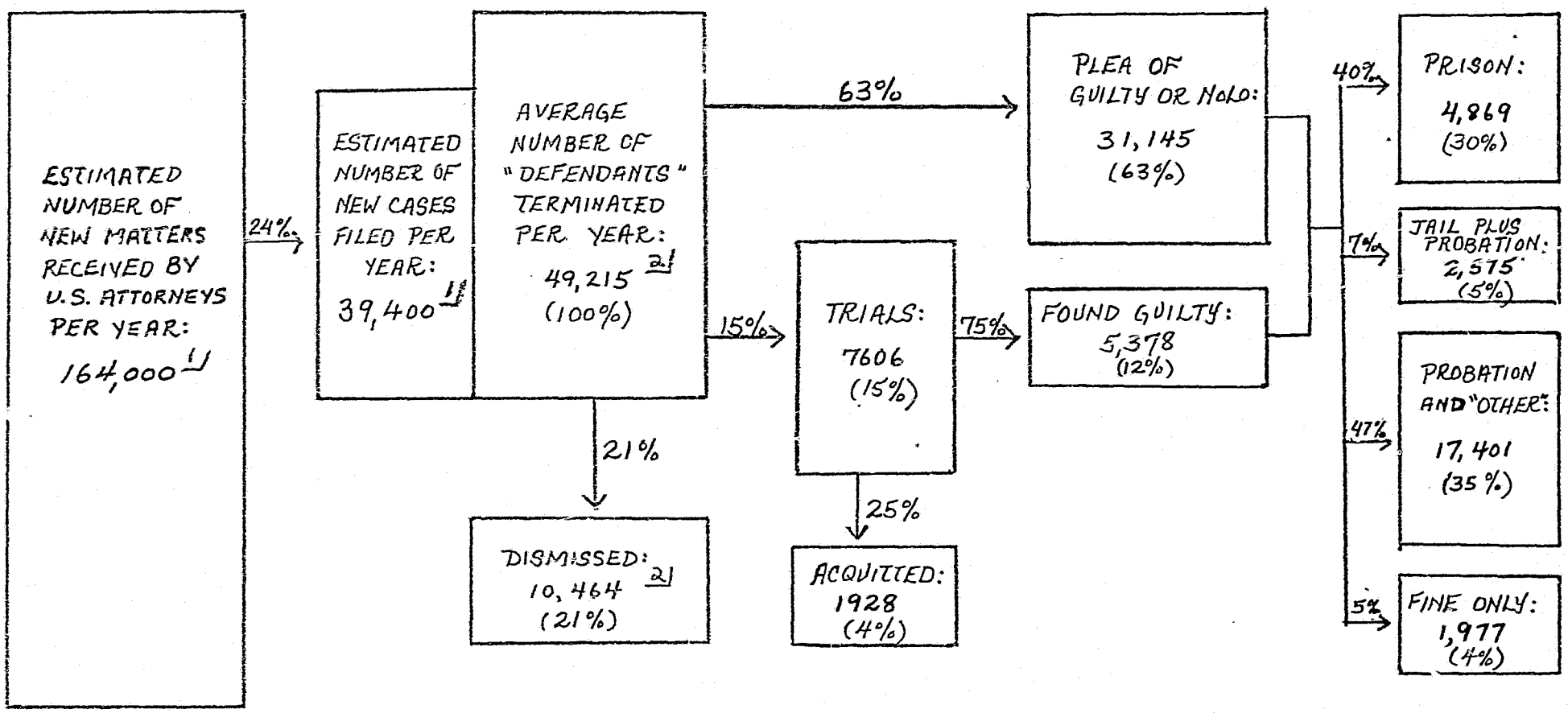
12. See part III-D, infra.

13. The left-hand portion of figure 1 is based on "matters" (i.e., groups of defendants charged with the same crime or series of crimes), since data is not reported for individual defendants at this stage. The average number of "cases filed" is lower than the figures shown in Table 1; this discrepancy appears to be due to the inclusion, in published court statistics, of a certain number of cases which merely superseded pending cases. Similarly, some of the defendants reported as "dismissed" in court statistics were actually named in superseding indictments or informations, so the proportion of dismissals shown in figure 1 is probably overstated.

Figure 1

Estimated Flow of Criminal Matters and Defendants
in 94 Federal Districts
(fiscal years 1971-1975)



1) Source: United States Attorney's Office Statistical Report, FY 1971, Table 7; Id., FY 1972; Id., FY 1973; Id., FY 1974; Id., FY 1975. The necessary adjustments to the published statistics are described in a separate report. See Frase, "The Decision to Prosecute Federal Criminal Charges--A Quantitative Study of Prosecutorial Discretion," (in process, 1976), Table 1.

2) Source: Annual Report of the Director, Admin. Office of U.S. Courts, FY 1971, table D-7; Id., FY 1972; Id., FY 1973; Id., FY 1974; Id., FY 1975. The numbers of defendants "terminated" and "dismissed" include an unknown number charged in superseding indictments or informations (see text). Percents within the boxes are based on the total of 49,215 defendants terminated; percents along the arrows are based on the number shown in the preceding box(es) (e.g., 40% of convicted defendants went to prison).

Magistrates issue only about 30,000 arrest warrants per year.[14] Thus, the prosecutorial discretion of the U.S. Attorney appears to operate at a stage of investigation which, in state criminal justice systems, is much more likely to be controlled by the police. Our study thus provides a unique opportunity to systematically examine the exercise of discretion at the earliest stages of the criminal justice process.

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14. Annual Report of the Director, Administrative Office of U.S. Courts, FY 1972, table M-3; Id., FY 1973; Id., FY 1974; Id., FY 1975. Since a separate warrant is issued for each defendant, the number of matters involved is probably much less than 30,000. On the other hand, those defendants who are not arrested until after indictment are sought by means of district court "bench" warrants or by summons, rather than magistrate warrants.

II

Methods

Location. This study was conducted in the Northern District of Illinois, which includes metropolitan Chicago and most of the northern third of the state. The district has a large and varied caseload,[1] which makes it possible to study processing decisions within a fairly narrow time span (so as to minimize the impact of shifting crime rates or changes in applicable law or personnel), and still have a large enough sample for statistical analysis. The extent of data availability also makes this an attractive district for system-oriented research; the Criminal Division of the U.S. Attorney's Office keeps a written record of all matters received from law enforcement agencies, and the decision to decline prosecution is particularly well documented.[2]

Research Design. Our principle data collection device was a random sample of "matters" received in the Criminal Division for the Northern District between October 1, 1973 and March 31, 1974. This cohort of matters was then followed to disposition, and all available information on all defendants in each matter was coded from files in the U.S. Attorney's office, court records, magistrate files and U.S. Marshal's

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[1] In the sample year, fiscal 1974, there were 796 original criminal cases filed in the Northern District, and 53 cases were received by transfer from other federal districts. Only nine of the other 93 districts had a higher total number of criminal cases filed in that year. See Annual Report of the Director, Administrative Office of U.S. Courts, FY 1974, Table D-1.

[2] See part III-B, infra.

office records. We thus obtained defendant-based data on variables such as offense and offender characteristics; method of disposition; reasons for declination; bail and pretrial custody status; type of defense counsel; and periods of time consumed at each stage of proceeding. Wherever possible, these variables were also coded on a case basis (e.g., referring agency, which is generally identical for all defendants in a matter).

Sampling. We drew a stratified sample of matters, taking a higher proportion of those which were not declined immediately ("U.S. Attorney complaints").[3] Since the latter included all of the prosecuted matters, a larger sample was needed to obtain sufficient numbers of cases within important subcategories (e.g., defendants convicted at trial). Specifically, we sampled 300 (27.6%) of the immediate declinations and 500 (46.0%) of the U.S. Attorney complaints. After removing all matters previously received by the office,[4] we arrived at a final sample size of 288 immediate declinations (containing 385 defendants), and 470 complaints (containing 686 defendants).[5]

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[3] The initial screening decision is described in greater detail in part III-B, infra. "Immediate declinations" are sometimes referred to by local staff as "miscellaneous" matters.

[4] Sometimes the same offender was received a second time for the same offense (usually after further investigation). If we sampled the first referral, then the two were treated as a single "matter," and were included in the study; if we sampled the second referral, neither was included.

[5] The case sizes and defendant counts for each of the sample strata are summarized in Table A-1 and A-2, in the appendix. The inclusion of two unusually large cases means that certain findings must be interpreted cautiously. See, e.g., Table 3, infra.

Estimates of "total matters" were obtained by weighting the immediate declinations by a factor of 1.67, to compensate for the lower sampling faction applied to those matters.[6]

Data Sources and Availability. Our sample of matters was drawn from the daily logbook of the criminal division, which shows the date received; the initial screening classification (i.e., "immediate" declinations versus complaints); the names of the defendants; offenses charged by the investigating agency; and miscellaneous additional information about the case or the defendants. After this point, however, the data available depends upon the disposition of the matter and the completeness of the office files.[7] For immediate declinations, the only other data source is the office case file, which includes preliminary correspondence from the referring agency, a memorandum of reasons for declination, and occasionally other notes and materials. From these sources we were able to determine the proper classification of the offense, based on details such as the use of force, nature of the victim, dollar amount of loss, nature and amount of drug or other contraband, etc. The files sometimes also contained information

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[6] This process yields a weighted sample of 951 matters and 1,329 defendants. In the remainder of this paper, whenever figures are presented for "total" matters, defendants, or declinations, the numbers and percents are based on weighted values. All tables also include the raw (unweighted) number of cases or defendants, which is referred to as the "sample size."

[7] Forty files of immediate declinations (13.9%) were missing and could not be located during the seven-month data collection period. Among U.S. Attorney complaints which were declined, 23 files, or 8.2%, were missing, but some of the file information was available from other sources (e.g., magistrate and U.S. Marshal's files). On the basis of the logbook descriptions, it appears that three offenses--civil rights, tax fraud, and mail fraud--accounted for two-thirds of all missing files, even though these offenses only constituted 8.6% of the declined cases in our sample.

a classification of reasons was developed early in the data collection process. The full classification appears in the appendix, Table A-4.[11/]

[11/] The theory and development of these reason categories is discussed in detail in a separate report of this project. See Frase, "The Decision to Prosecute Federal Criminal Charges--A Quantitative Study of Prosecutorial Discretion" (in process, 1976), at pp. 14-19.

III

Findings

The data sources described above yielded a rich data base which, in some respects, we have only begun to analyze. In the remainder of this paper we will summarize the major findings of the study, and suggest issues to which future research should be directed. The first section describes the nature of matters and defendants referred for possible prosecution in the Northern District, and summarizes the "flow" of these matters and defendants through the pretrial screening and adjudicatory processes. The second section focuses on the decision to file formal charges, and the third examines charging, plea bargaining, and disposition of prosecuted defendants. The final section summarizes the pretrial release conditions applied to prosecuted defendants and those non-prosecuted defendants who were arrested.

A. Summary of System Input and Dispositions

1. Characteristics of Matters Received

Our sample of 758 matters yielded a total of 1,071 defendants, or about 1.4 defendants per case. These defendants were charged with over 125 different provisions of the federal criminal statutes. Table 3 summarizes the major offense groupings we arrived at in an effort to reduce this diversity to manageable proportions, while retaining the distinctions which seem important conceptually, or in terms of the way certain cases are handled. For example, mail thefts by postal employees typically involve unusually small amounts of loss, relative to other mail thefts or thefts generally, and convictions almost always

Table 3

Matters and Defendants Referred to the
U.S. Attorney, Northern District of Illinois,
By Offense (1973-74)

Offense Category	Matters	Defendants	Average No. of Defendants Per Case
	%	%	
Violent[1]	2.3	2.1	1.27
employee mail theft	2.9	2.2	1.04
other mail theft	3.0	2.8	1.28
theft gov't property	2.3	2.3	1.14
theft from interstate shipment	6.2	7.7	1.73
interstate transport stolen motor vehicle (Dyer Act)	7.2	9.0	1.72 (1.46)*
transport other stolen property	1.0	1.4	1.90
other theft	.8	.8	1.38
importing marijuana	5.2	6.4	1.72
sale other drugs	3.6	5.7	2.23
importing other drugs	1.0	1.5	2.00
all other drug offenses	1.8	3.7	2.88 (1.44)*
mail fraud	2.2	2.0	1.29
tax fraud	2.6	2.0	1.08
false statements	2.5	1.9	1.04
other fraud	6.8	6.2	1.26
embezzlement	2.9	2.3	1.07
interstate forgery[2]	3.8	4.1	1.53
other forgery	4.8	3.8	1.09
counterfeiting	2.8	2.7	1.33
weapons and explosives	4.3	3.8	1.11
escape/bond jumping	1.0	.8	1.00
interstate fugitive (UFAP)	6.2	4.5	1.02
extortion/rackets/threats	4.6	3.6	1.09
selective service	1.0	.8	1.00
misc. postal offenses	1.2	.8	1.00
civil rights	4.9	6.1	1.72
simple assault	1.4	1.6	1.62
all other offenses[3]	8.4	7.3	1.21
TOTAL	100%	100%	1.40 (1.35)*
Sample size[4]	758	1,071	

*Excluding very large case(s)--one 20 defendant theft case; one 26 defendant drug case.

1. Includes rape, robbery, and aggravated assault.
2. I.e., interstate transport of forged securities.
3. E.g., bribery; perjury; immigration; and intra-family "kidnapping." All represented less than one percent of total matters.
4. Percents are based on weighted totals of 951 matters and 1329 defendants.

result in probation. The third column in Table 3 compares the average number of defendants in these different kinds of cases. Even adjusting for the effects of a few extremely large cases, clear differences emerge between the "lone gun" offenses (e.g., employee mail theft) and those violations which frequently involve multiple defendants (e.g., theft from interstate shipment).

More than half (56 percent) of these matters were referred by the Federal Bureau of Investigation, while the Drug Enforcement Administration (DEA) and the Postal Service each accounted for 11 percent of referrals. The Secret Service and the Alcohol, Tobacco and Firearms (AT&F) Divisions of the Treasury Department contributed another eight percent and four percent, respectively, and the remaining ten percent came from local police, citizen's complaints, and from several dozen federal law enforcement or administrative agencies (e.g., Customs; Immigration and Naturalization; the Department of Agriculture). The jurisdictions of the various federal agencies are generally non-overlapping and, with the following exceptions, self-explanatory. FBI referrals included bank robbery and other violent offenses; most thefts (except mail theft); embezzlement; frauds (except tax and mail fraud); escape; fugitives; extortion and threats; Selective Service; Civil Rights; and numerous miscellaneous offenses. Mail theft, mail fraud, and other postal violations were handled by the Postal Service. The Secret Service handled counter-

feiting and forgery (except interstate transport of forged securities, which was referred by the FBI).

The typical "federal case" is perhaps not as serious as might be supposed. There were relatively few crimes of actual violence in our sample, and only about six percent of defendants were alleged to have threatened or used force in the commission of the federal offense (another two percent were interstate fugitives charged with violent state offenses). The median dollar amount of loss in theft, fraud, and other applicable cases[1/] was only $500; the mean amount was $8,432, which indicates the presence of a few extremely large figures (mostly in tax and mail fraud cases). In a fairly large proportion of the thefts, frauds, etc., the records indicated that some or all of the loss had already been recovered; the full amount was recovered in 28 percent of the "loss" cases, and a lesser amount was recovered in another 2 percent.

In drug cases we were generally able to discover both the type and the aggregate amount of contraband, but the degree of purity and dollar value were not recorded. Marijuana offenses accounted for 56 percent of the drug referrals, mostly involving attempts to mail small packages into the country (charged as "importing"). Cocaine and Heroin accounted for 18 and 20 percent of referrals,

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[1/] Two-fifths of the dollar amounts were either unknown or uncodable (e.g., one credit card; eleven semi-trailers).

respectively, and these charges usually involved sale (or possession with intent to distribute). The amounts of contraband, by drug type, are shown in Table 4. The three major drug types appear equally likely to involve very small amounts, but marijuana and cocaine often involved amounts over one pound, whereas heroin matters generally involved four ounces or less.

In most cases we were also able to determine the nature of the victim, if any, of the offense charged. Six percent of our sample cases involved interstate flight to avoid prosecution on state felony charges. These cases are essentially "victim-less," in terms of the federal offense itself, (interstate flight), but even if they are excluded, almost one-fourth (24 percent) of the matters in our sample represented crimes without any complaining party. About two-thirds of these were drug or firearms registration violations; the remainder were various regulatory offenses (e.g., immigration laws). The most common victim type was an individual person (35 percent); 28 percent of the cases involved a business entity, and in 12 percent the victim was a government agency (mostly fraud offenses). In about one-fifth of the "business entity" cases, the offender was an employee of the victim (e.g., bank embezzlement).

2. Defendant Characteristics

We also attempted to discover the age, sex, and prior record of our sample defendants, but a large proportion

Table 4

Drug Types and Amounts in Cases Referred to the U.S. Attorney, Northern District of Illinois 1973-74

Amount of Drug	Drug Type: Marijuana	Cocaine	Heroin	Amphetamines and Barbituates
	%	%	%	%
1 ounce or less	49.8	49.2	44.7	0
1.1 to 2 ounces	0	20.3	13.8	52.6
2.1 to 4 ounces	8.3	5.1	18.4	0
4.1 ounce to 1 pound	8.3	5.1	4.6	0
Over 1 pound	19.3	20.3	4.6	0
Unknown amounts	14.4	0	13.8	47.4
TOTAL	100%	100%	100%	100%
Number of cases (unweighted)	39	17	21	5

of missing data was encountered -- particularly for prior record. Sex was the defendant characteristic most likely to be retrievable: only 9.3 percent of the defendants were of unknown sex (these were all unknown subjects); 3.8 percent of the defendants were corporate or business entities, and 86.9 percent were individuals of known sex. Of these, 89.3 percent were male, and 10.7 percent were female. Age was less often recorded, particularly for defendants declined immediately or without being arrested. Excluding the corporate defendants, age was unknown for 43 percent of defendants, of whom about one-fourth were unknown subjects. Of the remainder, the median age was 26.6 years. Among prosecuted defendants the percentage with known age was much higher (96 percent), and so was the median age: 29.7 years. 17 percent of total defendants received, with known ages, were under 21; for prosecuted defendants, the proportion was 11 percent.

Our data on prior record was limited to the information recorded in U.S. Attorney files on non-prosecuted cases; we did not have access to files of prosecuted defendants. 34 percent of the non-prosecuted defendants with useable data had a prior state or federal conviction record, usually the former. If the "no indication" cases (excluding missing files) are assumed most likely to be "no prior record," the proportion with a conviction record could be as low as 13 percent, and if interstate fugitives (who are really state defendants) are excluded, the rate falls to 11 percent. This low figure does not seem unlikely,

considering that the most recent published figures for convicted defendants in the Northern District indicate that only 39 percent had a prior record.[2/] Moreover, the latter figure was based on the two-thirds of prosecuted defendants with known record information; if the unreported records are again assumed to more often represent "no convictions," the prior record rate could be as low as 26 percent.

3. Disposition of Matters and Defendants

Figure 2 summarizes the processing and disposition of the sample matters and figures 3A and 3B show the disposition of individual defendants. The initial screening decision by the Chief of the Criminal Division eliminates about half of the matters, and another 30 percent are declined or transferred without any filing of formal charges in U.S. District Court. Another 4 percent were still pending two or more years after the date of referral; given the normal time span within which charges are filed, and the U.S. Attorney's reluctance to file stale charges (see Figure 4A and Table 11 , infra), these pending matters seem unlikely to be prosecuted.

