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# CRIMINOLOGY

## PLEA BARGAINING: ITS EFFECT ON SENTENCING AND CONVICTIONS IN THE DISTRICT OF COLUMBIA\*

WILLIAM M. RHODES\*\*

Citizens and public officials frequently share a belief that the criminal courts face a crisis. Plea bargaining—the process by which the state grants sentencing and other concessions in exchange for guilty pleas in criminal cases—is frequently paramount in this concern for crime control and justice. Yet despite the general recognition of the importance of plea bargaining to American jurisprudence, disagreement persists about what plea bargaining should accomplish given prevailing norms of justice, what plea bargaining actually does accomplish given the reality of the judicial process, and how the existing practice could be modified (or preserved) through public policy.

Research reported in this study addresses these concerns by posing and answering a broad question: Who gains and who loses from plea bargaining? Based on data contained in the Prosecutor's Management Information System (PROMIS) maintained by the United States Attorney's Office in Washington, D.C., the analysis is essentially empirical, and the attempt to quantify observations and support conclusions statistically contrasts with an equally important existing body of research, which is more qualitative.

### A MODEL OF THE CRIMINAL JUSTICE PROCESS

The impact of plea bargaining on the criminal justice system goes beyond the influence that negotiated settlements have on sentencing. To model this impact, it is useful to draw an analogy between the processing of criminal cases and the flow of fluid through a network of pipes. The flow through any branch of this network depends on the input into the system, the capacity of the pipes, and the

setting of valves intended to regulate the flow. Likewise, the processing of cases in a criminal court is constrained by the number of arrests that occur, by the quality of tangible evidence and witness testimony associated with those arrests, by the capacity of the different "branches" of the justice system to handle cases, and by official policy or informal rules. Compared with guilty pleas, trials are expensive both in terms of pecuniary and non-pecuniary organizational resources.<sup>1</sup> Because courts have a limited trial capacity, trials cause pressure to be applied to other parts of the criminal justice system. As a result, court delay and other organizational frictions may build, but these cannot increase forever. The state's response to its limited trial capacity is either to reject or dismiss a large number of criminal cases or to dispose of a significant volume of cases by guilty pleas.

<sup>1</sup> Resource limitations are social and political as well as economic. Beyond manpower and facility constraints, courtroom organizations have a limited capacity for conflict, and like all resources, stable work groups can tolerate only a limited amount of strain. Eisenstein and Jacob summarize this perspective well:

Pervasive conflict is not only unpleasant; it also makes work more difficult. Cohesion produces a sense of belonging and identification that satisfies human needs. It is maintained in several ways. Courtroom workgroups shun outsiders because of their potential threat to group cohesion. The workgroup possesses a variety of adaptive techniques to minimize the effect of abrasive participants. For instance, the occasional defense attorney who violates routine cooperative norms may be punished by having to wait until the end of the day to argue his motion; he may be given less time than he wishes for a lunch break in the middle of a trial; he may be kept beyond usual court hours for bench conferences. Likewise, unusually adversarial defense or prosecuting attorneys are likely to smooth over their formal conflicts with informal cordiality.

The instrumental expression of internal goals is reducing or controlling uncertainty. The strong incentive to reduce uncertainty forces courtroom members to work together, despite their different orientations toward doing justice.

J. EISENSTEIN & H. JACOB, FELONY JUSTICE 24 (1977).

\* Portions of the research data contained in this article were published in W. Rhodes, *Plea Bargaining: Who Gains? Who Loses?*, PROMIS Research Publication No. 14 (INSLAW 1978).

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The prosecutor is frequently in the most strategic position to regulate the flow of cases. He recognizes that each method of case disposition (trial, pleas, dismissals and rejections) consumes a portion of the system's resources. In consuming the system's resources, each method produces in the aggregate different results. An efficient prosecutor will manipulate each method to achieve the results that he finds optimal.

When establishing his policy, the prosecutor will balance competing considerations. These considerations are: (1) Guilty pleas increase the number of convictions. First, convictions increase since guilty pleas are substitutes for trials and defendants are sometimes acquitted at trial. Second, convictions increase to the extent that guilty pleas reduce dismissals. (2) Defendants receive more lenient sentences where plea bargaining is used more extensively. This follows if defendants are awarded sentence or other concessions to induce them to plead guilty. (3) Because of the above two considerations, there is a trade-off between the number of convictions and the sentences received by persons convicted of criminal offenses.

An efficient prosecutor's office operates at some point on the production possibility frontier represented in Figure 1.<sup>2</sup> Of course, the choice of where to locate on this frontier need not be conscious and, in fact, may be more likely to result from organizational dynamics and interplay than policy choice, although prosecutors do exercise some administrative control over these matters.<sup>3</sup> Of course,

<sup>2</sup> J. JACOBY, *THE PROSECUTORS CHARGING DECISION* (1977); WESSEL, *Plea Bargaining Analysis*, 13 *THE PROSECUTOR* 283 (1978).

<sup>3</sup> The choice of a position on the frontier has public policy implications, but before sketching some of these, it is appropriate to enhance the model's realism in three ways.

In the model's present form, it is assumed that all arrests are suitable for prosecution and that resource constraints alone result in dismissals. In reality, many arrests which do not merit prosecution are dismissed. See F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970); K. Williams, *The Role of the Victim in the Prosecution of Violent Crimes in 24* (INSLAW 1978). The model is adaptable to this eventuality by limiting prosecutions to those cases which merit adjudication. The adaptability of the model assumes that a standard independent of resource constraints (e.g., a legally defined standard) is used for screening.

The model also assumes that all cases would be prosecuted irrespective of the quality of tangible evidence and the availability of witnesses. That is, it is assumed that weaker cases are dropped because resource constraints force the prosecutor's priority to be placed on stronger cases, but all cases would be prosecuted if there

it is possible for an inefficient attorney's office to operate within the frontier, a possibility not addressed here.

It is not possible to state generally where on this production possibility frontier a policy-conscious prosecutor will choose to operate his office.<sup>4</sup> How-

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were sufficient resources. In reality, the level of evidence may be so deficient in some cases that prosecution would be inappropriate even if the system had the capacity to hear such cases. See B. Forst, J. Lucianovic & S. Cox, *What Happens After Arrest? A Court Perspective of Police Operations in the District of Columbia*, PROMIS Research Report No. 4 (INSLAW 1977). Again, the model can be adapted by assuming that such cases are dropped from processing.

Finally, the model fosters the impression that plea bargaining arises only because of the cost and uncertainty of trials. This is not necessarily true. Many guilty pleas resemble an amicable settlement of a civil case. See A. ROSSETT & D. CRESSEY, *JUSTICE BY CONSENT* (1976). When neither side contests the material facts of a criminal case they may view the trial as unnecessary because the trial outcome can be easily approximated, or even improved upon, by a negotiated settlement.

Such "settlements" are likely to occur frequently. In cases such as simple assault or petit larceny, a finding of the defendant's guilt may be likely and conviction at trial often would result in probation. Given the expense of a trial, little may be gained by either the state or the defendant in contesting the charge.

However, not all criminal cases are likely to have amicable dispositions. In many cases, there is ample room for bargaining, and it may be necessary for the state to offer a concession in order to induce guilty pleas. See D. NEWMAN, *CONVICTION* (1966); D. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* (1974). See also LaGoy, Senna & Siegel, *An Empirical Study of Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 *AM. CRIM. L. REV.* 435 (1976); Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 *LAW & SOC. REV.* 187 (1973). Bargaining is more likely when there is uncertainty about conviction at trial and/or when the sentence following conviction is expected to be severe. See MODELING THE CRIMINAL JUSTICE SYSTEM 145 (S. Nagel ed. 1977); Adelman, *The Plea Bargain in Theory: A Behavioral Model of the Negotiated Guilty Plea*, 44 *S. ECON. J.* 408 (1978). See also D. Weimer, *Plea Bargaining and the Decision To Go To Trial* (April 1977) (Working paper #74, Graduate School of Public Policy, University of California, Berkeley); E. Noam, *The Criminal Justice System—An Economic Analysis of Benefits and Interrelations* (1975) (unpublished Ph. D. Dissertation, Harvard University); J. Lachman, *An Economic Model of Plea Bargaining in the Criminal Justice System* (1975) (unpublished Ph.D. dissertation, Michigan State University). Because of these contested cases, the model's conclusion, that convictions will be exchanged for reduced sentences remains pertinent; in individual cases, such inducements need not be observed.

