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Bail Revisited

Hans Zeisel

The American bail system has been under serious criticism on a variety of grounds. It has been charged with three specific failures, all of which discriminate against the indigent defendant who cannot make bail: (1) that it keeps in jail defendants who would have returned to court if they had been released, some of whom are not even convicted; (2) that it releases defendants who should not have been released; (3) that the very fact of pretrial detention increases the likelihood that defendants will be convicted and, if convicted, will receive a custody sentence.¹

A comprehensive study of the law enforcement system of New York City permitted a review of some of these problems.² Begun in 1973, this study has as its data base a probability sample³ of 1,888 felony arrests whose itinerary through the system was traced to final disposition. For a subsample of 369 cases, interviews were conducted with the arresting police officer, the assistant district attorney, the defense counsel, and the judge about the respective part each played in the process that culminated

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1. Critical review of the bail system has a distinguished history, for which the following publications may stand as representative: Arthur L. Beeley, *The Bail System in Chicago* (1966; 2d imp., Chicago: University of Chicago Press, 1927); Caleb Foote, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958); Charles E. Ares, Anne Rankin, & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U.L. Rev. 67 (1963); U.S., Department of Justice, Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Poverty and the Administration of Federal Criminal Justice*, report submitted to Robert F. Kennedy, Attorney General of the United States, Feb. 25, 1963 (n.p.); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, report to the National Conference on Bail and Criminal Justice under cosponsorship of U.S. Department of Justice and the Vera Foundation, Inc. (Washington, D.C., 1964); Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125 (1965); A. Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U.L. Rev. 641 (1964); William M. Landes, *The Bail System: An Economic Approach*, 2 J. Legal Stud. 79 (1973); *id.*, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. Legal Stud. 287 (1974).

2. The substance of the articles on bail appearing in this *Journal* is part of my forthcoming book, "The Anatomy of Law Enforcement," to be published by the University of Chicago Press.

3. One drawn by some sort of lottery, which gives each unit in the sampled population an equal chance of being selected. Findings from such a sample can be projected with computable accuracy to the population from which it was drawn.

in the disposition.⁴ The data permit a close-up view of the bail system as it operates in the largest metropolitan court system in the United States.

I. INTRODUCTION

Although the law vigorously insists on the presumption of innocence, and although only about one-fourth of all felony arrests end in a custody sentence of any sort, the law enforcement process begins with the suspected defendant's being taken into custody.⁵ To be sure, within a relatively short time (within 24 hours in New York), this preliminary custody must be reviewed by the arraignment judge. But even at that point, long before any evidence is produced, the majority of the defendants arrested for a felony are kept in custody, albeit conditionally, until such time as they can post the bail set by the judge. For the defendants who cannot make bail, the judge's bail decision may be the most important step in the entire enforcement process.

Denial of bail is a rare event, although the New York law allows the judge to hold without bail a defendant who is charged with a felony.⁶ As a rule, the judge either sets bail or releases the defendant on his own recognizance (ROR). The law lists the circumstances the court must consider in making its bail decision: the defendant's (1) character, reputation, habits, and mental condition; (2) employment and financial resources; (3) family ties and length of residence in the community; (4) criminal record; (5) record of previous adjudication as juvenile delinquent or youthful offender; (6) record in responding to court appearances when required or with respect to flight to avoid criminal prosecution; (7) the weight of evidence against defendant and any other factor indicating the probability or improbability of conviction, or, on appeal, the merit or lack of merit of the appeal; and (8) the sentence that may be or has been imposed.⁷

Figure 1 gives the overall pattern of the bail decisions for defendants brought into the court on a felony charge. In 34 percent of the cases, the judge released the defendant on recognizance, that is, without bail; in 3 percent of the cases the defendant was held without bail; in the remaining 63 percent the judge set bail. Of these, in 10 percent the bail was below \$250; in 50 percent bail was set between \$250 and \$1,000; in the remaining 40 percent bail was set above \$1,000.⁸

4. The study began originally under the auspices of the Vera Institute of Justice, whose research director I was at the time. It was financed by the New York State Division of Criminal Justice Services, the state funding branch of the Law Enforcement Assistance Administration of the U.S. Department of Justice.

5. This holds true only for felony arrests; arrests for lesser lawbreaking may be initiated by a summons.

6. N.Y. Crim. Proc. Law § 530.20 (McKinney Cum. Supp. 1978-79).

7. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney Cum. Supp. 1978-79).

8. The bail information we were able to collect is incomplete since it does not record whether the amount was cash bond or not. The omission was discovered only after we had received the criminal history information for the individual cases, which made it impossible to go back to the files since

While the law asks the judge to consider a great many aspects of the crime and the defendant, in practice he is guided in his bail decision by the small amount of information available at the time bail is set. Normally, the bail judge has no more before him than the defendant's criminal record, if he has one;⁹ the crime with which he is charged; and whatever

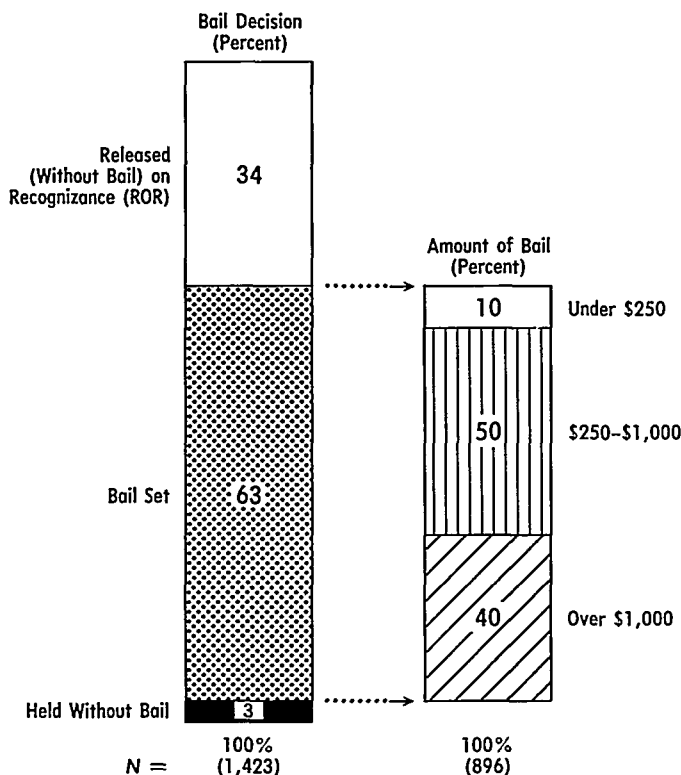


Fig. 1. The bail decision

we had been forced to remove the defendant's identification. The harm is small, because the two types divide according to the bail amount set. We obtained the corresponding data (shown below) from the Brooklyn Pretrial Services Agency (see note 10 *infra*).

