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A STUDY OF JUDICIAL DOMINANCE OF THE CHARGING PROCESS

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Although the present article is based upon a study of the Preliminary Hearing process in Cook County (Chicago), Illinois, it has a broad significance with respect to the general subject indicated by its title. It constitutes part of a national study of preliminary hearings being conducted by the Institute of Criminal Law and Procedure at Georgetown University.

Understanding the preliminary hearing process in Chicago provides insight into several fundamental problems that arise in connection with charging felonies and disposing of such cases without resort to trial. In Chicago, the preliminary hearing is a process by which lower court judges review some 16,000 felony cases initiated by the police each year and decide which of them should be further prosecuted, which should be dismissed, and which should be dealt with by some method other than the formal processes of prosecution and adjudication. Only about 20 per cent of the cases receiving a hearing are bound over to the Grand Jury for further prosecution; the remainder are disposed of by dismissals, convictions of lesser (misdemeanor) offenses, or by one of several other alternatives to prosecution on the felony.

Selecting the appropriate disposition of a case is, of course, governed by substantive and procedural laws and by the rules of evidence, but equally influential in deciding how to proceed is a variety of pragmatic considerations that are not reflected in legal theory, in statutes, or in appellate court decisions. The purpose of this analysis is to explore the various procedural devices and processes for disposing of felony cases and to explain when and why these alternatives are decided upon.

Two methods were used to obtain data that form the basis for this analysis. One was periodic observations of numerous preliminary hearings, covering a total of fifteen days throughout the

summer months of 1967; as questions arose during these periods of observation, interviews were conducted with the judges, assistant state's attorneys, and defense counsel who regularly practice before these courts in order to understand the reasons for the actions taken. The other method was compiling and synthesizing various court records so as to show the quantitative dimensions of cases handled and their dispositions; these quantitative data were also used to support the generalizations made about the preliminary hearing from the observations and interviews.

**A. THE FUNCTION OF THE PRELIMINARY HEARING
IN THE CHICAGO SYSTEM OF CRIMINAL JUSTICE**

The detailed description of the preliminary hearing set forth in subsequent sections can be more easily understood by first explaining how the hearing fits into the overall scheme of processing felony cases, and how the operation of the hearing differs from its theoretical model as outlined by statutes and decisions. The analysis of the hearing's objectives, moreover, will have greater meaning once it is placed in this broad context.

The Chicago preliminary hearing is unique in several respects when compared to preliminary screening procedures elsewhere. The practice in most jurisdictions in this country is for the police, once they have completed their investigation of a felony case and have decided that there is enough evidence to press charges, to refer the matter to the

prosecutor's office for what is commonly referred to as a charging decision. At that time a member of the prosecutor's staff will review the evidence, adjudge its admissibility and sufficiency for obtaining a conviction, consider mitigating and aggravating circumstances, and from this information decide whether to prefer charges. Once having decided to prosecute, the assistant then must select the appropriate charge or charges to be filed. In contrast, after a routine felony arrest in Chicago, the police alone decide whether to file a complaint in one of the courts having jurisdiction over preliminary hearings. Seldom do the police drop a felony case because they regard the disposition of a person under arrest for a serious offense sufficiently important to require the action of a judicial officer. The state's attorney's office in Cook County normally does not make a thorough, authoritative review of felony cases prior to the hearing, although some exceptions, which will be noted further along, do exist.

Immediately after the complaint is filed—which normally means a day or two after the arrest—the defendant is brought before the court for a hearing, which may be held at that time or it may be continued for two or three weeks so that the state or defense will have more time to process the evidence and subpoena witnesses. When the hearing is held the judge and assistant state's attorney assigned to the court both review—normally for the first time—the officer's investigation or arrest report, examine the evidence, and listen to testimony.

Inasmuch as the hearing is the first formal and authoritative review of most felony cases initiated by the police, in large measure it supplants the discretionary power for charging crime that in other jurisdictions is exercised within the prosecutor's office. It is true that assistant state's attorneys are assigned to preliminary hearing courts and that they present the state's case, but the judge in almost all instances, by virtue of his control over this judicial process, decides the outcome of cases.

The court's dominance over this early screening process, however, does not mean simply that the judge is acting like a prosecutor, for the decisions made at the hearing are in every sense judicial decisions in that they extend significantly beyond prosecutorial discretion for charging crime. The hearing, more accurately, represents a convergence of the discretionary power traditionally used by both the police and prosecutor when preparing and screening cases; when exercising judicial discretion

in determining guilt or innocence; and, perhaps more importantly, when making a final disposition of cases. This broad exercise of discretion is done in open court, after all parties have testified and questions of law have been argued and resolved.

Such a system offers distinct advantages for researchers observing criminal law. One is the convenience of being able, at a single time and place, to get a pervasive view of the substantive and administrative problems that are being dealt with at the preliminary stages of the criminal process. Felony cases that are in some jurisdictions dropped or settled at the police station or in the prosecutor's office are, in Chicago, dropped or settled at the preliminary hearing. This means that one is able to observe a relatively full spectrum of criminal behavior and procedural and evidentiary problems. These include, for example, cases for which the evidence, while adequate for establishing probable cause, is inadequate for establishing guilt beyond a reasonable doubt—the conviction standard; cases in which the victim-complainant's only interest is in obtaining restitution with a corresponding disinterest in and even resistance to conviction once reparation has been made or offered; cases where guilt seems clear but conviction seems unduly harsh in view of mitigating circumstances; and cases involving behavior and personality traits that are clearly indicative of the defendant's dangerousness to society. Purely legal problems also run the gamut. Some arrests, searches and seizures, confessions, and other police investigation procedures reflect superior police work, some present tight legal questions, while others are clearly unlawful.

This telescoping of charge, adjudication, and dispositional decisions into one setting, covering all manner of deviant behavior, brings into rather sharp perspective the disparity between concepts of law enforcement as enunciated by legislatures and courts and the practical necessities and limitations confronting the functionaries of the criminal justice system. The fact that about 80 percent of the felony cases receive final disposition at the preliminary hearing does not necessarily mean that 80 percent of the time defendants are innocent of felonies or that there is inadequate probable cause for their arrest or their bindover to the grand jury. It does mean that only a small percentage of the cases initiated involve conduct that, in the judge's opinion, is serious enough to warrant full enforcement—that is, a conviction on the felony charge—and, in adjudging the seriousness of the conduct, the judge is markedly influenced by

his knowledge that the single grand jury in Cook County, the ten judges who preside over felony trials, the limited personnel in the state's attorney's offices, and the heavily taxed jails and probation facilities can only handle about 20 percent of the cases initiated. Hence the selection of felony cases that are to be pursued through conviction is, in the first instance, determined by the numerical limitation on cases that can be accommodated by these criminal law agencies.

This state of affairs makes clear the inadequacies of extant statutes, decisions, and reform programs in their attempt to deal with the dynamics of the administration of criminal laws. The operational function of the Chicago preliminary hearing in fact bears little resemblance to legislative and judicial concepts about what is to be accomplished at this stage in the process. And since the formal law is not addressed to the problems and concerns that daily face police, prosecutors, and lower court judges when deciding what to do with felony cases, it becomes necessary for these agencies to formulate their own informal procedural devices for disposing of cases.

To some extent this is what lawmakers may have intended, without recognizing the consequences of such implied powers. For example, no one seriously questions the fact that decision makers, which include the police as well as prosecutors and courts, must have sufficient flexibility in their enforcement policies to insure proper allocation of resources to the most important crime problems and to permit them to temper the harshness of the law in a way that will satisfy demands for individualized justice.

It is true that various attempts have been made by legislatures and courts, especially during the last decade, to control the actions and decisions of criminal law agencies. Controls have been sought, however, by attempts to refine and perfect concepts of due process, and by dealing with problems that arise in connection with the adjudication process at the trial level. Policies set forth in these laws often have little effect on the majority of cases disposed of at preliminary stages where attention is focused on what is proper, rather than what is "legal," and on the imposition of sanctions, however informal and extra-judicial these might be, against persons who are probably guilty of crime.

The preliminary hearing in Chicago is in effect a dispositional authority midpoint between the imposition of sanctions at the police level and the high degree of attention given to guilt or innocence and compliance with technical rules of procedure

by trial and appellate courts at the other end of the spectrum.

For many—perhaps most—criminal cases the allocation of time, money, and expert attention given to them, and concern for compliance with due process that is shown for them, is markedly influenced by the likelihood that a conviction will serve any useful purpose. If thought not, then an arrest, overnight detention, the posting of bond, payment of restitution, or a judicial reprimand at a preliminary hearing are, of themselves, often relied on as adequate sanctions. In these circumstances formal procedural requirements often take a back seat.

The police for example often stop, question, search, confiscate property, rebuke, detain, scold, and threaten individuals on the street who are mere suspects or who are thought to be likely to commit crimes unless action of this sort is taken. Since these are measures aimed at preventing crime, with prosecution and conviction obviously of little concern, compliance with due process is of secondary importance, if it is considered at all. In any event there is a minimum of time, energy, and thought expended. The next level of sanction is for the suspect to be taken to the police station for interrogation or for whatever deterrent effect detention overnight will have. As the behavior becomes more serious and is thought to require a more severe sanction—more than the police feel justified in imposing—the matter is referred to the next highest step in the hierarchy. This means that the case will go to the prosecutor's office, or, in Chicago, to a preliminary hearing court. It is here that the matter is given more serious consideration since the sanction is apt to be more severe. The evidence is summarily reviewed to ascertain the probability that an offense was committed, but this is done without the legal constraint of inquiry only into the establishment of "probable cause" or the need to bind over cases to the Grand Jury where this probability exists.

Cases that are obviously weak, either because of a clear lack of evidence, uncertainty as to the defendant's identification, or the existence of a valid defense, are dismissed or are disposed of on pleas to misdemeanors; but these reasons do not fully explain the large number of cases terminated at the preliminary hearing. The impression one gets from observing these hearings is that many cases are dropped or reduced for reasons other than failure to establish guilt. What is taken into account is the fact that the defendant has been caught, arrested,

appeared in court for the posting of bond, perhaps awaited in jail when the preliminary hearing has been continued, hired an attorney, faced the state's witnesses at the hearing, and may have offered to provide restitution. These events are regarded as a pretty good dose of the criminal process and, in the face of mitigating circumstances, are sanctions that may themselves have provided adequate deterrence. The fact that the largest number of cases are dismissed or dropped out at the preliminary hearing stage does not mean that the judge is of the opinion that the police decision to arrest and charge was incorrect. Rather, the judge is in effect expressing a belief that further sanction is unnecessary, based on the wide range of considerations that constitute the criteria for making the sanction fit the conduct and the defendant's background.

The next highest hierarchy of decision is at the trial court although the grand jury, an intermediate step in the process, seems to be guided, in routine cases at least, by what the prosecutor instructs it to do. At the trial level only a minority of felony cases actually receive a formal hearing since most convictions for felonies are obtained on guilty pleas. The relatively few cases that are tried provide the grist of the material handled by the appellate courts. They represent those cases in which the defendant either has refused to accept the system's allocation of punishment for his guilt or insists upon his innocence. The issues on appeal of course involve the adequacy of initial decisions as to the defendant's guilt and whether there has been compliance with procedural requirements throughout the processing of the case. The attention given by trial and appellate courts to questions of sufficiency of evidence and due process, however, should not divert attention from the fact that the great bulk of cases are disposed of at early stages where the primary question frequently is, "What ought to be done with this individual who is probably guilty of a crime?"

The clearest examples of legislative and judicial preoccupation with procedural technicalities, rather than with the operational needs of screening and charging practices, are the Illinois laws defining the scope and purpose of the preliminary hearing. The functions of the hearing, in practice throughout the state, apparently have not been made known to legislators and appellate courts because underlying their policy decisions are misconceptions and contradictions of what the preliminary hearing is all about. As a result there is wide variation within and between local Illinois jurisdictions

on the manner and method of conducting preliminary hearings.¹

A basic assumption has been made in the law, for example, that the hearing is or should be limited to the narrow, traditional inquiry of whether probable cause exists.² If it does exist, the defendant is to be bound over to the Grand Jury; if not, the felony is dismissed.³ This superficially simple limitation is probably grounded on the further assumption that other screening procedures—such as those presumably practiced by the police, prosecutor, Grand Jury, and coroner—reduce the importance of the hearing as a screening and charging operation. Such an assumption might also be used to explain the Illinois law which permits the state's attorney's office, if it wishes, to bypass the preliminary hearing by taking the case direct to the Grand Jury for indictment or to obtain an indictment even after the matter is dismissed at the hearing.⁴

The Illinois Supreme Court interpretation of right to counsel at the hearing further adds to the view that the hearing is inconsequential. Despite a statute entitling a defendant to a preliminary

¹This reporter had occasion to interview a number of magistrates from downstate Illinois, who had assembled for an American Bar Association Traffic Court Conference in Peoria. They were asked about their conception of the preliminary hearing and how they were conducted in their respective jurisdictions. Opinions varied considerably. Some adhered to the view that once the state has shown probable cause on direct examination, the case is bound over without the defense being given an opportunity to cross examine. Others took a diametrically opposite position, in that they require the state to produce all of its evidence, cross examination is allowed, and the defense is encouraged to put on its case; as a result the hearing resembles a full-blown trial. Some assign counsel to indigents and some do not. Some admit hearsay evidence and some do not. There was a consensus, however, that the overwhelming majority of cases are bound over. The accuracy of these practices was not established by observation or further study. In view of the apparent disparity in conception and practice, such a study is obviously needed.