<sup>4</sup> Our inability to make such a general statement stems from the fact that prosecutors are likely to differ in their

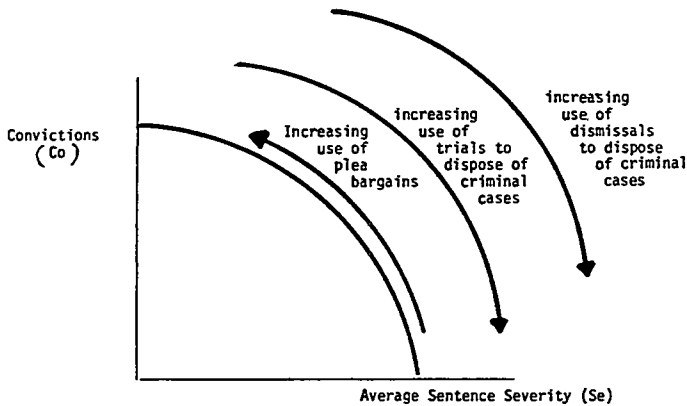


FIGURE 1  
Relationship between convictions and sentences

ever, it is possible to examine where on the frontier one prosecutor—the United States attorney for the District of Columbia—operated his office in 1974. While conclusions based on this examination are applicable only to the District of Columbia, a recent study of a number of jurisdictions with the Prosecutor's Management Information System (PROMIS) revealed that case processing in the District of Columbia is typical of case processing in other settings.<sup>5</sup>

#### THE PROCESSING OF CASES IN THE DISTRICT OF COLUMBIA

Data came from 1974 arrests processed in the Superior Court of Washington, D.C. To ensure a sufficient number of cases to make statistical analysis meaningful, the examination includes four

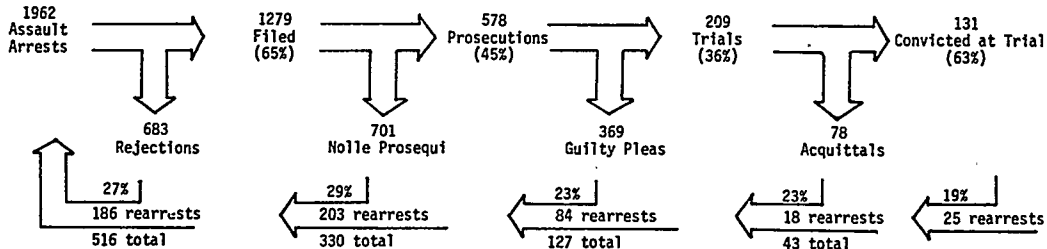
role perceptions. They are also likely to differ in their perceptions of how office policy affects crime control. Finally, they are likely to exercise varying amounts of control over the way that assistant prosecutors actually handle criminal matters.

<sup>5</sup> K. Brosi, *A Cross-City Comparison of Felony Case Processing* (INSLAW 1979). In the District, prosecutors reject somewhat more felony cases than their counterparts in Cobb County (Ga.), Milwaukee, and Salt Lake, but they reject considerably fewer than prosecutors in New Orleans and Los Angeles. The rate at which filed felony cases go to trial in the District is greater than in about half the PROMIS sites studied (Cobb County, Rhode Island, Golden (Colo.), Milwaukee, and Kalamazoo) but less than in the others (Los Angeles, Florida Second Circuit, Detroit, Louisville, Indianapolis, and New Orleans). However, unlike other sites, in the District a trial is almost always by jury. The percentage of convictions that are guilty pleas is comparable across the sites examined. Finally, court delay from arrest to post-indictment disposition (about 224 days) was greater than in New Orleans, Los Angeles, and Indianapolis, but less than in Detroit, Cobb County, and Rhode Island.

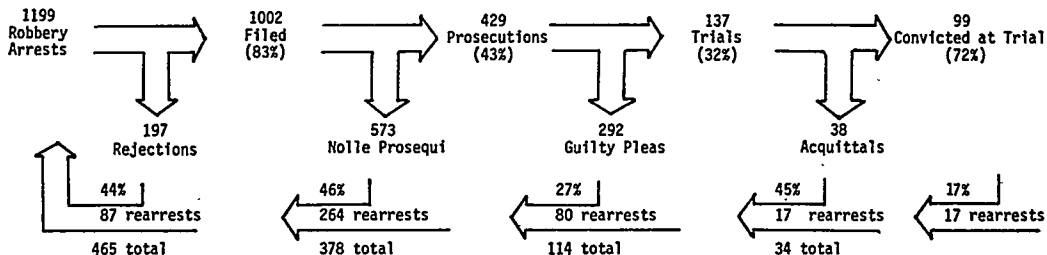
high-volume charges: assault, burglary, larceny, and robbery. "Charge" was based on the most serious accusation brought by the arresting officer, even though the defendant may have been prosecuted for a different offense. The charge which the police officer brought appears to be the best available substitute for the offense that the accused is said to have committed. Its use allows a comparison between cases actually prosecuted and those which were not. Because the police may have an incentive to overcharge at this stage, the statistical analysis regarding the charge description controls for the amount of harm to victims and the property loss. Other substitutes for the offense committed were problematic. According to experienced prosecutors, a less serious felony charge is frequently filed by the screening prosecutor with the expectation that the grand jury will include more serious charges in the indictment, and the final conviction may reflect charge reduction following plea bargaining. Therefore, we concluded that neither the charge initially filed nor the conviction was appropriate for this study.

The processing of these four high-volume offenses is outlined in Figure 2. Only three-fourths of the cases survived the initial screening. Of the surviving cases, less than half were prosecuted; others were dismissed by the prosecutor or by the court. Ultimately, twenty-nine percent of the assault cases, thirty-six percent of the burglary cases, thirty-three percent of the larceny cases, and thirty-eight percent of the robbery cases either went to trial or were terminated by a guilty plea. Of the cases that were prosecuted, guilty pleas predominate. Just over one in three assault prosecutions resulted in a trial. Fewer than one of three individuals accused of robbery, larceny, or burglary went

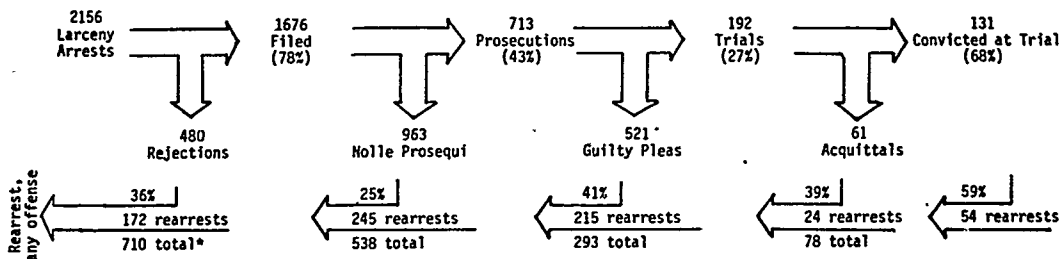
A. ASSAULT



B. ROBBERY



C. LARCENY



D. BURGLARY

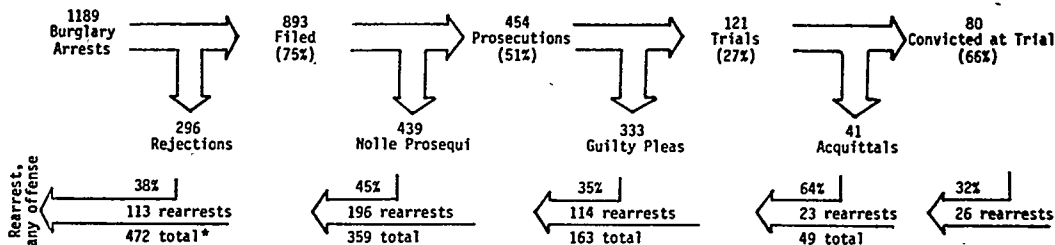


FIGURE 2  
Disposition and recidivism

to trial. Thus, as expected, out-of-court settlements dominated the processing of cases in the District of Columbia courts.