About 16 percent of total matters result in formal prosecutions, and this high screening rate appears to yield a very high rate of conviction or plea. Only three of the prosecuted cases resulted in acquittal of all defendants, and another seven were dismissed on the government's motion,

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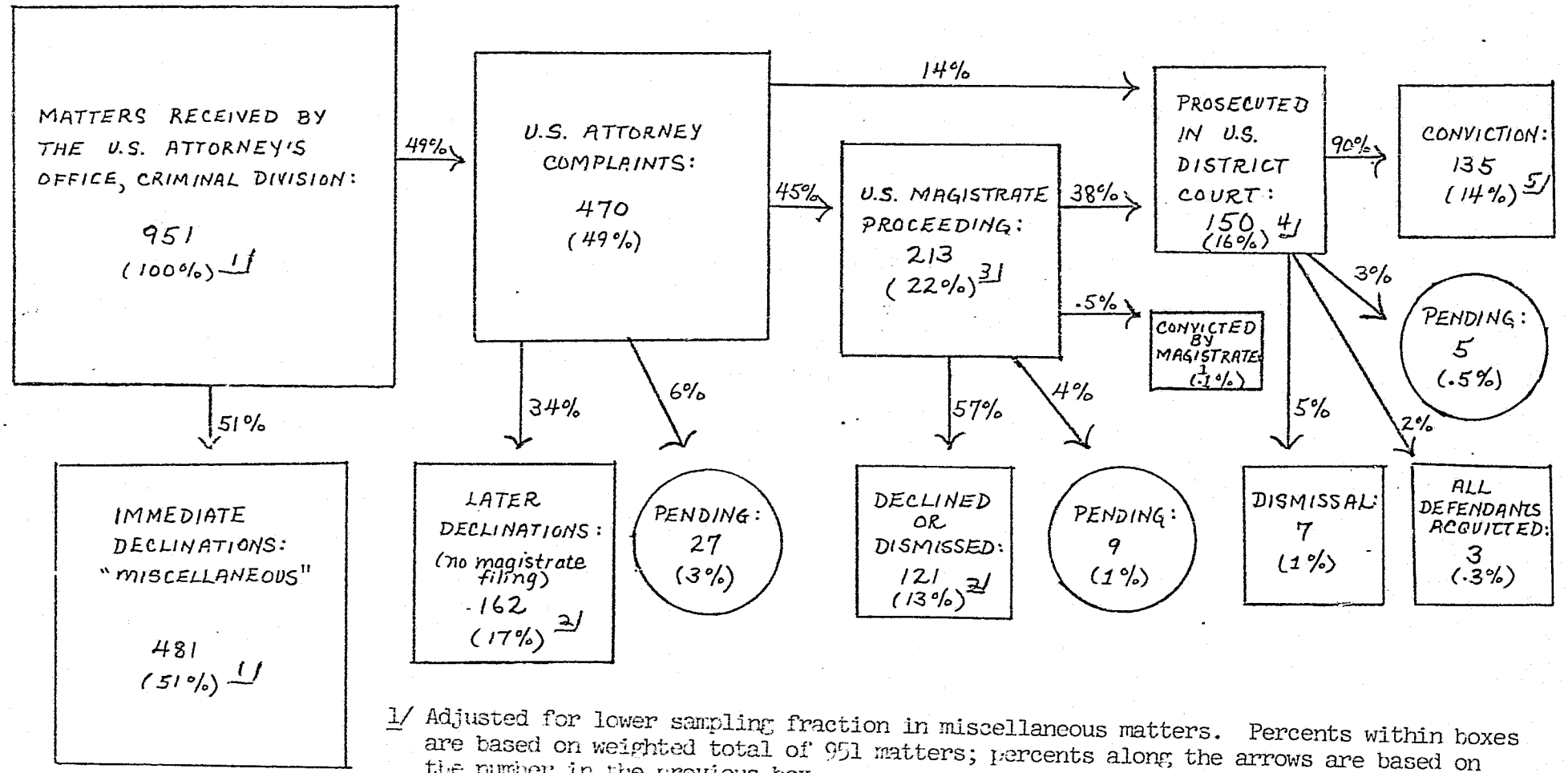
2/ Admin. Office of U.S. Courts, Federal Offenders in the United States District Courts, Fiscal Year 1973, table 5, p. 25 (1976).

Figure 2

ESTIMATED CASEFLOW
NORTHERN DISTRICT OF ILLINOIS



1/ Adjusted for lower sampling fraction in miscellaneous matters. Percents within boxes are based on weighted total of 951 matters; percents along the arrows are based on the number in the previous box.

2/ No defendant in these matters had yet been prosecuted, and none were pending.

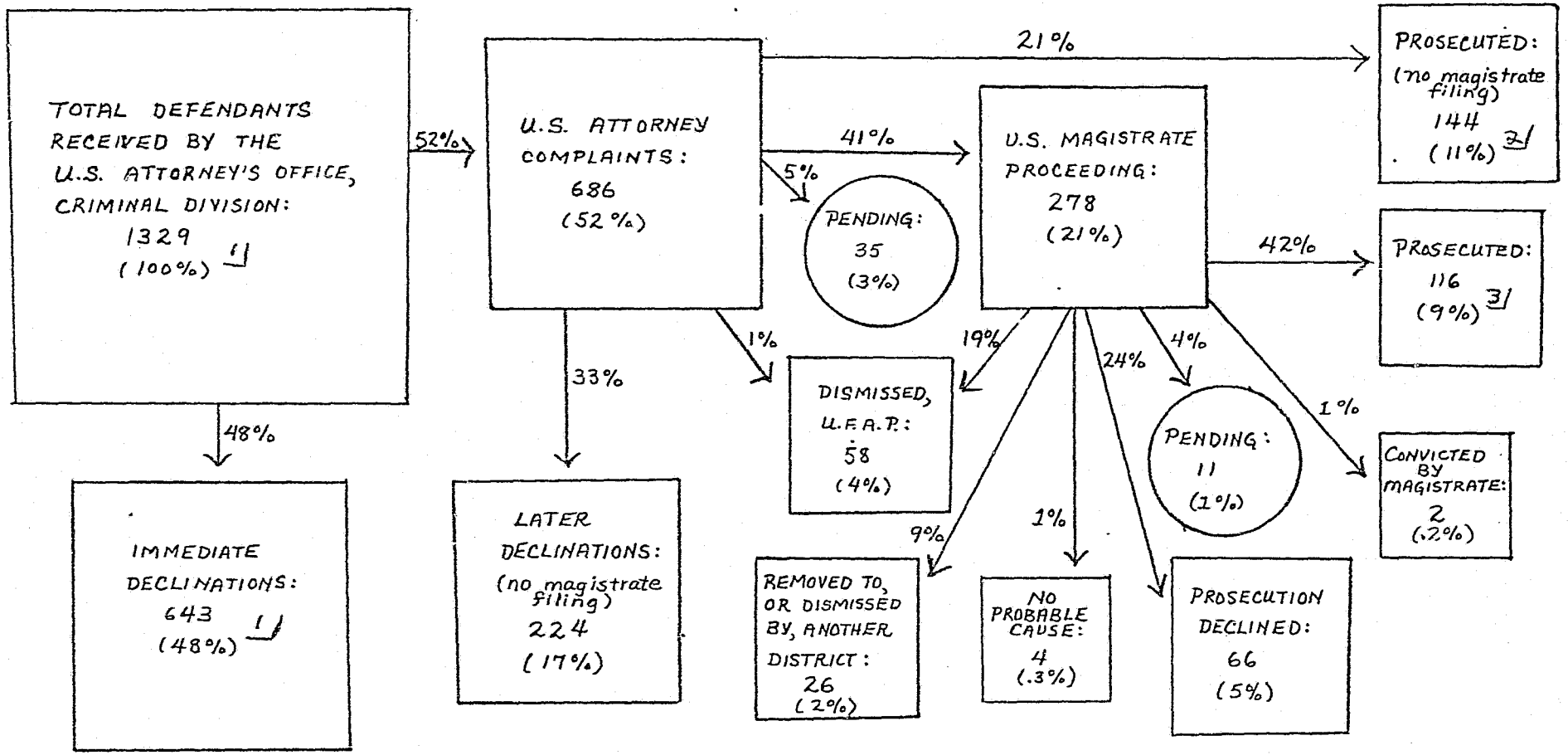
3/ At least one defendant in these matters was named in a magistrate proceeding.

4/ At least one defendant in these matters was prosecuted.

5/ At least one defendant in these matters was convicted.

Figure 3A

Estimated Defendant Flow
Prior to Filing in U.S. District Court,
Northern District of Illinois, 1973-1975



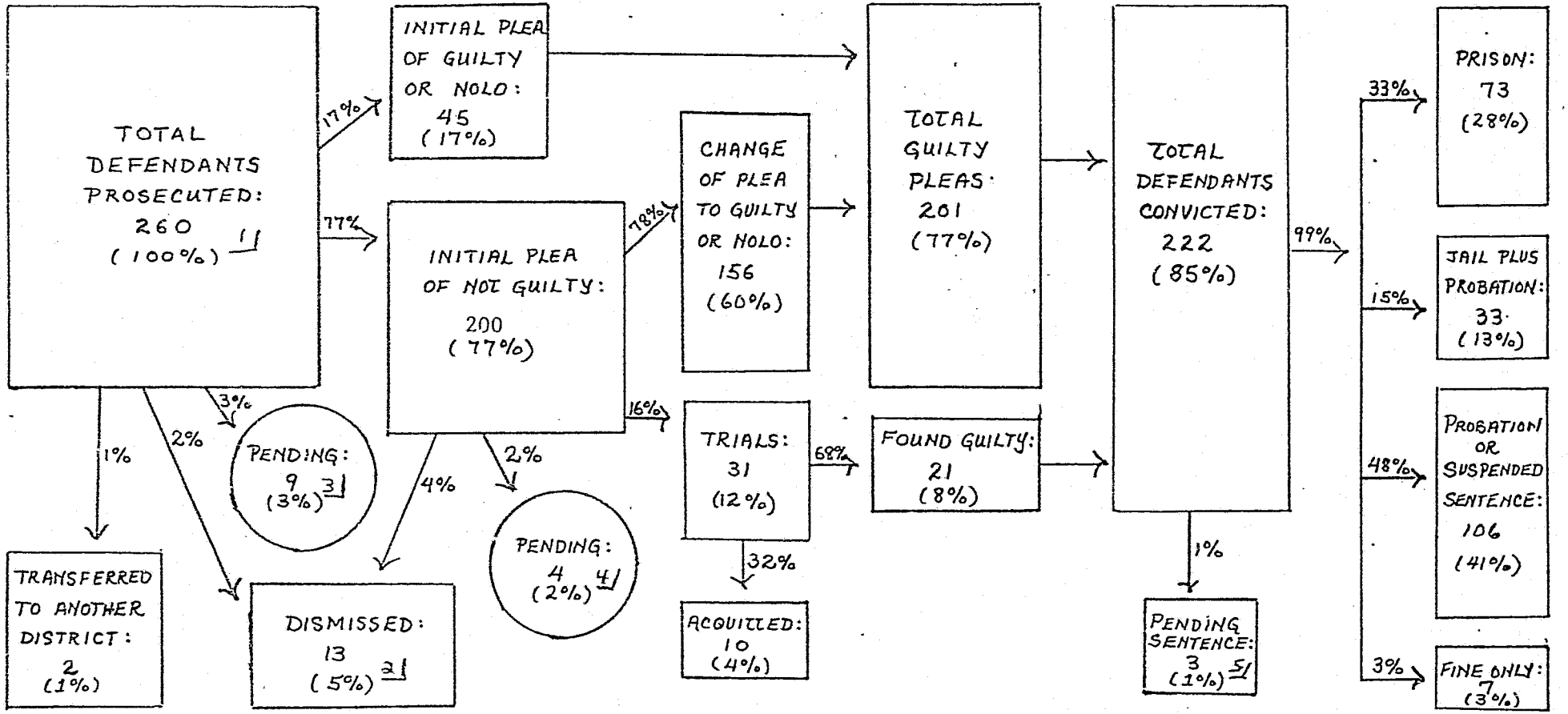
1/ Adjusted for lower sampling fraction in miscellaneous matters. Percents within boxes are based on weighted total of 1,329 defendants; percents along the arrows are based on previous box.

2/ Includes one defendant received by transfer under Federal Rule 20.

3/ Includes 13 defendants received by transfer under Federal Rule 20.

Figure 3B

Disposition of Sample Defendants
Prosecuted in U.S. District Court,
Northern District of Illinois, 1973-1975



1/ Includes 14 defendants received by transfer under Federal Rule 20. Percents within boxes are based on total of 260 defendants; percents along the arrows are based on previous box.
2/ Nine of these defendants had entered a plea of not guilty.
3/ Eight of these defendants were fugitives.
4/ Two of these defendants were fugitives.
5/ Two of these defendants were fugitives.

prior to trial, resulting in a case conviction rate (excluding pending cases) of 93 percent. (The conviction rate could be as low as 90 percent, if none of the five pending cases results in a conviction.)

Figures 3A and 3B give a somewhat more detailed picture of dispositional flow, based on defendants rather than matters. As figure 3A indicates, a fairly large proportion of defendants "declined" after the initial screening stage do not represent actual exercise of prosecutorial discretion, and this is particularly true of defendants who drop out after the filing of charges with the U.S. Magistrate. Of the 151 sample defendants in the latter category, 35 percent were interstate fugitives ("unlawful flight to avoid prosecution," or "UFAP"), most of whom could not have been prosecuted in the Northern District;[3/] seventeen percent were "received" in the Northern District only because they were wanted by federal authorities in other districts, and another 4 percent were either convicted by the magistrate or dismissed for lack of probable cause. All three stages of "declination" shown in Table 3A also include a large number of defendants declined in favor of state criminal charges, or other alternatives to federal prosecution (see Table 11, infra).

The proportion of defendants prosecuted without any prior magistrate filing is exaggerated somewhat by the presence of two very large cases in our sample.

3/ 18 U.S.C. §1073 requires Department of Justice approval for any federal prosecution of these fugitives, and prosecution may only take place in the district fled from. Most "UFAP's" in our sample were from outside Illinois.

The proportion of prosecuted cases not involving a magistrate filing was 45 percent (see figure 2), although if transfers into the district under Federal Rule 20 are excluded, this proportion rises to 49 percent. The decision to file magistrate proceedings is analyzed later in this section.

Table 5 summarizes the nature of court filing used for 260 sample defendants (150 cases) prosecuted in U.S. District Court. The number of superseded charges is of interest because prior to changes required pursuant to the Speedy Trial Act of 1974,[4/] published federal court statistics did not always treat superseded and superseding cases as a single prosecution, as was done in this study. The method of filing also reveals that most defendants were charged with a felony which, absent a waiver, requires indictment. Of the 35 defendants prosecuted by information, 12 were charged with a felony and waived indictment. All 14 transferred defendants were charged with felonies: two waived indictment.

Figure 3B shows the disposition of these 260 defendants. The small number transferred out, in comparison to the number transferred in, suggests that the Northern District is relatively "popular" with defendants and/or prosecutors

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4/ P.L. 93-619 (Jan. 3, 1975); 18 U.S.C. §§3161-74.

Table 5

Method of Prosecution
in U.S. District Court
Northern District of Illinois

	Cases	Defendants
	%	%
Single indictment	64.7	66.9
Initial and superseding indictments	6.7[1/]	14.2
Single information	18.7	12.3
Initial and superseding informations	2.0[1/]	1.2
Transfer in under Rule 20	8.0	5.4
TOTAL	100%	100%
Number prosecuted	150	260

[1/] A case was treated as "superseded" if at least one defendant was charged in a superseding indictment or information

(all of whom must agree to the transfer).[5/] These figures overstate the pattern somewhat, since defendants are twice as likely to be arrested in the Northern District, on out-of-district charges, as vice versa. However, the same pattern emerges when we examine Illinois and other district defendants separately; Illinois defendants are more likely to return to the charging district.

Table 6

Relative Use of Rule 20 Transfers In and Out of the Northern District of Illinois

	N.Dist. Defts Arrested elsewhere	Other Dist. Defts Arrested in N. Dist.
	%	%
Returned to charging district	90.0	64.1
Plea of guilty and transfer to dist. of arrest	10.0	35.9
	100%	100%
No. of defendants	20	39

A detailed analysis of this phenomenon is beyond the scope of the present study, but a likely hypothesis is that defendants favor the Northern District because they

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5/ Under Federal Rule 20, a defendant arrested outside the charging district may be sentenced in the arresting district if he agrees to plead guilty and the U.S. Attorneys in both districts approve the transfer.

believe they will receive lesser penalties there. This could be either because a given offense generally receives a less severe sentence, or because Chicago judges are less impressed with the transiency of such defendants than are judges in the other, generally smaller, districts. Concerning the latter hypothesis, our study found that the fourteen transfers in received sentences comparable to those given local defendants (see text at p. 110, infra).

In addition to transfers out, there were fourteen other defendants in our sample who were dismissed or still pending without entering an initial plea to the charges. 89 percent of the defendants pending at this stage were fugitives, all of them charged with drug or immigration offenses. Four defendants were dismissed at this stage, and another nine were subsequently dismissed after entering a plea of not guilty. All thirteen dismissals were entered at the request of the prosecutor, and only three appeared to reflect adverse developments in a seriously intended prosecution; the rest were, in effect, late "declinations" (see discussion at p. 81, infra).

The middle section of Table 3B shows that conviction after a plea of guilty is the dominant mode of disposition, but that three-fourths of the guilty pleas are entered subsequent to an initial plea of not guilty. About one-third of the defendants who contested their cases at trial were acquitted (all of them jury trials), which raises the question why more defendants do not go to trial. The nature of prosecutor and defense plea bargaining strategy is examined in a later section of this paper.

One-third of the sentenced defendants received a prison sentence ("custody of the Attorney General"), and another 15 percent received a short jail sentence followed by a term of probation ("split sentence"). The average prison sentence was 2.6 years,[6] with a range of from 30 days to eight years, and the median was 2.2 years. The average length of jail terms was 120 days, with a range of from 60 to 180 days (the statutory maximum).[7] The probation components of these sentences averaged 3.4 years, with a range of one to five years.

Almost half of the sentenced defendants received probation or a suspended custody sentence (two defendants). The average length of probation imposed was 3.0 years, with a range from three months to five years (the statutory maximum for any offense).[8] Seven defendants (three of them corporations) were sentenced to pay a fine only, ranging from $1,500 to $50,000 (the corporate defendant in a major bribery case). The probation and split sentences were also sometimes combined with a fine, usually of $5,000 or less.

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[6] The published court statistics for the Northern District during this period show somewhat longer terms (about 3.0 years), but these may not reflect all court-ordered sentence reductions. Cf. Admin. Office of U.S. Courts, Annual Report of the Director, Table D-7(1974); Id. (1975).

[7] 18 U.S.C. §3651

[8] Id.

Consecutive sentencing in multiple count cases was very rare, and except for two "fine only" cases, was not used to impose aggregate sentences in excess of the statutory maximum for a single count. Four defendants received a probation term on one count consecutive to a prison sentence on another. In addition, all seventeen defendants sentenced to prison for distributing narcotics received the mandatory consecutive three-year "special parole" term required under the federal statute.[9/] Finally, eleven of the 219 sentenced defendants were ordered to undergo special treatment -- mostly drug or psychiatric counseling -- as a condition of probation.

4. Other Aspects of Caseflow

The processing of matters and cases prior to disposition can be analyzed from several additional perspectives: bail and custody status; periods of time consumed at each stage of procedure; the use of magistrate proceedings; and variations in types of defense counsel by offense and stage of proceeding. The first topic is treated in greater detail in a later section of this paper.

The Decision to File Magistrate Proceedings. As figure 2 indicates, 45 percent of the matters not declined immediately involve the filing of charges before a U.S. Magistrate; excluding matters not subject to local federal prosecution (interstate fugitives and defendants wanted in other districts) the proportion is much lower: 33 percent. Of local

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9/ Id. 21 U.S.C. §841.

prosecuted matters, the proportion involving a magistrate filing is 51 percent. Thus, even in the cases which would presumably appear most likely to be prosecuted, magistrate proceedings are not routinely initiated.

Table 7 shows the proportion of declined and prosecuted cases in each offense category which involved a magistrate filing. (Immediate declinations are excluded, since they never involve magistrate proceedings.) With the exception of forgery and interstate shipment cases, there is a strong positive relationship[10/] between the proportion of magistrate filings among declinations and among prosecutions, for a given offense. This suggests that there are consistent factors in these cases (or in the law enforcement styles of different federal agencies) which lead to high or low use of magistrate filings. The high filing rate among violent offenses would seem to reflect special problems of dangerousness and/or flight in the period prior to filing of an indictment; drug offenders may also present greater than average risks of flight, although the bonds set in these cases do not necessarily control this problem (See discussion at p. 137 infra). Moreover, the high magistrate filing rates for mail theft and counterfeiting would not seem to be justified by these considerations.