Bail and Cash Bond Amounts in Brooklyn Criminal Court in 1972-73

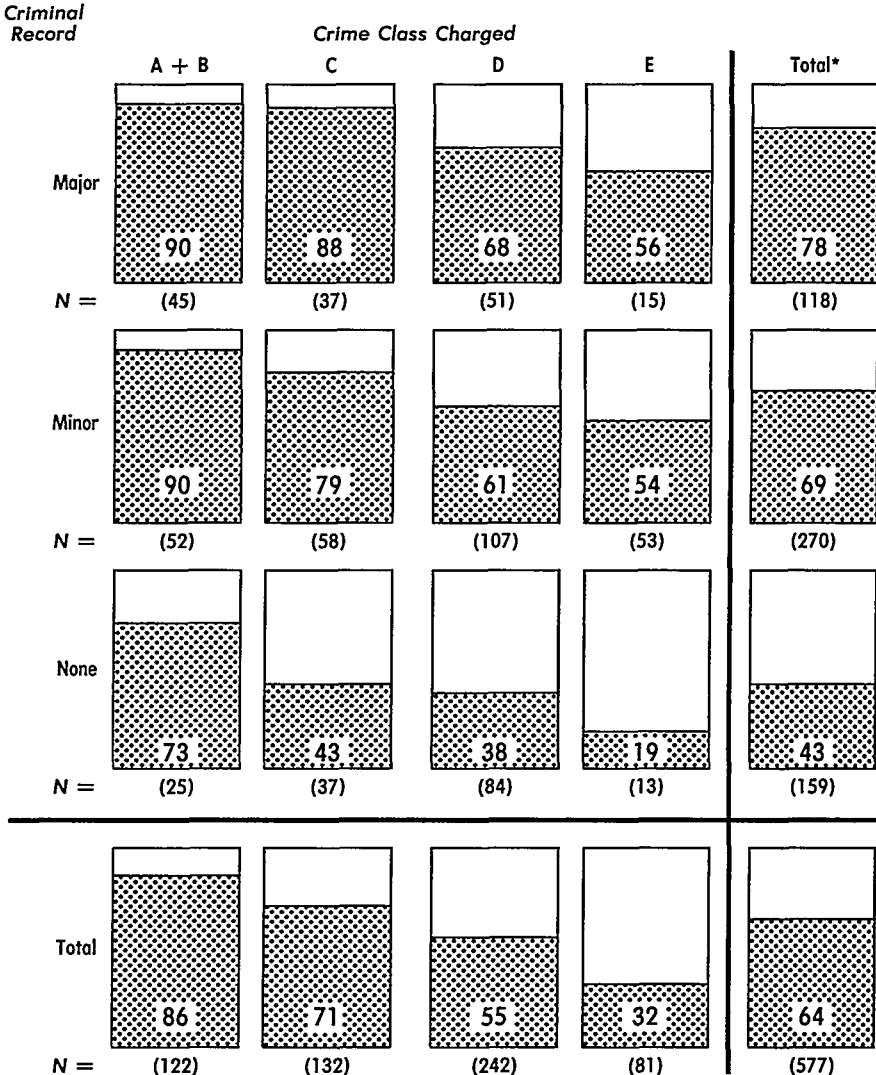
Amount	Percent of Cases (N = 1,418)	Percent Unsecured Cash Bonds
\$ 1 - \$ 250	20	98
251 - 500	28	13
501 - 1,000	17	5
1,001 - 2,500	17	2
2,501 - 5,000	10	1
5,001 or more	8	-
All cases	100	25

Bail amounts up to \$250 were predominantly cash bonds; all higher bail amounts contained only a small fraction of cash bond.

9. It goes without saying that both judges and defendants, in the sample as well as in the society at large, include both women and men. But since this study is not considering the factor of the sex of the subjects, for economy and ease of reading in this article the generic singular "he," "him," and "his" will be used to refer to both women and men.

information the assistant district attorney, the defense counsel, and the defendant himself might bring to the court's attention either on their own initiative or at the court's request.¹⁰

Figure 2 shows how the bail decision is influenced by the severity of the



*The number of total cases exceeds the sum of the group numbers because the information on crime class charged and criminal record was not always available.

Fig. 2. Bail decision by crime class charged and criminal record: percent for whom bail is set at \$250 or more.

10. This pattern has changed in recent years. The Pretrial Services Agency, pioneered by the Vera Institute of Justice originally in one of the boroughs, is now operating on a city-wide basis as an independent organization with the guidance of the deputy mayor for criminal justice. One of the contributions of this innovative agency is to provide the arraignment judge with detailed information concerning the person of the defendant.

arrest charge and the seriousness of the defendant's prior record.¹¹ The defendants arraigned before the bail judge are grouped in the graph according to the crime class charged (*across*) and their criminal record (*down*). The graph indicates for each of the resulting 12 subgroups the proportion of defendants for whom bail was set at \$250 or more; the complementary percentage (not listed) comprises the defendants for whom bail was set at less than \$250 or who were released without bail. The 12 bars that form the body of the graph show how the severity of crime and the defendant's record combine in determining the amount of bail. Throughout, the difference between defendants with major records and those with minor records is small, whereas that between those with any record and those with no record is great. Predictably, the highest proportion of no or low bail (81 percent) is found in the lower right-hand bar, the defendants with no record charged with the lowest felony. Since both the severity of the charged crime and the defendant's criminal record are also the prime determinants of the sentence that may eventually be imposed on the defendant, the bail decision is therefore also related to the expected sentence.

As figure 3 shows, there is also a relationship between the bail decision

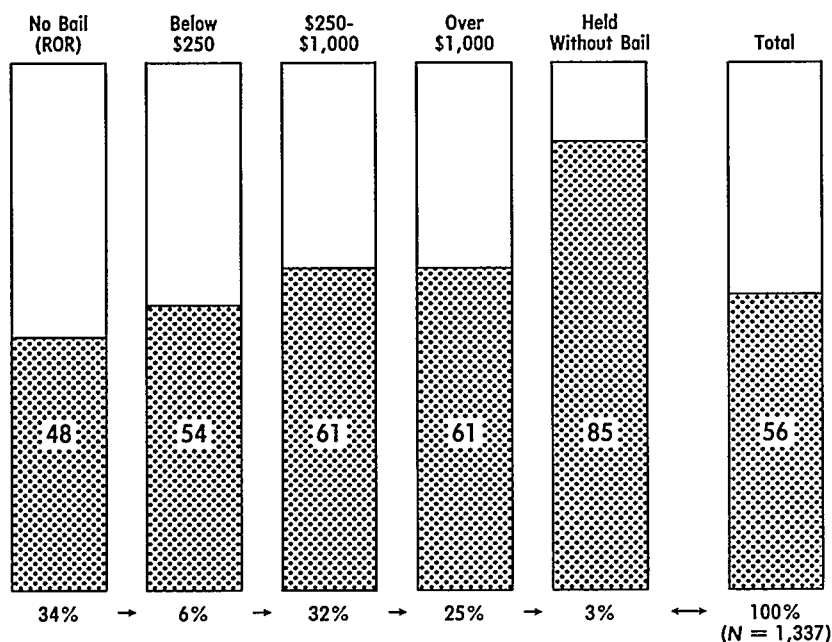


Fig. 3. Bail decision and conviction rate (percent)

11. If bail is set below \$250, 9 out of 10 defendants are able to make it. And since only 8 percent of all defendants fall into this minimal bail category, we group them with the defendants who were released without bail. The number of cases included in this and the following graphs does not always reach the number of cases in fig. 1, because in some cases the additional information required for the more detailed statistic was not available.

and the likelihood of eventual conviction, but it is not as strong as one might expect. The proportion of convicted defendants increases only by small increments from those released without bail (ROR) to those for whom high bail was set. Only the 3 percent of the defendants held without bail showed a high conviction rate.