Of those persons convicted, the proportion re-

ceiving a jail or prison sentence varied by offense. Approximately one-third of the assault and larceny defendants received prison sentences following conviction. The proportion increases to nearly one-half

for those individuals convicted of burglary and to more than two-thirds for persons convicted of robbery.

Sentences were categorized as probation, incarceration under the Federal Youth Corrections Act or Narcotics Rehabilitation Act, incarceration for a minimum period less than three years, and incarceration for a minimum period of three years or more. Probation authorities usually release persons following a minimum sentence; thus, the minimum sentence imposed corresponds closely to the sentence actually served.<sup>6</sup>

In the following two sections this article will compare the sentences received by defendants convicted at trial with the sentences received by those entering guilty pleas. The final two sections will assess the probability that defendants who entered guilty pleas would have been convicted if they had gone to trial.

#### SENTENCING IN THE CRIMINAL COURTS

Some of the factors which influence the sentence received by defendants convicted at trial are difficult to quantify (e.g., a defendant's demeanor), while others are sometimes incompletely or inaccurately reported in the data base (e.g., employment status). Despite these limitations, there remain patterns of variables that are correlated with sentence severity, and those factors are used here to explain sentencing in the criminal courts.

These patterns were reduced to three sets. First, some researchers have found that a defendant's personal characteristics affect his sentence. Thus, age, sex, and release on own recognizance (the latter as a measure of established community ties) were included in the analysis. Second, specific attributes of the offense were considered as a set of potential factors influencing the sentence imposed. The amount of damage to property and the amount of injury to persons were assessed; as were the presence of a gun at the time of arrest and the number of charges included in the indictment. Third, the defendant's arrest record was believed to be a determinant of the sentence imposed. Thus, the number of previous arrests for crimes against property and the number of previous arrests for crimes against the person were included in the analysis.

The PROBIT results reported in Table 2 were

<sup>6</sup> T. Dungworth, *An Empirical Assessment of Sentencing Practices in the Superior Court of the District of Columbia*, PROMIS Research Publication No. 17 (IN-SLAW 1978).

derived from parsimonious specifications.<sup>7</sup> A one-tailed test of statistical significance was used, and statistical significance was determined at .05 and .10 levels of confidence. The statistic  $\chi^2$  equals minus two times the log likelihood ratio, where the latter was determined by comparing the likelihood of the fully specified model with the likelihood of the model with the  $\beta$ 's constrained to equal zero. The summary statistic,  $R^2$ , is the square of the multiple correlation coefficient and has an interpretation analogous to that of its counterpart in ordinary least squares regression. In addition, Table 2 presents the proportion of cases predicted correctly and the expected value of the proportion that would be predicted by chance.<sup>8</sup>

Generally, our findings conformed to our expectations and were consistent with the findings reported by other researchers in different settings.<sup>9</sup>

<sup>7</sup> Because the dependent variable of sentence severity was measured on an ordinal scale, a form of PROBIT was used to estimate the probability of receiving a given sentence. See McKelvey & Zavoina, *A Statistical Model for the Analysis of Ordinal Level Dependent Variables*, 4 J. MATH. SOC. 103 (1975).

In general, the model's specification is:

$$\Pr [Y_{ik} = 1] = \phi \left[ \frac{\mu_k - \beta_0 - \sum \beta_j X_{ij}}{\sigma} \right] - \phi \left[ \frac{\mu_{k-1} - \beta_0 - \sum \beta_j X_{ij}}{\sigma} \right]$$

where  $\phi$  represents the cumulative standard normal density function. The  $\mu$  and  $\beta$ 's are parameters estimated using maximum likelihood techniques.  $\Pr [Y_{ik} = 1]$  is the probability that the  $i^{\text{th}}$  observation of the dependent variable falls into the  $k^{\text{th}}$  category of the dependent variable  $y$ . Descriptions of the independent variables,  $X_{ij}$ , can be found in Table 1. Data used in the analysis include all defendants who were convicted at trial.

<sup>8</sup> There are several ways to "guess" at the sentence. The method chosen here is analogous to that used to calculate lambda, a measure of association commonly used in contingency table analysis. The technique requires one to assign defendants randomly to each of the sentencing categories so that the final number of defendants placed in each category equals the number actually observed in that category. Probability theory is used to calculate the expected number of mistakes that would arise through such a process.

<sup>9</sup> See Chiricos & Waldo, *Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition*, 40 AM. SOC. REV. 753 (1977); Hagan, *Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice*, 55 SOC. FORCES 597 (1977); Jacob & Eisenstein, *Sentencing and Other Sanctions in the Criminal Courts of Baltimore, Chicago and Detroit*, 90 POL. SCI. Q. 617 (1975); Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968*, 4 J. LEG. STUDIES 369 (1975); Burke & Turk, *Factors Affecting Post-arrest Dispositions: A Model for Analysis*, 22 SOC. PROB. 313 (1975); Hagan, *Extra-legal Attributes and*

TABLE 1

## VARIABLES USED IN REGRESSION EQUATIONS ON SENTENCING FOLLOWING CONVICTION AT TRIAL IN SUPERIOR COURT

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$y_{11}$	equals one if the $i^{\text{th}}$ defendant was sentenced to probation.
$y_{12}$	equals one if the $i^{\text{th}}$ defendant was sentenced under the Federal Youth Corrections Act (receiving a sentence other than probation) or if the defendant was sentenced under the Narcotics Rehabilitation Act.
$y_{13}$	equals one if the $i^{\text{th}}$ defendant was sentenced to incarceration with a minimum term of less than three years.
$y_{14}$	equals one if the $i^{\text{th}}$ defendant was sentenced to incarceration with a minimum term of three years or more.
$x_{11}$	equals one if the $i^{\text{th}}$ defendant was released on personal recognizance prior to trial (ROR).
$x_{12}$	equals one if the defendant was a male (SEX).
$x_{13}$	equals the defendant's age in years (AGE).
$x_{14}$	equals one if a gun was present at the time of arrest (GUN).
$x_{15}$	harm to the victim; coded zero for none or threat only, coded one if there were minor injuries, coded two if victims were treated and released, coded three if victims were hospitalized. The most serious harm done determined the category coded (HARM).
$x_{16}$	dollar value of property stolen, damaged, or destroyed; coded zero for none, coded one for under \$10, coded two for between \$10 and \$200, coded three for between \$250 and \$2,000, and coded four if in excess of \$2,000 (DOLLAR VALUE).
$x_{17}$	number of previous arrests for crimes against persons (CRIMES AG PERS).
$x_{18}$	number of previous arrests for crimes against property (CRIMES AG PROP).
$x_{19}$	number of charges ever brought (CHARGES).