²ILL. REV. STAT. ch. 38, §109-3 (1965); *People v. Morris*, 30 Ill. 2d 406, 197 N.E.2d 433 (1964).

³Prosecution for a felony may be initiated by indictment by a grand jury unless the indictment is waived by the accused, in which event prosecution may proceed by information. ILL. REV. STAT. ch. 38, §111-2 (1965).

⁴In *People v. Jones*, 9 Ill. 2d 481, 138 N.E.2d 522 (1956), *cert. denied*, 353 U.S. 915 (1957), it was held that where the defendant is tried on an indictment containing full information concerning the crime with which he is charged, the preliminary is neither required nor necessary. Similarly, in *People v. Vitek*, 68 Ill. App. 2d 178, 215 N.E.2d 673 (1966), the court held that although the trial court gained jurisdiction through an indictment which had not been preceded by a preliminary, there was no impairment of the trial court's jurisdiction.

hearing at the time of his initial appearance in court, with further provision that counsel will be assigned to represent him at the hearing if he is indigent, the court does not view the preliminary hearing as a "critical stage," and hence the statutory provision is not regarded as a due process or constitutional requirement.⁵ Thus the hearing, under a technical interpretation of the law, may be held without the defendant being represented by counsel.⁶

There are a few opinions, however, that are inconsistent with these conceptions of the hearing in that they clearly indicate its critical nature insofar as it affects the success or failure of the litigants in the trial court. One concerns admissibility of physical evidence. Under Illinois law a ruling by the lower court at the preliminary hearing to suppress unlawfully seized evidence is binding on subsequent procedures, including the trial of a case.⁷

⁵ ILL. REV. STAT. ch. 38, §109-1(2) (1965).

The most recent judicial attitude on the role of the preliminary hearing was stated in *People v. Bonner*, 37 Ill. 2d 553 (1967), on the question of whether representation by counsel is a matter of right at this stage of the process:

"... in Illinois an accused does not have constitutional right to a preliminary hearing (*People v. Petruso*, 35 Ill. 2d 578);... the hearing judge may terminate the proceedings once probable cause is established;... the accused is not required to put on his defense at this time and has ample opportunity to enter a plea of guilty to a lesser offense at his arraignment. In view of the scope and purpose of the preliminary hearing, as defined by the above statements, we cannot say that the denial of counsel at this proceeding results in the likelihood of ensuing prejudice enabling the proceeding to be characterized as a critical stage requiring representation by counsel." *Id.* at 559.

⁶ In *People v. Bernatowicz*, 35 Ill. 2d 192, 220 N.E.2d 745 (1966), the court took the position that a denial of due process because of the lack of counsel at the preliminary hearing must be clearly shown, which was not evident in the instant case. In dealing with the statutory requirement of assigned counsel to indigent defendants, ILL. REV. STAT. ch. 38, §109-k(b) (2) (1965), the court dismissed the importance of counsel by holding: "The fact that the legislature has seen fit to now require the matter of counsel to be resolved at the preliminary examination is not to say that due process requires it." 220 N.E.2d at 746.

⁷ *People ex rel McMillan v. Napoli*, 35 Ill. 2d 80, 219 N.E.2d 489 (1966). It should be noted that in this instance the preliminary was presided over by an associate justice of the Circuit Court, not by a magistrate. The state argued that since the associate justice was not given jurisdiction in this instance to try the case, the order to suppress was not binding on the trial court, as outlined in a statute which states:

The motion [to suppress] shall be made only before a court with jurisdiction to try the offense and the motion may be renewed if the trial takes place before a judge other than the

In making a motion to suppress evidence, which must be in writing, and in arguing complex questions of search and seizure law, the importance of counsel is obvious. It is also permissible under Illinois law for the defense or state to impeach witnesses at the trial of a case, based on conflicting testimony given at the preliminary hearing and the trial,⁸ again indicating the critical nature of the preliminary hearing.

This latter defense strategy leads to the question of whether the preliminary hearing serves, or should serve, as a pretrial discovery device. Obviously it is not seriously regarded as such since the state can bypass the preliminary hearing and go direct to the grand jury for an indictment. In the recent *Bonner* case the defense argument emphasized the need for counsel to cross-examine state's witnesses and otherwise "learn the state's case", but again this was deemed inadequate justification for viewing the preliminary hearing as critical.⁹ Discovery, to the extent it is provided for in the statutes, merely states that it shall be covered by Supreme Court Rules. Yet the only discovery rules published by the Supreme Court cover civil proceedings and are inapplicable to criminal cases.¹⁰ As it now stands the only formal methods for discovery in criminal cases are a motion for a bill of particulars after arraignment on the indictment,¹¹ reliance on recent decisions of the United States Supreme Court requiring the state to disclose evi-

one who heard the motion. ILL. REV. STAT. ch. 38, §114-12(d) (1965).

The court reasoned, however, that under the 1964 enactment of a new Judicial Article for the Illinois Constitution, Art. IV, §8, both associate judges and regular judges are members of the same Circuit Court. It also pointed to a further provision (in another subsection of the same statute) that evidence excluded by an order to suppress "shall not be admissible against the movant at any trial." ILL. REV. STAT. ch. 38, §114-12(b) (1965). Finally the court supported its interpretation of the statute by pointing out that the people have the right, by statute, if they are not satisfied with the order, to appeal direct from such order, ILL. REV. STAT. ch. 110, §101-27 (1965), which was not done in the present case.

⁸ In *People v. Sledge*, 25 Ill. 2d 403 (1962), the Illinois Supreme Court reversed a conviction because of the existence of reasonable doubt based on testimony of a key witness whose statements at the preliminary conflicted with those given at the trial. Whether this advantage to the defense is sufficient to warrant assignment of counsel has not been decided.

⁹ *People v. Bonner*, 37 Ill. 2d 553 (1967).

¹⁰ The Rules Committee of the Illinois Supreme Court considered the drafting of discovery rules, but it has apparently been decided, for the time being at least, that existing statutory provisions allowing defense to examine certain of the state's evidence is adequate.

¹¹ ILL. REV. STAT. ch. 38, §114-2 (1965).

dence which may exonerate the defendant or be of material importance to him,¹² motion for a list of witnesses¹³ or confession,¹⁴ and the use of subpoena to inspect police files for the purpose of impeachment of witnesses.¹⁵ The extent to which these procedures may be utilized by the defense prior to trial or indictment is not clear.

Despite inconsistencies and ambiguities in the law concerning the purpose and importance of the preliminary hearing, there is no doubt, in practice, that the hearing is an important if not vital part of the criminal law process in Chicago. One purpose of this report is to demonstrate this fact. But more fundamental problems exist, and there is a much deeper concern here than just the disparity between theoretical concepts of hearing procedures and their actual operation. At the heart of the hearing process is the court's criteria for disposing of felony cases, most of which come from slum areas in Chicago where the crime rate is high. An analysis of these criteria raises the question of the extent to which present criminal laws, while presumably adequate for maintaining an orderly middle-class society, have much utility in attacking serious crime problems produced by urban slums and ghettos, whether they be in Chicago or any large city. This is a question that is inseparable from attempts to resolve the disparity between procedural theory and practice. For unless those involved in procedural reform recognize and deal with the problems surrounding the criteria for screening and disposing of the majority of felony cases, the reform will likely have no effect on such basic problems as the control of crime, the maintenance of consistency and integrity in the criminal justice system, and the need to provide resources for rehabilitation and deterrence other than simply to convict persons and confine them in a jail cell.

¹² *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967). See also Vols. II and IV, *Defender News Letter*, March & May, 1967 (National Defender Project, NLADA) for a review of statutes and decisions relating to pre-trial discovery in criminal cases.

¹³ ILL. REV. STAT. ch. 38, § 114-9 (1965).

¹⁴ ILL. REV. STAT. ch. 38, § 114-10 (1965).

¹⁵ *People v. Wright*, 30 Ill. 2d 519, 198 N.E.2d 316 (1964). In this case the court did not indicate that the defendant had the power to inspect police records prior to trial. The power is limited to instances where pre-trial statements have been established and are relevant to testimony at the trial for impeachment purposes. See also *People v. Wolff*, 19 Ill. 2d 318, 167 N.E.2d 197 (1960), where the court, in effect, adopted the provisions in the federal "Jencks Act," 18 U.S.C. § 3500, and cases subsequently interpreting that Act.

B. JURISDICTION AND STRUCTURE OF PRELIMINARY HEARING COURTS

Cook County, Illinois, is divided into six municipal districts. Associate Justices of the Circuit Court assigned to the various districts have preliminary hearing jurisdiction for felonies committed within their district.

District One embraces the city of Chicago. The outlying portions of Cook County are divided into Districts Two through Six. Under the 1960 census, Cook County had a population of 5,129,725 with 3,550,404 of that number residing in Chicago, or District One. The areas outside of Chicago, moreover, are made up of small, largely residential communities and the crime rate in these out-county areas has been estimated to be only one-fourth that of Chicago.¹⁶ Hence the great bulk of preliminary hearings in the county are conducted in Chicago and under the following courts, all of which are Branches of the First Municipal District:

Felony Court (Branch 44). All felony cases, except for those that have special characteristics that bestow jurisdiction on the courts named below, are filed in this court. Slightly over 10,000 cases are handled each year. These are not all felony cases, however. Often a felony charge will be accompanied by one or more misdemeanors growing out of a defendant's conduct. Felony court statistics are not broken down into felonies and misdemeanors, but it is estimated that at least 7,000 of the total cases are felonies.

Narcotics Court (Branch 57). If the offense involves narcotics traffic, whether a misdemeanor or felony, or if the defendant is an addict, or has been convicted previously on a narcotics offense, then the Narcotics Court takes jurisdiction. Approximately 8,500 cases are filed in this court each year, 2,000 of which are felonies.

Boys' Court (Branches 42, 43, and 49). If a male defendant is 17 or over, and therefore not within the jurisdiction of juvenile court, but is under the age of 21, he is referred to one of the three Boys' Courts for disposition, whether the offense be a misdemeanor or felony. Annually,

¹⁶ Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 ILL. L.F. 584, 600.

the three Boys Courts handle a little over 36,000 cases, 5,000 of which are felonies.

Rackets Court (Branch 27). This branch mainly handles misdemeanors committed in the downtown "Loop" area, which include many shoplifting and petty theft cases plus cases throughout Chicago involving the possession of dangerous weapons and gambling violations. Preliminary hearings in this court involve organized or syndicated gambling, which are felonies under Illinois law, and auto thefts. Of the 17,000 cases filed annually in this court, 2,000 are felonies.

Women's Court (Branch 40). Petty vices, such as prostitution and non-syndicated gambling, and other misdemeanors committed by women over 17 years of age are within the jurisdiction of this court. The only felonies routed through Women's Court are auto thefts committed within a limited area of Chicago, and these number about 140 per year out of the total of 15,000 cases filed.

In sum, there are approximately 16,000 felony cases filed in Chicago courts each year,¹⁷ and practically all of them are scheduled for a preliminary hearing.

C. RESPONSIBILITY FOR INITIATION OF FELONY CASES

In order to understand the importance of the preliminary hearing, attention must be given to the events leading up to this stage in the process. The criteria for initiating a felony charge, the screening, preparation, and attitudes of both the police and state's attorney's office concerning the role of the judiciary in the charging process markedly affect the nature of the preliminary hearing.

As earlier indicated, there is relatively little screening out of felony cases by the police and state's attorney's office prior to the preliminary hearing. It is the police, in fact, who have the major responsibility for initiating the criminal charge by completing their arrest report and complaint, which are filed in the preliminary hearing court. In deciding to invoke the criminal process

¹⁷ The figures used in the above compilations were furnished by Mr. Harry T. Alton, a representative of the auditing firm employed by the Cook County Circuit Court to process statistical data. Data from the 1966 court records were used in reaching the totals.

the police are guided by the strong belief that analysis of the evidence, both in regard to its admissibility and its weight, are matters that should be decided by higher authority. Thus, when there is evidence sufficient to establish probable cause to arrest, the implied assumption to police policy is that there is enough to charge and possibly to convict. Procedural and substantive technicalities, rules of evidence, and legal presumptions that affect the outcome of the case are regarded by the police in many instances to be beyond their competence. The strong tendency, therefore, is for the police to make no significant attempt to weed out cases whose facts seem too weak to support a conviction or whose facts indicate that a misdemeanor charge would be more appropriate.

The pressure on police to establish an impressive "crime clearance rate" may add insight into their "charging" practices. The importance of this factor has been stressed by nonpolice agencies responsible for controlling crime and assisting law enforcement generally. The Chicago Crime Commission, for example, has taken the following position:

"A significant criterion for measuring police efficiency is provided by the percentage of offenses cleared by arrest. For an offense to be considered cleared, the police must establish the identity of the offender or offenders and one or more persons *must be taken into custody and charged with the crime.*" (Emphasis added).¹⁸

It should also be noted that the Chicago Police Annual Statistical Reports, in listing the number of arrests made, specifically excludes "those released without having been formally charged."¹⁹

Police efficiency measured in these terms there-

¹⁸ PETERSON, A REPORT ON CHICAGO CRIME FOR 1965 (Chicago Crime Commission) 6 (1965). Crime clearance, however, does not depend on arrests alone according to Chicago Police Department policies. Even though the police use discretion not to arrest and charge in some cases, they are, according to the writing of the former Executive Assistant to the Chicago Superintendent of Police, "written off statistically as clearances—which is viewed as an index to police efficiency—and thus the most immediate administrative pressure is satisfied." Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1138 (1967).