II. MAKING BAIL

Once bail is set, the next move—to make bail if he can—is up to the defendant. As one would expect and as figure 4 shows, the higher the bail, the smaller the proportion of defendants who can make it. Figure 5 gives the overall view of the bail status of all defendants. Almost one-half of the defendants for whom bail was set—29 percent of all defendants—were unable to make it. Together with the 3 percent to whom bail was denied, these defendants form the group held in jail, altogether about one-third of all defendants.¹² The remaining two-thirds of the defendants either made bail or were released on recognizance without bail.

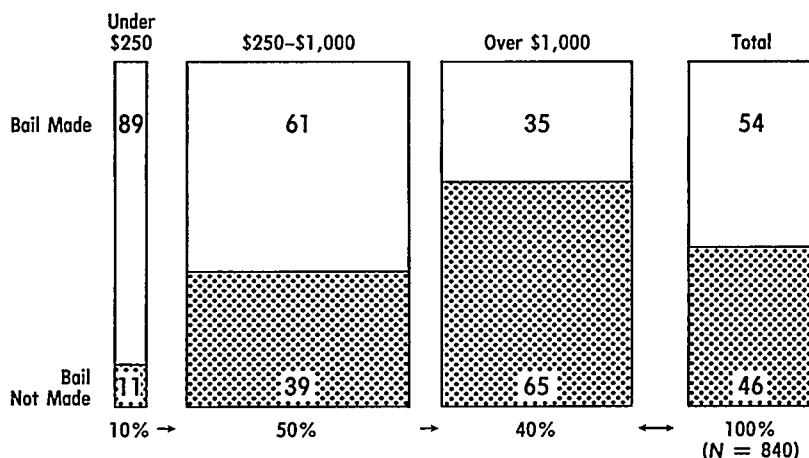


Fig. 4. Percent bail made by amount of bail

III. THE TWO POTENTIAL ERRORS

Ideally, bail should be high enough to insure the defendant's appearance at trial but not higher. Reaching this ideal would require a degree of familiarity with the defendant's circumstances and character which far transcends even the best available pretrial information. As a result, the system is bound to make errors. In some cases, it will force some defendants unable to make bail to stay in jail, although they would have ap-

12. Some of these defendants (their number has never been determined) make bail at some later point, prior to the disposition of their case.

peared in court if bail had been set at a level they could have afforded;¹³ the pretrial detention of these defendants represents the system's most signal failure. In other cases, the system will make the error of releasing some defendants who then jump bail but conceivably would have appeared in court if higher bail had been set.

Traditionally, the courts have erred more often in the first direction. A massive reform movement, spearheaded by the Vera Foundation, now the Vera Institute of Justice, has done much to reduce that error. In 1961 Vera conducted a controlled experiment with important implications for the direction of reform. Defendants in the New York courts were assigned randomly, that is, by lot, to two groups: in a control group the judge set bail as usual; in an experimental group the judge was provided

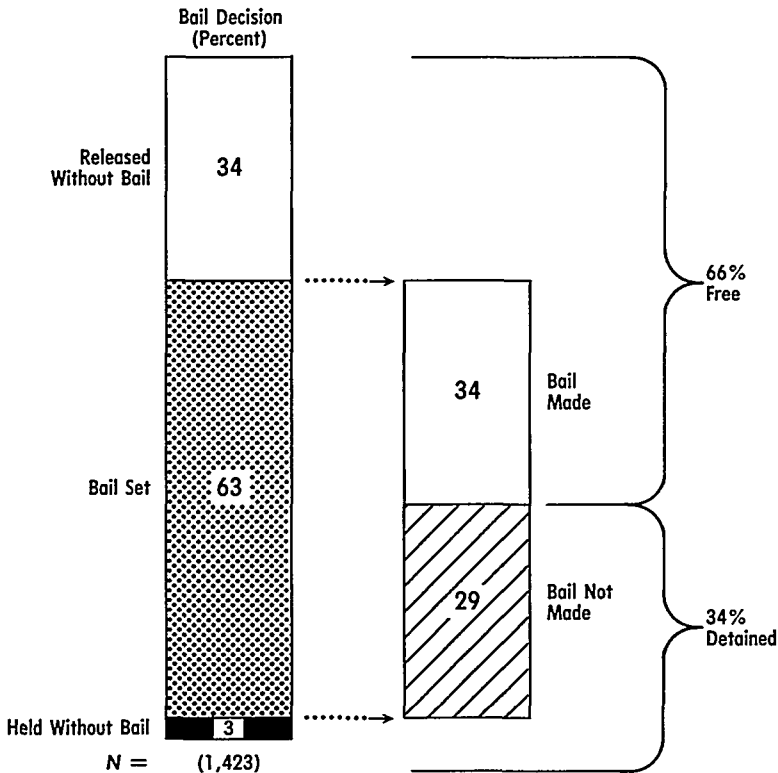


Fig. 5. Bail status of all defendants

13. The situation is aggravated for the detained defendants who eventually are acquitted or whose cases are dismissed. This, however, is a different problem, created by the higher standard of proof required for conviction than for the pretrial stage of prosecution; "probable cause" as against "proof beyond reasonable doubt." This unresolved problem has engendered the proposal to hold an evidentiary hearing prior to a defendant's pretrial detention. Jeff Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis. L. Rev. 441.

with background information on the defendant and with a recommendation as to whether or not it was safe to release him without bail. In this experimental group, many more defendants were released without bail on their own recognizance; only 40 percent were kept in jail as against 86 percent in the control group where bail was set as usual. Increasing the release rate did not result in an increase in the number of defendants who jumped bail; the proportion of bail jumpers did not exceed 1 percent in either group. Releasing more defendants without requiring bail turned out to be a cure without undesirable side effects.¹⁴

That pioneering experiment powerfully stimulated the growth of a nationwide reform movement to reduce the number of defendants held unnecessarily in pretrial detention, a reform achieved primarily through improving the quality and increasing the amount of information about the defendants arraigned before the bail judge.¹⁵