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Although corresponding results reported in an earlier study on sentencing practices were based on a different model and used similar but not identical data, the findings for this study are in substantive agreement with those reported in the sentencing study.<sup>10</sup>

Overall, we found that males generally received more severe sanctions than females and that individuals who were released on personal recognizance (ROR) prior to trial were sentenced more leniently. This latter finding is consistent with the belief that ROR defendants have more community ties than non-ROR defendants and, as a result, make better probation risks.<sup>11</sup> While the age of the defendant did not have an impact on sentence severity, the seriousness of the harm done to the victim was an important factor in explaining sentences following convictions for assault and for burglary, but not for robbery.<sup>12</sup> The value of property lost was important for robbery, larceny, and burglary—and,

to a degree, for assault, while possession of a gun increased the sentence in assault and burglary cases. Previous arrests generally increased the probability that a defendant would be sentenced to prison rather than to probation. Finally, sentence leniency was inversely related to the number of counts in the indictment for robbery and burglary.

This model significantly improved our ability to explain the sentence received following conviction at trial. Using these results, we can accurately predict the sentence received in assault cases seventy-six percent of the time, in robbery cases forty-six percent of the time, in larceny cases sixty-nine percent of the time, and in burglary cases fifty-six percent of the time.<sup>13</sup> In contrast, if we were to guess at the sentences received, the percentage of times that we would expect to be correct ranges from a high of sixty-four percent for assault to a low of twenty-seven percent for robbery.<sup>14</sup>

*Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC. REV. 357 (1974); Green, *Inter- and Intra-racial Crime Relative to Sentencing*, 55 J. CRIM. L.C. & P.S. 348 (1964).

<sup>10</sup> T. Dungworth, note 6 *supra*.

<sup>11</sup> In a study of pretrial release practices in the District of Columbia, over 40% of the felony defendants were released on personal recognizance; previous record, number of cases pending, and employment were important variables in predicting release. But there is considerable doubt about how strongly these variables are correlated with pretrial misconduct and, thus, whether ROR clients actually make better probation risks. See Roth & Wice, *Pretrial Release and Misconduct in the District of Columbia*, PROMIS Research Publication No. 16 (INSLAW 1979).

<sup>12</sup> The reason robbery deviates from the statistical

norm is not absolutely clear. Yet, perhaps robbery is such a serious offense that the factor that an individual is harmed during a robbery may have little independent effect on the ultimate sentence received. However, if the robbery victim incurs a *serious* injury during the course of a robbery, a more serious charge is likely to be lodged.

<sup>13</sup> If we accept a strict regression analogue and calculate adjusted  $R^2$ , then explanatory power falls from .23 to .16 (assault), .38 to .34 (robbery), .28 to .25 (larceny), and .30 to .25 (burglary). See F. KERLINGER & E. PEDHAZUR, *MULTIPLE REGRESSION IN BEHAVIORAL SCIENCE* 282-83 (1973).

<sup>14</sup> Knowing that given percentages of defendants charged with each offense will receive jail terms, probation, and acquittals, our "guess" was based on a random assignment of all defendants in each data base to prison, probation, or freedom. We then compared the actual outcome of each defendant's encounter with the criminal

TABLE 2  
REGRESSION RESULTS ON SENTENCING OFFENDERS CONVICTED AT TRIAL

Explanatory Variables	Regression coefficients and asymptotic z scores			
	Assault	Robbery	Larceny	Burglary
Constant	-1.79** (2.74)	-1.28** (1.90)	-1.85** (3.1)	-0.20 (.43)
ROR	-0.42* (1.42)	-0.48** (2.19)	-0.55** (2.66)	-0.33* (1.37)
SEX	0.25 (.55)	0.46 (.99)	1.14** (2.30)	***
AGE	0.03 (.21)	0.04** (1.83)	-0.01 (.36)	-0.02 (.97)
GUN	0.47* (1.47)	.18 (.83)	***	0.57* (1.49)
HARM	.20* (1.51)	-.12 (.76)	***	0.29* (1.69)
DOLLAR VALUE	0.30* (1.32)	0.23** (2.49)	0.30** (2.71)	0.15** (1.66)
CRIMES AG. PERS	0.11* (1.56)	0.07** (1.99)	0.04* (1.37)	-0.07 (1.24)
CRIMES AG. PROP	0.03 (.75)	0.04* (1.31)	0.02 (.87)	0.06** (2.28)
CHARGES	0.09 (1.22)	0.11** (3.44)	0.08 (1.12)	0.09** (1.97)
$\chi^2$	15.87*	52.86**	30.08**	33.46**
$R^2$	.23	.38	.28	.30
% Predicted Correct	76%	46%	69%	56%
% Correct by Chance	64%	27%	54%	33%
N of cases	113	157	185	123

## Notes:

\* Significant at  $p < .10$ \*\* Significant at  $p < .05$ 

\*\*\* Gun and harm were infrequently elements of the offense (larceny); virtually all burglars were male

Results from the regression analyses lend credence to the belief that the model can predict sentences received following trial. Of course, the main purpose of this exercise was not to predict the sentences of defendants convicted at trial. Rather, our primary interest was to predict the sentence that would have been received by defendants actually entering a guilty plea or actually having their cases terminated in a dismissal, if they had in fact been convicted at trial. These predictions are reported and discussed below.

PREDICTED SENTENCES FOR DEFENDANTS CONVICTED BY PLEA OR DISMISSED

In this section, we will compare the sentences received by defendants who entered guilty pleas with the sentences received by individuals con-

icted at trial. The sentence received following trial was also compared with a predicted sentence: a sentence which we predict would have been imposed had the defendant who pled guilty actually gone to trial. The prediction is based on the regression model reported in the previous section.

In the first column of Table 3 sentences are grouped into four categories of increasing severity: probation, incarceration under the Federal Youth Corrections Act (FYCA) or the Narcotics Rehabilitation Act (NARA), a minimum sentence of less than three years, and a minimum sentence of three years or more.

The second column records the proportion of offenders convicted at trial who actually received a given type of sentence. Column 3(a) records a comparable measure for defendants convicted by plea. Column 3(b) presents the sentence distribution that would be expected if the same guilty plea defendants had been convicted at trial, and the fourth column shows the corresponding expectation for persons whose cases were dismissed either

justice system with our randomly predicted result. The percentage of the time our random assignment correctly predicted the actual result constituted the percentage of times we would expect to be correct.



TABLE 3  
OBSERVED AND PREDICTED SENTENCES FOLLOWING CONVICTION AT TRIAL, GUILTY PLEA, AND NOLLE PROSEQUI:  
PROPORTION OF INDIVIDUALS SENTENCED TO EACH OF FOUR SENTENCES

Charge and Sentence Severity (1)	Sentence Imposed				Number of Trials to Guilty Pleas (5)
	Following Conviction at Trial actual (2)	Following Conviction by Plea		Following Nolle Prosequi exp. (4)	
		act. (3a)	exp. (3b)		
Assault					113/280
Probation	78%	80%	77%	77%	
FYCA/NARA <sup>a</sup>					
Minimum < 3 yrs.	18	18	20	18	
Minimum > 3 yrs.	4	2	2	5	
Robbery					157/435
Probation	25	43	24	30	
FYCA/NARA	19	21	21	24	
Minimum < 3 yrs.	21	23	22	22	
Minimum > 3 yrs.	35	14	32	25	
Larceny					185/745
Probation	69	70	67	75	
FYCA/NARA	6	4	7	6	
Minimum < 3 yrs.	25	26	27	19	
Minimum > 3 yrs. <sup>a</sup>					
Burglary					123/554
Probation	50	53	51	61	
FYCA/NARA	14	15	14	14	
Minimum 3 yrs.	24	27	23	19	
Minimum 3 yrs.	12	5	11	6	

<sup>a</sup> Category merged with "minimum < 3 yrs."

by the prosecutor or by the judge. Columns 3(b) and 4 were predicted from the regression equations.