10/ The value of the correlation coefficients, for all 17 pairs of percents, is +.610 ($p < .01$).

Relative Use of Magistrate Proceedings, by Offense and Disposition

Offense Category	Declined Cases 1/	Prosecuted Cases 2/	Total Sample	Number of Cases 3/
Violent	100%	57%	67%	9
employee mail theft	50%	93%	79%	24
other mail theft	54%	85%	70%	27
theft interstate shipment	13%	80%	29%	21
interstate motor vehicle	0%	40%	20%	10
other theft	0%	50%	11%	9
all drug offenses	71%	86%	78%	41
mail fraud	0%	0%	0%	14
tax fraud	0%	0%	0%	25
other fraud	4%	33%	13%	39
embezzlement	0%	0%	0%	10
interstate forgery	40%	25%	36%	14
other forgery	44%	29%	44%	18
counterfeiting	45%	100%	57%	14
weapons and explosives	13%	36%	22%	27
extortion/rackets/ threats	0%	0%	0%	19
all other offenses	11%	31%	15%	55
all offenses	23%	51%	33%	376
number of cases	204	138		

1/ Percents are based on total declined cases in each offense category, excluding immediate declinations and non-local cases (i.e., interstate fugitives and other district cases).

2/ Percents are based on total prosecuted cases in each offense category, excluding Rule 20 transfers from other districts.

3/ Includes offenses in first two columns, plus pending cases.

One circumstance which mail theft (especially by postal employees), drug offenses, and counterfeiting all have in common is that the defendant is frequently "caught in the act," either by federal or local authorities. In such cases there may be a tendency to go ahead and process the defendant, either to protect investigating officers acting without a warrant,[11] or to achieve other purposes (such as deterrence of co-workers, in the case of employee mail theft).

In light of recent changes if federal law, requiring that an indictment be filed within 30 days of arrest,[12] it seems likely that pre-indictment arrests will become less frequent in cases where there is no serious risk of flight or further crime. A greater reliance on arrest after indictment would reduce even further the number of preliminary, "probable cause" hearings, which sometimes serve as a discovery device for defendants. However, more than half of the defendants in our sample who were arrested prior to indictment waived this hearing, so its usefulness to defendants appears to be limited.

Type of Defense Counsel. The Northern District of Illinois operates a Federal Defender Program, under which indigent defendants may be represented by appointed counsel, compensated

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[11] 51 percent of local defendants arrested prior to indictment (including declinations and pending defendants) were apparently arrested prior to the issuance of an arrest warrant; many arrests occurred on the same day as issuance, however, and we often had to guess at the timing of events, based on the hour at which the defendant arrived at the Marshal's lockup.

[12] The Speedy Trial Act of 1974, supra, note 4 (effective July 1, 1979).

under the Criminal Justice Act of 1964.[13] The Program employs six full-time staff attorneys, and also maintains and supervises a larger group of court-approved "panel" attorneys -- private practitioners who volunteer for such appointments, and are paid by the Program. During the period covered by our study, assignments were made in more or less random fashion, to whichever staff or panel attorney was on "duty" the day the judge or magistrate made the determination that the defendant qualified for appointed counsel. Staff and panel attorneys each man three days of the week, so the overall number of appointments received by each group is roughly equal. In the absence of a Federal Defender appointment, of course, the defendant retains a privately compensated attorney.

Table 8 summarizes the frequency with which these three defense counsel types appear in Magistrate proceedings and district court. The type of counsel in Magistrate proceedings was measured at the time of the defendant's initial appearance, or as soon thereafter as an attorney appeared or was appointed.[14] As expected, the relative proportions of initial Federal Defender Staff and Panel appointments were equal, but both types were less common among defendants who were eventually prosecuted. This suggests that prosecuted defendants are either less likely to meet the indigency standards of the Program, or are more likely to prefer, and immediately retain, private counsel.

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[13] 18 U.S.C. § 3006A *et seq.*

[14] Six percent of defendants had no attorney at their initial appearance, but subsequently retained private counsel. All but two of these defendants received an "OR" (recognizance) bond, and only one was detained after the hearing.

Table 8

Type of Defense Counsel in Magistrate Proceedings and U. S. District Court Northern District of Illinois

Counsel Type	Magistrate Proceedings[1] Defendants not Prosecuted	Magistrate Proceedings[1] Defendants later Prosecuted[3]	Magistrate Proceedings[1] All Defendants[4]	U.S. District Court[2] Defendants not previously in Magistrate Ct.	U.S. District Court[2] Defendants Previously in Magistrate Ct.[3]	District Court Total
	%	%	%	%	%	%
Federal Defender Staff	38.2	30.8	34.9	9.7	24.5	16.4
Federal Defender Panel	37.3	32.7	34.9	22.4	30.9	26.2
Private Attorney	24.5	36.4	30.2	67.9	44.5	57.4
TOTAL	100%	100%	100%	100%	100%	100%
No. of Defendants	102	107	215	134	110	244

1/ Where more than one counsel type was involved, the type shown is the first one appearing in magistrate court in the Northern District.

2/ Where more than one counsel type was involved, the type shown is the last one.

3/ Except for missing data, these defendants appear twice in the table (once in each court).

4/ Including six pending defendants who were neither declined nor prosecuted.

The type of counsel in District Court was measured at the time of disposition or most recent status (i.e., the "final" counsel type, where more than one type appeared). Overall, defendants in District Court are much more likely to have private counsel, and this is particularly true of defendants arrested after indictment, with no previous appearance in Magistrate court. As we shall see, the latter difference is due primarily to the types of offenses charged against these defendants; however, the other group of prosecuted defendants are the same persons shown in the second column on the left of Table 8, and it appears that some defendants switch from Federal Defender Staff or Panel to private counsel, in the period between the initial magistrate hearing and final disposition. An analysis of these cases revealed that such switches were particularly common in cases involving the sale of heroin or cocaine.

Tables 9 and 10 show the relative proportions of each counsel type in Magistrate and court proceedings, by offense. Overall, private attorneys are more likely to handle interstate thefts, and in District Court these attorneys handle a high proportion of drug, fraud, bribery and extortion cases which (except for drugs) are rarely handled in Magistrate proceedings. Federal Defender Staff attorneys are particularly common in employee mail theft and interstate fugitive cases, and the low incidence of Panel appointments in these cases suggests that the assignment process may not be entirely random. Both of these offenses appear to involve highly "routine" magistrate proceedings; since Staff attorneys have offices in the federal courthouse, it may be that an exception

Table 9

Type of Defense Counsel in Magistrate Proceedings By Offense

Offense Category	Federal Defender Staff	Federal Defender Panel	Private Attorney	Total Defendants (=100%)
Violent	33%	53%	13%	15
Employee mail theft	68%	26%	5%	19
Other mail theft	39%	22%	39%	23
Theft interstate shipment	20%	20%	60%	15
Other thefts	33%	42%	25%	12
Sale of heroin/cocaine	39%	27%	34%	44
Other drug offenses	15%	46%	38%	13
Fraud and embezzlement	29%	57%	14%	7
Forgery	21%	50%	29%	14
Counterfeiting	31%	38%	31%	13
Weapons	0%	71%	29%	7
Interstate fugitives	71%	12%	18%	17
All other offenses	6%	50%	44%	16
All offenses	34.9%	34.9%	30.2%	215

Table 10

Type of Defense Counsel in U.S. District Court, By Offense

Offense Category	Federal Defender Staff	Federal Defender Panel	Private Attorney	Total Defendants (=100%)
Violent	43%	43%	14%	7
Employee mail theft	60%	27%	13%	15
Other mail theft	29%	41%	29%	17
Theft interstate shipment	0%	50%	50%	12
Motor vehicle (conspiracy)	14%	29%	57%	21
Other thefts	27%	20%	53%	15
Sale of heroin/cocaine	15%	18%	68%	34
Other drug offenses	0%	24%	76%	33
Fraud and embezzlement	10%	16%	74%	31
Forgery	31%	38%	31%	16
Counterfeiting	29%	57%	14%	7
Weapons	9%	27%	64%	11
Extortion	0%	0%	100%	6
Bribery	0%	13%	88%	8
All other offenses	0%	18%	82%	11
All offenses	16.4%	26.2%	57.4%	244

is made to the normal appointment procedure, to expedite the hearing of these cases. Alternatively, these defendants may be more likely to arrive on Saturdays, which are always covered by Staff attorneys. The greater incidence of Panel appointments for some offenses (e.g., "other drug") could be due to chance variation, but it may also reflect a tendency for these defendants to decline appointment of a full-time "government" defense attorney.

Periods of Time Elapsed at Each Stage of Processing. One of the advantages of longitudinal analysis of caseflow is that it permits comparison of the relative amounts of time required to dispose of cases by various methods. Figures 4A and 4B show the average (mean) time intervals at each stage of processing, for all defendants who were not declined immediately.

A surprising finding is that the decision to prosecute is finalized (by filing of charges in District Court) much sooner than the decision to decline prosecution. Of defendants processed without a magistrate filing, the average time to indictment is 115 days;[15/] the comparable group of declinations take an average of 236 days. Defendants initially charged in a magistrate proceeding show a similar pattern. The simplest explanation for these differences is that the date of final declination is partly a function of when the Assistant U. S. Attorney gets around to writing up the file memorandum,

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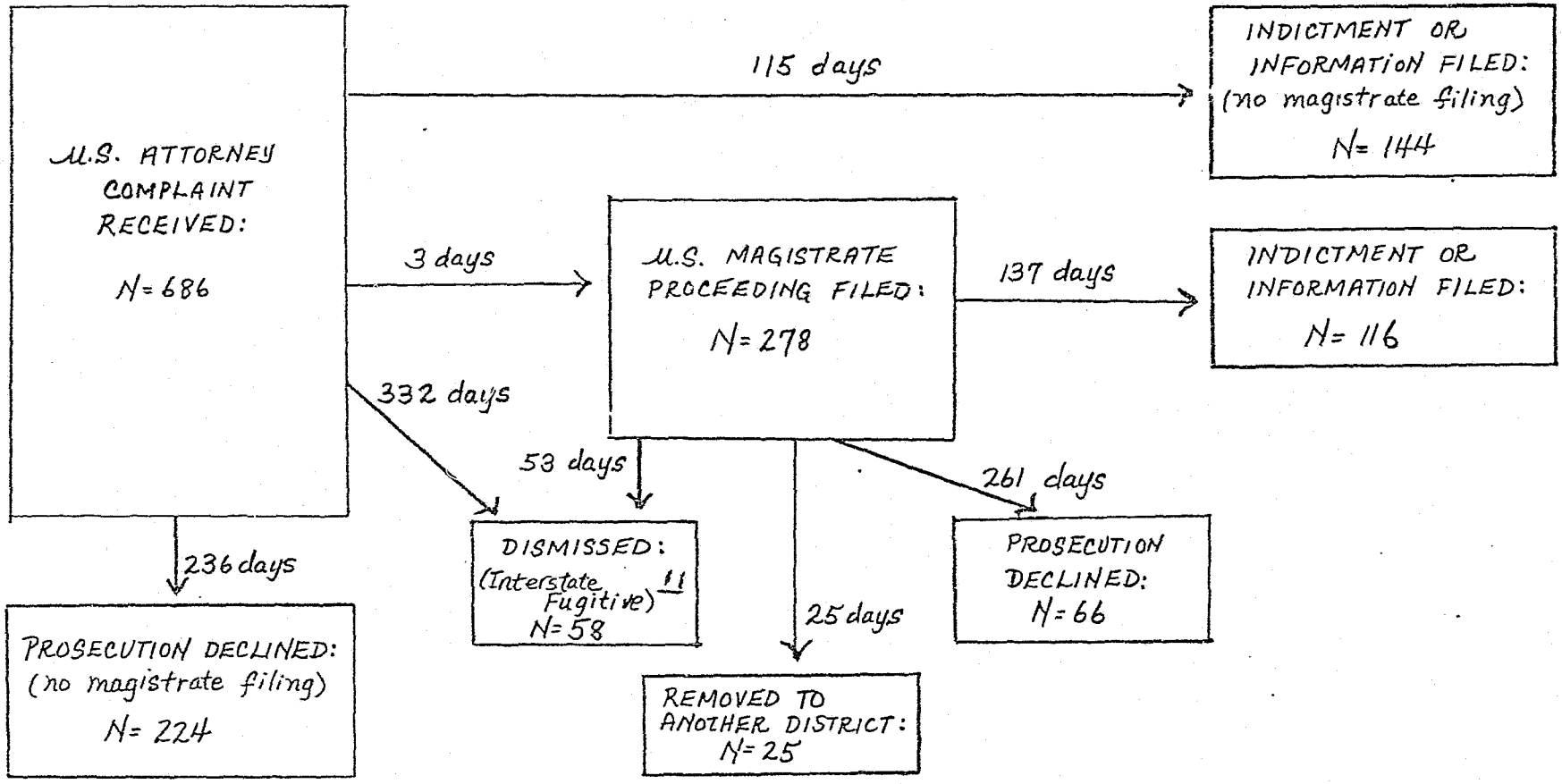
15/ If "immediate prosecutions" -- defendants indicted on the day of referral -- are excluded, this interval increases to an average of 149 days.

Figure 4A

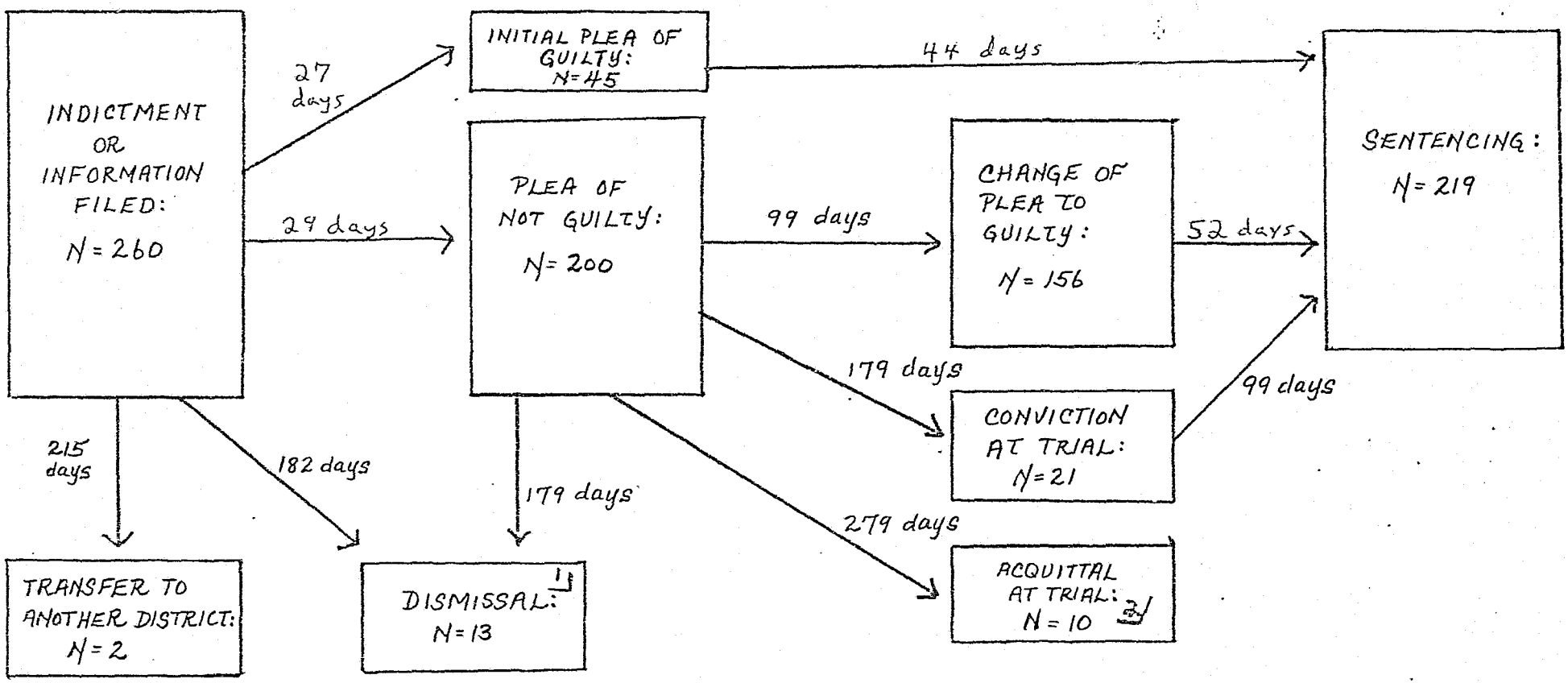
Average Time Lapses (in Days)
Prior to filing in U.S. District Court,
Northern District of Illinois



1/ 53 of these defendants had a magistrate proceeding.

Figure 4B

Average Time Lapses (in days) for Processing
of Defendants Subsequent to Filing in U.S. District Court,
Northern District of Illinois



1/ 9 of these defendants had entered a plea of not guilty.

2/ 5 of these defendants were in the same case; without them, the average plea-to-trial interval would be 166 days.

formally closing the case. This chore is probably considered less interesting than the drafting of indictments, and may simply receive lower priority.

However, some of the other time interval data suggest that other factors are also at work. As Figure 4A indicates, interstate fugitives and defendants charged in other federal districts are generally transferred to the appropriate authorities within a month or two after the initial filing of magistrate proceedings, and an examination of the "close-out" dates in these cases reveals relatively little "paperwork" delay; fugitives and removals are generally closed within a few days of the date of final magistrate action. The difference between these cases and true declinations is that the disposition of fugitives and removals requires relatively little exercise of prosecutorial judgment, whereas true declinations involve important factual and policy issues. Thus, the reason for delay in declination is probably not just the low priority of paperwork, but also the difficulty of making these decisions (and perhaps a reluctance to "give up" on borderline cases).

Another cause of delay in a few cases is the pendency of formal charges against co-defendants. Nine defendants who were declined with no magistrate filing, and another nine declined after such filing, had co-defendants who were prosecuted, and the unprosecuted defendants were often not declined until well after the filing of the indictment. These delays may reflect the use of the declined defendants as

informers or witnesses, with the possibility of prosecution held in reserve.

Figures 3A and 3B also indicate the extent of the difference between existing processing times and the requirements of the new federal Speedy Trial Act.[16] As of July 1, 1979, the Act requires that indictments be filed within 30 days after arrest on a magistrate complaint; the average arrest-to-indictment interval in our sample was 135 days (which is slightly less than the magistrate filing-to-indictment interval shown in Figure 3A, owing to delays in effecting arrests). To the extent that arrest prior to indictment is not essential (to prevent flight or further crime, for example), the government can avoid the 30-day statutory limit by delaying arrest until a later stage. Another alternative is to speed up the process of drafting indictments and presenting them to the grand jury, but if this results in less investigation and case preparation prior to indictment, the delays which formerly took place at this early stage may simply appear in the post-indictment period, thus causing even greater delays prior to trial or plea negotiation. As Figure 4B indicates, there are already substantial delays after the filing of District Court charges,[17] and these delays far exceed the new statutory time limits of ten days from indictment to first plea,[18] and sixty

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16/ See note 4, supra. See generally, Frase "The Speedy Trial Act of 1974," 43 U.Chi.L.Rev. 667-723 (1976).

17/ The Northern District is not the only district with problems of compliance under the Act. In all districts, the median time interval from indictment to disposition in fiscal 1976 was over three months, and 16 districts had medians longer than the Northern District (4.8 months). See Adm. Office of U.S. Courts, Annual Report of the Director, FY 1976, Table D-6.

18/ Where arrest follows indictment, the 10-day limit begins to run at arrest. Most such arrests in our sample took place shortly after indictment, and the average arrest-to-first plea interval was 14 days.

days from first plea to trial or change of plea. The current delays are particularly long in tried cases and they may grow worse if defendants decline plea negotiations in hopes that the government will not be ready for trial within 60 days.

