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OFFICIAL MORALITY AND OFFENDER PERCEPTIONS OF THE BARGAINING PROCESS

by

(C) JOHN FREDERICK KLEIN

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, ~~a thesis~~ entitled Official Morality and Offender Perceptions of the Bargaining Process

submitted by John Frederick Klein

in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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ABSTRACT

Much of what has been written on the subject of negotiated justice has been legalistic in nature and restricted to the boundaries of the role of the prosecutor. This study is aimed at extending these boundaries and providing a broader view of the structure of negotiations and the process of exchange.

This exploration of the dynamics of the negotiation process has focused upon the perceptions of the one actor who is involved in the process from the time that a crime is committed through the final disposition of the case -- the offender. In many respects, the view of the offender is not unique; his view is logically consistent with what we already know about the criminal justice system and the negotiation process. At the same time, the offender's view of this process is at considerable variance with that reflected in the publicly espoused official morality.

Emerging from this study is a view of the system of negotiated justice in which the relative power and needs of offenders and officials determine the nature of the exchange transaction. Such a system is the antithesis of a system of criminal justice which conforms to a due process model. The offender who is criminally sophisticated and who possesses the knowledge and skills required to take advantage of the possibilities for manipulation which exist in the system is most likely to get the best deal.

Deals involving the kickback of stolen property or materiel used in the commission of criminal acts may result in significant

concessions to offenders while furthering the achievement of the legitimate goals of crime prevention and control. However, the benefits obtained by officials are sometimes more apparent than real. Taken to its logical conclusion, the possibility of making such a deal may actually encourage crime as offenders commit criminal acts to acquire the materiel needed to bolster their bargaining positions.

Information is the lifeblood of any police department. Offenders who can supply the police with information may be able to obtain worthwhile concessions from the authorities. However, most offenders perceive the costs -- both mental and physical -- of acting as an informer as outweighing whatever benefits they might accrue.

A deal in which the focus is a plea of guilty in exchange for concessions is the focus of most literature on negotiated justice. Such deals are designed to increase bureaucratic efficiency in appearance or in actuality. While common, they are of questionable benefit to most offenders.

Not all negotiated pleas involve a voluntary exchange transaction. There are some situations in which the discretionary authority of officials may be used to induce a defendant to plead guilty. Herein lies the greatest danger of the system in that an innocent defendant may be induced to plead guilty.

Whatever the specific outcome of a negotiated settlement, there is one constant: a decrease in the offender's perception of the legitimacy of the system of criminal justice.

The implications of this study for further research and for public policy are discussed.

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Thank you.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER ONE

ON MAKING A DEAL: WHAT WE KNOW

> And then, after several encounters with the police, it finally hit me: the Criminal Code is irrelevant -- it's all just a game we play. They [the police] get me in and we soon forget about charges and talk about a deal -- charges we can talk about later. You see, I've got something they want whether it be information, stolen property, crimes I can clear for them (whether I actually committed them is irrelevant) or whatever, and they have some things I want such as bail and the least amount of time. . . . For example, at one point in time in _____ I was making more "nitro" to kick-back to the police for deals than I was ever using myself.
>
> -- Anonymous

A. Introduction

The development of institutions charged with the administration of criminal justice in democratic societies has been characterized by increasing bureaucratization, complexity, and uncertainty. Uncertainty in the process of obtaining the conviction of those who have been charged with a criminal offence is, in large measure, the outcome of the creation of procedural rules which have been designed to protect what we deem to be the rights of individuals who live in a free society. These procedural rules

and safeguards which add so much uncertainty to the process of screening individuals who are brought into the net of the criminal justice system are, in fact, of relatively recent origin. For example, the criminal justice system of some 200 years ago in France and England has been characterized as one in which

> Crimes were ill defined and both the Crown and judges exercised arbitrary discretion to convict ex post facto for acts not previously prohibited; procedural safeguards were nonexistent; no assistance of counsel was allowed; police would keep individuals in custody indefinitely on unknown charges and had the further powers of judgment and sentence; witnesses were secretly examined; and torture was employed to wrench confessions from the accused (Kittrie, 1971:19-20).

While, in terms of our social values, such a system is seen as unjust, it was nonetheless certain -- certain in the sense that no procedural rules stood in the way of a conviction. In contrast, our contemporary quest for justice and fair play for those charged with a criminal offence has meant uncertainty in the conviction process.

Thompson (1967:159) notes that

> Uncertainty appears as the fundamental problem for complex orgainizations, and coping with uncertainty, as the essence of the administrative process.

So long as individuals or organizations are in a situation of competing goals and interests in which "winner-takes-all", uncertainty will persist. The adversarial system which is an important feature of our system of criminal justice exemplifies such a situation.

A means of avoiding some of the uncertainty which characterizes a "winner-takes-all" situation is to resort to a

compromise as a result of bargaining in which each party achieves some measure of what it desires, although neither party achieves all that it desires. According to Browne (1973:1), ". . . the bargaining of one who has with one who wants is a basic form of interaction." Bargaining and compromise have long been recognized as the norm for achieveing a satisfactory (even if a somewhat less than desired) solution to, and as a means of avoiding uncertainty in, civil cases. What about the bargaining process in the compromise of criminal cases? Cressey (1968:6) that

> Since about ninety percent of civil cases coming before some courts are settled by agreement between the parties, without a full trial of the issues, it is not surprising that there is a tendency to settle criminal cases by the same procedure.

While it is generally held to be a proper and acceptable practice to reach compromises in order to settle civil cases, the propriety of such a practice in criminal cases has been questioned.

> A guilty plea induced by a bargain occurs because the state has structured the outcome so that the defendants will choose not to go to trial. Plea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials. The practice forfeits the benefits of formal, public adjudication; it eliminates the protections for individuals provided by the adversary system and substitutes administrative for judicial determinations of guilty; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sentencing decisions by introducing non-correctional criteria (Comment, Harvard Law Review, 1970: 1397-98).

As the above indicates, compromising criminal cases in order to avoid an uncertain outcome at trial involves, at the very least, a question of values.

The basis for the value conflict which results in the

questioning of the propriety of negotiated justice in criminal cases lies in the acceptance of either the Due Process Model or the Crime Control Model of the criminal process as outlined by Packer (1964 and 1968). Basically, the Due Process Model of the criminal justice system is a textbook model of the criminal process in which an accused, from arrest to final disposition of his case, is afforded all the procedural safeguards guaranteeing a fair trial. It is an ideal which places the onus of proof upon the state while demanding that the state scrupulously protect all of the accused's rights. In contrast, the Crime Control Model places primary emphasis upon certainty and bureaucratic efficiency. Justice by negotiation as opposed to justice by adjudication is central to such a model.

> The pure Crime Control Model has very little use of many conspicuous features of the adjudicative process, and in real life works out a number of ingenious compromises with them. . . . The focal device . . . is the plea of guilty; through its use, adjudicative fact-finding is reduced to a minimum (Packer, 1968:162).

As we shall observe in later Chapters, the contrast between adjudicative fact-finding and justice by negotiation is, in the eyes of some, the difference between the Ought and the Is of our system of criminal justice.

In recent years, increasing attention has been focused upon what has been variously termed plea bargaining, plea negotiation, justice by negotiation, or "making a deal". These terms imply an exchange of concessions and advantages between the state and the accused

> . . . whereby the defendant trades a plea of guilty for a reduction in charge, a promise of sentence leniency, or

> some other concession from full, maximum implementation of the conviction and sentencing authority of the court (Newman, 1966:60-61).

The raison d'etre for such an arrangement is fairly obvious: individuals who have committed criminal acts prefer that the sanctions which are attached to their predations be minimal and officials involved in the administration of justice prefer that cases be disposed of as efficiently as possible so as to prevent a serious backlog of cases.

Although a fairly extensive literature has developed on the topic, it is suggested that, in fact, very little is known about the dynamics of the processes involved in negotiating justice. This primarily is due to three factors: 1) the legalistic nature of most published literature on negotiated justice; 2) the restrictive context (in terms of offence and penalty structures) in which a surprisingly small amount of descriptive and empirical research has been conducted given the number of articles which have been published on the subject; and, 3) the attenuated boundaries of such research resulting from a primary focus on prosecutorial discretion rather than the full range of actions which might be viewed as falling under the umbrella of negotiated justice.

To say that most of the published literature on negotiated justice is legalistic in nature is not intended to be construed as a criticism per se; it is simply intended to call attention to the fact that little research has been done on the actual dynamics of justice by negotiation which would be of interest to sociologists or criminologists. Newman, who is probably the most oft cited

authority on the subject of negotiated justice, states:

> It is fair to say that the major forms of nontrial adjudication -- the guilty plea, the negotiated plea, and summary acquital of certain guilty defendants by the trial judge -- together form one of the most important processes in day-by-day criminal justice administration, and yet one that has been largely neglected in professional literature, by researchers, and by lawmaking bodies (Newman, 1966:231).

Of the work which examines the process of negotiated justice, of greatest interest to sociologists is the research reported by Newman (1969, originally published in 1956; his later work [1966] which was carried out for the American Bar Foundation is primarily a legalistic study), Sudnow (1965), Blumberg (1967), and, to a lesser extent, Grosman (1969) and Shin (1973). Most other works on negotiated justice from a sociological perspective must be considered secondary sources. That there is an extensive literature on the issue of negotiated justice (see Bibliography) and a meager input of actual data may well indicate a real disparity between what we <u>believe</u> we know and what we <u>know</u> in actuality. Most of the published work to date has been authored by legal scholars. This serves to indicate that the issue is not unimportant inasmuch as that which is legal is tied to our values (whether they be conflicting or consensual).

As we shall see, the penalty and offence structure of a given jurisdiction is a crucial factor in understanding the dynamics and goals involved in negotiated justice. Newman's early research (1969) was carried out in Wisconsin; his later research (Newman, 1966) relied upon the American Bar Foundation's

data which were obtained in Wisconsin, Michigan, and Kansas; Sudnow's (1965) research was done in a California public defender's office; Blumberg's (1967), in an unidentified, major metropolitan court in the U.S.; Grosman (1969) researched prosecutorial discretion in York County which encompasses a northern region of the City of Toronto; and Shin (1973) relied upon court records from the City of New York. The offence and penalty structures as well as the demands which are made upon agents of the criminal justice systems in these various jurisdictions are, in many important respects, unique. For these reasons, caution must be exercised in making any generalizations about the general dynamics of negotiatied justice given these data.

With the exception of the work of Shin (1973), which attempts to answer the question of whether the offender who receives a sentence of incarceration as a result of a negotiated plea actually benefits in terms of the amount of time actually served, the available literature on negotiated justice is largely restricted to an analysis of the use of prosecutorial discretion. Largely neglected are the roles of the other officials with whom an offender or his counsel might have contact in the course of negotiating the outcome of a criminal case. By restricting the boundaries of the study of negotiated justice in such a way, it is likely that some, if not much, of what is viewed by the offender as a "deal" is never examined. As will become apparent later, the view of some offenders of the contemporary "deal" is not unlike Chic Conwell's view of the "fix" in the 1930's:

> In order to send a thief to the penitentiary, it is necessary to have the co-operation of the victim, witnesses, police, bailiffs, clerks, grand jury, jury, prosecutor, judge, and perhaps others. A weak link in this chain can practically always be found, and any of the links can be broken if you have pressure enough. . . . It is just a question of . . . using your head until you find the right way (Sutherland, 1956:82-3).

It is within the context of the foregoing that we shall examine in greater detail some of the current claims to knowledge about negotiated justice, the limitations of these claims, and, as a response to these difficulties, present an expanded and complementary perspective on the dynamics and boundaries of nontrial adjudication.

B. Negotiated Justice in an Organizational Context

The existence of a system of negotiated justice cannot be understood apart from the organizational context in which the practice occurs. Organizations may be viewed as ". . . complex mixtures of both designed and responsive behaviour"(Selznick, 1957:6). When we look at the organizations involved in the administration of criminal justice, the prototype of the designed component is found in Packer's (1966) Due Process Model; the responsive component consists of those adaptations which are made to accommodate the demands made upon the organizations as a result of the nature and requirements of the tasks for which they are given responsibility.

There is no denying that there are heavy pressures placed on the police and the courts to deal with more crime and to

process more offenders that the organizations are properly equipped to handle if they are to operate in their ideal forms. There is no evidence which clearly demonstrates that the "crime problem" of this age is any more serious than in past periods. In fact, there is probably less serious crime now than in past decades -- it appears that from the time of recorded history each age has discovered an unprecedented "crime wave" (see, for example, Canadian Committee on Corrections, 1969:21-30 and Erickson, 1966). However, when a concern over the amount of crime in a community is expressed, the police and the courts are placed in a position where they are expected to show that they are "doing something" about it. Unfortunately, the ideals of crime control and prevention for the police, and justice for the courts, are difficult to measure. The result is that tangible outcomes which may be related to these ideals are assessed -- such things as the number of arrests which have been made, the number of cases cleared, the amount of stolen property recovered, the number of persons convicted, etc. -- so as to demonstrate that the organizations are responding to the crime problem and actually doing something about it.

A problem is that such a response may lead to goal displacement.

> . . . bureaucracies become so engrossed in pursuing, defending, reacting to, and, even, in creating immediate problems that their objective is forgotten. This tendency to displace goals is accelerated by the one value dear to all bureaucracies -- efficiency. Efficiency is the be-all and end-all of bureaucratic organizations (Manning, 1971:169-70).

There is little doubt that negotiated justice is efficient:

> . . . the guilty plea represents the most expedient manner by which to dispose of the greatest number of cases with the least administrative complication and delay; the formal trial . . . consumes an unpredictable length of time with the concomitant inconvenience to prosecution witnesses, police officers, as well as to counsel and accused persons who are awaiting the trial of their cases (Grosman, 1969:52).

The situation that many officials who are charged with the administration of justice find themselves in is analogous to Bensman and Gerver's (1963) description of the use of the "tap" in a wartime airplane plant. They found that when there is pressure placed upon workers to demonstrate a high rate of productivity, the ultimate goal (producing a safe, well-constructed airplane) may be ignored under the more immediate pressure to produce an airplane within the required time. When means must be found to raise production, rules are circumvented in response to demands for efficiency. On one hand, such a response may be seen as "positive deviance"; on the other, the response may be inconsistent with the ultimate goals which the organizations are expected to serve.

A difficulty arises in that what is initially perceived as a short-term expedient response to a pressing problem may become, as Williams (1960:372-96) has described it, an "institionalized evasion of normative patterns." Such appears to be the case with negotiated justice. Rather than hire more personnel to cope with a situation where the work load has exceeded the capacity of the organization's resources, the deviant solution becomes the norm with the justice system being clandestinely restructured in harmony with this new norm.

> Both processes [the negotiated plea and the acquittal of the guilty as a matter of judicial discretion] are so important and so commonly employed that the entire criminal justice system comes to depend upon a high rate of guilty pleas and a systematic diversion of certain guilty defendants from correctional facilities. Prosecutors' offices are staffed, court calendars planned, and correctional facilities built in anticipation of these practices (Newman, 1966:4).

While this is a situation which has received a fair amount of attention in recent years (cf. Enker, 1967), it should come as no surprise given the warnings of Justin Miller (1927) and Newman Baker (1933) some four decades ago that such a situation was in the offing.

While the pressure of a large number of cases undoubtedly has an impact in terms of encouraging the criminal justice system to resort to and to institutionalize the practice of negotiated justice, the organizations which make up the criminal justice system also place pressure on individuals within the organizations to resort to deviant, if not expedient, solutions. Blau (1955: 202-3) found that North American bureaucracies, unlike those portrayed by Max Weber as having a system of hierarchical control, permit junior officials considerable discretion in discharging their responsibilities. Couple this with Thompson's (1967:123) assertion that, "Where work loads exceed capacity and the individual has options, he is tempted to select tasks which promise to enhance his scores on assessment criteria," then it is not surprising that individuals working in the criminal justice system are likely to resort to expedient means in discharging their responsibilities. Occupational and career commitments and personal

drives may generate priorities within individuals which, in turn, exert additional pressures in the direction of a negotiated rather than an adversarial solution to criminal cases. This is consonant with a claim that

> . . . a plea of guilty is a source of considerable psychological satisfaction to many of the participants in law-enforcement agencies. To the police, it is an assurance that their suspicions were accurate. To the prosecutor, it is another case expeditiously handled (Chambliss and Siedman, 1971:400).

There is a certain amount of tragic irony in a situation where an organization "manufactures" indicators of effectiveness which are somewhat divorced from its goals, uses these indicators to publicly proclaim its effectiveness, then uses these same indicators to evaluate the worth of its incumbents. When, in evaluating the effectiveness of a prosecutor, we look at the number of cases which he presented which resulted in acquittals rather than convictions, ignoring whether the outcome of the cases furthered the ends of justice, such an irony is present. (A similar situation exists for the police in respect to their concern with clearance rates. See Chapter Five.) While it is true that

> . . . as a system of organization, bureaucracy can hope to achieve efficiency only by allowing officials to initiate their own means for solving specific problems that interfere with their capacity to achieve productive results (Skolnick, 1966:237)[,]

this can also result in a negation of the very values which the organization was meant to protect or exemplify.

C. Negotiated Justice in a Legal Context

1. Introduction: The existence and the prevalence of the

practice of law enforcement officials negotiating with defendants in order to diminish uncertainty and increase efficiency can be seen as a response to pressure on the organizations themselves. It may also be seen as a response to pressure placed upon individuals within these organizations given the organizational structure and demands and the personal needs of the organization's incumbents. If we are to move beyond attempting to understand why the practice exists and wish to gain some understanding of the reasons for a particular structure of negotiated outcomes, we must observe the legal framework in which the practice occurs. The law of a particular jurisdicition demarcates the boundaries of the negotiation process. For law enforcement officials, the law -- the offence and penalty structure and procedural rules -- defines the nature of the concessions which can be offered to defendants. For the defendant (who must ultimately decide to accept or reject the negotiated settlement), the nature of the laws within a jurisdiction creates a context in which he perceives and evaluates the desirability of a particular settlement in terms of its probable outcome.

Scant attention has been paid to negotiated justice in Canada (exceptions, but exceptions of limited applicability for this study, are Blackstock, 1967:177-83; Grosman, 1969; Hagan, 1974:73-94; and Klein, 1973). Most of the research on negotiated justice has been conducted in the United States and has been limited to particular jurisdictions, hence particular legal contexts, within that country. This has obvious implications for the findings'

generalizability for, in addition to U.S. Federal criminal legislation (under which relatively few criminal prosecutions are initiated), each state has its own unique offence and penalty structure. If U.S. research findings which are context specific are of questionable generalizability to the U.S. as a whole, any attempt to generalize these findings to Canada is even more questionable. This is true not only because Canada has an offence and penalty structure which is quite different from the structures found in most U.S. jurisdicitions, but also because the basis of Canada's legal system differs from that of the U.S.

That the two legal systems differ can be seen in a reference made by Packer (1968:173) to the nature of the U.S. system:

> Ours is not a system of legislative supremacy. The distinctively American institution of judicial review exercises a limiting and ultimately a shaping influence on the criminal process.

In the U.S., the limits which are placed on the nature of official power and on the modes of its exercise, are derived from judicial review, from supra-legislative law which is based upon the law of the U.S. Constitution. Canada does not have in its law the equivalent of some of the landmark decisions of the U.S. Supreme Court which have the force of law -- Escobedo v. Illinois, Mapp v. Ohio, Gideon v. Wainwright, Miranda v. Arizona, etc. This should not be construed as meaning that either it is not concerned about the problems which these decisions represent or that it is not concerned about such problems. Rather, it means that the legal system itself is quite different. Canada's legal system is, under

the terms of the British North America Act, a system of legislative supremacy in which the ultimate authority for formulating criminal law and procedure is vested in Parliament.

However, it should be noted that this distinction may be becoming increasingly less valid as the Canadian courts now recognize an obligation to declare Federal Acts inoperative to the extent of contradiction with the Canadian Bill of Rights. (In many provinces there are similar Bills which may be used to strike down Provincial Acts.) Admittedly, Canadian courts, in view of their traditional subserviance to the supremacy of Parliament -- indeed, the Bills could, in theory, be repealed at any time -- are proceeding conservatively but case law is emerging, for example, on the right to counsel.

2. Offence and penalty structures have an important impact on the ostensible aim of the negotiation process from the standpoint of the defendant. As Newman (1966:91) notes,

> The type of bargain, charge reduction or sentence promise, is dictated pretty much by the formal sentencing structures of the state.

In a state such as California, which has an indeterminate sentencing law, the judge has no discretion in the sentence which he gives. The sentence which is given for a particular offence is the indeterminate sentence which is prescribed by the California Penal Code. The Adult Authority then determines what the maximum amount of time to be served will be, given the boundaries set out in the penal code. In such a situation it would be pointless for a defendant to make a deal with the authorities for a lenient sentence

of imprisonment. The only rational approach in insuring a relatively short sentence is in bargaining for a charge which carries with it a short maximum sentence.

In states such as Kansas and Michigan where mandatory sentences for particular crimes are common, bargaining for a reduced charge is also the norm in avoiding a lengthy, mandatory sentence. For example, in Michigan where being convicted of armed robbery means a mandatory life sentence, it is almost the norm to reduce the charge to unarmed robbery. As Miller explains,

> When a legislature restricts the sentencing discretion of the trial judge, as has been done in both Kansas and Michigan, a sentence promise sufficient to secure a plea of guilty often requires an accompanying reduction in formal charge. It is for this reason that in both states, bargaining, even when its primary objective is sentence minimization, is reflected in reduced charges (F. Miller, 1970:192-93).

In the State of New York, for example, there are some twelve possible necessarily-included offences to which robbery in the first degree (which carries a maximum sentence of twenty years) may be reduced -- including reduction to a misdemeanor which carries a maximum penalty of one year. This means that an offender facing a charge of first degree robbery would be well advised to negotiate for a lesser charge which carries a minimal sentence.

A conclusion which may be derived from Sudnow's (1965) analysis of negotiated justice is that routine charge reduction comes close to being the norm when two conditions are present: 1) there exists a large variety of charges and degrees of these charges in the penal code, and 2) there exists a "tariff system" of sentencing on these offences, that is, a deal for a charge

reduction involves a high degree of predictability in respect to the sentence to be given.

Not all jurisdictions have the significant features of a criminal and penal code which encourage, if not actually necessitate, negotiating for a charge reduction: mandatory or indeterminate sentences, a large number of lesser-included offences, and a lack of discretion given to the judiciary in fixing sentences. Federal criminal law in the U.S. lacks these features with the outcome of negotiations being that

> A defendant may plead guilty to a charge that accurately describes his conduct in return for a general promise of leniency at sentencing or a more specific promise of probation or of a sentence that does not exceed a specified term of years. To the extent that plea bargaining occurs in Federal courts, except for narcotics cases which carry a mandatory minimum sentence, it usually takes this form. This is probably so because the Federal law contains few lesser included offences to which charges can be reduced (Enker, 1967:110).

In light of the above, Canada's legal system does have some unique features which should be examined in detail since these features may affect the form which negotiated justice takes.

Hogarth (1971b) has outlined some features of Canada's legal system which differentiate it from systems in other national jurisdictions -- features which should be considered in analyzing the legal context of negotiated justice.

> The Canadian magistrate has a broader jurisdicition to try cases and a greater discretionary power in sentencing than that given to any single lower court judge in Europe, the Commonwealth or the United States (Hogarth, 1971b:549).

Coupled with this is the fact that magistrates try all summary conviction offences and 94% of all indictable offences (Hogarth,

1971b:549). The importance of these facts can only truly be appreciated in the context of other facts. With only a few exceptions, there are no mandatory sentences in Canada. Reliance is placed upon the definite, fixed-term type of sentence. The sentencing judge or magistrate has a great deal of discretion in sentencing a person to a term of imprisonment -- he may impose any sentence up to the maximum provided by Parliament in the Criminal Code. And, prior to 1969 he was, under s.638 of the Criminal Code, severely restricted in the amount of discretion he could exercise in granting probation. There does not exist in the Canadian Criminal Code the multitude of charges which are found in the Codes of many other jurisdictions. In order to accommodate this situation, the maximum sentences in the Code are generally conceded to be quite high. For example, theft over $200 (formerly theft over $50) carries a maximum sentence of ten years; breaking and entering, if in relation to a dwelling house, carries a maximum sentence of life imprisonment; and, robbery carries a maximum sentence of life imprisonment. Given such a situation of a limited number of charges and high maximum penalties, it should come as little surprise that there exists a great deal of disparity in sentencing. In fact, Hogarth (1971a) found that he was better able to predict sentence by knowing certain personality and background characteristics of individual magistrates than he could by knowing the facts surrounding a particular offence.

What are some of the implications of the above for the defendant who wishes to negotiate in the hope of minimizing his

sentence? It means that, in most instances, a promise to have a charge reduced in exchange for a guilty plea can be meaningless in terms of the outcome of his sentence -- maximum sentences are rarely meted out for any of the offences in the Criminal Code and one can still receive what would be considered a "normal" sentence for the original charge when a defendant pleads guilty to a reduced charge. There are a few exceptions to this but, by and large, a defendant who seeks a favourable deal in Canada should concern himself more with a negotiated sentence than a negotiated charge. Given the penalty structure in Canada, the offender who successfully negotiates for a lesser charge may find himself serving a sentence which is the same as the sentence normally given for conviction on the original charge. The same holds true for having some counts dropped (for example, having 30 charges involving bad cheques dropped down to five or ten) in exchange for a guilty plea. As Grosman (1969:33) indicates, given the general pattern of giving concurrent as opposed to consecutive sentences on multiple counts, a reduction in the number of counts seldom makes any difference in terms of the length of sentence.

3. Legal safeguards aimed at protecting the rights of the defendant who negotiates with law enforcement officials in the hope of lessening his sentence have been rather slow to develop in Canada. For example, Hogarth (1971a:192) states that

> Bargaining has never been fully recognized as a legitimate practice in Canada, at least not to the same extent as in some American jurisdictions. There is by no means a uniform set of rules governing this process, and the way it functions depends primarily on the kinds of relationships that have

> grown up between magistrates, crown attorneys, and defence counsel in particular parts of the province.

In contrast, a rather considerable body of case law has developed in the United States (see, for example, Verti, 1964a: 870-78 and, generally, Santobello v. New York, 1971) for dealing with the negotiated plea. The basic requirement which can be derived from these cases is that the plea be a voluntary one.

> The current requirement that a plea of guilty be voluntary relates only in part to concern for the accuracy of the conviction or to whether the defendant freely consented to plead guilty. Courts have insisted upon certain characteristics of fairness which do not related directly to either accuracy or consent. Among these are the requirement that the trial judge advise the defendant of the possible sentence if he pleads guilty, the requirement that enough time elapse between arrest and plea to enable a defendant to consider adequately whether he wishes to plead guilty, and the requirement that bargaining agreements be honored by the court (Newman, 1966:32).

Compare the above with the situation in Canada in which

> . . . if the plea is acceptable to the prosecution is is acceptable to the court. There is little judicial interest in inquiring whether the accused's plea is a result of prior discussions between the prosecution and the defence or the police and the defence, or whether it is a result of the accused's expectation that he will achieve greater leniency by his plea of guilty than he could expect at trial (Grosman, 1969:30).

A recent Supreme Court of Canada decision (Adgey v. The Queen, 1973) appears to support this position. While this was a split decision (three-to-two), the view of the majority was that when a plea of guilty is entered, it is a matter of judicial discretion whether an inquiry be made to determine whether the plea is in order. However, note should be made of the minority opinion in this case. In the view of the minority, the trial judge has an obligation: 1) to determine that the plea was made voluntarily

and that the accused has a full understanding of the nature of the charge and its consequences and 2) to determine that, on the facts offered in support of the charge, the accused could be, in law, convicted of the offence charged.

There have been some other recent decisions in Canada related to negotiated justice. These decisions relate to a situation which does not exist in the United States -- that of the Crown appealing for an increase in the sentence which was meted out as a result of a negotiated plea -- and is, as we shall see, of limited relevance in terms of providing adequate protection for defendants who enter into such arrangements given the limited visibility of the process.

One of the more significant decisions handed down to date in Canada is that of Attorney General of Canada v. Roy [Que.] (1972). In this case, the Crown counsel at trial suggested a fine in a certain amount. The accused was subsequently fined that amount upon entering a plea of guilty. After the sentence was given, the Crown then appealed on the grounds that the sentence was too lenient. In handing down his opinion dismissing the appeal, Hugessen J. stated that

> The following principles were to be derived from the cases: (1) Plea bargaining was not regarded with favour; the court (trial or appellate) was not bound by the Crown counsel's suggestion [regarding sentence]. (2) Before an accused's guilty plea was accepted, the court should be satisfied that the accused realized that his sentence would be determined by the judge who was not bound by the Crown's suggestion. (3) The Crown, upon appeal, would not be heard to repudiate its position taken at trial except in circumstances such as those set forth below: (a) imposition of an illegal

> sentence; (b) misleading of Crown counsel at trial; (c) public interest in orderly administration of justice outweighed by gravity of crime and gross insufficiency of sentence (Attorney General of Canada v. Roy [Que.], 1972: 89).

The position that Crown counsel should not repudiate the position which it has taken at trial through an appeal of sentence has also been upheld in Regina v. Kirkpatrick (1971) and Regina v. Agozzino (1970).

In dealing with only the most visible problems associated with negotiated justice, these decisions offer defendants only limited protection from official abuse. They do not have the impact of the decision of the English Court of Appeal in R. v. Turner (1970). In this case it was held that a defendant should have freedom of choice in deciding whether to enter a plea of guilty or go to trial and that the judge should be involved in any negotiated settlement which might be made. While the principles set forth in R. v. Turner undoubtedly serve as additional protection for defendants, they still do not encompass all the situations in which defendants attempt to negotiate the outcome of an arrest. Other situations will be dealt with in later chapters.

In contrast to R. v. Turner (1970) which holds that the judge should be an active participant in the actual bargaining process, the United States Supreme Court in Santobello v. New York (1971) sets out guidelines which have the potential of affording an accused an even greater degree of protection while not suggesting that the judge be directly involved in the process. The principles which may be derived from Santobello include the following: 1)

The accused pleading guilty must have the benefit of counsel unless he waives this right. 2) Under Rule 11, Federal Criminal Procedure (which applies to the U.S. Federal Courts), the judge must develop on the record that there is a factual basis for the plea. This may include having the accused describe his conduct as it relates to the charge. 3) The plea must be voluntary. If the plea were induced by promises, the nature of those promises must be made known to the court. 4) If it deems fit, the court may reject a plea of guilty as an exercise of judicial discretion. 5) If, to any significant extent, a plea of guilty comes about as a result of promises made to the accused by the prosecutor, these promises must be kept. 6) If a member of the prosecutor's office makes an agreement with an accused, he has an obligation to inform any other member of the office who may subsequently handle the case of the nature of that agreement. 7) Should these guidelines not be met, the accused should have the opportunity to withdraw his plea of guilty. It is suggested that these guidelines, while preserving the practice of negotiating pleas, come closer to achieving procedural regularity which is in line with the requirements of due process than do those derived from the Turner case.

It may be concluded that an analysis of the dynamics of negotiated justice and of the stances and roles assumed by the participants in the process must take into account the legal context in which these participants act in addition to the organizational and extra-organizational demands which are made upon them.

D. Negotiated Justice and Official Morality

A not uncommon feature of organizations is a divergence between stated and real goals (Etzioni, 1964:5-19). Warriner (1958) suggests that when there is a divergence between stated and real goals and when the stated goals are believed to be instrumental in the preservation of the social system, "official moralities" (or "textbook moralities") develop which publicly proclaim that the stated goals are being achieved. Warriner states that

> Official moralities function to maintain the equilibrium of the social systems in which they occur by preventing public argument between those with conflicting personal beliefs. The official morality, the agent of the consequence, is brought into existence and is in part sustained by the belief that such arguments do have deleterious consequences (Warriner, 1958:168).

In this context, then, hypocrisy may have an important function in acting as a social lubricant and reminding the public of important social values even though the pronouncement of the official morality may indicate that there exists some disjunction between ideals and practices. It is this situation which, in part, led J.D. Morton (1963) to advance the idea that the trial can be viewed as a contemporary morality play. Of similar interest is Skolnick's (1966) finding that the police, while often not adhering to the dictates of due process of law and textbook criminal procedure, write their reports in such a manner as to suggest that their activities have conformed to these ideals. Similar, too, is Kadish's observation regarding the publicly proclaimed official morality given by chiefs of police:

> The common reaction of police chiefs queried by the press concerning their attitude to enforcement of controversial laws is revealing. On the record, it is that the duty of the police is to enforce all the criminal laws of the state; off the record it is that to say otherwise would create hostility in some segments of the public and expose the police to nonfeasance charges by grand juries (Kadish: 1962:907).

This type of behaviour on the part of the police also extends to those who work in criminal courts. Blumberg (1967: 87) claims that

> Everyone in the criminal court, like the panoptican inmate, genuinely feels he is being observed at all times -- and at the same time is observing others. Police, district attorneys, judges, probation officers, lawyers, and even clerks arrange their official behaviour to suit the expectancies of those who will be "watching."

If this observation is correct, then we should expect stage management to be at its greatest when negotiated justice is the issue at hand. What is involved is a tacit negation of the adversary posture which lies at the heart of the ideal of the legal system. It is exactly this situation which led Blumberg (1967:89) to conclude that

> The "cop-out" is in fact a charade, during which an accused must project an appropriate and acceptable degree of guilt, penitence, and remorse. If he adequately feigns the role of the "guilty person," his hearers will engage in the fantasy that he is contrite and thereby merits a lesser plea.

It is significant that this is one of the few areas where an outsider -- the accused -- is able to observe the disjunction between the official morality and the actual backstage behaviour of law enforcement agents in the criminal justice system. It is here that the accused becomes bound in the reality of the system as, in effect, he becomes part of a "conspiracy" against himself.

That there is a certain amount of hostility on the part of law enforcement officials directed against "outsiders" who wish to research the process of negotiating justice should come as no surprise. A researcher may expose a gap between the ideal and the practice. Hostility may serve as a psychological defence against the inherent deficiencies of assembly-line justice. Such a situation leads to secrecy as well as hostility:

> Because they fear criticism on ethical as well as legal gounds, all the significant participants in the court's social structure are bound into an organized system of complicity. Patterned, covert, informal breaches, and evasion of "due process" are accepted as routine -- they are institutionalized -- but are nevertheless denied to exist (Blumberg, 1967:xi).

Overt attempts at maintaining secrecy with respect to negotiated justice aside, the very nature of the process is such that it may be characterized as consisting of "low-visibility decisions in the administration of justice" (J. Goldstein, 1969). The low visibility of negotiated justice may be seen as one of its main dangers. As Wilensky (1967:132) has noted,

> Power, if invisible and therefore not effectively accountable, is generally considered subversive in a duly constituted government.

That the process is generally invisible, there is little doubt:

> No record reveals the participants, their positions, or the reason for or facts underlying the disposition. When the disposition involves dismissal of filed charges or the entry of a guilty plea, it is likely to reach the court, but only the end product is visible, and that view is often misleading. There are disturbing opportunities for coercion and overreaching, as well as for undue leniency (President's Commission on Law Enforcement and Administration of Justice, 1967a:4).

As we shall see in later chapters, the nature of some situations

involving negotiated justice, particularly those situations which appear to have little to do with justice, is such that the encounters between the defendant and the police, prosecutor, and defence counsel cannot be brought to public attention. Some have gone so far as to suggest that the process conceivably could result in criminal charges being laid against the participants:

> . . . the process of the trade is covert, so it always exposes the criminal and the noncriminal alike to a stage in the operation of the law where the entire set of agents -- judge, prosecutor, defence -- formally lie to one another about conspiracy; it is a stage where, with the cooperation and sometimes the blessing of the defendant, the representatives of law and order formally apply themselves to the perpetration of perjury (Jackson, 1969:48).

The fact that the defendant loses respect for the criminal justice system as a result of such practices can be easily rationalized away: if defendants had respect for the system and what it stands for, they would not be defendants in the first place. It is not quite so easy to rationalize the loss of respect among the public-at-large for the system of criminal justice should such practices become visible.