We might note that knowledge of that first type of error—detaining defendants who need not be detained—can come only from a controlled experiment such as Vera conducted. There is no other way of estimating how many of the defendants who could not make bail would have appeared in court if they had been released. The data from the present study, while they were not derived from such an experiment, cannot illuminate that part of the issue; however, they do measure the second type of error, the proportion of released defendants who jump bail.¹⁶

Until recently the courts, for understandable reasons, have not been eager to publish bail-jumping figures.¹⁷ Also, the reform-minded critics of the bail system have a tendency to minimize the importance of these figures, perhaps because in the original Vera experiment they formed indeed a negligible quantity. Thus we read in one recent major study, “The number of defendants who . . . are lost to the court system and thereby evade justice is quite small.” For 11 of the 14 recorded cities the proportion of “fugitives” of defendants released after a felony charge was less than 3 percent.¹⁸

14. Ares, Rankin, & Sturz, *supra* note 1, at 86.

15. For reasons I have never appreciated, Vera's recommendations have always been based on the defendant's demographic and background characteristics. The information did not include the seriousness of the offense or the severity of the sentence that was to be expected. It was left to the judge to base his judgment on the joint weight of all factors. This division makes it impossible to decide whether the judge followed the recommendation. It also makes it impossible to evaluate the recommendation itself.

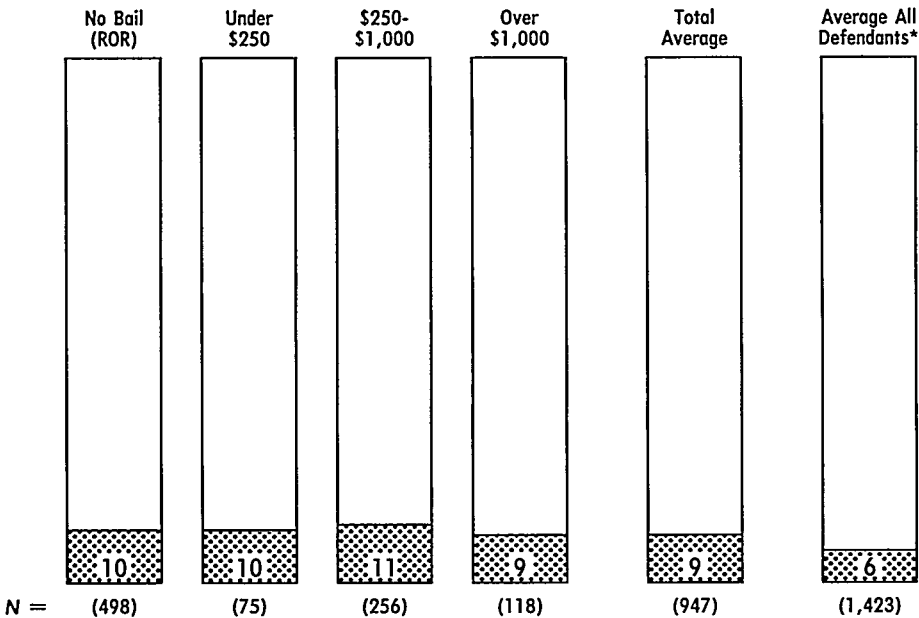
16. The expression “jump bail” here includes also defendants released without bail (ROR) who failed to return to the court.

17. For some time now, however, the Quarterly Reports of the New York City Criminal Justice Agency have been reporting bail-jumping figures.

18. Wayne H. Thomas, *Bail Reform in America* 104 table 36 (Berkeley: University of California Press, 1976). The above figure is suspect. For the cities of San Diego, Philadelphia, and Hartford, the cited statistics (these cities provide roughly three-fourths of all cases in the study) claim zero percent fled the jurisdiction of the court. Allowing for the rounding-off effect, this means that less than 1/2 of 1 percent jumped bail. For Kansas City, which released only 37 percent of its felony defend-

Our data suggest, however, that the bail-jumping rates have reached a level that demands attention. In New York, bail jumping is no longer a negligible event: among the 65 percent of all defendants “at risk” (those who made bail or were released without bail) the proportion of bail jumpers was 9.5 percent, which amounts to $(9.5 \times 0.65 =)$ 6.2 percent of all defendants. To put that figure into perspective: in 1973 more defendants jumped bail (6.2 percent) than were eventually sent to prison for more than one year (5.4 percent).¹⁹

Figure 6 shows how little the bail-jumping rate varies with the amount of bail set and made; through all brackets, it hardly deviates from the 10 percent average. Since bail jumping is clearly an undesirable event, one



*This includes defendants both in and out of jail.

Fig. 6. Percent jumping bail by amount of bail

ants prior to trial, the bail-jumping rate is recorded as 18 percent. Such stark differences suggest error in the data compilation.

19. Determining the jump rate is a tricky business because nonappearances differ in kind, from the involuntary missing of a court appearance or two to the deliberate decision not to appear again. The issuance of a bench warrant seldom distinguishes the temporary from the permanent disappearance. The proper way of making the distinction is to define flight through the lapse of a sufficiently large time interval, for instance, a six-month period. As defined in this study, bail jumpers include all who disappeared sufficiently long from the system so that a warrant for their arrest was issued and had not been returned by the time, at least several months later, when our data were collected and the cases were recorded as undisposed.

would like to see its overall distribution. Figure 7 makes such an effort: it shows the jump rate for all defendants—whether at risk or not—for the 20 combinations of 4 criminal record and 5 arrest categories.

Only 3 percent of the bail jumpers had a prison record. Two-thirds of all bail jumpers had no record and were charged with the two lowest felony grades. From what we know from this study, these defendants had relatively little to fear from the court's disposition.

Criminal Record		Crime Class Charged				
		A	B	C	D	E
Jail or Prison				4%		
Convictions				14%		
Arrests	0%					
None		4%		78%		
Total		100%				

Fig. 7. Percent distribution of bail jumpers by crime class charged and criminal record

In the two categories that mark the potentially most dangerous offenders, there is hardly any bail jumping. Nobody charged with a class A crime jumped bail, and the defendants who had a jail or prison record form all told only 4 percent of all bail jumpers. This comes as a surprise. One would have expected the jump rate to increase among the defendants who faced the risk of a severe sentence rather than among these low-level defendants. The bulk of the bail jumpers clearly are the minor and less dangerous offenders.