Given these probable consequences of speeding up indictments, and the apparent low need for arrest and pre-trial detention of federal defendants (see text at p. infra), U.S. Attorneys will probably choose to avoid pre-indictment arrests wherever possible. Where such an arrest is avoided, the government can (subject to statute of limitations problems)[19] delay the filing of the indictment for as long as is necessary to prepare the case for prompt plea negotiation or trial. However, it seems unlikely that defendants would engage in equally extensive pre-indictment case preparation; thus, the Act is likely to further increase the advantage which the government enjoys at the outset of prosecution. Defendants can, of course, request extension of the statutory time limits, but such requests are not supposed to be granted routinely under the Act, unlike most state speedy trial legislation.[20] Thus, if the Act is strictly construed as presently drafted, it may ultimately strengthen the hand of the prosecution. Given the degree of selectivity and resource-richness already enjoyed by the U.S. Attorney, such a development seems undesirable. To avoid this result, and the equally undesirable alternative of permitting routine continuances, the statutory time limits may have to be lengthened.

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[19] The general federal statute of limitations is five years. 18 U.S.C. § 3282. The median offense-to-indictment interval in our sample was one year (measured from the date of the earliest offense charged).

[20] See Frase, supra, note 16, at 698

B. The Decision to Prosecute

We turn now to a more detailed analysis of dispositional flow, beginning, in this section, with the decision to file formal charges in U.S. District Court.[1] The last two sections of this paper take up the disposition of prosecuted defendants and the nature of pre-disposition bail conditions set for arrested or summonsed defendants.

Figures 2 and 3A in the previous section reveal that the U.S. Attorney for the Northern District is highly selective in the cases he chooses for prosecution; only 19.6 percent of sample defendants were prosecuted, and the proportion of matters prosecuted was even lower: 15.8 percent. If we exclude pending defendants, on the assumption that they will eventually be prosecuted in the same proportion as the "closed"cases in our sample, the sample prosecution rates are slightly higher. If we further exclude defendants not actually subject to federal prosecution in the Northern District -- interstate fugitives and federal defendants wanted in other districts -- the sample prosecution rates become 20.8 percent, for defendants, and 16.8 percent, for matters received.[2] The latter figure is somewhat lower than the estimated U.S. average shown in figure 1, suggesting that the Northern District is even more selective than most

1. This subject is covered in greater detail in a separate report of this project. See Frase, "The Decision to Prosecute Federal Criminal Charges -- A Quantitative Study of Prosecutorial Discretion."

2. Specifically, we have excluded 14 prosecuted defendants received by transfer under Federal Rule 20; 46 pending defendants; 58 interstate fugitives; 26 defendants removed to or dismissed by other districts,who were never wanted in the Northern District; and 2 defendants convicted by a U.S.Magistrate

federal districts.

In the remainder of this section, we will explore the reasons for this selectivity, and suggest some implications of our findings for theories of prosecutorial decision-making and for proposals to control the prosecutor's descretion. We will measure prosecutorial discretion from two complementary perspectives: (1) the "reasons" for declination cited in file memoranda prepared by Assistant U.S. Attorneys; and (2) the prosecution criteria implicit in the characteristics of declined and prosecuted cases. The former approach is the most direct, but is limited to negative criteria, and may also be distorted by the sensitivity of the declination decision (although the file memoranda were written primarily for internal office purposes). The latter approach, which attempts to measure more "objective" prosecution and declination criteria, thus serves to corroborate some of the "reasons" given,[3] and provides clues as to positive prosecution priorities in the Northern District.

1. Reasons for Declination

When a matter is received in the Criminal Division of the U.S. Attorney's Office for the Northern District, the Chief of the Division makes a preliminary screening decision[4] and assigns the case to an Assistant U.S.

3. See H. Zeisel, Say it With Figures, ch. 12, "Triangulation of Proof."

4. A large number of matters are declined immediately, as shown in figures 2 and 3A. This preliminary decision is occasionally reversed, upon further examination or receipt of additional information from the referring agency.

Attorney ("AUSA"), who examines it in more detail and recommends prosecution or declination. For all recommended declinations, the AUSA prepares a file memorandum, summarizing the case and the reasons for declination. This memo is then attached to the office file and circulated for review by the Chief, the First Assistant U.S. Attorney, and the U.S. Attorney, who may approve or send the case back for further consideration. This system thus permits close supervision and enforcement of office prosecution policies, which are generally not in written form.

Table 11 summarizes the frequency of specific declination reasons cited in these memoranda. Since more than one reason is often cited, the total frequencies add up to 170%, or 1.7 reasons per defendant. The most common reason given was "state prosecution;" sometimes this meant that the defendant had already been convicted on state charges (usually unrelated to the federal offense), or that state prosecution was already pending, but in 51 percent of these declinations there was nothing in the file to indicate that state prosecution would necessarily be pursued. To corroborate these findings, we attempted to follow up the cases which appeared to involve arrests by Chicago Police and local prosecution on <u>related</u> state charges;[5/] as of June 30, 1976 (27 months after the last

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5. Unrelated charges were excluded because they would be harder to trace, given the limited information available on sample defendants.

TABLE 11

Frequency of Specific Reasons for Declination of Defendants

Reason Category	% of Defendants 1/
No Crime	
1. by anyone	5
2. by this defendant - intent	5
3. by this defendant - act	3
Insufficient Evidence	
1. to convict anyone	5
2. this defendant - intent	7
3. this defendant - act	10
Parties Unavailable	
1. defendant - unknown	8
- unavailable	2
- fugitive	1
2. victim - unavailable	1
- reluctant	1
- credibility problem	1
3. witness - unavailable	*
- reluctant	*
- credibility problem	*
Legal Bar	
1. statute of limitations	0
2. immunity	*
3. illegal search	2
4. illegal arrest	0
5. illegal confession	0
6. venue improper	*
7. speedy trial violation	1

Reason Category	% of Defendant
Prosecution Alternatives	
1. state prosecution	26
2. prosecution in another dist.	3
3. Other charges, this dist.	2
4. plea bargain	*
5. parole/probation revoc.-fed.	*
6. parole/probation revoc.-state	*
7. civil commitment	0
8. civil/admin. remedies	8
9. deferred prosecution	3
10. restitution	4
Offense characteristics	
1. small contraband	13
2. small amount of loss	18
3. isolated act	11
4. no interstate impact	*
5. statutory overbreadth	1
Defendant characteristics	
1. age	6
2. no prior record	16
3. family hardship	*
4. other mitigating circumstances	2
5. informer	2
Other Policy Reasons	
1. agent recommendation	1
2. other dist. recommendation	*
3. Dept. of Justice recommendation	*
4. excessive delay	1
5. agency misconduct	*

Average No. of reasons per defendant	1.7
Sample size	546

1/ Based on weighted total of 758 defendants.
* Less than 0.5 percent but greater than zero.

sample defendant was referred to the U.S. Attorney) less than one-fourth of these "state prosecution" declinations appeared to have been prosecuted in Cook County Circuit Court.[6/] However, most of the untraceable defendants were charged with relatively minor federal offenses (e.g., a $10 counterfeiting charge; a $100 theft from interstate shipment). As indicated below, it is highly unlikely that such defendants would have been prosecuted in federal court even if the absence of state prosecution had been known at the time of declination.

Table 12 consolidates the specific reasons shown in Table 11 into ten major reason categories.[7/] The left-hand column shows the frequency of the ten categories, and the column on the right shows the relative "sufficiency" of these reasons -- i.e., how often each was cited alone, without additional reasons. Thus, the three reason categories having to do with alternatives to federal prosecution -- state prosecution, civil or administrative remedies, and other alternatives -- are often cited alone, whereas the three "policy" reason categories -- minor offense, defendant characteristics, and "other" -- are much more likely to appear in combination with other reasons. These differences suggest that policy reasons may be used to lend additional support to declinations based in part on other policy reasons, problems of proof, or prosecution

6. As discussed more fully in a separate report, there are major methodological difficulties in tracing defendants from federal to state court, and the results reported here must be viewed as very rough estimates. See Frase, note 1 supra.

7. There are slightly fewer "reasons" per defendant, compared to Table 11, since combinations of specific reasons within one of the ten categories are treated as a single "reason" in Table 12.

Table 12

Relative Use and Sufficiency of Ten Major Declination Reason Categories

Reason Category	Frequency of use [1] %	Sufficiency (Frequency of Usage Alone, Without Other Reasons) [2]
No Crime	12	53%
Insufficient Evidence	22	29%
Parties Unavailable	13	19%
Legal Bar	4	21%
State Prosecution	26	46%
Civil/Admin. Remedies	8	44%
Other Prosec. alternatives	11	38%
Minor Offense [3]	44	18%
Defendant Characteristics	21	5%
Other Policy Reasons	3	4%

Average number of reason categories per defendant - 1.6

Sample size 546 Defendants

1 Percents are based on weighted total of 753 defendants.

2 Percents are based on weighted total number of declinations involving each reason category (e.g., 53% of the declinations involving the "No Crime" reason were based on this reason alone; the other 47% involved combinations of this reason with one of the other ten reason categories).

3 Includes all reasons listed under "Offense Characteristics" in Table 11.

alternatives, whereas the latter two factors are more often considered self-sufficient bases for non-prosecution.

In order to separate out these different combinations, we further consolidated the ten reason categories into three: the first four categories in Table 12 were treated as "convictability" reasons; the middle three were collapsed into a "prosecution alternative" category; and the last three became "policy" reasons. Table 13 summarizes the frequency with which these three reason types occurred alone or in combination with each other. As suggested above, convictability and prosecution alternative reasons do tend to be mutually exclusive, whereas policy reasons are frequently combined with one of these two factors.

The figures in Table 13 can also be recombined to show that 45 percent of all declinations involved problems of proof, with or without prosecution alternatives or policy considerations; 44 percent involved "alternatives;" and 54 percent involved one or more policy reasons. As noted earlier, our follow-up of "state prosecution" declinations suggests that many "alternative only" declinations actually involve policy considerations as well; thus, it appears that evidenciary and policy considerations may account for most of the declinations in our sample. In particular, the perceived triviality of the offense emerges as the single most important factor; this reason was cited in 44 percent of all declinations, and was implicit in many of the other declinations based solely on the "state prosecution" reason. The following analysis of case and

Table 13

Combinations of Convictability, Prosecution Alternative, and Policy Reasons for Declination of Defendants

Reason Combinations	% of Defendants Declined 1/
Convictability plus Alternative	4%
Convictability plus Policy	18%
Alternative plus Policy	15%
All Three Reason Types	3%
Single-Reason Declinations	
Convictability Only	20%
Alternative Only	22%
Policy Only	18%
Total	100%
Sample size (unweighted)	546 defendants

1/ Percentages are based on weighted total of 758 defendants.

defendant characteristics lends further support to our conclusions about the federal "de minimis" policy.

2. Implicit Prosecution Criteria: Case and Defendant Characteristics

The declination reasons shown in Table 11 reflect negative prosecution criteria which may or may not have positive counterparts (e.g., large amounts of loss or contraband; conspiracy; overwhelming evidence of guilt). Since the affirmative decision to prosecute is not documented with "reasons" in the same manner as the declination decision, it is necessary to infer these positive criteria from the characteristics of matters and defendants declined and prosecuted. Another important reason for examining these characteristics is to double-check the results of the "reason" analysis above. Since the AUSA is not required to cite all reasons for declination which could possibly be given,[8] the frequency with which reasons are actually cited may be biased by the perceived "strength" of different rationales for non-prosecution. In particular, the reasons which most often appear alone--convictability and prosecution alternatives--may be considered "stronger" than "de minimis" and may be cited alone in cases which would not be prosecuted in any event, due to the perceived triviality of the offense.[9]

8. However, we would expect assistants to cite as many reasons as possible to explain and justify their decision.

9. The opposite may also be true, of course; cases which are clearly not "prosecutable" on the basis of policy considerations may be declined for that reason alone, without sufficient investigation into the basis for obtaining a conviction. We were not able to assess this possibility, however, since we had no basis independent of the reasons cited for evaluating the evidentiary strength of matters declined.

Perhaps the most salient case characteristic is the nature of the offense charged. Table 14 shows the relative prosecution rates for "local" matters received, by offense, and the "adjusted" rates which result when we exclude cases declined for "convictability" reasons. The latter adjustment is necessary in order to rule out the possibility that the relative strength of the cases, rather than prosecution priorities, explains the observed differences in prosecution rates by offense. A comparison of the two columns in Table 14 shows that evidence and other "convictability" problems do not explain prosecution rates; in fact, some of the differences in the left-hand column become even greater when weak cases are excluded (e.g., heroin versus marijuana offenses).

Table 14 thus suggests that offense is an important factor shaping the decision to prosecute or decline.[10/] The relative priorities of offenses involving different drug types is especially noticeable, and further analysis reveals that the three drug types have different "de minimis"

10. The relatively high prosecution rate for tax cases may not reflect local priorities, since all tax prosecutions are screened and approved by the Department of Justice. Many cases are probably never referred to local U.S. Attorneys. To a lesser extent, the relative "priority" of other offenses may also reflect different degrees of pre-referral screening, although it is interesting to note that, even after the initial prosecutor screening removes one-half of all matters received, the offenses in Table 14 show very similar relative prosecution rates; the value of the correlation coefficient for the regression of overall prosecution percent against adjusted prosecution percent (excluding immediate declinations) is +.685 ($p < .01$).

Table 14

Overall and Adjusted Prosecution Rates of Local Matters Received, by Offense

Offense Category	Overall Percent Prosecuted	Adjusted % Excluding Weak Cases[1/]
Violent	50.0	63.6
employee mail theft	53.2	60.9
other mail theft	48.7	55.3
theft gov't property	3.8	11.1
theft interstate shipment	8.4	17.2
motor vehicle theft	7.8	9.1
drugs: -marijuana	5.3	6.0
-cocaine	36.8	42.2
-heroin	52.4	71.4
mail fraud	21.4	*
tax fraud	59.1	*
false statements	20.8	29.4
other fraud	7.0	12.9
embezzlement	11.1	37.5
interstate forgery	11.8	20.0
other forgery	16.3	21.2
counterfeiting	12.5	27.3
weapons & explosives	23.9	35.4
extortion/rackets/threats	10.0	28.6
civil rights	0.0	*
simple assault	0.0	0
all other offenses[2/]	12.3	21.6
Total - all offenses	16.8	26.1
Total sample sizes (cases)[3/]	629	433

1/ "Weak "cases are those declined for one or more "convictability" reasons. Except as noted below, the strength of "unknown reason" cases in each offense category is estimated on the basis of the declined cases with known reasons.

2/ Includes other thefts, amphetamine offenses, escape, bribery, perjury, Selective Service, other postal offenses, immigration violations, and miscellaneous; each of these offenses represented less than 2 percent of total matters received.

3/ Excludes pending matters, interstate fugitives, and matters received from other federal districts. See note 2 in the text.

* Cannot be computed, due to the high proportion of declinations with unknown reasons.

levels: no defendant was prosecuted for an offense involving less than one pound of marijuana or less than one ounce of cocaine, whereas even the smallest amounts of heroin were sometimes prosecuted. For all three drug types, the probability of prosecution was directly proportional to the amount of contraband involved.

Other case attributes which appear to be related to the probability of prosecution are the dollar amount of loss, in fraud or theft cases; the presence or absence of conspiracy allegations at the time of referral; and the number of defendants involved. The median dollar amount in prosecuted cases was $1,700, but only $325 in declined cases,[11] and this pattern remained when dollar amounts were compared within specific offense categories. However, the average dollar amount varied dramatically in these different categories, and the implicit "de minimis" amount reflected these differences. Thus, for example, the median dollar amount in non-employee mail theft cases was over $600, whereas most employee mail thefts involved very small amounts (e.g., $5 or $10; a wristwatch). The relatively high prosecution priority of the latter cases may be due to the special need to deter part-time or seasonal employees hired during the Christmas season.[12/]

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11. If declinations based on "convictability" reasons are excluded, the median is even lower: $229.

12. Our sample was drawn from the six-month period between October 1, 1973, and March 31, 1974. Although we do not have data for the other six months of fiscal 1974, we were able to examine computerized data for all matters

3. Implications of the Findings

Studies such as this one serve to broaden our understanding of how prosecutors operate and to suggest how these operations can be improved. Recent commentators have suggested that prosecutorial discretion should be subject to much more extensive controls, in accordance with the developing principles of administrative law.[13] However, students of law and economics have proposed a broad theory of prosecutorial decisionmaking,[14] which, if correct, would suggest that such formal controls are unnecessary. As often happens, these two groups have not attempted to reconcile their theories, nor have they conducted original research to document their assumptions; the present study suggests that each view is too narrow.

The Law and Economics Model, proposed by William Landes, asserts that the prosecutor will allocate his scarce resources so as to maximize his conviction rate, weighted by the severity of the sentences achieved. More specifically, he will allocate his resources to those cases in

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(other than immediate declinations) which were received during the two previous fiscal years. This data suggests that prosecution rates for employee mail theft are much higher during the winter months, whereas other mail thefts receive high priority throughout the year. For defendants received during fiscal years 1972 and 1973 combined, the estimated prosecution rate for employee mail theft was 24 percent; for other mail theft, the rate was 50 percent.

13. See K.C. Davis, Discretionary Justice: A Preliminary Inquiry (1969); Davis, et al., Discretionary Justice in Europe and America (1976).

14. See W. Landes, "An Economic Analysis of the Courts," 14 J. Law & Econ. 61, 62-65 (1971).

The heavy reliance on alternatives to federal prosecution also conflicts with the "weighted conviction "rate" model. If we assume, from the absence of any other reasons for non-prosecution, that these declinations often involve a high degree of expected convictability and sentence severity, then it is apparent that the U.S. Attorney is taking into account the appropriateness, as well as the likely success, of prosecution; he is a policy maker, not just a manager. On the other hand, even if these are generally cases that the U.S. Attorney would not want to prosecute in any event, his preference for the "prosecution alternative" rationale suggests that he is at least sensitive to criticism by referring agencies, or other interested parties, and does not want to appear to be allowing criminals to go free. Such informal constraints have been noted by many observers,[21] and it seems clear that the prosecutor is subject to limitations unrelated to his conviction rate goals.

A third major discrepancy between the observed operations of the Northern District and the economic model relates to the allocation of additional prosecution resources. From 1971 to 1975 the number of Assistant U.S. Attorneys in the district increased 76 percent, while the total number of civil and criminal cases filed per year

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21. See, e.g., R. Rabin, "Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion," 24 Stan. L. Rev. 1036, 1056 (1972).

(including appeals) only increased by 12 percent.[22] Most of the additional manpower seems to have been used to support a major campaign against bribery and other forms of public corruption, which had not previously been investigated by state or local agencies. Such "special prosecutions" are extremely labor-intensive, but they do not necessarily result in either a high conviction rate or lengthy sentences. Thus, the additional resources appear to have been allocated on the basis of policy considerations that are independent of "weighted conviction" probabilities.[23]

The Administrative Law Model. If the economic model assumes that the prosecutor has little freedom from financial constraints, the model proposed by Professor Davis assumes the opposite; namely, that there are few effective limitations on the exercise of prosecutorial discretion. Given this premise, Davis concludes that prosecutors will frequently abuse their discretion and that formal controls are necessary to prevent such abuses.[24] Yet if the economic model is valid--and it may be much more so in the case of state prosecutors--then such abuses ought to be rare; the under-financed prosecutor simply cannot afford to waste his time

22. U.S. Attorney's Office Statistical Report FY 1971, Table 6; Id., FY 1972; Id., FY 1973; Id., FY 1974; Id., FY 1975. For all 94 federal districts, the increase in manpower was 64 percent, and the increase in filings was 16 percent. Id.

23. The Landes model may attempt to take account of the peculiar value of "special" prosecutions by positing a "notoriety" factor, in addition to the weighted conviction formula. 14 J. Law & Econ., at 65.

24. Davis et al., note 13, supra, at 4, 8.

and resources on trivial or unsubstantiated charges.