Comparing columns 2 and 3(a) with column 3(b) leads to two conclusions. First, with respect to assault, larceny, and burglary, defendants who entered guilty pleas received sentences comparable to sentences they would have received had they been convicted at trial. For assault, seventy-seven percent of the defendants were expected to receive probation; eighty percent actually received probation. For larceny, sixty-seven percent were predicted to be placed on probation; seventy percent actually were. For burglary, we expected fifty-one percent of the defendants to receive probation; fifty-three percent did. Based on these data, we conclude that prosecutors are not giving significant plea bargaining concessions and that judges are not rewarding guilty pleas with sentence leniency for these three offenses.

In contrast, plea bargaining concessions were apparent for robbery convictions. Using the regression equations, we predicted that twenty-four percent of those defendants who entered a guilty plea after being arrested for robbery would receive pro-

bation. In fact, forty-three percent received probation. We also predicted that thirty-two percent of the robbery offenders would receive a prison sentence with a minimum length of three years or more. In fact, only fourteen percent received such a severe sentence following a guilty plea. This may indicate that considerable bargaining is occurring for robbery cases and that, in general, a robbery suspect can expect to fare better if he enters a guilty plea instead of being convicted at trial.<sup>15</sup>

Finally, we found that suspects whose cases were dismissed would have received somewhat lighter, but not radically different, sentences compared with their convicted counterparts.

<sup>15</sup> These findings are consistent with those reported in T. Dungworth, note 6 *supra*. Dungworth reports marked sentence concessions awarded to robbery suspects. His findings with respect to other personal crimes are not comparable, because he did not include misdemeanors in his analysis. With respect to crimes against property (he includes crimes against the public order in this category), his findings were comparable to those reported here: 50% of the guilty plea convictions resulted in probation relative to 48% of the convictions at trial. T. Dungworth, *supra* note 6, at V-35 and V-36.

TABLE 4

## VARIABLES USED IN THE REGRESSION EQUATIONS OF CONVICTION FOLLOWING TRIAL IN SUPERIOR COURT

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$W_{i1}$	equals one if the $i^{\text{th}}$ defendant was convicted at trial.
$W_{i2}$	equals one if the $i^{\text{th}}$ defendant was acquitted at trial.
$x_{i1}$	the defendant's age in years (AGE).
$x_{i2}$	coded one if the defendant was arrested the same day the offense was committed (SAME).
$x_{i3}$	coded one if physical evidence was available (PHYSE).
$x_{i4}$	the number of charges (CHARGES).
$x_{i5}$	coded one if the defendant was arrested at the scene of the offense, although not necessarily at the same time as the offense occurred (SCENE).
$x_{i6}$	the number of lay witnesses (LAYWIT).
$x_{i7}$	coded one if the defendant was released on personal recognizance (ROR).
$x_{i8}$	coded one if the defendant was granted a third-party release (SR).
$x_{i9}$	coded one if there was corroboration that a crime was committed (CORROB).
$x_{i10}$	coded one if exculpatory evidence was present (EXCULP).

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Our failure to find significant plea bargaining concessions, with the exception of robbery cases, runs contrary to our expectations. As such, the findings mandate explanation. However, this explanation will be deferred. Next, the analysis turns to predicting the probability of conviction at trial.

#### THE PROBABILITY OF CONVICTION AT TRIAL

In the previous two sections, PROBIT analysis was used to *estimate* the probability of receiving different types of sentences if convicted at trial. These estimates then were used to *predict* the sentence that would have been received by those defendants actually pleading guilty if they had in fact gone to trial. Here, the probability of being convicted at trial is estimated using the availability of physical evidence, the number of lay witnesses, whether the defendant was arrested at the scene of the offense, whether the defendant was arrested within one day of the offense, the number of charges, and the defendant's pretrial release status as explanatory variables. PROBIT again was used to estimate the probability of conviction.<sup>16</sup>

We believed that release on personal recognizance was more likely for weaker cases, that evidence corroborating the fact that a crime had been committed was likely to increase the probability of conviction, while exculpatory evidence decreased it, and that the number of charges increased the

probability of conviction. Therefore, a one-tailed test of significance was used for these four variables at .10 and .05 levels of confidence. However, initial analysis showed no definite patterns with respect to the other variables.<sup>17</sup>

We found that while physical evidence and the availability of witnesses appeared to increase the likelihood of a robbery conviction, they appeared to decrease the likelihood of a burglary conviction. Similarly, the presence of evidence corroborating the existence of an offense seemed to increase the probability of conviction for all studied offenses

<sup>17</sup> The social relationship between the victim and the defendant, and whether there was provocation or participation by the victim, had no significant impact on the probability of conviction at trial. *See* K. Williams, note 3 *supra*. Alternative specifications were attempted and rejected because they failed to enhance explanatory power. These alternative specifications included the above variables and the following ones:

1. The screening prosecutor's estimate of the probability of conviction. A question was posed to the screening prosecutor, asking him the "probability of winning" the case. Allowable responses were: "poor (under 50%)," "fair (50%-75%)," "good (75%-90%)," and "excellent (90%-100%)." In one specification, the category mean was used as an explanatory variable. In an alternative specification, dummy categories were created for each response category. In neither case were the results statistically significant, and in some cases, the regression coefficients were in the wrong direction.

2. Availability of an eyewitness; availability of a complaining witness. The number of lay witnesses was refined to reflect whether eye witnesses and complaining witnesses were available. If so, a dummy variable was created for each category. Results were not statistically significant.

3. The seriousness of the offense. The estimates from the sentencing regression equations were used as weights for the seriousness of the offense. This did not appear to lend additional explanatory power to the model.

<sup>16</sup> The general form of the model was:

$$\Pr [W_{i1} = 1] = \Phi \left[ \frac{-\alpha_0 - \sum \alpha_j x_{ij}}{\sigma} \right]$$

$$\Pr [W_{i2} = 1] = 1 - \Pr [W_{i1} = 1]$$

where  $\Pr [W_{i1} = 1]$  is the probability of being convicted at trial;  $\Phi$  the cumulative standard normal density function. Variables entering the model are described in Table 4.

TABLE 5  
REGRESSION RESULTS ON THE PROBABILITY OF CONVICTION FOR DEFENDANTS GOING TO TRIAL

Explanatory Variables	Regression coefficients and asymptotic z scores			
	Assault	Robbery	Larceny	Burglary
Constant	.24 (.57)	.60 (1.23)	-.23 (.46)	1.65** (2.72)
AGE	-.005 (.61)	-.04** (2.46)	-.00 (.03)	-.01 (1.17)
SAME	-.97** (2.90)	-.05 (.14)	.36 (1.27)	-.45 (1.20)
PHYSE	.05 (.22)	.79** (2.56)	-.34 (1.18)	-.42* (1.82)
CHARGES	.22** (2.94)	-.02 (.39)	.18** (1.64)	.07* (1.43)
SCENE	.78** (2.61)	.23 (.78)	.32 (1.45)	-.05 (.14)
LAYWIT	-.05 (.60)	.38** (2.65)	-.02 (.22)	-.25** (2.20)
ROR	-.28* (1.45)	-.57** (2.00)	.06 (.35)	-.53** (2.11)
SR	.40 (1.11)	-.50 (1.32)	-.30 (.91)	-.16 (.52)
CORROB	.26* (1.39)	.66** (2.51)	.27* (1.57)	.46** (1.93)
EXCULP	.09 (.14)	-.36 (.71)	-.54 (1.11)	-1.23** (2.42)
$\chi^2$	27.2**	31.6**	14.1	25.8**
R <sup>2</sup>	.21	.37	.10	.26
% Predicted Correct	68%	79%	70%	67%
% Correct by Chance	54%	65%	56%	55%
N of cases	234	174	268	169

## Notes:

\* Significant at .10

\*\* Significant at .05

except burglary. For burglary, the existence of exculpatory evidence seemed to reduce the probability of conviction.<sup>18</sup> Being arrested within one day of the offense, the number of charges brought, and being arrested at the scene of the offense all appeared to raise the likelihood of conviction only in assault. Finally, we found that being released on

<sup>18</sup> Note that the probability of convicting accused burglars decreased with both the availability of physical evidence and with the number of lay witnesses (in contrast to robbery convictions). It seems that either (a) the variables are proxies for other elements of the offense or (b) the evidence may be used by the defense as well as the prosecutor. As an illustration, the availability of a lay witness in a burglary offense may indicate a more "trivial" offense, such as that of a friend stealing from a friend. On the other hand, the lack of a lay witness may more typically indicate a nighttime burglary of a warehouse, for example, in which there were no witnesses. At any rate, the fact that these variables appear to have the "wrong" sign is not too troublesome here since we are primarily interested in prediction rather than estimation.

recognizance was significant only in burglary and robbery cases.

