

GUILTY OF POVERTY:  
A Study of  
Bail and Pretrial Detention  
in Buffalo, New York

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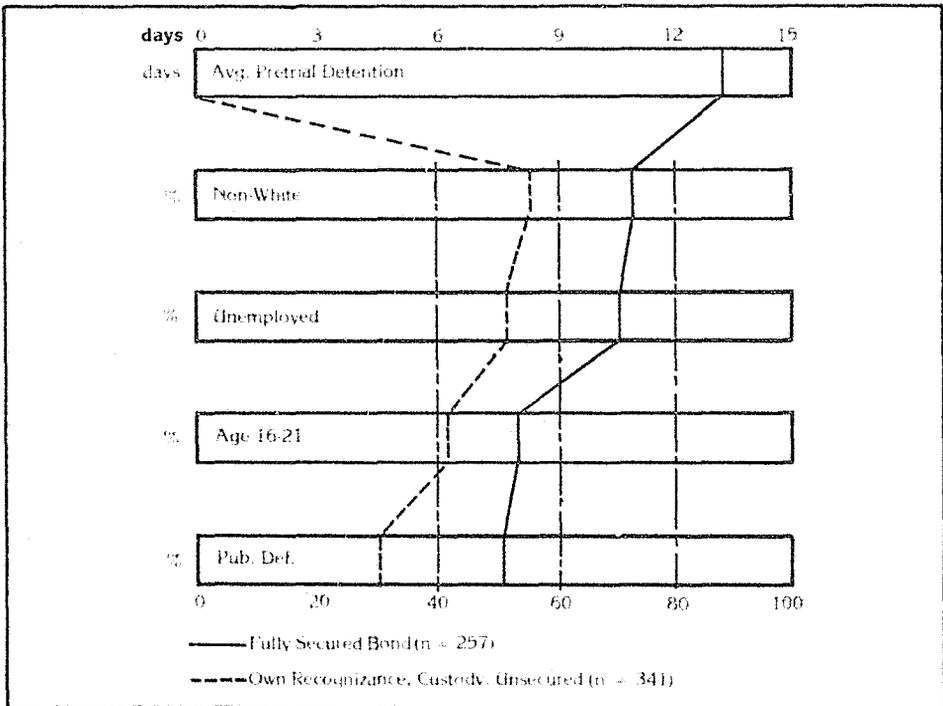
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FUNDED BY ERIE COUNTY

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ACQUISITION

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**FIGURE 1:  
Pretrial Detention, Race, Age, and Economic Indicators**



This chart compares several characteristics of defendants with different types of release conditions.

Days of pretrial detention here (not in text) is averaged over all defendants with each bail type; it is included here for illustrative purposes.

Unemployment and representation by a Public Defender are taken as indicators of defendants' relative financial resources.

With the exception of the proportion of defendants between 16 and 21 years old, there is an approximately 20% differential in all these characteristics, between defendants released at arraignment and those given Fully Secured bail.

Pre-Trial Services Agency (PTSA) is a non-profit agency administered by the Erie County Bar Association and funded by Erie County. Its purpose is to assist those arrested in the county, between the time of their arrest and the disposition of their case. This assistance takes a number of forms; but PTSA's work centers on making recommendations to judges for release on recognizance, or for some form of bail, in order to assist selected defendants in obtaining pretrial release.

Since PTSA has an advisory role in the determination of bail, it needs an accurate, objective, and comprehensive view of the operation of the bail system in order to be able to evaluate its own effectiveness and its policies, and to inform the community about its work and about the bail system. Toward those ends, PTSA recently conducted a detailed statistical study focusing on the operation of the bail system in Buffalo based on records concerning defendants interviewed in 1975 by PTSA bail investigators. The following report explains PTSA's work and presents major findings of the study, which, we believe, will be of interest to those concerned with the criminal justice system.

## I. OVERVIEW OF PRETRIAL DETENTION

In 1975, over three thousand people arrested in Buffalo on criminal charges, but presumed innocent, were incarcerated in the Erie County Holding Center for an average of nineteen days: over one hundred fifty man-years in all. Those who spent the longest periods of time in pretrial detention were, in general, younger, poorer, and non-White more often than other pretrial detainees.<sup>1</sup>

Of all those arrested during the year on misdemeanor or felony charges, under 60% were ever convicted of any offense whatsoever. Only nine percent of those convicted were convicted of the criminal offense they were originally charged with. The remaining 91% of convictions resulted from pleas to lower charges; and almost 60% of these pleas were to charges lower than a misdemeanor (see Figure 2).

Although less than 15% of all those arrested on criminal charges were ever sentenced to jail, 30% of them were incarcerated between arraignment and the disposition of their cases. In fact, the number of people subjected to pretrial detention was greater than the number ever convicted of any crime. Conversely, of course, not all those eventually given jail sentences served any pretrial time. As a result, after the judicial process had run its course, nearly two-thirds of those who spent time in pretrial detention (about two thousand people) had been kept for an average of over twelve days in the Holding Center but were never sentenced to jail. During the year, then, some seventy-five man-years were wasted in pretrial detention by people whom the courts eventually determined should not be put in jail<sup>2</sup> (see figure 2).

To incarcerate three thousand pretrial detainees entitled to the presumption of innocence cost Erie County roughly \$3 million for the year in Holding Center costs. Of that total, the cost of incarcerating those who were never sentenced to jail accounted for about half. These amounts represent costs directly related to the Holding Center only.<sup>3</sup> We are unable to estimate the total economic impact of pretrial detention on the community; but it must include loss of jobs, the resulting increase in public assistance costs, and disruption of families.<sup>4</sup> Whatever these dollar amounts may be, it is impossible to calculate all the various kinds of costs and hardships, and the emotional and social destruction, which are often caused by pretrial detention.

On the basis of this sketch, it is difficult to avoid the impression that neither efficiency nor justice is well served by a system which produces these results. The remainder of this report will indicate in more detail how and why the system of bail and pretrial detention produces such results, and what Pre-Trial Services Agency does to ameliorate them.

## II. OVERVIEW OF PRE-TRIAL SERVICES AGENCY

PTSA's assistance to defendants takes many forms: in any particular case, PTSA may recommend to the judge either recognizance release or a bail which will enable the defendant to obtain pretrial release; assist those posting bail for a defendant; submit an Information Report to the judge to aid his bail decision; help the incarcerated defendant communicate with family, friends, or attorneys; arrange for release under PTSA's Supervised Release Program; remind the defendant of subsequent court appearances; assist in arranging for an alternative to punitive sentencing; or furnish several of these forms of assistance. PTSA has also absorbed the functions of the Jail Counselling Service, which no longer exists. It should be noted that PTSA's bail recommendations are only advisory, and the decision concerning bail remains with judges; but judges have generally been quite responsive to PTSA's recommendations, and at times refuse to set bail until PTSA makes a report.