Although the process of negotiating justice is generally conceded to be a low-visibility process, some participants and their actions are better hidden than are others. It is for this reason that it is suggested that most available research has focused on the role of the prosecutor (exceptions include Klein, 1973, and Skolnick, 1966, especially Chapter 6 on the informer system). In contrast, in autobiographies of criminals where attention is paid to negotiated settlements (see, for example, Blackstock, 1967; Chambliss, 1972; Jackson, 1969; MacIsaac, 1968; and Martin, 1970),

one gets the impression that a sizable proportion, if not a majority, of deals are made with the police. Others have noted that police actions are less visible than the actions of the prosecutor:

> The exercise of discretion on the part of a police officer not to invoke the criminal process is not subject to similar scrutiny [as it is in the case of the prosecutor], because there may be no person other than the police officer and the person who is affected who is aware of the incident giving rise to the exercise of discretion (Canadian Committee on Corrections, 1969:44).

Equally relevant is Grosman's (1969:28) comment that, "If the accused enters a plea of guilty the police decision is never reviewed." The above may be more pertinent when we see that, at least in the view of some defendants, police activities relating to the use of discretion in invoking the criminal process and determining the nature of the initial charge are central to the entire negotiation process. Not only is this discretion itself an important lever to be used in negotiating with defendants, but how this discretion is initially used results in the charges that the prosecutor may later use as a subject for negotiation.

The guilty plea which may result from negotiation is both an admission of guilt by the defendant and a cover of obscurity for prior police and prosecutorial activities. This has significant implications for the fair and orderly administration of justice and for the researcher who wishes to understand the dynamics of the negotiation process. Given the official morality which is espoused by the agents of the criminal justice system and the vested interests which they have in maintaining secrecy about certain practices, another source of information about these practices suggests itself.

Because the convicted have been through the system and because they generally have less of a vested interest in maintaining the official morality, they are in a position to shed some additional light on the backstage actions involved in negotiating justice. It is for these reasons that we shall consider the offenders' perspective in subsequent chapters.

E. Exchange, Power, and Negotiated Justice

1. Introduction: The dynamics of the process of negotiating justice cannot be understood apart from the concepts of exchange and power. The concept of exchange is relevant if for no other reason than exchange is inherent in the concept of negotiation:

> . . . we see operating in the relationship between the criminal and the legal system a process of exchange wherein the criminal or the accused has something to offer the law and the representatives of the law must bend or perhaps totally break the legal yardstick to effect a resolution of the bargain which is to their advantage (Chambliss, 1969:208).

Similarly, the concept of power is relevant to an understanding of the dynamics of negotiated justice for,

> Broadly defined, power refers to all kinds of influence between persons or groups, including those exercised in exchange transactions, where one induces others to accede to his wishes by rewarding them for doing so (Blau:1964: 115).

Power is thus important in that it has a determining influence on the outcome of negotiations.

The concepts of exchange and power will underlie much of our subsequent analysis of offender perceptions of negotiated

justice. For this reason, we shall briefly examine these concepts within the context of negotiated justice in the hope of creating a more adequate framework for the analysis of offender perceptions of the process.

2. Social or economic exchange? It is our view that negotiated justice may be better viewed as a form of economic exchange in which valued commodities are traded than as social exchange. Blau (1964:112) describes social exchange as always entailing

> . . . elements of intrinsic significance for the participants, which distinguishes it from strictly economic transactions, although its focus is on benefits of some extrinsic value and on, at least implicit bargaining for advantage, which distinguishes it from the mutual attraction and support in profound love. . . . Social exchange, then, is an intermediate case between pure calculation of advantage, and pure expression of love.

To assume that the above description of social exchange accurately describes the behaviour and motivation of those who attempt to reach an agreement as to the disposition of criminal charges would be in error. A mixture of conflict and mutual dependence epitomizes most of these situations (cf., Schelling, 1960:87). The defendant is bargaining for his freedom and the agents of the law are bargaining for what, in some instances, is perceived as organizational survival. The participants come together as a result of conflict; conflicting interests persist as both parties make an attempt at accommodation while recognizing that the adversarial which neither desires remains as the alternative solution to the conflict.

When defendants and agents of the law enter into negotiation,

the situation is not unlike the bargaining which may take place between a car salesman and a customer in which the goal is a mutually advantageous economic exchange.

> Both salesman and customer expect to get cheated, yet neither wishes to appear the fool. The entire situation is then one of compromise and exchange, giving in and being stubborn, pleasing and being pleased, attacking and retreating . . . (Browne, 1973:xiv).

By virtue of the fact that each party possesses something which the other desires, such a negotiation does not take place in a power vacuum. Since power over others makes it possible to direct and organize their activities, it is essential that we examine some of the sources of power which both the defendant and agents of the criminal justice system may have at their disposal in reaching a negotiated settlement.

3. The power of officials: That agents of the criminal justice system have considerable power which may be used in negotiating with defendants is self-evident. They possess the authority which is vested in their office and with this authority comes discretion, hence power. There are several areas where such power resources exist which may be used to induce an accused to "cooperate" with the officials.

a. The police are able to exercise considerable discretion in deciding whether to make an arrest and in helping to determine the nature of a charge (cf., Lafave, 1965). Not to charge a suspect or to charge him with jaywalking rather than robbery with violence in return for information, the return of stolen property, or the like, can have a considerable influence on the actions of some

individuals. The police are the gatekeepers of the criminal justice system and, as such, may exercise considerable power over the lives of the criminals with whom they deal in the pursuit of what they see as organizational goals. The information which the police give to the prosecutor can be structured in such a way as to make an accused look ver bad or very good. It is this information which will ultimately have an important bearing on how the prosecutor decides to approach the case in question. This is especially true since the prosecutor generally presents his case on the basis of the information which has been given to him by the police and which he has had only a few minutes to consider before presenting the case in court (cf., Grosman, 1969: 20-28).

b. The prosecutor has considerable power in dealing with defendants since he has the discretion to alter or drop charges, perhaps doing so after overcharging or multiplying counts to expand the possible penalty so as to gain leverage in negotiating a guilty plea (Remington, 1969:455).

> The bargaining prosecutor insists that the original charge in the information be as high as the evidence permits. Overcharging is not customarily used to induce pleas, but on the other hand no charging leniency is shown by the prosecutor who first determines what the charge will be. An assistant prosecutor whose job is to file the original charge explained:
>
> The other day the bargaining prosecutor came in and told us: "For God's sakes, give me something to work with over there. Don't reduce these cases over here, let me do it over there or many of these guys will be tried on a misdemeanor" (Newman, 1966:81).

While, given the penalty structure in the Canadian Criminal Code, the benefits which accrue to most defendants as a result of a

charge reduction may be more apparent than real, a reduction in charge can be of considerable importance to some defendants.

Another area where prosecutorial discretion serves as a source of power is in speaking to sentence. Such discretion is reflected not only in what the prosecutor actually says if he decides to speak to sentence but, also, in terms of how hard he "pushes" a case in court. While the judge is not obligated to accept the prosecutor's sentence recommendation, it is rare that a judge hands out a sentence which is more severe than that recommended by the prosecutor. Such being the case, the prosecutor is in a position where he can exercise a considerable influence on the outermost limit of the sentence.

c. The judge, while rarely a participant in negotiations, can influence the decisions of defendants to enter guilty pleas by his general sentencing patterns in dealing with defendants who have pleaded guilty.

> Where the judge is given discretion in the matter of the maximum term and there is no high legislatively fixed minimum term, pleas of guilty will be forthcoming if offenders assume that a guilty plea will result in a lighter sentence (Ohlin and Remington, 1958:504).

A survey was conducted by the Yale Law Journal (Comment, 1956: 206-07) in which a questionnaire was sent to every federal district court judge in the United States. The survey revealed that 66% of the 140 judges who replied considered the defendant's plea to be a relevant factor in local sentencing procedures. Eighty-seven percent of the judges, who acknowledged that the plea was germane, indicated that a defendant pleading guilty was given a more lenient

sentence than one pleading not guilty. The estimates of the extent to which the fine or prison term was diminished for a defendant pleading guilty ranged from 10% to 95% of the punishment that would ordinarily be given after trial and conviction. So long as some judges treat offenders who have pleaded guilty more leniently than those who go to trial and are convicted, a source of power in inducing defendants to plead guilty will be present.

d. Officials acting in concert in dealing with defendants is, in itself, a source of power. Officials acting in concert to bare the full forces of the state in dealing with a recalcitrant defendant may remind other defendants of the dangers which may be involved in refusing to "cooperate".

In addition, the decisions which are made in respect to bail -- whether to grant bail and, if so, in what amount -- may come about as a result of informal discussions among various agents in the criminal justice system. Denial of bail may serve as a means of encouraging guilty pleas. Most defendants agree that doing time in a maximum security remand wing of a provincial jail is worse than doing time in a maximum security penitentiary (see Chapter Six). Some defendants have alleged that remands have been coercively used by some officials to obtain guilty pleas.

In sum, then, officials have legitimate power over people's lives and discretion at their disposal which gives them considerable power in negotiating with defendants. This is not to say, however, that the defendants are powerless.

4. The power of defendants: Unlike the power of officials which is derived from the authority which is attached to one's office and the ability to exercise discretion in using this authority, the power of offenders is derived from the needs of the criminal justice system.

a. The threat of creating inefficiency is a source of power which is in the hands of virtually all defendants. A defendant's knowledge about the problems faced by officials in the criminal justice system (both organizational and personal) can be used in tactical manoeuvres. This may have as much to do with the outcome of his case as the facts surrounding his offence or anything in his record. As Justice Henry T. Lumus said in 1937,

> The truth is, that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty, paying in leniency the price for the pleas. (quoted in Newman, 1966:76).

The above is a belief which is also shared by many offenders. The threat of going to trial (and, where possible, the threat of requesting a jury trial) and delay tactics which result in numerous unproductive appearances in court for officials and witnesses can be used to set the stage for a favourable outcome.

In some situations the defendants' power simply relates to efficiency in the criminal justice system; in other situations it is tied directly to the system's survival. A public defender in New York City who spends most of his time negotiating with the police and the prosecution on the behalf of his clients claims that

> Trials are obsolete. In New York City only one arrest in thousands ends in trial. The government no longer has time and money to afford the luxury of presuming innocence,

> nor the belief that the surest way of determining guilt is by jury trial. Today, in effect, the government says to each defendant, "If you will abandon your unsupportable claim of innocence, we will compensate you with a light sentence." The defendant says, "How light?" -- and the D.A., defence lawyer and judge are drawn together at the bench. . . . Power is in the hands of the prisoners. For as increasing crime has pushed our judicial system to the crumbling edge of chaos and collapse, the defendant himself has emerged as the only man with a helping hand (J. Mills, 1971:59).

An official has power because he is an official; similarly, a defendant has power because he is a defendant.

b. Information is the lifeblood of any police organization. Of this fact, criminals are also aware. Both know that one is as likely to get information on crime from a preacher as one is to get information on religion from a criminal. And, even in genteel circles, to be described as an informer is not to be paid a compliment. This situation creates a dilemma for the police who are in constant need of information on criminal activities. This same dilemma creates a source of power for criminals in dealing with the police. It is generally acknowledged by students of the informer system (see, for example, Harney and Cross, 1968, and Skolnick, 1966:112-38) that the best means of obtaining information from criminal informants is to trade leniency or noninvocation of the law for information. As we shall see later, there are inherent difficulties in obtaining much information from defendants (or, for that matter, from the police) on the actual amount of power which a defendant has when negotiating with officials for various forms of leniency in return for information.

c. The kickback of stolen or illicit goods is a source of

power for certain classes of offenders. The police, victims, and insurance companies are all concerned about obtaining such goods, although not always for similar reasons. Some offenders, particularly systematic property offenders, are aware of the practice of granting leniency to those who cooperate in the return of stolen property and structure their criminal activities accordingly. While obtaining the return of stolen property is a legitimate law enforcement function, the practice may have the unanticipated consequence of actually encouraging crime (cf., Blackstock, 1967:177-78) as offenders steal certain commodities so as to have something to deal with should they be arrested later.

In conclusion, negotiated justice involves an exchange in which both law enforcement officials and offenders have power, the utilization of which helps to determine the outcome of the negotiation. This is not to say, however, the the outcome of any particular negotiation can be predicted on the basis of power differentials for there are various contextual and situational factors which also have an important bearing on the outcome. As Browne (1973:5) notes,

> Within the bargaining context there is an incredible lack of control, both over the final outcome or even the intermediate steps. By its very nature, the course of events is not predictable since each participant depends on the actions of the other before he can determine his own next act. He cannot control, so he cannot predict.

Mead's notion of responsive interaction as an ongoing process is pertinent here. That the outcome of the negotiation is not always predictable can, of course, result in a sense of injustice for

offenders -- a situation which may lead to a further decrease in the perceived legitimacy of the criminal justice system among offenders and consequent problems for correctional authorities.

F. Conclusion and Implications

If the sheer number of pages which have been published on negotiated justice is an indication of how much we actually know about the process, then there is probably little need for this study. Unfortunately for sociologists and criminologists, this is not the case. As we have seen, very little research of a non-legalistic nature has been done on the process in the United States and next to no research has been done on the process in Canada. Also, we have observed that there is no reason to assume that the research done on the situation in the United States is generalizable to the Canadian scene given the differing legal traditions in the two countries. It is for these reasons that there is a need for descriptive research on the negotiation process.

While, for some, description is viewed as the lowest rung on the ladder of intellectual endeavor (and, in some respects, this position is quite correct), there is a fundamental place for description in science.

> Description . . . provides the input for developing units of a theory, its laws of interaction, the system states, and the boundaries of the model. Without adequate description, we would not have models that connect with the world that man perceives and about which he theorizes (Dubin, 1969:227).

That there has been little descriptive research on negotiated justice wherever the practice exists and, in particular, on the practice as it exists in Canada, serves as partial justification for this study. Additional justification for this study is derived from the fact that a key figure in the negotiation process -- the offender -- has been virtually ignored in research to date. It is our belief that only through a description of the attitudes and actions of all participants in the process of negotiating justice can we begin to arrive at an understanding of the dynamics of the process. It is for the foregoing reasons that we have embarked upon a descriptive study of the offenders' accounts and perceptions of this process.

CHAPTER TWO

METHODOLOGY

A. Introduction

In May of 1972 permission was obtained from the Commissioner of Penitentiaries, Canadian Penitentiary Service, to interview inmates at a maximum security federal penitentiary on their experiences with and interpretations of the bargaining process. The semi-structured interviews were taped and took place between May and September, 1972. Prior to this time the researcher had had over two years' exposure to the institution, first as an invited participant in some inmate activities and later as the instructor of a university credit class in introductory sociology. Assisting the researcher were two inmates, both of whom had some formal exposure to the discipline of sociology and who were respected within the inmate population. One of the assistants was Metis and was serving a life sentence for non-capital murder. He was chairman of the education sub-committee of the Inmate Representative Committee, editor of the prison newspaper, and president of the Gavel Club. The other assistant was a professional bank robber serving a seven year sentence. He would best be categorized as a "solid con". Without their assistance it is doubtful that candid

interviews would have been possible (cf., Toch, 1971). Interviewing continued on a less formal basis after September, 1972, at a medium security penitentiary and at a minimum security community release centre as well as in the researcher's home. These were a result of leads provided by informants initially interviewed in the maximum security penitentiary who were later released on parole or transferred to these other institutions.

Since an important aim of this research is to help determine the boundaries of what constitutes negotiated justice in the eyes of offenders, it was felt that the interview schedule should not be rigidly structured nor should the working definition of negotiated justice be such that it would prematurely restrict the boundaries of the investigation.

In conducting an exploratory/descriptive study there is a presumption of the researcher's ignorance of the dimensions and the dynamics of the phenomenon. To begin the research with a highly structured interview schedule negates this presumption and diminishes the possibility of the discovery of aspects of the phenomenon not previously considered. The interviews were semi-structured in that, from the review of the literature on negotiated justice, it was felt to be important to ascertain where the negotiation took place, a description of the dynamics of the process, the perceived roles of the participants in the negotiation, and the reported outcome of the negotiation.

Since an aim of the study was to acquire an indication of the offender's perception of the negotiation and not to

restrict prematurely the boundaries of what might be considered as negotiated justice (or in inmate parlance, "making a deal"), the following working definition was employed:

> Negotiated justice consists of that which is done by the offender in interaction with agents in the criminal justice system to minimize the possible punitive consequences of his illegal predations.

Had not such a broad definition been used in conjunction with very loosely structured interviews, some important types of negotiations (for example, negotiating for bail and the reasons for doing so) might not have emerged from the interviews.

Interview data were obtained from 115 inmates. At the time that the interviews were conducted, there were approximately 350 inmates in the institution. While approximately 40% of the inmates in the institution were of native origin, only 14 of these individuals agreed to be interviewed. A follow-up on this problem revealed that the reason for their lack of cooperation was their having been involved in the bargaining process far less frequently than their white counterparts.[1]

Fifty-three percent of those interviewed reported that they had more than one experience with the bargaining process. This is not surprising since approximately 80% of all inmates in federal institutions have been sentenced to two years or more on more than one occasion (DBS, 1967).

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[1] For a view of why this was the case, see Chapter Eight, Section D.

In the next section we look at some of the problems which were encountered in collecting the data. These problems and the approaches used to overcome them are couched in general terms in the hope that they might be of some benefit to those who attempt to conduct research in a prison setting in the future.

B. Problems of Data Collection in a Prison Setting[2]

1. Introduction: In three years of teaching and conducting research in penal institutions, I have observed and been told by inmates who have served sentences in various institutions that each institution has its own "personality" -- one does time differently in different institutions. This phenomenon is vividly described by a safecracker whom I have observed and interviewed while he was an inmate in maximum, medium, and minimum security institutions:

> I've done four bits in _____ [a maximum security penitentiary] and I'd always prided myself on being a solid convict and believed in the [inmate] code -- at least up until the time you got me thinking about it in the sociology class. Then, after class was over, I got transferred to _____ [a medium security, treatment oriented penitentiary] -- me and a bull that I did those four bits with got transferred together. He had to be one of the worst bulls in _____ [maximum] but when we got to _____ [medium] we both hated the place so much that we started talking. Like no one believed in the code there -- too many kids in on drug beefs. Like I've always said, "If you can't do time,

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[2]This section is adapted from a paper of the same title which was presented at the meetings of the Western Association of Sociologists and Anthropologists, Banff, Alberta, December 29-31, 1973.

> don't do crime" but, god, there's no way I could stand to do any amount of time in that joint. So, anyway, I applied for parole but the parole board decided that they didn't want to assist me in my rehabilitation. After they shot me down I went up to that bull I knew in maximum and told him that I couldn't take this place and I was going to do something to get sent back. He said that he wanted to go with me but that I should cool it for a few days. Three days later we were shipped up to _____ [a minimum security community correctional centre]. . . . We've been here for about eight months now. It's been fun watching him learn that he's no longer a bull in maximum. I think it's probably been harder for him to get used to this place than it's been for me. And you know something else I've discovered is that we've still got the code, but it's different. The code's always meant "do your own time, don't hassle other convicts." In maximum this meant that I wouldn't be caught dead talking to a bull but here [minimum] it means things like don't leave your tray on the table because someone else is going to have to return it to the kitchen for you (Interview, author's home, June 15, 1973).

That the nature of the inmate social system varies as a function of the administrative and custodial policies of the institution and the composition of the inmate population has been noted by others. For example, Grusky (1959), in his study of a minimum security prison camp, found that staff and inmates interacted more when the administration placed more emphasis upon treatment than upon custody. Street (1965) came to a similar conclusion in his study of juvenile insititutions. McCleery (1961: 156-57) offers an explanation of this phenomenon:

> The development of rehabilitative programs in the prison involves generation of patterns of interaction and communication inconsistent with custodial patterns of constraint.

There is some evidence which suggests that the composition of the inmate population will have an effect upon staff-inmate interaction. Cline (1968), in a study of fifteen Scandanavian penal institutions,

found that the institutions in which inmates collectively had greater experience in crime tended to be the ones where the opposition to staff was the more pronounced.

While there is a small literature on problems of interviewing in a prison setting (see, for example, Cohen and Taylor, 1972:11-40; Conklin, 1972:196-98; Giallombardo, 1966a; Johnston, 1956; and, Letkemann, 1973:165-75), the problems encountered by the authors and the solutions suggested are, in part, context specific. Since the sociologist doing research in a penal institution is an outsider and not a part of the inmate community, variations in the social climate among institutions should be reflected in the problems that the researcher faces in gaining rapport, trust, and cooperation from inmates as he attempts to collect data. As well, not only are there differences among prisons but prisons themselves change over time: changes in the size of the inmate population, changes in the composition of the inmate population, and changes in policy. This means that for the purposes of gaining rapport, trust, and cooperation which are needed for the collection of useful data, what is acceptable behaviour in one context may be unacceptable in another context. A rather amusing incident may make this clear:

> Early this morning I stopped by _____ [a minimum security community correctional centre] to have a cup of coffee with Al [an informant, inmate, and friend]. Al was concerned and dismayed as he had just discovered that as a ward of the government he did not qualify for a much needed student loan to attend the corrections program at a local community college. Not long after I began discussing this problem, the Director of the Centre joined us. Al told him of his dilemma and the

> Director appeared to be quite sympathetic. I indicated that if an important aim of the Centre was to re-integrate the offender into the community, then it seem as though the penitentiary service ought to provide the residents going to school with more than $8.25 per week from which they were expected to pay for transportation, clothing, and incidentals. The Director agreed and said that he would at least try to find money for bus fare. After the Director left our conversation turned to mutual acquaintances and their present situation in _____ [a maximum security penitentiary]. At this point we were interrupted by a well dressed fellow in his mid-thirties who asked if he could join us. I assumed that he was a staff member at the Centre. Our conversation continued for sometime while the newcomer simply listened, reinforcing my belief that he was staff. Only when Al and the newcomer began talking about someone they knew in _____ [a medium security penitentiary] did I realize that he was an inmate. Not knowing of whom they spoke, I queried them. The newcomer replied, "You were in _____ [maximum] and you must have passed through _____ [medium] if you're on parole. You must have met him there." After Al and I finished laughing, Al explained who I was (Field notes, August 21, 1973).

Suffice it to say that such an incident would never have occurred in the maximum security penitentiary where I first began the research. In a maximum security setting, one's attire alone generally serves as an accurate reflection of one's status.

2. Gaining rapport and trust: There is an inherent danger in coming into an institution "cold" and initiating research. The interactional norms within the institution must first be learned and this is primarily a process of trial and error. The ramifications of the errors made in learning these norms will be a function of both the quality of the error and the perceived role of the researcher at the time that the error is made. In terms of their effects upon the research enterprise, errors made by the sociologist at a time when he is attempting to gain rapport with his would-be

informants are less serious than those errors made at the time that the sociologist is recognized in the role of researcher. The reason for this is simply that at the pre-data collection stage, the sociologist has time to rectify past mistakes and establish himself as an individual who can be trusted. The sociologist should gain rapport and trust with the relevant constituencies prior to the time that he assumes the role of researcher within the institution. In fact, if the sociologist is successful in gaining rapport and trust prior to the time that he is identified as a researcher, he may not be identified as being primarily a researcher once he formally initiates the task of data collection. This is advantageous in that, if he is not perceived in the primary role of researcher, his motivations for conducting the research (which are all too often viewed by inmates in terms of the researcher's personal professional aggrandizement) are less likely to be seen as questionable.

Gaining rapport, trust, and cooperation in order to collect interview data in a prison setting is no mean feat. The realistic researcher should plan on perhaps sperding more time in laying the groundwork for successful interviewing than for the interviewing itself.

In speaking of rapport, reference is made to interaction which is characterized by harmony, accord, and appreciation. The term appreciation is used in Matza's (1969:25) sense:

> The decision to appreciate . . . delivers the analyst into the arms of the subject who renders the phenomenon, and commits him, though not without regrets or qualifications,

> to the subject's definition of the situation. This does not mean the analyst always concurs with the subject's definition of the situation; rather, that his aim is to comprehend and to illuminate the subject's view and to interpret the world as it appears to him.

This does not mean, however, that one should attempt to be the same as those being studied. Not only is this not possible (if for no other reason than the fact that the researcher is not incarcerated) but, in addition, such an attempt is often resented by inmates. An indication of this is revealed in an encounter that took place a few months prior to the time that I began collecting data on a formal basis. In the course of an informal discussion with a few inmates whom I had gotten to know rather well, I was told:

> One thing that we've appreciated is the fact that you've never used our language in talking to us. We guessed that you knew most of it before you ever came into the joint from you reading but, yet, you never have used it in talking with us (Field notes, February 20, 1972).

The interpretation that I gave to this statement was that in not using prison argot, though it was assumed that I knew it, I tended to confer non-deviant status on the inmates in the context of our interaction.

According to Polsky (1969:119),

> Successful field research depends on the investigator's trained abilities to look at people, listen to them, think and feel with them, talk with them rather than at them.

While it is undoubtedly true that the successful field researcher must be able to assume the stance which Polsky suggest, the extent to which this ability is the result of formal training is open to question. Others have suggested that the success of the interviewer in gaining rapport, trust, and cooperation from informants is

highly dependant upon the interviewer's personality, attitudes, values, and beliefs. For example, Lofland (1971:99) states that the researcher

> . . . must ask himself "Am I reasonably able to get along with these people? Am I reasonably comfortable in their presence? Do I truly like a reasonable number of them, even though I may not agree with their view of the world?" It seems to me that for observation to be possible, one's personal and private answers to questions such as these must, at a minimum, be a qualified yes.

If this is true, as I believe it is, then it is safe to assume that the problematic necessity of gaining rapport is compounded for the "straight" or personally unskilled researcher who wishes to observe and interview criminal deviants. As Irwin (1972:129) points out:

> It will be impossible to do good research, to become involved in the lives of some criminal group or groups, and not to generate true feelings of friendship. Such friendship is not inconsistent with good research. . . . And as one draws close, learns to appreciate his subjects, he will also develop sincere feelings of friendship and, thereby, in the case of criminal groups, an appreciation for their norms of mutual aid.

Certainly not all researchers are able or willing to make such a commitment.

In respect to the problem of gaining rapport in order to interview criminals, I must agree with Johnston (1956:48) that:

> Perhaps in the final analysis the personality of the professional is the most important single ingredient of the successful interview.

Unfortunately, gaining rapport is little more than a necessary first step in establishing the type of relationship which is essential if one is to be successful in interviewing criminals. Douglas (1972:12) asserts that:

> . . . trust is the crucial factor involved in establishing a research relationship. This is true of the situation of deviance in general. In the deviant encounter situation, the most important factor related to trust is probably the suspicions that deviants might have about the relationship existing between the researcher and the deviants' enemies, especially official control agents.

Distrust is a central feature of penal institutions -- distrust not only between staff and inmates but among inmates themselves. As well, both staff and inmates generally distrust outsiders coming into the institution no matter what their avowed purposes in doing so. Gaining trust in such a setting is generally the most difficult and time consuming aspect of the research enterprise. Continual, intensive exposure to the setting prior to formally undertaking the research is simply not sufficient in order to gain the trust of potential informants; one needs exposure over a fairly long period of time so that the potential informants may "check out" the researcher (and, also, so that the researcher may "check out" his informants).

For the researcher to explain his role in order to justify his presence to inmates for the purpose of establishing a relationship of trust is simply not sufficient and should perhaps be avoided. In an atmosphere of distrust and suspicion, only the naive would accept such an explanation -- and I have yet to encounter many inmates who are so naive. Rather, the would-be researcher will be wittingly or unwittingly put through a series of tests to determine if he can be trusted. This concern with the researcher's trustworthiness extends to two spheres of his life: personal and professional.

Statements made by the researcher to the effect that he can be trusted to keep the information which is given to him confidential are just that -- statements. In a prison setting where promises of confidentiality are believed to be continually broken, the informant who will confide in the researcher on the basis of such a statement will probably have very little or no useful information to offer. In the course of my research I discovered that the informants who turned out to be the most useful were the ones who were initially the most suspicious and who put me through the most tests in order to assess my integrity.

For example, a few informants told me several months after the fact that, prior to the time I undertook the research, false information (which was unrelated to my research) was deliberately given to me to see if it would get back to the authorities. Outside contacts were used to see what could be learned about my personal integrity, lifestyle, and the like. One informant went so far as to have an acquaintance of his who was living in the same community as I run a credit check on me. In the same way that one who applies for credit implicitly consents to and expects a credit check, the researcher who hopes to establish a relationship of trust among inmates in a prison setting should be prepared to have his life and integrity evaluated.

It should come as no surprise that there is a concern among inmates as to the researcher's professional integrity. The professional integrity of the researcher will determine, at least in part, how the research data are used. While the evaluatory criteria

which are used by one's professional colleagues are not the same as those used by inmate evaluators, a similar concern is nonetheless present. One has a public life as a professional and this public life is monitored and evaluated, both in terms of the acceptability of the researcher's public statements and the congruence between those statements made in public and those made privately within the institution. This does not imply that public statements must necessarily be pro-inmate; it does mean, however, that one's public statements must be perceived as being honest and capable of being substantiated.

In sum, the trustworthiness of the researcher is evaluated in terms of the implicit precepts of the inmate code with the researcher often being judged more harshly than if he were a fellow inmate.

3. Cooperation: Both trust and rapport are necessary but not sufficient conditions which must be present in the research encounter if the researcher is truly to gain the cooperation of the people whom he desires to interview. Once trust and rapport are present and the research endeavor has been announced, the potential informants will typically ask themselves, "What is in this for me? What is the pay-off?" Wax (1952:34-5) outlines an exchange model which is the basis of cooperation:

> "Why should anybody in this group bother to talk to me? Why should this man take time out from his work, gambling, or pleasant loafing to answer my questions?" I suggest that as the field worker discovers the correct answers he will improve not only his technique in obtaining information but also his ability to evaluate it. I suggest moreover, that the correct answers to these questions

> will tend to show that whether an informant likes, hates, or just doesn't give a hoot about the field worker, he will talk because he and the field worker are making an exchange, are consciously or unconsciously giving each other something they both desire or need.

Because of the deprivations associated with being incarcerated, the element of the pay-off is crucial. As the same time, there are ethical, legal, and institutional restraints which limit the number and types of pay-offs that the researcher can deliver.

My experience has been that if trust and respect for the researcher are present, being asked to deliver pay-offs which violate the researcher's ethical standards or legal or institutional norms is simply not problematic. What is problematic, however, is being placed in a position where it is later perceived by those who have requested legitimate forms of assistance that you have promised to do more than you can actually deliver. A dictum such as "If the researcher is to get continued cooperation, he should promise no more than he can deliver" tends to oversimplify the matter. The dilemma which the researcher is in all too often is one in which those who ask him to intercede on their own behalf or on the behalf of the interests of a group of inmates with some individual or group outside the prison misperceive the amount of influence which the researcher actually possesses. Thus, the problem is one of not having the influence to effect the representation which has been made rather than simply being able to make the representation. I found that throughout the course of my research, I had to reassert how little influence I actually had outside the prison even though I might have a formal or

informal association with those whom I was being asked to contact on an inmate's behalf.

An important type of pay-off which the researcher can deliver to his inmate informants is suggested by Skolnick (1966:130-32) in his discussion of the interpersonal rewards which may exist for police informers. The researcher who is able to interact with his inmate informants in an egalitarian and nonjudgmental manner will tend to raise their self-esteem -- a reward which is not unimportant for those whose identity is perceived as being most stigmatized when interacting with those who come from outside the prison setting.

The gaining of cooperation because of its effect upon the informant's self-esteem may be encouraged in another way: Zelditch (1969:13-14) has noted that the informant may act "as the observer's observer" or as a kind of research assistant. If this is the case in one's research, then by all means let the informants know that this is how you view them.

Following the suggestions of Toch (1971), I found it advantageous to go a step futher and use "the convict as researcher." Two inmates whom I had gotten to know and respect and who were respected by inmates came to me prior to the time that the formal research was to begin and offered their services as research assistants. The advantages of having inmate research assistants were numerous: they could make requests for cooperation from other inmates that I could not make; they could ask questions of informants that I might not have asked for a variety of reasons;

and, their presence in the interview situation and knowledge of the informants lessened the likelihood of my being "conned". In addition, I was given the benefit of their unique perspectives in the interpretation of the data. Their assistance undoubtedly resulted in greater cooperation from other inmates and, I believe, in an increase in the reliability and validity of the data which were obtained. However, it is unlikely that their assistance would have been advantageous had they not been trusted and respected by other inmates.

Finally, another important means of gaining the cooperation of inmate informants is through what they feel they owe you, the researcher, as a result of perceived benefits which were obtained prior to the time that the formal research was undertaken. The type of interaction which leads to a relationship of trust may also lead to a feeling on the part of both the researcher and the potential informants that they "owe something" to each other. In this context, I recall an incident which took place just prior to the time that I decided to ask inmates to consent to taped interviews: An inmate who was staying at my home while on a pass from penitentiary told me that he and some other inmates had been discussing what they might do for me in order to pay me back for what they believed I had been doing for them. I was told that arrangements could be made so that I could get a new car for $500 through a successful stolen car--insurance fraud operation or, if I preferred, arrangements could be made to have an enemy of two "taken care of" by some of their outside contacts. I settled

on requesting that I be given the type of cooperation which would contribute to the realization of the goal of obtaining useful and valid data.

4. The assessment of validity: Any researcher must be concerned with the validity of his data. For the researcher who uses data obtained from criminals, the issue is an especially thorny one: those who have used such data have probably been confronted with some variation on the unsubstantiated assertion that "convicts will always try to con you." Substantiated or not, it is nonetheless a charge which must be answered.

As previously suggested, the gaining of trust in a prison setting is an emerging process. (This holds true for the research design as well for it must be structured within the context of these contingencies.) So, too, is the assessment of the validity of the data which have been obtained.

There is a variety of indicators which the researcher who conducts interviews in a prison setting may use to make a judgment as to whether his informants are telling the truth. Some of these indicators are present while the formal research is taking place; other emerge only after the formal research has ended. At any rate, the researcher must keep them in mind and pursue them.

a. On-the-scene validation: A criterion which is commonly employed in assessing whether we are being told the truth, both in the research encounter and in everyday life, is that of plausibility. Unfortunately, an objective assessment of plausibility is a function of one's knowledge of the phenomenon being described. The less we

know about the phenomenon, the more likely we are to rely upon personal biases with the result being a subjective assessment of plausibility. A useful approach to this problem is suggested by Irwin (1972:128):

> Bringing a group together expressly for the discussion of their world is perhaps one of the best techniques for both obtaining data related to very subtle material and testing the generalizations which the researcher has generated.

I found that informal group meetings in which the research topic was discussed prior to the time that formal, individual interviews took place sensitized me to aspects of the phenomenon about which I should question my informants and also gave me some basis for assessing the plausibility of the accounts given to me. The continuation of such meetings during the course of the formal research enabled me to further evaluate the plausibility of these accounts. As a result of such meetings, there were some instances where I discovered that the implausibility of certain accounts was a function of my own ignorance.

If the researcher is questioning inmates about events related to their criminal behaviour, he will find that many of these events involve more than one participant. In some instances, these participants are serving sentences at the same institution. The researcher thus may be in a position of being able to interview more than one participant about the same event. The congruence of the separate accounts may increase the researcher's confidence that the informants are telling the truth (although it should be remembered that all could be lying).