At first blush one might see here the counterpart of the system's earlier error of releasing too few defendants and argue that it now releases too many. Our data suggest that this would be a poor answer. Unless one

could pinpoint the future bail jumpers in advance—which one cannot—the error rate of unnecessary incarcerations would rise substantially if one were to increase the number of pretrial detentions. For every foiled bail jumper one would have to keep 10 defendants unnecessarily in jail because they would have appeared in court anyway. This follows from the finding that the average bail-jumping rate in all groups at risk is approximately 9 percent, about 1 out of every 11 cases.²⁰

The data suggest a better remedy. The new bail jumpers, on the whole, face only minor charges and have either no record or only a minor one; they have, therefore, relatively little to fear from the law. The worst they face is a minor jail sentence. Bail jumping, therefore, is a decision to disappear not so much because the consequences of the pending criminal prosecution are too threatening but rather because the consequences of disappearing are negligible. The judge will issue a warrant for arrest, but to search out such defendants and execute the warrant could be time consuming, and the police probably assign a low priority to it. As a rule, these defendants reappear when they are arrested on another charge. A more thorough follow-up by the police of the court-issued warrants should bring some of the bail jumpers back.

Increasing the number of pretrial detentions seems to be the wrong solution because it invariably increases the number of unnecessary detentions, including defendants who eventually are not even convicted.

IV. PRETRIAL DETENTION AFFECTS THE DISPOSITION

We now turn to the most serious congenital defect of the system. A growing body of evidence suggests that some defendants unable to make bail are, for that reason alone, more likely to be convicted and, if convicted, more likely to be sentenced to jail. The discriminatory effect was observed for the first time serendipitously in the Vera experiment, which was designed to discover whether more defendants could be released without bail. The Vera findings were later buttressed by studies that formed the foundation of two major lawsuits attacking the constitutionality of the New York bail laws.²¹ The data in the present study corroborate these earlier observations; in addition, they bring us closer to explaining them.

The first suggestion of the jail effect came from the raw comparison of the conviction and sentencing rates of defendants on bail and defendants

20. See fig. 7 *supra*.

21. *Bellamy v. Judges & Justices*, 41 A.D.2d 196, *aff'd*, 32 N.Y.2d 866, 346 N.Y.S.2d 812, *remititur amended*, 33 N.Y.2d 632, 347 N.Y.S.2d 582 (1973), and *Wallace v. Kern*, 520 F.2d 400 (1975), *cert. denied*, 424 U.S. 1912 (1976).

in jail, as shown in figure 8. Many more of the defendants who could not make bail, and therefore remained in jail, were convicted than of the defendants who made bail. And of the convicted defendants, those in jail received a custody sentence more often than the defendants who made bail. Such raw comparison, however, does not prove discrimination because, in some cases, cause and effect may be reversed; for the defendants more likely to be severely sentenced if convicted, higher bail may have been set, which fewer of them could make.²²

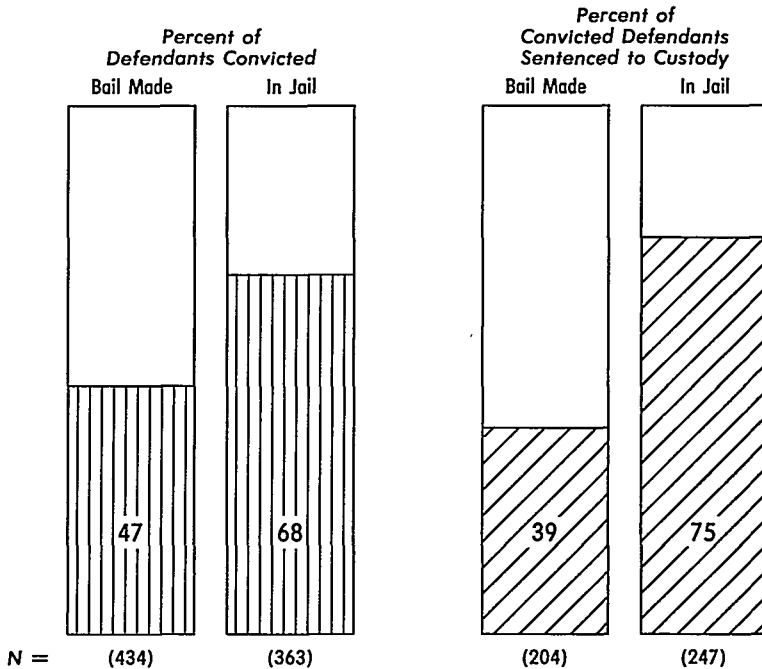


Fig. 8. Bail status, rate (percent) of conviction, and likelihood (percent) of custody sentence

To separate cause from effect in this entangled situation is difficult. Perfect separation could come only from a controlled experiment in which for a group of defendants the decision to be released or detained would be made randomly (by lot) instead of on the basis of the defendant's ability to make bail. Selection by lot would insure that the two groups would be equal in every respect, except that one half, the experimental group, would be kept in jail, while the other half, the control group, would be out of jail. If, under these controlled conditions, the detained group would show a higher conviction and custody rate, this dif-

22. The law indeed instructs the judge to do this. See point 8 of the statute on p. 770 and note 7 *supra*.

ferential could be unambiguously ascribed to the fact of detention, because being detained or not being detained would be the only difference between the two groups.

Although such an experiment could not be permitted, at least not in the radical form outlined above, looking at its structure will aid in the analysis of the data available on this crucial issue. This analysis, which must be modeled after that ideal, impossible experiment, can be achieved by restricting comparison to more narrowly defined subgroups that, except for the in-jail-out-of-jail difference, would have a reasonably equal chance of being convicted and, if convicted, a reasonably equal chance of receiving a custody sentence.

Of the two propositions—that defendants in pretrial detention have a higher likelihood of conviction and that they have a higher likelihood of a custody sentence—the latter is more understandable. The greater likelihood of a detained defendant's ending up with a jail sentence if convicted is not surprising. If a defendant at the time of sentencing has spent some time in jail, the court will be tempted to make the time served "legal" by imposing a jail sentence rather than allowing a "walk" sentence that may raise doubts about the merits of the earlier imposed pretrial detention.

We begin the analysis with a test of the second proposition. We present this effort in figure 9 by sorting the convicted defendants first by the seriousness of the crime they had been charged with and then by the seriousness of their criminal record. In each of these groups we then compare the frequency of a custody sentence among the defendants free on bail and among the defendants in jail. With the exception of the few defendants charged with a class A crime, the analysis reveals that in every class the defendants who could not make bail were worse off than their counterparts out of jail. The same is true for the four comparisons of defendants with similar criminal records.