However, the federal prosecutor can probably "afford" to abuse his discretion, given his greater resources and "residual" law enforcement responsibility. Does the present study suggest that the controls proposed by Davis should be adopted? Specifically, which of the following are necessary and feasible, in the federal context?[25/]

(1) a presumption of compulsory prosecution, at least where there is evidence of the commission of a serious offense;

(2) a requirement that prosecutors confine their discretion by adopting written, published rules as to what will and will not be prosecuted, which would be binding unless superseded by a "reasoned opinion";

(3) a requirement of written findings and reasons to support each "significant" discretionary decision;

(4) internal review of all discretionary decisions by higher officers, including close supervision of local U.S. Attorneys by the Attorney General;

(5) administrative or judicial remedies for victims' complaints in cases of non-prosecution;

(6) judicial review of the prosecutor's decisions, for "abuse of discretion."

The present study suggests that a system of routine internal review within the U.S. Attorney's Office can

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25. See Id., esp. pp. 73-74. These controls are presented in the form of rhetorical questions, and Davis' earlier writings leave little doubt that he strongly favors their adoption. See Davis, note 13, supra, at pp. 224-30.

produce a fairly consistent pattern of implicit prosecution criteria, some of which could perhaps be reduced to written form. However, with the possible exception of the "de minimis" drug amounts, none of these criteria appears to be absolute, and it is arguable that even the drug rules would have to be substantially qualified (e.g., "except in extraordinary circumstances, such as (1) repeated commercial dealings in such amounts . . ." etc. The diversity and frequent combinations of declination reasons further suggest that the decision is a function of many variables, some of which interact in highly complex ways. The internal screening and review process will probably work more efficiently if greater attempts are made to articulate prosecution criteria, in the form of intra-office guidelines, but until we have more experience with the formulation and application of such rules, a requirement of published, binding statements seems premature.

As for the suggestion that local decisions be subject to Department of Justice review, it is not clear that the complete centralization of federal prosecution policy would be an improvement; a balance of power between national and local authorities serves to limit the abuse of discretion at the highest levels and permits tailoring of federal efforts to specific law enforcement needs at the local level. The previous lack of coordination of certain state/federal law enforcement efforts[26/] does not mean that such a partnership

26. See text at note 6, supra.

is undesirable or unattainable.

A requirement of written "reasons" for discretionary decisions seems feasible in the case of declinations, since this is already done internally, but the reasons in favor of prosecution may be harder to articulate; some initial "in-house" experimentation should be attempted, in conjunction with the formulation of internal guidelines, suggested above. Published reasons are another matter; we have seen that a large proportion of declinations currently involve evidentiary or legal defects, which Davis seems to consider an unquestionable basis for declination,[27] and if the U.S. Attorney were to make his reasons for declination public in every case, it seems likely "convictability" problems would be cited even more frequently. The resulting distortion of the true declination reasons could lower the effectiveness of internal supervision and minimize the value of any administrative or judicial review mechanisms.

The need for such mechanisms is also questionable, but a study such as this one cannot quantify the exact incidence of "abuse of discretion." One way to assess the frequency of such abuses would be to set up a temporary "ombudsman" to receive and investigate the complaints of either victims, law enforcement agencies, or defendants. If such complaints

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27. Davis seems to have great respect for the German theory of "compulsory prosecution," in which only evidentiary or legal deficiencies justify declination of felonies. See Id., at 62. However, there is some question whether the German system actually operates with this little flexibility. See J. Herrmann, "The German Prosecutor," Id. at pp. 16-59, esp. p. 25 (prosecutor control over development of "the evidence"); pp. 28-30 (exception for "private" disputes); p. 59 (frequent failures of police to investigate and refer).

prove to be both well-founded and suitable for informal resolution, the ombudsman could be given a permanent status, and the need for more cumbersome administrative or judicial procedures would be avoided.

Ultimately, the extent to which the Davis model should apply to prosecutors depends on the degree of similarity between modern law enforcement processes and the operations of the typical "administrative" agencies for which the model was developed. Since the criminal process already incorporates many constitutional and procedural protections which favor the defendant, the addition of further administrative or legal remedies against the prosecutor could produce an imbalance which would not occur in a "civil" administrative context. Another possible distinction relates to the nature of law enforcement goals; to the extent that general deterrence is the primary objective,[28] rather than achieving "fairness" or social control in the individual case, then the prosecutor may be required to adopt selective enforcement strategies which entail some "inequality" of treatment. In such a system, the focus of "reform" would be twofold: (1) placing outside limits on the policy-making power of the prosecutor, relative to the legislature; and (2) preventing the application of political or other factors which are irrelevant to effective law enforcement. The range of administrative controls suggested by Davis may not be necessary to achieve these objectives.

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28. See text at pp. 109-118, infra.

C. Charging and Disposition of Prosecuted Defendants

Once a decision is reached to prosecute some or all defendants in a matter, an information or indictment is filed in U.S. District Court, each defendant is arraigned, and the case proceeds through the formal adjudication process. In this section we will examine in detail the nature of the counts and offenses charged in these indictments and informations; the ways in which charges are revised at each stage of procedure; variations in the method of adjudication; and sentencing patterns. Given the very small proportion of total "matters" which result in eventual conviction and sentence, our findings are often only suggestions of patterns which further research, with larger, more focussed samples, might demonstrate. However, the overall consistency in our data, between the patterns which emerge in court dispositions and the implicit policies which guide the decision to prosecute, lends further support to the "significance" of the statistically "insignificant" findings.[1/]

1. Selection and Revision of Charges

Our first comparison is between the offenses listed at the time the matter was referred to the U.S. Attorney, and the offenses charged in the initial indictment or information. It is sometimes assumed

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[1/] See Zeisel, "The Significance of Insignificant Differences," 19 Public Opinion Quarterly 319 (1955).

that all prosecutors "pump up" the formal charges, so as to leave maximum room for plea bargaining (as well as maximum flexibility for developments in the evidence),[2/] but our study reveals relatively few such changes. As shown in Table 20*, the majority of local defendants were charged with substantially the same offenses listed at the time of referral, and the dropping of offenses was actually slightly more common than addition. Of course, it may be that the major kind of charge "inflation" involves multiple counts of the same offense, rather than different offenses; since the number of separate counts is not recorded until the formal charges are drawn up, we could not assess this aspect of charge revision. However, as we shall see in a moment, most indictment or information charges involve a single count of each offense, so the extent of "count inflation," if it exists, must be quite limited. As we shall also see, the number of additional counts appears to have relatively little affect on the type or severity of sentence imposed; since the maximum penalties provided for most federal offenses are so far in excess of the average sentence imposed, there is little need to multiply the charges to gain additional leverage against defendants.

[2/] See Alschuler "The Prosecutor's Role in Plea Bargaining," 36 U. Chi. L. Rev. 50, 85 (1968)

* There are no Tables 15 - 19.

Table 20

Revisions of Offenses Charged, between Referral to U.S. Attorney and Filing of Formal Charges in District Court

	Defendants %	
No change in offenses charged	57.3	
Substitution of offense with equal penalty	6.6	
No change in maximum penalty - subtotal		63.8
Addition of conspiracy charges	8.4	
Addition of similar substantive charges	3.3	
Addition of other substantive charges	4.7	
Increased penalty - subtotal		16.4
Offenses(s) dropped	14.6	
Substitution of offense with lower penalty	5.2	
Decreased penalty - subtotal		19.7
Total	100%	
Number of Defendants[1/]	213	

1/ Excludes transfers under Federal Rule 20, since referral and indictment charges against these defendants reflect different factors. Also excludes 33 defendants indicted on the date of referral.

The degree of multiplicity in the indictment and information charges filed is shown in Table 21. Some offenses in our sample, such as interstate stolen car conspiracy and thefts from interstate shipment, never involved more than a single count; at the other extreme, the bribery charges all involved more than one offense. Tax fraud cases typically charged multiple counts (one for each year the defendant underpaid or failed to file), and other frauds also involved numerous charges (e.g., one mail fraud count for each use of the mails in furtherance of the scheme). Overall, 43 percent of the local[3/] prosecuted defendants were charged with a single count, and two-thirds were charged with a single offense. Thus, in a substantial number of cases, any plea bargaining efforts would , of necessity, have to involve either the possibility of substituting a lesser included offense, or an understanding as to the sentence to be recommended (or not opposed) by the government; bargains aimed simply at reducing the maximum penalty available to the judge are often unavailable. The nature of sentence recommendations could not be examined directly in this study, but the implicit "price" of going to trial will be discussed in a later section.

[3/] Transfers under Federal Rule 20 were excluded because the charges filed in this district would reflect the plea agreement required for transfer.

Table 21

Number of Counts and Offenses Charged in District Court, by Offense

Offense Category	charged with a single count	multiple counts--one offense	multiple offenses	No. of Defendants (= 100%)[1]
violent	75%	12.5%	12.5%	8
employee mail theft	66.7%	33.3%	--	15
other mail theft	35.3%	23.5%	41.2%	17
interstate shipment	100%	--	--	12
cars: conspiracy	100%	--	--	21
other theft	41.7%	--	58.3%	12
drugs:				
marijuana	51.7%	--	48.3%	29
cocaine	26.7%	6.7%	66.7%	15
heroin	21.7%	39.1%	39.1%	23
other	--	--	100.0%	4
tax fraud	15.4%	69.2%	15.4%	13
other fraud	28.6%	71.4%	--	14
embezzlement	66.7%	--	33.3%	3
interstate forgery	11.1%	66.7%	22.2%	9
other forgery	37.5%	37.5%	25.0%	8
counterfeiting	40.0%	--	60.0%	5
weapons	18.2%	9.1%	72.7%	11
extortion	33.3%	50.0%	16.7%	6
bribery	--	--	100.0%	8
all other	38.4%	46.2%	15.4%	13
total offenses	43.4%	23.6%	32.9%	246

[1] Excludes transfers received under Federal Rule 20.

As for the alternative devices for narrowing the sentencing discretion of the judge, namely, conviction of lesser included offenses, or the substitution of lesser charges by means of a superseding indictment or information--neither appeared to be utilized in the sample cases. Defendants were always found guilty "as charged" of one or more counts, and superseding charges generally involved technical amendments or corrections, rather than increased or reduced charges.

Table 22 focusses on the charges against those defendants in our sample who plead guilty or were convicted at trial. As with the overall sample of prosecuted defendants, a large proportion of convicted defendants were originally charged with a single count, and this was particularly true of defendants convicted at trial.[4/] Tried defendants were also slightly more likely to be charged with multiple counts of a single offense. These findings suggest that the degree of "bargaining room" could be one of the factors determining whether a given case will be negotiated or tried. Even if the actual number of counts and offenses convicted is unrelated to the severity of sentencing in most cases, it is likely that defendants would be more satisfied with a "deal" which produced some visible reduction in the

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[4/] Among defendants acquitted at trial, the proportion of one-count charges was even higher: 80%. Overall, 67% of trials involved one count.

TABLE 22

Counts and Offenses Charged and Convicted, by Method of Disposition

		Multiple Counts one offense		Multiple Offenses		
	single count	convicted of all	counts dropped	convicted on all charges	counts or offenses dropped	Total convicte (=100%)
Plea of Guilty	36.8%	14.1%	12.4%	6.4%	30.3%	185 1/
Tried and Convicted	60.0%	20.0%	10.0%	0	10.0%	20
TOTAL	39.0%	14.6%	12.2%	5.9%	28.3%	205

1/ Excludes Rule 20 transfers. Includes three defendants who pleaded guilty on the day set for trial

scope of the government's case. Alternatively, it may be that prosecutors and defense attorneys are reluctant to try multi-charge cases.

As for those cases where charge reduction was possible, pleas and trials show a similar pattern; multiple count, one-offense cases are somewhat more likely to result in conviction on all counts, whereas multiple offense cases almost always involve dropping of counts and/or offenses. However, in the case of guilty pleas, two-thirds of the defendants charged with multiple counts or offenses were convicted of fewer than all charges, whereas only one-half of the multi-charge defendants convicted at trial were acquitted of some charges. Thus, if the plea and trial cases are assumed to be comparable, it would appear that a plea of guilty often obtains charge reductions which would not be achieved at trial. As we shall see, however, these two groups of defendants are <u>not</u> comparable in a number of respects, and the effects of plea bargaining are difficult to assess.

Whether or not plea and trial cases are comparable, it is clear that the charge-reduction process, if not the end result, is quite different in these two modes of disposition. Table 23 focusses on the nature of charge reduction in guilty plea cases where there was room for bargaining (i.e., excluding one-count cases). Overall, offenses (rather than extra counts) were

TABLE 23

Nature of Charge Reductions in Multi-charge, Guilty Plea cases, by Offense

Offense Category	Convicted on all Charges	Offenses Dropped 1/	Counts Dropped	Total Multi-charge Defendants (=100%
employee mail theft	50%	-	50%	4
other mail theft	27%	55%	18%	11
misc. theft	14%	86%	-	7
drugs: marijuana	18%	82%	-	11
drugs: cocaine	13%	75%	13%	8
drugs: heroin	69%	19%	13%	16
other drugs	-	100%	-	4
tax fraud	55%	18%	27%	11
other fraud/embezz.	70%	10%	20%	10
forgery/ counterfeiting	18%	18%	27%	11
weapons	29%	71%	-	7
extortion	-	-	100%	4
bribery	-	43%	57%	7
all other 2/	17%	33%	50%	6
TOTAL	32.5%	41.9%	25.6%	117

1/ Includes six defendants against whom both offenses, and additional counts of convicted offenses, were dropped.

2/ Includes robbery, assault, perjury and miscellaneous offenses.

most often dropped, and this practice was particularly common in theft, marijuana, cocaine, and weapons cases. Extra counts tended to be dropped when only one offense was charged; three-fourths of the "counts dropped" defendants shown in Table 23 were charged with one offense. Certain types of offense seem particularly likely to result in conviction on all charges, namely, heroin and various fraud offenses. These differences suggest the possibility of different plea bargaining policies on the part of the prosecutor, presumably aimed at obtaining more severe penalties in such cases. If so, however, this goal is only partially achieved: heroin cases do tend to receive harsher sentences than other drug offenses, but the number of fraud counts convicted does not seem to lead to higher penalties.[5/]

2. Method of Disposition

Table 24 shows how the local cases in our sample were disposed of, by offense. Acquittals and dismissals are so rare that the sample plea and conviction rates of these offenses vary within a narrow range, and the differences shown in the table are often due to the presence of a few large cases. The data does serve to suggest that some offenses (e.g., hard drugs; tax fraud rarely result in an immediate plea of guilty, perhaps because such cases are more complex

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[5/] See discussion at p. 94, infra.

TABLE 24

Method of Disposition by Offense

Offense Category	Initial Plea of Guilty	Later Plea of Guilty	Total Plea Rate	Found Guilty at Trial	Total Conviction Rate	Acquitted	Dismissed	Total No. of Defendants (=100%)
violent	13%	63%	75%	13%	88%	--	13%	8
employee mail theft	20%	67%	87%	7%	93%	7%	--	15
other mail theft	6%	82%	88%	6%	94%	--	6%	17
interstate shipment	42%	25%	67%	25%	92%	8%	--	12
cars (conspiracy)	5%	62%	67%	24%	90%	5%	5%	21
other theft	--	67%	67%	--	67%	--	33%	12
drugs:								
marihuana	4%	68%	72%	--	72%	20%	8%	25
cocaine	--	91%	91%	--	91%	--	9%	11
heroin	--	86%	86%	5%	91%	9%	--	22
other	50%	50%	100%	--	100%	--	--	4
tax fraud	8%	85%	92%	8%	100%	--	--	13
other fraud	21%	71%	93%	--	93%	--	7%	14
embezzlement	--	100%	100%	--	100%	--	--	3
interstate forgery	20%	60%	80%	20%	100%	--	--	5
other forgery	33%	67%	100%	--	100%	--	--	6
counterfeiting	20%	60%	80%	20%	100%	--	--	5
weapons	20%	70%	90%	10%	100%	--	--	10
extortion	17%	83%	100%	--	100%	--	--	6
bribery	63%	25%	88%	13%	100%	--	--	8
perjury	--	33%	33%	67%	100%	--	--	3
all other offenses	--	63%	63%	13%	75%	--	25%	8
Total[1/]	13%	68%	81%	9%	90%	4%	6%	228

[1/] Excludes transfers received under Federal Rule 20 (which require a plea of guilty).

or less likely to receive probation (see table 26, infra). On the other hand, most of the bribery defendants (all of whom received custody sentences) entered an initial plea of guilty, presumably to minimize the embarrassment of lengthy court proceedings. Table 24 also shows clearly that, whereas guilty pleas represent a fair cross-section of the offenses in our sample, this is not true of either trials or dismissals; interstate shipment and stolen car conspiracy defendants accounted for one-third of the defendants disposed of at trial, and five defendants in one large marijuana conspiracy case represented one-half of all acquittals. Defendants charged with non-conspiracy auto theft accounted for almost one-third of the dismissals.

The overall dismissal rate of six percent, shown in Table 24, actually overstates the proportion of cases "lost" by the prosecution. All thirteen of these dismissals were entered at the request of the government, and only three appeared to reflect the adverse progress of the case; one defendant died, one was dropped four months after his co-defendant pleaded guilty, and one was dropped following a successful motion to suppress the principal piece of evidence. Of the remainder, three defendants were apparently dismissed in favor of more serious state or federal charges; three appeared to have cooperated

in the prosecution of their co-defendants; and the other four were charged with offenses so trivial that the decision to prosecute may have been a mistake. (e.g., a one-car, one defendant auto theft). In most of these cases, the apparent reasons for dismissal are very similar to the reasons for declination previously examined, and it does not appear that conviction was ever seriously attempted. If all but three of these dismissals are viewed as, in effect, belated "declination," the actual conviction rate for "real" prosecutions could be as high as 95 percent! This figure is not implausible, given the extremely high degree of selectivity implicit in the overall declination rate of 79 percent; it is not unreasonable to assume that the cases not declined or dismissed display a very high degree of provable guilt. In a system such as this, the most interesting question thus may not be why so many defendants agree to give up their right to trial, but rather, why the "normal" mode of disposition -- plea bargaining -- breaks down in certain cases. What causes "plea bargaining failure"?

One determinant of the method of disposition could be different types of defense counsel. As noted in an earlier discussion, defense attorneys in the Northern District may be either government employees (Federal Defender Staff), government com-

pensated (Federal Defender Panel), or privately-retained. As shown in Table 25, these three types appear to be equally involved in dismissals, but panel and retained attorneys are more likely to go to trial than are full-time government defense counsel.[6/] Since panel attorneys are actually "private" practitioners being paid to handle the particular case, these differences might suggest that public defenders are less aggressive in their defense efforts, less interested in trial experience for its own sake, or more adapted to the "assembly-line" processing of defendants with a high probability of provable guilt. However, the differences in the types of offenses typically handled by the different attorney types (See Table 10 , supra), provide an equally plausible explanation for these differences. On the basis of our data, it is not possible to say whether , for example, major conspiracy cases are more likely to go to trial because they involve attorneys who prefer that mode of disposition, or whether the nature of these cases (or defendants) determines the likelihood of trial.

[6/] The proportion of acquittals won by private attorneys in our sample may be exaggerated somewhat by the presence of one extremely large marijuana case, handled almost entirely by private attorneys. All five tried defendants in that case were acquitted.

TABLE 25

Method of Disposition,
by Type of Defense Counsel

	Federal Defender: Staff		Federal Defender: Panel		Privately Retained	
	%		%		%	
Plea of Guilty	89.2		82.8		78.4	
Convicted at Trial	2.7	5.4	10.3	12.1	10.4	16.8
Acquitted	2.7		1.7		6.4	
Dismissed	5.4		5.2		4.8	
Total	100%		100%		100%	
Number of Defendants[1/]	37		58		125	

1/ Excludes transfers received under Federal Rule 20.

There are other indications, however, that the method of disposition is selected by defendants or by the prosecution, not by defense counsel. As Figure 3A and Table 24 indicate, one-third of defendants who go to trial are acquitted,[7/] which is inconsistent both with the high overall plea rates, and with the high degree of pre-indictment screening. Such screening should serve to eliminate "weak" cases, and if a substantial number remained, we would expect more defendants to contest their cases at trial. One way to harmonize these findings is to hypothesize that there are a certain number of cases which are "weak" enough to result in acquittal, but not so clearly insubstantial as to lead the prosecution to decline or dismiss. These borderline cases thus should constitute one type of "plea bargaining failure."