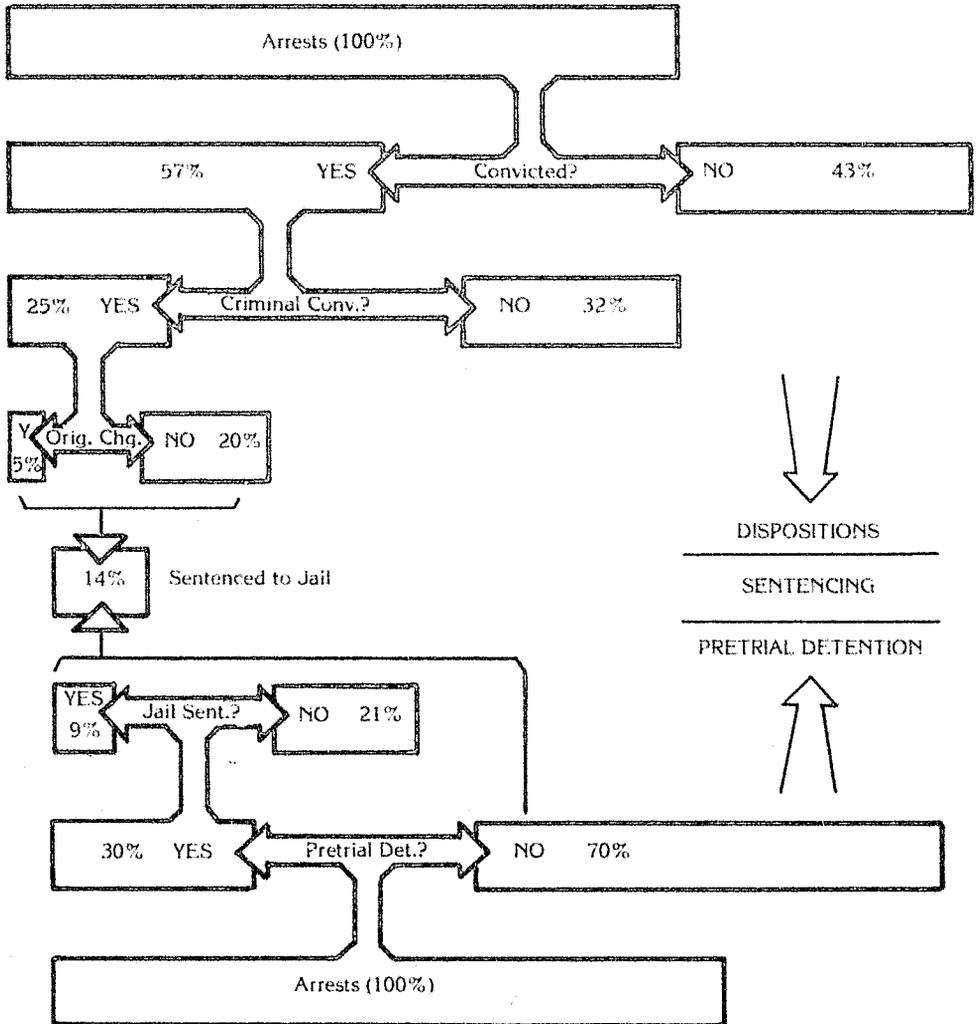
During 1976, PTSA bail investigators conducted over 6400 interviews with defendants, almost all of whom were incarcerated either in the Buffalo City Jail before arraignment, or in the Erie County Holding Center or its Alden annex after arraignment.<sup>5</sup> PTSA's work falls into two major phases whose character is somewhat different: pre-arraignment and post-arraignment.

### II.A. Pre-Arraignment Work

Beginning at 6:30 every morning of the year, PTSA bail investigators interview defendants in the City Jail who are charged with crimes (not Violations) other than the most serious felonies. Over 80% of all those in the jail fall within these limits. Each defendant who wants PTSA's assistance is interviewed about his family and community ties, previous arrest and conviction record, previous missed court appearances, employment, and possible sources of help with bail such as family or friends. The investigators then attempt to verify this information by telephoning the defendant's family or friends, by referring to City and State arrest history information, and by consulting any information previously gathered by PTSA. (These verification calls are sometimes the first notification of the arrest received by friends or family.) In order for there to be any possibility of a bail recommendation, the interview information **must** be verified.

There may be as many as fifty defendants in the jail on a single morning; arraignments begin at 9:30 a.m.; and only two or three investigators work each morning. Thus, the investigators must do a great deal of work and make a large number of sound decisions in very little time. If the interview information is verified, if the defendant has roots in the community, if he has a good record of previous court appearances, and depending on the number of previous felony convictions, the PTSA court representative may then make a bail recommendation before the arraignment judge.

**FIGURE 2:  
Arrests, Pretrial Detention, and Dispositions**



This chart illustrates results of the judicial and pretrial detention processes. Court processes, starting with arrests on criminal charges, begin from the top; pretrial detention for the same arrests begins from the bottom. All percentages take total criminal arrests as common denominator and blocks are drawn to scale, allowing visual comparisons of various groups.

**Conviction** refers to conviction on any charge; **Criminal Convictions** involve felony or misdemeanor charges. The **Original Charge** is the highest charge at arraignment; here, all convictions on other than the original charge are convictions to lesser charges. **Pretrial Detention** refers to any incarceration between arraignment and disposition. **Jail Sentence** is a sentence to time served and/or to additional jail time. Those not receiving jail sentences either received other kinds of sentences or were exonerated of all charges.

Investigators' decisions to recommend are often complex, and depend on their experience and judgement, on consultation with senior staff members, and on policy guidelines. More specific criteria entering into these decisions will be discussed below; but major factors are the likelihood of the defendant's appearance in court if released and the absence of evidence of serious drug or psychological problems.

Figure 2A diagrams the results of various selection and decision processes in pre-arraignment work for a hypothetical typical year in which there are ten thousand arrests. Note that PTSA recommends in nearly 70% of the cases in which interview information is verified: i.e., PTSA makes discretionary judgements not to recommend in about 30% of the cases in which a recommendation is theoretically possible (criteria employed in making these decisions will be discussed below). Further, the number of recommendations represents over 40% of the maximum possible number which could have been made (according to the few exclusionary categories employed in this diagram). Finally, the actual pre-arraignment assistance rendered, in terms of accepted recommendations, represents about one-third of this theoretical (and over-estimated) maximum of possible assistance.

In 1976, PTSA made nearly 2300 recommendations at arraignment in Buffalo City Court, three-fourths of which were accepted by judges. Of those recommended and released in 1975, 90% showed up for all subsequent court appearances. The non-appearance rate for defendants not recommended by PTSA was 2½ times that for those released on PTSA's recommendation.

## **II.B. Post-Arraignment Work**

PTSA also assists defendants after arraignment. In various respects this post-arraignment phase of work is more difficult than the pre-arraignment assistance. In general, defendants incarcerated in the Holding Center instead of being released at arraignment have more serious charges, have higher bails, have less ability than most to post any amount of bail, and are at a more advanced stage of judicial proceedings. In this phase of PTSA's work the time pressure is less intense, and the character of the assistance is somewhat different from that furnished at arraignment.

Investigators must gain a much more personal, in-depth knowledge of the defendant's situation than they can in pre-arraignment work. They often contact interested people repeatedly, help them arrange to post bail, and help the defendant communicate with family, friends, or attorney. For defendants from outside the area, PTSA attempts to speed up assignment of counsel, although it can usually be of little other assistance to these defendants. In some cases where PTSA does not make a post-arraignment bail recommendation, the investigator may submit an Information Report to the judge, since when judges have full pertinent information as stipulated in the law, they can make more knowledgeable and appropriate bail decisions.<sup>6</sup> PTSA investigators also help those posting bail to understand

the nature of the commitment they are making, to locate the correct part of court, and to navigate the court bureaucracy.

In addition, once a defendant recommended at arraignment is released, PTSA follows up by reminding him of certain court appearances. This followup reduces the number of bench warrants issued; non-appearances are also reduced by the fact that investigators make sure that defendants fully understand their commitment to return to court. In addition, by maintaining this followup contact PTSA investigators can have judges withdraw bench warrants in cases where the defendant is merely late, is in the hospital, or otherwise has a warrant issued for him without having wilfully violated the terms of his release.

In a few carefully selected cases in which defendants are, or will be, unable to post the bail set by the court, PTSA has recently implemented a Supervised Release Program, as an alternative to pretrial detention.<sup>7</sup> Defendants accepted for Supervised Release commit themselves to contacting PTSA on a regular basis. Besides verifying their presence in the area, this contact enables defendants to discuss with investigators developments in their cases, efforts to find jobs, and so forth; and it constantly reaffirms their obligation to maintain this contact.

In other cases PTSA makes referrals to psychological counselling or drug abuse programs and agencies, often helping families establish contact with these programs. Families usually lack any other source for this information. Finally, PTSA investigators may help defendants become enrolled in diversion programs such as Project W.H.E.A.T. or the Division for Youth, which may result in an alternative to punitive sentencing.