Unfortunately, the regressions did not function as well for this data as it did for the previous regressions on sentences. Nevertheless, using the multivariate results to predict the probability of conviction increased the proportion of correct predictions, relative to chance, from fifty-four percent to sixty-eight percent for assault, from sixty-five percent to seventy-nine percent for robbery, from fifty-six percent to seventy percent for larceny, and from fifty-five percent to sixty-seven percent for burglary.

These findings have interesting implications. Once cases have been accepted for prosecution, it is difficult to predict whether they will lead to a conviction at trial. Perhaps this can be attributed to the vagaries of judges and juries; perhaps the quality of evidence, especially witness testimony, cannot be accurately assessed until the time of the

trial; or perhaps the variables, or their measurement, used in this analysis fail to capture what is important in convincing a judge or a jury of guilt.<sup>19</sup>

ESTIMATED PROBABILITIES OF CONVICTION AT TRIAL: CASES TERMINATED BY GUILTY PLEA OR DISMISSAL

The previous section examined the probability of conviction for defendants who went to trial. In this section, those estimates are used to predict the probability of conviction at a hypothetical trial (a) for defendants actually entering guilty pleas and (b) for defendants whose cases actually were dismissed.

Table 6 consists of four rows pertaining to the four offenses examined. The first two columns pertain to cases terminated at trial. The next column corresponds to cases terminated by a guilty plea. The final column pertains to cases ending with a dismissal. The column labeled "A" reports the observed proportion of convictions at trial for each type of offense. Columns labeled "B" report the estimated proportion of convictions at hypothetical trials based on the multivariate results.

For present purposes, the most interesting findings appear in the columns "By Plea" and "Dismissed." The plea column indicates that if defendants went to trial rather than entering guilty pleas, they would be convicted at about the same rate as those actually going to trial. To illustrate, we predicted that sixty-six percent of the defendants who plead guilty in assault cases would be convicted if tried; the actual conviction rate for assault cases was sixty-five percent. For robbery, we predicted eighty-four percent of the guilty plea cases would have resulted in convictions at trial; seventy-eight

<sup>19</sup> We know of only one other study that has attempted to predict the probability of conviction *at trial* using the availability of evidence and witnesses as explanatory variables. That study is J. EISENSTEIN & H. JACOB, note 1 *supra*. Unfortunately, Eisenstein and Jacob exclude some variables included in our analysis; they include other variables that are not included in the present study; and since they do not report the specification of their regressions or detail their findings, it is difficult to make a direct comparison. Nevertheless, it is notable that they, too, were unable to account for much of the "variance" in their data and attributed very little of their explanatory power to "strength of the evidence." J. EISENSTEIN & H. JACOB, *supra* note 1, at 242. They are careful to point out, however, that this failure may be attributable to measurement errors in the variables representing "strength of the evidence." J. EISENSTEIN & H. JACOB, *supra* note 1, at 183. It appears that the amount and quality of evidence are reported in greater detail, and with more accuracy, in PROMIS.

TABLE 6  
PROPORTIONS OF CONVICTIONS: ACTUAL AND PREDICTED

Charge	At Trial		By Plea	Nolle
	A	B	B	B
Assault	65%	66%	66%	59%
Robbery	78	79	84	78
Larceny	66	68	69	67
Burglary	67	67	68	64

Code:

A Observed probability of conviction at trial = number of convictions/total number of trials

B Predicted probability of conviction had this case gone to trial, based on the regression equations reported in Table 5.

Number of cases analyzed: trials/pleas/dismissals

Assault 246/404/806

Robbery 185/336/653

Larceny 275/750/1166

Burglary 177/534/610

percent of litigated robbery cases resulted in convictions. For larceny and burglary we predicted convictions in sixty-nine and sixty-eight percent of the guilty plea cases, respectively; in sixty-six percent of the larceny cases and in sixty-seven percent of the burglary cases that went to trial convictions were forthcoming. Thus, *were it not for the significant number of guilty pleas, a large number of criminal cases probably would not result in conviction because trial outcomes are uncertain.* If all guilty plea cases went to trial, the percentage of prosecutions leading to conviction would fall from eighty-seven percent to sixty-six percent (assault), ninety-three percent to eighty-two percent (robbery), ninety-one percent to sixty-eight percent (larceny), and ninety-two percent to sixty-eight percent (burglary).<sup>20</sup> Additionally, a larger number of trials would be expected to reduce the rate of prosecutions, further limiting the number of convictions.

These findings have two implications. First, coupled with the finding that sentencing concessions in exchange for guilty pleas are not pervasive (with the exception of robbery), more defendants should go to trial. It would appear to be in their interest to do so<sup>21</sup> since they are likely to receive an equiv-

<sup>20</sup> Given the present mix of guilty pleas (G) and trials (T), the observed proportion of cases going to trial that result in conviction (P<sub>i</sub>) and the estimated proportion of guilty plea cases that would result in conviction if tried (P<sub>gp</sub>), the conviction rate equals [(T × P<sub>i</sub>) + G]/[T + G]. If all defendants who presently plead guilty actually went to trial, the conviction rate would fall to [(T × P<sub>i</sub>) + (G × P<sub>gp</sub>)]/[T + G].

<sup>21</sup> For the many defendants having appointed counsel, the cost of presenting a defense is unlikely to deter them from exercising their right to trial.

TABLE 7  
 DESCRIPTIONS GIVEN BY THE PROSECUTING ATTORNEY OF GUILTY PLEA DISPOSITIONS

	Type of Offense			
	Assault	Robbery	Larceny	Burglary
As Charged by Prosecutor	80%	56%	90%	63%
To Lesser Offense	11	26	5	18
Nolle/Other Case <sup>a</sup>	1	0	1	0
Nolle/This Case <sup>b</sup>	6	16	4	19
Alford	2	3	0	0

Source: PROMIS (Prosecutor's Management Information System).

Note: Number of cases examined: assault (432), robbery (463), larceny (797), and burglary (597).

<sup>a</sup> Defendant pled guilty in exchange for the prosecutor's agreement to dismiss a second pending case.

<sup>b</sup> Defendant pled guilty in exchange for the prosecutor's agreement to dismiss one or more counts of the present indictment.

alent sanction if convicted, whereas they stand a good chance of being acquitted at trial. Second, this evidence seems to contradict an often-made assertion that cases in which guilt is contested will go to trial. If the evidence stored in PROMIS can be taken as an indicator, guilty plea convictions frequently may result in conviction of the legally innocent, i.e., persons who would not be adjudged guilty at trial.

Interesting implications are not limited to hypothetical trial outcomes for defendants entering guilty pleas. Note that the last two columns of Table 6 lead to the conclusion that dismissed cases frequently would result in conviction if taken to trial.