Becker (1969:249-50) makes a distinction between directed and volunteered statements, attributing greater validity to the latter. To this should be added that, when interviewing in a prison setting, we should make a distinction between voluntary and involuntary interviews. In most instances, the inmate who has not volunteered to be interviewed will say very little, lie to you, or, more likely, simply not show up for the interview. While the researcher who relies upon the cooperation of volunteers may be justly criticized for not having a sample which is representative of the inmate population, it should be remembered that the turnover which is a result of releases and transfers and nonavailability due to assignments to the segregation unit is so great in most penitentiaries that, at best, a probability sample will be representative only of the inmate population on the day that the sample was drawn (cf., Wilkins, 1969:48-50).

b. Off-the-scene validation: The higher the security rating of the institution in which the interviews are being conducted, the greater the level of distrust in the institution. The researcher can help control for systematic bias which may be a result of the reactive nature of the interview setting by conducting interviews in other settings. The major difficulty in carrying the research (either formally or informally) into other settings is not so much one of having to take time to gain rapport in these new settings. Rather, it is primarily a problem of the researcher's being able to travel to these different settings. If the researcher has been successful in developing the kind of

relations which lead to profitable interviews in a maximum security penitentiary, then he should have little difficulty in gaining an entre into institutions of a lesser security rating by relying upon informants who have been transferred to these institutions. Consistency in the accounts of informants in different types of institutions and (after these informants have been released) "on the street" should lend support to the assumption that the accounts are valid.

Another approach to off-the-scene validation is to ask those individuals whom you got to know well and with whom you have a continuing relationship to assess the validity of the data in terms of what they observed during the time it was being collected and what they heard afterwards through the prison "grapevine". For example, in response to this question, one of my research assistants stated in a letter written some six months after the interviewing was completed that:

> . . . Tommy and I served an additional function besides just arranging the interviews -- we know the people interviewed, we live with them, and, in some cases, were criminally involved with them and because of this our presence during the interviews prevented them from laying track. We would have picked up on it because we've been through that shit (deals) and they know it. So because of that and because they knew you and therefore accepted and trusted you, they laid "straight goods" on you. Now, I know I don't have to tell you that you were liked, respected, and trusted by the cons but this is again for those in doubt. . . . For most people this would be an acceptable answer but not for all as I anticipate them saying "cons will always try to con you and what's to prevent this one (me) from doing the same?" . . .when we were collecting names for interviews the majority (too strong), a good percentage, expressed concern over what you were going to do with the material because they though it might jeopordize the possibility of future deals.

> If they were going to lay track on you they certainly wouldn't have been concerned about the results (Correspondence, February 29, 1973).

In a later letter (April 14, 1973) this inmate stated that what helps ". . . to substantiate the information's validity are the internal similarities that, in my opinion, preclude any possibility of a 'con-job' or coincidence."

A final indicator that the kind of rapport which should lead to truthfulness on the part of one's informants was actually gained is that of a continuing relationship with some of the informants after the termination of the research. It is impossible to gain the type of rapport with informants which is necessary to obtain reliable and valid data and not to become friends with some of them. If this is the case, then a natural consequence would be that the researcher would continue to interact with some of these informants through such means as correspondence, phone calls, and visits.

In the final analysis, the feeling that rapport was present prior to the time that the data were collected offers the best assurance that the informants were telling the truth. By the same token, this rapport can be used to facilitate other checks on the validity of the data such as described above.

It is suggested that since this researcher did sense rapport with his informants and since the data which were collected did meet the criteria for the assessment of validity outlined above, that the data to be presented in subsequent chapters are worthy of consideration in increasing our understanding of the negotiation

C. Analysis of Data

In his analysis of gang delinquency, Schwendinger (1963), whenever possible, lets the participants speak for themselves. Similarly, Browne (1973) presents a wealth of interview data in the body of her work so that the reader might evaluate her inferences. As will be seen, much of the interview data collected on negotiated justice consists of vivid descriptions by offenders of the bargains which were offered and the circumstances surrounding the negotiations. Were these data to be reduced to a purely statistics rendering, much of the richness of these data would be lost.

However, the coding and statistical analysis of the interview data has been useful from the standpoint of discerning patterns and types of negotiations and as an information retrieval system. Of the 115 respondents, 104 described 202 usuable cases of negotiations. Since theoretical sampling (cf., Glaser and Strauss, 1967) was employed, the data are population data and should thus be viewed as being technically representative only of those who were interviewed.[3] Given the exploratory nature of this study, statistical representativeness is not viewed as being problematic.

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[3]Since the aim of this study is to discover and to describe patterns of negotiations, it is important that the patterns themselves be sampled. The technique which was employed is termed "theoretical saturation" by Glaser and Strauss (1967:61):

> The criterion for judging when to stop sampling the different groups pertinent to a category is the category's theoretical saturation. Saturation means that no additional data are being found whereby the sociologist can develop properties of the category. As he sees similar instances over and over again, the researcher becomes [continued]

D. Reality and the Ideology of the "Con"

It has been necessary to include a glossary to assist the reader in his understanding of offender accounts of negotiations with law enforcement agents. This serves as evidence of the communality of the informants' language and of their world, that is, it suggests that there may well be an "ideology of the 'con'." That most of the offenders who were interviewed were cynical about negotiated justice should come as no surprise. It does suggest, however, that their perceptions of reality may be little more than a reflection of a more general convict ideology.

To what extent are convicts able correctly to perceive reality? In the most thorough review of the evidence pertaining to this question to date, Nettler (1961) concluded that "bad" men perceive reality at least as accurately -- or as inaccurately -- as do "good" men. In addition, the perception that many offenders have of the system of negotiated justice as being somewhat less than just is shared by other observers of the system (see, for example, Blumberg, 1967 and 1969; Dash, 1951:395; J. Miller, 1927:221; Newman, 1966: 39 and 231, and 1969:232-33; and Packer, 1968:150). Many of those interviewed would agree with Baker's (1933:790) claim that:

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empirically confident that the category is saturated. It was found that after 72 of the 115 informants were interviewed, no additional information was obtained which had a significant impact on the development of the patterns of negotiation which are described in the following chapters.

> . . . the chief loss to orderly administration of the criminal law which comes from bargaining for pleas of guilty, pleas to lesser offences and the "immunity bath" is that it is all extra-legal, secret and under-cover. Statutes are stretched or ignored. It is "law in action" entirely, with slight regard for law in books.

Offenders have no more of a vested interest in making the system of negotiated justice look bad than do those who are expected, if not required, to espouse the official morality have in making the system look good. With the above in mind, we shall tentatively accept the proposition that the offender's perception of the system is no more inaccurate than the perceptions of others who operate within the system.

CHAPTER THREE

THE KICKBACK

> Made a big thing out of it. There was some papers in that safe. And he was real nice about it. He knew I hadn't had a chance to spend mine, he was pretty sure of it. He said, Look, if you wanta kick the stuff back I'll guarantee you won't get very much time, but if you don't we'll see that you get the limit. He said, You probably got it aboard, we're not going to look for it, makes no difference to us, it'll make a difference of ten or fifteen years to you. They were just laying it on the board the way it was. So I figured the best thing to do was kick it back and get off as easy as I could. They gave the other two a year apiece and they gave me two years.
>
> -- Martin, 1970:38.

A. Introduction

From the standpoint of the offender, the best deals can be made by kicking back stolen or illicit goods to the authorities. The reason for this is twofold: the possession of goods which are desired by the authorities constitutes power in the hands of the offender and many deals involving a kickback may be made at a relatively early stage in which it is possible to avoid the filing of criminal charges. If handled properly, a kickback can mean a swift, certain, and favourable outcome of an arrest for the offender. While not all offenders are in a position to offer a

kickback to the authorities, our informants described 38 cases where such a deal was discussed.

In this chapter we shall look at the experiences of offenders with the kickback and how this type of negotiated settlement may, in addition to assisting officials in achieving the legitimate goals of crime prevention and the recovery of stolen property, encourage crime when taken to its logical conclusion.

B. The Recovery of Stolen Property

The recovery of stolen property is alleged to be an important police function:

> One of the main jobs of the burglary detective is to recover stolen property (Skolnick, 1966:127).
>
> . . . . . .
>
> . . . indeed, their [the police's] ability to recover stolen items is of much greater importance in passing judgment on their efficiency than is the question of whether they apprehended the person that perpetuated [sic] the crime (Chambliss, 1972:170).

To make the assumption from the above that the thief's possession of stolen property *per se* gives him a great deal of bargaining power when dealing with the police would be a gross oversimplification. Our data simply do not support such an assumption. What does emerge from the data, however, is that the offender who possesses stolen or illicit property has power if one of two conditions is present: 1) The property in question may be used in the perpetration of further, and perhaps more serious, criminal acts. 2) An insurance company or influential victim makes it apparent to the police that they desire (which perhaps understate

the case) the return of the stolen property. When one of these two conditions is not present, the concessions which are offered are generally such that they are not perceived by the offender as being especially advantageous.

> . . . I was charged with a gram of hash and they [the police] said they'd drop the charge if I'd turn back this coloured film. I thought I was charged with more than the gram of hash to start with, and some pills, too, but I wasn't charged for them. So, I told them to stick the deal up their ass, 'cause it was $4,000 worth of coloured film for a seven dollar gram of hash. They were upset, but. . . .
>
> WHAT FINALLY HAPPENED WITH THE BEEF?
>
> They dropped it, finally. (no. 15)

A similar type of case, in which the gains were felt to be more apparent than real, involved an informant who discussed his case prior to his transfer to another institution and before taped interviews began. "Ted" is regarded by systematic cheque forgers as one of the best in the business. In a period of less than two months, he cashed over $100,000 worth of forged certified cheques. As has been the case with many systematic cheque forgers, his arrest came about as a result of chance rather than through scientific detective work: he was stopped for a traffic violation (cf., Klein and Montague, 1975). At the time of his arrest, the police promised him a lenient sentence if he would return the proceeds of his cheque-writing spree. Ted simply could not see the percentage in such a deal. He felt certain that, given the publicity which was associated with the case, he would get at least a five year sentence even if he returned the money. Without returning the money, he estimated that the most time he would get

would be ten years, given the sentencing patterns in the jurisdiction where he was arrested. In Ted's estimation, one-hundred thousand, well-laundered, tax-free dollars were worth more than what, at most, would be a five year difference in the amount of time to be served. He refused to return the money and was given a seven year sentence.

When an offender is certain of a conviction and of a sentence involving incarceration (as opposed to the dropping of all charges) and there are no real or meaningful assurances that the return of the stolen property will be all that advantageous, a promise of leniency may not be too meaningful. This is especially true when there are no guarantees that the promise of leniency will be kept.

WHAT KIND OF OFFER DID THEY [THE POLICE] MAKE?

Less time. Like on this one here they said, "Give us the money and we'll see that you get only a few years; don't give us the money and we'll see that you get twenty years.

DID YOU COMPLY?

No. I figured if I'm going to jail, I'm not going to give them the money.

WHAT HAPPENED AS A RESULT OF THIS DECISION?

Nothing. They just gave me what I figured I was going to get.

EVEN IF YOU HAD RETURNED THE MONEY?

I couldn't see any sense in giving the money back because I knew one way or the other there's no witness to it. A deal is a deal. Now what kind of deal is this? They could turn around and still give me the same thing whether I returned it or not. Who am I going to scream to? Who's going to believe me?

HOW MUCH TIME DID YOU GET?

Five years and they were threatening twenty. (no. 87)

Even in the case where an offender does return the stolen property in exchange for leniency, and receives the leniency which was promised, the perceived advantage may not be all that great, even if that which was returned was not particularly valuable to him.

> On turning in material from a warehouse burglary or something, you can make a deal with that. You get picked up on a simple B & E and tell 'em you'll turn in so many T.V.'s or something. That's easy.
>
> DO YOU THINK YOU GAINED OR LOST IN YOUR CASE?
>
> Oh, I didn't lose anything 'cause I stole the T.V.'s to start with. Just time.
>
> DO YOU THINK YOU GAINED THOUGH -- GAINED IN THE SENSE OF NOT HAVING TO DO SO MUCH TIME?
>
> No, 'cause if I'd have fought the charges, there's a chance I might not have beat them. I plead guilty to them and I can't appeal them. It's on my record for life. There's no taking them back, so I lose. (no. 43)

A straight return of stolen property -- property which does not carry with it the potential of further, and perhaps more serious, crime being created without its return -- is not a sound basis for a profitable deal. This can be gleaned from cases such as the following:

> The first deal was in '62. It was a B & E and, well, it was just a straight deal, right across the board, you know.
>
> WHAT WAS THE BASIS FOR THE DEAL?
>
> I kicked back the goods.
>
> WHAT HAPPENED AS A RESULT OF THAT?
>
> I was supposed to get a suspended sentence and I ended up getting eighteen months.

UNSUSPENDED?

Yeah, unsuspended.

WITH WHOM DID YOU DEAL?

The RCMP and the prosecutor in _____. (no. 26)

. . . . . .

They said that if I would return the merchandise [stolen furs] they would drop the charges. See, when I was picked up I had -- like, someone had said something and I got picked up. And I was in possession of a gun. And I'd been picked up for a gun about a year before, and I knew I was going to get a lot of time for this gun. And they [the police] said, "Well, look, we'll drop the charge and that way it won't even get to court. We'll keep the gun and we'll drop the charge." They got the furs but they never did drop the charge. I ended up getting two and a half years for it. (no. 17)

We must conclude that to negotiate on the basis of a straight return of the proceeds of a crime is not to negotiate from a position of strength. The experiences of offenders who have negotiated on this basis raises serious questions as to whether the police are, in fact, all that concerned about the return of stolen property per se. Offenders who have had experience with such deals simply do not believe that the outcome is generally all that advantageous, especially when a fair amount of money is involved in the kickback. Additional support for their belief comes from a recommendation made by the Canadian Committee on Corrections (1969: 199) that a greater use be made of fines, either in lieu of, or in addition to, a sentence of incarceration. This recommendation was made in order to eliminate situations where the offender benefits financially from the commission of the offence relative to the sentence which he receives -- a situation which the Committee obviously believes exists.

C. The Prevention of Crime

"From time to time, the police have been known to make, what is in the view of some, rather pious statements to the effect that "we are less concerned about law enforcement than we are about crime prevention." Such assertions often bring rather cynical rejoinders from criminals. However, to believe the claims of our informants regarding their experiences with the system of negotiated justice means that crime prevention must be accepted as a focal concern of the police as they carry out their duties. One means by which the police may prevent and control crime is through the restriction of the supply of materiel which is essential for the perpetration of certain types of criminal acts: to blow a safe, one must have explosives; to commit armed robbery, one must have a weapon; to deal in narcotics, one must have a supply of drugs; to engage in cheque passing, one must have a supply of cheques, etc. To the extent that the police are successful in controlling the supply of such materiel, they will be successful in contolling the volume of the relevant type of crime. It should thus come as no surprise that the criminal who possesses materiel which may be used in the commission of criminal acts has in his possession an important source of power which may be used in a bargaining situation.

1. [illegible] explosives: The existence of illegal weapons and [illegible]s is of vital concern to the police. Not only may their existence suggest the possibility of their being used in the perpetration of criminal acts but their existence and use may also result in physical harm to the police or to the public.

The recovery of weapons or explosives which might be used in the commission of criminal acts is thus a legitimate and important goal for the police. However, in the pursuit of this goal, the authorities may have to make various concessions in order to receive the cooperation of an accused. An indication of the degree of importance which is attached to the recovery of illegal weapons as well as the nature of the concessions which might be made to achieve this goal is found in the following account.

> On May 7, 1970, I was arrested in _____ while being in possession of a motor vehicle stolen from a new car storage lot in _____ eight hours earlier. During the subsequent investigation, a .38 revolver was found in the spare wheel well under the spare tire. The revolver had been stolen along with 16 other guns of various shapes and sizes from a sporting goods store in _____ approximately six months earlier.
>
> Results of the ensuing investigation had me charged with theft and possession of 11 automobiles as well as one charge of possession of a handgun known to be stolen.
>
> I was returned to _____ to face the automobile charges and approximately ten days after I was first arrested, I was approached by a detective of the _____ City Police and a corporal of the RCMP _____ Detachment. At this time I was questioned at length regarding the missing guns. I indicated, after I realized that a deal was imminent, that I would cooperate.
>
> The following day at 9 A.M., my lawyer, the detective, the RCMP corporal, and a prosecutor discussed negotiation with me. The complete negotiation consumed the short side of six hours.
>
> The main factor in my deciding to negotiate was the fact that I was promised by the prosecutor that I would do absolutely no time if I cooperated with the police in respect to returning the stolen guns. This, combined with the fact that I knew I would be found guilty on the automobile charges, and the prosecutor stating that he would ask for no less than seven years for me on conviction, convinced me that I should make a deal.
>
> The final outcome was as I expected. The prosecutor wrote in his own handwriting, and signed by him, my lawyer, the detective, the RCMP corporal, and myself, a declaration saying that all charges against me would be withdrawn never to be brought up again, with one stipulation: that I

plead guilty to the possession of an unregistered firearm. This I did and was fined $75 plus $3.50 costs. All the guns with the exception of four were turned over to the police (after I was released from jail). The copy of the prosecutor's letter was retained by my lawyer. (no. 105)

The dropping of charges in return for the recovery of weapons and explosives is not limited to cases where the charges are relatively minor in nature, such as in the previous case.

My original charge was robbery with violence. The negotiation took place after the charge was laid, and before the preliminary hearing. The negotiation took from about 10 A.M. to 2 P.M. the same day and involved the _____ City Police. The reason I decided to negotiate was that I was guilty of robbery with violence. If I dealed with them my charges would be dropped or withdrawn. There was no negotiated charge as such. The final outcome of the negotiation was that I told the cops of some guns involved in, or was going to be involved in, a crime and that I knew the whereabouts of these guns. If the charge was withdrawn on me, I'd turn over the guns. So I waited after pleading not guilty at 10 A.M. to robbery with violence until about 1:30 P.M. and the cops arranged for the court to withdraw the charge against me which was, of course, robbery with violence. After I signed myself out, free of all charges, I handed over a hand gun. They thanked me and I never heard anything more. (no. 98)

Informants who had been involved in safecracking claimed that, up until the early 1960's, nitroglycerine was, like weapons, a considerable source of bargaining power for an accused.

I was originally charged with B & E. The deal took place before the charge was formally laid and took about two hours. It involved myself and the RCMP. I had some nitro hidden and told them that in return for not laying a charge, I would tell them where to find the nitro. Everything worked out as agreed: I turned over the nitro and they did not lay the charge of B & E. (no. 103)

Kicking back nitroglycerine in exchange for dropped or reduced charges is seldom a possibility today. (However, some still believe that, under certain conditions, it is possible -- see p. 90.)

The reason for this is that the golden age of safecracking was ushered out with the coming of the credit economy and the invention of night depositories. There is simply little cash to be found in most safes today (see, generally, Letkemann, 1973:86-89). One informant, who was regarded by both the author's criminal and police acquaintances as being one of the most proficient safecrackers in the country, told of making a two-month tour of several provinces for the purpose of blowing safes. He claimed that, though he did manage to empty many safes, he did not even make enough money to cover his expenses. His contention is that the police have become aware of the fact that, with a few exceptions, the decline of safecracking as a profitable criminal activity has meant that most nitroglycerine is manufactured for use in bargaining and not on safes. As a consequence, it is no longer useful as a bargaining lever. The implication of this is that technological and economic change can have a significant impact on criminal behaviour patterns and the sources of power which an offender is able to use in negotiating for a favourable outcome of the charges which he faces.

2. Drugs: The avowed aim of the police in dealing with the problem of the illegal distribution and use of drugs is that of containment and control rather than full enforcement of the law. In fact, the police have little choice but to pursue such a policy. Given the widespread use of illegal drugs, the lack of public consensus as to the appropriateness of some drug legislation, and the limitations on police power which are deemed essential in

a free and democratic society, the laws are inherently unenforceable (see, for example, Lindesmith, 1965, and Schur, 1965). Accordingly, the most efficient means of controlling the use of illegal drugs is to focus police activities on those engaged in supplying such drugs to users.

As we shall see in Chapter Four, a policy of full enforcement, even when dealing with those engaged in or about to become engaged in the kicking in illegal drugs is not the most effective means of controlling the supply of such drugs to users. Discretion is used in prosecuting and charging drug traffickers. Since the possession and use of discretion on the part of officials involved in the administration of criminal justice is a prerequisite for bargaining, and since the use of discretion is an inherent part of the enforcement pattern of the police in dealing with drug traffickers (see, generally, Harney and Cross, 1968), a bargaining encounter is a theoretical possibility.

Our data indicate that there are two situations in which the offender who is involved in drug trafficking has bargaining power when he has an encounter with the police: 1) the situation is such that the offender's kicking back the drugs in his possession is deemed to be of primary importance in the fulfillment of law enforcement aims. 2) The offender is in a position to supply information which will enable law enforcement officials to obtain the conviction of other offenders who are believed to have a greater degree of involvement in the illegal drug trade. A discussion of this latter situation will be presented in Chapter Four.

As we shall see, these two situations imply limitations on the power which the drug offender has in achieving a negotiated settlement which is favourable to his interests. As well, even if the offender has such power, there are forces operating which may lead the offender to perceive that to use his power in the negotiation process would not be in his best interests in the long-run.

> . . . I've had a beef dropped because we kicked back the shit we had.
>
> WAS IT SOME PRETTY SERIOUS STUFF THAT YOU HAD?
>
> Well, you remember _____ Drugs?. We B & E'd the place and when we got picked up later we kicked back most of the drugs and they let us go.
>
> DO YOU THINK THEY WERE MORE INTERESTED IN THE DRUGS THAN IN A CONVICTION?
>
> Yeah, well, they were ju[illegible] trying to keep them off the street. We had an awful lot. (no. 75)

> To begin with, there was a break and enter into a drug store in which a bunch of drugs were taken. And, well, that was on a Saturday night. On Monday, there were some drugs sold in the city -- just soft drugs. We kept the hard drugs back. And on Wednesday, when I went to meet the accomplices, I couldn't find them or the apartment where they lived. I went downtown and found a man and his wife who lived there also and they told me where I should go to find them. When I got there I saw a car pull up and about five people get in but it was too far back to see what was going on. So, I went back downtown and I decided that I might as well go home 'cause nothing was going to happen. And that night at about 7:30 the police came to the door and asked me very politely if I would like to come down to the station, guaranteeing me a ride home at the end of the evening. So, I prepared to go to jail. And we got down to the police station and the detective said, "Just sit there. I'm going to tell you a story -- don't deny nothing." And he ran down the whole B & E, only missing one or two small points, so I concluded that his information was fairly complete. And he says, "I've got the other four arrested up there and I'm going

> to keep you in jail for about a month unless I get these drugs back." And there was a great quantity. So he gave me a newspaper to read. He didn't want to book me in. Otherwise, I'd go to court in the morning and he'd guaranteed me a ride home. I guess he still meant to keep his word. About 10:00 he came in, took me upstairs, and said that he was going to book me in so I'd have some company. I was still sitting there at 10:30 waiting to be booked in, and he came and got me. Two of the accomplices had gone and made a phone call. He'd released them at about 9:00 and they got their drugs back. And that was the end of it. I thought at the least he'd inform the RCMP but he didn't and we never had any trouble at all. (no. 23)

This account was substantiated by one of the informant's accomplices in the crime.

Our data suggest that if a kickback of drugs is to be successful from the standpoint of the offender, two conditions must be present: 1) The drugs must have been obtained as a result of a burglary and be of sufficient quantity to serve as a threat of a possible significant increase in the amount of drug abuse in the community. 2) The offender must not be systematically involved in drug trafficking. If he is systematically involved in drug trafficking, then the majority of his drugs will come from underworld sources. Even if some of his drugs have been obtained from the proceeds of a burglary, his systematic involvement and connections with the underworld will mean that, in all likelihood, he will be defined as a "good pinch"[1] by the police.

---

[1] A "good pinch" has been defined as ". . . an arrest which (a) is politically clear and (b) likely to bring them [the police] esteem. Usually it refers to felonies, but in the case of a 'real' vice drive it may include the arrest and conviction of an important bookie" (Westley, 1953:36).

3. Negotiable instruments: Stolen negotiable instruments -- whether they be cheques, money orders, stocks, or bonds -- may serve as a considerable source of power for the offender in the negotiation process. That the offender who possesses $50,000 worth of stolen negotiable instruments is in a better bargaining position than the offender who has $2,000 worth of drugs as a result of a drug store burglary should come as no surprise. The relative amount of financial loss which might be expected should the drugs or cheques not be recovered is a reason why this is the case. However, it is not the only reason. The owner of a burglarized drug store will, in most instances, have his losses covered through his insurance. This is, for the most part, not the case for the various banks and merchants who are stuck with bad cheques. Foldessy (1968:1) indicates that many banks now have a $25,000 deductible clause in their insurance against bad cheques.

To think that there is little or no pressure placed upon the police to prevent crimes involving stolen negotiable instruments is naive. The losses as a result of such crimes may be substantial and the victims are generally the more influential individuals or the more influential institutions in the community. As well, the government itself may be the victim. In honouring $50,000 worth of stolen postal money orders, the government loses $50,000. In situations involving the recovery of stolen negotiable instruments, the consideration of crime prevention may well take precedence over considerations involving law enforcement.

Offenders are not unaware of the fact that the possession

of negotiable instruments may be useful in the context of plea bargaining. An indication of this is given by an informant who uttered various types of negotiable instruments for over 25 years.

> We had $11,000 in Unemployment Insurance stamps which were no good to anyone but the detective for the simple reason that if you're running a business, you have to be able to account for where you're buying your stamps. So really, the only thing that they were good for was for a patch. And we had about a thousand money orders which we could have put out on the street. This was back before the time they were perforated, coded, and made out for separate amounts -- you could make them out for any amount you wanted. And we were going to put them to use but this other thing came up in the meantime -- we got busted -- so we felt that they would probably do us more good in this case than in the other. (no. 114)

One does not have to be criminally s[illegible]d, however, to realize that the possession of stol[illegible]ble instruments can be used as a powerful bargaining lever. One of the most lucid accounts of how a favourable deal may be effected through the kickback of stolen cheques was related to the author by one of his research assistants. At the time of this incident, he was a member of a motor cycle gang. Both he and the members of his gang were criminally naive in respect to theft in general and the use of stolen negotiable instruments in particular.

> The second deal was, see, they were in the habit, the police -- whenever somebody in the club would do something, they'd arrest everybody. This way they'd pressure the other guy to cop out to get their friends off, 'cause they used our code of unity against us. They knew that if they had everybody in jail, whoever it was who did the deed was going to cop out to get everbody else off. 'Cause you know, we don't have much money for bail and shit like that.
>
> So, what happended was a couple of punks that were hanging around with the club, just sort of coming and going, had pulled off a few B & E's and they'd stolen a cheque perforator, and a couple hundred thousand dollars

worth of cheques, a stack of them. So we ripped these guys off for the cheques and the perforator. See, we were going to go into business and make some money.

So what happened was, these two guys got picked up and the cops beat on them, and they told the man that we had the cheques and the cheque perforator, see. So, what they did was they waited until a Friday night when everybody was in the clubhouse. There was about 18 of us and they busted us. And there was about 50 -- man, the place was just crawling with cops! They took us all downtown and they told us, "O.K., you've got the cheques and the cheque perforator. We're going to charge you." We told them, "We don't have anything." They said, "That doesn't matter. We don't need that. You know that." And we knew it.

See, all they had to do was take us to court on this charge and have the two guys that they beat up testify that they gave us the perforator and the cheques. That's all the evidence the court would have needed to convict us and we knew it. 'Cause, you know, they don't really go justice-wise in the courts in _____, especially in _____ when it comes to motorcycle gangs.

So, what we did was we told them, "You cut us loose and we'll give you back the cheques and the perforator 'cause we're not greedy, see." It was just a couple hundred thousand dollars.

So, they said, "That's cool." We phoned up one of the guys and told him to go get the perforator and the cheques and bring them down. So, he did, but he only brought half the cheques. So, he brought them down and -- oh, yeah, the reason he only brought half the cheques was becuase he had made out half the cheques and the half that he'd made out and perforated and everything, he kept.

He came down and he gave them the stuff and the man came down and saw me and the president of the club and said, "We're got the goods and now we've got a case, so we're going to charge you."

We didn't know what to do but the president's old lady comes up to the joint to see us and she said, "Bob (that's the cat who had the cheques) held out on the man and he's got them all printed and perforated and ready to go and if you're not out of here in an hour, the cheques are going to hit the street." See, he didn't trust them. So when we heard, we called the man down and told him if we weren't out in an hour, the cheques would hit the street. And that was the only way they were going to get them back. So they did and we gave them back the cheques. (no. 32)

It would appear that the crucial factor in the preceding negotiation was that the cheques would have been passed had the

accused not been released. However, even if the accused are not in a position realistically to offer a threat that unless they were released, the negotiable instruments would be passed, the fact that they do have control over them may still give them some bargaining power. This is not to say that, in the absence of such a threat, the accused's bargaining power is lost. It does not take too much imagination to realized that even if the accused is convicted of a criminal offence and is incarcerated, he still may be in a position to fence the instruments or pass them himself upon his release from prison. So long as the instruments are unrecovered by the police, their existence is a threat to the goal of crime prevention.

> I had, oh, I don't know how many thousand copies of blank cheques. He [and RCMP officer] said that if I returned the cheques, I'd get less time. And if I didn't return them, he'd see that I got all the time in the world. So the cheques were returned and consequently I only got three and one half years for it whereas I could have gotten five or over. (no. 48)

. . . . . .

> When I got pinched in '63 I was able to deal. The case . . . well, it was a kickback. It wasn't much of a kickback except that we had quite a few blank traveller's cheques and certified cheques that we were in a position to move when we got back on the street. There were three of us. One just hit the street, the other one got a suspended sentence and a large fine, and I went to jail for ten months, the understanding being that we would kickback the cheques.
>
> WITH WHOM DID YOU DEAL?
>
> The city police. (no. 56)

Much of the preceding should serve as ample indication that crime prevention is, indeed, an important goal of the police. Yet, paradoxically, the pursuit of this goal can inadvertently put power

into the hands of the offender who possesses that at which the police desire to control.

4. Deceptive kickbacks: The benefits which are derived by the offender or by the authorities as a result of a crime prevention kickback may be deceptive. The offender clearly benefits if all charges are dropped as a result of a kickback. However, should the offender receive a sentence involving a term of incarceration, an assessment of whether he benefitted as a result of the deal becomes far more subjective. For example, take the case of the informant (no. 48) who received a sentence of three and one-half years after kicking back cheques when he was threatened with "all the time in the world" if he did not cooperate. When asked whether he believed that he would have received a sentence of five years or more had he not cooperated, he replied, "Oh, I definitely think I would've gotten five years." In this case, the police obviously benefitted from the return of the blank cheques and the offender believed that he benefitted as a result of returning the cheques. Whether he objectively benefitted is, however, an unknown.

If we accept the notion that crime prevention is an important aim of the police, then it does stand to reason that most offenders should benefit from negotiations which are related to the fulfillment of this aim. Should officials renege on too many deals involving a crime prevention kickback, the word would soon pass through the underworld that such is the case. The consequence of this would be that it would become increasingly

difficult for officials to obtain the cooperation of offenders in effecting this type of negotiated settlement.

While, in general, offenders who claim to have been involved in crime prevention kickbacks believe that they benefited, some claim that the officials who were involved were deceived into thinking that they benefited.

> Well, actually, I'd told them it was a machine gun, and it was a machine gun, you know. But somebody had taken it from the army barracks -- it was filled up with lead. I never let them in on that part. They got me awhile later, you know. They got me in the police station and beat the hell out of me. But the deal had already gone through. Here was the gun, in a box, all put away. Boy, they got me later for it, though. But you can always get a gun if you want. You get somebody on the street and say, "Listen, line me up three guns." In _____, guns can always be had. (no. 28)

. . . . . .

> Last year -- I'd been up on boosting charges, you know, like theft overs and shit like that -- they busted me. I was in jail for awhile and I got out on bail. And I went up to this one detective, said he'd patch for me, you know, 'cause he was good for patches -- for four boosting charges and a theft over [$200]. He wanted a .38. And all the charges were dropped. He says -- I'll quote him -- he says, "I can patch anything but a murder beef." I knew a lot of people that got their things patched. Like with chicks it was, your know . . . .
>
> DID YOU HAVE A .38 OR DID YOU JUST HUSTLE ONE UP?
>
> No, I hustled one up. I paid a hundred dollars for it but it was worth it to me. (no 90)

. . . . . .

> Well, on a drug store [burglary] once -- Al was in on me with that one, you know Al -- on that one drug store they cut us loose to get the dope back.
>
> WHO WAS "THEY"?
>
> The _____ City Police. What they did there was they said they'd just keep us in there and they'd jack our bail so high -- they just stalled us 'cause they knew we'd beat

it eventually. But they just kept us in remand. Kept the good stuff anyways -- gave them the garbage back. (no. 89)

If the preceding accouts are accurate, it may be safe to make the inference that, in some cases, the gains made by the officials in making such a deal may be more apparent than real. The possibility should also be noted that, just as the officials may find it difficult, if not impossible, to successfully negotiate for kickbacks if they "burn" too many offenders, the same may hold true of offenders should they engage in too many deceptive kickbacks. Basic to the continuation of a system of negotiated justice is the good faith of the participants. A system of negotiated justice breaks down with the knowledge of the absence of the good faith of any of the participants.

D. Insurance Companies and the Kickback

The role of insurance companies and their representatives has been virtually ignored in the academic literature on negotiated justice. We suspect that, in part, this is because the involvement of a representative of an insurance company in the negotiation process is a relatively rare occurrence. Of the 115 offenders who were interviewed, only one reported being involved in a negotiation which included the representative of an insurance company. Though such involvement is admittedly an infrequent occurrence, this is not to say that it is insignificant.

It should come as no surprise that insurance companies might be desirous of becoming involved in the negotiation process

in cases where an offender has illegally obtained valuable property for which the company must reimburse the victim under the terms of his insurance policy. If a deal can be made which involves the kickback of the stolen property, the insurance company may stand to save a great deal of money. For example, MacIsaac (1968:204-5, 210) describes such a situation in his autobiography.

> Through my own carelessness, I had gotten pinched for defrauding a wealthy West Palm widow out of a great deal of money. The law had landed me without any trouble, but they hadn't been able to find up to as much as a dime of the widow's cash. That omission had everyone particularly upset. The police, the insurance people, and the widow woman all wanted that money. And I wanted my freedom.
>
> A situation like this is tailor-made for dealing. . . . If you have something to deal with, you can disentangle yourself from the law without earning a single gray hair behind bars. . . .
>
> There are many variations. . . . The variation in this case was a very common one. I would trade a sizable unrecovered lump of loot for my freedom. But deals take time and, with the money still missing, no one was going to be stupid enough to give me a bond. I spent several months in jail while everyone concerned took turns browbeating the judge into the wisdom of allowing such a trade to be effected.
>
> . . . . The local authorities finally decided that I wasn't going to bounce [redacted] loot until I had some guarantees. So the Ch[redacted] evolence of the insurance company won out, and a [redacted]de. I told my lawyer where he could dig up [redacted] the court decided that I was once again a worthy and respectable citizen, and I was allowed to walk out of the county jail as a free man -- albeit with a strong recommendation that I get my thieving Yankee ass the hell out of Florida within one week, else I might find myself with a ten-year sentence for any charge that was handy.

In his autobiography, Blackstock (1967) views the role of a representative of an insurance company as being of great importance in respect to the initiation and the outcome of a negotiated settlement.

> Deals like this [kickbacks of stolen property] are common, especially where an insurance company is involved. A spokesman for the insurance company will actually promise that you will not get more than a stated amount of time if you deliver the goods. I have never heard of anyone getting more than was agreed upon.
>
> The insurance man usually wants a day or two to investigate before he makes a deal. This, I supposed, is to confer with the crown prosecutor and the police involved and, for all I know, maybe with the magistrate or judge (Blackstock, 1967:178).

Blackstock (1967:178-83) tells the story of a friend and fellow drug addict who broke the window of a jewellery store and ran off with two trays of rings. He hid the rings prior to his arrest. The company which insured the jewellery store against theft soon had a claim for $20,000 from the store's owner. However, the insurance company suspected that he was claiming for rings which were far in excess of the value of the rings which were actually stolen. Consequently, the company was most eager to recover the rings. A representative of the insurance company intervened and negotiated a deal in which the offender received a light sentence on the theft charge plus another charge which was unrelated to the theft. As it turned out, cheap rings had been substituted for expensive ones. Blackstock claims that the insurance company representative told the magistrate in court that, "The real criminal in this case is not this man, who has pleaded guilty to stealing the rings; it is the man who attempted to defraud the insurance company, and would have done so had the rings not been recovered" (Blackstock, 1967:183). Blackstock concludes by saying that:

> While deals like this are never publicized, they are made quite frequently. I have heard of a couple of dozen

> where I knew the persons accused, and I have never heard of the representative of an insurance company not backing up his word (Blackstock, 1967:183).