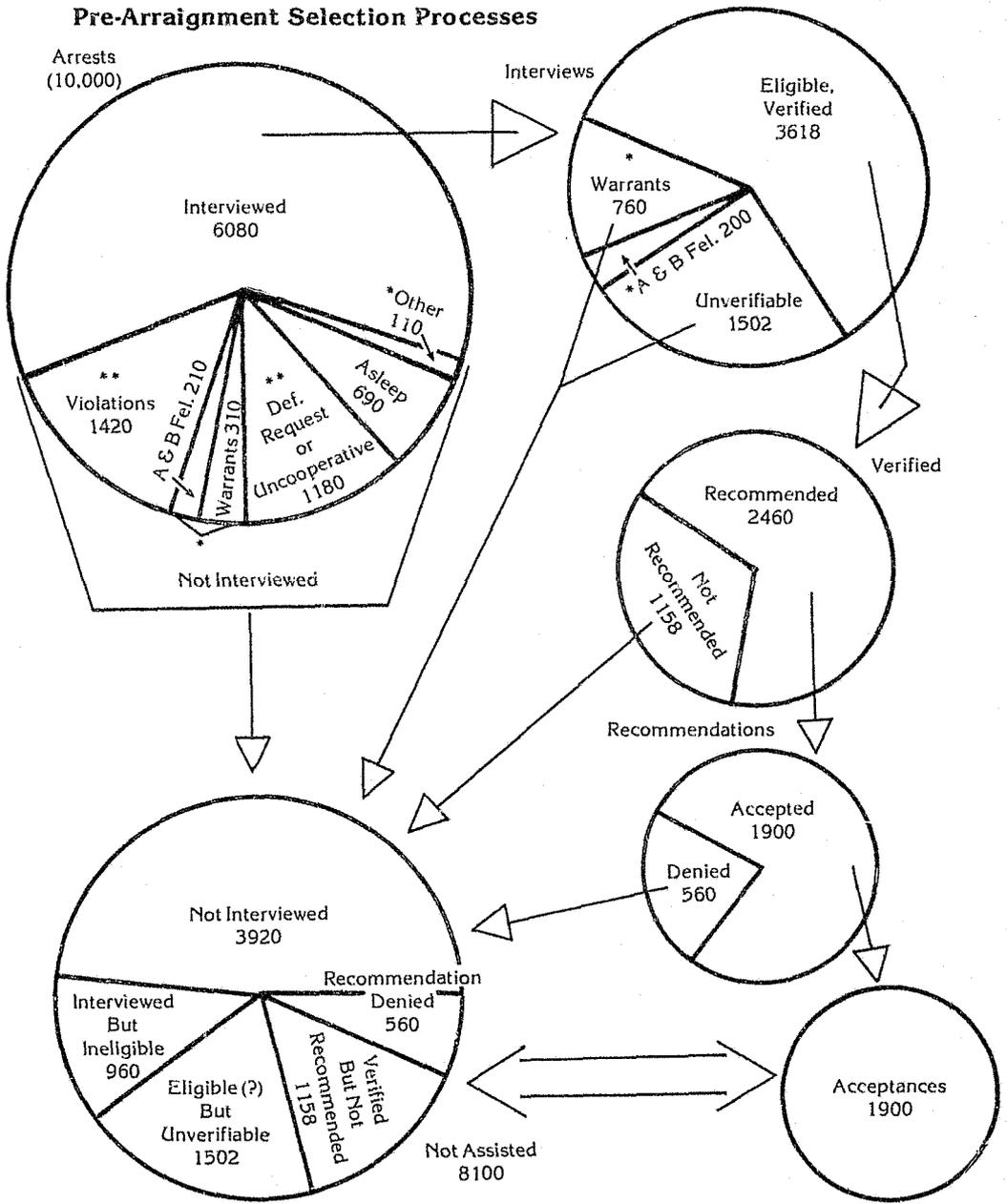
In 1976, PTSA made 198 post-arraignment bail recommendations, 136 of which were accepted. In all, PTSA efforts led to bail reductions for 204 defendants after arraignment. An additional 245 defendants were given other post-arraignment assistance such as help with posting bail, contacting attorneys, arranging for assignment of counsel, communicating with family, etc.

### **II.C. PTSA's Benefits to the Community**

PTSA's work benefits the community in a number of significant respects. By obtaining virtually immediate release from custody for nearly 1700 people annually, and by considerably shortening the pretrial detention of another 200, PTSA greatly reduces the amount of time spent in jail by those presumed innocent of any crime. This reduction in pretrial detention is particularly important to all concerned in view of the chronic overcrowding of the Holding Center.<sup>8</sup>

The cost of keeping one defendant in the Holding Center for one day is \$54. The study summarized below indicates that, according to overall patterns of bail setting and release, those for whom PTSA recommendations were accepted at arraignment would otherwise have spent an average of nearly five days in the Holding Center. As well, 1976

**FIGURE 2A:  
Pre-Arrestment Selection Processes**



Total Arrests .....	10000
Could Not be Assisted (groups marked **) —	1590
Assistance Not Needed or Not Desired (groups marked ***) —	2600
Total Excluded .....	(4190)
Maximum Possible Assistance .....	5810
Recommendations Made as % of Maximum Assist. ....	42.3%
Acceptances as % of Maximum Assistance .....	32.7%
Recommendations as % of Verifications .....	68.0%

statistics indicate that those whom PTSA helped to release after arraignment would have spent an average of almost a month longer in the Holding Center without PTSA's efforts. It can be conservatively calculated that the reduction in Holding Center costs due to PTSA's work amounts, by itself, to \$774,000 for 1976 — over eight times PTSA's total budget.<sup>9</sup>

This sum represents only a part, and perhaps not the most significant part, of PTSA's total financial benefit to the community, which must also include a reduction in bench warrants and their costs, and the prevention of increased welfare and unemployment compensation expenses and of all the other economic difficulties to which pretrial detention subjects defendants, their families, and the community at large.

Finally, it must be stressed that these economic benefits represent the achievement of a more tangible presumption of innocence, through reduction in pretrial detention. Most important, they reflect the fact that PTSA's efforts prevent, or at least lessen, an incalculable amount of unnecessary disruption and suffering in the lives of thousands of people.

### **III. SUMMARY OF RESEARCH PROJECT**

#### **A. Purpose**

In 1976, PTSA undertook a detailed statistical study of a sample of the defendants arrested by the Buffalo Police Department and interviewed in the City Jail before arraignment during 1975. Its results almost entirely concern bail setting in Buffalo City Court rather than that in superior courts. The remainder of this report will summarize major findings of this research effort, which had several related purposes: to provide PTSA with a more objective picture of the system in which it operates; to establish a reliable basis for self-evaluation and improvement by PTSA; and to inform those with whom PTSA deals, as well as interested people elsewhere, about pretrial detention, bail, and the purpose and value of PTSA's work.

A large amount of information was gathered for each of the 650 defendants included in the study sample in order to investigate relationships among such factors as race, sex, age, employment, length of residence in the area, previous arrests, seriousness of charge, bail, court appearance, pretrial detention, conviction, sentencing, and so forth. Where possible, results from this sample were compared with larger, independent data bases; and the sample proved to be accurately representative of 1975 Buffalo criminal arrests in terms of the only factors for which comparable data could be obtained: sex, race, age, distribution of charges, types of PTSA recommendations and acceptances, types of bail, and non-appearance rate of those recommended.