¹⁹ For example, see *Chicago Police Statistical Report* 15 (1965).

fore does not depend on the outcome of cases for which arrests and charges have been made. A dismissal or nolle prosequi at the preliminary hearing, reduction of the charge to a misdemeanor, resort to civil commitment in lieu of prosecution, or settlement of the case by an arrangement for restitution to the victim are regarded as the court's business and not a reflection on the competence of the police.

No serious attempt was made in this study to determine the full extent of police level screening out of felony cases, either after the arrest or as a result of investigation prior to arrest. There is some authority, however, for the proposition that the police do considerable screening of aggravated assault cases when it is clear that the victims will not cooperate:

"[Aggravated assault cases] come to police attention routinely because they frequently occur in public, the victim or witnesses seek out the police, there is a desire for police intervention before more harm is done, or simply because the victim desires police assistance in acquiring medical aid. Even though the perpetrator is known to the victim in a high percentage of these cases, however, there frequently is no arrest or, if an arrest is made, it may be followed by release without prosecution. This is especially true in the slum areas of large urban centers and is due primarily to an unwillingness on the part of the victim to cooperate in a prosecution."²⁰

On the other hand interviews with a few high officials of the Chicago Police Department indicated that there is a strong tendency in police practice not to release felony suspects unless, of course, facts develop subsequent to the arrest exonerating the person in custody.²¹ Moreover, release of prisoners by the police is regarded as a command decision—the commander of the district having jurisdiction of the case must give his personal approval. Finally, the lack of any significant

²⁰ Goldstein, *supra* note 18.

²¹ Despite a statute enacted in 1964 giving police the power to release prisoners "when the officer is satisfied that there are not grounds for a criminal complaint against the person arrested," ILL. REV. STAT. ch. 38, §107-6 (1965), there continues to be relatively little release of prisoners once having been placed in custody at the stationhouse. This is probably because the tradition of not releasing is deep seated and not easily susceptible to change, even though general orders from the Superintendent's Office have been issued encouraging releases in appropriate circumstances.

intake screening of the great majority of felony cases is shown by a comparison of police arrest figures with the number of hearings conducted. In 1966 there were an estimated 32,000 felony arrests in Chicago,²² but almost 13,000 of these were of juveniles—persons sixteen and under—who were not processed under preliminary hearing procedures.²³ The disparity between the 19,000 adult felony arrests reported and the 16,000 hearings conducted can be explained, in part, by the fact that some cases went direct to the Grand Jury and some were doubtless dropped prior to the hearing for various reasons.

In the state's attorney's office there is no routine review of screening of most felony cases prior to their preliminary hearing. The state's attorney does assume major responsibility, often with the cooperation of the police, for the investigation of some types of crime. Normally these involve alleged corruption in public offices or business, and crimes, such as murder, that are particularly heinous and for which convictions are highly desirable. The most routine form of police-prosecutor cooperation occurs in the Vice and Organized Crime Department of the State's Attorney's Office. A police sergeant from the Chicago Department is assigned to this detail on a full-time basis and functions as a liaison officer in the joint effort to build cases against crime syndicates, usually gambling cases.

Another way the state's attorney's office controls the initiation of felony charges is through its Fraud and Complaint Department. This department is concerned with the nonviolent "white collar" crimes where victims complain directly to the state's attorney's office. About two-thirds of these offenses involve bad checks, with the remainder covering misrepresentation in advertising and other forms of fraud. A person who feels victimized goes directly to the Bureau, where an assistant state's attorney determines whether the criminal code has been violated, or whether it is purely a civil matter. If it appears that a crime has been committed the assistant will arrange for a hearing, at which time the defendant (or respondent

²² This figure is an approximation in that published police records do not identify certain categories of arrest as either misdemeanors or felonies: one must estimate, for example, the number of felonies included in the 6971 adult arrests for "Larceny—Theft (Except for Auto Theft)" and the 1747 arrests for "Sex Offenses (Except for Forcible Rape and Prostitution)." *Chicago Police Statistical Report* 14 (1966).

²³ *Id.* at 10-11.

ent as he is called), the complainant, and any other witnesses will meet in the state's attorney's office to discuss the matter with the assistant.

If the hearing discloses that the wrongdoer does not habitually engage in fraudulent conduct, is no real threat to the community, and is willing to provide restitution to the victim, then the matter is disposed of by restitution. Approximately 10,000 hearings are conducted annually and a majority result in restitution to the victim. Initiation of prosecutions, largely on misdemeanor charges, occurs in less than ten per cent of the cases.²⁴

D. THE HEARING PROCESS

Inasmuch as Felony Court handles the largest number of preliminary hearings, the following description of the hearing process is based primarily on observations in that court. It became apparent when observing the other preliminary hearing courts, however, that practices varied, sometimes significantly, because of the nature of cases handled, caseloads, and the attitudes and temperaments of the judges. These variations, as they appeared from observations in each of the other courts, will be noted and included in this section.

In routine felony cases the arrest report and formal complaint are completed at the police district level, often on the day of the arrest. If time is needed to investigate, the defendant may be taken to "bond court" for the fixing of his bail bond while the investigation is made.²⁵ Once the

²⁴ The following is a breakdown of the cases handled and dispositions made in the Fraud and Complaint Department for 1966:

Type of Offense	Hearings	Amount of Restitution Provided	Settled and Closed	Prosecutions Initiated	Cases Rejected—Civil Matter Only
Automobile Transactions	1,510	\$178,442.10	1,014	125	211
Purchase of Appliances	205	28,021.70	117	9	33
Building Contractors	207	28,862.38	92	13	38
Real Estate Transactions	286	208,274.13	126	28	35
Bad Checks	4,710	465,815.98	3,804	448	221
Others	3,051	492,351.59	1,710	229	462
Total	9,969	\$1,401,767.39	6,863	852	1,000

²⁵ If arrests are made on days—i.e., weekends and holidays—not immediately preceding regular court sessions, defendants are taken to Holiday Court, which

arrest report and complaint are prepared they are picked up by a messenger service and brought to the clerk of the First Municipal District who places the case on the docket of the appropriate preliminary hearing court for the following day. These processes are handled expeditiously and it is not unusual for a defendant to be scheduled for a preliminary hearing the day following his arrest.

When Felony Court convenes at 9:00 A.M., the courtroom is crowded with defendants, police officers, witnesses, attorneys, and the various bailiffs and clerks assigned to the court.²⁶

There are no counsel's tables in the courtroom; the witness box is unoccupied or is used by an observer or a person officially connected with court business; police officers occupy the jury box. Immediately in front of the bench are tables used by the clerk, court reporter, and assistant state's attorney. When a case is called, the defendant, if he is in custody, is brought before the bench from the adjoining detention facility by one of the court bailiffs; if not in custody he will make his way to the bench from the spectator's section, where he joins his lawyer, if he has one. The arresting or investigating officer, together with any witnesses, joins the assistant state's attorney, who also stands in front of the bench.

1. *Continuances.*²⁷ The practice of the clerk of Felony Court is to schedule, as the first order of business each day, cases in which defendants are making their initial appearances,²⁸ which means

was established especially to insure quick attention to defendants under arrest. Preliminary hearings are not held in Holiday Court, however, although it does hear misdemeanor cases; felony defendants are simply informed of the charge lodged against them and bail is fixed. The hearing is set over until the next session of Felony Court.

²⁶ The Felony Court is located in the Criminal Court Building of Cook County on the west side of Chicago, some four miles from the downtown business area, and is adjacent to the Cook County Jail and City House of Corrections. The Criminal Court Building also houses Narcotics Court, the Criminal Division of Cook County Circuit Court (the trial court) and headquarters for the county Grand Jury, the State's Attorney, Public Defender, and County Sheriff.

²⁷ See generally Banfield & Anderson, *Continuances in Cook County Courts*, 35 U. Chi. L. Rev. 259 (1968), for an excellent analysis of continuances throughout the criminal adjudication process in Chicago.

²⁸ It is a statutory requirement in Illinois that when a person is arrested for a felony he is taken without unnecessary delay, before a court where the criminal charge is filed. Then and there the defendant must be informed of the charge, advised of his right to counsel, and be admitted to bail if his is a bailable offense. ILL. REV. STAT. ch. 38, §109-1 (1965). These procedural steps, which are characteristics of immediate post-arrest procedures followed in other jurisdictions in this country,

that they were probably arrested the day or night before. In a typical day, anywhere from 30 to 50 defendants will be appearing for the first time, and an equal number, comprising the balance of the docket, will be making their second or third appearances.

Most of the initial appearance cases are continued, leaving the court with 40 or 50 cases to dispose of on their merits, pursuant to a hearing. When a continuance is granted, a date for a hearing is fixed three or four weeks hence, depending on the convenience of both the state and defense.

Motions for continuance are grounded on any number of reasons. The state frequently asks for a continuance on cases arising the day or night before the initial appearance: investigating officers or witnesses are often unavailable, or more time is needed to perfect the case. The state may seek to delay aggravated battery cases because the victim may die and a murder charge will be substituted. In homicide cases a continuance is always granted so as first to give the coroner's office a chance to rule on the cause of death. The state may also seek a continuance so that they will have sufficient time to take the case direct to the grand jury.²⁹ Finally, the state's attorney may become aware from the writeup of the case, or by interview with the investigating officer, that the defendant appears to be mentally ill and psychiatric examination is indicated; a continuance for this reason is often entered at the instance of the court when the demeanor of the defendant, or the circumstances of the case, show the possibility of mental illness.

Continuances on motion of the defense at the time of the initial appearance do not occur with the same frequency as state motions. The principal reason for this is that most defendants do not have counsel at that point and they want to get the matter over with. Many are unable to make bond and for obvious good reason prefer not to wait another two or three weeks before knowing their fate. Motions by the defense to continue are most often made when the defendant is able to make bond and his counsel needs more time to become fully acquainted with the case. Moreover, when there is a likelihood that within a week or so

the defendant can "settle" the matter by providing restitution, or the complainant-victim will cool off or otherwise be dissuaded from appearing in court, a continuance is sought by the defense.

When a motion to continue is made on the defendant's first appearance in court the motion is granted automatically. Thus many defendants in fact receive nothing more than "initial appearances," *i.e.*, they are informed of the charge, their bail bonds are fixed, and dates for their preliminary hearings are set for a later time. (A few instances were observed, however, when both the state and defense were ready for a hearing at the defendant's initial appearance. In these instances the hearings were held, thus merging the initial appearance with the preliminary hearing.)

Before setting the amount of bond, the judge hears a brief account of the facts of the case and receives a recommendation from the state's attorney. In a typical instance of this sort, the judge will ask for a summary of the case and the defendant's background. This is related by the state's attorney who refers to the police officer's writeup and the defendant's conviction and arrest record, which is supplied by the police. From this information bond is fixed. Where crimes are not particularly serious and the defendants have clean records, families to support, and jobs awaiting, they will be released on their own recognizance—referred to in Chicago courts as "individual" bonds—which entitles the defendant to release on his signature alone. Regular bail bonds can be satisfied, under Illinois law, by depositing with the court clerk ten per cent of the amount of the bond; when the defendant appears and the case is terminated, ninety per cent of this deposit will be returned to him.

2. *Assignment of Counsel.* The hearing is not conducted unless and until the defendant is represented, despite the law which does not make representation mandatory. If the state is ready and the defendant is without counsel, and has no money to retain one, the public defender, standing nearby, is immediately called into the case. However, questions arising prior to the hearing, such as the fixing of bond and deciding the length of or reason for a continuance, are resolved without defense counsel unless one is retained.³⁰

see Miller & Remington, *Procedures Before Trial*, 339 ANNALS 111 (1962), can be identified as the defendant's "initial appearance," although in Chicago the term "initial appearance" is seldom used.

²⁹ See Section F, text p. 483 *infra*.

³⁰ The study of continuances in criminal cases by Banfield & Anderson, *supra* Note 27, shows an important correlation between retained counsel and continuances. A review of some 573 cases, for example, showed that the number of court appearances signifi-

Whether the defendant stands before the bench for what can be appropriately termed his initial appearance, or whether he is there on the data specifically fixed for a preliminary hearing, he is always informed of the charge and is asked by the judge: "Are you ready for a hearing?" An explanation of what the hearing is, its objectives, and the possible consequences of it is given only if specifically requested, which rarely occurs. If the defendant is represented, there is obviously no need for an explanation, but the many defendants who are not represented are usually unacquainted with the process. Without counsel, defendants often express confusion and doubt by shrugging their shoulders, by saying they "don't know," or, in some instances, by asking for a lawyer. In any event, defendants are not asked if they desire a preliminary hearing or informed that they can waive it if they desire; it is unquestioningly assumed that the hearing will be held.

In determining eligibility for services of the public defender, the court makes a quick, pointed inquiry into the defendant's indigency. Occasionally the defendant is asked about his employment, salary, financial obligations, and status as a family breadwinner, but his statement that he has no money with which to hire counsel usually suffices. Since a very high percentage of defendants are from economically depressed areas of the city, the inability of many defendants to hire a lawyer is suggested by appearance and demeanor.