We now turn to the analysis of the first, less understandable proposition that defendants in pretrial detention are, for that reason alone, more likely to be convicted than if they had been free on bail. Figure 10 shows the comparison of 16 subgroups, the combinations of 4 crime classes and 4 types of criminal records. Compared with figure 9, this is a more elaborate analysis, made possible by the greater sample at our disposal; we can use all defendants rather than only the convicted ones. In all but 3 of the 16 cells of figure 10, comparison of defendants with the same record and charged with the same crime class shows that the defendants in custody have a higher conviction rate than the defendants who make bail. The three reversals occur again among defendants charged with the highest crime classes (A and B) who have at least a prior arrest record. The reversal, in spite of the small sample, makes sense; when the stakes are very

high, being in jail will make little difference for the outcome. There is, nevertheless, a loophole left in the evidence of figure 10; the judge to some extent sets higher bail for the defendants against whom the evidence

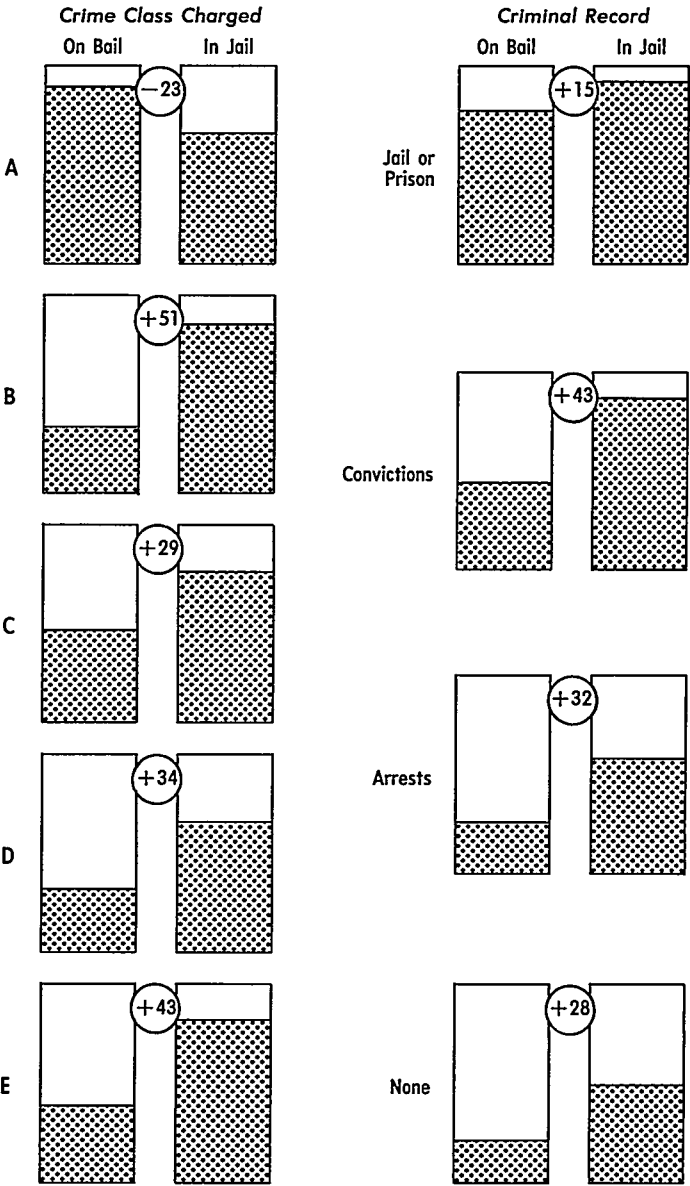


Fig. 9. Percent difference of custody sentences after conviction by crime class charged, criminal record, and bail status.

is strong.²³ If he does that, we must not be surprised that defendants who stay in jail are more often convicted.

In response to this objection, figure 11 shows in addition to the grouping by criminal record the grouping by the dollar range within which bail was set. Again, in all but two groups the defendants who could not make bail have higher conviction rates than those who could. The puzzle is why this should be so. A 1971 study advanced the following hypothesis:

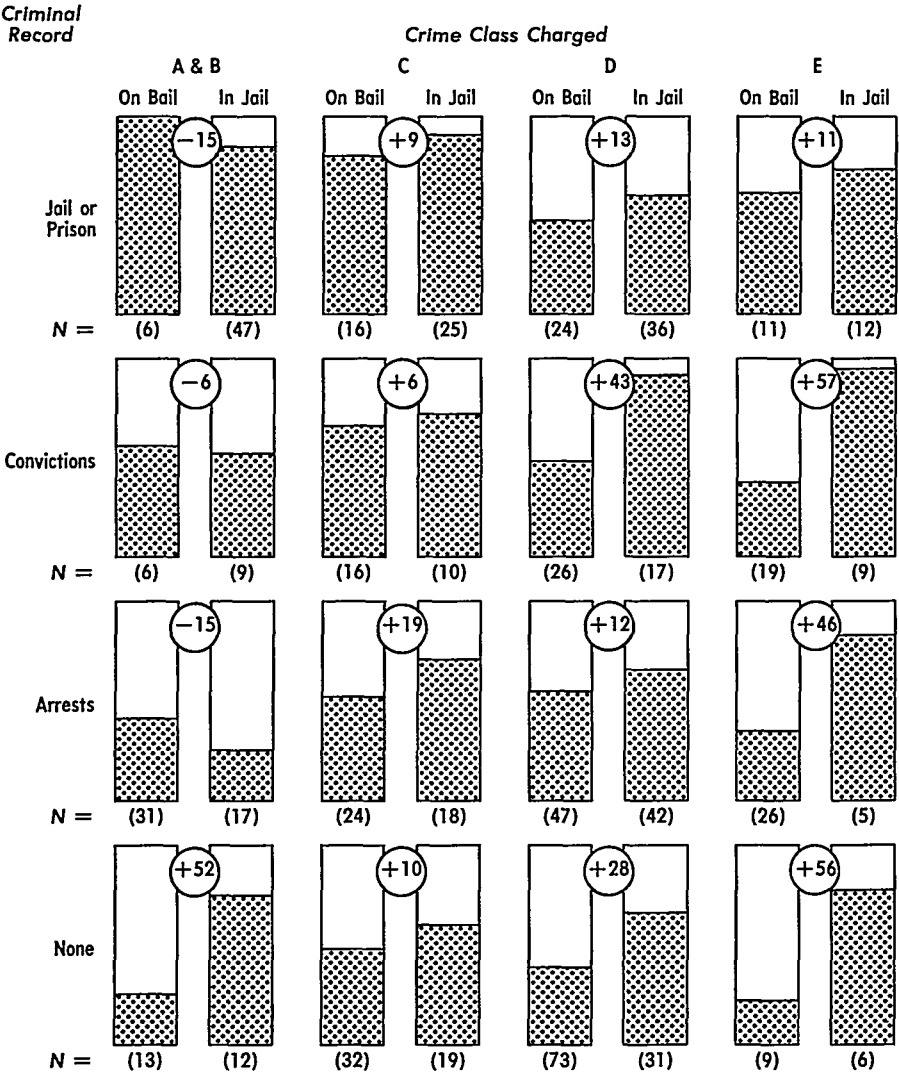


Fig. 10. Conviction rate (percent) by crime class charged, criminal record, and bail status

23. The relationship, as observed in fig. 3, is not very strong.

One factor which might explain differences in guilty findings is that the incarcerated defendant cannot consult with his lawyer as freely or as often as the person not detained. Neither is he free to prepare his case fully, to gather witnesses, or to establish an alibi. . . .