The analysis next investigates the reasons behind plea bargains and the reasons for dismissals. This information helps explain the pattern of dispositions observed in the previous section.

#### EXPLANATIONS OF PLEA AND DISMISSAL DISPOSITIONS

Table 7 reports the frequency with which the prosecutors cite a series of standard descriptions of guilty pleas. Note that assault and larceny cases are frequently pled "as charged." Indeed, even if dismissals in exchange for pleas of guilty to other charges in the same case and dismissals in exchange for guilty pleas in other cases are considered to reflect charge reductions, then eighty percent of the assault pleas and ninety percent of the larceny pleas are to the most serious charge.<sup>22</sup> Since charge

<sup>22</sup> This is likely to be explained in part by the fact that there may be fewer appropriate "lesser included offenses" for assault and larceny, so these findings reflect statutory rather than behavioral explanations. Our main interest is to work with sentence concessions, and the only purpose

reduction is the primary method of plea bargaining in the District of Columbia, it is not surprising to discover that sentence concessions infrequently result for assault and larceny cases.

Robbery suspects enter guilty pleas to the most serious charge only fifty-six percent of the time, a frequency that corresponds to the high rate of sentence concessions awarded to persons who pled guilty following an arrest for robbery. However, individuals charged with burglary pled guilty to the most serious charge sixty-three percent of the time yet no sentencing concessions were apparent. Thus, sentencing patterns are consistent with dispositions for assault, robbery, and larceny, but burglary appears as an anomaly.

Having found that a guilty plea does not necessarily result in a charge reduction; and that a charge reduction does not necessarily lead to a sentence concession, the question remains: Why do defendants enter guilty pleas in the Superior Court of the District of Columbia? Defendants who plead guilty following an arrest for robbery receive sentence concessions. This would seem to explain, in part, their motivations to forego a trial. However, defendants accused of assault, larceny, and burglary are about as likely as robbery defendants to enter guilty pleas, although the latter offenses infrequently result in sentence reductions. Clearly, explanations must be sought beyond the incentive to seek leniency in exchange for "consideration."

Unfortunately, direct evidence supportive of other explanations is unavailable. It is possible that attorneys and judges are simply unaware of the actual outcomes of guilty pleas, and act as though

in including these statistics here is to record the extent to which a charge reduction is used, by the prosecutor, to communicate a desire for sentence leniency.

pleas routinely result in sentence concessions. When these findings were shown to local prosecutors and judges, they generally expressed surprise. The prevailing belief among court participants seems to be that sentence concessions do follow guilty pleas.

Nonetheless, lack of knowledge of existing sentencing patterns does not explain the patterns detected. Perhaps the simplest explanation is that in many cases a prison or jail sentence is unlikely to occur no matter how a defendant is convicted. Even when convicted by a jury, almost four of every five defendants accused of assault and nearly seven of every ten defendants accused of larceny received probation. When a jail sentence does result from conviction, it is likely to be for a short period. Given these conditions, a majority of defendants may feel that neither a trial nor active negotiation with the prosecutor is necessary. Consequently, a defense attorney may best serve his client's interest by facilitating his plea of guilty.

Rosett and Cressey emphasize plea bargaining as a method of "settling disputes," a view that is also consistent with the infrequency of prison sentences for assault and larceny cases.<sup>23</sup> From the case settling perspective, it is reasonable to believe that "routine" cases have little to be contested, especially if both sides believe the defendant is guilty. Solutions to conflicts are sought through what is believed to be an appropriate settlement. Since robbery, burglary, assault, and larceny are high-volume offenses, there is ample opportunity for "rules of thumb" to arise, especially since senior assistant United States attorneys supervise plea negotiations. Because probation frequently follows conviction at trial, guilty plea dispositions are to be expected. When more difficult cases appear there may be less pressure to compromise with a bargain. Perhaps this explains why robbery, the offense that routinely results in a prison sentence, was found to be the only offense in which sentence concessions are awarded.

Other researchers have pointed out that trials are disruptive, not only for judges and prosecutors, but also for defense counsel. Rarely is a defendant capable of determining whether he received a bargain. Given the high incidence of probation, the prosecutor's willingness to award charge reductions, which do not necessarily lead to sentence concessions, and the actual award of sentence reductions in robbery cases, it is easy to see how a plea bargaining "myth" is preserved for nonrobbery offenses. From the organizational viewpoint,

a high volume of guilty pleas preserves organizational equilibrium at the same time that it appears to serve the defendant's interests. As a result, the plea bargaining "myth" promotes the smooth operation of criminal justice.

Finally, it should be noted that the statistical analysis that forms the basis for findings reported here captures only routine case handling. It may be that plea bargaining is more important in atypical cases and that in those cases sentence concessions do occur. Furthermore, it is reasonable to expect that these atypical cases are the most highly publicized and eventually come to characterize what is believed to be typical in the criminal justice process. Whatever the explanation, sentencing concessions in exchange for guilty pleas do not appear to be pervasive in the District of Columbia Superior Court.

Turning to reasons given for dismissing criminal cases, Table 8 shows that reasons for these dispositions vary considerably across categories. Correcting for the category "unknown," it is possible to determine why cases were dismissed by the prosecutor despite an initial estimate that the defendant was likely to be factually guilty and stood a good chance of being convicted.<sup>24</sup> First, the large proportions of dismissed cases reported earlier are misleading. Approximately ten percent of all dismissals were part of a plea bargain, primarily in exchange for a plea to another charge in the same case. Thus, defendants in this category ultimately are convicted and sentenced for at least some offense. Similarly, over half of the larceny filings, almost twenty percent of the burglary filings, and six percent of the assault filings were assigned primarily to one of two diversion programs existing in the District of Columbia. In addition, a significant proportion of criminal cases lack prosecutory merit because of the trivial or insignificant nature of the offense. As shown in Table 8, thirty-one percent of the robbery filings, over ten percent of the assault filings, and almost twenty percent of the burglary filings lacked merit. When the statistics are corrected to account for plea bargaining, diversion, and cases that lack prosecutory merit, the proportion of prosecutorial and judicial dis-

<sup>24</sup> Correcting for the category "unknown" involved dividing the percentages in each row by the number one minus the proportion unknown. This correction factor assumes that "unknown" is uniformly distributed throughout the explanations given. We have no evidence or reason to believe that the category "unknown" varies systematically. It varies little across offense categories and only slightly and irregularly over time.

<sup>23</sup> A. ROSSETT & D. CRESSEY, note 3 *supra*.

TABLE 8

REASONS GIVEN BY THE PROSECUTING ATTORNEY FOR NOLLES AND DISMISSALS, CORRECTED FOR THE CATEGORY "UNKNOWN"<sup>18</sup>

Reason Given by Prosecutor	Type of Offense			
	Assault	Robbery	Larceny	Burglary
Evidence Problems <sup>b</sup>	10%	31%	10%	16%
Witness Problems <sup>c</sup>	59	27	21	31
Due Process	0	0	1	0
Bookkeeping <sup>d</sup>	6	10	3	10
Lacks Merit <sup>e</sup>	12	31	5	16
Diversion <sup>f</sup>	6	0	51	16
Guilty Plea <sup>g</sup>	6	2	17	7

Source: PROMIS (Prosecutor's Management Information System).

Note: Number of cases examined: assault (781), robbery (662), larceny (1154), and burglary (577), excluding cases in which the reasons for dismissals were not known.

<sup>a</sup> The reason for lack of prosecution was frequently unknown: assault (32%), robbery (38%), larceny (27%), and burglary (39%).

<sup>b</sup> The most frequently cited "evidence problems" were (1) analysis report unavailable, (2) analytical results insufficient to prove offense, and (3) physical evidence unavailable to prove offense.

<sup>c</sup> The most frequent explanations of "witness problems" were (1) complaining witness did not appear or was unfit for trial, (2) unable to locate complaining witness, and (3) police officer failed to appear or was unavailable.