Because PTSA has no access to automatic data processing equipment, all data had to be gathered and analyzed manually. This laborious process made the research extremely time consuming, and placed limits on its scope.<sup>10</sup>

### III.B. Results for All Defendants

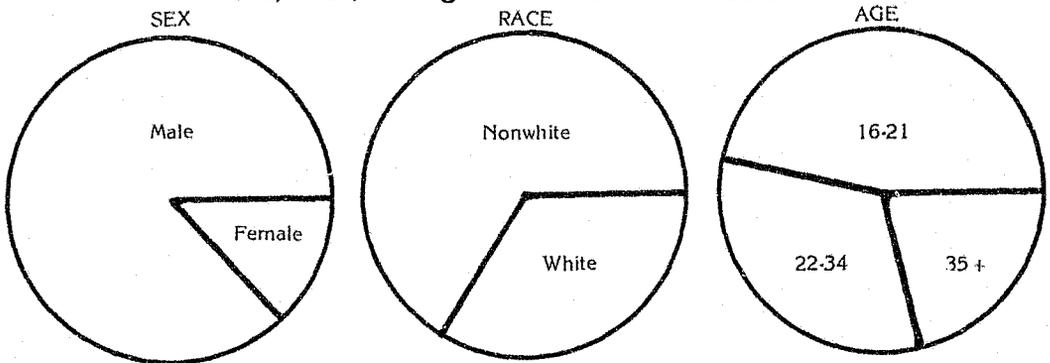
When data for the entire sample was totalled, the following results emerged. Of all defendants in the sample, 87% were male, almost two-thirds were non-White,<sup>11</sup> almost half were between 16 and 21 years old (no one under 16 was included in the sample), and almost 80% were under 35 (see Figure 3). Nearly 90% of all defendants had lived in Erie County for more than five years; but only 63% had lived at their present addresses for more than one year. 18% were married, and 25% had dependents.

The unemployment rate is defined straightforwardly in this study, as the percentage of defendants who did not hold jobs when arrested. The unemployment rate for all defendants was 61%. Differential unemployment rates were: Whites 51%, non-Whites 66%; males 57%, females 86% (prostitution is not counted as employment); 16-21 year-olds 73%, 22-34 year-olds 56%, and those over 34 years old, 40% (see Figure 4). (One-fourth of all unemployed defendants were attending school.)

Roughly one-sixth of all defendants were supported by welfare; another 20% received other forms of public assistance (unemployment, disability, veterans, social security). 10% of all defendants were receiving unemployment compensation, which provides a conservative indication of the rate of recent job loss. Almost one-fourth of the defendants were supported by working family or friends (see Figure 5). There was a group which accounts for one-fourth of all defendants composed of people who were neither working, attending school, nor married, had no dependents, and lived with family or friends: they had no apparent occupations or responsibilities (two-thirds of those in this group were under 22 years old).

The major variation between the study sample and independent data is that the number of defendants charged with Driving While Intoxicated is disproportionately large in the sample. Those arrested for this charge proved, among other striking characteristics, to have a comparatively high rate of employment. Thus, if this charge is omitted from the overall results, the unemployment rate for all defendants rises to 67%, and only 26% of those employed have held their jobs for over a year.

**FIGURE 3:**  
**Sex, Race, and Age of Criminal Defendants**

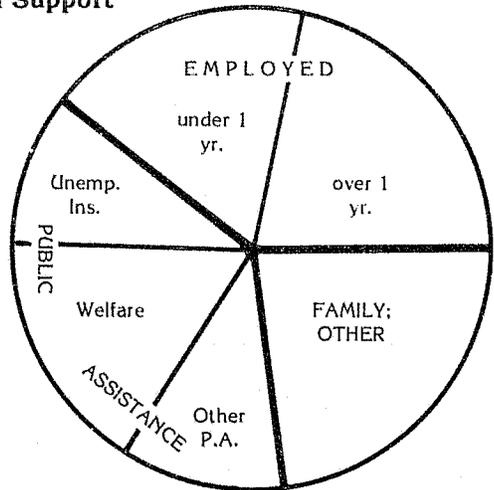


Another economic indicator is that 39% of all defendants were represented by a Public Defender (44½% if D.W.I. is omitted). Eligibility for a Public Defender is based largely on Federal poverty guidelines.

Almost 60% of all defendants in the sample had prior arrest histories; almost 40% had previous felony arrests. Within the twelve months preceding the arrests studied, almost one-third of all defendants had been arrested; and those in this group had been arrested nearly two times apiece during that year (excluding the arrest studied). Over one-quarter of all defendants had been arrested previously on charges similar to the one studied; this subgroup averaged 1.7 such previous arrests. Of those with arrest histories, 12½% had previously failed to appear in court (the reasons for these previous non-appearances were not determined).



**FIGURE 5: Defendants' Means of Financial Support**



Of the cases included in the study sample, 39% involved felony charges. Although 85% of all defendants were released from custody at some point before the disposition of their cases, 30% spent time in pretrial detention (an average of 19 days apiece). Of those released, 10.4% eventually failed to appear in court, without mitigating circumstances as far as we could determine. Less than 60% of the arrests studied resulted in any conviction; and 91% of all convictions resulted from plea bargaining. Only about one-third of those who spent time in jail before the disposition of their cases were ever sentenced to jail or given "time served" (see Figure 2). Less than 60% of the total number of days of pretrial jail time was applied in sentencing. The result was that about two-thirds of those incarcerated between arraignment and disposition spent an average of over 12½ days apiece in the Holding Center for no reason whatsoever, except that they could not post their bails.

The foregoing results for all defendants can be summarized by saying that, on the whole, those who were arrested had very little in the way of financial resources and tended to be long-time area residents, although they changed addresses frequently. Over half of them had had jobs at some point during the year before the arrest; but, of these, fewer than half had jobs of as much as a year's standing when arrested and 1/5 had lost their jobs. Almost half of all defendants were under 21 years old; almost 2/3 were Black; nearly 90% were male. More than half had been arrested in the past. They were usually released from the Holding Center, or at arraignment, before their cases were finished; and 90% of those released showed up for scheduled court appearances. Somewhat more than half of these arrests resulted in convictions; but almost no one was convicted of what he was arrested for. Nonetheless, 30% of them spent an average of almost three weeks in pretrial detention; and 2/3 of these cases of pretrial detention remained wholly unjustifiable in terms of subsequent conviction or sentencing.

This pretrial detention results directly from the way in which bail is set, an analysis of which follows.

### **III.C. Defendants with Various Kinds of Release and Bail**

This discussion will refer continually to several forms of release and bail. Release on one's Own Recognizance (OR) or in someone else's custody (C) do not require the posting of any security (cash, bond, or property) with the court, and result in the defendant's immediate release. Unsecured Bond (US) requires that a working individual sign for a certain amount of money, to be surrendered to the court in the event the defendant fails to appear in court and bail is estreated; but Unsecured Bond does not require that any security be posted. Partially Secured Bond (PS) works in the same way as Unsecured, except that 10% of the bail amount must be posted in cash (provided the defendant appears in court, this amount is returned, unlike a bail bondsman's fee). Finally, Fully Secured Bond (FS) requires posting the entire bail amount.

The Criminal Procedure Law of New York sets forth several criteria on the basis of which discretionary bail determinations are to be made (CPL, Sec. 510.30). These criteria, and the stated purpose of bail, are:

. . . the court must consider the kind and degree of control or restriction that is necessary to secure [the defendant's] court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

- (i) [His] character, reputation, habits and mental condition;
- (ii) His employment and financial resources; and
- (iii) His family ties and the length of his residence if any in the community; and
- (iv) His criminal record if any; and
- (v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
- (vi) the weight of the evidence against him . . . and any other factor indicating probability or improbability of conviction; . . . and
- (vii) the sentence which may be or has been imposed upon conviction.