The existence of these cases poses a problem for the prosecutor; if only they go to trial, he may find himself with an embarassingly high acquittal rate, which not only reflects on the skill of his office, but also might tend to encourage additional defendants to choose trial. Moreover, the "weak" cases which result in conviction at trial may receive sentencing leniency from the court, in recognition of the

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7/ Published court statistics show that the acquittal rate in the Northern District varied between 27% and 33% in fiscal years 1973 through 1976. See Administrative Office of U.S. Courts, Annual Report of the Director FY1973, Table D-7; Id, FY1974; Id., FY1975; Id., FY1976.

marginality of the evidence; this tends to reduce the weighted convicted rate (conviction rate times average sentence severity), thus further encouraging defendants to choose trial over plea disposition. Finally, prosecutors may feel that some cases require few if any sentence concessions, in light of the seriousness or prosecution priority of the offense, or that such cases will yield greater deterrent impact if the sentence is imposed after public trial.

For all of these reasons, the prosecutor may refuse to bargain in certain cases, thus forcing the case to trial unless the defendant agrees to plead guilty in return for nothing other than the saving in time and legal expense. Some defendants will still decide to plead guilty -- perhaps to avoid the possibility of a court-imposed "penalty" for not doing so (see below), but in general, we would expect that the fewer the concessions by the prosecutor, the more willing the defendant should be to submit to trial, in hopes of securing outright acquittal. In addition, the more serious the offense, the more attractive the possibility of acquittal -- however remote -- will appear, and if a custody sentence appears a certainty in any event, there may be little risk of receiving a court-imposed "penalty" which would not be substantially eliminated by parole authorities.

An examination of the cases in our sample which went to trial tends to support these hypotheses. 15 of the 30 defendants were charged with offenses which receive special prosecution priority (i.e., conspiracy; public corruption; violent offenses; and perjury), and another eight defendants were charged with offenses which appeared to be of greater than average seriousness, compared with other offenses of the same category (i.e., larger dollar amount of loss; "commercial" violations of weapons or nationality laws; tax "evasion," as opposed to "failure to file"). All but one of the other seven trials was of average seriousness, for its offense type.

Thus, it appears that a certain number of relatively serious cases may be "selected" for trial by the interaction of the prosecution and defense considerations suggested above. These cases, plus the "weak" cases which are more likely to result in acquittal, make it very difficult to compare defendants who plead with those who go to trial and are convicted. Notwithstanding this difficulty, it is sometimes suggested that many defendants who plead guilty would be acquitted or dismissed if they contested their cases;[8/] moreover, it is generally believed that defendants convicted at trial receive

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[8/] See Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 Harv. L. Rev. 293 (1975).

"substantially more severe" sentences than they would if they had pleaded guilty.[9/] Both of these assertions rely on the assumption that cases going to trial are "comparable" to cases disposed of by plea, which our findings suggest is unlikely. Indeed, to make this assumption is to presuppose that the system lacks any degree of rationality in the determination of the method of disposition. In the federal system at least, pleas and trials are not "randomly selected" from among the total group of defendants prosecuted. We shall return to this problem after a preliminary examination of the factors which affect sentencing within the guilty plea group.

9/ See National Advisory Commission on Criminal Justice Standards and Goals, Report on Courts (1973), at 48.

3. Sentencing Patterns

In the federal system, sentences are imposed by the judge who received the plea or presided over the trial of the defendant. Recommendations are sometimes made by the prosecutor or, in the Northern District, other judges who sit on the court's Sentencing Council,[10] and both of these influences may serve to encourage consistent sentencing in cases heard by different judges. Some disparity in the sentencing of "similarly situated" offenders still remains, however,[11] and our study did not attempt to measure and analyze these variations. Instead, we have focused on a few case attributes, such as the offense and dollar amount of loss, in an effort to determine whether the average sentences imposed in different types of cases form any consistent pattern. In an effort to control for the effects of method of filing and disposition, we will first examine sentences imposed in local cases where a plea of guilty was entered.

The three basic sentencing alternatives available to federal judges are (1) commitment to a federal penitentiary, reformatory or camp ("Custody of the Attorney General"); (2) supervision by the U.S. Probation Service, with or without special non-custodial conditions;[12] and (3) a combination of a short sentence (six months or less) in a "jail-type" or "treatment" institution followed by a term of probation ("split sentence").[13] Any of these sentences may be combined with a fine, where authorized by the

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10/ See Diamond & Zeisel, "Sentencing Councils: A Study of Sentence Disparity and Its Reduction," 43 U.Chi.L.Rev.109 (1975)

11/ Id.

12/ In the present study, suspended sentences not involving any period of probationary supervision are grouped with probation sentences.

13/ 18 U.S.C. § 3651.

statute defining the offense, and a fine may be imposed as the only penalty ("fine only").

Table 26 shows how these different sentence types were used in local guilty plea cases, by offense. Certain categories, such as violent offenses, non-employee mail theft, heroin offenses, extortion and bribery display a very high incidence of custody sentences, whereas employee mail theft, miscellaneous thefts, and marihuana offenses generally receive probation. The magnitude of these differences suggests a high degree of consensus in sentencing policy among judges and prosecutors in the Northern District, which we will examine further at the conclusion of this section. These differences also mean that any more detailed analysis of sentencing patterns must control for the possible effects of the offense variable.

An analysis of the effect of different types of defense counsel illustrates this problem. Table 27, which summarizes the sentences received by defendants with each counsel type, suggests that Federal Defender Staff attorneys are more effective in securing non-custodial sentences. As previously indicated, however, the three attorney types handled very different kinds of cases; private attorneys handled almost all of the extortion, bribery, and income tax cases, and these offenses tended to receive custody or a split sentence. Panel attorneys handled a high proportion of the counterfeiting and non-employee mail theft cases, which also received frequent custody sentences. The contribution of these attorneys could be one factor which caused the differences in sentence types, between

TABLE 26

Sentence Type, by Offense

Local Guilty Plea Cases Only

Offense Category	Custody of the Attorney General	Jail plus Probation	Probation or Suspended	Fine Only	No. of Defendants (100%) 1/
Violent	83%	-	17%	-	6
employee mail theft	-	-	100%	-	13
other mail theft	60%	-	40%	-	15
cars: conspiracy	29%	21%	50%	-	14
other theft	6%	25%	63%	6%	16
drugs:					
marihuana & other	-	18%	82%	-	22
cocaine	30%	10%	60%	-	10
heroin	68%	11%	21%	-	19
tax fraud	25%	33%	42%	-	12
other fraud/ embezzlement	13%	19%	69%	-	16
forgery & counterfeiting	43%	14%	43%	-	14
extortion & bribery	77%	-	8%	15%	13
all other 2/	20%	13%	40%	27%	15
Total local pleas	31.9%	13.5%	50.8%	3.8%	185

1/ Excludes transfers received under Federal Rule 20 and defendants convicted at trial.

2/ Includes weapons, perjury, and miscellaneous offenses.

TABLE 27

Sentence Type by Type of
Defense Counsel, Guilty Pleas Only

	Federal Defender Staff	Federal Defender Panel	Private Attorney
	%	%	%
Custody of the Attorney General	21.2	33.3	33.7
Jail Plus Probation (or "split sentence")	18.2	14.6	12.2
Probation or Suspended Sentence	60.6	52.1	46.9
Fine Only	0	0	7.1
Total	100%	100%	100%
Number of Defendants	33	48	98

these offense groups, or the differences could be due to the cases themselves.

In an effort to separate these effects, we examined sentencing by attorney type within three major offense categories which included fairly equal proportions of each attorney type, as well as considerable sentence variation. Among the 14 defendants who pleaded guilty to one count of conspiracy to transport stolen semi-trailers in interstate commerce, sentence severity was equal in cases handled by Federal Defender Staff and Panel attorneys, while private attorneys obtained a higher rate of probation; if trials are included, the sentence severity of all three types is equal. As for non-employee mail thefts (fifteen pleas) and drug offenses involving sale of heroin (eighteen pleas), the defendants represented by staff attorneys received the lightest sentences, while those represented by private attorneys were most likely to receive a custody sentence. However, an examination of the amounts of drug and contraband in these cases yielded an alternative explanation: private attorneys consistently represented the most serious cases, while staff attorneys handled the smallest ones.

When dollar and drug amounts were examined separately, for those offenses with sufficient sentence variation and known amounts, the patterns were strikingly similar to those found in the analysis of the decision to prosecute. Among non-employee mail thefts, the median amount to which defendants receiving custody sentences pleaded guilty was $3,350, whereas the median amount for defendants receiving probation was only $460. For defendants who pleaded guilty to offenses involving heroin, the median amounts were as follows: Custody and split

sentences--63 grams; probation--22 grams. As for defendants pleading to cocaine offenses, the median amount of drug for defendants sentenced to custody or split sentence was 767 grams; for defendants sentenced to probation, the median amount was 275 grams. Given the limitations of our sample size, it is not possible to analyze dollar and drug amounts separately for each type of defense counsel, so we cannot be sure which variable has more explanatory power. At this point, however, we have more corroboration for the offense severity variables; larger dollar and drug amounts appear to be associated both with higher prosecution rates and greater sentencing severity.

We also examined the relationship between sentence severity and the number of counts or offenses to which defendants pleaded guilty. Even if judges are unwilling to impose consecutive sentences, it might be that the presence of more counts or offenses at conviction would encourage greater use of custody sentences, or longer terms. Table 28 compares the sentences imposed on defendants convicted of one, two, and three offenses, following a plea of guilty, and Table 29 shows the effect of multiple counts, controlling for number of offenses.

TABLE 28

Sentence Type by Number of Offenses
Convicted--Guilty Pleas Only

Sentence	One Offense %	Two Offenses %	Three Offenses %
Custody of the Attorney General	27.0	54.5	100.0
Jail plus Probation ("split sentence")	13.8	13.6	--
Probation or Suspended Sentence	55.3	27.3	--
Fine Only	3.8	4.5	--
Total	100%	100%	100%
Number of Defendants	159	22	4

The significance of additional offenses appears to be related to the high priority given conspiracy charges in the Northern District. Additional counts of a single offense often reflect a series of acts in a single course of conduct, which the authorities may consider to be a single "crime," with limited indications of broader criminality. Another factor related to the insignificance of extra counts is the relatively narrow sentencing range employed by judges in the Northern District. As previously noted, the average custody sentence in our sample was 2.6 years, which was about one-fourth of the average statutory maximum available in these cases (10.1 years), assuming fully concurrent sentencing.[14/] Apparently, the judges of the Northern District are reluctant to impose heavy custody sentences, perhaps out of respect for the power of the parole board, perhaps to maintain a high plea rate, or perhaps because they feel longer terms would be unjust. In any case, it is clear that the judges are not in need of additional sentencing

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14/ With full consecutive sentencing, the average maximum available in these cases was 16.9 years.

authority in very many cases (the typical statutory maximum is five years), nor could they take extra counts into consideration in custody cases without exceeding the sentencing limits they wish to observe.

Effects of Plea Bargaining on Sentencing. It is generally assumed that plea bargaining results in sentence concessions, and that defendants convicted at trial thus receive more severe sentences than they would have if they had pleaded guilty. Sentence leniency can be dispensed in several ways: (1) It can result from charge reductions which lower the maximum penalty available to the judge (or eliminate a mandatory penalty); (2) sentence recommendations of the prosecutor can lead the court to order a lesser sanction; (3) Even if the prosecutor takes no action, the court can decide to "punish" defendants who refuse to admit their guilt. One judge in the Northern District attempts to distinguish between defendants with a substantial "good faith" defense, and those who simply decide to "roll dice with justice."

However, there are at least two reasons, apart from plea concessions, why we would expect defendants convicted at trial to receive sentences of greater average severity. First, as noted above, there is reason to believe that prosecutors and defendants select trials by differential willingness to bargain, and that many of the trials so selected represent more serious offenses, or at least cases with a high priority within the prosecutor's office (resulting in demands for stiffer penalties). Secondly, defendants convicted at trial represent only a portion of defendants going to trial; the rest are acquitted. Even assuming that trials and pleas are generally "comparable" in terms of overall "strength," and prosecution priority, it is the weakest, lowest priority cases which are most likely to result in acquittal, and which, given a plea of guilty, would have been most likely to result in sentence leniency, reflecting either low priority or continuing uncertainty about the strength of the case. Thus, if the "bottom" drops out, in terms of sentence severity, the defendants

TABLE 30

Sentence Type by Method of Disposition

Sentence	Guilty Plea %	Court or Jury Trial %
Custody of the Attorney General	31.9	60.0
Jail plus Probation ("split sentence")	13.5	30.0
Probation or Suspended Sentence	50.8	10.0
Fine Only	3.8	--
Total	100%	100%
Number of Defendants	185[1/]	20

1/ Includes three defendants who entered a guilty plea on the day scheduled for trial. Excludes 14 defendants received by transfer under Rule 20 of the Federal Rules of Criminal Procedure.

Moreover, a number of offenses with very high probation rates are not represented among the defendants convicted at trial and, as previously suggested, many of the latter defendants were among the most "serious" in their respective offense category.

If defendants were randomly assigned to these different methods of disposition, and the probable sentences of acquitted defendants could be estimated (by interviewing the judge, for example), it would be possible to define the "price" of trial precisely. Obviously, the first condition is illegal, and the second was not feasible, given the "after-the-fact" nature of our research design. However, these conditions may be approximated by a careful matching of pleas and trials, and the results tend to suggest a lower "price" than shown in Table 30. Of the 20 defendants convicted at trial, matches among the pleas could not be found for six, either because no defendants charged with such an offense were disposed of by plea, or because the tried defendant was clearly charged with a much more serious violation than the average plea (e.g., a $10,000 interstate

forgery case, which involved four times the largest amount charged in any plea case).[16/] In some cases matching was fairly easy, since the majority of pleading defendants were codefendants in the same case as the defendant(s) who went to trial. In other cases, the matching is only approximate (e.g., two trial defendants charged with two counts each of perjury before the grand jury were matched with one defendant who pled to the same number of counts of that offense; a postal employee charged with theft of two typewriters was matched with 13 other employees who pleaded guilty to the same offense, involving stolen watches, "test letters," and various thefts of undisclosed amount). Each of the 14 tried defendants is within the range of apparent seriousness for the matched plea cases; eleven appeared to be of equal seriousness; two were above the average for that offense, and one was slightly below.

16/ Corporations were also excluded, since the only possible sentence is a fine.

convicted at trial will tend to receive sentences of greater average severity.[15/]

Table 30 summarizes the extent to which these various factors produce overall disparity in sentences between pleas and trials. If these two groups are "comparable," then it is clear that the "price" of going to trial is a substantially increased risk of receiving a prison sentence, or at least a brief term in jail followed by probation ("split sentence"). However, at least six of the ten acquitted defendants were charged with offenses which would probably have led to probation, so some of the difference shown in the table may be due to loss of these "bottom" cases.

15/ One implication of this argument is that the group of defendants who plead guilty also contains a number of "weak" cases which, if they had gone to trial, would have resulted in acquittal. Thus, plea bargaining raises problems of equity even if careful studies show that there is relatively little added sentence severity imposed on defendants who are convicted at trial; these may not be the defendants who are being treated most unjustly. However, if the "price" of trial is not too great, the probability of coercing guilty pleas from unconvictable defendants is lower.

Table 31 shows the result of this matching exercise. Defendants convicted at trial still receive more severe penalties, but the gap between pleas and trials is narrower than the overall difference shown in Table 30. Moreover, there are still several factors other than plea concessions which could explain this gap. These defendants were matched on the basis of overall offense description, which does not take account of either differential degrees of criminal responsibility within a case, or differences in criminal histories. For the reasons previously suggested, it is likely that prosecutors select the more culpable and repetitive offenders for trial. Finally, there is still the problem of the acquitted defendants, who may represent the least serious, least responsible defendants selected for trial. Of the ten acquittals, five were charged with offenses which permitted matching in Table 27; four involved charges which often led to probation, among the pleading defendants. If these four are treated as, in effect, probation sentences, and the fifth as probable custody, the gap in Table 27 narrows even further; trials would involve 47 percent custody, 21 percent split sentence, and 32 percent probation.

TABLE 31

Sentence Type by Method of Disposition
for Matched Plea and Trial Defendants[1]/

Sentence	Guilty Plea %	Court or Jury Trial %
Custody of the Attorney General	41	57
Jail plus Probation ("split sentence")	13	29
Probation or Suspended Sentence	46	14
Fine Only	0	0
Total	100%	100%
Number of Defendants	87	14
Average Sentence Severity[2]/	4 1/2 points	6 points
Average Length of Comparable Custody Sentences[3]/	2.4 years	2.8 years

[1]/ Guilty plea defendants were "matched" to tried defendants on the basis of offense and amount of loss or contraband.

[2]/ Based on the sentence-severity scale employed in Diamond and Zeisel, "Sentencing Councils: A Study of Sentence Disparity and Its Reduction," 43 U. Chi. L. Rev. 109, 121 (1975).

[3]/ Seven tried defendants who received custody sentences were matched with 33 guilty-plea defendants who received custody terms for similar offenses.

The matching exercise and other "adjustments" described above certainly do not rule out the possiblity that defendants who exercise their constitutional right to trial are "punished" for this decision. Our data does suggest, however, that this penalty is less than might be supposed. Our best estimate of the true differential is shown at the bottom of Table 31, in terms of sentence severity "points" (which permit comparison of different sentence types), and also in terms of the average length of custody terms imposed (which tends to lessen the impact of the "missing" acquittals). A difference of 1½ points overall is equivalent to the difference between three years' probation and a split sentence; or between a split sentence and a year in prison; or between a year in prison and two years in prison. However, the average custody terms shown suggest that the difference is less when that sentence type is used, and any differences remaining may be eliminated by parole decisions, which are generally based on the nature of the offense and

offender, not the method of adjudication.[17] These differences still raise important policy issues--is it proper to favor defendants who plead, and which group has received the "optimum" degree of punishment, relative to the offense? But to the extent that defendants, through their counsel, are aware of the true differential, a "price" this low would not appear to pose a significant risk of generating coerced pleas.

Assuming that there is a "price" for going to trial, how is this penalty exacted? It was previously suggested that charge reductions, resulting in reduced maximum penalties, would be one way to favor defendants who plead. However, an examination of the matched defendants in Table 31 suggests that this method is rarely used; nine of the 14 tried defendants were charged with a single count, and three who were convicted of more than one count received sentences no more

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[17] The U.S. Parole Board recently adopted guidelines for its decision-making based on the severity of the offense (including dollar value of loss of drugs) and probability of parole success. See 47 Fed. Register 37,322 (1976).

severe than similar defendants convicted of a single count. Thus, it appears that sentence recommendations or court-initiated penalties are the source of the sentencing differential shown in the table. This conclusion agrees with our previous finding, in guilty plea cases, that sentence severity is not affected by the number of counts at conviction.

Overall Sentencing Patterns by Offense. We turn now to a further examination of the offense variable, which appears to bear a strong relationship to sentence type and severity. The patterns explored below lend further support to our earlier conclusions about the most basic priorities implicit in the administration of federal criminal justice in the Northern District. The rationale of prosecution and punishment in this district is generally based on deterrence or retribution, not incapacitation or rehabilitation, and the variations in prosecution and sentencing rates by offense reflect a consistent set of relative value judgments.

A threshhold problem concerns the selection of cases for this analysis. Up to now we have excluded transfers into the

district, since these are selected for prosecution by officials in other districts; are transferred only if the defendant agrees to plead guilty; and involve patterns of charge selection and revision which are atypical of this district. When it comes to sentencing, however, these cases conform very closely to the patterns of the Northern District; they more often receive probation, when compared with local plea cases, but this appears to be due to the fact that the transfers (which ususally originate in smaller districts) are generally less serious violations, in terms of dollar amounts, drug amounts, conspiracy charges, and other factors. Accordingly, the transfers will be included in our summary of sentencing patterns by offense.