The presence of the public defender makes assignments quick and easy and liberal use of his services in turn expedites the disposition of the high daily caseload. When the public defender is called into the case he may request a short postponement—which usually lasts not more than 30 minutes—to interview the defendant in the privacy of one of the rooms adjoining the courtroom. Short postponements are exceptions to the general practice, however, and they are sought only when the case presents some unusual complication.

Typically, the hearing will proceed with the defender having no knowledge of the case other than what he gets from reading a copy of the officer's arrest report while the state's witnesses are being examined. Weaknesses detected in the state's case in this manner are, of course, explored in cross-examination. At the conclusion of the

cantly increased with retained counsel and, as appearances increased, the conviction rate dropped. *Id.* at 291.

state's case he will ask the defendant to give an account of his version of what happened. Because of his experience (the defender interviewed at the time of this study had been assigned to Felony Court for over a year) he expressed no discomfort with these procedures. The routine cases, he says, really require no advanced preparation in the light of the purpose of the preliminary hearing.

3. *The Conduct of the Hearing.* The hearing is commenced when the assistant state's attorney asks the first state's witness, usually the police officer, to give an account of the case. The assistant state's attorney's knowledge of the case is gained by his review of the officer's arrest report, which was made a part of the file of the case. These reports are reviewed by him prior to the convening of the court so as to detect cases with difficult evidentiary and procedural problems. If these problems are apparent the state's witnesses are interviewed prior to the hearing to clarify ambiguities in the arrest report and to decide whether additional investigation is needed. For the most part, however, the state's attorney does not interview witnesses, and instead relies on the arrest report and the ability of the officer and other witnesses to give an adequate account of the case. For example, after establishing the identity of the officer, the state's attorney (referring to the arrest report) will ask, "And now, officer, what, if anything, happened with reference to the defendant in this case at 1800 K Street, on or about 3 A.M. on July 18 of this year?" Civilian witnesses, who are commonly the victims, will be asked similar questions. In response, the witnesses will tell their story. The officer will give the circumstances leading up to the arrest, what a search of the defendant produced, and the results of any laboratory analysis of physical evidence. The victim states what transpired and identifies the defendant as the offender. The state's attorney will interrupt testimony when it strays from material or relevant facts, or when the witness omits an important aspect of the case, but for the most part the testimony is given in an informal way without too much interruption. Hearsay evidence will occasionally be stated, such as an officer's account of what other witnesses or an informant told him, but so long as it is relevant it is received and never objected to.³¹ The court simply wants

³¹ Hearsay evidence has been held to be admissible at the preliminary hearing under the reasoning that a grand jury indictment cannot be challenged because it

substantial information about the case, including the kind of testimony that will be available at the trial even if all the witnesses are not on hand at the moment.

Questions on cross-examination are most often aimed at challenging the identification of the defendant, establishing facts showing the event to be more of a private affair than a crime (such as the victim's close relationship to the defendant), or in pointing out a lack of corroboration of the complainant's testimony. Cross-examination is normally very laconic although the policy of the court is to allow extended examination so long as it is relevant to the case.

After the state has rested, defense counsel asks his client (and witnesses, if any) to give his account of the matter. He too gives his statement informally and is subject to brief cross-examination by the state's attorney. All in all the hearing will last from three to six minutes unless some complicating feature requires prolonged testimony.

At the conclusion of the hearing, the court will immediately announce one of the following basic dispositions:

1. The defendant is bound over to the Grand Jury. A *nolle prosequi* may be used to extinguish superfluous charges accompanying the felony; a non-suit serves the same purpose when ordinance violations accompany the felony.
2. The defendant is released either by an outright dismissal or a qualified discharge such as to Strike Off With Leave to Reinstate (SOL) or Dismissal for Want of Prosecution (DWP).
3. The charge is reduced to a misdemeanor and disposed of either by an immediate plea of guilty or transfer to another lower trial court. Alternatively, when the felony is accompanied by an ancillary minor charge the finding of guilty can be entered on it and the felony extinguished by a *nolle prosequi* or dismissal.

The following table depicts the number of terminations that, in an average month (projected into a yearly average), are ordered in Felony Court under these major alternatives. A compilation of the termination in Felony Court records of

is based wholly or partially on hearsay, and therefore no more stringent a rule should be applied to a procedure designed to determine whether a case should go to the grand jury. *People v. Valez*, 72 Ill. App. 2d 178 (1966).

all cases in the first nine months of 1966 is the basis for the table. (See Table I.)

A few words of caution are necessary for a proper interpretation of these dispositions. The table does not reflect the number of defendants actually processed. It records cases only. Like the exaggerated impressions that should be guarded against in considering the number of cases continued, it must be recognized that a single defendant will sometimes have several charges—each a separate case for recording purposes—lodged against him. How often this occurs is not known, but a glance at any daily court call in Felony Court will show that the names of several defendants appear more than once, in consecutive order, each stating a separate offense growing out of his conduct.

Moreover, the total dispositions have some distortions since the large number of *nolle prosequi* entered include those used to extinguish felony charges that have been reduced to misdemeanors. Thus *nolle prosequi* are to some extent a duplication of cases terminated under the heading "Reductions to Misdemeanors. . . ."

In another sense the total dispositions may be understated because the order "Bond Forfeiture and Warrant" (averaging forty-seven per month) has not been included in the table. This entry is made when a defendant, out on bond, fails to appear on the prescribed date, and a bench arrest warrant is ordered. A final disposition would be appropriate under this heading if the defendant is not found, or, if captured, is proceeded against by taking his case direct to the Grand Jury. Records do not show how frequently this happens.

E. CRITERIA FOR ALTERNATIVE DISPOSITIONS

The criteria for selecting among the foregoing basic dispositions are complex because of the numerous factors considered. Sometimes the decision is based on some unique feature of the case that may never arise again, or a combination of factors that simply indicate to the judge that a particular course of action will work to the greatest good of both the defendant and the state. Periodic observations of the Felony Court process did reveal specific recurring factors that significantly affect the disposition of cases. These factors, together with illustrations of each, will be discussed below as they apply to the various dispositions.

Before going to these specifics, however, there are two pervasive influences on the preliminary hearing that, although mentioned earlier, should

TABLE I

AVERAGE MONTHLY AND YEARLY DISPOSITIONS IN FELONY COURT (BASED ON 1966 RECORDS)

Disposition	Monthly Average	Yearly Average
Discharges:		
Dismissed (after hearing).....	119	1428
Dismissed for want of prosecution (no hearing).....	18	216
Non-suit (applicable only to charges of ordinance violation).....	61	732
Total discharges.....	198	2376
Stricken off with leave to reinstate.....	130	1560
Reductions to misdemeanors or convictions on minor charges accompanying felonies:		
Sentenced to jail.....	60	720
Probation.....	37	444
Court supervision.....	12	144
Transfer to Criminal Jury Court (Branch 46 of First Municipal District)*.....	20	240
Total.....	129	1548
Bound over to grand jury.....	86	1032
Nolle prosequi (including those entered on a felony when reduced to misdemeanor).....	231	2772
Transferred to branches of Municipal Court (other than Jury Court)*.....	25	300
Grand total.....	799	9578

* Estimates are necessary here since transfers to the Criminal Jury Court as well as to other branches of the First Municipal District (i.e., Narcotics Court, Boys' Court, Women's Court, and Rackets Court) are combined in official court records under the single entry "Transferred to Other Branches."

be emphasized here. First are the limitations on criminal justice resources in Cook County. All the functionaries of the system are acutely aware that the single grand jury sitting in Cook County, and the eleven circuit court judges assigned to the trial of felony cases, cannot handle more than their present caseload, which is about 4500 cases annually. Penal institutions and probation services are also taxed to their limit.³² Even if these facilities could handle greater numbers it seems clear that only a fraction of the felony charges filed by the police merit further prosecution. Hence the court's primary task is to bind over only the most serious cases, involving defendants who pose a genuine threat to the community and against whom the

³² Overloaded probation facilities well illustrate the limitations in the correctional field. Whereas the maximum caseload for probation supervisors is recommended to be fifty, *Standards and Guides for Adult Probation*, NCCD, p. 57 (1962), the average caseload for adult probation officers in Chicago is 150. The Cook County Jail, moreover, has an average prisoner population of 1900 in facilities built to accommodate a little over 1300 prisoners. See *THE COOK COUNTY JAIL, REPORT OF THE DECEMBER 1967 COOK COUNTY GRAND JURY 7; Sheriff's Report of Prisoners in the Cook County Jail (May 31, 1968) (unpublished); THE COOK COUNTY JAIL, REPORT OF COOK COUNTY'S CORRECTIONAL PRACTICE AND PROGRAM 10 (1957).*

state can be reasonably assured of a conviction should the case go to trial. In practice, therefore, the adequacy of evidence to support a conviction is more apt to be used as a standard for binding over a defendant than the traditional standard of "probable cause." In adjudging the possibility of conviction the court considers, in addition to quantity and quality of evidence, mitigating circumstances which indicate that further prosecution would result in an acquittal, a finding of guilty on a lesser offense, or a reduction of the charge even if an indictment were returned. When these possibilities are evident, the case can be (and is) disposed of at the preliminary hearing, saving the grand jury and trial court for more substantial, serious cases.

The second important aspect of the preliminary hearing is its preoccupation with the criminal behavior of minority groups whose cultural and social environments are quite different from the majority of the population.³³ When observing

³³ A few interviews were conducted with village police and assistant state's attorneys assigned to areas of Cook County outside Chicago, but who had had experience in Chicago courts. They could see a clear distinction between the level of enforcement in the two areas. Whereas the suburban communities, made up

Felony Court one cannot help but be impressed with the fact that a large number—perhaps ninety percent—of persons waiting to be heard either as defendants or witnesses are from economically depressed areas of the city. A majority of these are Negroes, with white "hillbillies" and Spanish speaking persons making up most of the remainder. This high representation of minority groups is a reflection of the fact that most felonies reported in Chicago come from the slum areas of the city inhabited by these groups, even though they constitute only a small percentage of the total population. For example, although the Negro population in Chicago is 35% of the total, close to 70% of arrests for serious crime are of Negroes.³⁴

A question the court faces many times a day is whether slum dwellers should be held accountable for their conduct to the same extent as persons living under better conditions or what are assumed to be different norms of conduct. In making this decision the court inquires into the motives of the complainant-victim, the mores of the neighborhood or groups of which the defendant and complainant are members, and whether full, strict enforcement of the law would serve any useful purpose, or would indeed make matters worse. The question, to take two examples frequently appearing in court, is whether a robbery involving a small sum of money between skid row bums, or a felonious assault between neighbors in a slum tenement whose uninhibited show of violence is common, should go any further than the preliminary hearing stage.

1. *Dismissals*. Dismissals of cases at the preliminary hearing in Felony Court outnumber any other form of disposition except *nolle prosequis* which, to reiterate, are in large part duplications of charge reductions. Many dismissals result from cases that are plainly weak—those where there is scarcely enough evidence to charge, much less convict. Occasionally an extreme example of this, similar to the following one observed in Felony Court, is revealed at the preliminary hearing:

largely of white middle-class persons, tend to look upon many felonies, such as the sale of a marijuana cigarette, as "crimes of the century" many of the same crimes in Chicago are viewed with equanimity. Suburban news media and community groups simply demand stricter, fuller enforcement than is expected in Chicago according to some law enforcement people interviewed.

³⁴The percentage of Negro arrests for serious crimes in Chicago was estimated from an analysis of total arrests reported in *Chicago Police Statistical Report 10-17* (1966). This report separates the total arrest figure for each category of crime into "white," "Negro" and "other."

Both the defendant and the state indicated that they were ready for a hearing. The defendant was represented by counsel. After being asked by the prosecutor to give an account of the case, the police officer stated that he received a radio call and proceeded to the address in question to investigate what was alleged to be a burglary.

There he met the complainant who said the intruder was in the basement of his apartment house. The police officer went into the basement, arrested the defendant, and found carpenter's tools on his person. Next the complaining witness stated that he observed the defendant going to the basement, that the defendant was a perfect stranger to him, and that he was acquainted with all the residents of the apartment building. There was no cross-examination. The state rested. The defendant, when asked by counsel to explain his side of the story, stated that he was a friend of the janitor of the building and had received permission to enter the basement to get some tools. The janitor was presented and confirmed this fact. The judge immediately discharged the defendant.

The weakness of the state's case may also show up in an inadequate identification of the defendant. If the defendant is not apprehended until two or three weeks after the incident, the victim of the crime may have some hesitancy in his identification. Further inquiry may then reveal that a victim was robbed, usually on the street in the nighttime, where events transpire so fast that a victim is often unable to see the assailant clearly. Consequently, the judge looks for some indication that the identification will stand up when the test is proof of guilt beyond a reasonable doubt. An example of such an indication was observed in a case in which a Negro girl was charged with fraudulent use of a credit card. The victim, an owner of a dress shop, identified the defendant because her hair was bleached blonde and this made her stand out from other Negro women who frequented the dress shop. In the judge's estimation this was a good identification.