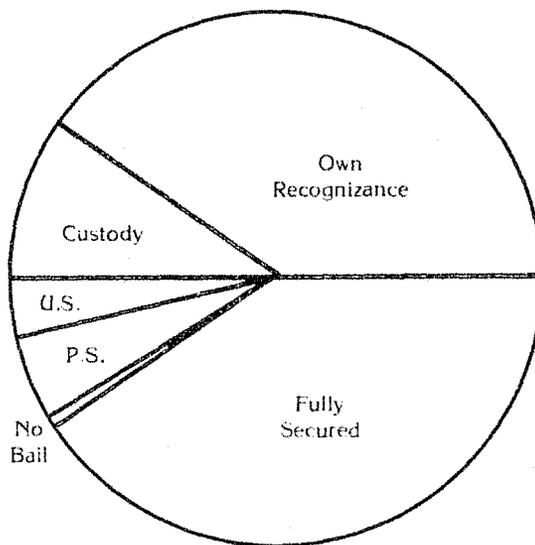
These criteria should be borne in mind throughout the presentation of the study's results, since two major questions are whether and how these criteria are being used in bail determination, and whether empirical evidence supports their relevance. It is also at least as important to remember that, according to the above law, the **only** justifiable purpose of bail is **to secure court appearance**.

Of all defendants whose cases were not dismissed at arraignment, 51% were released at arraignment on their Own Recognizance or in Custody, and 41% had Fully Secured bail set. Unsecured Bond was almost never used; Partially Secured was not used often. Therefore, most of these results concern either "release" (OR and C) or bail (FS), which together accounted for over 90% of all arraignment bail decisions (see Figure 6).

Whereas 54% of those released OR or in Custody were Black, 82% of those for whom FS bail was set were Black. The rate of unemployment was 52½% among those released OR and C, but 70% for those with bail. Of those released OR and C, 42% were under 22 years old and 73% were under 35; for those with bail the figures are 54% and 86%. When employed, over 60% of those released OR and C had worked for over a year; for those with bail this figure drops to about one-third. Those released OR and C had considerably stronger community ties; but those with bail had dependents almost as often (see Figure 1).

In all respects, those for whom bail was set had worse arrest records than those released at arraignment. 51% had prior felony arrests, as compared with 29% of those released OR and C. Those with bail had over 1½ times as high a rate of previous non-appearance. Two-thirds of those with bail spent time in pretrial detention; but their conviction rate was slightly lower than that of those released OR and C. Almost three-fourths of those with

**FIGURE 6:  
Bails and Releases at Arraignment**



bail were eventually released before disposition; but, when released, they had a higher non-appearance rate (12%) than defendants with any other type of release or bail.

As would be assumed, defendants with Fully Secured bails of \$100 or less had a much higher release rate than those with bails of \$5000 or more. However, the study shows that those with bails of anywhere between \$250 and \$2500 had almost exactly the **same** release rate. These bails over \$100 and under \$5000 account for 75% of all FS bails (Fig. 7).

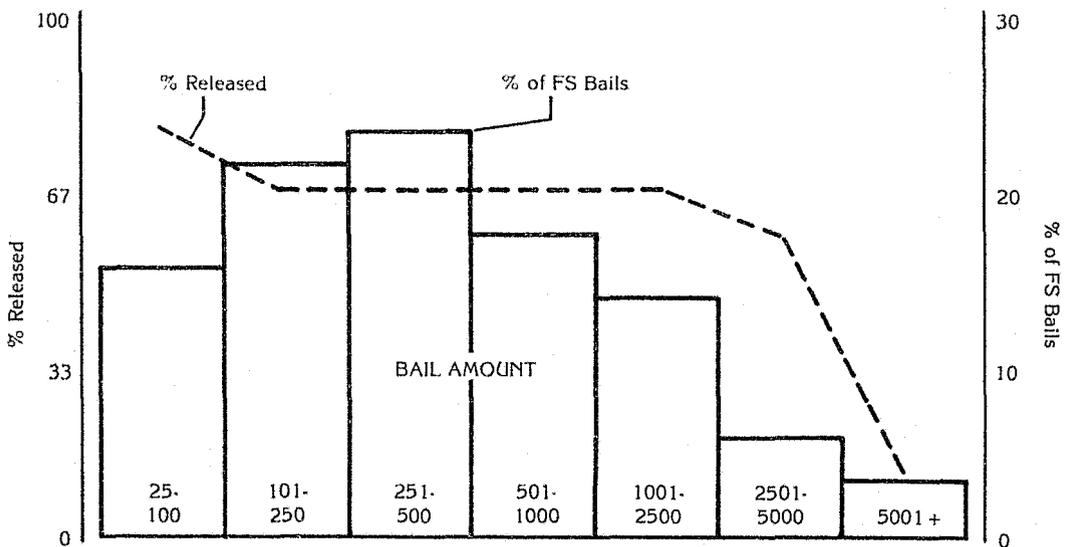
Finally, there is a distinct relationship between the seriousness of the charge and the use and amount of Fully Secured Bail (see Figure 8); as charges become more serious, both the amount and the frequency of use of FS bail increase.

Partially Secured Bond accounted for only 5.2% of all bails and releases at arraignment, Unsecured Bond for only 3.4%. By the time of final disposition, these proportions had risen to 7.7% and 3.8% respectively, still accounting in total for under one-eighth of all the cases studied. Partially Secured Bond appears to be used, in general, according to the seriousness of the charge. 82% of all Partially Secured bonds were set in misdemeanor and D Felony cases (half were misdemeanors); and the amount of PS bond rises with the seriousness of the charge: 80% of the PS bonds in misdemeanor cases were either \$250 or \$500; in felony cases, 68% were either \$500 or \$1000. There is an indication that low probability of conviction was judged successfully in setting PS bond in felony cases, since the conviction rate in such cases was only 20%. It also appears that in misdemeanor cases, the use of PS is related to high probability of conviction, since the conviction rate in those cases was 90%. 48% of the

PS bonds set in felony cases at arraignment resulted from the acceptance of PTSA recommendations. When used, PS eliminated a large amount of pretrial detention. Less than three-fifths as large a proportion of those with PS bonds spent pretrial jail time as did those with FS bail, and on the average they spent only about 1/3 as long. For both PS and US bonds the non-appearance rates were below average; for US it was extremely low (4%). Finally, 63% of all US, and 42% of all PS bonds resulted from the acceptance of PTSA recommendations.

Another result concerning Partially Secured bond is that the release rate for defendants with this form of bail was much higher than that for defendants with even the lowest amounts of FS bail. This means that, even if PS bond amounts are reduced to the 10% posting requirement, defendants with PS bonds were much more likely to be able to post a given amount than were defendants with FS bail. Financial information about these two groups of defendants does not suggest any explanation for this difference in ability to post bond. Therefore, it appears likely that the high release rate of those with PS bond resulted from the fact that such a high proportion of these bonds were set on PTSA's recommendation, based on knowledge of the defendant's ability to post such a bond.

**FIGURE 7:  
Bail Amount and Release Rate**



Generally, then, the following can be said about Partially Secured and Unsecured bond: (a) They are rarely used; (b) when used, they seem to be effective forms of release, which reduce pretrial detention and secure court appearance successfully; (c) however, their use also tends to be based on the seriousness of the charge or, at best, on probability of conviction. (It should be pointed out that the results for US and PS bonds in this study are open to a comparatively great degree of doubt because they are based on so few cases).

The use and the results of the various forms of release and bail can be summarized as follows. The stringency of the conditions set at arraignment for release appears to be governed very largely by the seriousness of the charge, perhaps moreso than by any other factor. The defendant's history of previous arrests also appears as a weighty factor. However, whatever criteria are being used in bail determinations, the objective result is, in general, that those for whom conditions of pretrial release are made **most difficult** are those who are **least able** to meet them.