<sup>d</sup> "Bookkeeping" most frequently refers to (1) charge mooted by verdict of the most serious offense and (2) charge to be picked up by the grand jury.

<sup>e</sup> The dominant explanation for "lacks prosecutive merit" was that the offense was trivial or insignificant.

<sup>f</sup> Diversion was primarily to Project Crossroads or the First Offender Treatment program.

<sup>g</sup> When "plea bargain" was given as an explanation for dismissals, it generally means that the defendant pled to another charge in the current case in exchange for a nolle of this charge.

missals attributed to problems with the case, witness or evidence problems, or due process concerns falls markedly to sixty-nine percent for assault, fifty-eight percent for robbery, thirty-two percent for larceny, and forty-seven percent for burglary. These final figures provide a better estimate of the number of defendants who appear likely to be guilty but who manage to escape the judicial process.

However, these numbers may still overstate the proportion of defendants who "escape" the criminal justice process. The prosecutor's charging responsibility is not limited to selecting cases with a high probability of conviction. He must also consider the appropriateness of the criminal process in managing conflicts that result in arrests. Assistant United States attorneys meet this responsibility by selectively filing criminal cases.<sup>25</sup> Kristen Williams found that cases in which the victim provoked or participated in the criminal event were more likely to be dropped at screening, a policy choice that appears to reflect the defendant's lessened responsibility or the victim's lack of deservedness in such cases. Additionally, in cases of aggravated assault, sexual assault, and robbery, victims who were

chronic alcohol abusers were more likely to have their cases rejected at screening. Finally, the social relationship between the victim and the defendant frequently made a difference in case processing, perhaps because witness problems were more likely to occur, or because the criminal process was seen as inappropriate in handling what were essentially domestic relation conflicts. Thus, in screening cases, assistant United States attorneys recognize that criminal prosecution is frequently inappropriate in settling disputes. Yet the fact remains that from thirty-two to sixty-nine percent of all dismissed cases result from witness problems and difficulties with physical evidence, and a majority of these cases would likely *not* fall into the category "inappropriate for criminal prosecution." Since Table 8 lists reasons given for dismissing cases *following case filings*, other explanations must underlie these reasons. In his study of witness cooperation, Frank Cannavale concluded:

[C]ommunication difficulties between police/prosecutor and witness prevented prosecutors from ascertaining the true intentions of many witnesses. As a result, many witnesses were regarded as noncooperators when this was not necessarily their conscious choice. The impact on prosecutive effectiveness is

<sup>25</sup> K. Williams, note 3 *supra*.

obvious: many cases may have been rejected, dropped or dismissed when they could and should have been pursued, had communication problems not led prosecutors to misinterpret witnesses' intentions.<sup>26</sup>

In interviews with 215 persons labeled as non-cooperative by prosecutors, ninety-four percent disagreed with the prosecutor's assessments and asserted that they were willing to testify.<sup>27</sup>

In part, witness problems seem to arise because police officers either fail to get the names of witnesses or inaccurately record addresses. But Cannavale also concluded:

Failing to contact a witness in order to arrange an appearance at trial, the prosecutor's office leaves a telephone message, which is never passed on to the witness. Time constraints do not permit follow-up by the prosecuting attorney, and there is a scarcity of qualified support staff to do it. The witness fails to appear, which, in all likelihood, leaves the prosecutor little choice except to check as the reason for dropping the case "witness no show."<sup>28</sup>

These findings linking resource constraints to witness problems and dismissals are important to an assessment of plea bargaining, for two reasons. First, the actual availability of witnesses and physical evidence is less important to a guilty plea than it is to a trial; i.e., a prosecutor who negotiates an out-of-court settlement need not worry whether a crucial witness will appear for trial. Second, to the extent that guilty pleas free prosecutorial resources that otherwise would be devoted to trial preparation, it is possible to be more thorough in preparing other cases, including maintaining contact with witnesses and gathering physical evidence. Referring to the criminal process model developed earlier, it is our expectation that the larger the number of guilty pleas, the smaller the number of dismissals.

This model of prosecution receives additional support from the effect of a career criminal program, Operation Doorstop, initiated in August 1976 by the Metropolitan Police Department and the United States Attorney's Office for the District of Columbia. Prior to 1976, the fact that a defendant was a career criminal did not cause the prosecutor to devote special attention to his case, with the exception of serious crimes with marginal evi-

dence.<sup>29</sup> After this experimental program was instituted, experienced prosecutors and police investigators were specially assigned to the cases of repeating violent offenders. Selection was made after case screening and not all eligible cases were selected.

Four prosecutors are assigned to Operation Doorstop. One prosecutor is responsible for the case following screening through indictment; the second is responsible for trial and sentencing. In addition, six police officers are available for special investigations.<sup>30</sup>

Because of the selective nature of the program, it is not possible to conclude definitively that Operation Doorstop had an impact on case processing. Nevertheless, its apparent impact is consistent with expectations. Only six percent of the cases of the selected career criminals (N=148) were dismissed compared with thirty-five percent of all other felonies (N=2,441). Trials were also more likely to occur in career criminal cases than in others (twenty-three percent to seventeen percent of all cases going to trial or entering a guilty plea), and trials of career criminals were more likely to result in conviction (eighty-five percent to seventy-three percent). Finally, cases involving career criminals required only half the court time that was required for other felonies (113 days to 235 days).<sup>31</sup> Given that career criminals were not previously given special prosecutory consideration, these findings are consistent with a belief that many cases are dismissed and others are disposed of by guilty pleas, partly because of resource constraints.<sup>32</sup>

#### SUMMARY

As noted earlier, because of the uncertainty of trial, were it not for the significant number of guilty pleas, a large number of criminal cases prob-

<sup>29</sup> *Curbing the Repeat Offender: A Strategy for Prosecutors*, PROMIS Research Publication No. 3 (INSLAW 1977).

<sup>30</sup> This description comes from K. Williams, *Robbery and Burglary: A Study of the Characteristics of Persons Arrested and the Handling of Their Cases in Court*, PROMIS Research Publication No. 6 (INSLAW 1979), and K. Brosi, note 5 *supra*.

<sup>31</sup> Brosi, *supra* note 5, at IX-10, IX-11. Brosi reports a similar program impact in Detroit. In New Orleans and Indianapolis, the dismissal rate is the same for career criminal and other felony prosecutions, but for career criminals, the trial rate is greater; and cases that go to trial more frequently result in convictions.

<sup>32</sup> They are also consistent in the selection of cases for the career criminal program on the basis of convictability, in addition to the formal criteria. (Clearly, some additional criteria are employed, since so few cases are chosen.)

<sup>26</sup> WITNESS COOPERATION 6 (F. Cannavale, Jr. & W. Falcon ed. 1976).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



ably would not result in convictions. Thus, guilty pleas aid the prosecution by rendering convictions for those who have committed a crime but who would not be convicted at trial. As a further benefit to the prosecutor, and contrary to expectation, sentence concessions were not awarded routinely to defendants who entered guilty pleas. In fact, no concessions were apparent for assault and larceny cases. For burglary, many guilty pleas followed charge reductions, but there was no evidence that these charge reductions resulted in lenient sentences. Only for the offenses of robbery were sentences more severe for offenders convicted at trial.

As the defendant's adversary, the defendant's losses are the prosecutor's gains. Thus, the prosecutor benefits from increased convictions and loses little from bargaining concessions. Only for robbery do guilty plea defendants appear to receive more lenient treatment. Since a trial is much more expensive than a guilty plea, a guilty plea saves the prosecutor resources. It is likely that without those savings his office would be forced to handle a reduced work load.

In general, guilty pleas benefited the prosecutor, while only benefiting those defendants who were charged with robbery.