Weakness of the case may also stem from poor credibility of the state's witness. For example, many aggravated battery and robbery cases arise from the barroom brawls or the antics of skid row bums. Typically, both the defendant and the victim are drunk, and there is difficulty in deter-

mining who started the fracas and who, in fact, was the victim:

The complainant said the defendant attacked him in a bar, pulled a knife, and stabbed him in the leg. The defendant's answer was that he had placed some money on the bar and the complainant stole it. When the defendant demanded its return the complainant struck him. The defendant claimed that during the struggle he was knocked to the ground and was being stomped in the face by the complainant when he defended himself with his knife. The judge dismissed the case, saying there was no basis for believing either one of the parties.

Existence of a good defense will often be used for a discharge. Homicide cases, in particular, require careful assessment of self-defense, especially when the victim had a reputation for violence. During one morning session of Felony Court, two defendants, both charged with murder, were discharged. The coroner's jury had earlier ruled that there had been adequate justification or excuse for the deaths.³⁵ In both instances the defendants were the wives of the victims. Both testified, with witnesses to support their allegations, that the husband habitually came home drunk and beat them, and that the deaths resulted from the wives defending themselves.

Factors other than the lack of evidence or a valid defense are at times the bases for discharges. The court is alert to offenses that seem clearly to have been committed but the conduct involved tends to be more of a private matter between spouses, lovers, neighbors, or friends whose amiable relationships have been temporarily disrupted. Assaults, robberies, burglaries, and thefts in some circumstances seem less serious than the charge suggests.

The complainant, a middle-aged woman, testified that the defendant, a middle-aged

man, twisted her arm, grabbed her purse, and took \$8.00 from it. The judge interrupted the testimony to ask if she knew the defendant: "Is he your boyfriend?" She acknowledged that he "used to be." On further questioning she admitted having lived with him for over a year, and they were on a date on the night in question. The case was dismissed with an admonition to the defendant that any further misconduct would not be treated leniently. (The reporter noted that the defendant and complainant left the courtroom together.)

Leniency is more apt to be shown where the conduct is believed to be a common behavioral pattern in the subculture of which the parties are members. As indicated earlier, many aggravated battery cases come from areas where neighborhood and street fighting is common, and the court knows that many of these offenses do not result in an arrest. When complaints are signed and arrests made, the complainants are sometimes motivated by a desire to obtain restitution for injury or damage sustained without resorting to the expense of a civil law suit. At other times the injured parties cool off and do not wish to prosecute. When the defendant promises to cover the damage or medical expenses, or already has done so, the case is disposed of by an SOL, a disposition covered in the next succeeding section. The court also shows considerable skepticism of allegations of theft when it is shown that the defendant and victim are neighbors in a slum tenement and have for some time had free access to one another's premises; the defendant is normally discharged when he promises "to return the item he borrowed."

Hardly a day goes by that the court is not called upon to review two or more rape cases. A high percentage of these are statutory rape, with little or no force involved. Commonly, a young girl under the age of consent alleges that an adult male, who turns out to be a neighbor or close friend of the family, had sex relations with her. Examination of the complainant, however, often reveals that she has a history of sexual promiscuity and has complained in order to escape discipline from her parents. Less frequently, inquiry reveals that her parents have forced her to complain as a means of collecting money from the defendant. It may be observed too that the prosecutrix's mother or father may be standing behind the girl coaching or interrupting as she gives an account of the matter.

³⁵ Homicide cases are first reviewed by the coroner's inquest, although the charge is initially filed in Felony Court so that the defendant can receive an "initial appearance" before a judicial officer which the coroner is not. If the inquest finds that death was by unlawful means the case, as a matter of policy and practice, is automatically taken to the Grand Jury. Under this practice the preliminary hearing is bypassed, see section F, text p. 483 *infra*, because even if the defendant were discharged at the preliminary (following an "unlawful death" finding by the inquest) the grand jury would consider it anyway.

In a case that exemplifies the problem with most rape cases, the following was observed:

The young girl testified that she had gone to bed and when she awoke she was having intercourse with a man who lived in an apartment down the hall. The judge began to question the girl. He asked if she had any clothes on when she went to bed. She did. "Did you have night clothes on when you were awakened by the defendant?" She said, "No," and that the defendant removed them before she was awakened. The defendant then stated that he really had not had sexual relations with the girl but had merely gone into the bedroom to talk to her since they were good friends, and that the girl's older sister, who was in the next room, became jealous and complained.

After discharging the case (mainly because of the girl's unlikely story and lack of corroboration) the judge surmised that the defendant may very well have had intercourse with the girl. His decision to dismiss was also partially based on the apparent maturity of this girl. Her account of the incident was flippant and without shame or embarrassment, thus raising the question of whether she was coached or had a background of promiscuous sexual behavior. Unless there is corroboration by a witness or medical report or some aggravating circumstances (*i.e.*, rape by force or some serious damage to the girl), rape cases of this sort are dismissed. Put differently, rape cases "are all or nothing" in that they are either bound over or dismissed.

A significant number of cases are dismissed for want of prosecution (DWP) or by "non-suit." If the complaining witness fails to appear in court on the prescribed date, and the matter has the earmarks of a private rather than serious public offense, a DWP will be ordered, with the understanding that a new arrest and charge can be instituted if the state wishes further to examine the matter. In serious cases, such as robbery of a store, the store owner will be subpoenaed if he fails to appear for the hearing.

The 61 non-suits per month are of an entirely different character. When a felony charge is filed it will sometimes be accompanied by ancillary minor charges including city ordinance violations such as disorderly conduct or resisting arrest which stem from the defendant's behavior when being

taken into custody. If the defendant is bound over on the felony, the minor charges are extinguished by use of the non-suit, a procedural term applicable to ordinance, as opposed to state violations.

2. *Stricken Off with Leave to Reinstate (SOL)*. The 130 SOL's ordered in an average month have much the same effect as an outright dismissal. The defendant is free to leave the courtroom, without bail, but with the knowledge that the prosecution has the option of reinstating the case within 120 days, which is the statutory (speedy trial) limit for bringing a person to trial after he has been taken into custody.³⁶

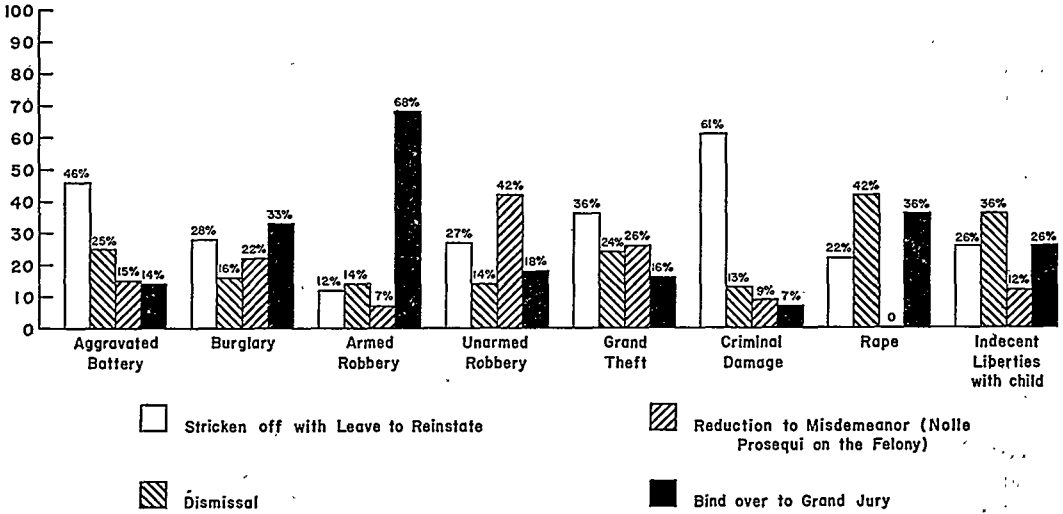
There are several circumstances in which the SOL is used rather than a discharge, a bindover, or conviction of a misdemeanor. Any of the following reasons, or more likely a combination of them, account for the use of the SOL.

When restitution to the victim is promised, rather than being an accomplished fact, and a discharge is otherwise appropriate, the threat of revival of the charge under the SOL is an effective means of enforcing the promise. The defendant is informed by the court or state's attorney of the intention to proceed with prosecution in the event of default. The threat also has the psychological effect of inducing the defendant to behave himself, even when restitution is not involved. Assaults between neighbors, spouses, and lovers that are too serious to warrant an outright discharge received SOL's with this effect in mind.

Observations of hearings in Felony Court leave the impression that aggravated assault cases receive a higher proportion of SOL's than other cases, for the reasons just stated. To confirm this, and to determine other dispositional trends, a limited study was made of dispositions appearing consecutively in the court records over the period January through May, 1966. The study was confined to cases most frequently filed, and no follow-up was made on cases that were continued. Homicide cases were not included since they seldom if ever receive an SOL or result in a misdemeanor conviction. Table II, prepared from this limited

³⁶ ILL. REV. STAT. ch. 38, §193-5(a) (1965). A dismissal of the case, it should be noted, does not bar the filing of a new charge beyond the 120 day limit. ILL. REV. STAT. ch. 38, § 114-1 (1965). It should be noted too that the court can extend the 120 day limit for a speedy trial an additional 60 days if the court believes the state's vital evidence may be obtained during the extension and that due diligence has already been exercised in an attempt to obtain such evidence. ILL. REV. STAT. ch. 38, § 103-5(c) (1965).

TABLE II



data, therefore gives an indication of dispositional patterns in Felony Court and does not reflect the quantitative dimensions of its case load.

Another application of the SOL is for cases that are too substantial for the court to commit itself to an outright dismissal, but for which conviction seems unlikely. The SOL permits the state to re-examine the evidence or investigate further if it wishes before closing the matter. The best example of this is where the court sustains a motion to suppress physical evidence because of an invalid search and seizure. The state's case is often seriously weakened without the physical evidence, although it might be possible to proceed without it. The SOL conveniently offers this opportunity.

Motions to suppress evidence are made with much greater frequency in Narcotics Court than the other preliminary hearing courts.³⁷ Indeed,

³⁷ Searches giving the court the most trouble are those conducted without a warrant and by regular policemen, as opposed to officers assigned to the Narcotics Squad who received special training in search and seizure law. According to the Judge of Narcotics Court, over half of the searches conducted by "non-specialists" are invalid in that they are not pursuant to a valid arrest giving rise to probable cause to search for weapons or contraband, or by the frisking of suspects against whom there are inadequate grounds to arrest and therefore there is no basis for a general search incident to the arrest.

Search warrants, when offered to establish the lawfulness of the search, are reviewed by the Court prior to the swearing of the officers. Occasionally these warrants are ruled invalid (even before the hearing starts) because of inadequate identification of the premises searched or failure of the supporting complaint to establish probable cause.

practically every hearing on a narcotics possession or sale case commences with an inquiry into the validity of the search and seizure of the narcotics. Although there is a statutory requirement that motions to suppress unlawfully seized evidence be in writing, they occur with such frequency that their written form is often dispensed with. If the search is good, the case automatically is bound over or, in some instances, the indictment is waived on a plea taken immediately.³⁸ If the search is bad, as many are, then the court automatically again gives the case an SOL.

The extent to which charges are actually reinstated is not known, but persons interviewed allow that it is infrequent. It is revived, for example, when the defendant has jumped bond; under the SOL, a new arrest and charge is unnecessary upon his capture. A continuance would accomplish the same objective but it would, at least according to one view, obligate the state to pursue the case, whereas an SOL would not.³⁹

3. *Charge Reductions and Misdemeanor Convictions.* Felony Court has jurisdiction to accept pleas of guilty to misdemeanors or to determine guilt or innocence of a misdemeanor pursuant to a hearing. Upon hearing the evidence of a felony charge, the judge frequently rules that while an offense has been committed, it is a misdemeanor, or that at least it should be disposed of as a misdemeanor. The defendant is then asked to enter a

³⁸ See Section E(6), text p. 482 *infra*.

³⁹ Oaks & Lehman, *supra* note 16, at 621.

plea on the misdemeanor. Five out of six times when the defendant is asked to do so, a guilty plea is entered, followed by an immediate imposition of sentence or probation. In most instances the court itself will decide whether a misdemeanor disposition is appropriate; on these rare occasions when the state's attorney objects to a reduction and pushes hard for a bindover, the court is inclined to acquiesce.

When a decision is made to dispose of the case by conviction on a misdemeanor, the felony charge is extinguished by a *nolle prosequi*. A related or included misdemeanor is then substituted. As indicated earlier, some felony charges are accompanied by one or more misdemeanors and in this event no substitution is required. For example, a petty theft charge is appended to a burglary or grand theft complaint, which probably reflects doubt by the police they could prove that the felony was actually committed. Multiple charges may not be related to or included in the primary felony, however. Separate, distinct offenses may be initiated against one defendant to cover a dozen different robberies or the fact that the defendant injured a policeman or was disorderly upon being arrested. When this is the situation, the court obviously has greater flexibility in deciding which offense should be used as a basis for conviction, whether it is a felony or misdemeanor.