Moreover, Fully Secured bail does not help to secure court appearance; instead, it shows the highest non-appearance rate of any form of bail. This might seem to indicate that, in fact, the highest bails were set for those correctly judged as least likely to appear in court. However, upon closer examination, it appears that if this is true at all, it is true only in a very perverse and partial way. The high non-appearance rate for FS bail results entirely from a very high non-appearance rate of 18% among defendants with **misdemeanor** charges who were released on FS bail. **Felony** defendants released on FS bail actually had a non-appearance rate 2% **below** average. Yet, almost two-thirds of all FS bails were set in Felony cases; and, as above, bail amounts were higher in those cases. Additionally, the release rate for felony defendants with FS bails was only 68%, as compared with a rate of 77% for those with misdemeanors and FS bails. Thus, when FS bail is set in misdemeanor cases it may be more appropriately set (for those who are unlikely to appear in court); but the amounts are lower and the release rate is higher than in felony cases. In felony cases, on the other hand, the use of FS bail appears to be relatively indiscriminate, and hinders the release of a large number of defendants who appear likely to return to court if released. That is, set punitively, Fully Secured bail is counterproductive; and set discriminatingly, it is ineffective. This situation appears to be a result of the determination of bail according to the seriousness of the charge; and these results indicate that that factor should not be nearly as influential in bail determinations as it seems to be.

Finally, differences in conviction rates of those with the various kinds of release and bail are small. In all, these results point toward the conclusion that Fully Secured bail, rather than an effective form of bail, is instead essentially an unjustifiable form of incarceration, which, moreover, is inflicted mainly upon those with the least ability to obtain release on such conditions.

### III.D. Defendants Recommended by PTSA

PTSA made bail recommendations at arraignment for 46% of all defendants in the study sample, recommending 52% of the defendants charged with misdemeanors and 42% of those charged with C, D, and E felonies (recommendations on A and B felony charges are not made at arraignment). Decisions to recommend showed marked preferences for defendants who, compared with the averages, had stronger community ties and somewhat greater financial resources, had no prior felony arrests, and, especially, no previous non-appearances. Some of these findings may be related to the additional fact that 41% of the defendants recommended were White, as compared with 37% of all defendants. The age distribution of those recommended is quite close to average. Only 12% of those recommended spent any time in pretrial detention, as compared with 45% of those not recommended; and when they were incarcerated, those for whom PTSA had made recommendations spent an average of 8.8 days, rather than the 21.2 spent by those not recommended. 94% of the defendants recommended by PTSA obtained release sometime before the disposition of their cases; and their non-appearance rate was 6% (as contrasted with 15% of those not recommended). Their conviction rate was about average; but, when convicted, they received relatively light sentences (11% of those recommended and convicted were given jail sentences, compared with 42% of those not recommended and convicted).

Over 80% of PTSA's recommendations were accepted by judges; as a group, the defendants for whom recommendations were accepted exhibit all the above characteristics, but to somewhat greater degrees. 86% of the recommendations in misdemeanor cases, and 70% of those in felony cases, were accepted.

Of the defendants for whom judges **denied** PTSA's recommendation, however, 64% were Black (compared with 46% of the acceptances). They were also somewhat younger than the recommended defendants as a whole; and their unemployment rate was higher (62%, as compared with 50% for acceptances). Their arrest records were markedly worse: 46% of them had previous felony arrests, compared with 25% of those for whom recommendations were accepted. Only 70% of those with denied recommendations ever obtained pretrial release; however, when released, their non-appearance rate was below average (8%). They spent a large amount of time in pretrial detention (43% of them spent an average of over 10 days). They were convicted somewhat less often than those for whom recommendations were accepted.

It can be concluded from these results that (a) PTSA recommends defendants who, when released, have a very low non-appearance rate; (b) PTSA does not select particularly "easy" cases for recommendations, since a high proportion of both misdemeanor and felony defendants is recommended and the conviction rate among them is not low; (c) they evidently need PTSA's assistance, since a relatively high proportion of

those for whom recommendations are denied never obtain pretrial release; (d) those recommended do, however, receive lighter than average sentences; even denials are sentenced to jail only slightly more often than average. PTSA decisions to recommend appear strongly influenced by the defendant's community ties, previous arrest record, previous non-appearances, and financial resources (the latter is related in various ways to community ties, to the high proportion of D.W.I. charges in the sample as discussed below, and also to the fact that PTSA works within a bail system based on property). In accepting recommendations, judges appear to reinforce PTSA's use of these criteria. In denying recommendations, however, judges give particular weight to employment, marriage, previous felony arrests, and recent arrests.

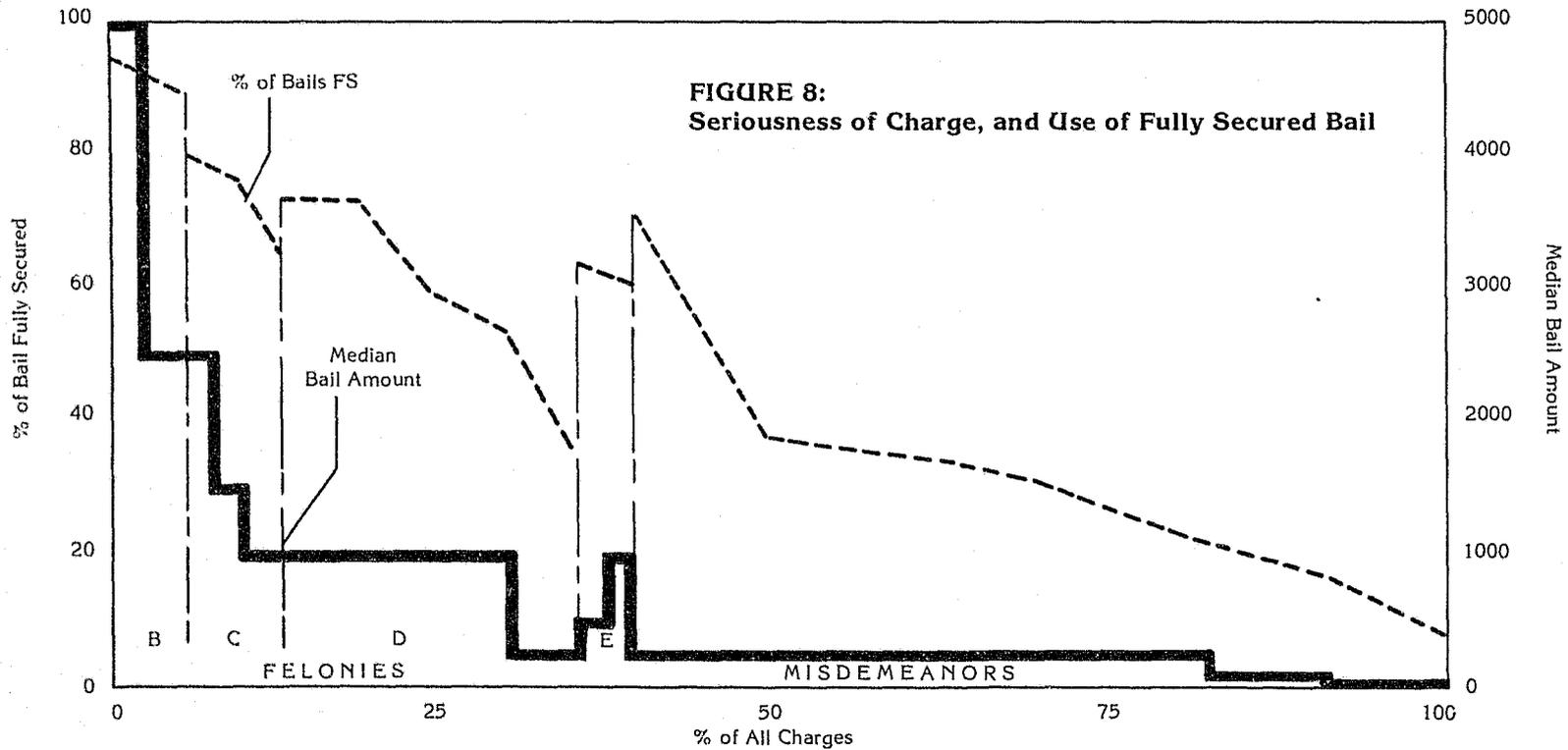
However, it appears that the defendants for whom judges deny PTSA's recommendation both need PTSA's help to obtain pretrial release and, insofar as they are released, do show up very consistently for subsequent court appearances. That is, in the case of denials as well as acceptances, PTSA's judgment in recommending appears sound. When recommendations are accepted, a large amount of pretrial detention is avoided; when they are denied, a large amount results.