Blackstock's perception that deals of this type are made frequently may be a function of the era in which he was criminally active -- the early 1930's through the early 1950's. None of our informants expressed the belief that deals involving representatives of insurance companies are especially prevalent today, though they did concede that their involvement was a possibility when a large insurance claim was involved.

One of the most colourful informants interviewed was an ex-policeman who gave up his job to become a thief. He was involved in a theft of nearly $400,000 worth of bearer bonds which were covered by theft insurance. When arrested with two of the bonds in his possession, he was told by the police that a charge of possession of stolen property (there was not enough evidence to prove that he was involved in the theft) would be dropped if he would act as an informer, reveal the identity of his partners, and return the stolen bonds. He refused to do so and was given a two-year sentence for possession of stolen property. He describes the role of the insurance company as follows:

> . . . they [the police] said they wanted to deal with me and they said that, "We want the bonds."
>
> And I said, "I don't doubt that a fuckin' bit." Had $385,000 worth, too. It was a fair chunk of money.
>
> And they got a lawyer who was representing the insurance companies that were involved. He came up and talked to me. I wouldn't even sit in the room with him because of microphones -- I walked up and down the hall to talk to him. And I said, "Yeah, I can lay my hands on some of them." But I'm not going to make any kind of deal or promise to him. I said, "Let me out of here for two weeks." They also wouldn't let me out on bail.

DID THE INSURANCE COMPANY LAWYER TALK TO YOU? DID HE SAY HE WOULD APPROACH THE PROSECUTOR OR WHAT?

The insurance company lawyer came and talked to me. And this goofy prick, he was from Seattle, he was an American, he said, "You realize that we're compounding a felony in here."

Well, I said, "Compound your ass out of here. I'm not interested in talking to you, you dumb son of a bitch.

Then he comes to me after I've done the two years. I'm in jail again when the rest of my partners got out of the penitentiary and the minute the debentures hit the street everybody's cashing them -- there's all kinds of paper flying. So he comes to me and says, "They [the police] know that they got a connection through you. What kind of deal do you want to make?"

I said, "Look, I'm willing to deal, I'm always willing to deal but in order to have a deal or make a bargain or trade, both sides must have something to offer. Now you came out to see me so, obviously, I have something to offer. And I'm in jail, so, obviously, you have something to offer because I want out.

Soon after that the police came to me and said, "O.K., you're out, you're as good as out. But let's get down to business. How much money?"

I said, "Send the man [a lawyer from the insurance companies] out to me and I'll talk to him alone." You know, I'm not going to talk to him in front of a policeman.

This same fuckin' Yank lawyer comes out, this is four years later, and as soon as I saw him I said, "Ah, fuck off, you jerk! I did the two years because you were too fuckin' stupid to deal then! Now you want to come up and deal. Fuck away!"

So they sent another lawyer out and he said, "What kind of deal would you make?"

I said, "I want a percentage deal." We were going on a percentage of whatever I could get back.

He said, "What percentage?"

I said, "Jesus, there's a lot of steel and concrete in here. I can't think. I got to get out in the fresh air before I can think."

He said, "I don't blame you. I don't give a fuck about deals. All I'm interested in is getting the stuff back. That's my job. I don't care if they saw the bars to get you out of here or come in and get you out at the point of a gun. All I'm interested in is getting that paper back.

I said, "Fine, get me out."

So he said, "Well, give me an idea."

Well, I knew we could get 15% on the street so I said, "Well, I'm thinking in terms of 35%, a third."

"Oh, Jesus, this is a lot of money."

> It is a lot of money, too. About a hundred thousand since we kicked back on another score, but there was at least two hundred thousand left.
>
> He said, "Jesus, that's a lot of money. You're talking about $70,000."
>
> "Well, that's what I'm talking about because I'm going to get my end of it, I'm sure. I've also got to pay the people [my partners]. My end's gone -- it's been gone already. I've got to pay the people that it belongs to and I still want to make a dollar."
>
> And he said, "Look, I don't give a fuck." He's happy! You can't blame him. He just doing what he's there to do -- recover the bonds. . (no. 72)

Following their conversation, arrangements were made to complete the terms of the settlement, including a parole for the informant. However, just prior to the time that he was to go out on parole, his partners, who were on the street, committed a crime. The nature of the crime was such that the informant was afraid that were he to go out on parole, he might be implicated. Hence, at the last moment, he turned down the parole, backed out of the deal, and chose to finish his sentence inside the penitentiary.[2]

In conclusion, the preceding discussion suggests that, in situations where an individual has been arrested for the theft of unrecovered goods which represent a substantial claim on an insurance policy, an insurance company may occasionally serve as an ally in the offender's attempt to make a deal.

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[2]This informant was first interviewed in front of two other inmates while in custody. Nearly two years later he was again interviewed in front of two other persons (both of whom were friends of both the author and the informant) some three months after his release from the penitentiary. In that his account remained the same after two years, that the interview took place in a different setting, and that different persons were present at the time of the interview, gives, in the author's opinion, added credibility to the account.

E. The Kickback and the Creation of Crime

In much of the previous discussion, the kickback has been viewed as a means of achieving legitimate law enforcement aims -- the prevention of crime and the recovery of stolen property. However, this need not always be the case. It would follow that if the offender perceives that, under certain circumstances, officials are interested in kickbacks in exchange for leniency or noninvocation of the criminal process, then he might well reach the conclusion that the course of wisdom would be to obtain some goods which could later be used as a kickback should he be arrested for some other offence.

There is nothing really novel about such a practice. It is directly analogous to descriptions of the practice of thieves in setting aside "fall money" in jurisdictions where "the fix" either is or has been a means of nullifying the criminal justice process (see, for example, Sutherland, 1956:111; Shover, 1971:164-73; and, Maurer, 1964:137-38). As well, officials in the criminal justice system are aware of this practice. A prosecutor who was interviewed by Grosman (1969:40) stated that:

> Hoods will steal bonds and hold them for a rainy day and then when they are charged with something they'll try to make a deal with the police to give them the bonds if the police will withdraw the charges.

Another prosecutor viewed such a practice as being little more than a variation of "the fix":

> The police attempt to withdraw charges because they say that the accused man is going to do something for the police like find some stolen goods or return some stolen

> bonds. But as far as I am concerned, in these cases all an accused is doing is purchasing his freedom by giving the police a payoff in a minor way (Grosman, 1969:39-40).

The preceding is very much in accord with the view of some of the more sophisticated thieves who were interviewed in this research.

> DID YOU HAVE MUCH TO DEAL WITH?
>
> Oh, yeah, lots. Like on the armed robbery beef, when they brought me back from Idaho in '70, all I kicked back was a shotgun and three .38's. On this one here, I had to kickback a whole case of shit.
>
> DID YOU LAY SOME STUFF ASIDE FOR DEALING?
>
> Oh, yeah, everthing from cheque perforators to -- it doesn't hurt to have some stuff on hand. Now, since 1966, I've stuck to armed robberies so I can only deal in money or guns. So, if I hit an armory to get guns, then I'll just keep some and bury them, stash them, and then if I get pinched for something, I'll say, "Hey, what's going on here? I've got such-and-such." (no. 21)
>
> . . . . . .
>
> You see, this is also another thing a thief should do when you get out is -- one easy way to do it when you get out -- make a quart of grease and plant the son of a bitch all over the place -- in church yards, schoolyards, and everything else, and everytime you get pinched say, I'll give you ten ounces."
>
> IS THIS ACTUALLY DONE MUCH ANY MORE?
>
> I'll tell you, if you've got it planted in a schoolyard, they're sure as hell going to listen, they're sure as hell going to deal. A museum is also a good place to plant. The buildings are worth fuck-all to you -- you can't sell the pricks -- but they're insured and they're worth money. And so you plant it, and boy, they're getting pressured, the police are getting pressured. In the case of [illegible], they're getting pressure: "What did they do with them, who did they sell them to? You people are supposed to know all the fences and connections and everything else." And then you come to the police and say, "Ha, ha, I know where those paintings or whatever are." (no. 72)

One of the most perceptive analyses of how the existence of a system of kicking back commodities in exchange for concessions

may have the unanticipated consequence of encouraging and creating crime comes from a former safecracker:

> This really is a kind of routine operation. I think everybody appreciates this. I myself have probably made more nitroglycerine to be given back to the police than I ever, ever used. Like you don't use that much -- 3/4 of an ounce is a big charge. And, I don't know today if they have this big desire to capture nitroglycerine. I think it's probably -- what would they want it for, John? Is it just good publicity for the police department? I mean, they must be aware that what they've done really is created a market. Like 80% of the time I manufactured [nitroglycerine] I actually didn't have any on hand. I had to go out and make it so the guy could come up with something to give back. (no. 24)

F. Summary

A system of negotiated justice in which concessions are made to offenders in exchange for the return of stolen property or for the prevention of greater and perhaps more serious crime, can help to achieve certain legitimate law enforcement goals. At the same time, achieving these goals accentuates the value of certain goods and materiel and may inadvertently confer power upon certain offenders seeking to avoid the consequences of full enforcement of the law. By overstating the importance of these goals, the gains actually obtained by law enforcement officials through the kickback may be more apparent than real. Taken to its logical conclusion, the consequence of emphasizing such goals may actually encourage the commission of criminal acts. The foregoing suggests that, under certain conditions, the goals of crime prevention and law enforcement may be at odds with one another.

CHAPTER FOUR

. . DEALS FOR INFORMATION:

A LITTLE KNOWLEDGE CAN BE A DANGEROUS THING

"I won't beat about the bush, Walters," said the superintendent. "I want your help."

"And I won't beat about it either," said Walters. "You won't get it."

"You don't know what it is yet."

"That makes me even more certain."

"You'll get seven years, you know, at least for this, maybe ten."

"So?"

"So wouldn't it be nicer if it were five -- even three -- even nothing at all."

"Much nicer."

"Then it's up to you. If you help us, we can help you."

"I heard from a man called Reynolds that you've a picture of a dead man in that drawer," said Walters.

"Oh that," said the superintendent. "I've sent that away, but I've got another."

"He talked too, I suppose."

"There's only one thing I know for certain that he did. He died."

"You can't stop people from dying, superintendent."

"Nor can anyone."

"Before their time, I mean. Unnatural causes. A person or persons unknown."

-- Cecil, 1968:57

A. The Importance of Informers

A police department cannot function without a continuous input of information about criminal activities in the community. This is obvious in respect to achieving the police goal of crime

prevention; the police must know about crimes which are being planned if they are to prevent them. To some, however, the need for information in respect to the detection of perpetrators of criminal acts is not so obvious. It is simply false to assume that scientific detective work results in the detection and conviction of many criminals. As Inbau, a lawyer and expert on police interrogation techniques, puts it:

> . . . the fallacy is certainly perpetuated to a very considerable extent by mystery writers, the movies, and TV: Whenever a crime is committed, if the police will only look carefully at the crime scene they will almost always find some clue that will lead them to the offender and at the same time establish his guilt; and once the offender is located, he will readily confess or disclose his guilt by trying to talk his way out of the trap. But this is pure fiction; in actuality the situation is quite different. As a matter of fact, the art of criminal investigation has not developed to a point where the search for and the examination of physical evidence will always reveal a clue to the identity of the perpetrator or provide the necessary proof of his guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, and of others who may possess significant information (quoted in Remington, 1969:379-80).

Other observers of the police have reached similar conclusions (see, for example, Aubry and Caputo, 1972; Conklin, 1972:123-50; H. Goldstein, 1967; and Skolnick, 1966:112-38).

Criminals, too, concur with the view of Aubry and Caputo (1972:178) that,

> Truly, information is the life blood of the [police] department.

As one offender who spent most of his adult life in crime put it:

> . . . if a man can't connive, deal, do dealings, he's not gonna find out anything for the force. You see, they've

> got to go along to a certain extent -- the police have to depend on information for 85 per cent of their pinches. Scientific detective work, all it does is verify what they already know. What good is a bullet without the gun, what good is a fingerprint without the guy? A copper is only as good as his connections. (Martin, 1970:105).

One informant, a heroin addict, had no illusions about the police's need for information in pursuing their goals:

> Everytime a dope fiend gets picked up he's got a deal going. "Come on, where'd you buy? Tell us." So they slam a few heads or make a few promises for it. And they want to know who's got, who's moving stuff into town, what's new, you know. (no. 58)

The desire of the police to obtain information is, to most informants, little more than a fact of life.

Essentially, there are two clandestine sources of information on criminal activities: police agents working undercover and individuals who are involved in crime either directly or peripherally. While undercover policemen are sometimes used to gather information on crimes involving vice and subversive activities, it generally is not an efficient and economical means of obtaining information. In addition to the fact that he is a full-time salaried employee while working undercover, the policeman must create a new and plausible identity for himself, lead a double life while becoming accepted by the criminal group, continually live with the knowledge that he may be expected to participate in criminal acts, and recognize that his life may well be in danger should his true identity become known. As well, once his identity does become known (as it eventually will when he must testify in court), he will no longer be useful to the police department in

his role as an undercover agent. It should come as little surprise that there are not many individuals who desire to undertake such work.

A far more efficient and economical means of obtaining information is through underworld informants. In many instances, these individuals already possess the information which the police desire. Such individuals do not have to establish a cover in the same way as the police in their quest for new information. Also, since they are part of the underworld, they have little compunction about committing criminal acts. If reliable information can be obtained from underworld informants, it is, from the standpoint of the police, a far more efficient and a far less dangerous means of obtaining such information.

In this chapter we examine how offenders perceive the police's need for information and how this need serves as a relevant variable in the process of negotiating justice. Predictably, not a single informant admitted that he actually cooperated with the police by acting as an informer in return for concessions. However, experiences were described in which the offender perceived that he could have made a deal in return for information; in which the offender believed that his conviction was largely the result of someone's having acted as an informer; and in which offenders claimed that they made deals as a result of tricking law enforcement officials into believing that they would supply them with information.

B. Obtaining Informants

One may accept as an article of faith J. Edgar Hoover's assertion that:

> Unlike the totalitarian practice, the informant in America serves of his own free will, fulfilling one of the citizenship obligations of our democratic form of government (quoted in Harney and Cross, 1968:18).

Unfortunately, this description of the motivation of the informer is not accurate. Harney and Cross (both of whom are police scientists who have had considerable experience with the use of informers) paint a far more realistic picture of what motivates the informer.

> Self-preservation is the first law of nature. This is one of the old saws which must be respected, in that it expresses some of the accumulated wisdom of the race. Whatever the priority given to self-preservation, it must be high. Therefore, we might expect an emotional reaction favourable to our investigative objective, if we have a prospective informer who is afraid of something. . . . Our informer might be in fear of the law (Harney and Cross, 1968:41).

To put it baldly, Harney and Cross suggest that the threat of full enforcement of the law -- or, alternatively, concessions from full enforcement -- may be used by the police to induce offenders to act as informers[1]. This, we suggest, is the principal means used by the police to obtain information from criminals.

Another means of obtaining information from criminals is

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[1]Other writers have reached this same conclusion. See, for example, Lindesmith, 1965:47; F. Miller, 1970:286; Skolnick, 1966:112-38; Blumberg, 1967:64-65; Grosman, 1969:39; Newman, 1966:194-95; Jackson, 1969:47; and The President's Commission on Law Enforcement and Administration of Justice, 1967b:47.

to pay them, making them " special employees". While this is done on occasion[2], most police departments do not have a budget which allows them to purchase much useful information. Budgetary considerations aside,

> The reduction of time in jail or prison can usually purchase more and better information than can available moneys (Skolnick, 1966:125).

The use of charging and sentencing discretion may serve as a lever to induce persons to become informers.

One offender gave a very vivid and detailed account of the process he went through when the police allegedly attempted to induce him to act as an informer.

> I got out on parole on September 17, 1970. On October 4, they charged me with rape, abduction, and assault. So they flung me in the digger for 11 days and then they called me up and said, "Well, we'll (after they investigated the case, I guess) take a guilty plea to assault, common assault, and we'll drop the rape and abduction."
>
> I said, "I'll tell you what I'll do. You give me a ten dollar fine and a week to pay and I'll go along with you." [Laughter] Well, I'm not guilty, see.
>
> So my lawyer comes down and he says, "Do you realize what you're doing? Jesus, you're risking 20 years which is maximum for rape against two which is maximum for assault."
>
> I said, "Look, I'm not guilty of any of them but I'll pay ten dollars just to get out of jail." Becuase no way was I going to get bail. So, I said, "That's the deal."
>
> So, he said, "I'll talk to them, tell them that this is what you will do -- ten dollar fine."
>
> I went up to the courtroom, he comes over to me and says, "No, the prosecutor won't go for the deal."

---

[2]"A heroin addict was paid $50 to help police capture a hashish trafficker, an Alberta Supreme Court judge was told Tuesday. Police witnesses said the man, in custody on drug and fraud charges, agreed to help an undercover policeman locate narcotics dealers" (Edmonton Journal, February 6, 1974, p. 4).

So, the prosecutor jumped up and said, "It has been requested that this man be released on his own recognizance and we don't oppose this."

My own recognizance for one of the major crimes in the country! Now this is bloody ridiculous!

They said, "$20,000." Well, no way was I going to make $20,000 bail.

So, he said, "We'll release you on your own recognizance."

And my lawyer says, "When did you talk to the prosecutor? I didn't talk to him. I didn't talk to anyone."

I said, "Did you ask him to come out like this?"

He said, "I never mentioned it to him. They dug this up themselves."

But, now, the funny part of it is that there is this little Indian guy that comes up behind me. He'd been fighting with his friend on the street the night before over a bottle of wine and he was charged with causing a disturbance. And he says, "I'd like my own recognizance."

And the magistrate says, "No, we have to protect society from people like you."

And here's me with a record as long as my arm and charged with rape!

So, now I go to court and they said -- nobody showed up for the preliminary hearing so they threw the charges out. That was on November the 23rd, 1970.

I had to report to the police on parole. I went over to report and they said, "You know, it would do you a lot of good. You've got to stay in this town for 15 months while you're on parole. You met a couple of guys in there that are big connections in dope here."

First of all I said I didn't know them. I said, "I can't place who you're talking about."

They said, "You can't place -- shit! You went out to a party with the guy when you got out on bail. We want information on them and it will do you a lot of good."

WHAT WAS MEANT BY "DO YOU A LOT OF GOOD"?

In so many words it meant that it would do me a lot of good if I wanted to keep my parole. They can't come right out and say it, you know. And even if they did come out and say it, there's nothing they can do about it. So right away I went up to an ex-con that I knew in _____ and I said, "Look, this is the deal these bastards are putting to me." I want somebody to know about it, you know -- somebody that knows other people so if anything happens. . . . There's no way I'm even going to talk to this guy that they want. So now they take me to court and they find me guilty of rape and abduction.

EVEN THOUGH NO ONE SHOWED UP AT THE PRELIMINARY HEARING?

They relaid the charge. They came down and picked me up at the house one night and said, "Will you go down to the _____ Hotel? There's some people down at the _____ Hotel and there's a guy in from Vancouver. We want you to go down there and see what's going on."

I said, "Gee, I can't go down. I'm broke." So they give me a twenty dollar bill -- one of the new twenties!

So, I went down to the _____ Hotel and bought everybody a beer and sat there and had a good rap. I got a little hammered, I guess, and I came out and they said, "Well, what's happening?"

And I said, "You don't see me into that (see, I'm pissed) -- fuckin' do your own dirty work, cocksuckers!"

Two weeks later I get recharged. But, still, I didn't give a fuck because they couldn't find me guilty. But they did. They can't find me guilty, you know.

WHAT WAS YOUR SENTENCE?

Three years! Three years for rape and abduction! You know, that's stupid too. I said, "Look, if I'm guilty of the charge, first of all I shouldn't be in a penitentiary. I should be in a bug house. If you believe that I'm guilty of rape and abduction, I should be in a bug house. And, secondly, I shouldn't get three years. I should be kept at the Governor General's pleasure. There's got to be something short-circuited in my head!" They just giggled and laughed. (no. 72)

There are some factors which support the credibility of this account: 1) During the time that he was charged with rape, abduction, and assault, his parole was not suspended. A parole suspension is standard procedure when it is believed that a parolee has committed a serious offence. 2) A three-year sentence was unusually short considering the nature of the offence and the previous record of the offender. 3) When the informant was sent to the maximum security penitentiary where he was interviewed, he was not placed in protective custody as is the normal procedure with sex offenders in a maximum security institution (cf., Marcus, 1971). In fact, the whole affair was regarded by other inmates as a tragic joke -- he was simply not viewed as a sex offender. 4) When the informant was

re-interviewed some two years later, his account remained unchanged.

The preceding account represents one offender's perception of how the police may attempt to use the law as a lever in order to obtain information. It is, however, an extreme case. If we were to summarize the experiences of other offenders who claimed that they had been offered a deal in return for information, their collective account would go something as follows:

> I was picked up and charged with armed robbery. When we got down to the station, they told me that if I'd give them some information on other robberies in town, they'd see to it that I'd get a light sentence.[3]

This type of offer was regarded by most informants as little more than a routine police practice.

In the following sections, we shall look at the offender's view of three types of practices related to the need for information which may be used to control crime: 1) deals for testimony against a co-accused; 2) deals for information which may be used to apprehend more serious offenders; and, 3) deals involving what offenders term a "set-up".

C. Deals for Testimony

When two or more persons have been charged with an offence and when a conviction appears to be unlikely, it is not an uncommon practice to grant concessions to a co-defendant in exchange for his testimony against the other(s) (F. Miller, 1970:258). Polstein (1962),

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[3] For a variation on this type of pattern, see Chapter Five, Section B3.

in an article entitled "How to 'Settle' a Criminal Case", (which is, in effect, a manual for defence lawyers in the U.S. who wish to make deals for their clients) states that:

> There is one situation, however, where no one can fault the district attorney -- where leniency is exchanged for needed co-operation against co-defendants. Whether such a bargain can be struck depends on a variety of factors; the weakness of the case against the co-defendants, the extent of the defendant's participation, the aid he can render, and who the prosecutor's real target is. . . . Thus, the possibility of co-operation in exchange for consideration is an avenue that should be explored in every serious case involving multiple defendants (Polstein, 1962:38, emphasis added).

While there was not a single informant who admitted that he had participated in a deal involving testimony against a co-accused in return for leniency, several considered themselves to be the "victims" of such a deal. This is not surprising since it is generally acknowledged to be unhealthy to be known as an informer in an inmate population.

Deals involving testimony against a co-accused -- whether such a deal is offered to an informant and he refuses or the informant believes that he is the victim of such a deal -- often result in a sense of injustice.

> I was offered a deal to testify against somebody else which I turned down and, as a result, got more time than I probably should have.
>
> WHO APPROACHED YOU WITH THE DEAL?
>
> The police, the narcs, in _____. They're just loaded with deals down there. And as a result, they shoved it up my ass. I'm only one of many, many people. And there's nothing you can do about it because -- it seems that the police have a direct influence on the prosecutor. If the police say, "We want this guy dead, we want him in jail for 20 years", the guy's going to be there 20 years. It doesn't involve justice any more.

WHAT DO YOU THINK YOU MIGHT HAVE GOTTEN HAD YOU TESTIFIED?

Well, they said two years tops, provincial time. I ended up getting seven.

WHAT WAS THE SITUATION? WOULD IT HAVE BEEN UNHEALTHY TO TESTIFY?

No, it wouldn't have been unheal~~thy~~ physically in this particular case but it would probably have been unhealthy for me mentally. I really didn't get off on the idea because they had nothing on this other man. They just wanted his body more than mine. Because they never knew me at all, never heard of me before. I was just a surprise attraction to them, you know. But they knew this other guy was carrying on illicit trafficking and they knew I was a very good friend of his. They picked him up on some little phoney-baloney charge and they came to me to try to get me to testify. "We're going to lock him up forever but we'll only give you a couple of years if you cooperate." (no. 68)

Other offenders found that refusing to cooperate by giving testimony against a co-accused could have unpleasant consequences. One informant was sentenced to eight years for armed robbery. He filed an appeal in the hope of having his sentence reduced.

Two weeks before I was taken to appear before the appeal court I was taken to the city police station. Once there I was told by two detectives that I was to appear at the preliminary hearing of two suspects on the same charge as me. I was told that I had to help convict these people or there would be no time cut for me. . . . The people charged were not in the robbery with me. When I told the magistrate what happened, the prosecutor said he expected me to make this type of allegation. The suspects were acquitted. Two weeks later I went to appeal court and got turned down for my time cut. (no. 104)

. . . . . .

The charge was armed robbery in 1969. I was charged along with two others and only one of us was convicted. He got seven years. The crown appealed and offered a deal to the one who was found guilty saying that if he would testify against the other two of us, he would not be hit with the bitch. He refused and got the bitch. (no. 94)

"The bitch", as it is fondly termed by offenders, refers to the

habitual offender legislation. In Canada, it carries with it a sentence of preventive detention which is an indeterminate, life-top sentence (See section 688 of the Canadian Criminal Code R.S.C. 1970, c. C-34).

The tactic of trading leniency for testimony is not always so unsuccessful. Some informants claimed that they were sold-out by their partners as a result of such a deal.

> My original charge was kidnapping. The deal took place right after the charge was made and took approximately three hours. It involved my partner in the crime and the RCMP. My partner negotiated because he felt that he could draw a minimum sentence by doing so and also because the RCMP officials were mostly after me and wanted my partner to turn over other information which would lead to further charges against me. As a result, my partner got off with a one-year sentence and I got five. Also, there were other charges that I faced after my partner put the finger on me. (no. 102)

In situations where the informant believes that he was sold-out by his partner and there is a large gap between the sentences given to himself and to his partner (presumably as a result of such cooperation with the authorities), bitterness about the criminal justice system in general and the disparate sentences in particular was a universal outcome. Just a cynacism about the criminal justice system may be a by-product of deceptive kickbacks which militates against the reformation of the offender, so, too, is the bitterness which comes from deals made for testimony against a co-accused.

It was alleged by three offenders that an inducement used by officials to obtain the testimony of a co-accused which led to their own convictions was a promise of early parole. In one case (no. 14) the deal was turned down and in two cases (no, 15 and no. 54)

the deal was alleged to have been satisfactorly completed.

> On this bit, it wasn't me that made the deal. It was a guy who was on the armed robbery with me. He made a deal for a suspended sentence -- to plead guilty to driving the car -- and he got two years less a day. So he said he wouldn't testify against me because the police really fucked him. So he wasn't going to testify until they promised him an early parole. And he got the parole for testifying.
>
> HOW LONG DID HE SERVE BEFORE BEING PAROLED?
>
> Thirty-seven days on a sentence of two-years less a day. (no. 15)

. . . . . .

> He traded three of us. They got me first and gave me the time so I testified under the Canada Evidence Act and screwed him 'cause the other two guys beat the beef, see. He copped a guilty in court thinking it didn't matter, right? He got a total of six years. But he's going out [on parole] next month -- he got six years in November [meaning that the person referred to served ten months of a six-year sentence before being paroled]. (no. 54)

A perceptual distortion is one thing; an obvious factual distortion is quite another. As a result of the author's own ignorance, these accounts were intitially dismissed on the grounds that they fell outside of the realm of the possible. The reason for this is found in Section 2. Subsection 1a, of the Parole Regulations:

> Where the sentence of imprisonment is not a sentence of imprisonment for life or a sentence of preventive detention, one-third of the term of imprisonment imposed or four years, whichever is the lesser, but in the case of imprisonment of two years or more . . . at least nine months [must be served before parole may be granted].

In other words, the individual referred to by informant no. 15 would not have been eligible for parole until he had served nine months of his sentence and, in the case involving informant no. 54, two years.

However, further investigation revealed that what was described was indeed possible. When one of the inmate research assistants was questioned about how something like this might occur, he replied,

> Parole by exception. I think the parole board works to this extent with the police: if they need evidence and the only way they can get it is by giving a convicted accomplice parole, they do it. There's been cases where it's happened. (no. 115)

Section 2 of the Parole Regulations provides the necessary loophole for a deal of this nature:

> 2. Notwithstanding subsection (1), where in the opinion of the Board special circumstances exist, the Board may grant parole to an inmate before he has served the portion of his sentence of imprisonment required under subsection (1) to have been served before a parole may be granted.

An acquaintance of the author's employed by the Parole Service also indicated that a deal of the nature described by informants no. 15 and no. 54 was plausible.

In conclusion, in this section we have seen that in cases involving multiple defendants and evidentiary problems, concessions may be offered in order to secure the testimony of one of the defendants against the other(s). In the view of offenders, such deals are to be regarded with disfavour -- one must sell out to get out.

D. Deals for Information

Deals offered by the police to offenders which involve less than full invocation of the criminal process in exchange for information leading to the arrest and conviction of other, more serious,

offenders were perceived as reflecting a standard police procedure which is used whenever it is suspected that the offender might possess information of value. Additionally, efforts to obtain information from offenders was alleged to occur even when a known offender was not facing criminal charges.

> If he [a policeman] can get an informer, more power to him -- you know, he's doing a better job. They see you and they come over and sit down and talk to you. In fact, if they're driving by your apartment or house, they'll drop in and drink your whiskey. I mean, you can't throw them out. But they just come to see what you'll tell them, what they can get out of you. (no. 72)
>
> . . . . . .
>
> . . . they always ask for information, you know. Sometimes they'll even stop you on the street, just to make you look bad, and ask you for information. (no. 7)

The police, observers of the police, and criminals generally accept the fact that it is necessary to have informers to control certain types of crime -- notably crimes of vice (especially narcotics) and burglary.[4] At the same time, the need for informers and the ability to offer concessions in order to obtain informers -- either on a protracted and systematic or on a "one-shot" basis -- is not a simple task. As previously noted, not a single offender who was interviewed admitted to acting as an informer. While it may be reasonable to assume that some of these offenders, at sometime or another, had given information to the police in exchange for concessions, we should note that there

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[4]See, for example, Chambliss, 1972:108; J. Goldstein, 1969:173; Gosling, 1959:19; Jackson, 1969:140; Lafave, 1965: 133 and 192; F. Miller, 1970:253; and, Skolnick, 1966:115.

is also a number of factors operating which outweigh the advantages which one might obtain through giving information to the authorities.

One factor is simply that of self-respect. In the words of one offender,

> Believe me, as rotten as an informer is to us, there's nobody -- the police, a squarejohn, nobody -- has any respect for an informer. (no. 72)

Skolnick's (1966:130-32) description of police efforts to dignify the character of their informers lends support to the notion that to act as an informer may entail a loss of self-respect.

Another factor which may prevent an offender from acting as an informer is that his information may implicate close friends or relatives. One of our informants was an East Indian who was the "local representative" of a family-controlled drug importation operation. While he, himself, was a "big fish" in the drug importation business, the business was controlled by even bigger fish -- members of his family who were residing in India. The Canadian authorities were understandably interested in obtaining information which would enable the Indian authorities to smash this operation. The informant (no. 30) claims that he was remanded in custody for eight months while the authorities (both the RCMP and the prosecutor) tried to induce him to provide information. He claims that he was continually interrogated by the RCMP and was, on two occasions, called into the prosecutor's office. He also claims that he was promised that if he would give the authorities the information which they desired, the charge against him would be dropped from importation of narcotics to possession for the

purpose of trafficking. When asked why he was remanded in custody for so long, he stated that,

> . . . they were not really interested in cop a plea [sic]. They were interested in me to give them information. The more I stayed [remanded in custody], the more my patience would break up, you know. And I wanted to get it over. I think their main purpose was to keep me waiting as long as possible. (no. 30)

He refused to give the authorities the information which they desired so as "not to harm my people back home." He was finally taken to court, convicted of the importation of narcotics, and was given a minimal seven-year sentence (and will be deported at the termination of this sentence).

Another reason for refusing to cooperate with the authorities by acting as an informer is that of the offender's assumptions about the unpleasant consequences of cooperating. Bluntly stated, the offender may believe that to act as an informer could mean his death, particularly if he is to inform on those involved in organized crime. This was the reason given by one informant for not cooperating with the police when he was told "to fly east and finger the source of the counterfeit money or get bitched" (no. 24). He indicated that while he could have done what the police were demanding in all probability, he was certain that to do so would mean his death. His account is an excellent one from the standpoint of indicating: 1) the pressure which the authorities will put on offenders when seeking information on major crimes and, 2) the lengths to which some offenders will go to avoid the consequences of not cooperating.

Perhaps one of the more interesting types of negotiations that took place was on the term I'm presently serving because it involved a long series of trials and a long series of manoeuverings on everybody's part. Initially Tom and I were charged with conspiracy -- we forged twenty dollar bills. The police followed us for months and finally they added conspiracy to our other charge. The police theory was that we could lead them to the source of the counterfeiting. Of course, the pressure they put on people in a situation like this is unbelievable. Like, as a matter or course, they threatened my wife and Tom's sister and threatened to charge us with the bitch if we didn't inform and all sorts of stuff, and it went on for a really protracted period. . . . . We got quite concerned about the whole thing, as we well should, because we believed that when the police threaten you with the bitch -- if this club is going to work, it's got to deal out the odd rap.

O.K., we're in an awkward position all around. I will say, to conclude Tom's part in it, fortunately for Tom, his father knew the MLA from _____, Mr. _____. And he was able to speak to the Attorney General and managed to stop the -- see, the Attorney General of the province has to sign the habitual papers, and he managed to stop that aspect of it. Unfortunately, my father did not know the member from _____.

It appeared that we had about three ways to go. We could either deal -- and this is, I think, the basis of most of our later problems with the police. We offered them the press plates and all the crap that was laying around the press -- there was a whole bunch of I.D. and stamps. They were printing a great deal of shit like this, see. Unfortunately, Ottawa was called into the situation. . . . They did not want the plates; they were not interested in the plates. They were interested in one of two other things: either bodies [that is, those behind the entire operation] or the negatives. If you have good negatives, you can make plates by the score. There isn't any problem at all. This wouldn't do, of course, so we decided to take other steps.

The whole thing got sort of surrealistic in the end. We had them make a set of master keys to the court house. We thought we had two avenues: like we'd either rob the exhibit room of the exhibits or, we could've -- which is something I think we should've done -- we could've bugged the judge's chamber 'cause the prosecutor is always running in there and making all kinds of weird representations, as we all full well know.

Turned out anyway, we robbed the exhibit room, went to trial, and beat the beef. However, by this time they'd accumulated so many crappy charges, we could hardly breathe. And, one of the crappy charges I'd accumulated was I was

> set-up in a parking lot and charged with possession of some meter keys and so on, and here I sit today, of course [serving a sentence of preventive detention as an habitual offender]. But this is again a negotiation, let's say, that I think the course of wisdom tells me now, that we should have never offered to impress. It was too big. This now totally convinced them that we could tell them the source of the money. It's unfortunate as hell that we're not as wise at the time. We couldn't see them not going for what we offered. After all, the plates and a room full of money -- it's just crap, after all, but still it is counterfeit money. And I think we could've made a sub-inspector out of just any plain old sergeant, you know. But counterfeit money, I'm told, destroys the economy of the country. In fact, the static involved in the whole thing is even worse, I think, than when you're dealing in heroin. Incidentally, both our roles, as the police are well aware, were quite marginal. It's quite simply that we had access to too much information for our own good. (no. 24)

In conclusion, while deals involving attractive concessions or threatening unattractive penalties may be offered by the authorities in return for information which is considered to be important in controlling crime, the offender may perceive such factors as his self-respect, the protection of loved ones, and his physical safety as outweighing any benefits he might receive through cooperating with the authorities.

E. Deceptive Deals for Information

As in the case of the kickback, the benefits accrued by the authorities as a result of a deal for information may be more apparent than real -- they may end up receiving bad, fictitious, or simply no information.

> Belief in the informer's evidence, faith in the efficacy of under cover operations, and the weakness of outside criticism and control can sometimes produce absurd results. (Wilensky, 1967:135).