When the felony is dismissed and a plea of not guilty is entered to the misdemeanor, the court may either hold a new hearing on the misdemeanor or, if a jury is demanded, transfer the case to a "criminal jury court" set up to hear misdemeanor cases from all the inferior criminal courts in Chicago. Even when a jury is not requested, the case will likely be transferred to criminal jury court because the judge feels that, once he has heard the evidence on the felony and announced the existence of a misdemeanor, he is in no position to render an impartial verdict on the misdemeanor hearing.⁴⁰

At times there is a fine line of distinction between a decision to give a case an SOL or to seek a misdemeanor conviction. The decision may be to enter an SOL simply to give the defendant a

break because he has a clean record, a family to support, or because he gave the police no trouble. The circumstances of the following observed case typify the distinction:

An elderly man was charged with indecent liberties with a child. The public defender was assigned. Before the parties could be sworn the mother of the girl—the chief complaining witness—volunteered that she did not wish to prosecute. The state's attorney interceded, saying that he would object to a withdrawal of the case since the complaint had been made, the defendant arrested, and several witnesses, all present, had been put to the bother of appearing in court. The judge asked for a summary of the case. The state's attorney said that five witnesses saw the defendant put his hand under the eight-year-old girl's dress. In answers to questions put to her by the court, the mother said the defendant was a neighbor and no damage was done to the child. At this point the court suggested that a plea to a lesser offense appeared to be called for. This was objected to by the public defender who emphasized the harmlessness of the old man and the desire of the state's witness to let the matter drop. The judge said: "All right then, I'll give it an SOL. Take the defendant home." Two of the state's witnesses took the old man by the arm and led him out of the courtroom.

The sampling of dispositions in court records to show dispositional trends (Table II) was carried one step further to determine the kinds of misdemeanors most often pleaded to. The records show that of the 75 unarmed robberies reduced, 71 were to petty theft and 3 to simple battery; for the 67 burglaries, 42 were convicted of petty theft and 22 of criminal damage; of the 46 aggravated batteries, 20 were to simple battery, 3 to resisting arrest and 1 criminal damage; and the 59 grand thefts resulted in convictions on 55 petty thefts and 4 attempted petty thefts.

Since the great majority of reductions result in guilty pleas, one might expect a considerable amount of negotiation between defense counsel and the state's attorney, calling for a plea in exchange for a reduction. While this is the practice in other jurisdictions, such is not the case in Chicago. Defense counsel rarely consults with the state's attorney to work out a reduction in these terms. On the other hand, counsel may, at the

⁴⁰ On one occasion observed, the court proceeded to hold a hearing on the plea of not guilty to the charge after it had been reduced to a misdemeanor. The hearing consisted of the court reminding the witnesses that they were still under oath. The witnesses were then asked if their testimony would be the same on the misdemeanor hearing as it was on the preliminary hearing for the felony. They stated that it would. The defendant was found guilty, whereupon he was placed on probation.

conclusion of a hearing, suggest that a plea to a misdemeanor would be appropriate.

4. *Court Supervision.* Once a felony has been reduced to a misdemeanor, the defendant may be placed under "court supervision" as an alternative to a conviction on a lesser charge. There is no provision in the law for court supervision, but it is regarded as the most practical correctional measure in some cases. While this disposition is only occasionally used in Felony Court (an average of 12 cases per month), it is frequently employed in misdemeanor and felony cases in the three Boys' Courts. In one of the Boys' Courts, for example, the judge estimated that he will order court supervision as often as fifteen times a day.

The effect of court supervision is to determine guilt but not to enter a conviction on the record. At the conclusion of the hearing, it is made clear to the defendant that enough evidence has been produced to establish guilt, but that he is being given a break. The defendant is further informed that he is being placed under the supervision of a representative of the court and that a conviction will not be enforced unless during the period of supervision he again violates the law. At the end of the period of supervision, which is normally one year, the criminal charge is dismissed.

Responsibility for supervision is assigned either to the Social Service Department of the First Municipal District (an arm of Boys' Courts), the Psychiatric Institute attached to the court, a service agency of the boy's church (e.g., the Holy Name Society in Chicago), or the probation department. Actual supervision in many cases amounts to a monthly in-person report by the boy to his supervisor who, time permitting, counsels the boy on special problems and endeavors to find employment for him.

The greatest use of court supervision is for youthful offenders whose records are good and whose violations are not too serious. In these circumstances avoidance of a criminal record and the pernicious effect such record will have on the defendant's chances for future employment and general social adjustment is believed to be a far better alternative than conviction and whatever deterrent effect a jail sentence would have on the boy. Both the judges and assistant state's attorneys assigned to Boys Courts expressed enthusiasm about the success of this form of disposition, and they indicated that most defendants placed under supervision are never seen in court again.

Another variation of the practice in Boys' Courts

is to give the defendant a small dose of incarceration while at the same time precluding the need for a conviction record. If the judge feels that supervision alone may not sufficiently impress the defendant with the error of his ways, he may arrange for the defendant to spend a short time in jail, referred to as a "sitting out period," or SOP. To accomplish this without recording a conviction, supervision will be stated as the appropriate disposition but the matter is continued for a few days or as long as two weeks. Bond is fixed on the continuance in an amount so prohibitively high that the defendant cannot satisfy it, resulting in jail confinement for the continuance period. At the end of this period, bond is withdrawn and the defendant released under the supervision order. Despite the obvious lack of legal justification for this practice, its effectiveness in providing deterrence, in the judgment of several persons interviewed, has been established.

5. *Bindover to the Grand Jury.* Only a small percentage of the cases receiving a preliminary hearing are bound over to the Grand Jury. In Felony Court, for example, only twelve per cent of cases receiving a hearing get this disposition. Reasons for this small percentage of bindovers have been set forth in the foregoing sections, explaining the alternatives to bindovers. Succinctly stated, cases that are bound over are simply the ones left over from the winnowing process. Stated more positively, the criteria for deciding to bind over are that: (1) the evidence is strong enough to sustain a conviction, and (2) the defendant's conduct and background indicate that he is a genuine threat to society.

The first of these factors has been emphasized earlier. While judges recognize that "probable cause" is the formal, prescribed standard for binding over, they do not feel bound by it. In the words of one judge, "There is no point in wasting the time of the Grand Jury and trial courts by sending them cases that I know will result in acquittals or be thrown out by some other judge, even if they do get past the Grand Jury." It has been made clear to the judges by their superiors, who are mindful that no significant intake screening procedures are used by the state's attorney's office, that their primary responsibility is to screen out cases that have no reasonable expectation of conviction should the case go to trial. The presiding judge of the criminal division of the Circuit Court, and the ten trial judges under him, are geared to handle only

those cases that are meritorious under the conviction standard.

That only the strong cases go to the Grand Jury and trial courts is borne out by statistical data from these agencies; practically all charges referred to the Grand Jury through the preliminary hearing result in indictments. The few "no-bills" that are returned are administrative devices to accommodate the situation where one defendant is bound over on several charges but the grand jury decides to indict on only one, usually the most serious one. The "extra" charges are extinguished by the "no-bill."⁴¹

The screening out of weak cases at preliminary hearings also has an effect on the procedures followed at the trial level. It was learned from several trial judges that negotiations and charge reductions rarely occur after the indictment is returned. The great bulk of guilty pleas in the trial courts—in 1964, 2377 out of the 2925 convictions obtained—⁴² were to the charges contained in the indictments. Several judges interviewed explained the reason for this was due to the careful screening of weak cases at the preliminary hearing level.

The second major characteristic of cases bound over—the need for strict punishment because of the menacing nature of defendant's conduct—is seen most clearly in cases where the defendant used a gun or knife while committing the crime. Assault or battery cases that are bound over normally mean that a gun or knife was used and there was no provocation from a blameless complainant-victim. The court shows little or no leniency when there is use of deadly weapons and, at times, defendants using them are apt to be bound over despite weaknesses in the state's case. In this connection it is significant to note in Table II the large numbers of bindovers in armed robbery cases—137—compared to the 29 dismissals, 25 SOL's, and 10 reductions for that offense. Moreover, there are more armed robbery cases bound over (and for which indictments are returned) than any other offense.⁴³

⁴¹ See Oaks & Lehman, *supra* note 16, at 623.

⁴² ANNUAL REPORT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS 15 (1964).

⁴³ The following offenses, and defendants involved, received the largest number of indictments in Cook County in 1964.

	Indictments	Defendants
Armed Robbery	748	1125
Possession of Narcotics	497	492
Burglary	470	802

There are, of course, other indicia of seriousness. These include the defendant's arrest and conviction record, his conduct upon being arrested and while in custody, the extent of injury inflicted, the value of property stolen or damaged, the stealth with which the crime was committed, and the planning that apparently went into it.

6. *Waiver of Indictment and Plea to the Felony.* A procedure employed almost exclusively in Narcotics Court is to proceed against the defendant by information, rather than grand jury indictment, when the preliminary hearing shows strong evidence of guilt, that a conviction on the felony is warranted, and that probation is the appropriate sanction. For example, a defendant shown to have been in unlawful possession of a small amount of narcotics often will have a clean record, is not in the business of selling drugs, and, therefore, is a good candidate for probation. In these circumstances both the state and defense can waive the indictment and prosecution may proceed immediately by information.⁴⁴

This procedure is initiated when the judge, after hearing the evidence, informs counsel that in his judgment "something should be worked out." The assistant state's attorney and defense counsel then retire to one side of the courtroom to confer, for it is clear to them that the euphemism "work something out" is the court's instruction to consider waiver of indictment and to negotiate for a plea. Negotiations normally involve the defendant's waiver and agreement to plead guilty to the felony in exchange for the state's recommendation for leniency, usually probation.

This unique practice can be attributed primarily to the difficulty in reducing narcotics charges to lesser included misdemeanors. Both possession and sale of narcotics are felonies and lesser charges, such as possession of hypodermic syringes or "dangerous drugs" (both misdemeanors), seldom

Sale of Narcotics	294	337
Murder	232	292
Grand Theft	190	275
Unarmed Robbery	190	225
Auto Theft	137	206
Rape	130	153
Aggravated Battery	122	143

These indictments constitute 75% of the total returned in 1964. The remaining indictments cover some 50 offenses ranging from manslaughter (80 indictments) to offenses like attempted abortion, embezzlement, and child abandonment (with only one indictment returned for each). ANNUAL REPORT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS 14 (1964).

⁴⁴ ILL. REV. STAT. ch. 38, § 111-2 (1965).

fit the facts of the cases. The court is loath to accept or suggest a lesser unrelated or illogical charge. Another reason is the judge's attitude toward sentencing. His practice is to accept the recommendation agreed upon by the parties, which is announced by the state's attorney as soon as the plea is entered. Counsel regularly practicing in this court understand that the recommendation is tantamount to the sentencing decision.

It does not always happen that the parties in these narcotics cases are able to work something out, and this is a source of concern to the judge. His view is that over one-half of the felony cases heard by him could be finally disposed of following the preliminary hearing and that the sentences meted out would not be different from those imposed upon a plea after indictment, since a majority of convictions at the trial court level are on pleas of guilty. In discussing this matter one judge recalled a recent case in which the parties were asked to work something out on a possession case. The defense offered a plea and was willing to accept probation for three years with the first 60 days to be spent in confinement. The state refused to accept this since, in the judgment of the state's attorney, a longer period of confinement was called for. The defendant was bound over, an indictment was returned, and a plea of guilty entered to it. The defendant was given three years' probation, a more lenient sentence than originally offered. In the judge's estimation this was a waste of time and money resulting from the inability of a young, inexperienced assistant state's attorney to assess not only the kind of sentence indicated by the circumstances of the case but the need to dispose of cases at some preliminary step in the process.

F. DIRECT INDICTMENT BY THE GRAND JURY

No records are kept of the number of cases that bypass the preliminary hearing and go directly to the grand jury. Interviews with members of the state's attorney's staff indicate that as many as 400 cases per year go "direct" and that this procedure is regarded as part of the state's attorney's discretionary power. "Going direct" occurs most often when the defendant has already been indicted but while on bond, awaiting trial, commits another felony. This procedure will also be followed where more evidence is uncovered relating to the original crime, establishing it as

more serious than originally estimated. A preliminary hearing in these circumstances has no value as a screening device.

An added inducement to go direct is the "fourth term rule," mentioned earlier,⁴⁵ which is a statutory requirement that the defendant must be brought to trial within 120 days after his arrest. Where investigation lasts several weeks, the time consumed in holding a preliminary hearing may become critical in making the 120-day limitation.

Cases may also go direct when they involve considerable analysis of books and records, such as for crimes involving fraudulent misuse of funds within corporations and governmental bodies. Producing these records at a preliminary hearing, together with the expert testimony needed to explain the crime, is regarded as a needless duplication of effort since they would have to be produced again at the grand jury and at the trial.

Going direct obviously permits the prosecution to withhold exposure of certain elements of his case. When asked about this, one assistant state's attorney stated that sometimes in cases involving crime syndicate operators the state simply does not wish to reveal at preliminary stages of the process the precise nature of the physical evidence or testimony, if for no other reason than to protect persons willing to cooperate with the state. Persons interviewed hastened to add, however, that it is the policy of the state's attorney's office to reveal evidence material to the defense upon personal and direct application by defense counsel.

G. CONCLUSION

Making final disposition of most felony cases at the preliminary hearing is a long-standing practice in Chicago. Although no exhaustive effort was made to determine the origins of this practice, descriptions and analyses of the Chicago preliminary hearing appear in the *Illinois Crime Survey* (1929), in *Moley, Our Criminal Courts* (1930), in a 1934 report by Baker and DeLong on the activities of the Cook County State's Attorney's Office,⁴⁶ in a 1951 study of the Chicago Municipal Court by Dash⁴⁷ and, more recently, in an analysis of criminal procedures and statistics

⁴⁵ See note 36 *supra*.