. . . Detainees also are less able to afford the service of paid investigators, or the expense of witnesses. Incarcerated defendants are also more readily available to law enforcement officials for involuntary participation in lineups and other police processes that may increase the likelihood of a

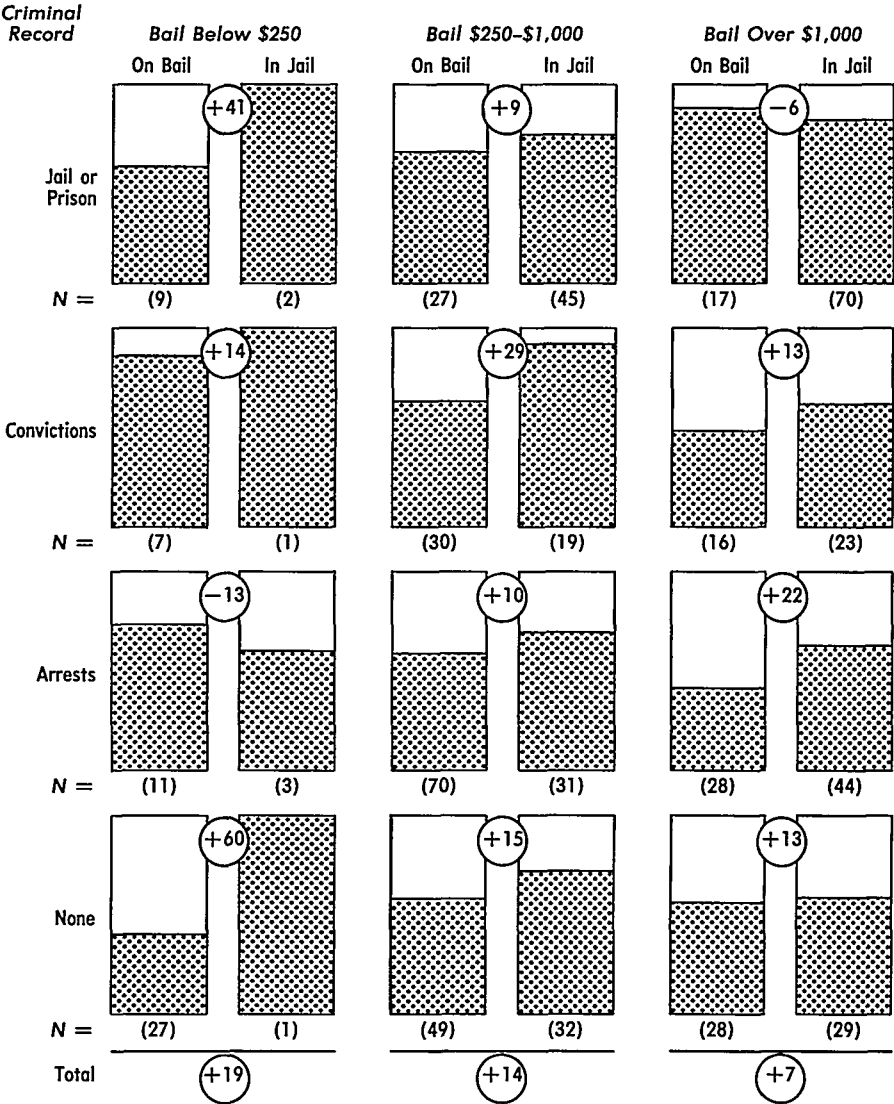


Fig. 11. Conviction rate (percent) by defendant's bail status, criminal record, and amount of bail

finding of guilt. Finally, defendants who come into court in the custody of police officers, stripped of their self-confidence by detention, and wearing prison clothes or the clothes in which they were arrested, may be prejudiced in the eyes of the jury.²⁴

The data in the present study suggest a different or at least a supplementary explanation: that the bargaining power of a defendant is reduced when he is in jail and, conversely, that the bargaining power of the prosecutor is reduced when the defendant is free on bail.

The issue comes up as follows. The defendant in jail is told one day by his lawyer: "The D.A. has agreed to a jail sentence of x weeks (or months) if you plead guilty," or words to that effect. Often that sentence will be equal to the time spent in pretrial detention so that the defendant would be freed immediately upon pleading guilty. Such a sentence is dubbed "time served." If the offered sentence were to exceed somewhat the time spent in pretrial detention, the guilty plea would secure at least an early release. This is an incentive to pleading guilty which the defendant who made bail does not have. As a result, every so often a guilty plea is given by a defendant in jail who would have refused such a plea had he not been in jail. In some cases this refusal will eventually be rewarded by the prosecutor's decision to dismiss the case rather than to try it: "If the attorney had not pleaded guilty to a B misdemeanor, the case would have been dismissed; the complaining witness, herself a junkie with a record, refused to come into court" (assistant district attorney in case 198). And every so often, the defendant free on bail, before pleading guilty, will be able to negotiate for a nonprison sentence, where under equal circumstances the defendant in custody will accept "time served."²⁵ The following cases illustrate the "time served" offer:

When a transit policeman entered an IRT subway train, he saw two youths standing at the car door. They were the only passengers in the car. As he moved in the car, the policeman saw a brown paper bag with a handgun; he said he could see the contents from where he stood. On the opposite seat, under some newspapers, he discovered a pistol. The gun was in operating condition. The two youths were charged with possession of a prohibited weapon. Bail was set, which the defendant (in our sample)

24. Arthur R. Angel, Eric D. Green, Henry R. Kaufman, & Eric E. Van Loon, *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L.L. Rev. 289, 348-49 (1971), reprinted by American Bar Foundation under Law Review Research Project: Staff of the Harvard Civil Rights-Civil Liberties Law Review, *op. cit.* (Chicago: American Bar Foundation, 1971) (footnotes omitted).

25. There is a hint in our data that being in jail may also affect the defendant's decision whether to go to trial or to plead guilty:

Percent of Defendants Going to Trial		
Defendants	Percent	Approximate N
Free on bail	3.3	(425)
In jail	1.7	(381)

could not make, the codefendant made bail and was eventually indicted on a different charge and separated from the case. Eventually, the defendant pleaded guilty against an offer of "time served." (case 50)

The defendant and three unapprehended accomplices were charged with robbery at knife point. A knife had been found at the scene of the crime but it could not be linked up with the defendant. No blood had been found on the weapon, no property was found on the defendant, who had been apprehended near the scene of the crime, though the ADA did not know how close. Defendant and complainant had known one another and probably had been lovers. The case was a year old when it was evaluated for disposition. During all that time, the defendant had been in jail. The prosecutor thought the case weak; he interviewed the complainant prior to disposition and found that he had changed his testimony. There were also contradictions between complaint and indictment. On the basis of these facts, the prosecutor offered a plea to a D felony and a sentence of "time served" and the defendant accepted. (case 96)

The complainant was the common-law wife of the defendant. There had been a fight the night before. When the woman complained to the police and the defendant was questioned, he went back to her and hit her with a soda-water bottle over the head. He was charged with assault and possession of a dangerous instrument. He could not make bail. After spending some time in jail, he pleaded guilty to assault in the third degree, an A misdemeanor. He received a five-month sentence because he had a record of some 20 convictions. Since the complaining witness had withdrawn, there is a good chance that the case would have been dismissed had the defendant not been in jail. (case 281)

We should expect the effect of being in jail to be particularly large among defendants in the lower sentence brackets where a jail sentence, especially a time-served sentence, and a walk sentence are plausible alternatives. Looking back at figure 11, we find this to be the case. The differences are lowest (even negative) after arrests for the most serious crimes and the most serious prior record, and they are highest around the lower right-hand corner where the expected sentence will be modest.