As Kooken, a former police official, has noted:

> In most instances the motive of informers are purely mercenary, and their veracity generally is so unreliable that their information is of questionable value (Kooken, 1947:174).

When an offender is able to delude the authorities into believing that they are getting worthwhile information, the offender may end up with a good deal -- one which does not carry with it the unpleasant consequences of being labelled an informer.

Maxwell describes how 12 participants in a gigantic fraud operation conned the authorities:

> "This is the insane part of it," an acquaintance of the swindlers says. "They are spewing out anything they can think of. One of them has been giving imaginary deals to the government because he thought they sounded interesting and could be done. So he put people's names in and gave it to the government and the government said 'wow.'"
>
> "They [the crooks] got the message real fast," the acquaintance continues, "that the more they gave the Justice Department, the better deal they could make. The Justice Department was conned into thinking that they could turn in every known paper criminal in the world. So they [the Justice Department] would do anything for them [the crooks]" (Maxwell, 1973:24).

Different, but equally absurd, cases in which offenders agreed to give information to the authorities were described by two of our informants. In one case, the informant was stopped by the police and was found to have a quantity of drugs in his possession. He was told that if he would supply them with information as to the source of the drugs, he would not be charged.

> And I said, "Well, I don't know the guys by name."
>
> And they said, "Well, can you tell us, can you find out?"
>
> I said, "Yes."
>
> They said, "Well, we'll give you two hours." And they gave me this car and they said, "We'll be watching you."

> And they let me out, and I hopped in this car and took off back to _____ [a city 1,000 miles away] and I haven't been back to _____ [where I was arrested] since. (no. 17)

In another case, the informant described a deal for information (which included kicking back stolen money orders) which took two months to negotiate. This account was first turned over to the author in writing and was later discussed in some detail in the author's home after the informant was paroled.[5]

> I was arrested in _____, early 1969, for: 1) possession of a sawed-off shotgun; 2) stolen goods under $50 (blank cheques, credit cards, etc.); 3) forgery instruments; 4) possession for the purpose [of trafficking] (six caps of heroin -- I am a known non-user); 5) 59 counts of forgery and false pretences; 6) conspiracy to utter forged documents; and, 7) two counts of B & E.
>
> I was arrested after a routine car check. Hard evidence for charges one through four was found in the car. The others, arising from follow-up investigations, were used for bargaining. All bargaining was conducted between myself and the chief of the _____ Police Department Fraud Squad, an RCMP corporal from _____, and two RCMP sergeants who came in from _____ to _____. The following transpired: It was agreed that I would plead guilty to the 59 cheque charges, but only after being sentenced for charges one and two, both of which are summary [conviction] offences. In order to facilitate this, the cheque charges had to be waived in from various parts of the country so that they could be processed at one court sitting.
>
> Because the co-charged could beat one and two, we pleaded not guilty to these and took the case to Assize court. The cheque charges stayed in magistrate's court. The co-charged was acquitted of one and two. I was found guilty and, as per arrangement, given the maximum two years. (Part of this complex arrangement was the dropping of other possible charges against the co-accused. The co-accused was not involved in the negotiations.
>
> For the 59 cheque charges I was given two years concurrent a week after the first sentencing. I was

[5]The author was the informant's parole sponsor.

found not guilty of the two B & E charges. All the other charges were dropped as per arrangements.

There were some side issues in the above. The police sought the name of a person who was responsible for several vault entries (from which the cheques were obtained as well as nearly $500,000 in negotiable securities). I promised the name when all court proceedings were over, when the appeal period had expired, and when I was finally paroled. I got the parole; they didn't get the name. I do not believe the parole board was involved. The police merely provided an excellent report and the two years was my first penitentiary bit. Another side issue: I'd promised to return $40,000 (approximately) in post office money orders (at the time of my arrest there were several in my possession). These were never returned.

Also, as part of the bargain in this case, I was formally warned that I was eligible for habitual criminal proceedings.

On only one occasion when arrested have I not been involved in a deal or trade-off with the justice people at some level. (no. 92)

The foregoing accounts serve as testimony to the need that the authorities have for information in order to achieve the goals of crime prevention and law enforcement. They also testify to the power which offenders who possess significant information may have in striking a favourable bargain with these same authorities. As we have seen, however, a bargain for information seldom, if ever, appears to be an equitable arrangement. The authorities may suffer the embarassment of having entered into an unprofitable arrangement or the offender, if he accepts the deal, may suffer from one or more unpleasant consequences.

F. The Set-Up

A set-up has been defined as an arrangement "for an arrest usually at a time when the person apprehended will be in possession of incriminating evidence" (California, Board of Corrections, 1962:20).

The set-up may be viewed as a logical extension of the informer system. Rather than simply give information to the authorities on the activities of a particular offender, the individual is expected to actively participate in an offence in a way that insures the arrest of the authorities' target. This may include inticing the offender to participate in a criminal act. Although the practice may be viewed as reprehensible, it is a certain means of obtaining enough evidence to result in the conviction of a particularly troublesome offender.

The set-up may be viewed as a response to a dilemma sometimes faced by the police when they know that a person is systematically involved in the commission of criminal acts but do not have enough evidence to warrant a charge, let alone a conviction. As Wilensky (1967:134) has noted,

> . . . the overcriminalization of the substantive law encourages abuses in the detection of crime. . . . Without a complainant the police are under pressure to seek out, if not provoke, the crime.

The easiest way to insure that an offender is convicted and incapacitated is to create a situation in which he will engage in a criminal act while under the active surveillance of the police.

Most of our recidivist informants, while understandably unhappy about the set-up, accepted it as a hazard which one must face if one is to become systematically involved in crime. While none admitted to having been involved in setting someone up, they readily discussed cases where they believed that they had been set-up as well as cases where the perceived that they were offered deals which would involve setting someone up. The set-up is

viewed by offenders as a deal in that it involves an exchange transaction with the authorities. The techniques which were described for obtaining the cooperation needed for a set-up were directly analogous to the techniques used to obtain information.

> Maybe the pressure's been put on him by the police department to set me up. They'll tell him, "Well, we've got you for this or that, now you set this guy up and we'll let you go (Chambliss, 1972:26).

This description of Chambliss' thief of the set-up as a deal (in that it involves the element of exchange) parallels the experiences of our informants who claimed that they were offered concessions if they would set someone up.

> Again it was cheques and I was in on it and there were three of us involved. They approached us up in _____ and said that they would let us out on bail, a very low bail, to set up another fellow. There was another fellow and I who were offered this. If we would go out on this low bail and set up a fellow that we all knew and have him lay down some money orders and stuff which they knew he had, they would catch him and have him -- they wanted him pretty bad -- and they would give us six months in any institution in _____ we wanted to go to. When we told them that we wouldn't do this, they said, "That's fine. Then you both realize that you'll be charged as habitual criminals." And we still didn't go along with it. Fortunately, by the time we went through the courts, we both came up with two years on that charge. (no. 41)
>
> . . . . . .
>
> Bodies -- they always want that. When I was out on the street, which has been seldom lately, they'd come up to me -- even on this last charge they wanted me to give them bodies but. . . . I might as well tell the whole story the way it happened. I got out on parole and I got picked up on this possession of an offensive weapon [charge]. They let me go the next day. And the _____ [out of town] police came to see me, RCMP, and he said, "You give us some bodies and we'll forget about the charge." So I played it cool. I said, "Look, give me a couple of weeks

> to think about it." So a couple of days later I was gone -- flew the coop and went down East. . . . They always approach you and tell you that, "If you cooperate with us, we'll cooperate with you." (no. 86)
>
> . . . . . .
>
> I don't think I've ever been involved in anything that you'd call a deal other than the detective in _____ that used to keep count of my scores and let me know at the time when the police were going to start looking for me. And, when I was being charged as an habitual criminal I could have made a deal but I thought my life was more important to me than the deal was. The deal was that if I set some guys up, they wouldn't bitch me. It involved cheques and stuff. But I figured it wasn't worth it; I'd rather take my chances on the habitual thing. (no. 48)

As we can see from the above cases, the technique used to induce someone to engage in a set-up is similar to the technique used to encourage one to act as an informer. In addition, the motivation for refusing to cooperate is similar to the motivation behind refusing to cooperate with the authorities in deals for information.

Seven informants believed that they were the victims of a set-up. One informant (no. 73) was convinced that while he and his brother were remanded in custody on a safecracking charge (of which they were later acquitted) that a person was placed in their cell for the express purpose of eventually setting them up.

> We figured the guy was alright. So, we went stealing with this guy and we went to a place in _____. It was a drug store jag -- going to take the safe there, kick it in. And somewhere along the line this guy got to a phone and called the mounties. The mounties were following us and just before _____ [a largecity approximately 50 miles from the one where the drug store was entered] they stopped us. See, we went into the place, the can was open, so we left. We were aware that we were being followed so we tried to duck them. And they put the hammer on me and my brother -- we got two years. And you know something? That other guy did't even show up in court! (no. 73)

Another informant was reasonably certain that his arrest and conviction came about as a result of a set-up:

> From what I was told -- not just by the pigs, but by a couple of friends and my lawyer -- it was a set-up. See, there was a drug store. I was to go in the back door -- the door was to be left open. So, I went in the back door of the drug store. And behind the drug store is an optical centre which was closed. So I'm wheeling out of the drug store and a fucking four pigs come out with their guns out, right out of the optical centre. Sort of sounds like a set-up, doesn't it? (no. 49)

Three informants were certain that their convictions (and, in one case, the death of the informant's brother) came as the result of a set-up. All three alleged that the set-ups occured in a large metropolitan area at a time when bank robberies in that area had reached epidemic proportions. One of the three informants viewed the set-up as the most efficient way to prevent this type of crime:

> This is their way of stopping armed robberies. They can't stop them by somebody taking away machine guns or money, but they can stop them by getting somebody to kick back a body. This certainly stops that person from committing a crime. (no. 115)

One of these informants describes his experience as follows:

> They went so far as to have a guy invite me on a score, take me into the bank. You know, he robbed the bank with me. Like, I mean, he could have gotten shot just like me 'cause we all had balaclavas on, and how would they know who is who? But that's how far they went to get me. The guy came and asked me. He says, "Come on. I got a bank lined up." I mean, if he don't ask me to go in a bank, I don't go in a bank.
>
> ARE YOU SURE YOU WERE SET UP?
>
> Oh, yeah, I'm positive. It was even in the papers. The guy got a thousand dollars which ain't too much. Like I never thought they'd go to so much trouble for one meazly guy. . . . (no. 11)

In conclusion, the informant who stated that the set-up ". . . certainly stops that person from committing a crime" (no. 115) was correct, but only partially. Legal and moral issues aside, the set-up is an efficient short-term measure which may be used to incapacitate an especially troublesome offender for the duration of his sentence. However, in the long run, the achievement of the goals of crime prevention and crime control may be illusory. One informant who had been set-up (some three years after his conviction the press reported that the authorities said that two unidentified individuals had been paid to do this) was so bitter and vengeful that it seems likely that, upon the informant's release from prison, either the informant or those who he believes set him up will be killed.[6] If situations are created where offenders firmly believe that they have been set-up and if such a belief makes the offender vengeful, then it may be questionable that the ends justify the means.

G. Summary

Information is the lifeblood of any police department. The best single source of information on criminals and criminal activities is from criminals themselves. In order to obtain the

[6]The ethical dilemma for the researcher who is given confidential information from an informant which leads him to such a conclusion is obvious. However, in this particular case, it was not a dilemma which the researcher had to resolve for both the paroling authorities and the authorities in the jurisdiction where the informant had been set up and convicted were aware of the informant's attitude.

information which is needed to obtain convictions and prevent crime, the authorities may offer concessions to offenders in the hope that they may provide information which may be used to achieve these ends. We have seen that in the attempt to achieve these goals, concessions may be offered for straight information, for testimony against a co-accused, or, in its most extreme form, for setting up a known offender.

While many, if not most, experienced offenders accept the practice of offering such a deal as routine, they express serious reservations about cooperating with the authorities on such a basis. These reservations can be best summarized by offenders themselves:

> I like my body in one piece. I've seen it happen too often [known informers getting killed]. It really gets rank, you know -- they get out of hand. (no. 90)
>
> . . . . . .
>
> And I said, "Lock, I'll make a deal with anybody -- I'll make any kind of an agreement or a deal -- but it's going to be on my terms." I'm not going to make it on their terms because they'll bury you. Some of these informers out on the coast probably got the same sort of deal put to them and they took it. Then they get flung in on another beef and they say, "Now look, now we want something bigger." Now these guys are in so deep that they don't dare go to jail because they aren't going to come out alive. So what can these damn poor fools do? It's blackmail; it's a form of blackmail. And you can't avoid it. But, also, you can't blame the police either. It's not immoral as far as they are concerned -- they're doing their job. You can't say that that they're being unethical or immoral in doing this, can you? But what do you have to do to stay on the street? You say, "O.K., yeah, what do you want me to do?" They'd have supported me and had me running around town associating with all the thieves in town. And I've been around long enough that I'm known. They'd have trusted me. And then pimp these people! This can't be done. It may be legal but it's immoral! People could

> justify it, people that do this sort of thing. They get away with it for awhile but, eventually, they're going to get a bullet in their head. They've got to get it. (no. 72)

While our informants readily classified concessions for information as deals, none indicated that to cooperate with the authorities under such conditions was advantageous. The immediate benefits which could be obtained through such a deal were viewed as being outweighed by what were perceived to be the eventual consequences (both in terms of physical and mental health) of such a form of cooperation.

CHAPTER FIVE

DEALS FOR EFFICIENCY:

KEEPING THE WHEELS OILED

> This attitude of enforcement officials [which leads to the compromise of criminal cases] is aggravated by the tremendous increase of their work which has been caused by this prolific creation of new crimes. Inadequate staffs, inadequate equipment, lack of consecutive administrative guidance even in local units, and lack of unified direction and operation as between local units, have made it impossible to cope successfully with the professional banditry of this scientific age.
>
> -- J. Miller, 1927:19

A. Introduction

In some jurisdictions, law enforcement officials are under tremendous pressure to expedite a large number of criminal cases. It has been alleged by some that without the guilty, the system of criminal justice in some jurisdictions would simply collapse. J. Mills quotes a New York City public defender who spends most of his working hours negotiating for pleas of guilty in exchange for lenient sentences:

> Today defendants are telling the judges what sentences they'll take. I had a guy the other day who told me he knew the system was congested and that they needed guilty pleas, and he was willing to help by pleading guilty for eight months. The guilty are getting great breaks, but the innocent are put under tremendous pressure to take a

> plea and get out. The innocent suffer and the community suffers.
>
> If the defendants really get together, they've got the system by the balls. If they all decide to plead not guilty, and keep on pleading not guilty, then what will happen? . . . They have the power, and when they find out, you're in trouble (J. Mills, 1971:63).

It almost goes without saying that the most efficient means of processing a large number of offenders (thus keeping the system fluid and intact) is to encourage defendants to plead guilty by making charge and sentence concessions. It is this practice that has been the focus of most of the literature on negotiated justice. It differs from deals involving a kickback or information in that it is not directly related to the higher goal of crime prevention. However, it may serve this goal indirectly in that it may prevent the collapse of the criminal justice system and, in doing so, may be seen as aiding in the preservation of the social order. This assumes that the practice itself does not undermine the very integrity of the institution which it supposedly preserves.

While the congestion which is said to exist in some courts in the United States may not be indicative of the situation in Canada, there is some reason to believe that at least some Canadian courts are under similar pressure (see, for example, Ryan, 1965: 158-65; Friedland, 1965:89; and, Hogarth, 1971a:270). For example, a prosecutor in one metropolitan area, in commenting on the case load in his jurisdiction, stated that:

> "As a result [of this case load] . . . . the prosecutor finds he must deal on things" to ease the load.
>
> The prosecutor recognizes this "plea bargaining" is built into the Canadian system of justice but adds that the case load results in "a psychological pressure to

> process these people like sardines" (Edmonton Journal, April 18, 1973:75).

The extent to which the case load pressure in Canadian courts is analogous to the pressure found in some United States courts (see President's Commission on Law Enforcement and Administration of Justice, 1967b:127-28) is still, however, an open question.

The expediting of cases by means of a system of negotiated guilty pleas may be important to all the participants in the criminal justice system. For the police, such a system will mean a decrease in the amount of time which they must spend in court (often on their off-duty hours) and, in some instances, a decrease in the amount of time spent in obtaining the evidence which is necessary for a conviction. For the offender, a negotiated plea of guilty may mean a lesser sentence and a decrease in the amount of time spent remanded in custody while awaiting trial. The judge, prosecutor, and defence lawyer are freed from the amount of time involved in going to trial, they are free to devote their time to what they consider to be more important cases, and they do not have to cope with the uncertainty which is inherent in the adversarial solution to the determination of guilt or innocence.

Case load pressures aside, there are other reasons for resorting to a system of negotiated pleas of guilt. The appearance of efficiency may be just as important as actual efficiency. Thompson notes that:

> Under norms of rationality, complex organizations are most alert to and emphasize scoring well on those criteria which are most visible to important task-environment elements (Thompson, 1967:90).

For the police, the "clearance rate" is generally used as a measure of efficiency and effectiveness for the organization (Wilson, 1962: 112 and Comment, Yale Law Journal, 1967:1595). A commonly used measure of efficiency for the prosecutor is his conviction rate. If a prosecutor loses too many cases, serious questions may arise regarding his competency. Such items are more easily measured than are such items as crime prevention and justice and, as we shall see, may sometimes have very little to do with these goals. As Etzioni has pointed out, when organizations are under pressure to be rational and to measure and demonstrate their efficiency, the situation

> . . . tends to encourage over-production of highly measurable items and neglect of the less measurable ones. The distortion consequences of over-measuring are larger when it is impossible or impractical to quantify the more central, substantive output of an organization, and when at the same time some exterior aspects of the product, which are superficially related to its substance are readily measurable (Etzioni, 1964:9-10).

In other words, an increase in the appearance of efficiency in terms of easily measured items may, in fact, imply a decrease in the efficiency of the organization in its attempts to achieve its real but unmeasured goals.

In this chapter we shall look at how offenders act and are acted upon in the system of negotiated justice when efficiency is the prime mover of the system. We shall look at descriptions of deals which have actually promoted efficiency, deals which are designed to give the appearance of efficiency, and deals which come about as a result of evidentiary problems.

B. Deals for Efficiency

1. The convergence of rationales: In looking at offender perceptions of the bargaining process, one is struck by the convergence which exists among the views of academics, officials, and offenders as to the importance of making deals which are related to the actual or apparent promotion of efficiency in the criminal justice system. Given the role of the offender in the bargaining process, this convergence is surprising. One would not expect him to perceive as readily the importance of internal demands for efficiency as he would the far more tangible demands which are related to crime prevention and which may result in deals involving a kickback or acting as an informer. Let us first look at the convergence among these rationales, for such convergence lends credence to our examination of offenders' preceptions of efficiency deals.[1]

There are numerous pressures placed upon prosecutors to resort to an expedient, non-adversarial solution in order to resolve criminal cases. As Chambliss and Siedman note:

> . . . there are heavy institutional pressures on the prosecutor to obtain guilty pleas. His own office is, at least in urban centres, invariably overworked. Trials are arduous. They require that witnesses be interviewed and their statements taken, the law researched, motions drawn and filed, and perhaps an appeal briefed and argued. To the overworked prosecutor, a short hearing on plea and sentence is a welcome respite (Chambliss and Siedman, 1971: 401-402).

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[1] Polya (1954:Vol. II, Chapt. XII) maintains that a basic pattern of plausible inference is that consistency validates.

This view is shared by a senior prosecutor who states:

> There is no doubt that criminal cases do get settled. It goes on all the time. If we fought every case on our list we'd be twenty thousand cases behind. As the case load gets higher and higher there is more and more pressure to settle cases (Grosman, 1969:32).

Offenders see much the same rationale behind deals which promote efficiency. One informant faced a number of charges of auto theft and possession of stolen property. He accepted a deal whereby if he were to plead guilty to one charge of auto theft and one charge of possession of stolen property, all other charges would be dropped. He perceived the rationale for the deal in the following manner:

> WHY DO YOU THINK THEY DID IT?
>
> Well, it makes it easier, you know. It's like if I was a bureaucrat, I'd want to cut all my work and time in half. I guess it just makes it easier for them.
>
> DO YOU THINK THEY HAD A PRETTY GOOD CASE?
>
> Yeah, they did. Let's face it. I was guilty of them all, so let's face it. So I made a good deal there. (no. 74)

Another informant expressed a similar view when he offered the following opinion:

> See, it keeps their cases from piling up for months and months. Without deals we'd have to sit in those provincial jails [remanded in custody while awaiting trial] six months or a year or whatever until our case was heard. See, like both of us here are in the same kind of situation for the same kind of beef. And I'd be doing twenty years for sure, maybe twenty-five, if it wasn't for plea negotiation. I'm doing eleven, so that's darn near half. (no. 21)

The offender who is in a position to demand a jury trial is often in a good bargaining position, for a jury trial is generally

more costly and time consuming that a trial by judge alone.[2] According to Newman,

> There is such a general desire to avoid trial that, as one prosecutor said, "All any lawyer has to do to get a reduced charge is to request a jury trial. (Newman, 1966:74).

One informant was charged with non-capital murder. This meant that, under the Canadian Criminal Code, he was entitled to a trial by judge and jury. He clearly believed that efficiency was the primary factor in having the charge reduced to manslaughter.

> And the murder beef -- I think we were sunk on the murder beef, so we come out ahead on that one. They didn't have to drop it to manslaughter but I guess it was just easier for them. (no. 43)

In another case, an informant who was charged with a drug offence which gave him the right to elect trial by judge and jury used this right as a bargaining lever.

> I held out for a judge and jury trial and we made a deal where I would plead guilty in magistrate's court. They gave me three months and they dropped the jail break [charge] to escape from lawful custody. (no. 5)

This concern with efficiency is not restricted to the activities of the prosecutor's office. Offenders and academics have noted that the police, too, are concerned about efficiency. According to Blumberg, there are two aspects of this concern of the police with efficiently expediting criminal cases:

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[2] In Canada, the option of a trial by judge and jury is limited to what are construed to be the more serious indictable offences (see Salhany, 1972:5-8). In the United States, in contrast, an accused who is charged with either a felony or a misdemeanor may elect to be tried by a judge and jury.

> To police administrations, a plea of guilty is a welcome addition to the statistical evidence of their effectiveness, for they correlate a favourable public image and a high conviction rate. Equally important is the fact that valuable police time that would be spent in trial testimony is freed for other activities (Blumberg, 1967: 64).

Both Manning (1971:168) and Chambliss and Siedman (1971:402) have expressed a similar view regarding the attitude of the police toward a plea of guilty. Some of our informants went a step further and suggested (not totally tongue-in-cheek) that without the guilty plea, the police would have to investigate the crime.

> It's really a routine operation. They charge you and if you don't cop out, then they investigate the crime. (no. 24)

Some of our informants commented on the concern of the police with efficiency.

> See, now if the police don't solve a case, they've got an open case and it stays open. This is the way I figure it anyway. I mean, they don't get marks or anything like that if they convict somebody but it is an open case and they've got to keep going after it. (no. 7)
>
> . . . . . .
>
> And their books are cluttered up and backlogged and, and possibly, they just want a conviction. (no. 91)
>
> . . . . . .
>
> . . . we got down to seven years. I wouldn't accept. Finally he [my lawyer] went to the police. The police said they just wanted to get the hell out of that courtroom. They didn't care how much time I got. They just didn't want nothing to do with me anymore. So, consequently, the prosecutor went down to six years. I said, "No, I'd rather go through with the trial and take my chances." Finally my lawyer went back to the prosecutor with the detective and the detective told him, "Give him what he wants and let us get the hell out of here too." So he [my lawyer] says, "Look, the police don't even care. What do you care about six months?" And the prosecutor says, "Ah, the hell with it. Fine. Five and a half years." Then we went into chambers with the judge and the prosecutor. . . . . (no. 2)

The foregoing suggests that offenders do perceive efficiency as a significant factor which serves as the underlying rationale for some negotiated pleas of guilty. This understanding permits us to engage in a more detailed examination of deals which are primarily aimed at improving the efficiency of the criminal justice system.

2. Efficiency in reality: There are a number of overlapping factors which place pressure on those in the criminal justice system to negotiate with offenders so as to conserve limited resources. A jury trial, a trial where a large number of witnesses must be called, or a trial which involves a defendant who has been charged with a large number of offences are both time consuming and uncertain. Time consuming trials not only prevent court functionaries from having the time needed to process other offenders, they also serve as a burden to the police. Making appearances in court only to have a case continued to a later date undoubtedly detract from the performance of other essential duties of the police. Lengthy trials are also costly trials and the cost may not end with the conviction of the offender. The offender who is found guilty may launch a series of appeals in respect to his conviction.[3]

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[3]An offender who has entered a plea of guilty may appeal his sentence. However, the time and expense involved in an appeal against sentence is generally less than that involved in an appeal against conviction. The primary reason for this is that an appeal against sentence will not extend beyond a provincial court of appeal. In addition, knowledge that the crown may also appeal sentence (with the possibility of the sentence being increased) may disuade some offenders from launching such an appeal.

Among our informants we found that deals for efficiency may be offered by the authorities under two conditions. One condition is when it is recognized by the authorities without any action on the part of the accused that to go to trial will mean inefficiency. In such a case the offender is the passive beneficiary of the deal. This most often appears to be the case when an offender has been charged with multiple offences. Since concurrent sentencing is generally the rule, it is unlikely that convictions on the less serious offences will result in an appreciably longer sentence. From the point of view which sees the conviction and sentencing process as essentially punitive, the time spent in obtaining convictions on these offences is time wasted.

> On this beef I'm on now, I made a deal with the police that -- like I was only charged with one B & E originally. And they came up with some more that would have taken a long court trial. So they made a deal with me that if I copped out to the rest of these beefs, they'd get me off on a light sentence. And I got charged in the normal process of the court.
>
> DID THEY HAVE ENOUGH EVIDENCE FOR CONVICTIONS ON THOSE OTHER BEEFS?
>
> They had me. They even had some merchandise. They had me on three or four more besides the one which I was charged with originally. I'd already done time prior to this for B & E's so I figured I'm just not going to get it. But they assured me that I'd get a light sentence and I copped out to the police. So I only got 18 months.
>
> FOR FOUR B & E'S?
>
> No. For 19. (no. 4)
>
> . . . . . .
>
> Well, the first deal I was in on, there were six of us involved and there were 85 or 90 B & E's. Rather than

> each of us copping out to all of them, we made a deal with them to just split them up between us so we each got charged with the minimum amount. (no. 4)

Another informant was arrested for a series of armed robberies and claimed that he made a deal with the police who came to transport him back to the jurisdiction where the robberies had taken place. He clearly saw efficiency as the primary factor in obtaining a deal which he perceived as being beneficial.

> Well, I started the deal in _____. I was picked up in _____ and the city police from _____ [a city 800 miles away where he had committed the armed robberies] were there and we made the deal with them. And then we were brought to _____ and we talked to the prosecutor there and he, in turn, talked to the judge. And everything was O.K. We negotiated so to speak. We wanted less time and we got less time and got it over fast. That's it, you know. Seems like it avoids a lot of hassle. And it avoids us getting more time than we did. (no. 21)

Another condition under which an offender may be the recipient of a deal which is made for the sake of efficiency exists when the offender, by his actions, promotes inefficiency in the system. As a result of demanding a trial on a number of charges or demanding a jury trial, the offender may create enough pressure on the system that an acceptable deal can be negotiated.[4]

> Initially I was charged with -- I was suspected of ten or fifteen armed robberies. I fell on a break and enter charge and I didn't really have too much going for me. In at least two armed robberies it appeared that the evidence would be enough [for a conviction] based on the preliminary hearing. So, about all my lawyer advised me to do -- and it turned out to be quite good advice -- was to ask for a judge and jury on all the charges, much to the prosecutor's dismay. Now, this negotiation didn't

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[4]However, such a tactic may backfire. See pages 153-55.

> really take place until we got to Supreme Court where, rather than have a series of lengthy jury trials on all the armed robberies, the prosecutor agreed to a concurrent five-year term which certainly didn't give the police any satisfaction 'cause they'd insisted I get nine or ten. But, nevertheless, to keep the machinery of the law going as it were, they did concede to it. . . . I should perhaps add that while I was involved in lower court, the police themselves offered me half a dozen times first a nine-year term, then a seven-year term. Seven was as low as it ever got. I fortunately didn't take it and it did work out quite well. The role of the judge was this: his son had gone to law school with _____ who was my attorney at the time. It meant that when he told the crown prosecutor that he would give me a concurrent five-year term, I believed him. I was very reluctant to plead guilty. I was afraid, naturally, of getting double crossed. But it did work out. (no. 24)

The threat of going to trial need not be as direct as it was in the preceding case. Such a threat may be implicit in the type of deal which the offender tells the authorities he wishes to make.

> I got arrested in _____ for cheques and a gun and was taken to _____ [a city where the offences took place] and I made a deal with the detective in charge. I told him that I would cop a guilty plea that morning or the next afternoon if they would give me no more than a year and I have an extensive record. And he said he'd think about it and ten minutes later he called me into the judge's chambers. I got a year. There was no court or anything.
>
> WAS THERE ANY DISCUSSION WITH THE JUDGE IN YOUR PRESENCE ABOUT THE AMOUNT OF TIME YOU WOULD GET?
>
> No, not in my presence. But it was obvious that such a discussion had taken place because the whole procedure where the judge asks you how you elect, how you plead -- there was no such thing. He said one year and that was that. (no. 91)

The prosecutor is not the only person involved in the disposition of a criminal case who is concerned about efficiency. The police may also be concerned with whether an offender goes to

trial. The entering of a plea of guilty by the offender means a sudden and certain conviction. It serves as testimony to the effectiveness of the police and removes from the consideration of the court questions related to the propriety of police actions in dealing with the offender.

The negotiated plea may also save the police time. An accused may be remanded on may occasions and over a protracted period of time. Each time the case comes before the court, the crown must be prepared to go to trial. This means that witnesses must be present. In such a situation police officers who are expected to give testimony may have to make many unproductive appearances in court. This, of course, detracts from the other duties of the police. Also, it may mean that the police will have to make appearances during their off-duty hours. In some jurisdictions the police are not remunerated for these off-duty appearances in court.

An offender may create a bargaining position for himself if, through a series of remands, he can wear down the police witnesses enough that, in the name of efficiency, they simply want "to get it over with." The accounts given to us by our informants indicate that this tactic may be effective when the offender has already been convicted and sentenced on a serious offence and is fighting some less serious charges. In such a situation neither side -- the police nor the offender -- makes important concessions in absolute terms. In respect to time served, the remands mean little to the offender, for while he is being remanded in custody,

he is serving his sentence on the primary offence. Additionally, it is generally recognized that conviction through a trial or conviction through a deal will make little difference, if any, in the total amount of time which the offender will serve since the norm is that he will be given a sentence(s) which will run concurrent to his sentence on the primary offence.

> I was charged with armed robbery and three charges of possession of unregistered firearms. I was convicted of the armed robbery and got a sentence of five years. And going to court each month [fighting the charges of possession of unregistered firearms], I found that this man, this Corporal _____ of the RCMP did not like wasting half a day off duty and got quite upset when you even mentioned it to him. "I'll bring you to court every so often to fight the charges." So, finally, my old lady said, "Why don't you make a deal with him?" And I said, "Sure", never thinking he would. The next time I went to court, he hauled me into his office and he said, "If you will plead guilty to one charge of possession of stolen goods, namely three semi-automatic pistols, we'll drop the other three charges." I didn't like the way it was going so I just said no and argued with him. About 15 minutes later when my lawyer appeared it became clear to me. I never knew he was talking in terms of possession of unregistered firearms and he didn't want to increase the charge to possession of stolen weapons. And my lawyer informed me that on one charge, due to the fact that my two accomplices had pleaded guilty to it, I knew or ought to have known that it was stolen, and they would convict me of that. So I told him that if Corporal _____ would agree to one charge of possession of three unregistered weapons, I would plead guilty to it. He agreed. No sentence or nothing was involved in the deal -- just copping the plea. I went to court and pleaded guilty to the charge and was sentenced to six months concurrent to the term I was serving for the armed robbery. (no. 23)

In another case, the fact that the informant was a first offender at the time, in conjunction with the delaying tactic, probably had an impact on his making what he perceived to be a very favourable deal.

I was charged with robbery with violence and I was remanded for five months. No bail. When they did finally set bail it was five thousand cash. I kept pleading not guilty and finally the cops were making deals. I copped out to theft under and I got two months. That was my first beef. (no. 49)

A rather amusing case involved a war of attrition between an accused and the police. It took place prior to the time that a charge was formally laid.

The other case that I have knowledge of was when I was originally sentenced to the 15 year term. For security reasons, I was being confined in a segregation cell, of which there were two in a Mounted Police station. The narcotics squad detectives grabbed a fellow coming off the plane from Vancouver and he was locked up in the other cell. We are side by side with one of these two detectives sitting in front of us 24 hours a day.

Coming off the plane he spotted these detectives. He had a parcel with ten caps of heroin inside of a balloon and he swallowed it so they're waiting for him to pass it. They're going to charge him with possession for the purpose of trafficking. He's toughing it out like a champ. And there was some discussion about, "Well, you know, maybe we can make some kind of arrangement -- get this over with." 'Cause they're sitting there days on end and getting a little fed up 'cause somebody's got to sit there 24 hours a day with this guy. All the plumbing facilities are shut off and they're waiting for the passing of this balloon containing the heroin.

So the accused, a young chap, said, "Well, look, if I can get my lawyer down here maybe we can come to some kind of an arrangement to dispose of this rather sudden like to the satisfaction of everybody."

"Alright, we'll get the lawyer down here." So the lawyer was brought down and the detective and this accused fellow were all there and I'm in the cell right next to them where I can hear all of this.

He said, "In exchange for a guaranteed maximum of a three-year sentence for simple possession -- forget about the trafficking that you were going to charge me with -- I'll take whatever is required to pass this, mineral oil or whatever, and we'll go to court, plead guilty, get my time, and we'll all bugger off and everybody'll be happy."

This was arranged through the lawyer, the accused, and this particular narcotics detective. The final result was that he was charged with simple possession and was given a three-year sentence as a result of the arrangements. As I

> say, it is hearsay but I was a party right next door and could hear all of this and knew all of the principals involved. (no. 38)

The efficient utilization of financial resources is not an irrelevant consideration to those in the criminal justice system. As one prosecutor has noted:

> It may be that a plea of guilty to the lesser offence will result in the same punishment. If the end result will be the same, there is no point in going to trial with all the attendant expense to the state and to the witnesses (Worgan and Paulsen, 1961:52-3).

Similarly, Miller sees cost as a factor in negotiating a plea.

> It is clear that the common practice of making concessions to a suspect in exchange for a plea of guilty will reduce the cost to the system by obviating a formal trial on the question of guilt (F. Miller, 1970:191).

Some of our informants believed that the cost of going to trial was the basis for their having been able to make a deal. One informant, in describing a deal in which he was involved and which was made prior to the time of his preliminary hearing, believed that he was offered a deal which was to his benefit as a result of the desire of the officials to avoid incuring the cost of a preliminary hearing as well as a trial.

> See, that's what they were trying to avoid, a preliminary hearing. You know, they were going to have to bring in 40 witnesses and that costs them money. That's why they were trying to get rid of it before it got to the preliminary hearing. (no. 11)

In another case an informant said that he was charged with three offences and was threatened with being charged as an habitual criminal. He, too, saw cost as a factor in the negotiation process.