⁴⁶ Baker & DeLong, *The Prosecuting Attorney: The Process of Prosecution*, 25 J. CRIM. L., C. & P.S. 185 (1935).

⁴⁷ Dash, *Cracks in the Foundation of Justice*, 46 ILL. L. REV. 385 (1951).

relating to indigent defendants in Cook County by Oakes and Lehman.⁴⁸

Most of the foregoing reports were severely critical of the preliminary hearing procedures, often characterizing them in plainly derogatory terms. The observations and conclusions of the *Illinois Crime Survey*, in particular, took the hearing procedures to task, and they are quoted here at length to illustrate one of the problems of earlier studies.

1. *Observation*: "Of the 10,829 felony cases entering the preliminary hearing in the City of Chicago in 1926, 6,124, or 56.55% did not go beyond; in other words almost 60% of the cases entering the preliminary hearing were finally disposed of at this point."⁴⁹

Conclusion: "Either the police have been arresting too many innocent persons or more than half of the work of the police in enforcing the law in serious crimes is thus wiped out in this stage of procedure."⁵⁰

2. *Observation*: "In observing the conduct of the cases in the Municipal Court, it requires careful observation to determine whether the assistant state's attorney is there as a clerk, reporter, prosecutor or casual visitor. He permits the judge to put most of the questions, . . . [and] one is never able to feel the real proceeding which is taking place is an inquisition of those accused of crime by the state so that the presiding judge may decide whether there is 'probable cause'."⁵¹

Conclusion: "It is not too much to say . . . that the presence of the assistant state's attorney in a preliminary hearing is merely perfunctory, and in actual fact there is no actual prosecution worthy of the name in the preliminary hearing at all."⁵²

3. *Observation*: "[The state's attorney] shows no familiarity with cases; in fact, he is probably entirely ignorant of the cases until they are brought before him. [He] shows no disposition to overcome this initial handicap by acquainting himself with the facts of the case."⁵³

Conclusion: "All this means is that prosecution, so far as there is any in the preliminary hearing, must be conducted by the police. The police officer usually signs the complaint, the evidence of which is merely a formal charge. If the policeman suffers

from forgetfulness or is subject to pressure from some source favorable to the defendant, the case fails."⁵⁴

4. *Observation*: "After the enormous loss of felony cases . . . [through dismissals] . . . and the defendant has actually reached the point where his guilt has been determined, in most cases he is not found guilty of that which he was originally charged. . . . [A]mong the crimes to which the original charges are reduced, it is significant to note that petty larceny is the most frequent representative of such favor. Of the 1,855 felony charges which are reduced to a lesser offense, 973 are finally punished as petty larceny."⁵⁵

Conclusions: "If law enforcement is to be reduced to such a petty gesture . . . , there should be slight wonder that criminals choose to ply their dangerous trade under such conditions."⁵⁶ "[T]he practice [of] compromising with criminals and agreeing to a reduction of the character of charges from a grave offense to a petty offense has become so prevalent in Cook County that the criminal populations has become contemptuous of the law and fear of punishment is no longer a deterrent of crime."⁵⁷

5. *Observation*: "There is found to be widespread practice on the part of the victims of crime to compromise with the criminal by accepting restitution, and the state's attorney to thereupon dismiss the criminal charge."⁵⁸

Conclusion: "This results in convincing the criminal that the only offense of which he can be guilty is that of 'getting caught' and if 'caught,' the only punishment he need fear is giving up some or all of the fruits of his crime."⁵⁹

Whatever might be said about the accuracy or merit of these criticisms, their lack of impact on the system is beyond question. Descriptions of preliminary hearing procedures set forth in the earlier studies are remarkably similar to the one contained in this report.⁶⁰

⁵⁴ *Id.* at 307.

⁵⁵ *Id.* at 314.

⁵⁶ *Ibid.*

⁵⁷ *Id.* at 326.

⁵⁸ *Id.* at 329.

⁵⁹ *Ibid.*

⁶⁰ Note the striking similarity between the 1935 description of the preliminary hearing process by Baker and DeLong and the present report:

"After the person accused of a felony has been arrested, with or without a warrant, as the case may be, he is brought before the judge of the Felony Court for a preliminary examination to determine whether or not he shall be bound over to the grand jury. As a

⁴⁸ Oakes & Lehman, *supra* note 16.

⁴⁹ ILLINOIS CRIME SURVEY 305 (1929).

⁵⁰ *Ibid.*

⁵¹ *Id.* at 306.

⁵² *Id.* at 307.

⁵³ *Id.* at 306.

What is even more remarkable is that the preliminary hearing and the judiciary have continued to screen felony cases the same way and apparently for the same reasons despite periodic changes in the law and significant renovations in policies throughout the system. It was thought in 1930, for example, that the establishment of the "Felony Branch" of Chicago Municipal Court, in which all preliminary hearings would be conducted (rather than in the sixteen outlying branches of that court), would centralize responsibility and alleviate the problems identified by the *Illinois Crime Survey*.⁶¹ Substantial changes have not occurred in the dynamics of disposing of felony cases as a result of this change. It was also alleged

general rule, two or three assistant state's attorneys are assigned to this court room to conduct the prosecutions in these preliminary hearings, which average about five hundred a week.

... the assistant state's attorneys know nothing whatever about the case when it comes up except the brief statement of facts which appears on the complaint sheet sent up from the clerk's office on the morning of the day the case is to be heard. If a police officer, either from the state's attorney's staff or from the city police department, has worked on the case, he is usually present to testify, but only in the rarest instances does the court receive the benefit of any study which may have been made by an assistant state's attorney.

"The preliminary hearing itself is a rapid, jumbled proceeding. The defendant and his attorney, the witnesses, the police officer, and the assistant state's attorneys all stand in a huddle around the judge. The judge and the prosecutors all ask questions of witnesses and defendants with little regard for the rules of evidence, and from the resultant mass of leading questions, hearsay evidence, opinions, and competent testimony the judge learns what crime is charged and decides whether or not there is probable cause for holding the accused over to the grand jury. The prosecutors in this court can hardly be said to prosecute. Their lack of acquaintance with the cases and the witnesses prevents them from framing their questions to outline and present effectively the salient features of the case. The judge knows as much about the case as they do and consequently he usually makes his own inquires.

"The cases which come before this court involve, of course, the whole range of the criminal code provisions defining felonies. The dispositions made may be classified as follows: (1) discharged; (2) continued pending settlement between the defendant and the complaining witnesses, with agreement that case will be dismissed when this settlement is reached; (3) change of charge and sentence on misdemeanor charge immediately; (4) bound over the grand jury." Baker & DeLong, *supra* note 46, at 186.

⁶¹ ILLINOIS CRIME SURVEY, 415 (1929).

in the early 1950's that there were excessive charge reductions and guilty pleas to misdemeanors at preliminary hearings, and that legal representation of all defendants would provide a solution to this problem.⁶² This recommendation was adopted by the permanent assignment of a member of the public defender's office to preliminary hearing courts. The present study shows that such representation has had little or no effect on the rate of charge reductions or guilty pleas. It should be noted too that there have been numerous appellate court decisions on procedural and due process questions arising at the preliminary hearing and, in the early 1960's, there was a complete revision of the Illinois substantive and procedural criminal codes and an enactment of a new judicial article to the Illinois Constitution reorganizing the court structure of the state. There has also been a succession of judges and state's attorneys and a rather thorough reorganization of the Chicago Police Department a few years back. These changes in procedure and organizational structure apparently have been superficial ones with regard to preliminary hearings since they have had little or no effect on the hearing process in Chicago.

While this study actually has no quarrel with the accuracy of descriptive data in earlier studies of the preliminary hearing, it must be contended here that the conclusions drawn from these data were misdirected and deficient in that they failed altogether to inquire into the underlying causes of the practices and to consider the criteria for determining their efficacy in attacking the social problems of the day. Whereas the *Illinois Crime Survey* concluded that preliminary hearing practices were wrong, and were "travesties of justice," the view taken here is that such evaluations contribute little to an understanding of the reasons behind screening and charging practices. What was needed then, and will be attempted here, is an analysis of the preliminary hearing under the hypothesis that basic deficiencies and misconceptions about criminal law generally will explain and give insight into problems that seem peculiar to the preliminary hearing process.

1. *Relationship Between Dispositional Policies and the Purposes of Criminal Law.* Criminal law reform movements have not shown adequate concern for the effects of various criminal law sanctions, whether imposed before or after conviction, and for the compromises that must be made in the deployment of limited criminal law resources.

⁶² Dash, *supra* note 47, at 402.

Attention is focused instead on substantive questions concerning the kinds of behavior that should be labeled criminal, and on procedural questions concerning the enforcement of rights of the parties once the criminal law system has been invoked against an individual. Seldom does the reformer, in stating enforcement policies and priorities, take into account the social and economic conditions that breed crime.⁶³ Nor is much guidance provided on the practicality of procedures and sanctions most likely to induce guilty persons to behave themselves in the future. It is precisely these latter factors, however, that receive substantial emphasis by the people responsible for screening and disposing of serious criminal cases. They have no other choice but to develop their own criteria for decisions.

The system's functionaries cannot help but be influenced in their decisions by the law's failure, for example, to provide adequate correctional and custodial facilities to which defendants, once convicted, can be committed. In Chicago, correctional institutions literally cannot accommodate more than twenty per cent of the felony cases initiated. Hence, society's unwillingness to provide for the facilities to receive persons who have violated its laws is an indication that society really isn't interested in convicting most of its law violators.

Is this plain hypocrisy or are there more basic goals to be achieved than conviction and punishment for crimes actually committed? Could it be that conviction is less important in controlling crime and achieving social order than the alternatives to conviction?

The specific questions that must be asked about the Chicago system are whether the eighty per cent drop-out of felony cases at preliminary stages encourages crime and criminals, as is alleged by the *Illinois Crime Survey* and other commentators, or whether the reasons for the eighty per cent drop-

⁶³ Chief Justice Earl Warren, addressing the First National Conference on Crime Control, put his concern thusly:

"We are inclined to consider at times that it is easy to deal with the unorganized criminal but far more difficult to cope with organized crime. That I believe is probably true if all we are thinking about in terms of law enforcement is to arrest people, convict them, put them in jail, and then return them to their slum conditions. But if our objective is to rid our cities of crime, and we are willing to face up to the job of removing the conditions which breed crime, the answer is different." PROCEEDINGS, FIRST NATIONAL CONFERENCE ON CRIME CONTROL 7-8 (March 28-29, 1967).

out come closer to achieving the more basic goals of criminal justice.

Very little data are available to show a correlation between conviction and crime rates. Some statistical materials have been published, however, showing considerable variation between states and cities as to their policies and motives in seeking convictions. Chicago, Los Angeles, and Detroit offer interesting contrasts.

In 1964, the latest year covered by published statistical data from Cook County courts, there were 5579 felony cases prosecuted in trial courts. Convictions were obtained in 4101 of these (or about 70 per cent of the total) with the remainder acquitted, given a nolle prosequi, or dismissed for some reason.⁶⁴ The population of Cook County is about 5½ million. In the same year in Detroit, whose population is about 2 million, there were 5912 felony cases prosecuted and disposed of in Recorders Court, which has jurisdiction over all criminal cases in that city. Convictions were obtained in 4458 of these cases (75 per cent of the total) with acquittals, nolle prosequis, and dismissals accounting for the rest.⁶⁵ Hence, an area with a population less than one half the size of Cook County sought and claimed convictions for a larger number of felony cases.

Los Angeles County felony prosecutions offer an even more striking contrast. The population there is estimated to be 6½ million, or 20 per cent higher than Cook County. Yet in 1964 there were 16,460 felony prosecutions in Los Angeles Superior Court—more than three times as many as in the Cook County Circuit Court. There were 13,629 convictions in Los Angeles (or 82 per cent of the total prosecuted). The remainder were acquitted or dismissed (the nolle prosequi was abolished in California by statute).⁶⁶

How does one measure the effects of a relatively high or low rate of felony prosecutions whether at the trial level or at the lower court level,⁶⁷ such

⁶⁴ *Establish Justice*, ANNUAL REPORT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS 14-15 (1964).

⁶⁵ ANNUAL REPORT, THE RECORDER'S COURT OF THE CITY OF DETROIT, MICHIGAN 18 (1964).

⁶⁶ CRIME IN CALIFORNIA, DEPT. OF JUSTICE, DIVISION OF LAW ENFORCEMENT, STATE OF CAL. 145 (1964).

⁶⁷ To be meaningful, conviction rates on cases initiated as felonies must cover both trial and lower court levels since many of these cases are reduced to misdemeanors. In Detroit, for example, a majority of guilty pleas at the trial level are induced by charge reductions, some of which are to misdemeanors, a practice not unlike the Chicago Felony Court operation. See McINTYRE, LAW ENFORCEMENT IN THE METROPOLIS 132 (1967). In Los Angeles, about 10% of convictions gained at the trial level are on misdemeanors, reduced

as the preliminary hearing? The conclusion that one system provides more or less serious crime deterrence is tempting but not easily supported. The 1964 Uniform Crime Reports reveal that the number of all crimes per 100,000 population in the Chicago metropolitan area was 2259.5, whereas in the Los Angeles areas it was 3263; in the Detroit area there were 1927 crimes per 100,000 persons.⁶⁸ Aside from the possible differences in criteria for identifying and reporting crime (including misdemeanors) in these areas, there are too many other imponderables in the use of these data to demonstrate any effects on the crime rate from the number of felony prosecutions and convictions. Nor does it make much sense to explain the quantitative differences in terms of one city having a greater number of felonies committed and therefore more prosecutions commenced. It may be that there isn't much overall difference in "crime per capita" between the three cities. The practical effects of high or low felony prosecutions and conviction rates on crime simply are not known.