We have also been excluding cases disposed of at trial from certain analyses, so as to eliminate whatever effect the method of disposition itself might have. However, we also recognized that cases going to trial often represent the most serious cases in that offense group, so that some added sentence severity would be expected. Thus, in comparing the sentences

imposed in different offense groups, there are possible distortions both from including and from excluding the tried defendants. Despite the common assumptions about pleas and trials, we have decided to adopt the "null hypothesis" for purposes of comparing sentences, and include all sentenced defendants.

Table 32 summarizes the sentencing patterns within each offense category represented in our sample. If non-probationary sentences, particularly custody of the Attorney General, are taken as a measure of seriousness or priority, the sentencing patterns look remarkably similar to the relative prosecution rates examined previously (see Table 14, supra). Violent offenses, non-employee mail thefts, heroin offenses, extortion and bribery all show very high gross and adjusted prosecution rates,[18/] and very high probabilities of receiving a custody sentence. When split sentences are included in the measure of

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18/ Extortion and bribery are not shown separately in Table 14, due to the small number of cases, but virtually all such cases in our sample were prosecuted.

TABLE 32

Sentence Type, by Offense

Offense Category	Custody of the Attorney General	Jail plus Probation	Probation or Suspended	Fine Only	No. of Defendants (= 100%)
violent	85.7%	--	14.3%	--	7
employee mail theft	--	--	100.0%	--	14
other mail theft	62.5%	--	37.5%	--	16
interstate shipment	27.3%	18.2%	54.5%	--	11
cars: conspiracy	36.8%	26.3%	36.8%	--	19
cars: no conspiracy	--	--	100.0%	--	3
other theft	--	22.2%	66.6%	11.1%	9
drugs:					
marihuana	--	13.6%	86.4%	--	22
cocaine	27.3%	9.1	63.6%	--	11
heroin	70.0%	10.0%	20.0%	--	20
other	--	50.0%	50.0%	--	4
tax fraud	23.1%	38.4%	38.4%	--	13
other fraud	7.7%	15.4%	76.9%	--	13
embezzlement	25.0%	25.0%	50.0%	--	4
interstate forgery	20.0%	40.0%	40.0%	--	5
other forgery	28.6%	14.3%	57.1%	--	7
counterfeiting	71.4%	14.3%	14.3%	--	7
weapons	30.0%	20.0%	40.0%	10.0%	10
extortion	66.7%	--	16.7%	16.7%	6
bribery	87.5%	--	--	12.5%	8
all other	30.0%	20.0%	20.0%	30.0%	10
Total	33.3%	15.1%	48.4%	3.2%	219

sentence severity, two other high prosecution priority offenses--conspiracy auto theft and tax fraud--also show high sentence severity. The three major drug types show the same pattern of priority in sentencing as in prosecution; marijuana is least "serious," heroin is most serious, and cocaine falls in the middle. The similarity of these rankings is all the more impressive considering that one effect of heavy pre-trial screening (low prosecution priority) is to weed out the most trivial cases. Thus, from a purely statistical point of view, one might have predicted an inverse relationship between prosecution rates and sentencing severity.

Mail theft by postal employees is the only offense with a high prosecution rate but low sentence severity. This appears to be a case of unusually heavy pressure from the law enforcement agency (the Postal Service) during the Christmas mail period, which results in prosecution of many very trivial thefts; amounts of five or ten dollars are common, unlike the very high "de minimis" level applied to other offenses by the

U.S. Attorney's Office. The Postal Service feels the need to deal strictly with dishonest employees, but the federal courts are unwilling to impose heavy penalties for such relatively minor offenses.

Further analysis of these sentencing patterns suggests a mixture of deterrent and retributive sentencing philosophies. The use of short jail terms, for example, appears to be rather selective. In tax cases these sentences are probably designed to achieve the deterrent effects of a custody sentence without seriously disrupting an otherwise law-abiding life-style--the "taste of jail" philosophy. This approach may be followed in other cases too, but an alternative explanation is that these sentences reflect compromise or ambivalence as to the seriousness of the offense. Conspiracy car thefts, "other drugs" (amphetamines), and interstate transport of forged securities may appear insufficiently serious to merit a prison sentence, but too serious for probation. The average jail sentence imposed--120 days--may seem an appropriate means of making a deterrent "statement" about these offenses.

The imposition of fines, either alone or in combination with other penalties, is also highly selective. Naturally, a fine is the only penalty available for a corporation or other individual, and half of the "fine only" sentences involved such defendants. In serious cases the fines can be very high (e.g., $50,000 in one bribery case), but the normal range is closer to $2,000. A fine is most often combined with probation (18 percent of these sentences), and is sometimes used in conjunction with a split sentence (12 percent). In terms of offense, such combination fines were most often imposed in fraud (31% of these cases) and in conspiracy car theft cases (32%). Most of the other "fine-plus" sentences were imposed in mail theft and drug cases. The use of fines in fraud, drug, and conspiracy theft offenses may be based on the assumed profitability of these crimes; fines for mail theft are harder to justify, given the low dollar amounts involved.

A comparison of custody sentence lengths within these offense categories sheds further light on sentencing philosophy. As previously indicated, the average custody sentence in our

The average term of probation in our sample was 3.0 years (3.3 years for probation components of split sentences), which is much closer to the statutory maximum (five years) than most custody sentences. Probation terms seem unlikely to have any significant general deterrent effect, but they might be viewed as encouraging some defendants to abstain from criminal involvement during the period of supervision (a form of temporary, "special" deterrence), and some conditions of probation (e.g., drug or alcohol treatment) are clearly intended to promote rehabilitation. The most likely function of probation, however, and the hypothesis which best explains the lengthy terms imposed, is retribution. If defendants who receive these sentences are considered to have "gotten off" with a lesser penalty than incarceration, judges may feel that the symbolic value of a longer probationary term is a necessary substitute for greater sentence severity.

A Postscript on Mandatory Sentencing. The present study, by focussing on average sentences, has tended to ignore the large degree of variation within groups of defendants charged with

fairly similar offenses. The problem of such disparity is one explanation for the recent rash of proposals for mandatory sentencing,[19] under which the offense at conviction determines, within a fairly narrow range, the sentence which must be imposed. Some of these proposals also call expressly for some degree of mandatory consecutive sentencing.[20]

Our study has shown that the number of counts at conviction is a poor predictor of the sentence imposed; that average custody sentences imposed are much lower than statutory maxima; and that sentencing levels, by offense, do not always correlate with the levels of seriousness implicit in statutory maxima.[21] Thus, the present system is very far removed from "fixed price"[22]

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[19] See, e.g., Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing, McGraw-Hill, 1976.

[20] Id., 27-28; 49-50.

[21] For example, the weapons offenders in our sample received average custody terms of 1.5 years; the statutory maximum for a single count is 10 years. 26 U.S.C. §5871. Seven sample defendants convicted of conspiracy to transport stolen semi-trailers received average custody sentences of 2.6 years, and two received the statutory maximum of five years. 18 U.S.C. § 371.

[22] See F. Zimring, "Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform" (1976).

sentencing, but the results achieved form a consistent and rational pattern of law enforcement.

From these results, one could draw two very different conclusions about the need for mandatory sentences. Some would say that this "lawless" approach is precisely why rigid controls are necessary. However, the degree of variance between the present system and mandatory sentencing, plus the apparent coherence of the de facto policies, must caution us against attempting so thorough and sudden a change. The policies being pursued in this District appear to be shared by both prosecutors and judges, and one cannot help thinking that these decision-makers would find ways to continue the pursuit of justice as they define it, despite attempts to drastically limit their options. Certainly the massive scale of prosecutorial discretion in the federal system, as documented in this study, provides substantial potential for rigging the "price list," and thereby defeating mandatory penalties. Existing devices, such as guidelines for prosecutorial and judicial discretion, may provide more effective safeguards against arbitrary administration of criminal justice.

D. Arrest and Pre-conviction Release Policies

All prosecuted defendants, except fugitives, and a certain number of defendants who are eventually declined or transferred to other authorities, are arrested or otherwise subjected to official restraint pending the disposition of the charges. Under the Bail Reform Act of 1966,[1] arrested defendants are to be released on their own recognizance, or under the least restrictive conditions which will "reasonably" assure their appearance in court as needed. Such conditions may include (1) custody or supervision by designated parties, (2) restrictions on travel, associations, or place of abode, (3) execution of an appearance bond, with a deposit of cash up to 10% of the amount of the bond ("10% bond"), (4) execution of a bail bond with sureties, (5) deposit of 100% of the bond amount in cash, or (6) any other condition (including detention after certain hours of the day) that is "deemed reasonably necessary to assure appearance."

Defendants who are unable to meet their release conditions, or who are waiting to have release conditions set, are held in custody of the U.S. Marshal. During the period covered by our study the only federally operated pretrial detention facility in the Northern District was the Marshal's lockup in the courthouse building, which was used solely for daytime detention of persons awaiting hearings.[2] Thus, defendants

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[1] 18 U.S.C. § 3141, et seq.

[2] Subsequently, the U.S. Bureau of Prisons opened a combined detention and correctional center in Chicago. See text at n. 14, infra.

being held overnight had to be housed in local county or city facilities, on a contract basis. Typically, defendants arrested in the evening, or on Sunday, would be held in the main Chicago Police lockup until they could be brought before a magistrate; at that point, if they were not released or turned over to other authorities (the usual procedure with interstate fugitives), they would be transferred to the Cook County Jail. The jail formerly held all federal prisoners together in a single tier, but during the period of our study they were scattered throughout the institution.

As part of a related study, members of our project and U.S. Bureau of Prisons staff interviewed all federal prisoners at the jail as of June 23, 1975. At that point (and during most of the period of our study) the jail was extremely overcrowded, with many prisoners lacking even a bed and eating utensils. Those prisoners with beds were generally held two-to-a-cell, in a 6-by-8-foot space originally designed to hold one person. Most of the federal prisoners interviewed spent their days in idleness, and the un-air-conditioned tiers where they were confined were dark and extremely foul-smelling. The jail itself is located about five miles from the center of town (the site of the federal building and most lawyers' offices) and is not easily reached by public transportation. Prisoners are further isolated by the infrequent visiting times (two days per month for a given tier) and by the restrictions on telephone usage (one call per prisoner).

In light of such severe detention conditions, the nature and timing of pretrial release decisions take on major

importance; a delay in bail-setting or inability to make bail results in confinement which can only be described as punitive. On the other hand, a humane desire to avoid imposing such confinement could lead to excessively lenient release conditions, resulting in greater rates of non-appearance and the delay, or permanent avoidance, of criminal sanctions. In the remainder of this section we will examine the nature of bail-setting practices in the Northern District, the rates of release and detention, and the incidence of failure-to-appear problems.

1. Initial and Revised Bond Conditions

Three hundred sixty-eight of the defendants in our sample had release conditions set by a magistrate or judge in the Northern District. All of the possible release conditions mentioned above were used, with the exception of detention "after hours," but the most common choices were personal recognizance (without special conditions) and 10% bond. Table 33 summarizes the initial release conditions set by magistrates and judges in our sample of matters.

Most of the district court bonds were set by the Chief Judge or acting Chief Judge, upon receipt of the indictment from the U.S. Attorney--i.e., prior to arrest and the appearance of defense counsel. Magistrate bonds were generally set after arrest, at the time of the defendant's first appearance before the magistrate. In spite of these differences in procedure, and certain differences in types of offense involved, magistrates and judges set fairly similar bonds for

Table 33

Initial Bond Type, by Judicial Officer and Disposition[1]

Bond Type	Set by U.S. Magistrate, N.D. Illinois: turned over to other authorities[2]	Set by U.S. Magistrate, N.D. Illinois: prosecution declined	Set by U.S. Magistrate, N.D. Illinois: prosecuted	Set by U.S. District Judge after Filing of Indictment or Information	Total[3]
	%	%	%	%	%
Recognizance					
no special conditions	16.3	80.6	48.6	46.1[4]	50.0
third party co-sign	0.0	3.2	4.5	0.0	2.2
other special conditions	4.7	3.2	2.7	1.4	2.4
Subtotal	20.9	87.1	55.9	47.6	54.6
10% Bond	41.9	12.9	35.1	47.6	36.1
Surety Bond	25.6	0.0	4.5	0.0	4.3
100% Cash	9.3	0.0	0.9	4.9	3.3
Combination or Other	2.3	0.0	3.6	0.0	1.6
Total	100%	100%	100%	100%	100%
No. of Defendants	43	62	111	143	368

[1] Excludes seven bonds set by judges and magistrates in other districts.

[2] Includes interstate fugitives and defendants wanted in other districts.

[3] Includes nine defendants still pending final decision as to prosecution; all but one had recognizance bonds.

[4] Includes six defendants who were issued a summons and appeared but who never actually signed a recognizance bond.

prosecuted defendants. Among non-prosecuted defendants, however, the magistrates distinguished sharply between "local" and non-local defendants. The latter--interstate fugitives and defendants wanted for prosecution in other federal districts--most often received 10% or surety bonds; local defendants who were eventually declined by the U.S. Attorney were almost always released on recognizance.

The very high proportion of "OR" bonds among declined defendants, particularly when compared with the bonds set by magistrates in prosecuted cases, suggests that declined defendants are considered to be better release risks; alternatively, bond-setting may actually be an anticipatory "punishment" decision," based on the perceived seriousness of the offense and the probability of conviction. Since risk of flight is arguably correlated with the latter two factors, it is difficult to say which rationale governs bond-setting. As we shall see, declined defendants do have a lower failure-to-appear rate, and the bond-setting policies applied to different offenses suggest that risk of flight is a major consideration. However, this does not necessarily mean that prosecuted defendants who appear as required do so <u>because</u> they posted higher bonds; if the typical federal defendant is simply a very low escape risk, then the higher bonds given to prosecuted defendants are unnecessary.

Table 34 analyzes initial bond-setting practices by offense. In order to permit the size of non-recognizance bonds to be taken into account, all such bonds have been recoded to show

Table 34

Initial Dollar Amount Needed
to Obtain Release, by Offense

Offense Category	No Deposit Required [1]	Less than $1000	$1000 to $9,999	Over $10,000	Total Defendants (= 100%)
Violent [2]	14%	11%	21%	54%	28
Theft	68%	26%	5%	1%	102
Drugs	34%	37%	21%	8%	97
Fraud/Embezzlement	76%	18%	6%	0%	34
Forgery/Counterfeiting	82%	7%	5%	7%	44
Weapons	43%	36%	21%	0%	14
Nonviolent Fugitives and Federal Escape	27%	33%	20%	20%	15
Extortion and Bribery	79%	21%	0%	0%	14
All Other	60%	35%	5%	0%	20
All Offenses	54.6%	25.8%	11.4%	8.2%	368

[1] Includes six defendants who were issued a summons and appeared, but never signed a recognizance bond.

[2] Includes two defendants charged with interstate auto theft and murder (of the owner) under state law. Also includes eight interstate fugitives charged with violent state offenses.

the actual dollar amount required to be posted to obtain release ("release amount").[3] As might be expected, defendants charged with violent offenses had the highest release amounts (often over $50,000), and non-violent fugitives were also given relatively high bonds.[4] Drug and weapons offenders were more likely to receive initial bonds in the middle range (release amounts of $1000 to $10,000). Most other offenders were required to post small amounts or no money at all, and certain offenses, such as fraud, forgery and extortion, are associated with very heavy use of recognizance bonds.[5]

The data sources available to us did not contain detailed background information on each offender, but it seems likely that many of the patterns in Table 34 reflect perceived differences in social class and "community ties," which are believed to represent differential risk of flight. This may also be true of the violent offenders, many of whom were nonresidents of the district.[6] However, the extremely high bond amounts in these cases suggest that predictions of dangerousness are an additional factor; a $1 million cash bond is probably not

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[3] For example, a $5000 10% bond was recoded as $500. Corporate surety bonds were treated as if the entire amount had to be deposited; this may tend to overstate the actual "cost" of release to the defendant, but the face amounts of these bonds were so high that the classification shown in Table 34 would generally not be affected by adopting a lower estimate (e.g., 10%).

[4] Violent fugitives were grouped with violent federal offenders, because the bonds of the former were much more like the latter than they were like nonviolent fugitives.

[5] The "extortion" cases in our sample were nonviolent, generally involving abuse of official powers rather than physical threats.

[6] The 18 violent, out-of-district defendants had by far the highest release amounts: 72 percent were over $10,000. Among "local" violent offenders, 40 percent had bonds between $1,000 and $9,999, and 20 percent had release amounts over $10,000.

intended to deter flight after release but rather to insure continued custody.

About one-sixth of the defendants shown in Tables 33 and 34 received one or more bond revisions prior to final disposition of the charges. Such revisions were most common in weapons cases (36 percent of these defendants) and never occurred in the escape, nonviolent fugitive, bribery and extortion cases. Except for weapons, these revisions do not affect the rank order of offenses by bond size, shown in Table 34. Overall, 59.5 percent of final bonds were recognizance; 33.2 percent were 10% deposit; 3.5 percent were surety bonds; and 2.4 percent required 100% cash deposit. Among weapons offenses, 71 percent of final bonds were recognizance, and the remainder were 10% bonds, generally with release amounts of $500 or less.

2. Summons, Arrest and Release Patterns

Three hundred ninety-six of the defendants in our sample were arrested, transferred from other authorities, or issued a summons; of these, 366 were initially taken into custody within the Northern District of Illinois, and 22 of the other 30 returned to this district prior to final disposition. The total number of "arrests" is greater than the number of defendants who had bond conditions set because some defendants--particularly interstate fugitives--were dismissed or turned over to other authorities immediately after arrest.

Table 35 summarizes the basis for the arrest or appearance of the 396 defendants. Fifteen defendants were issued a summons

Table 35

Process by Which Defendants Were Arrested or Otherwise Appeared

	%
Responded to summons pursuant to local indictment or information	3.8
Arrested or transferred pursuant to local indictment or information	31.1
Arrested or transferred pursuant to local magistrate complaint	21.2
Arrested without a warrant on local federal charges	23.4
Arrested for state authorities or other federal districts	20.4
Total	100%
Number of Defendants	396

after the filing of charges (usually an information) in District Court. Three were corporations, and eight others were charged with income tax violations. Nine of the summoned defendants subsequently signed recognizance bonds; the other six apparently signed nothing, but did appear in court as required. Approximately one-fifth of the 396 defendants were arrested on warrants issued by magistrates and judges in other districts (including fugitive warrants). Among local defendants arrested prior to indictment, arrests with and without a warrant were about equally common. Nearly three-fourths of the no-warrant arrests involved either mail theft or drug offenses; such offenders are often "caught in the act," or even suspected prior to the actual "completion" of the offense (as in the "controlled delivery" of drugs to an undercover agent).

Bond and release information was secured on 366 of the defendants who were apprehended, and 320 of these defendants (87.4 percent) were eventually released under the initial or revised conditions set. Table 36 shows the final release amount in these 366 cases, and the effect these amounts had on the release outcome. Two hundred nineteen defendants--two-thirds of those released--had recognizance bonds, and among defendants required to post money or other security, the probability of release was inversely proportional to the amount required. The released defendants posted amounts ranging from $100 to $50,000, and all obtained release within four days after arrest. Defendants arrested prior to indictment obtained release more slowly than those arrested after indictment, even though the latter

Table 36

Timing of Release by Final Dollar Amount Needed to Obtain Release

Release Outcome	No Money Required	$1 to $999	$1000 to $9999	$10,000 to $99,999	$100,000 or more	Total
	%	%	%	%	%	%
Released on Initial Bond	89.0%[1]	81.6	37.5	5.9	0	76.2
Released on Revised Bond	11.0%	11.5	12.5	17.6	0	11.2
Never Released	0	6.9	50.0	76.5	100%	12.6
Total	100%	100%	100%	100%	100%	100%
Number of Defendants	219	87	32	17	11	366

[1] Includes six defendants who were issued a summons and appeared, but who never signed a recognizance bond.

generally had higher bonds. Seventy-two percent of the post-indictment arrestees spent no time in jail, whereas only 51 percent of the pre-indictment arrestees were never detained. This difference may be due to the greater affluence of defendants arrested after indictment, but it could also be the result of the way in which such arrests and bonds are handled. Twenty percent of these "arrests" actually involved voluntary surrender of the defendant to the U.S. Marshals, and, as previously noted, all post-indictment arrests occurred after bond had been set. Thus, defendants who surrender may be able to arrange for bond money before reporting to the Marshals, and arrested defendants do not need to wait for a determination of bond, as is often the case for defendants arrested on a magistrate's warrant or without a warrant.