> So, the net result was that my lawyer and myself talked to the prosecutor and the detectives and in exchange for

> disposing of all this in a rather sudden hurry, I would be guaranteed no more than a year. And, in exchange for this guilty plea to dispose of this quickly at very little expense to the crown, they would forget about habitual criminal proceedings. (no. 38)

A recidivist armed robber had a similar rationale for his being able to make a deal when he faced two charges of armed robbery:

> It was two stores and the amount of money involved was $214 and I got five years for this. From the time of arrest to the time of sentence was approximately 17 hours. I was told that if I didn't plead guilty I was going to get between seven and then years; if I did, I'd get four to five.
>
> WHO WAS THIS THAT APPROACHED YOU?
>
> Detective _____ up in _____.
>
> DID YOU TALK TO THE PROSECUTOR AS WELL?
>
> No, I didn't talk to the prosecutor. Detective _____ did.
>
> WHAT KIND OF ASSURANCES WERE THERE THAT THEY WOULD LIVE UP TO THEIR END OF THE BARGAIN?
>
> Well, usually when they [the police] make a deal like that with the prosecutor, they go through with it. And the only reason I got five years was, like I say, I saved them a lot of time and a lot of money by not going through all the court appearances. (no. 35)

Whether the offender is the passive recipient of a deal which promotes efficiency in the criminal justice system through the avoidance of trial or actively seeks to promote inefficiency in the system so as to create bargaining power, the outcome is the same: by not having to go to trial, scarce resources are conserved. For the moment, we shall defer examining the question of the extent to which such deals promote efficiency in the long-run.

3. The appearance of efficiency: At the level of prosecution and conviction, negotiated justice can, as we have seen, be used to

insure the efficient utilization of scarce financial and human resources in the processing of offenders. In general, throughout Canada there is a nine-out-of-ten chance that an offender who is charged with a criminal offence will be convicted (Cousineau and Veevers, 1972:16).[5] The negotiated plea can be used to sustain such a conviction rate. This may be viewed as efficiency in reality.

In contrast, at the level of "clearing" crimes known to the police, negotiated justice may be used to create an appearance of efficiency. This involves a practice which is commonly known as "clearing the books" or "cleaning the slate" of unsolved crimes. An indication of why some police departments may be interested in inflating their clearance rates is found in the police science literature. For example, O.W. Wilson, an emminent police scientist and former Superintendent of the Chicago Police Department, claims that,

> In no branch of police service may the accomplishment of the unit and of its individual members be so accurately evaluated as in the detective division. Rates of clearance by arrest, of property recovered, and of convictions, serve as measures of the level of performance (Wilson, 1962: 112).

Further indication as to why clearance rates are important comes from Griffin's Statistics Essential for Police Efficiency:

> The activities of the police department necessitate the keeping of records, not only criminal records of all the

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[5]The President's Commission on Law Enforcement and Administration of Justice (1967b:128) reports that in some courts 90% of all convictions result from defendants' entering pleas of guilty.

> essential activities of the department. . . . These activities might be regarded as comparable to production or sales reports in the sense that they tell what the department has done in a given period of time. Both internal and external data possess significance as a purely historical record but, of much greater significance, can be used by the administrative heads of departments in the measurement of accomplishment and efficiency. These data also keep the public informed of police activity and may do much to create a favourable climate of public opinion (Griffin, 1958:31, emphasis added).

Put simply, "The 'clearance' rate is generally used as an index of the effectiveness of a law enforcement agency" (Comment, Yale Law Journal, 1967:1595).

There are two fundamental ways in which the negotiation process may be used to boost clearance rates: 1) An offender is arrested and told that if he confesses to other crimes that he, in fact, has committed, he will be given no additional time. 2) An offender is arrested and asked to "confess" to a number of similar offences, the understanding being that he need not have actually committed all of the offences in question. In either case, the offender may or may not be charged with the extra offences.

There are two categories which are used in the compilation of official police statistics in arriving at an overall clearance rate: offences which are "cleared by arrest" and offences which are "cleared otherwise". Neither category reflects a set of consistent actions on the part of the police. In exchange for sentencing concessions, an offender may be charged with the offences to which he confessed. This need not mean that he actually committed all the offences with which he was charged. This type of practice was discovered by Letkemann in the course of his research.

> Both the inmates and the penal officials also pointed out that not all crimes listed on an FPS [Finger Print Serial] record need necessarily have been committed by the offender under whose name they were recorded. In other words, I found widespread recognition of bargain-justice (Letkemann, 1973:15).

In a case such as this, the offences would be listed as having been "cleared by arrest".

If an offender is not charged with the additional offences to which he confesses, then the offences will be listed as having been "cleared otherwise". The types of situations which may be included in this category may well be limited only by one's imagination: a man takes his own life after having taken the life of his wife; an offender is killed in the course of committing an armed robbery; though the offender is known, the victim of a rape indicates to the police that she will not cooperate in the prosecution of the offender out of fear of adverse publicity; or, the police induce an offender to confess to a large number of offences simply to "clear the books" and boost their clearance rate.

What evidence is there to support the thesis that the police engage in this type of practice in order to boost their clearance rates? Conklin (1972:147-48) cites three facts which he claims support this thesis: 1) the wording of the police reports in such cases; 2) the fact that the technique is frequently used with ". . . inexperienced youths who are opportunists and who are unlikely to be aware of their right to remain silent" (p. 148); and, 3) the fact that a criminal may confess to a large number of crimes, possibly more than he could remember doing.

Related to this last fact is a case described by Skolnick

(1966:179). A burglary suspect informed on his partners, helped to recover some stolen property, and "cleared" in excess of 400 burglaries for the police. While those who did not cooperate received lengthy prison sentences, the informant received a sentence of 30 days in jail. Unless the cooperative burglar had a penchant for record keeping, it is unlikely that he could have remembered the locations, let alone the specifics, of such a large number of burglaries.

In both the autobiographies of criminals and among the criminals who shared their experiences with the bargaining process with us, support is found for the thesis that the exchange transaction between offenders and the police which involves "clearing the books" is done primarily to create the appearance of efficiency. For example, Martin's thief helped the police to "clear the books" in the hope of avoiding being charged as an habitual criminal.

> The cops, when they're hot on your neck, they're like a pack of foxhounds that catch a fox. They come up on you all out of breath and they don't think of anything but they've got you in their clutches. So they overlook things. You can admit a lot of things to the police. But admitting things to the police and proving them in court are something else. When you're stealing, you're taking a chance. When you get caught you gotta do the best thing for yourself you can. They got me on one good burglary charge. But if they keep rooting they may come into something really important. So what do I do? I admit four or five things I never done, including a couple that never happened. It makes them very happy. They're bigshots. And I also know I can get convicted on habitual in Illinois which they don't stop to think of, they're in such a hurry. . . . (Martin, 1970:196).

Harry King, Chambliss' thief, also claimed that he was involved in deals which resulted in concessions in exchange for "clearing the books".

> In the old days we used to take and make a deal with the police. We knew we were going to make a deal, or the dicks knew we were going to, and they would have a lot of unsolved crimes. So, to make it easier for everybody we'd just do what we called "clean the slate" for them. They'd say, "I got fifteen capers here we haven't been able to solve, will you clean them up for us?" That's all. We'd just sign a confession, I mean it wasn't really a confession. We didn't even know where these capers were. But they never used them against us or anything. It was just to clean the slate for the police department (Chambliss, 1972: 97).

Among our informants who discussed their experiences with deals which involved "clearing the books", there was a concensus as to the rationale behind the practice. The practice was essentially viewed as a housekeeping task which resulted in the appearance of efficiency.

> WHAT DO YOU THINK THE POLICE GAINED BY MAKING THIS DEAL?
>
> Well, all they gained was they cleared these charges off the records.
>
> DO YOU THINK THEY WERE JUST TRYING TO CLEAN UP THEIR RECORDS?
>
> They've got a pile [of unsolved crimes] this high and if they can cut it down then it looks like they're doing their job--forget about the time. That's the way it works, you know. Sounds corny, but that's what's happening. (no. 4)
>
> . . . . . .
>
> Three days before I was gonna cop out they brought up a bunch of armed robberies. And, they were going to try to make me on these other armed robberies. I don't know how they were going to do it, you know. Clear your conscience, stuff like this, you know. Clear their records, that's what they wanted! (no. 49)
>
> . . . . . .
>
> I guess it's the type of thing where near the end of the year they like to clean up their books.
>
> THIS SEEMS TO HAPPEN TOWARD THE END OF THE YEAR?

> Yeah. I found that like the last part of the year and like the first part of the year -- between November and February -- they kind of like to clear up all their books. I guess it gives them a good face or something. (no. 90)

Another informant was in agreement with Conklin's (1972: 148) claim that deals involving "clearing the books" are most often made with inexperienced and opportunistic youths who may be somewhat credulous.

> But they make deals too much with kids, you know, as far as I'm concerned. Well, they don't make deals -- they throw them in the cop shop and they don't make a deal. They say, "Listen, we've got fifteen charges wrapped up in B & E's. You cop out to all of them and we'll get you a suspended sentence." And he's only done one or two and the cop knows damned well he's only done one or two. But he'll cop out to fifteen to get a suspended sentence, you know. He thinks the only way to get a suspended sentence is to cop out to the fifteen. They'll clear their books. The _____ police force has the best record in the country, you know. It's because they get these kids to cop out to the beefs. (no. 28)

This informant was correct in his claim that the police force to which he referred had the best clearance rate in the country. There was a widespread belief among those interviewed (both in and out of prison) that this particular force used this technique for improving their clearance rate far more often than any other municipal police force.

Turning to cases in which our informants claimed that they were active participants in "clearing the books", we can see that when the offender agrees to cooperate with the authorities, such deals are quite straightforward.

> I made a deal to cop a plea of guilt to two charges of B & E -- cop a plea in front of a judge and they'd guarantee me no more than three years. I got my three years there. And there were some more charges, some

more B & E's that they'd promised me I wouldn't get more than three years concurrent on.

WAS IT ONLY THE DETECTIVE THAT APPROACHED YOU?

Yes. Detective _____.

HOW DO YOU THINK HE WAS ABLE TO DELIVER?

Well, he talked to the prosecutor. No doubt about that. The prosecutor gets up and says what he recommends -- this kind of garbage.

DID THEY WANT ANYTHING MORE THAN THE GUILTY PLEA?

No. Just a straight cop a plea and clear off some of their books.

WERE YOU PLEADING GUILTY TO SOME EXTRA CHARGES THAT YOU HAD NOTHING TO DO WITH?

Yes. And they cleared off quite a few. (no. 88)

. . . . . .

Well, it was the first car theft, the one I stole to go over the Rockies. They made a deal with me that if I would cop out to that one they would forget it. See, all they wanted to do was clear the books and I would get concurrent time. (no. 61)

. . . . . .

I was up on charges of cheques with another fella and I was taken in by the Mounted Police, taken in to the magistrate himself, told that if I would take all charges plus some that weren't mine, I would get two years less a day and they would release the guy that was with me. And, at that time, two years less a day was pretty fair for me. . . . Two years less a day I was quite happy with so, naturally, I cleaned off the books and everyone was happy. (no. 41)

Deals such as those described above may be of questionable benefit to the offender. As the following case indicates, there is no assurance that the offender would have received a lengthier sentence as a result of not cooperating with the authorities.

Then in '69 I was busted for armed robbery. They made a deal to cop a plea for time. I made a deal there and got three years for armed robbery.

HOW MUCH TIME DID YOU EXPECT?

> Oh, the lawyer figured six to seven because we fired twice at this guy.
>
> DID THEY TRY TO GET YOU TO CLEAR SOME OTHER CRIMES AT THE SAME TIME?
>
> Oh, yeah. Get you to plead guilty to jobs that you weren't involved in.
>
> DID YOU DO IT?
>
> Oh, no, I didn't. I told them, "If you want to make a deal, let's make a deal. Let's not talk about things I had nothing to do with." Yeah, they had about eight more beefs that they wanted me and my partner to cop out to. One of them was ours, like the other seven weren't. And they didn't have any case either, you know, so we didn't cop out or even talk to them about it. And we got our three years each. That was another good deal. (no. 74)

Even if the offender gets a slightly longer sentence as a result of refusing to accept a deal where "clearing the books" means that additional offences will end up on his record, it will not necessarily mean that the amount of time which he actually serves in prison will be any greater. A shorter record of convictions may improve the offender's chances for obtaining an early parole. Conversely, a lengthy record of convictions which may result from such a deal may mean the denial of parole.

Should the offender accept a deal which lengthens his conviction record and does, in fact, receive a short sentence, he may find himself facing much lengthier sentences than he ordinarily might have faced should he have subsequent convictions. This could come about as a result of the sentencing judge's consideration of his previous record, even though his record might not accurately reflect the reality of his past criminal behaviour.

Another factor which may bring into question the wisdom of

an offender's making a deal which involves "clearing the books" when the offences will end up on his conviction record is that, should he continue in crime, habitual offender proceedings may be just around the corner. While offences which are on his record as a result of "clearing the books" are not enough per se to result in conviction as an habitual offender, they may add strength to the prosecutor's contention that an offender should be given a sentence of preventive detention (in effect, a life sentence) as an habitual criminal. It was this belief which led one informant to refuse to cooperate with the police. The cooperation was to take the form of pleading guilty to three bank robberies which he was convinced the police knew he did not commit.[6]

> So I come up here and this would be about a month after I was here [starting my seven-year sentence], and these two bird dogs call me up front -- I thought it was a visit, the censor called me up. Here's these two bird dogs, big straps. They say, "Oh, hi, Tom. How are you?" They're dressed in civies. _____ RCMP. They said, "We didn't come here especially to see you. We know your mom and dad and we heard you back in here. How's everything going?"
>
> "Fine."
>
> "What are you in for?"
>
> "Robberies."
>
> "Bank robberies?"
>
> "Yeah."
>
> "There were two robberies down here [a jurisdiciton some 200 miles away] before Christmas two years ago."
>
> I said, "Yeah, I heard about three of them."
>
> "That's right. Not two. Three."
>
> So smooth. . . .

---

[6] The informant's claim that he did not commit the robberies in question had added credibility since, in the course of the interview and off the record, he described several bank robberies which he had committed elsewhere and for which he had not been arrested or even questioned.

They said, "How much money did you get out of these? These ones down here he got about $9,000."

I know fuckin' well it was more than $9,000. They say how the guy's lucky, he's still on the loose, guess he worked it right and all.

"So, we'll see you. Next time we're up we'll drop in and see you."

About two weeks later they call me up again and told me that I was going to court on Monday. I asked what the charge was and they said, "We don't know. All we know is that you're going downtown."

So they load me in a wagon here on a Monday -- I went with the three escapee guys, you know. And there were these two bird dogs down at the courtroom there. So they call me over to the side and we go into this little room and they say, "Look, Tom, we got the sheet here and we can guarantee you no more than six years concurrent on the three robberies."

I said,"Robberies be damned! I never did the fuckin' robberies! Besides, six years -- how are you going to guarantee me six years?"

They said, "We can do it." Yeah.

So, we're still talking there and he says, "Look, we've got everything in black and white. We talked to your mother and she's convinced that you're responsible."

And they don't know my mother very well. She's no spring chicken. She's been around the ball park. I've been in trouble before and she's got quite a bunch of kids.

So he tells me that my car was seen. I can't remember the time now but in order for me to travel these 35 miles I would have had to been travelling at 140 miles per hour. This is how I figured everything out. And it was supposed to be a red Charger and it had British Columbia license plates on it and so and so. Well, it wasn't a red Charger that I owned and they did go to the trouble of looking up old license plate numbers. Now, they said it had B.C. plates, number so and so. Well, I did have B.C. plates on an Oldsmobile I had before that and these were the license plates but this Charger never ever did have B.C. license plates on it. It had Illinois plates on it from the day I bought it until right now.

And they said that there was one girl in the _____ bank who said she went to school with me. Well, this has to be the biggest fuckin' lie because I never went to school with a girl in my life -- I went to private schools! And they kept laying shit on like this. So now we're getting to the interesting part.

So they said, "Well, sorry Tom, we're just going to have to go through with it. We can't guarantee you anything out of this."

So we go back into the courtroom. These other three chaps had already been up, I guess, and they had gone up

> to the upstairs courtroom and I was still in the bottom one and they call my name. So I stand up and _____ [the judge] says, "On or about March, 1970, in the _____ Park area. . . ." I was charged with hit and run! Now I hadn't been to _____ Park in ten years!
>
> So the cop gets up and he says, "Your honour, at the time that the charges were laid we figured we had sufficient evidence to go ahead with the prosecution but through reviewing our evidence, etc., we find that we'll have to withdraw the charge."
>
> Now this was March [five months ago] and I haven't heard from them since. Mom said that they had been there seeing them and that they knew fuck-all as far as the robberies went. They just wanted to clear them up the easiest way possible. Had I gone along with them they would have had what they needed to bitch me. (no. 71)

In the above case and in other cases where the ostensible aim in making the deal appears to be that of creating the appearance of efficiency, we may do well to remember Chambliss' assertion that

> . . . it is out of the struggle to perform their tasks in ways which maximize rewards and minimize strains for the organization and the individuals involved that the legal processing agencies shape the law (Chambliss, 1969:86).

When the practice of "clearing the books" is used to create the appearance of efficiency, we may also find that <u>on the surface</u> the hierarchy of penalties associated with one's record of convictions may be reversed. The fact that backstage deals involving "clearing the books" may create such an illusion should be of concern to those who wish to carry out research on sentencing disparities using official records. In additon, the existence of such practices should serve as another reminder that the assumption that one's criminal record is an accurate reflection of one's mode of criminal behaviour may not be justified (cf., Newman, 1962).

C. Evidentiary Problems

Deals which come about as a result of the belief of officials that there may be insufficient evidence to sustain a conviction may be viewed as a type of efficiency deal. As we have seen, going to trial, even when the evidence is sufficient for a conviction, may be viewed as being inefficient. Going to trial when the evidence is such that the accused has a good chance of being acquitted must thus be viewed as being even more important.

Weak evidence may be an important factor in motivating a prosecutor to offer a deal to an accused. As a prosecutor who was interviewed by Grosman suggested,

> If there is no evidence or little evidence, or when I know that the jury will most likely not convict on the charge, that is a major factor to me in taking a plea of guilty to a lesser charge. I am also interested in the likelihood of getting a conviction on the higher charge (Grosman, 1969:34).

A similar rationale for negotiating for a plea of guilty has been suggested by Verti:

> In New York some of the most common reasons submitted by district attorneys [for negotiating for a plea of guilty] have been difficulty in proving the indictment, mitigation of harsh penalties, unreliability of state's witnesses, conflicting evidence, reluctant complainant, lack of adequate identification, and lack of corroboration (Verti, 1964a:868).

Polstein goes a step further and suggests that in addition to the factor of evidentiary problems, the personal professional aggrandizement of the prosecutor may be a factor in negotiating a plea.

> The measure of a prosecutor's success is the amount of convictions he obtains. . . . Thus, to protect his

> record, any prosecutor is usually willing to offer a lesser plea of guilt in a weak case (Polstein, 1962:37).

No matter what may be the actual rationale for negotiating a plea when there are evidentiary problems, one might make the case that, given the traditional concern in free societies of not convicting the innocent, it is in exactly such instances that the case should go to trial.[7]

If our informants perceptions of their cases reflect reality, then there are some instances where deals are offered in order to overcome evidentiary problems. The following case involves a native offender.

> The police approached me and they said that I had three charges and I was on bail for two of them and yet it wasn't that serious of a charge. So, on the day of my preliminary hearing, they came up and seen me and they said that if I'd plead guilty to this charge which was theft, they said they would drop that small charge plus they'd lower the other one. I didn't know precisely what they meant.
>
> WHAT WERE THE OTHER TWO CHARGES?
>
> Theft [over $50] and theft under [$50]. I told them I didn't go for it, but I ended up beating the charges anyways 'cause they didn't have enough evidence against me so they couldn't do anything about it anyways.
>
> DID YOU BEAT ALL THE CHARGES?
>
> I beat everything, yeah.
>
> DID YOU HAVE A LAWYER?
>
> I had a lawyer, yeah. Plus they had one charge that they dropped because they didn't even have sufficient evidence. They just dropped it because they didn't see no point in.

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[7] Implicit in such a view is a recognition of the distinction between factual and legal guilt.

> taking me to court for it 'cause it was just a waste of time for them. And that was the only plea bargaining I've ever come across. They didn't mention any specific time if I did plead guilty. They just said, "We won't give you very much time." And that was it. I think their main reason here was to get rid of me as fast as they could. (no. 50)

A disturbing feature of this case is that it suggests the possibility that had the informant agreed to accept [redacted] he might have been incarcerated for crimes which he was [redacted] not guilty. We may speculate that had the inform[redacted] legal representation, this might have been the outcome.

Another informant believed that he was given a substantial charge reduction and sentence concession as a result of the weakness of the evidence related to the original charges.

> Well, in 1969 I was charged with four B & E's and two charges of theft and I got all this dropped to just possession [of stolen property] and attempted theft.
>
> WHAT HAPPENED?
>
> Well, the police chief came and said they wanted me to plead guilty to theft and to the B & E's. And I said, "No, you're not going to prove theft. I won't plead guilty to that." So they withdrew those [charges] and charged me with attempted theft. So I finally pleaded guilty to that just to get it over with.
>
> DID THEY DROP ANY OTHER CHARGES?
>
> Well, the dropped the breaking and enterings all down to possession of stolen property under $50.
>
> WERE THERE ANY PROMISES MADE REGARDING TIME?
>
> Well, they said the time would be concurrent. It would all be concurrent. I had three nine-month sentences and four three-month sentences concurrent.
>
> DID IT ALL COME THROUGH THIS WAY?
>
> Yeah.

IF IT WAS THE POLICE CHIEF YOU TALKED TO, HOW DO YOU THINK HE WAS ABLE TO DELIVER ON THE DEAL?

Well, it's a small town. They're all in with, ah -- _____, the magistrate, the police chief, they're all good friends. I figure they just all sat down and decided that that was the easiest way, you know. (no. 51)

It is worth noting that if this account is accurate, then the informant might well have stood convicted and sentenced on far more serious charges had he not believed that the evidence for the charges to which he was originally asked to plead guilty was insufficient.

The following account involves an individual who was, at the time of his arrest, a member of a motorcycle gang. He is currently serving a life sentence for non-capital murder. His account serves as a striking example of how the naive may be at a disadvantage in the negotiation process -- not simply because they may lack the bargaining power of more sophisticated offenders but, also, because they do not possess the understanding which enables them to recognize a good deal when one is offered.

There were 16 of us originally, all charged with murder. And so we went to the preliminary hearing. The evidence which came out of the preliminary hearing would not substantiate a murder charge. It was open and closed as far as I was concerned for manslaughter. Pure and simple. So, at the end of the preliminary hearing all our lawyers were agreed that it was an open and closed manslaughter charge. The crown approached me and said, "If you cop out to manslaughter, we'll cut everybody loose."

DID HE PROMISE ANY TIME?

No, he didn't. He just said cop out to manslaughter. So I went back and talked to my friends and they said, "Shit on that."

To start with, the identification of me was very poor. They couldn't decide whether it was me or my brother that

fought with the guy. In fact, they'd placed me fifty feet away at the time this guy was being assaulted, so, if I was being tried alone, I don't think it would've been -- it just wouldn't have been like _____ [a motorcycle gang] or anything. I don't think they would've convicted me 'cause the evidence wasn't strong enough. So, anyway, I went back and talked to the rest of the guys and they said, "Shit, they'll give you twenty years. They can't prove murder and we all know it, so we'll all go to court and see what happens."

So I went back to the prosecutor and told him to go to hell. So, we went to trial on a murder charge and, after three days of trial, the prosecutor came to me and told me that for a manslaughter charge he'd give me 15 years, this other guy ten years, my brother seven years, and the rest of the guys a year.

So, the first thing I said to myself was, "This isn't a murder charge and the evidence is there to show anyone, including the jury. (Unfortunately, I wasn't aware of middle class values at that time.) Nevertheless, I said, "The evidence is there that this is just a manslaughter charge." The cause of death, by the way was death by drowning. So, the evidence was there for manslaughter and there was no evidence for murder.

I said to myself, "First of all, my brother had nothing to do with this. He was stoned. He didn't know what was happening. It was just a spur of the moment thing were we got involved in a fight." I said, "No, I can't see him getting seven years for doing nothing. Just because he's pushing smack and they can't catch him, he's not going to get seven years for something I've done."

Secondly, I didn't feel that I would get 15 years from the judge because, like I felt the evidence didn't support a murder charge -- the jury would find me guilty of manslaughter and I figured the judge would give me about seven years. So, again, I told the prosecutor to go to hell. And, they went to trial and sat on their asses, carried through the trial, and I was convicted of murder.

ALONG WITH EVERYONE ELSE?

Yeah, right. And later on, of course, they got their charges reduced and everything. One of the things, too, that I might point out that I would do differently now was -- at the time my lawyer was cynical about certain things and I was still naive about the courts and the system. I felt that irregardless of what their prejudices were against me, the jury, they must still sit on the evidence and, when they're in the jury-box, somehow I figured they'd be filled with a fervor to render justice, which they didn't do because they convicted me. But, if

I was starting all over again and they offered me 15 years, I'd take it. Because now I realize that there's no way that those people convicted me for what I did but for what, according to the movies, the publicity, and everything else, they thought I could have done, you see.

DO YOU THINK THAT IF YOU HAD BEEN A LITTLE LESS ARROGANT AND SELF-RIGHTEOUS AT THE TIME OF THE TRIAL THINGS MIGHT HAVE GONE ~~DIFFERENTLY~~?

Yeah. I don't think that at any time the jury was prepared to listen. I think they'd already decided what they were going to do before the trial started.

WAS THERE MUCH PUBLICITY BEFORE THE TRIAL?

Oh, certainly. Things in the paper like "ambush" -- all this sort of horseshit. I suppose we could forgive them in a sense. The guy that I fought was president of another motorcycle gang and what it appears to have been was "you chop off the head, you kill the body." Unfortunately, that wasn't what we were doing. What really annoys me about the whole thing was if I had said to myself, "O.K., you'll kill this guy", I certainly wouldn't have done it in front of 25 witnesses. (no. 32).

Although the members of the gang were convicted of non-capital murder, there is some reason to believe that the informant was correct in his perception that the evidence was weak. One reason is that, upon appeal, all but two members of the gang were granted new trials. At these trials they were convicted of manslaughter and given sentences ranging from a two-year suspended sentence to four years in the penitentiary.[8] Another reason is that there was a great deal of publicity associated with the case. Given the amount of publicity and the atypical nature of the offence, one would not expect a deal to be forthcoming unless the evidence were weak, given

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[8]The informant's brother who was initially offered a seven-year sentence as a part of the deal was later given a two-year suspended sentence as a result of his appeal and new trial.

Sudnow's characterization of "normal crimes".

In conclusion, while weak evidence has been cited by some officials as a justification for plea bargaining, there are inherent dangers in engaging in negotiations on this basis. It is in such situations that we run the greatest risk that the naive and legally innocent offender may be coerced into pleading guilty when faced with the power of the state (see Chapter Seven). As well, the naive offender may be left with a sense of injustice if he rejects a deal because he has been led to believe that there is probably insufficient evidence for a conviction, a belief which may be generated by the nature of the deal which is offered to the accused. Such a sense of injustice will do little to promote the reformation of the offender. In short, we suggest that when there are questions as to the sufficiency of the evidence, a trial should be the rule and the negotiated plea, the exception to this rule.

D. How Beneficial Are Efficiency Deals?

As we have seen in previous chapters, deals that are made in support of the goal of crime prevention may be beneficial to the offender under certain conditions. How beneficial are those deals that are made primarily to obtain a guilty plea with the purpose of promoting efficiency in the administration of criminal justice? In order to evaluate empirically how beneficial such deals are, we must possess information as to the sentence the offender would have received had he not entered a guilty plea.

Shin (1973) attempted to examine the benefits that robbers and assaultists who came before the Supreme Court of the State of New York obtained as a result of entering a guilty plea in exchange for a charge reduction. While the results of his empirical investigation were inconclusive, they do suggest that at least some offenders benefit.

> . . . the original hypothesis that a labeling break [that is, a charge reduction] given to a guilty pleading defendant may not be a bargain at all is supported by the data in the sense that there in fact exist processes which tend to readjust the impact of charge reduction. The data do, however, contradict the hypothesis in the sense that the longer the sentence the longer the period one actually serves in terms of absolute length of incarceration (Shin, 1973:40).

Shin noted that the lack of visibility of plea bargaining made an empirical analysis of the benefits obtained through the use of official records less than satisfactory.

> The questions related to guilty pleas or charge reductions are difficult to appreciate meaningfully when they are limited to the isolated issues of the charging or pleading process itself. Indeed there are many instances in which the application of sophisticated analytical techniques and models is less useful and even unrealistic not necessarily because of the limitations of the techniques themselves but because of erroneous assumptions about the basic nature of the criminal justice process (Shin, 1973:41).

Some indication that an "efficiency deal" may not be of much actual benefit to the offender may be derived from descriptions of how officials make the decision to offer concessions in such situations. For example, F. Miller (1970:191) claims that the prosecutor often makes the decision to specify a less serious offence or drop some charges ". . . when it is believed that the probable effect on the sentence would be minimal." Newman cites

a case and a comment from a presiding judge which supports this contention.

> A defendant in Michigan originally charged with armed robbery pleaded guilty to the reduced charge of unarmed robbery. After accepting the plea to the lesser offence, the judge commented: "What difference does it make? He's going to prison in any case and will probably do the same amount of time on the unarmed charge. On the other hand, if I insisted on the armed robbery charge, he would no doubt demand a trial and fight it. This way he thinks he has received a break and is willing to plead to it (Newman, 1966:184).

Contrary to the view of the judge ~~quoted above~~, not all offenders are convinced that they have received that much of a break as a result of a charge reduction or the dropping of a charge in exchange for a plea of guilty. The view expressed by some offenders is that, beyond not doing "dead time" while remanded in custody and having a "cleaner" looking criminal record, the benefits gained through a deal that is primarily designed to promote bureaucratic efficiency are often illusory:

> I was originally charged with car theft and arson. I was remanded for six months awaiting trial. I pleaded not guilty to both charges. During the course of the trial the prosecutor mentioned to my lawyer that if I would plead guilty to arson, the car theft would be dropped. The RCMP didn't like the idea at all. They were trying very hard for a conviction on both charges.
>
> I decided to accept the deal on the strength of my lawyer's recommendation. I was actually not guilty on the charge of car theft and they would have never convicted me on that charge anyway. I was technically guilty of arson because I had knowledge of the crime and I was also guilty of being an accessory after the fact and guilty of theft by coercion. When I pleaded guilty to arson, the other two charges were not laid.
>
> The deal made no difference on the sentence because my accomplice, who pleaded guilty to all the charges, received the same sentence as I did. The only difference it made is that I have only one more conviction on my record instead of two or three. (no. 96)

However, we have seen that this is not true in all cases. Some offenders undoubtedly do benefit as a result of deals which are intended to promote efficiency in the administration of justice. When disparity in sentencing comes about as a result of an offender's decision as to whether or not to exercise his right to trial, a very basic problem emerges: a fundamental standard of justice -- that the equally culpable receive equal punishment -- is undermined. In addition, the primary goals of sentencing -- rehabilitation, specific and general deterrence, retribution and incapacitation -- may be sacrificed in the name of administrative efficiency. We find ourselves in agreement with Newman that

> Efficiency alone is not the mark of proper administration of justice at the court level or at any other point in the criminal justice process. . . . . No matter how administratively efficient, unless the guilty plea process is accurate in its task and fair in its application, it is less than an adequate method of adjudication (Newman: 1966:4).

As in the case of other types of deals, the process of negotiating justice in the name of efficiency may help to foster in the offender attitudes which are unlikely to lead to his reformation.

E. Summary

It has been suggested that there is pressure in the criminal justice system to process offenders as expeditiously as possible. Efficiency is important to all participants, including offenders, in the criminal justice process. Whether efficiency deals actually promote efficiency is open to question. Some are clearly designed

to create the appearance of efficiency; others may do little to promote efficiency in the long run if they promote attitudes which militate against the reformation of the offender. It is questionable that most deals that promote efficiency are of much benefit to offenders when compared with deals involving a kickback. This may be taken to suggest that officials are, in fact, more concerned with the goal of crime prevention than with efficiency for efficiency's sake.

CHAPTER SIX

DEALS FOR BAIL

> For most guys, their first concern when they get pinched is for an old lady on the street. They're not -- you know, most guys are pretty jealous if you want to get right down to the truth. They're not really worried about the lawyer, 'cause if you're worried about the lawyer, either the lawyer's paid long before the crime or you have a lawyer that will hold you over. This is if you've been around long enough. If not, then, well, I would say that in 30% of the cases, guys are interested in getting out to make money to pay a lawyer. But the other 70% -- you can't make money locked in jail, you can't drink whiskey in jail, you can't get it on with your old lady in jail, you can't do nothing in jail.
>
> -- Anonymous

A. Introduction

Whether a person be a one-time loser or a systematic criminal, all have one thing in common: no one enjoys being in jail while awaiting trial. This is especially true with respect to being remanded in custody. In the typical remand unit, there is no classification of prisoners, most of one's time is spent in lock-up with little opportunity for recreation or exercise, and educational and vocational programs which are normally found in prisons are not available. To be remanded in custody is to do

"hard time"; it is also to do "dead time" since the time spent in jail while awaiting trial is seldom taken into account in sentencing. For these reasons alone, the desirability of being released on bail is self-evident.[1] In this chapter we shall examine some additional reasons why bail is important from the offender's perspective and how, in his view, bail may be subject to the negotiation process.

B. The Importance of Bail

There are a number of legitimate reasons why bail is important.[2] First and foremost, a theory of justice which presumes innocence until guilt has been proven is consonant with the principle of release on bail (or through some mechanism which achieves the same end) while awaiting trial. Release from custody while awaiting trial means that a person may live with his family and maintain community ties. If the person were employed at the time of his arrest, it may mean that he will not lose his job. Release may also mean that a person will be able to take a more active role in working in his own defence. The possibility always exists that a

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[1] A former student of the author's who had been a member of the RCMP for five years spent three days as a participant observer in a remand unit. He described the experience as demoralizing, dehumanizing, and terrifying. He expressed the belief that had he actually been charged with an offence, he would consider pleading guilty simply so that he could get out of the remand unit and into the general prison population.

[2] See, generally, Ares, Rankin, and Sturz (1970); Wald (1970); and Friedland (1965).

person may be confined while awaiting trial on a crime that he did not commit. As well, without release we may find the anomaly that a person is confined while presumed innocent and released on probation, a suspended sentence, or with a fine after having been found guilty. Finally, there is some evidence to suggest that release while awaiting trial improves one's chances of an acquittal or, if found guilty, results in a less punitive disposition (Ares, et al, 1970:156-62).

The above factors afford legitimacy to the use of bail or some other mechanism whereby a person avoids detention while awaiting trial. However, in order to maintain such legitimacy we must assume that the motives of the accused are in harmony with these legitimating factors. The assumption is that the person who is to be released from custody while awaiting trial has a non-criminal, "squarejohn" identity (cf., Irwin, 1970:32-34).

Unfortunately, the assumptions which legitimate release while awaiting trial are simply not justified among those informants who discussed making deals for bail.

> Well, with the criminal, let's face it. People who are stealing, when they get out, if they're stealing when they come in, they're going to steal when they get out, you know, to pay off lawyers and to live. At least that's the way I've always worked and people that I've known have worked. How many people stop because they're charged? (no. 13)

While the above is certainly not representative of all persons who desire bail, it was representative of most informants who claimed that they had been involved in deals for bail.[3]

Other researchers who have studied career criminals have

reached the conclusion that bail generally means a return to crime with the proceeds going to a lawyer. Shover, in his study of burglary, found that

> With few exceptions, good burglars will commit additional crimes while out on bail. Indeed there is really little alternative. As I have indicated, he knows that the poor and the poorly defended are at a distinct disadvantage in the courtroom. And since he want [sic] to avoid confinement at nearly any cost, and commonly has not saved enough money to satisfy his attorney, he is literally forced to steal. Faced with his attorney's request for, say %2,000, he will again take up the crowbar (Shover, 1971:169).

One of Jackson's informants claimed that

> The lawyers, they have got to put you on the streets, and they know that when they put you on the streets, that you've got to steal. How can I go out there and get a job for $60 and pay a lawyer that kind of fee (Jackson, 1969:139)?