2. *The Role of the Judiciary in Charging Serious Crimes.* The charging decision in Chicago is, for most serious crimes, a judicial decision, made at the preliminary hearing, and as such it challenges several traditional views about the respective roles of prosecutors and judges in the criminal law system and about the nature of the decision to charge crime. The prevailing assumption in this country, as reflected in both the law and practice, is that it is the police and prosecutor's job, and not the court's, to make the charging decision. At first blush the system in Chicago appears to function this way: The police invoke the process (or make the proceedings accusatorial) when they make an arrest and file a complaint in court, and the state's attorney's office moves the matter along by presenting it to the court. It can hardly be said, however, that these are charging activities since the administrative task of presenting the case, whatever its merits or complications, involves none of the considerations that in common usage of the term go into the charging decisions. There is no analysis of the evidence by the state's attorney to determine the offenses actually committed and for which a conviction can be obtained; he gives little or no attention to extenuating circumstances

and the defendant's background, which are factors often determinative of the appropriate charge; nor does he give consideration to the kinds of concessions and other inducements needed to get pleas of guilty, which elsewhere are matters discussed or negotiated for in conference between the prosecution and defense. These ingredients of the charging decision are considered, but by the court.

One of the major objections to judicial participation in or dominance of the charging process is the evil that results from an impartial judicial officer having much to do with negotiations and discussions for guilty pleas which, judging from the high percentage of guilty pleas entered, are perhaps the most important aspect of the charging process. The President's Commission on Law Enforcement and Administration of Justice, for example, took the position that "a judge should not undermine his judicial role by becoming excessively involved in negotiations" and that his function should be that of "an independent examiner to verify that the defendant's plea is to result in an intelligent and knowing choice and not based on misapprehension or the product of coercion."⁶⁹ Similarly, the American Bar Association Project on Minimum Standards for Criminal Justice Administration has come out against court participation in plea negotiations (or "discussions" as they choose to call the practice) because the effects are: (1) "... [to] create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge," (2) to make it "difficult for the judge objectively to determine the voluntariness of the plea when it is offered," (3) to ignore and be "... inconsistent with the theory behind the presentence investigation report" and (4) to run a risk that an innocent defendant may be induced to plead guilty rather than go against a disposition apparently desired by the judge.⁷⁰

These restrictions on the judiciary, however laudatory and desirable they may be, have severely limited application to the Chicago preliminary hearing. To begin with, about half of the cases heard result in either a dismissal or SOL and obviously reduce the pitfalls and concerns about an innocent defendant being induced to plead guilty. Moreover, the hearing is not in a strict sense a

from the original felonies. See *CRIME IN CALIFORNIA, DEPT. OF JUSTICE, DIVISION OF LAW ENFORCEMENT, STATE OF CAL. 145 (1964).*

⁶⁸ *CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS—1964, pp. 72, 78.*

⁶⁹ *THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 136 (1967).*

⁷⁰ *Standards Relating to Pleas of Guilty, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE 73 (1967).*

routine forum for negotiations in that there is relatively little discussion or *quid pro quo* between the prosecution and defense. When a felony charge is reduced to a misdemeanor, the reduction is not conditioned on a promise to plead guilty; and when guilty pleas are entered, they are not contingent on prearranged determinations of sentence or probation.

It is a fact, however, that above five out of six defendants who have their charges reduced plead guilty to the misdemeanor, a ratio about average for guilty pleas generally in this country. It can be expected, purely as an observation of human nature, that when the judge announces that a misdemeanor, and not a felony, has been committed and asks the defendant to plead to it, an element of coercion is bound to be felt both by the defendant in deciding on a plea and by counsel in giving advice about it. But the fact that one out of six defendants in this situation plead not guilty would indicate that the pressure is not overwhelming. An alternative procedure, wherein felonies reduced to misdemeanors would be automatically transferred to another court for a plea, would probably have a different psychological effect on the defendant in deciding whether to plead guilty, and it would have the advantage of giving the defense extra time for assessing his chances of acquittal when making that decision. In the final analysis, however, there will likely be no real reduction of pressure to plead guilty, even under the suggested transfer procedure, until defense counsel, prosecuting officials, and the courts are relieved of pressure on them to dispose of the high caseloads as expeditiously as possible.

A concern of long standing in this country has also been the pressure on prosecuting officials to establish impressive conviction records. It has been alleged that such pressure leads either to unjustifiably lenient treatment in exchange for guilty pleas or else to undue harshness in "overcharging" so as to place the prosecutor in a favorable negotiating position.⁷¹ The preliminary hearing judges in Chicago, again in contrast to what may be a typical charging problem elsewhere, obviously feel no pressure for convictions in view of the large numbers of dismissals ordered. Nor do they show any concern for the disparity between the 16,000 felony cases annually initiated and the 3000 resulting in referral to the grand jury. There have been no major criticisms of this large dropout

at the preliminary hearing since the criticisms of the *Illinois Crime Survey* some forty years ago.

Overcharging is of no apparent concern either, though not because it is absent or hard to detect. On the contrary, it is done openly, sometimes blatantly, by the police in deciding on the charge or charges to be included in the formal complaint. Police selection of the most serious charge possible, even in doubtful cases, is recognized as a routine practice and is dealt with accordingly: Neither the court nor prosecuting officials rely on the complaint as a significant indication of what crime was actually committed or could be proved. Thus the inquiry at the preliminary hearing is not an attempt to verify the accuracy of the complaint but is an attempt to find out what "really happened," and why, so as to determine then and there the appropriate correctional measure to be taken, if any.

The severest criticism of charging practices normally followed in this country centers on the *sub rosa* nature of "bargains," "deals," and "compromises" arrived at in fixing the charge to be pursued through conviction. While it is recognized by many that compromises in criminal cases are necessary and desirable, just as they are in civil cases, there is resentment over the fact that they are concealed, that the parties act as though no negotiations have even occurred when a plea is entered, and that a decision by the prosecutor in these circumstances is not based on adequate information about the defendant's behavioral problems—at least not as adequate as the judge receives with a presentence report.⁷² The role of defense counsel in this process has also been condemned:

"The defense attorneys—whether legal-aid, public defender variety, or privately retained—although operating in terms of pressures specific to their respective roles and obligations, ultimately are concerned with strategies which tend to lead to a plea. It is the rational, impersonal elements involving economics of time, labor, expense and a superior commitment of defense counsel to these rationalistic values of maximum production of court organization that prevail in his relationships with a client. . . . The continuing collegueship [of defense counsel 'regulars' and prosecutors] of supposedly adversary

⁷¹ THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 69, at 135-36.

⁷² See generally, *Standards Relating to Pleas of Guilty*, *supra* note 70, at 61-66.

counsel rests on real professional and organizational needs of a *quid pro quo*, which goes beyond the limits of accommodations or *modus vivendi* one might expect under an adversary relationship."⁷³

The preliminary hearing in Chicago, since it is the forum for—or takes the place of—"discussions" or "negotiations" for many pleas, suggests some interesting answers, at least by way of qualification, to these criticisms. To begin with the discussions, as earlier indicated, are not routinely private talks between prosecution and defense, although there is nothing to prevent this. Very few conferences or discussions between counsel were observed during the study; a number of persons interviewed indicated that negotiations for a plea to a lesser offense are sometimes engaged in after indictment but any deals require approval of the chief of the criminal divisions of the state's attorney's office. In a typical case, however, the attorneys put their facts and arguments about the charging decision to the preliminary hearing judge. It is done in open court for everybody—the police, victims, defendants, lawyers, witnesses, researchers, and newsmen—to see and hear if they care to. Any inadequacies and deficiencies in the process, such as the lack of any significant information about the defendant's background other than his arrest and conviction record and the inordinate speed with which decisions are made, are plainly visible and subject to criticism if anybody cares to make it.

One might make the observation, as was done by the *Illinois Crime Survey*, that the assistant state's attorney (and defense counsel for that matter) often resemble clerks in the sense that they engage in no fiery oratory nor produce lengthy, sophisticated arguments on technical questions of due process. These matters are pursued, however, with an eye toward what will be done with the defendant once the ruling is made. What the defendant said to the police upon being arrested, in other words, is at times less important than factors pointing to the appropriate disposition, assuming guilt could be proved. In any event, counsel obviously assumes that such decisions are matters for the judiciary to make.

The prosecutor's self-perception of his role in the criminal process also reduces his influence on and control over the charging process. Except for department heads, the highest rank in the office, in

both salary and prestige, is that of trial advocate. Experience and seniority within the state's attorney's office are the stepping stones to the job of trying important cases or to assignment to one of the court rooms of the Circuit Court where felony indictments are disposed of. As a result, assistant state's attorneys assigned to preliminary hearing courts are commonly young men who normally have no more than one or two years' experience.

In addition to these limitations, the state's attorney's office no doubt feels, just as the police department does, that it lacks the power to dismiss or reduce the great majority of felony cases on its own initiative, despite the discretionary power attributed to that office. Unlike the courts, the state's attorney does not have the procedural devices—such as SOL, DWP, misdemeanor conviction, and "court supervision," all of which indicate that the case was not merely "dropped" without a reason, without a review of the evidence, or without the defendant and accuser at least having an opportunity to confront each other in court.

The underlying reasons for these preliminary dispositions also help to account for the reluctance of the prosecution to take the initiative in charging. For example, while the state's attorney's office does maintain a misdemeanor complaint bureau to seek restitution rather than conviction in bad check and fraud cases, it is quite another matter for the office not to prosecute when restitution has been provided in cases of robbery, burglary, or other serious offenses. Moreover, dropping a serious charge because it involves a private lovers' quarrel, or because it is thought that standards of accountability should be more relaxed when dealing with behavior common in slum neighborhoods, are judgments that are controversial, or sensitive at best, and subject to criticism because they defy concepts of equality and uniformity of enforcement. In Chicago it is clear that the courts are less susceptible to criticism for showing leniency on these grounds; the *Illinois Crime Survey* laid the "blame" for the high dropout of felony cases at the preliminary hearing squarely on the state's attorney's office, with only an occasional criticism about the court's role in such a process.⁷⁴

⁷³ Blumberg, *The Practice of Law as a Confidence Game*, 1 L. & Soc'y REV. 15, 25-26 (1967).

⁷⁴ Said the *Illinois Crime Survey*: "The prosecution of felony cases in the preliminary hearing in the Municipal Court in Chicago is mainly in the hands of *incompetent and indifferent assistant state's attorneys* who know nothing about the facts in the cases and are not prepared to and do not render effective service. To this fact may

The fact that the judiciary has traditionally assumed the task of screening felony cases might be traced to the fact that the need to eliminate from further prosecution at least 80 percent of the felony cases initiated is a serious and hazardous business and one that perhaps only the judiciary in Chicago can manage. Major screening could be done, for example, by the police and state's attorney's office. Much pressure, however, is on the police to maintain a good crime clearance record and this requires, in the eyes of some, both arresting and charging. Police discretion not to arrest or not to charge also has significant limitations with regard to serious offenses; turning loose many felony suspects is more than is expected of a police department and more, probably, than it is willing to accept.

The state's attorney's office is similarly restricted for the same and other reasons. Although the prosecutor is vested in theory with considerable discretion in deciding whether and what to charge, his range of choice and his criteria for decisions are subject to any number of pressures and conditions which result in his staff's performing, in Chicago at least, either as trial advocates at the one extreme or as ministerial officers at the other. One factor inhibiting full use of discretion in this office is the high turnover of personnel. It was learned in interviews with high officials in the state's attorney's office that most assistants are young men who in-

largely be ascribed the failure of 56.55 percent of all cases to survive the preliminary hearing." *Illinois Crime Survey* 329 (1967).

tend to leave the office within a few years when their experience in trial court has prepared them for private, more lucrative, practice. The experience and confidence needed to screen, change, or negotiate for pleas cannot be gained in this short time. Preliminary hearing judges, on the other hand, have had years of experience in the Chicago system of criminal law and several started their careers in the state's attorney's office.

A final observation about the Chicago preliminary hearing process is that it demonstrates the significant way in which plain economic and social considerations influence decisions in the criminal law system. More particularly, it seems clear that for many probably guilty defendants the cost of prosecution and conviction beyond the preliminary hearing would have little or no rehabilitative or deterrent effect, or at least the pay-off in these terms would be less than the cost of conviction and sentence. To proceed beyond the preliminary hearing would thus seem a waste of time and cost, especially when less expensive and equally effective alternatives to conviction are available. Restitution to the victim, a plea to a misdemeanor, and court supervision may have more of an ameliorating effect on the defendant's behavior than conviction, and the cost to the state is negligible.

When this seems to be the case, as it often does to preliminary hearing judges, their decisions and operations are affected more by such factors than by compliance with procedural technicalities, labels, and organizational structure.