Moving from all defendants, to defendants recommended, to accepted recommendations, the proportion of Blacks drops from 63%, to 59%, to 46%. This particular result is, however, largely the result of the over-representation of Driving While Intoxicated charges in the study sample. PTSA makes a high proportion of recommendations on D.W.I. defendants, and a high proportion of those recommendations are accepted. As well, 49% of all D.W.I. defendants in the study were White. If D.W.I. defendants are omitted from the calculations, then the proportion of Blacks remains constant: 66% of all defendants, 64% of all recommendations, and 65% of acceptances. (Eliminating D.W.I. also decreases the average age of recommended defendants and increases their unemployment rate to about the average, but does not markedly lower the total proportion of recommendations accepted).

### **III.E. Defendants Never Released before Final Disposition**

These defendants were mainly those with more serious charges and higher bails. 72% of them were Black, 61% were under 22 years old, 67% were unemployed, less than half had lived at their present addresses for over one year, only 4% were married, and 75% qualified for a Public Defender. 56% had previous felony arrests, and 43% had been arrested during the previous year, an average of 2.4 times. 27% of those with previous arrests also had previous non-appearances; more than twice the average rate. These defendants spent an average of more than a month in pretrial detention (sometimes a year); and somewhat more than the average proportion were convicted (61%). Those who were convicted received much heavier sentences than average, over 70% of them being sentenced to jail.

**FIGURE 8:  
Seriousness of Charge, and Use of Fully Secured Bail**



### III.F. Defendants who Failed to Appear in Court

The great majority of these defendants were charged with one of the less serious offenses; 75% of them were charged with misdemeanors. The non-appearance rate among those with misdemeanor charges was 12% (the release rate being 95%); for felony charges the non-appearance rate was 7.2% (with a release rate of 77%). (It should be stressed that, throughout this report, the non-appearance rate is defined as the proportion of those **released** who failed to show up at a scheduled court appearance without a verified good reason. It does **not** refer to defendants who fail to appear as a proportion of all defendants in a group, but only of those **released**.)

Both Prostitution and Petit Larceny exhibit high non-appearance rates and also unusually high proportions of female defendants. This is the major reason why 25% of those who failed to appear were female, whereas only 13% of all defendants were female. 93% of those who failed to appear were under 35 years old; but only 42% — fewer than average — were under 22. Only one-third had lived at their present addresses for more than a year, although about the average proportions were employed and qualified for a Public Defender. Only 68% of the defendants who failed to appear had lived in the County more than five-years, as contrasted with a figure of 87% for all defendants. Of those who failed to appear, over three times the average proportion had records of previous non-appearance (34% of those with previous records). A high proportion of these defendants had misdemeanor-only records (30%, as compared with 21% of all defendants); 46% had been arrested during the preceding year (as against 30% of all defendants); and 39% had been previously arrested on similar charges (the overall average is 27%). They were convicted somewhat more often than usual (in 68% of these cases), but received comparatively light sentences. At the time the information for this study was gathered, 44% of those for whom bench warrants had been issued had not been apprehended.

Several observations can be made based on these results for non-releases and non-appearances. A close resemblance between the two groups might suggest that those who never obtained release were likely not to have shown up in court if they had been released. Such a correspondence between the two groups does exist with respect to the high proportion of recent arrests, the high proportion of previous non-appearances, and the large proportion who had recently moved. However, in many other respects there is great divergence between these two groups of defendants. Those who failed to appear tended to be charged with misdemeanors, whereas those not released were most often charged with felonies. Compared with the averages, those who failed to appear had records of less serious charges, were more likely to be White, and had not lived in the County as long. In all those respects, those not released are opposite. It is also worth pointing out that, among defendants who failed to appear, the rates of marriage and employment are about average.

When this comparison is combined with the foregoing results about types of bail and PTSA recommendations, it appears that both PTSA and judges employ the following appropriate criteria in bail decisions: previous non-appearances, recent arrests, and length of residence at present address. On the other hand, to different extents both PTSA and judges appear to give an inappropriate weight to employment and to misdemeanor-only record. Finally, in contrast to PTSA, judges apparently tend to place marked stress on the seriousness of the charge, to discriminate in favor of married defendants, and to place less emphasis on the length of residence in the County. Perhaps as a result of the use of these criteria, the bail system as a whole discriminates against Blacks, youth, and the poorer defendants. In general, however, PTSA's bail recommendation decisions appear considerably more sound than bail decisions in general.

### III.G. General Conclusions

Although the study indicates ways in which PTSA could improve its work, it also shows that PTSA makes unusually sound bail recommendation decisions based, in general, on the criteria set forth in the Criminal Procedure Law. PTSA thereby substantially reduces pretrial detention without increasing the non-appearance rate (in fact, as explained in the introductory section, PTSA's efforts probably reduce non-appearances). Moreover, these results of PTSA's work, which appear generally to validate the criteria stated in the law, are not achieved by choosing "easy" cases for recommendation: PTSA recommends a large proportion of all criminal defendants, and does not choose those with an especially low conviction rate or those unusually likely to obtain pretrial release in any event.

Nonetheless, despite PTSA's efforts, the overall results of the system of bail and pretrial detention remain at great variance with both the legally defined purpose of bail and with elementary notions of social justice. In practice, this system sets the most difficult conditions of release for the very defendants who, as a group, are least able to meet such conditions, are likely to appear in court if released, and are not particularly likely to be convicted. For two-thirds of those who spend time in jail before the disposition of their cases, their pretrial detention proves to be unjustifiable in terms of any eventual jail sentence; neither can it be justified, in general, by any apparent probability that they will fail to appear in court if released. The time spent by these defendants who are never sentenced to jail accounts for 40% of all pretrial jail time. In general, bail decisions appear to be based most significantly on the seriousness of the charge and on previous felony arrests, as well as on the criterion of previous non-appearances. The result is that the difficulty of obtaining pretrial release has an **inverse** relationship to the non-appearance rate (when defendants with different types of bails are compared), and it has **no** relationship to the conviction rate except in the case of the small number of defendants who are never released before disposition. Viewed as a whole, then, the bail system operates regressively and out of conformity with its legal purpose,

and leads to an enormous amount of unjustifiable pretrial detention. This situation appears even more insupportable in view of the fact that 90% of those who are released do, in fact, appear in court at every scheduled appearance.

However, the bail and pretrial detention system is not only legally and administratively counterproductive. It powerfully reinforces existing social inequalities. The bail system clearly appears as one link in a vicious circle of social stratification whose relationship with criminal activity is often recognized. Based on property as it is, the bail system reinforces the preexisting inequalities in the social distribution of property. This result of the bail system cannot be justified, since the purpose of bail is to secure court appearance, a matter with which the ownership of property has no positive relationship. Objectively and in general, bail and pretrial detention constitute a mechanism for locking up those already on the bottom of society, without legal justification. Within its limits, PTSA does an effective job of trying to introduce more justice into this situation, and to reduce its inefficiency. But the limitations are strict; and PTSA has not changed the preconceptions, and cannot change the rules, which govern the system within which it functions. It is our hope that this report, and the study on which it is based, will indicate both the need for such change and the depth of the problems.

#### **IV. A RECOMMENDATION FOR LEGISLATIVE ACTION**

The foregoing report indicates the serious need for a fundamental re-evaluation of the bail system, whose present emphasis on money and property bail is essentially arbitrary, unjust, and ineffective. Beyond the fact that pretrial detention as it now functions is of dubious constitutionality, the ability to post money or property has no demonstrable connection either with an individual's potential dangerousness to the community or with the likelihood that he will or will not appear in court.