The above fits nicely with Blumberg's (1969:227) observation that defence lawyers condition their clients ". . . to recognize that there is a firm interconnection between fee payment and the zealous exercise of professional expertise. . . ." Bail may thus be viewed by career criminals as a necessity if one is to obtain adequate legal representation.[4]

Stealing while on bail may be encouraged by local sentencing patterns. When concurrent sentencing is the norm, an offender may feel that he has little or nothing to lose by engaging in theft

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[3]The reader is cautioned that this finding should best be viewed as an artifact of the research design. Most of those interviewed were interviewed in a maximum security penitentiary and, in most cases, possessed a criminal self-concept.

[4]The ideology of the con holds that to be represented by a legal aid lawyer is tantamount to a plea of guilty.

while out on bail. In reference to the class of criminals that we have designated career criminals, a judge maintained that

> [what] they want to do is get out on bail so that they can go back to stealing and pay their legal fees. They assume that if they get arrested, they'll get "three-for-one" [that is, concurrent sentences] so they might as well take the chance (field notes, January 15, 1972).

In an extreme case reported by Herman Goldstein (in Lafave, 1965:193-94, footnote 92), an offender was apprehended in the act of committing a burglary, was indicted, and released on bail totaling $7,500. In the course of less than eight months, he was charged with nine additional burglaries which occurred after he was first released on bail. When he finally went to court, he was free on $48,500 in bail. He entered a guilty plea to the ten burglary charges and was sentenced to from five to 15 years in the penitentiary on each count -- the sentences to run concurrently. Obviously, the initial indictment and release on bail did not serve as a deterrent in this case, nor is it likely that the concurrent sentences which were given will serve as a deterrent against the commission of criminal acts while on bail in the future.

The police have an important voice in the setting of bail.[5] A prosecutor claims that, "On bail, the police have the most influence

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[5] It should be noted that our data were collected prior to the passing of the Bail Reform Act. Prior to the time of this Act, the accused or his counsel had to argue in favour of bail being granted. Under the provisions of the Bail Reform Act, the accused will usually be released unless the prosecutor objects. It is plausible that this situation actually increases the likelihood that bail will be subject to negotiation with the prosecutor and/or the police. See Salhany, 1972:5[illegible]

because they advise you about a guy's past" (Grosman, 1969:53). Since bail is desired by most accused, the police are thus in a position to negotiate with an accused for bail in exchange for whatever might be desired by them. Such a practice is alluded to by Lafave (1965:192) who claims that, "Freedom pending trial may be used as a reward for cooperating with the police . . . or as an inducement to cooperation." It is not surprising, therefore, that the basic patterns of negotiating for bail with the police follow the same general patterns of negotiating for a specific sentence or charge with the police.

C. Dealing for Bail

1. Kickbacks for bail: Kickbacks for time and charges as discussed in Chapter Three serve as a model for deals for bail that involve a kickback. There is an important exception to this general model, however. Since a deal for bail does not necessarily mean that an accused will enter a guilty plea when he goes to court, he must be careful that what he kicks back cannot be used to assist the prosecution in obtaining his conviction should he go to court and plead not guilty. One informant who was charged with armed robbery refused to agree to a deal for bail for precisely this reason.

> DID YOU EVER DEAL FOR BAIL?
>
> No, I've never dealt for bail. I was offered a deal on a charge of armed robbery. They said that maybe they'd see their way clear to having bail set if they had the two pistols. I didn't feel like giving them no further evidence to convict me. (no. 23)

In another case, an informant's kickback did not result in a conviction. However, in retrospect, the informant believed that the kickback was such that it did strengthen the authorities' perception that he was an excellent candidate for habitual criminal proceedings. (He was later found to be an habitual criminal.)

DID YOU DEAL FOR THESE BAILS?

I did. To get my first bail set, I had to kickback the keys to the courthouse. Now they -- naturally they don't know how we acquired the exhibits. All they know is they want to go to trial and they can't find the fucking exhibits. And this never happened, I'm told, in the history of that particular courthouse.

So, they fired the chief clerk and they had a serious investigation of the staff. Now, naturally, they've always got their fingers in various pies. For example, houses that go up for share of sale, and so on -- they were getting a piece of that action. And they had acquired much more money than their salaries would permit. You see, by this time the Attorney General's Department has involved the RCMP and the city police and they started uncovering a lot of bad shit. All around, they just raised so much hell around the courthouse that it just naturally disturbed everybody. Obviously we must've [stolen the exhibits] or there was collusion within. They couldn't come up with any particular relationship with the court staff or ourselves. Since I do have a certain aura connected with me with keys and so on, they felt obviously this must be it.

So, again, good old _____ busted me on a couple of phoney beefs. One of them was some crap like assaulting a policeman or something and no bail and demanded the keys. Well, naturally, I'm going to give them the keys or make them the keys. It doesn't much matter, you know, 'cause we haven't got bail and we can't manoeuver.

I went out to _____ [the remand unit]. I refused to do anything until I had a talk with Tom, naturally. Tom and I discussed it and decided "fuck it". What's the keys -- they're nothings, you know really.

So on my next remand, I went back and said yes, I'd cough up the keys. They released me on quite low bail. And I left them, as a matter of fact, under a pay telephone in the _____ Hotel -- phoned my good friend the _____ [police officer], the creep, and they got the keys.

I think it was just a case of, uh -- when you're in the box, what can you do? It's not the course of wisdom to admit you can make master keys but, then again, rotting in jail and having them do bad things to you is bad too. (no. 24)

This same informant claims that he was once an unwilling participant in a kickback for bail. Another offender took the liberty of offering a kickback to the police which consisted of some of the informant's property in exchange for bail.

> He was arrested about that time. He happened to accidentally know that I had a cheque writer, several ounces of grease, and a bunch of other assorted crap, and he told them that he had the stuff. Unfortunately, what really made me mad, as I told you, is that I detested the creep but he more or less put me in a position that, you know --"Give me the shit or I gotta go to jail, deary." Well, I drove him out to the country and gave him all the crap and he gave it back to them. (no. 24)

Other deals involving a kickback for bail were much more straightforward.

> Most of the deals that I was involved in was due to bail. See, I always plead not guilty. I just go for bail -- usually just give them some coins to get a lower bail. (no. 13)
>
> . . . . . .
>
> Well, giving the goods back, you know, to get bail reduced. In 1965 this happened in _____. In 1970 in _____ my bail was reduced from $5,000 cash to $1,000 surety -- signature surety. I just about beat the beef, too. They got the goodies back and I could have beat the beef but I ended up getting involved in this, you know. (no. 26)
>
> . . . . . .
>
> WHAT ABOUT DEALS FOR BAIL?
>
> Oh, they're easy to make. Just kickbacks. I kicked back two old Smith and Wesson pistols in _____ to get bail set on armed robbery. (no. 5)
>
> . . . . . .
>
> [redacted] heavy charge, they're not going to say a thousand [redacted] they'll say, maybe, two sureties of 2500 which is [redacted] easy. Well, you can still get out on bail. If the [redacted] set the bail at two sureties of five grand, you can't get two houses, but you can get one for ten. They know this -- they know this before they even pick you up. So you just got to talk to them -- convince them you've got

> a case of dynamite, a case of blasting caps, and get it dropped to one surety. They don't lose nothing, just one surety. They probably still got you on the beef anyways. So, you go to court the next week and they knock it down to one surety of ten grand. (no. 3)

Deals for bail involving a kickback, then, are quite similar to kickbacks for time and charges in that they may be related to the realization of crime prevention goals through the control of materiel which may be used in the commission of other criminal acts. However, a kickback for bail need not imply that a guilty plea will be forthcoming or that any concession will be made in respect to time or charges.

2. Information for bail: As we saw in Chapter Four, offenders did not percieve deals for information as being advantageous. This is especially true when what is gained in exchange for information is only bail. In such a situation, it is probable that the informer will end up being incarcerated (since the deal does not involve the consideration of either sentence or charges). Should he go to prison and should he become known as an informer as a result of such a deal, his period of incarceration would be predictably unpleasant. It should thus come as no surprise that deals which involve bail in exchange for information were not perceived by our informants as being common.

Only two informants claimed that they had been offered bail in an amount that they could meet in exchange for information. One informant simply refused to even discuss the offer. When asked why he refused, he stated, "Well, it's not my way." (no. 13)

Another informant described a case which was a deceptive

deal for information in exchange for reasonable bail. The informant, who was involved in the drug scene, had been arrested for burglarizing a drug store.

> They first tried to make a deal with my old lady 'cause she was pinched there too. She didn't go for it so they came to me. Now, it started out they wanted the doctor's bag back but then we went into different things. They wanted bodies. I didn't give them any, but I gave the impression that they would get some. My bail had been refused twice. During the conversation I gave the impression that if they would get bail for me, they would end up with a few bodies. They took me to _____ out three weeks later.

> WHO WAS INVOLVED IN THE DEAL?
>
> Only horsemen. Took me in front of the same judge as before and my bail was reheard. I had a lawyer there and they had a lawyer there. It wasn't a regular prosecutor. It was a lawyer paid by the RCMP. My bail was set for $2,000. There was no hassle over bail. I just went in to the magistrate and the guy got up and said, "Yeah, I got it," signed the papers, and I was free. I left the city because I know what's coming. I'm running around. _____ and I come back and they grab me. They say there's an armed robbery charge. So they kept me overnight, and all this, and they let me go in the morning. This is all horsemen, too. Now, I didn't realize the far-reaching consequences of this at the time. . . . (no. 9)

The "far-reaching consequences" to which the informant refers are in respect to the following: While out on bail, supposedly to act as an informer, he was arrested and charged with additional offences. Just prior to going to trial he made a deal to plead guilty to all the offences with which he was charged in exchange for a five-year sentence to run concurrent with a four-year sentence which he was already serving. Instead, he was given a five-year consecutive sentence. It was the informant's belief that he was intentionally double-crossed and that this was a direct result of his having double-crossed the police when he implied

that he would act as an informer in return for bail.

Given the foregoing discussion and our finding that only two informants mentioned deals involving information in exchange for bail, we may conclude that bail is viewed as an insignificant concession when equated with the perceived cost of acting as an informer.

3. Bail and efficiency: The granting of bail as a concession in exchange for a plea of guilty boarders on being logically contradictory. In addition to simply getting out of jail, an important motivation for getting bail is that of being better able to successfully fight the charges. To make a deal whereby one pleads guilty at a later date in exchange for bail would, of course, elminate this possibility. This view assumes, however, that good faith exists on the part of the participants in the negotiation process. If the element of good faith is absent, a deal for bail in exchange for a guilty plea may be made.

In that only one informant described a deal for bail in exchange for a guilty plea, in additon to contradictory logic inherent in such a deal, we suspect that to negotiate on such a basis is a rare phenomenon.

> Well, if you're caught for something and you've got no money and you can't get a lawyer, a good lawyer, and the prosecutor comes to you and says, "Listen, you've got no choice; you're up against the law," you can sit in that city bucket they got there and rot for six months or else you can hope this guy is making an honest deal. I got bail once. The prosecutor said, "Are you going to plead guilty? If you're going to plead guilty, I'll get bail set for you." I could have been remanded in custody for three months. To get bail, I had to promise to plead guilty. So I said, "Sure." But I don't have to plead

> guilty. I can do the same thing he's doing! But he gave me bail 'cause I promised to plead guilty. Never did plead guilty though. (no. 11)

If this account is to be believed, then something of a paradox exists. If the person admits his guilt, he is released from custody; if he pleads not guilty, he is kept in custody. This paradox, coupled with the desire of bail-seeking offenders to fight the charges, explains why deals for bail in the name of efficiency are unlikely to be made. Such deals may be difficult for both offenders and officials to rationalize.

A more logically consistent approach to the use of bail to encourage efficiency in the administration of justice lies in the denial of bail in the hope of coercing a defendant to plead guilty rather than granting bail in exchange for a guilty plea. This approach will be examined in Chapter Seven.

D. Summary

Release on bail occurs, in large measure, as a result of the exercise of discretion on the part of both the police and the prosecutor. Because release on bail is a discretionary act and because release is desired by offenders, it may be subject to the negotiation process. Negotiations for bail are similar to negotiations for sentence and charges.

Offenders who attempt to make a deal for bail generally do so out of a desire to be in a better position to fight their charges. This means that deals in which the offender agrees to plead guilty at a later date in exchange for bail are unlikely to occur. A deal

in which an individual acts as an informer in return for being granted bail is also unlikely to occur. Bail is simply an insignificant concession relative to the perceived costs of acting as an informer. This leaves the kickback as the focus of most deals for bail. The kickback may help officials to further their attainment of crime prevention goals while providing the offender with a relatively inexpensive means of obtaining bail. Exceptions to this occur when the offender is so unthinking as to provide the authorities with evidence which strengthens their case for a conviction as a result of what is kicked back in return for bail or when the offender makes a deal for bail so that he will be able to continue his criminal activities while awaiting trial.

CHAPTER SEVEN

INDUCEMENTS TO PLEAD GUILTY: FRONTIER JUSTICE REVISITED

> The police are constantly involved in negotiations of this kind. They'll bust two people for boosting. Quite often there's a woman involved along the way. Women are always better boosters than men but, you know, there's usually a pair involved. "Plead guilty and I'll release your wife." Dope fiends are always caught up in binds like this. They charge you under possession and it usually comes down to "Plead guilty and we'll release your old lady." Every sort of thing like this -- it just goes on day in and day out. In fact, they run a store. Their levers are fear and the tools that they've got are charges and bail. And, this crap is so common and ordinary, I think the prisoners themselves just take it for granted that this is the way life is. I don't know how the general public or criminologists understand the courts to work, but they do not work as they believe they do and that's a certainty. . . . I don't think they're aware of how insidious this is when they quite cheerfully charge people with crimes that are far in excess of what the crime calls for. They seem to fail to recognize that they're destroying the very system they claim to uphold.
>
> — Anonymous

A. Introduction

In previous chapters we have viewed negotiated justice as an exchange transaction in which both offenders and officials have sources of power. When both parties possess power and are able to bring it to bear on the negotiation process, the outcome may be

that both the needs of the system and the desires of offenders are at least partially met. In such a situation, the offender may legitimately speak of having made a "deal" or gotten a "bargain". However, this need not always be the case.

When gross power disparities exist, the model of a negotiation process involving reciprocity is inappropriate. Exchange becomes replaced by coercion (cf., Gouldner, 1960:164). When a power imbalance exists, it is possible that a defendant may be coerced into pleading guilty. Such a situation is the basis for the observation made by the President's Commission on Law Enforcement and Administration of Justice (1967a:10) that, "There is always the danger that a defendant who would be found not guilty if he insisted on his right to trial will be induced to plead guilty."

In this chapter we shall examine offenders' perceptions of the tactics used by officials to induce them to plead guilty to an offence when they are without the power to negotiate effectively and might otherwise be inclined to take their chances on the outcome of a trial.

B. Chivalry

Personal advantage may be viewed as the primary motivation behind the actions of those offenders who reported being participants in deals involving kickbacks, information, efficiency, or bail. In our examination of such negotiations, we have necessarily focused upon the individual's role as a criminal. It would be inaccurate to assume, however, that this is the only role that the individual

plays or that it is even necessarily his primary role. An offender may also be an employee, spouse, parent, lover, and so forth. If this were not the case, a major focus in the research on the process (and problems) of prisonization would not be that of role dispossession (see, for example, Clemmer, 1958:298-304; Giallombardo, 1966b: 92-104; and Sykes, 1969:62-83).

> Bizarre deviants are extremely rare; the chances are great that the vast majority of persons identified as criminals in a given population will be indistinguishable most of the time in most respects from the rest of that population (Turk, 1969:13, emphasis in the original).

If we accept the notion that in many, if not most, respects, offenders are similar to non-offenders, then it should come as no surprise that an offender's motivation for making a deal need not be restricted to gaining [redacted] advantage in respect to his status as a criminal.

If cherchez la femme is a guide to the official who is bent on detection, arrêtez la femme should be the guide for the official who is bent on obtaining a conviction as a result of a plea of guilty. Seventeen informants described "deals" where they claimed that they were told that a female either would not be arrested or that the charges would be dropped if they would enter a plea of guilty. If these cases are representative of other cases in which a female is charged along with a male, it apppears that a plea of guilty on the part of the male in exchange for the release of the female is a near certainty. Whether such a capitulation on the part of a male offender comes about solely as a result of some altruistic or chivalrous motive is open to question. However, we suspect that

altruism does have some bearing on the entering of a guilty plea since concessions beyond the release of the female were involved in only four of these cases.

Two generalizations emerged from those cases which involved the actual or threatened arrest and charging of a female: 1) Experienced offenders viewed the practice as a conscious effort on the part of officials to induce a male offender to plead guilty in exchange for the release of the female. 2) All informants (experienced or otherwise) who were involved in such cases demonstrated by their actions that if they perceived that there were enough evidence to result in the probable conviction of the female, a guilty plea was in order if it would mean the release of the female.

Offenders who had extensive involvement in crime and the negotiation process viewed the arrest of a female as a tactic which was employed by officials whenever possible.

> Like one thing they do whenever they think they can get away with it is to charge your old lady. They know they've got you by the balls then and they know you'll cop out to about anything if it means cutting your old lady loose. It really works well when there's kids involved. (no. 72)

. . . . . .

> It's just a normal procedure -- arrest your old lady or sister or whatever and then use it to pressure you into pleading guilty to get them off. (no. 73)

When asked whether he thought there was a tendency on the part of the police to jointly charge a female whenever possible, an informant replied:

> Oh, it's inevitable. Yeah, right, if there's any way they can do it. Particularly with drug charges this seems to be almost a certainty. Or with innocent victims, as it were. Take _____ for example [a former partner of the informant].

> He had a sten gun buried -- like first there was an alley, and then a hedge, and then there was a kind of an open field, and he had it in behind -- somewhere in that open field. Like it was in his sister's house's area, let's admit it. But first thing you know, he's charged with possession of it, his sister's charged, and they've got her children thrown in some home, and, oh, Jesus, the thing was unreal. _____ was just stubborn enough and got mad enough that he wouldn't plead guilty to it. But I think all kinds of people would have turned around and said, "Oh, yes, it's my gun. Let my poor sister and her children go." But in this case they didn't have enough evidence for a conviction and _____ knew it. (no. 24)

The practice of arresting and jointly charging a female is, to experienced offenders, little more than a fact of life.

> When an offender agrees to enter a plea of guilty to obtain the release of a female, the negotiation is quite straightforward.
>
> In October, 1970, my wife and I were charged with possession of narcotics. Just before the preliminary, the RCMP made the suggestion that if I pleaded guilty, they would drop the charges against my wife. I went through with the deal to get my wife off. The negotiation took about ten minutes and the outcome was as I anticipated -- they dropped the charge against my wife. (no. 106)
>
> . . . . . .
>
> Not much to describe. I copped a guilty plea and they gave me seven years, cut my old lady loose, and gave the guy I was with a $500 fine.
>
> WHEN YOU SAY "THEY". . . .
>
> The bulls and the prosecutor and my lawyer.
>
> AND THAT WAS THE BASIS FOR THE DEAL, CUTTING YOUR OLD LADY LOOSE?
>
> That was it.
>
> DID THEY PROMISE YOU A CERTAIN AMOUNT OF TIME?
>
> No. That was up to the judge, that part. It was just that that was the only way they would drop the charges against

her. Also, they wouldn't have so much hassle convicting me. They would've probably convicted me eventually anyway. (no. 89)

. . . . . .

Well, this time here I just entered a plea and they dropped the charge on my old lady. I had to plead guilty assault with a deadly weapon and attempted murder.

WHAT THE CHARGE AGAINST YOUR OLD LADY WAS. . . ?

Dismissed.

WHAT WAS THE CHARGE AGAINST HER?

Attempted murder. And they offered me six months to a year dropped from attempted murder to wounding with intent. I ended up with three years. (no. 3)

. . . . . .

In 1965 I was arrested with a woman in _____ on suspicion of theft over $50. The investigating police agreed to release the woman if I gave them a statement of guilt. I gave them the statement and they released the woman. I received 18 months immediately after entering a plea of guilty. (no. 92)

If an offender wishes to obtain benefits beyond simply obtaining the release of a female co-defendant, he may be disappointed. This was the case with a native offender.

I was charged with armed robbery, see, and the lawyer came in to see me in the provincial jail there in _____. Before I went up in the courtroom there, you know, the lawyer says we ain't got no chance after all the evidence come out. Said might as well plead guilty now he said. He said he talked to the prosecutor so the prosecutor came up to me and asked me, told me -- there's this younger girl charged with me, see. Said he'd drop the charges on her providing I plead guilty. I said no way unless you give me less time. He said he'd give me two years and he'd drop the charges on the girl. I said, "O.K., I'll plead guilty then." They just shot me out of there -- like I get five years and I didn't even say a word. They just shot me out of there. The prosecutor and the lawyer make deals and then they don't do it. They dropped that charge on the girl but I got five years. (no. 82)

When the woman who is charged is either pregnant or has

children, an offer involving the release of the woman in exchange for a guilty plea from the man serves as an extremely powerful bargaining lever.

WHAT PROMPTED YOU TO PLEAD GUILTY?

Well, I'll tell you, I didn't really know how much time I was going to get, but like the old lady's never been in trouble before, you know. She spent one night in the city [cell] block and they told me that they weren't going to give her bail, see. If she was a hooker or something it wouldn't matter, but I seen her the next day in the courtroom and she just didn't feel like dealing. Well, she wouldn't get time anyways but she was pregnant and everything else and they knew it. I didn't want her going through the hassle through a pregnancy -- being in jail and this and that, you know. The social worker would be giving her a rough time and whatever. That was the main thing, my old lady. I figured I had the case beat but in the meantime they would've kept her in jail. (no. 7)

. . . . . .

They said, "If you plead guilty [to armed robbery] we'll let her go." That's it. If we would of went to trial, we would of beat it. But, because of the kid. . . .

YOU DIDN'T WANT TO TAKE A CHANCE?

Yeah. It's not so much the chance, but she was pregnant at the time and would have been held in jail without bail and they would've taken the kid. (no. 27)

. . . . . .

In 1969, early spring, I was charged with conspiracy after being arrested with my common law wife in the car. At the time, I had a sawed-off shotgun in the car and a belt of ammunition. We couldn't get away. We were taken down to the station and charged with conspiracy to commit armed robbery. Like the police told me they only wanted me but, besides my common law wife, there was another woman that they were going to charge and they had her in custody at the time. There was also another fellow they were looking for. They claimed he was involved in a couple other armed robberies with me. And there was also a sergeant from the traffic division who was implicated in this. They told me that the only one they wanted out of circulation was myself and that if I pleaded guilty to these other two armed robberies, that they were going to drop the conspiracy charge against everyone else. Now, first I was going to play the hard rock

> and wasn't going to make any deals with them but between the two women they had seven children. My common law wife was from Holland and we had two kids, two boys, and the other woman, she was older. Her husband was in prison in _____. He was doing life out there. And, it was just that, you know -- the kids would have went to a welfare home. I was raised in a boys' home and I just didn't feel like sending those kids to the same thing. I really didn't have much choice, so I pleaded guilty. (no. 31)
>
> . . . . . .
>
> I was involved in a cheque conspiracy and there was a girl involved and she was pregnant. My lawyer, who went to law school with the prosecutor, said, "You plead guilty and she'll be released." I told her that I didn't want her to have her child in jail so I'd plead guilty. She said, "No, I've got no record; I'll get a suspended sentence." In all probability she would have. However, at the time, she was seven months' pregnant and they said, "Well, we can postpone this thing for another month or two." -- meaning that she would've had the kid in jail. (no. 20)

There was one type of situation where the technique of inducing an offender to plead guilty out of his altruistic motives did not function as intended. This occurred when a woman was threatened with arrest but the informant did not believe that there was enough evidence against her to sustain a charge, let alone a conviction.

> Well, this charge here that I'm on, I got 12 years for kidnapping. That's a real bummer, this one. The RCMP and the city police wanted to make deals with me on this one but I couldn't see myself making no deal with them 'cause I had nothing to deal with, actually. They said that if we didn't plead guilty, they were going to charge these other three chicks with harbouring criminals. So I politely informed them that they couldn't charge them because there was no warrant for my arrest at the time. The people weren't aware that I was wanted so they couldn't charge them with that. (no. 76)
>
> . . . . . .
>
> This is just a pressure kind of deal. We were picked up on account of a safecracking job. They were searching the house and they asked my mother, "Can we look in your

> purse?" They found seven one dollar bills, serial numbers in sequence -- they came from the job. And they came to me and they said, "Cop out or we're going to charge your mother." You know, like it was a hell of a decision -- I said, "Go ahead." You know, had they actually gone ahead and charged mom, I would have been forced to take the beef, but I figured, "Well, I've got nothing to lose by bluffing." They dropped the charges and we even got the money back. (no. 73)

In conclusion, it appears that chivalry has not died, at least among those whom have been charged with a criminal offence and have had a wife or girlfriend charged along with them. Intended or not, an offer made by officials to drop the charges against the female in exchange for a plea of guilty from a male co-accused acts as a powerful inducement to plead guilty. A problem may exist in that such an inducement to plead guilty may be so great that an accused may plead guilty to an offence to which he does not meet the legal requirements of guilt. In addition, the ideal of the criminal justice system dictates that if there is sufficient evidence to sustain a conviction of the female co-accused, a conviction should be the end result.

Finally, the existence of this pattern of negotiation serves as another warning to the use of official statistics. If this type of negotiation is fairly common (14.8% of our informants reported having been involved in such deals), then this pattern of negotiation should serve as yet another explanatory variable in the analysis of the disparity in male and female crime rates as reflected in official statistics.

C. The Habitual Offender Lever[1]

1. Introduction: The most potent of all bargaining levers for those who come within its purview is the threat of being charged as an habitual criminal. While we do not suggest that the legislative intent was that the habitual criminal legislation be used as a bargaining lever, we do suggest that it sometimes serves this purpose in meeting the sometimes questionable demands of bureaucratic efficiency.

The potency of the threat of being charged as an habitual criminal can be fully appreciated only within the context of the legislation itself. It is for this reason that we shall begin our analysis of the use of this legislation in the bargaining process with a detailed analysis of this legislation.

2. Canada's Habitual Offender Legislation: Section 688 of the Canadian Criminal Code R.S.C. 1970, c. C-34 provides:

> 688. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if
>
> (a) the accused is found to be an habitual criminal, and
>
> (b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

---

[1]This section is based upon an article by the author entitled "Habitual Offender Legislation and the Bargaining Process", Criminal Law Quarterly, 15:4 (August, 1973), 417-36.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(b) he has been previously sentenced to preventive detention.

According to Morris,

> . . . this legislation is modelled closely on the English Prevention of Crime Act, 1908, which long before 1946 [the time at which the legislation came into effect in Canada] was regarded in England as a failure; and it appears that no great study went to the adaption of the English Act to Canadian conditions (Morris, 1951:141).

Morris goes on to state that, while there are differences between the two Acts,

> . . . one can legitimately doubt that the Canadian legislation has successfully exorcised the faults of the English Prevention of Crime Act, 1908, in adapting it to Canadian conditions. The two most important changes made are the duration of punishment (indeterminate instead of a determined period of between five and ten years) and the fact that the Canadian preventive detention is a single-track system while the English Act introduced a preventive detention sentence to be served after the fixed term of imprisonment for the last offence (Morris, 1951:144).

It is unclear as to what was the legislative intent in passing this legislation. Although Grosman (1966:102) notes that, in proposing the English legislation, Gladstone saw it as needed to protect the public from the "dangerous professional criminal," it is not clear that this was the case in Canada. While some legislators expressed concern that this legislation would be applied to those who were simply menaces and nuisances rather than

dangerous (see, for example, Grosman, 1966:102 and Maloney, 1958: 210), it is also clear that some Canadian jurists read the Act to mean that the element of dangerousness (in the sense of the use of violence) is not necessary in finding a person to be an habitual criminal.[2] While the Canadian Committee on Corrections (1969:241-71) clearly feels that legislation of this nature should only apply to the dangerous offender and that the present legislation is poorly formulated in this respect, it may be a moot point. It may well be that there was an element of "fad" in the passing of this legislation in the wake of the passing of similar legislation in most European countries and most of the United States (cf., Sutherland, 1950:142-48).

Critics of this legislation have raised several issues: 1) There are conceptual problems when speaking of the habitual, persistent, or dangerous offender. 2) The discretionary characteristics of the legislation have led to a lack of uniformity in its use. 3) There are problems associated with a sentence of preventive detention and that the finding that a person is an habitual criminal does not necessarily mean that it is expedient to impose sentence. Since these issues are related to our thesis that this legislation may serve functions other than or in addition to those assumed from a reading of the legislation, they require examination.

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[2]For example, in Mendick v. The Queen (1970), Ritchie, J., in a dissenting opinion, held that being a "menace" to society is sufficient reason to sentence a person to preventive detention. The person need not be dangerous.

a. The definition of the habitual criminal: Wilkins (1966: 312-17) notes that most definitions of what constitutes an habitual criminal are extremely vague. Most legislation dealing with the habitual criminal may be characterized as legislation aimed at protecting the public from the recidivist offender.[3] Difficulties emerge when we attempt to contrast the legislative intent with the operational definition of such offenders. Most acts were designed to protect the public from the dangerous offender. However, in operation, the definition of the habitual criminal is such that we may be left with persistent offenders who, while clearly nuisances, are not dangerous. While in support of the existing legislation, Lynch notes that

> As a general rule, persons serving an indeterminate sentence as habitual criminals are not dangerous. A great many of them are drug addicts, others are persons who have persistently committed minor "nuisance" type offences such as burglary, shoplifting, etc. (Lynch, 1967:638).

Maloney (1958:210) reports that at the time when the legislation was introduced in Parliament there was apprehension expressed in respect to whom the legislation would, in fact, be applied. It is indeed questionable whether the conviction for four indictable offences where the individual might have received a sentence of five years or more is an adequate standard for labelling a person an habitual criminal. This is particularly true since under the Criminal Code, maximum sentences are quite high.

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[3]For a review of such legislation, see Tappan (1949) and Timasheff (1940).

As a result of Kirkland v. The Queen (1957) it was clearly established that in addition to the proof that the accused had been convicted of the requisite number of offences, that there is an onus on the Crown to prove that the accused has been leading a persistently dishonest or criminal life at the time he committed the substantive offence which led to habitual criminal proceedings. According to Harrington and Devine (1967:685),

> The courts have held that the only relevant period to consider is the interval between the accused's last release from prison and his arrest for the substantive offence, as "the legislature never intended that a man should be convicted of being an habitual criminal merely because he had a number of previous convictions against him.

However, in R. v. Channing (1966) it was stated that a long list of convictions in itself may permit an inference that the accused is an habitual criminal.

Even with some of the safeguards created as a result of case law, it still remains questionable whether persistency can be equated with dangerousness. Morris' definition of an habitual criminal is

> . . . one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime; and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or petty delinquent) (Morris, 1951:8)

While the notion of "dangerousness" seems to be in accord with the legislative intent (cf., Grosman, 1966:102 and Morris, 1951: 137-44), we can see from practice that this principle is seldom applied in finding a person to be an habitual criminal (see

Mewett, 1961:48-50). This is the primary reason for the recommendation of the Canadian Committee on Corrections (1969:241-71) that the present habitual criminal legislation be replaced with legislation aimed at the dangerous offender.[4] The present situation is anomalous in that the truly dangerous offender will probably be given such a long sentence for his substantive offence that he will not have the opportunity to meet the conditions for being found an habitual, and presumably dangerous, criminal in terms of the present legislation. As well, the dangerous professional offender (for example, a professional killer) is often able to avoid detection or conviction so that it is unlikely that he will meet the criteria as well. As Price (1970:9) notes,

> One of the most serious criticisms of the habitual criminal legislation is that it does not reach the types of offenders for whom special sanctions might be appropriate.

It is simply unlikely that the truly dangerous offender (with the possible exception of the recidivist armed robber) will collect the four substantive convictions necessary for being found to be an habitual criminal.[5] It is more likely that such individuals will

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[4] However, this proposal to create legislation aimed at the dangerous offender may be ill advised. For a cogent critique of the difficulties associated with the identification and treatment of such offenders, see Price (1970).

[5] An offender must have been convicted on separate and independent occasions of three indictable offences for which he could have received a sentence of five years or more before he is eligible for habitual criminal proceedings. It is not until he has been convicted of a fourth indictable offence for which he could be sentenced to five years or more that he may be charged as an habitual criminal.

either be serving a long penitentiary term or will be detained in a mental institution.

b. Discretion in the initiation of habitual criminal proceedings: Under s. 662 of the Criminal Code, the Attorney General of the province in which the accused is to be tried must give his consent to an application for sentencing the accused as an habitual criminal. In addition, if the accused has been found to be an habitual criminal under s. 688(2), the court may exercise discretion in whether or not to sentence the person to preventive detention. Discretion is also given to the parole board when it makes its yearly review of those who have been sentenced to preventive detention. In fact, the use of discretion can start the minute that the accused is brought into the police station for the substantive offence that would make him liable for being found an habitual criminal. It is fairly obvious that the prosecutor will be in a position to exercise a great deal of discretion in the decision of whether or not to ask the Attorney General for consent to proceed with an application to have the person sentenced to preventive detention as an habitual criminal. There is another area where the exercise of discretion is at least plausible: the police. The information given to the prosecutor by the police constitutes the basis for the laying of most charges. There is no reason not to believe that when the police feel that the prosecutor should proceed with an application for finding a person to be an habitual criminal based upon the experience of the police with the offender, that they would not make such a recommendation to the prosecutor. In his discussion of

Canada's habitual criminal legislation from the standpoint of the police, Springate (1967:650) states that, "It is the responsibility of the police for the betterment of society, to insure that the law is enforced."

c. The sentence of preventive detention: Most penologists would agree that, if anything, the sentence of preventive detention provided for in the Canadian legislation is a retrogressive feature of an Act which was modelled on one which was already recognized as a failure. This sentence means that the habitual criminal will either be in prison or on parole for life unless pardoned. In his discussion of the use of the indeterminate sentence for habitual criminals in England, Radzinowicz (1968:442) states that, "The indeterminate factor in their release has given rise to much sense of unfairness and has shown no compensating advantages in reformation." In a similar vein, Mewett (1961:55-56) notes that,

> Any hope of reform may well be defeated if the prisoner is confronted with the fact that he is never to be a completely free person again. The depressing realization that he will either live and die in prison, or that he will live with the threat of prison hanging over him if he violates his parole, without necessarily committing any further criminal offence, must militate against genuine reform.

In their discussion of the Model Sentencing Act and the dangerous (not simply persistent) offender, Murrah and Rubin (1965:1167) cite a comment in the Act which states that, "A life term, even though the offender is subject to release, is a psychological set back against any treatment other than the passage of time."

Once a person has been found to be an habitual criminal, it remains a matter of discretion as to whether the sentence of preventive

detention should be imposed. The debate as to whether the sentence should be imposed centers around the notion of "expediency". Mewett (1961:48) states that

> . . . the courts generally appear to ignore the provision [discretionary imposition of sentence] and assume that a finding that the accused is a [sic] habitual criminal, includes automatically a finding that it is expedient for the protection of the public to sentence him to preventive detention.

While this may have been true prior to the time that Mewett wrote, data presented by Boilard (1967:500) on habitual criminal cases from 1961-67 question this assertion. Of 140 cases concluded in this period, 69 persons were sentenced to preventive detention, 34 were adjudged to be habitual criminals but not so sentenced, and 37 were found not to be habitual criminals. As these data demonstrate, a finding that a person is an habitual criminal does not mean that he will automatically be sentenced as such.[6] However, a search for a consensus among jurists as to the meaning of "expediency" is a search in vain. As Harrington and Devine conclude:

> The scope of the legislation on the habitual criminal is much too wide, and even with the added criteria [sic] of expediency being employed by the courts, the case law

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[6]This finding is bolstered by a recent decision of the British Columbia Court of Appeal (Regina v. Laverick, 1973) where it was held that, "Before it could be said that it was expedient for the protection of society that a sentence of preventive detention be imposed it must be proved beyond a reasonable doubt that the accused was not merely a nuisance but a menace to society; the facts of the case at hand did not support such a conclusion, and failed to show that the appellant would, when released from custody, be a real danger to the public" (p. 96).