Forty-six defendants were never released from custody prior to final disposition of their cases in the Northern District. Twenty-six of these defendants were not prosecuted, of which 24 were "removed" to other federal districts or turned over to local police for extradition to other states (interstate fugitives). The bond sizes among these 26 defendants ranged from very small ($1000 10%) to very large ($1,000,000 corporate surety), with a median release amount of $20,000. Of the 101 defendants who posted cash or collateral to obtain release, only two posted an amount this large. It thus appears that fugitives and removals (who are frequently charged with violent crimes) are given very high bonds to insure that they remain in custody until transferred. The failure of some defendants

to post smaller amounts could be due to indigence, or to bonds in other cases (which we did not examine for the non-prosecuted defendants in our sample). Another likely explanation is that defendants arrested away from home have special problems in raising and transferring bail money.

The other twenty "never released" defendants were all prosecuted. Four defendants were already serving a federal or state sentence, and three had other federal or Immigration Service bonds to meet in addition to the bond in the sampled matter. The remaining 13 defendants were held on bonds ranging from $25,000 10% to $1,000,000 cash, with a median release amount of $5000. Seven of these defendants were drug offenders, three were violent offenders, and the remaining three were charged with fraud, counterfeiting, or escape.

The sixteen "never released" defendants who were not already serving a prison sentence were held in custody for an average of 115 days, pending disposition or transfer to other authorities. Thirteen were convicted and received a prison or jail sentence greater than the time already served in detention; thus, since federal prisoners must be given credit for all time served "in connection with the offense or acts for which sentence was imposed,"[7] the failure of these defendants to obtain pretrial release may simply have accelerated, not increased, their period of incarceration. However, to the extent that a federal penitentiary is a more desirable place

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[7] 18 U.S.C. §3568.

of confinement than a local jail, pretrial detention can involve increased hardship for the defendant. It is also possible that such defendants are hampered in their defense efforts and that the fact of pretrial confinement makes a custody sentence more likely than it would have been if release had been obtained. Pretrial detention in an inadequate jail can also serve to encourage a plea of guilty, but our sample suggests that this is not invariably the case; two of the "never released" defendants were convicted at trial and eleven pleaded guilty, which parallels the overall proportion of trials and pleas in our sample. As for the three other prosecuted defendants who were never released, all were dismissed on the government's motion. One defendant died, and the other two were handed over to state authorities within two weeks of arrest, for prosecution on murder charges.

3. The Incidence of Failure to Appear

Twenty-nine of the 320 released defendants (9.1 percent) failed to appear in court at some point in the proceedings. Of these, 14 returned voluntarily, 3 were re-arrested, and 12 remained fugitives. Those who returned voluntarily did so within a very short time, frequently the next day, and do not seem to have seriously intended to jump bail; their failures to appear were probably accidental or unavoidable. If we take those who were rearrested or remained fugitives as the "real" failures to appear, the overall failure rate falls to 4.7

percent; for prosecuted defendants only, the rate is 6.1 percent, and for non-prosecuted defendants, 1.1 percent. Two defendants absconded prior to the completion of magistrate proceedings,[8] and 13 others failed to appear at some point after the filing of district court charges. The most common time of disappearance was immediately after such filing, prior to the entry of an initial plea: six defendants absconded at this stage.[9] Of the remainder, two fled after entering an initial plea of not guilty, two failed to appear for sentencing, after changing to a plea of guilty, and three failed to surrender to serve their prison sentences. Thus, it seems that failures to appear are spread fairly evenly throughout the adjudication process and do not necessarily occur after lengthy delays.

The latter finding implies that the new federal Speedy Trial Act may not substantially improve appearance rates in the Northern District. The Act requires that defendants be indicted within 30 days of arrest on a magistrate complaint, and trial or a guilty plea must be reached within 70 days after indictment or post-indictment arrest (whichever is later). These limits were chosen in part because it was believed that longer delays lead to undue risks of flight. However, of the 14 prosecuted defendants in our sample who failed to appear

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[8] One of these defendants was subsequently declined by the U.S. Attorney; the other was prosecuted, and was eventually rearrested and convicted.

[9] Another four defendants were indicted but remained fugitives and were never arrested. In a sense, they may also have "absconded" during the filing-to-arraignment period, but they are excluded from the "failure to appear" analysis because they were never released.

and did not return voluntarily, six absconded prior to the expiration of these statutory time limits; moreover, five other defendants fled after conviction--at which point delay is no longer regulated by the Act, and two of these five had previously been processed well within the statutory time limits. The remaining three defendants failed to appear after post-indictment delays of 91, 99 and 120 days. Given the excessive number of exceptions to the Act's time limits,[10] however, at least two of these three would probably have been in "compliance" with the "net" limit of 70 days. Thus, the Act will probably have no measurable impact on appearance rates in the Northern District.

Given the liberal use of recognizance bonds in the district, it might be supposed that defendants with no immediate financial stake would be most likely to abscond, but this is not the case. Although two-thirds of released defendants had "OR" bonds, only eight of these defendants failed to appear. Of the other "real" failures to appear, six had 10% bonds (median release amount: $750, and one had a 100% cash bond in the amount of $4,500). Thus, the failure-to-appear rate for defendants on recognizance was 3.7 percent, whereas the rate was 6.9 percent for defendants required to post cash or a surety bond. Of course, the latter defendants are presumably the ones who were least likely to appear in any case--hence the higher bond requirements, and our data cannot tell us whether the bond amount itself tends to encourage appearance in court. It does

[10] See Frase, note 16, p. 47, supra, at 689-704.

seem, however, that some defendants are willing to forfeit substantial amounts of money to avoid conviction and sentence, while the vast majority appear with no more inducement than the criminal penalty for willful flight.[11]

An examination of the offenses charged against these fugitives casts further light on the nature of the failure-to-appear problem. Seven of the fifteen "real" failures were charged with drug offenses, and since none of these defendants was rearrested, they comprised an even higher proportion (58 percent) of the released defendants who remained fugitives.[12] However, given the large number of released drug offenders in our sample, it is necessary to inquire whether these offenders show a higher rate of non-appearance.

Table 37 compares the non-appearance rates of released defendants in different offense categories.[13] Forgery, immigration, drug, and weapons offenders showed the highest overall failure-to-appear rates, but forgers were less likely to avoid rearrest and become "long-term" fugitives. Other offenses such as theft, fraud, embezzlement, counterfeiting, bribery

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[11] 18 U.S.C. § 3150 provides a maximum penalty of five years' imprisonment and a $5000 fine for failing to appear in a felony case; for misdemeanors, the fine is the maximum for that offense, with a maximum prison term of one year.

[12] In addition, the four fugitives who were never arrested (n. 9, supra) were all charged with drug offenses.

[13] Non-prosecuted defendants are excluded, since they are very unlikely to abscond and may not be comparable to defendants facing actual prosecution in district court.

Table 37

Non-appearance Rates among Prosecuted Defendants, by Offense

Offense Category	Estimated Willful Non-appearance Rate[1]	Long-term Fugitive Rate	Total No. of Defendants Released (= 100%)
forgery	23.1%	7.7%	13
immigration	67.0%	67.0%	3
drugs	9.4%	9.4%	64
weapons	9.1%	9.1%	11
auto theft (conspiracy)	4.8%	4.8%	21
mail theft	3.1%	0.0%	32
all other offenses	0.0%	0.0%	85
	6.1%	4.8%	229

[1] Excludes defendants who returned voluntarily within a few days.

and extortion showed very low non-appearance rates. What most of the latter offenders probably have in common is a relatively high degree of commitment to the local community, unlike many of the drug offenders and most of the immigration violators. Given the importance of foreign sources in the higher-level drug traffic, which is the object of federal prosecution, it seems likely that fugitive drug offenders, as well as immigration defendants, succeed in avoiding rearrest by fleeing the country.

4. Evaluating Release Policies

Our study has shown that the vast majority of defendants apprehended in the Northern District are released immediately or after a very brief time in jail, most often on personal recognizance. Detention is used primarily to hold violent offenders, defendants wanted by other authorities, or defendants who eventually receive a custody sentence. Notwithstanding these liberal release policies, less than five percent of released defendants willfully fail to appear. Moreover, many of these may be aliens for whom no "reasonable" amount of bail would deter flight and whose permanent departure from the country may be a satisfactory disposition of the case. The "system" would appear to be very successful in selecting "good risks" for release, and the low non-appearance rate for defendants on recognizance might further suggest that criminal penalties for non-appearance are an adequate deterrent to flight--one on which state courts might place greater reliance than at present.

However, there is another explanation for these findings which is less complimentary to federal authorities and which also suggests that release on recognizance is not universally effective: the kinds of offenders prosecuted in the Northern District may simply be very good release risks. In part, this could be due to the large proportion of "white collar" and organized crimes prosecuted; such offenders are most likely to have property and family ties, which discourage flight. On the other hand, federal offenses also frequently involve interstate travel, and this greater transiency, relative to state systems, might pose special pretrial release problems. However, it is not so easy to escape the "jurisdiction" of a federal court; unless the defendant is able and willing to leave the country, he is likely to be hunted by federal law enforcement agents wherever he goes. Perhaps for this reason, there was only one failure to appear among the prosecuted "multi-state" defendants in our sample, even though many were released on recognizance.[14/]

For both of these reasons--community ties and nationwide jurisdiction--it is quite possible that federal authorities in the Northern District could make even greater use of summons and recognizance bonds, without substantially increasing non-appearance rates. However, recent improvements in the custodial alternatives

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[14] 12 of the 14 transfers from other districts were released, all on "OR" bonds, and all subsequently appeared as required. 16 other defendants were arrested outside the Northern District and brought back to face local prosecution. 12 were released, mostly on 10% bonds, and one failed to appear. Thus, for these 24 "out-of-state" defendants, the failure-to-appear rate was 4.2 percent; for the other 205 prosecuted defendants who were released, the failure-to-appear rate was 6.3 percent. The latter defendants had a much lower detention rate, however, so the two groups may not be comparable.

to pretrial release may actually encourage magistrates and judges to set higher, rather than lower, bond amounts. In September 1975, the U.S. Bureau of Prisons opened a Metropolitan Correctional Center ("MCC") in Chicago: this modern "high rise" facility, located only two blocks from the federal courthouse, is designed to provide convenient, humane, and secure custody for almost all sentenced and unsentenced federal prisoners in the district.[15] The contrast between the MCC and the former detention conditions of the County Jail is stark; if federal authorities were formerly motivated to keep all pretrial detention to the absolute minimum, they may now feel that it is better to err on the side of over-commitment. Defendants may also be less eager to post bond than they were when confronted with the horrors of the county jail. Both of these factors could cause detention rates and populations to rise substantially.

Countervailing factors are (1) Title I of the Speedy Trial Act of 1974[16] which may discourage detention by applying shorter time limits to defendants in custody;[17] and (2) Title II of the Act, pursuant to which the District now has a Pretrial Services Agency to recommend liberal release conditions and supervise released defendants. As always, a further constraint on detention rates is cost: pretrial prisoners must be fed and clothed, and

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[15] Such centers are operating, or proposed, in a half-dozen major cities.

[16] P.L. 93-619, Jan. 3, 1975; 18 U.S.C. §§ 3161 et seq.

[17] Id., § 3164. This special 90-day time limit for detained defendants only applies in the transition period prior to July 1, 1979.

they occupy units that could otherwise be used to absorb some of the Bureau's burgeoning sentenced population.

All of the latter factors may be sufficient to hold down pretrial detention rates, but it seems unlikely that the District will come any closer than it has to achieving the practical abolition of money bail. The present study suggests that this goal may be particularly approachable in federal courts. Perhaps other districts, with less custodial endowment, will explore further the limits of nonfinancial release.

IV

Conclusion

This study demonstrates the crucial importance of system-oriented analysis of the criminal justice process, and suggests a number of fruitful areas for further research. The vast exercise of discretion prior to the initiation of federal prosecution casts considerable doubt on the validity of studies which focus on court statistics only,[1] and also suggests that attempts to abolish the most visible forms of discretion (e.g., plea bargaining and sentencing) are too easily circumvented. On the other hand, the discretionary decisions of the federal prosecutor and sentencing judges are not necessarily unprincipled; they appear to conform, in general, with reasonable and broadly-accepted goals of law enforcement which could probably be articulated in the form of written rules or policy guidelines.

The achievement of consistency and fairness in the specific case is far more difficult, however, and much more research is needed to determine both the necessity and feasibility of formal administrative, judicial or statutory controls. Further studies, with larger or more focussed samples, should also explore the reasons for "plea bargaining failure;" the mechanism

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[1] See, e.g., Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 Harv. L.Rev. 293 (1975), which, in attempting to prove that many defendants who plead guilty would otherwise be acquitted or dismissed, assumes either (a) that cases filed in different districts are equally provable, or (b) that defendants who plead guilty are comparable, in terms of conviction probability, to defendants who are dismissed or go to trial.

and extent of the true sentencing differential between comparable defendants who plead or go to trial; the relative importance of details such as counsel type and dollar or drug amount, in determining sentence severity; and the extent to which money bail can be further dispensed within nonviolent, "local" federal cases. Given broader access to prosecutor files, it would be possible to assess the importance of prior criminal record or other affirmative criteria shaping the prosecution decision, and the nature of plea bargaining and sentencing recommendations could also be examined more directly than was possible in the present study. With the cooperation of local authorities, the problems of federal/state coordination could be more accurately assessed.

Research efforts should also expand in scope, as well as in depth; the extent of pre-referral screening by federal law enforcement agencies remains unknown, and the exercise of parole discretions could have a substantial impact on the ultimate severity of sentences imposed for various offense and offender types. Only when we have traced and documented the entire system of federal criminal justice can we begin to address the most fundamental, yet elusive, issue of all: the extent to which different law enforcement and adjudication policies affect the incidence of federal crime. Research of this kind cannot tell us what our basic goals and priorities should be, but it does serve to reveal the consequences of past choices, and the prospects for successful innovation or reform.

APPENDIX

Table A-1

Case Size and Defendant Count for Immediate Declinations Sampled

Case Size	Total No. of Cases	Total No. of Defendants
1 def.	213	213
2 defs.	59	118
3 defs.	11	33
4 defs.	4	16
5 defs.	1	5
	288	385

Table A-2

Case Size and Defendant Count for U.S. Attorney Complaints Sampled

Case Size	Total No. of Cases	Total No. of Defendants
1 def.	372	372
2 defs.	56	112
3 defs.	20	60
4 defs.	13	52
5 defs.	2	10
6 defs.	2	12
7 defs.	2	14
8 defs.	1	8
20 defs.	1	20
26 defs.	1	26
	470	686

Table A-3

PROJECT OFFENSE CODES

010 Violent Offenses

011 Homicide

012 Rape (forcible): (Code other sex offenses as miscellaneous)

013 Robbery

014 Aggravated Assault (with weapon or serious injury): (Code simple assault as miscellaneous)

015 Kidnapping (for ransom or as hostages): (Code custody disputes as miscellaneous)

020 Burglary, Larceny, and Stolen Property

022A Mail theft or possession of stolen mail--postal employee

022B Mail theft or possession of stolen mail--other

023 Theft of government property

024 Theft from interstate shipment (TFIS)

025 Transportation or possession of stolen motor vehicle (Dyer Act)

026 Interstate transport or possession of other stolen property (ITSP): Except securities--See 051

027 All other theft, transport, or possession of stolen property

030 Drugs

031 Possession of any controlled substance

032 Sale, distribution, or possession with intent to sell or distribute marijuana or hashish

033 Manufacture of marijuana or hashish

034 Importation of marijuana or hashish

036 Sale, distribution, or possession with intent to sell or distribute other drugs

037 Manufacture of other drugs

038 Importation of other drugs

040 Fraud and Embezzlement

041 Mail fraud

042 Income tax fraud

043 False statements (e.g., giving false statements in bank or or job application or welfare application)

044 Embezzlement

045 Miscellaneous fraud

050 Forgery and Counterfeiting

051 Transportation of forged securities

052 Counterfeiting

053 Other forgery (e.g., forgery U.S. treasury check)

054 Forgery and stolen mail

060 Weapons, Firearms and Explosives

061 Illegal possession or transfer of or dealing in, with no reference to use of weapon in other offense

062 Illegal possession or transfer of or dealing in, with reference to use of weapon in other offense

070 Escape

071 Failure to appear/bond jumping/other escape

072 Unlawful flight to avoid prosecution (UFAP) (non-violent state offense)

073 Unlawful flight to avoid prosecution (UFAP) (violent state offense)

080 Extortion, Racketeering, and Threats (includes white slave traffic)

090 Bribery

100 Perjury

110 Selective Service

120 Miscellaneous Offenses

- 121 Postal Offenses (except mail theft and mail fraud)
- 122 Liquor Laws (IRS)
- 123 Gambling and lottery offenses
- 124 Immigration offenses
- 125 All other
- 126 Civil rights
- 127 Simple Assault
- 128 Bootleg tapes (copyright)
- 129 Custody kidnapping

Table A-4

Codes For Reasons For Declination

Code	
1000	A. Convictability
1100	1. No federal crime
1110	a. No crime by anyone
1120	b. No crime by this defendant
1121	(1) No criminal intent
1122	(2) No criminal act
1200	2. Insufficient evidence of federal crime (other than 3, *infra*)
1210	a. Insufficient to convict anyone
1220	b. Insufficient to convict this defendant or suspect
1221	(1) Re: criminal intent
1222	(2) Re: criminal act
1300	3. Necessary parties unavailable
1310	a. Defendant
1311	(1) Unknown
1312	(2) Never found
1313	(3) Fugitive (found but absconded)
1320	b. Victim
1321	(1) Can't be found
1322	(2) Out of state, incompetent, or other obstacle
1323	(3) Reluctant to prosecute or testify
1324	(4) Questionable credibility
1325	(5) Improper motives
1330	c. Witness(es)
1331	(1) Can't be found
1332	(2) Out of state, incompetent, or other obstacle
1333	(3) Reluctant to testify
1334	(4) Questionable credibility
1335	(5) Improper motives

Code

1400 4. Legal bar
1410 a. Statute of limitations
1420 b. Immunity
1430 c. Illegal procedure
1431 (1) Search
1432 (2) Arrest
1433 (3) Confession

2000 B. Need for/desirability of prosecution
2100 1. Prosecution alternatives (something else being done)
2110 a. Deferred prosecution/pretrial diversion
2120 b. Restitution made or to be made
2130 c. State prosecution
2131 (1) UFAP
2132 (2) Other
2140 d. Prosecution in another federal district_____
2150 e. Civil or administrative remedies_____
2160 f. Other federal charges
2161 (1) Supersede or duplicate present charge
2162 (2) Overkill - other penalties sufficient
2163 (3) Plea bargain
2170 g. Parole or probation revocation
2171 (1) Federal
2172 (2) State
2180 h. Civil commitment, NARA, etc._____
2200 2. Policy against prosecution (prosecution inappropriate)
2210 a. Other agencies decline or recommend against pros.
2211 (1) Referring law enforcement agency
2212 (2) Originating U. S. attorney
2213 (3) Department of Justice

Code	
2220	b. Offense trivial or de minimis
2221	(1) Small amount of contraband
2222	(2) Small amount of loss
2223	(3) Statutory overbreadth or excessive penalty
2224	(4) Isolated act (no conspiracy)/non-commercial (specify)
2225	(5) No interstate impact
2230	c. Characteristics of defendant
2231	(1) Age
2232	(2) Prior record
2233	(3) Family hardship
2234	(4) Other mitigating circumstances
2235	(5) Informer/witness
2240	d. Excessive delay in prosecution
2241	e. Agency misconduct

Chapter 2

"The Decision to Prosecute Federal Criminal Charges; A Quantitative Study of Prosecutorial Discretion"

END