A more just and appropriate approach would be based on a presumption in favor of pretrial release, consonant with the presumption of innocence. Defendants should be released pending the disposition of their cases unless sufficient information were presented to justify either parental or third party custody, supervised release, or, as a last resort, incarceration. Any decision to incarcerate a presumably innocent individual should, however, be based on definite, substantial considerations introduced into court records; and there should be procedures for systematic review of all cases of pretrial detention. Finally, calendar priority should be given to the cases of incarcerated defendants, in order to minimize pretrial detention.

\* \* \* \* \*

## Footnotes

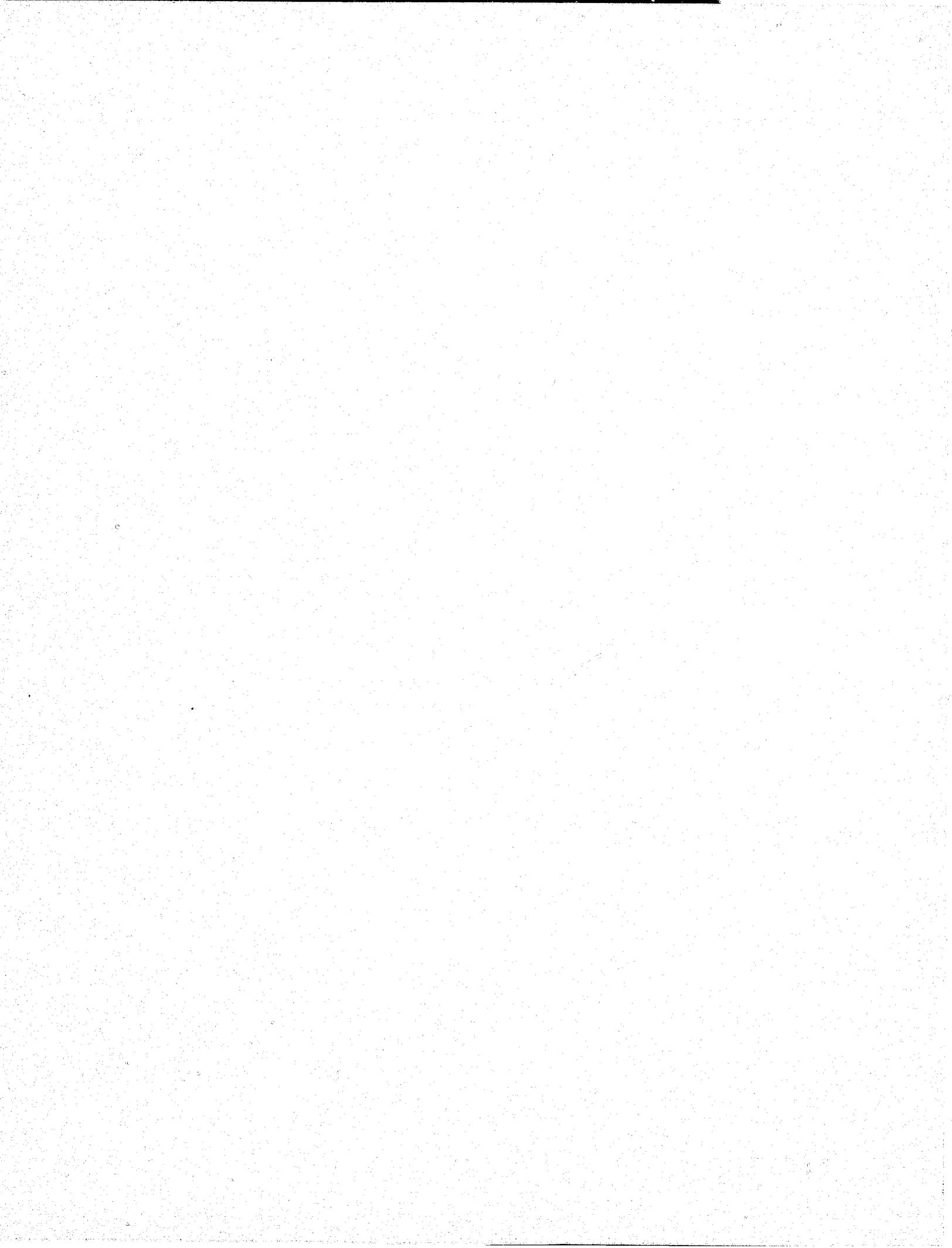
1. The results presented in this section are based on the findings of the study described below. Refer to Figure 1 for graphic presentation of economic and other differences between groups of defendants with different kinds of bail.
2. These figures refer to defendants who are given neither time served (credit for pretrial time or part or all of a subsequent jail sentence) nor any other jail sentence. There are undoubtedly cases in which the fact that a defendant has served pretrial time leads a judge neither to sentence him to jail nor explicitly to give him time served. However, the empirical study on which this report is based cannot speculate about judges' motives in sentencing. It is irrelevant to the objective results of the judicial process whether or not certain cases of pretrial detention were 'really' time served although the records indicate no jail sentence.
3. These figures are based on information from Thomas Whalen, Superintendent of the Holding Center, according to whom the total cost per defendant-day in the Holding Center was \$54. Although this is not a marginal cost figure, it is the best available estimate. Determination of marginal cost in this situation would be essentially impossible, given facts such as the current understaffing of the Holding Center, the changing State mandates for prison conditions and facilities, and current fiscal uncertainties in Erie County. That is to say that to the very large extent that marginal cost is determined by a complex of shifting political conditions, any attempt to determine it by statistical methods would be an exercise in futility.
4. One-fourth of all those arrested had dependents; and about 40% held jobs at the time of arrest. On the basis of our experience, after an average 12 days' absence from work, most working defendants had probably lost their jobs. Defendants dismissed from jobs, especially when the dismissal is due to incarceration, may also lose some degree of future employability. This side-effect of pretrial detention is particularly damaging in a severely economically depressed area such as Buffalo. The disruption of the lives of members of defendants' families magnifies these problems and creates others, such as an increase in the number of children supported by public assistance or placed in the custody of state agencies.
5. The statistics presented in this section are mostly based on PTSA's routine statistics for 1976. Where this is not possible, 1975 results from the study are used, and noted as such.
6. Our experience has been that, without an Information Report, the judge often has no way of verifying information; or, even if it is possible, it would be quite time-consuming to do so.
7. These defendants usually lack the ability to post any bail. When a case moves from City to County Court, bail is reset and judges often accept the bail recommendation of the District Attorney. Thus, some defendants who succeed in obtaining pretrial release at or soon after arraignment may be reincarcerated subsequently; and it is often at this point that PTSA proposes the Supervised Release arrangement.
8. In 1975, the male population of the Holding Center fluctuated between 99.7% and 142.7% of capacity, averaging 117.4%. For females, the range was from 54.5% to 190.9% of capacity, averaging 114.5%.
9. It should be pointed out that calculation of even this one specific benefit of PTSA is analytically difficult, and remains problematic. The method by which this figure is obtained is, essentially, a fairly complicated process of weighting various averages (e.g., release rates, jail time) by several other factors (e.g., charge seriousness, bail type). The dollar figure results from multiplying the \$54/defendant-day figure mentioned above by the calculated jail time reduction which results from this method. Obviously there are important areas of greyness in any such attempt to project statistically what 'would' have happened if PTSA had not made recommendations; however, the method is designed to err on the side of conservatism in a number of respects.
10. In particular, the question of recidivism was left largely unexplored. Although we regard the problem of re-arrest while on bail as an area for future research, we feel that this problem would best be addressed by speedier justice rather than by modifications in bailsetting practices.
11. In the study sample, all but 3% of the defendants were either Black or White. Thus, the "non-White" group referred to is composed almost entirely of Black defendants; and in the following it is often referred to as such.



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