The effect of pretrial detention is minimal where serious crimes are concerned; the effect is likely to grow where the crime is minor. The differential effect is aggravated if the prosecutor is less eager to go to trial. Since that eagerness is likely to decline with the seriousness of the defense, this is another reason why the effect of pretrial detention on conviction rates is likely to be greatest where the crime is least serious. For these reasons, an analogous study among defendants charged with a misdemeanor instead of a felony should reveal an even greater effect of pretrial detention on the likelihood of conviction.²⁶

26. Such a study would be of particular interest because, at the present time, the New York prosecutors bring hardly any misdemeanor cases to trial. Being in jail on such a charge, therefore, may be the major incentive to pleading guilty.

We shall now attempt to measure the magnitude of the discriminatory effect, that is, the proportion of cases in which a conviction is obtained because the defendant was in pretrial custody.

At first, the proportion of defendants who received a time-served sentence—it was 6 percent—might look like a good point to start from. That figure, however, overstates the looked-for effect in one respect and understates it in another. It overstates it because it is in no way certain that in these cases the refusal to plead guilty would *not* have led to a conviction; the prosecutor might have gone to trial and obtained one. The figure understates the effect because it does not include the defendants free on bail, against whom the prosecutor dismissed the charges but from whom he would have obtained a guilty plea had the defendant been in jail. Thus the time-served figure is not of much help.

Another source for estimating the size of the discriminatory effect is figure 11. There we compare for 12 subgroups, defined by amount of bail and the defendant's prior record, the conviction rates of the defendants on bail and in jail. The weighted average of these differences, weighted by the respective number of defendants in jail, is 13 percentage points. This figure will overstate the true effect because the cases represented by each pair of bars are not perfectly alike as they would be had they been derived from a controlled experiment, or if at least the ranges of bail amounts had been narrower. Arbitrarily averaging the two estimates, 6 and 13 percent, yields approximately 10 percent. Assuming that figure to be correct, the following conclusions would follow: (1) the average conviction level among the defendants who could not make bail was 68 percent (fig. 8), but had these defendants been able to make bail, only $(68 - 11 =) 57$ percent of them would have been convicted; and (2) such a reduction of the conviction rate of these defendants in jail would reduce the overall conviction rate for *all* defendants (of whom two-thirds are not in jail) from 56 percent to 53 percent.

All these computations are but approximations. They are based on sample data; they are based not on controlled experiments but on efforts to simulate experimental situations by creating reasonably homogeneous subgroups; and they assume that prosecution policies would not change if bail procedures were radically altered. With all these uncertainties, these computations may be taken as a rough measure of the discriminatory effect of pretrial detention.

V. UNANSWERED QUESTIONS

Judged superficially by its end effect, the bail system seems to work reasonably well: although two-thirds of all defendants are released either without or because they make bail, altogether only 6 percent of defendants jump bail, of which 5 percent either have no prior record or face relatively minor charges.

In a fundamental way, however, we know very little about how well the system operates—that is, how well it operates in terms of its own specific goals. That goal is to set bail in each instance at the minimum amount that, if the defendant posts it, will insure his return to court. In these terms, from our study we know only that the bail decision was correct for the ($34 \times 0.09 =$) 31 percent of the defendants released without bail who justified the confidence and the return to court. What we do not know is whether the 29 percent of the defendants who could not make the demanded bail would have returned if bail had been set at an amount they could have afforded; nor do we know whether it was the posted bail that led 31 percent of the defendants to make bail and return to court—that is, we do not know whether they would have returned also with a lower bail or even without bail.

Among these potential miscalculations, some are clearly of lesser significance: if a defendant is able to make bail on his own even if it was set at an unnecessarily high level, the harm is minor—he will get his money back; but if he is detained, and eventually not even convicted, the miscalculation is more serious.

The one thing we do know with reasonable certainty about our bail system is that the very fact of pretrial detention adversely affects the defendant's chances of being acquitted and, if convicted, of being sentenced to a noncustody sentence.

It is not immediately clear in which direction one should eliminate the discriminatory effect: should the conviction rates of the detained defendants be reduced, or should the conviction rates of the defendants on bail be increased? In any event, the discriminatory effect of pretrial detention cannot be doubted any longer. How can it be removed?

In theory, speedy disposition of the cases in jail could reduce the differential. But these time-served or "near-time-served" cases, which account for the bulk of that type of discrimination, are found in the lower ranges of crime, where sentences are measured in weeks or months. And since "speedy trial" normally means within about three months after arrest, this is not speedy enough; a three-month pretrial detention often provides a sufficient basis for a time-served sentence.

Since the discrimination arises from a shift in the bargaining power of the prosecutor, it can be reduced only by reducing that discretionary power.²⁷

27. The only way, obviously not a feasible one, to eliminate this effect of pretrial detention would be an early, *unchangeable* decision by the district attorney whether or not to prosecute and to go to trial if the defendant does not plead guilty to the charge.

The problem cannot easily arise under continental European law because there the guilty plea is unknown; no conviction can be obtained without trial.

Our bail system suffers from fundamental difficulties. It is predicated on the legal fiction that its sole purpose is to insure the defendant's appearance on his appointed day in court. In fact, another purpose often has greater weight with the judges. Because the judge is likely to be blamed if a defendant whose release he made possible commits another crime, he often sets bail at an amount he is sure the defendant cannot make. In other cases, the judge will set bail at a nominal amount, expecting, perhaps even hoping, that the defendant will make bail. In still other cases, he may set bail at a routine amount and does not know, and possibly does not even care, whether the defendant will make bail. We should explore the bail judge's thoughts, if any, about whether the defendant will make bail; about the likelihood that the defendant, if released, will continue his criminal activities; and about the likelihood of his reappearance in court.

European countries, including England, handle pretrial detention more directly. They allow it if the court believes one of three dangers likely: flight, continuation of the criminal activity, and—a ground hardly known to American law—collusion and tampering with the evidence. Under most continental laws release on bond is permissible only if the danger of flight is the sole ground for detention.

Since the realities of our pretrial detention are not so different, we might consider rethinking, within the constitutional restraints, not only the modalities of our present bail system but also that institution itself.