[7]See, for example, R. v. Sneddon (1966); R. v. Marcoux (1966); and, R. v. Jeffries (1965).

> still does not give rise to a sense of predictability. It would be well to consider the words of Mr. Justice Norris in Regina v. Marcoux: 'It is to be remembered that little is to be gained by the comparison of facts in different decisions on s. 660 [now s. 688] and each case must be decided on the basis of its own facts.' (Harrington and Devine, 1967:690).

What we are left with, then, is legislation which is vague in its terminology, which permits the use of a great deal of discretion, and for which reference to case law provides far too little guidance.

3. Bargaining and the Habitual Criminal Act: Newman (1962) has suggested that where the ability to exercise discretion is coupled with offences which carry severe penalties, plea bargaining is not uncommon. Tappan, in his review of habitual criminal legislation in the United States, claims that

> . . . the general circumvention of the statutes by legal authorities was stressed with a resultant nullification of their deterrent value. . . . avoidance and nullification of the recidivist provisions are common! The law was described frankly as ineffective in eight states, while others stressed the customary circumvention of legislative intent through the procedures of bargaining with the prosecution, of pleading to lesser charges, and of failure to secure the multiple offender indictment (Tappan, 1949: 28).

Furgeson is quite open in his description of the use of the recidivist statute in Texas:

> . . . since the operation of the criminal justice system depends upon the bargaining process to insure that the court dockets do not become hopelessly clogged, prosecutors more often used the habitual offender laws as a bargaining tool to strengthen their position in negotiations with defence attorneys on the plea and the sentence (Furgeson, 1967:663).

A career criminal from Texas concurs:

> So they say, "Well, I'll tell you what. We'll let you cop for the maximum, less than the habitual." In other words, in Texas, they'll let you cop for the twelve years, or they'll put the bitch on you. And there you are. They use it as a hammer (Jackson, 1969:232).

Mewett (1961:41) notes that, "The same allegation has been made by prisoners in Canada."

Harvey Blackstock was one of the first individuals in Canada to be sentenced to preventive detention as an habitual criminal. In his autobiography he offers the opinion that:

> In the States too, in the states that have Habitual Acts, it is mandatory to charge everyone who comes within its scope. [Blackstock is incorrect. In some states it is mandatory, in others it is discretionary.] Here, in essence, it was up to the arresting officer to make the charge. The Act seemed specifically designed to be used as a third-degree method for getting information.
>
> Had it been mandatory in Canada to charge everyone who came within its scope, they would have had to have a parole board long before they did, or build more penitentiaries, because about fifty percent of all penitentiary inmates could have been charged and convicted as the Act is now (Blackstock, 1967:222-23).

There is, in fact, some basis for Blackstock's belief that many more individuals than the number actually charged would be liable for a sentence of preventive detention as habitual criminals. An unpublished pilot study of recidivism done by the Judicial Section of DBS (1967) found that 46.7% of the 2,867 men released from federal penitentiaries between April 1 and December 31, 1966, had been committed to federal penitentiaries on three or more previous occasions. Presumably, many of these recidivist offenders would qualify for preventive detention under the present habitual criminal legislation.

Additional support for the claim that few "habitual criminals"

are so labelled comes from Price (1970:7):

> Equally significant is a Cormier study of 184 penitentiary recidivists, all of whom had been selected because of deep and persistent involvement in a life of crime. Although over half of this group had been convicted on three separate and independent occasions of indictable offences—punishable by imprisonment for five years or more, not one of the group had been sentenced to preventive detention.

Nine informants had experiences with the habitual criminal legislation being used as a bargaining lever. It was suggested by these informants that the threat of habitual criminal proceedings has been used by the police and the prosecutor in order: 1) to induce the accused to plead guilty to the substantive charge; 2) to induce the accused to provide information on other criminal acts and individuals; and, 3) to insure that the accused will not return to that jurisdiction upon release. In the words of one informant:

> Well, under the Habitual Criminal Act, it's a life sentence. I bargained my way out of the sentence. . . . Like I was bitched in court but I was in the judge's chambers where a deal was made where if I didn't fight the record, they wouldn't sentence me. So, like before all this came about, my lawyer got a psychiatrist. Me and him got together and he fixed it up on my tests so I wasn't anti-social or non-violent [sic]. So then we went in the office. I went in, my lawyer went in, the prosecutor went in, and we talked to the judge. The judge proved to himself that I wasn't anti-social after seeing all these exams. So, he said that if the psychiatrist would take the stand and put it out to the public so they could hear that, he wouldn't pass sentence on it. So the deal was that I was to go up and not fight the record -- like there was 47 witness against me in court and it was going to take six or seven days. Now there was no way I could possibly win, you know. There was no way in the world that I could beat them -- I had no choice. Like I've watched _____; I've watched _____ [persons currently serving sentences of preventive detention as habitual criminals]. I've heard their talk -- they're both here. So I thought the only answer is to make a deal.

> They already gave me a sawbuck for armed robbery. When I get out, I'm not going back there because if I do step out of line. . . . (no. 5)

In commenting on an individual who is currently serving a sentence of preventive detention, this informant stated that, "He's a nuisance. He's nothing but an out and out nuisance. He get's out of here, he's out of here for two days, and he B & E's a place for an overcoat." This appraisal was largely substantiated by senior officers at the two penitentiaries where the individual mentioned above has been serving his sentence of preventive detention.

Another informant reported that

> The first deal I was involved in was on a conspiracy beef. We got nailed with 600 cheques and a cheque writer. The cops came to me and they said, "We're going to make you a deal: either we're going to bitch you right here or return that cheque printer." I made the deal. I got thirty days on it, for conspiracy, which is, you know, damn good -- thirty days and a two year peace bond. (no. 21)

In another case, an informant (no. 24) was charged with passing counterfeit money. He said, "The word was this: either I fly east and finger the source of the counterfeit money or the bitch." Since it was his belief that the source of the counterfeit money was tied in with organized crime, he chose the latter alternative and is currently serving a sentence of preventive detention.

In a similar type of case, the informant reports that

> The persons involved in the conspiracy [to commit armed robbery charge] were my wife, myself, and a friend who was under the threat of the habitual criminal charge. The person who was under the threat of the bitch told me he would say anything the police wanted him to say as

> long as he was not bitched. Since they were only really after myself and I didn't want my wife to be convicted of conspiracy, I accepted [pleaded guilty] the two armed robbery charges and the possession of the shotgun. (no. 95)

Another informant describes a situation in which:

> Myself and two others were charged with armed robbery. One of us was convicted and got seven years. The Crown appealed and offered a deal to the one who was found guilty saying that if he would testify against us two he would not get the bitch. He refused and got the bitch. (no. 34)

In another case, an informant (no. 92) reported that after lengthy negotiations with the prosecutor and the police, a number of charges were dropped in return for a promise of giving information. He was given a two-year sentence on the remaining charges which involved passing a large number of forged cheques. At that time he was given formal warning that he was eligible for habitual criminal proceedings. (It should be noted that while he did have the requisite number of separate convictions, the longest period of time he had spent in jail prior to this two-year sentence was three months.) As it turned out, there were several other charges which could have been laid but were not. Prior to his release on parole, he was visited by the RCMP and informed that should he decide to return to the province in which he had been given this warning that he would be charged with these other offences and that habitual criminal proceedings would be initiated.

One informant who is serving a sentence of preventive detention clearly believes that the habitual offender legislation is used as a device to extract information and guilty pleas. He adds that, "If this club is going to work, it's got to deal out the odd rap." (no. 24)

Additional support for the thesis that the threat of habitual criminal proceedings can be used as a bargaining lever by the prosecutor and the police can be found by examining the structure of offences as it relates to police work and the offence patterns of those who have been sentenced as habitual criminals. (Unfortunately, data are not available on those who have been threatened with habitual criminal proceedings and those who have been found to be habitual criminals but not so sentenced.)

As noted in Chapter Four, the police often need the assistance of underworld informants if they are to be effective in the control of crimes of vice (especially narcotics offences) and burglaries. If the threat of habitual criminal proceedings is used as a means of gaining information, then we should expect a preponderance of those individuals who have been threatened with habitual criminal proceedings to have been involved with burglary and narcotics offences. As previously noted, data are not available on the criminal behaviour patterns of those who have been threatened with habitual criminal proceedings. However, Skolnick (1966:125) notes that those who are no longer willing or able to supply information or who have become involved in a crime which is "too big" are no longer in a bargaining position. Therefore, we might assume that some of those who have been sentenced to preventive detention as habitual criminals would have been involved in narcotics offences and burglaries or who, because of the nature of their own criminal activities in these areas, have become a nuisance or are no longer useful as a source of information.

Statistics on those sentenced to preventive detention as habitual criminals tend to support the above. Maloney, writing in 1957 (p. 247), states that 32 of the 53 persons serving this sentence were convicted of offences against the Opium and Narcotics Drug Act. A more detailed analysis was done for the Canadian Committee on Corrections. The lifetime criminal records of 80 persons who, on February 26, 1968, were serving sentences of preventive detention under the habitual criminal provisions of the Criminal Code were analyzed. A breakdown of the total offences (excluding juvenile offences can be seen in Table 1.

The Committee notes that while there were 77 convictions for assault, "virtually all . . . would appear not to be of a serious nature as appears from the penalties imposed" (Canadian Committee on Corrections, 1969:247). In addition, the Committee found that "approximately 37.5 percent of those sentenced to preventive detention have . . . no convictions for offences against the person" (p. 248). As well, it was noted that the legislation ". . . appears to be most frequently applied against the offender at a time when his behaviour pattern has assumed a non-violent character" (p. 248). The general conclusion was that no more than one-third of those detained as habitual offenders appear to represent a serious threat to personal safety (p. 252).

As suggested earlier, the use of this legislation is highly discretionary and, for this reason, may be used as a lever in bargaining. The Committee (p. 247) was ". . . not able to discover any consistent or rational basis upon which it has been invoked."

Table 1

All Offences Committed by the 80 Detainees under the Habitual Offender Legislation in Canadian Penitentiaries on February 26, 1968

Offences not Against the Person

Theft, B & E, and Related Offences	1,229
Fraud and Related Offences	270
Vagrancy and Related Offences	139
Narcotics*	107
Liquor Offences	61
Escapes	53
Driving Offences	36
Bail-jumping	8
Weapons	33
Disturbance	19
Damage	19
Offences of a Regulatory Nature	8
Conspiracies, Counselling, etc.	12
Counterfeiting and Revenue Offences	8
Interference with Police	8
Miscellaneous	22
Total	2,051

Offences Against the Person

Assault and Related Offences	77
Robberies	79
Wounding	5
Indecent Assault	9
Rape	4
Kidnapping	2
Homicide (Manslaughter)	1
Total	177
Grand Total of All Offences	2,288

*Eighteen of these offences were for trafficking, the remainder for possession.

Source: Canadian Committee on Corrections (1969:266-71)

Of the 80 detainees, it was found that 45 had been sentenced in British Columbia with 39 of these having been sentenced in the City of Vancouver. Lynch (1967:632) states that:

> . . . Vancouver, in addition to being a city in which there are many drug addicts, has also been for many years a mecca for criminals from other parts of Canada and the United States and he [the City Prosecutor] is determined to put a stop to this.

In other words, the attitudes of officials in a particular jurisdiction may have an impact upon whether a person will face habitual criminal proceedings. Perhaps if the legislation were considered from the vantage point of furthing the ends of bureaucratic efficiency, a more "consistent and rational basis upon which it has been invoked" might emerge.

4. Conclusions: While the intent in passing Canada's habitual criminal legislation appears to be that of protecting the public from the "dangerous professional criminal," the legislation has largely failed to achieve that aim. It has been shown that few of those detained as habitual offenders constitute a serious threat to personal safety. While the legislation does not appear to serve its purpose in terms of its legislative intent, it may at time function as a powerful bargaining lever. This comes as a result of the great degree of discretion which is in the hands of officials in initiating habitual criminal proceedings.

D. Capitalizing on Fear and Ignorance: The Native Offender

The assertion that "One does not have any rights unless he is aware of them and has the means by which to protect them" may

be a truism. Nonetheless, it does reflect reality for some naive and fearful defendants in the negotiation process. Officials need not co-charge a female or threaten such a defendant with habitual criminal proceedings in order to induce him to plead guilty; capitalizing on his fear or ignorance is often quite sufficient. The outcome involves negotiated justice in the sense that a plea of guilty comes about as a result of interaction between officials and the defendant. However, the negotiation is, by and large, a one-sided affair.

Certain defendants are at a distinct disadvantage in the negotiation process. This fact has been noted by others. For example, Newman (1966:46) found that

> Naive and inexperienced defendants plead guilty to offences that are ordinarily downgraded to less serious crimes for more experienced defendants who have engaged in plea negotiation.

This finding is paralleled by the claims of Chambliss and a Comment in the Harvard Law Review.

> There are undoubtedly systematic biases built into such a system which parallel the biases against lower-class persons, minority-group members, and persons who lack the aura of respectability. There is, in addition, the fact that the professional criminal can offer the system compensations for leniency and is therefore in a much stronger bargaining position than the amateur or occasional thief (Chambliss, 1969:209).
>
> . . . . . .
>
> . . . it is clear that not all defendants now get equal opportunities to bargain. The naive defendant often gets no bargain at all (Comment, 1970:1387).

Among our informants we found that "naive" frequently meant native. All indications were that certain native offenders were involved in the negotiation process far less frequently than

their white counterparts.[8] This is suggested by the fact that some inmates and penitentiary staff estimated that the proportion of inmates of native origin in the penitentiary where most of the data were collected was as high as 50%.[9] At the same time, only 12 (10.4%) of those offenders who agreed to be interviewed were of native origin. This could be explained by either the general unwillingness of native inmates to be interviewed by a white researcher, or the belief on the part of native offenders in that institution (who are admittedly not representative of all native offenders) that their lack of involvement in the negotiation process meant that they had little to offer the researcher. We believe that the latter explanation is the more plausible one. This belief stems

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[8]It is not suggested that this is true of all native offenders. The very fact that some native informants described the nature of the problem would, in itself, serve to negate such an assumption. Hagan (1974:89) found that among urban native offenders, race made no significant difference in the proportion who: 1) retained counsel; 2) entered an initial plea of not guilty; and, 3) had their primary charge altered. In contrast, the native offenders to whom reference is made in this section resided in rural areas where access to counsel (and to the native court worker programme which is now found in most urban areas) is limited. It should be noted that, at present, changes are taking place even in rural areas which should diminish the likelihood of the occurrence of situations such as described in this section.

[9]A precise estimate of the proportion of the inmate population of native origin could not be made. Official statistics (which reflected a figure of 30% being of native origin at the time of the research) were conceded by both staff and inmates to be inaccurate. In the federal penitentiary system, inmates are categorized as white, native, or other. Inmates of mixed blood (Metis) often opt for being classified as white. It should be emphasized, however, that those of mixed blood often share social disabilities which are similar to those acknowledged to exist among those persons of purely native origin. The difficulty of conceptualizing race or ethnicity for the purpose of accurate demographic surveys has been noted by Peterson (1969).

from the researcher's prior associations with native inmates in the institution, the fact that the person who served as the primary research assistant was himself of native origin, and the statements made by certain native informants.

Three informants spoke explicitly about the status of the native in the negotiation process. The picture they painted was one in which certain native offenders, out of some combination of fear and ignorance of the law and legal authorities, are literally forced into pleading guilty. After spending some time in prison, some of these offenders learn enough about the legal process to put themselves in a position where they might bargain. However, by this time they are angry enough about what they perceive to be the past abuse of their rights that they refuse to enter into any kind of negotiation with the authorities and, consequently, plead not guilty.

One informant, an articulate spokesman for native rights who is presently on parole and majoring in Indian education at university, was questioned at some length about his view of the role of the native offender in the negotiation process.

> Say, for example, a guy goes in charged with theft over [$200] and pleads not guilty. The magistrate will [illegible] something like, "Look, constable, I think you'd better have a word with this boy." He adjourns the court for ten minutes and ten minutes later he has his guilty plea. The guy is supposed to believe the cop is helping him. The usual thing they're told is that "if you plead guilty we'll just give you three months and not two years in the penitentiary." What happens is that the son of a gun pleads guilty and, "O.K., one year" or a deuce less, know what I mean? They work in pairs. I've seen this type of thing happen.
>
> DO YOU THINK THIS IS RELATED TO THE PERSON BEING UNAWARE OF HIS RIGHTS?

> Right. Exactly. Another thing, when you say "respect" -- I don't think it's respect. I think they're terrified more than anything else. The idea of going to jail for two or three years. . . . But once you've been in the penitentiary -- one year, two years -- you're going to fight, man, even if you have to rot in a provincial jail [remanded in custody] for six months or a year. A lot of the native fellows here say, "Never plead guilty even if you are guilty." I know myself, I would never plead guilty again. Never.
>
> EVEN IF YOU WERE OFFERED A GOOD DEAL?
>
> Even if I was offered a good deal. I'd go down swinging. . . . It's when you first start out being on your own you tend to go along with the law but once you've been through it all, been through the mill, no way would I make a deal with the law. From one extreme to the other. (no. 78)

This view that many native offenders plead guilty as a result of their fear of the authorities was shared by another native informant.

> Probably what they're afraid of is the RCMP always tell you that if you plead not guilty and you get made [that is, convicted], you're going to get a lot of time. They wanna maybe slap on another charge, or maybe it will be a higher degree or something, and this will scare them and they tell them, "You plead guilty and get it over with. You won't get very much time and you'll be out." And this is how they work it most of the time. They're afraid. I think the Indian people are scared shitless of the RCMP, you know. It's the way they operate. They're terribly afraid of them. (no. 50)

The belief of informant no. 78 that ignorance of one's rights and of the legal process plays a role in being able to induce native offenders to plead guilty was not unique.

> See, another thing, too, that I found out lately in here is about these legal aides [legal aid lawyers]. They don't tell a guy exactly what they discuss. Every time I have a legal aid lawyer, I expect him to give me some advice but they never told me that, they say it's up to me. I have to make the decisions. So, that's what I found out this last bit here, when I got this lawyer.
>
> ARE YOU SAYING THAT YOU NEVER REALLY MADE A DEAL FOR TIME

OR CHARGES, THAT YOU NEVER GOT LESS TIME OR HAD SOME CHARGES DROPPED BECAUSE YOU AGREED TO PLEAD GUILTY?

No, because I learned the first time. I used to think I know, but I don't know. Since the first time I heard a lot about police. They pick up some young fellow who don't know about nothing, particularly Indian children, youths. They grab him on some charge and they add some charges that they're supposed to investigate and then make a deal with him. "You plead guilty to this charge and get a suspended sentence." Now this young fella, he don't know. You get all the stories from the police. Then they plead guilty and get a lot of time. Because the police are too lazy -- just to get rid of charges, you know.

ARE YOU SAYING THAT IF PEOPLE KNEW THEIR RIGHTS THIS WOULDN'T HAPPEN?

Yeah, well, like I said, I didn't know a damned thing about my rights, even to make a phone call or a certain thing like that. (no. 53)

One can fully appreciate the significance of the above comments only by being present when these accounts were related. This is especially true of the following accounts. What follows cannot be said to be true of all native offenders. However, these cases do underscore how the offender who is ignorant of the legal process and who is not represented by a skilled advocate may be at a distinct disadvantage in taking advantage of some of the possibilities for manipulation which exist when a system of negotiated justice is in operation.

This last time, this bit here, when I got sentenced for this last bit here, I was approached by the RCMP back home. And they told me to plead guilty to the charge, you know, and you'll probably get out light even though you got a long record. So I did and I never got off so easy, really. I got three years for a B & E.

HAS THIS TYPE OF THING HAPPENED BEFORE?

Well, pretty well all the time. Times I've been in jail I've been told this anyway. This is my third bit in here

now and each time I got conned into it really. (no. 69)

. . . . . .

Most of the charges I was charged with were for theft and I always plead guilty all the time, you know. I never got no lawyer -- that was the second time I did get a lawyer for myself. Right off the bat I get five years.

DID THE POLICE OFFER YOU A DEAL ON SOME OF THESE EARLIER CHARGES?

Yeah. Mostly I went along with them. For instance, the charge before that one was theft over, theft over 50. Two counts of it. Made a deal with them. They said, "If you give us all the stuff, if we get all the stuff back, if you tell us where you stole it, we'll have probation on you."

DID THEY OFFER TO DROP THE CHARGES TO THEFT UNDER?

No. They said they'd leave it as it is but that they would recommend probation and that I'd be out of there for sure today. Even had the probation officer come in and he said, "Yeah; you're going to make it out today." So we went to the cops. I had all this stuff. Went to court and got two years probation and 18 months provincial time.

HAS THIS TYPE OF THING HAPPENED BEFORE?

Trying to recall -- been charged so many times. Most of the time I just plead guilty, don't fight the charges; nothing like that. (no. 82)

. . . . . .

I went to court and pleaded guilty and did most of my talking. I did my own talking, you know. Legal aid lawyer there didn't have too much to say. He told the magistrate I had a trade as a painter. So they adjourned for five minutes and they told me to go back in there, you know. I pleaded guilty to the charge, both charges, and I got two years concurrent. Although I had mentioned to my lawyer that I'd like to have some witnesses for every charge, suppoena witnesses, you know. . . . The native court worker was aware about that, you know. So if he was really concerned about me, you know, he'd go and have a talk with the witnesses at the _____ Jail. Well, he didn't. (no. 85)

. . . . . .

My first crime, actually, supposedly, in 1963, I was charged with B and E and theft. And I didn't know anything about the law at that time, so, the police told me that if

I pleaded guilty to this charge, I'd get off. But at that time I was a patient at a hospital at _____. I took off from there and I was picked up and charged with B & E. So they sent me back to the hospital at _____ and then I pleaded guilty to the charges, and I got one year on a suspended sentence. See, the case was there, on the reserve. I went to this place there and when I got into the house, here was a bunch of Indian boys come in, you know, to the house, and they had an instrument, you know, a guitar and all this, so I took one of them, you know, started playing it, and I took into the house. See, I didn't know it was stolen. About a week later, the police come up to the house, and they asked me who owned that thing and the lady there saw me bring it into the house and she said it was mine, see. So I was charged. I was the only one who was charged for it. I didn't even know where they pulled the B & E, you know. . . . I didn't like staying in the bucket, so I said, "O.K., take me back to the hospital. I'll plead guilty right away." So the first thing I was charged with I never actually did. Since then I started thinking. (no. 53)

. . . . . .

I'd been in the hospital for three years and I had weekend passes. The first time I got picked up in 1969 they took me to [a mental] hospital. I stayed there for about two and one-half weeks and I asked the doctor, I asked him before, could I go home for a weekend pass. He said, You're not ready." He really thought I was sick, you know. Last year it was harvesting time, September or August, the doctor said I could go home. "Get someone to pick you up." So I phoned home to my cousin. He came and picked me up. So I went home every weekend like that, you know. The doctor gave me pills and told me not to drink because I would get sick. I promised the doctor that I wouldn't drink, That's why I land up here. I got charged with robbery with violence. I never did rob that guy; I never did beat him up, you know. So I got two and a half years. I went to the appeal court in May and I couldn't exactly remember what happened because I wasn't feeling well. So I tried to appeal my conviction after six months. So the judge said in court, he said, "After 30 days you're not allowed to appeal." I didn't know anything about it. It was my first time in here. I had trouble before. A lot of times I was picked up -- had too many drunken charges, you know. This is the first time I've been in the pen here. (no. 57)

In the course of interviewing this informant, it became quite obvious that he had neither been advised of his rights nor did

he have any idea as to what his rights were.

The most pathetic case involving a native offender was one in which it became apparent that the informant (no. 67) was not even cognizant of why he was in prison. From what we were able to discover, the informant had been on parole and was working in a bush camp. When he was injured in an accident, he decided to return to a city some 50 miles away to see his parole officer. This was a holiday weekend and his parole officer was out of town. He then decided to visit his wife and son whom he had not seen for 18 months. Unfortunately, they lived nearly 200 miles away. The trip constituted a violation of his parole agreement and resulted in his return to the penitentiary.

> But the RCMP they lie sometime because I couldn't understand English. I don't know why they pinch me. And I say "yes", supposed to say "no", I say "yes", and some of those words is supposed to be "no" and I say "yes" -- don't understand English. When they say, I don't understand what they mean. The last time they took me there my parole officer about nine months I work up there in _____. I got a parole and I work up there nine months and I hurt my arm. I break here. I cut the tree, see. The other one standing here and it push this way. And I come to town. Had a holiday. And my parole officer is not there. I couldn't do anything and I got $125 and I heard it there my family didn't need anything. And I went to _____ to see my family because I never see them for year and half. And I go out there three days and I come back here and I see my parole officer and he send me back here. (no. 67)

Not all native offenders fare so badly. The offender who is aware of his rights or who has competent legal representation may, despite his own ignorance, avoid being railroaded into pleading guilty. However, the fact remains that not all defendants are equally equipped to protect themselves when the disposition of

their cases, at least in part, involves the ability to negotiate and manipulate. This fact underscores a fundamental difference between a pure due process model and a crime control model which emphasizes justice by negotiation. The former is designed to protect all defendants from the abuse of official authority; the latter affords protection from such abuse only to those who are clever, powerful, or lucky enough to successfully negotiate and manipulate.

> . . . where plea negotiation is common, there is a question of the fair and consistent opportunity for all defendants to participate in the bargaining process (Newman, 1966:42).

This problem, put in its most extreme form, is that we may find that the only inducement which is needed to obtain a plea of guilty from a defendant who is both ignorant and powerless is the official command to plead guilty.

E. Dead Time: The Remand Inducement

As seen in Chapter Six, release on bail while awaiting trial or negotiating the outcome of a criminal case is important to offenders. Since one is often not credited with the time served in custody while awaiting trial, the threat of having to serve a protracted period of "dead time" may be used to induce a person to enter a plea of guilty.

Unless there exists a large backlog of cases, such a threat may be difficult to carry out for it requires the cooperation of all official agents, including the judge. This, we suspect, explains why only three informants believed that being remanded in

custody was used to induce them to plead guilty. At the same time, all three informants believed that the tactic was used quite frequently. This may be viewed, however, as a function of their particular status and range of experiences: all three were known to the authorities as career criminals and had extensive exposure to the legal process.

When asked by one of the inmate research assistants, "Do you think they use remand time as another inducement to cop a plea?", one informant replied.

> Oh, sure . . . shit, always, _____. Look, I did spend 41 months on remand. I'd have been there three months if I'd pleaded guilty and put up a token defence. There is no doubt about it. Undoubtedly so. I want you to guess how long it took me to get to trial between my first trial and my second. Just estimate. Eighteen months! It's amazing what they can do when they're really interested in delaying a trial. (no. 24)

One informant, a working thief, believed that he was threatened with a lengthy period of time remanded in custody in order to force him to plead guilty to a minor charge. He felt that this was done because, although the police were certain that he had committed a series of burglaries, there was insufficient evidence to warrant a charge.

> Down in _____, I got picked up with a young girl and got charged with contributing [to the delinquency of a minor]. And they told me that if I didn't cop out, I'd end up doing six months and then some on remands. And, like they had nothing on me 'cause the girl wouldn't say nothing. All she was doing was hitchhiking. But there were some other things that they were pretty sure I'd done and couldn't prove and this was one way to get me out of circulation for awhile. And, so, the Sergeant at this police station told me, he says, "If you don't cop out, I'll make sure you get six months on remands." So, I didn't know what to do, cop out or fight it, 'cause

you'd only get about six months anyways. So, I turned around and got a lawyer. After he read the statements that they wrote, he told me to go to court and plead not guilty 'cause there was nothing to it. So, I went in there and pleaded not guilty and they dismissed the charge right there. So, if I would've went in there without a lawyer, I would've been doing six months.

DO YOU THINK THAT THIS THREAT OF LENGTHY REMANDS IS USED ON OCCASION TO GET YOU TO COP OUT?

I think it happens quite frequently. (no. 19)

Another informant was not so fortunate in a case which involved similar conditions.

In _____ they did that to me. Picked me up on car theft. Locked me up in a cell all by myself -- wouldn't even let me talk to another prisoner.

IN ORDER TO FORCE YOU TO PLEAD GUILTY?

Sure. I said, "What am I charged with?"

"Car theft. You go to court in the morning."

Go to court in the morning, call my name out -- I didn't even get to open my mouth. No plea! "You're remanded, eight days or sooner." I thought, that was fast. Eight days later, I'm back in court. I thought we'd get it over with this morning. Get up there: "You're remanded, eight days or sooner." I thought, "What the hell's going on? Don't I even get a plea any more? Don't they ask me?" The fourth time I went up there "eight days or sooner" I got mad. I thought, "What the hell!"

The cop came along -- they couldn't prove car theft -- and says, "How do you feel?"

I said, "What's going on? How long are you going to keep me in here? Don't I even get a plea in court?"

"Oh, hell," he says, "this can go on for quite awhile. We're in no hurry to proceed."

I said, "Well, God, I don't feel like spending the rest of my life in here."

"Well," he says, "anytime you want to get it over with, we can talk."

"What do you mean?"

"I'll make you a deal. Plead guilty to joy riding and I'll guarantee that you don't get any more than two months; keep fuckin' around and I'll see that you stay here for six months without a plea."

I thought, "Well, I'll have to go along with him. One way or the other I'm not going to get anywhere." I says, "OK, plead guilty to joy riding."

> The next morning I went up to court. It wasn't even my court day. Special court session! "How do you plead?"
> "Guilty."
> "Two months in the district jail."
> I thought to myself, "Well, what the hell?" What was the idea when they couldn't even prove it to start with? Usually they'll say that they haven't got evidence, withdraw, throw out the case, take a stay of proceedings, or something. No. Lock him up in custody! It's always in custody. I've never. . . . (no. 87)

The threat of remanding a person in custody for a lengthy period of time is simply another one of a series of inducements which may be used to obtain a guilty plea. Given the experiences of these informants, we may hypothesize that the technique is most likely to be employed when the individual involved is a career criminal and the situation is such that, while there is strong suspicion, there is insufficient evidence to sustain a charge related to the offender's "normal line of work." By charging the person with a relatively minor offence (to which there also may be insufficient evidence) and threatening to remand him in custody for a lengthy period of time, the person may be induced to enter a plea of guilty. Whether the person serves his time as a convicted or as a remanded prisoner, the same end is achieved: a career criminal is temporarily kept off the street and out of work.

F. Overcharging as an Inducement

What constitutes overcharging is related more to normative than legal considerations. If a defendant were charged with an offence which is more serious than could be supported by the facts of the case, his best course of action would be to go to trial on

the grounds that he would probably not be convicted. In such a case, overcharging would not serve as an inducement to plead guilty to a lesser charge.

Overcharging as an inducement to plead guilty to a lesser charge relates more specifically to the norm which is operating in a jurisdiction in respect to a charge vis à vis the behavioural components (as opposed to the legal components) of an act.

> Some defendants can with equal appropriateness be charged with one crime or with several related crimes. The forgery of the endorsement and the negotiation of a cheque may be charged as one offence; or the forging, uttering, and possession of the cheque may be charged as three distinct crimes (President's Commission on Law Enforcement and Administration of Justice, 1967b:134-35).

If the norm in a jurisdiction is to charge an individual who forged and cashed a stolen cheque with only one offence, then to charge him with three offences in relation to this act would be perceived as overcharging. In much the same way that complaints in civil cases sometimes contain exagerated claims so as to encourage a negotiated settlement (cf., Polstein, 1962:36), an exagerated charge in a criminal case may be laid to encourage a negotiated plea of guilty to a charge which is, in fact, the charge which is normally laid. This is supported by a finding of Hagan's (1974:92) which suggests ". . . a possible tendency to 'over-charge' offenders in anticipation of 'rewards' to be distributed later in the bargaining process."

One technique which may be used to encourage an offender to plead guilty is to initially charge him with as many charges in relation to an offence as possible (cf., Remington and Joseph, 1961: 530).

DID THEY CHARGE YOU WITH THREE ARMED ROBBERIES?

No. It was just -- the way they told it to me was that in this one building, because there were three custodians with the money involved, that I could be charged individually on these counts which would turn it from one particular crime into three. They said that with a plea of guilty, they would amalgamate the three.

BUT THEY NEVER CAME THROUGH ON THEIR THREAT?

Oh, no, I mean they can't do it, but they try all those things. In this case, it was the prosecutor who wanted the plea of guilty. He said if I pleaded guilty at my preliminary [hearing], he'd give me three years and make it one charge.

WHAT FINALLY HAPPENED?

I wouldn't go along with it. Ended up getting convicted and got five years but I'm appealing the conviction. (no. 14)

A similar approach to using overcharging as a bargaining lever is simply that of couching ". . . the original version of [the] charge against the accused in the most extreme form possible within the confines of a given set of facts" (Blumberg, 1967:53). In such cases, "The charges are filed to provide 'leverage' to insure a guilty plea, and the only real issue is the range of the reduction" (Newman, 1966:79) -- a view which was shared by one of our informants.

Some years ago I went out and stole some motorcycle parts with some friends. The parts were worth about $25. It was the front wheel off a Harley. So, they charged us with theft over [$50]. This was a used part. We just stole it off this bike in a bike lot. They charged us with the price of a new wheel, see. So I sent my lawyer to the man and told him, "We'll cop out if you'll reduce it to theft under." So they did. There was no mention of time or anything. We got off fairly easy that way.

DO YOU THINK THEY CHARGED YOU WITH THEFT OVER TO INDUCE YOU TO COP OUT TO THEFT UNDER?

Oh, certainly, certainly. We were aware of it; the police

were aware of it; the prosecutor was aware of it. You know, we all knew what was happening. We knew that if they didn't come to us, we'd go to them, and they knew that. (no. 32)

Finally, an individual may be charged with a series of crimes. This ". . . may be sufficient to cause the defendant to plead guilty to one or two charges proceeded upon by information" (R. Mills, 1966:518).

> See, what they'll do lots of times, they'll charge you with 20 B & E's, whether you did them or not. But they say they related to each other, like they were sort of done in a pattern. So, they know your pattern and they'll take 20 of these B & E's and they'll say, "OK, we're charging you with 20 B & E's." And you know that out of that 20, you're going to get made on a couple of them, so why not plead guilty to one instead of having more on your record? (no. 7)

Charging an individual in such a way that the charge (or charges) may imply the possibility of a sentence which is greater than the sentence normally given for the act which was committed may thus serve as an inducement to plead guilty to a lesser, but in fact normal, charge.

G. Summary

The outcome of a negotiated settlement need not always be a "bargain" for a defendant. When a gross power imbalance exists, the exchange which takes place between offenders and officials may be very one-sided.

> Marginal offenders . . . may be dealt with harshly, and left with a deep sense of injustice, having learned too late of the possibilities of manipulation offered by the system. . . . Such improper practices as deliberate and unwarranted overcharging by the prosecutor to improve his bargaining position, threats of very heavy sentences if

> the defendant insists on a trial, or threats to prosecute relatives and friends of the defendant unless he pleads guilty may, on occasion, create pressures that prove too great for even the innocent to resist (President's Commission on Law Enforcement and Administration of Justice, 1967a:11-12).

As the data indicate, these are dangers which should not be ignored.

In the course of interviewing offenders about their experiences with negotiated justice, we heard of many deals which were clearly to the benefit of offenders. Initially, it came as something of a surprise when a number of informants volunteered comments at the end of their interviews to the effect that, "I sure hope that something can be done about this dealing. It's rotten." After hearing of enough cases such as those described in this chapter, the element of surprise in response to such comments disappeared.

CHAPTER EIGHT

CONCLUSION

> They can play their games all they want but there are supposed to be boundaries -- like the criminal himself is supposed to know how far he can go and the officials are supposed to know how far they can go. But these deals are -- there's no limit at all!
>
> -- Anonymous

A. Looking Backwards

In looking at the system of negotiated justice from the offender's perspective, the reader who is familiar with the related literature may judge the extent to which there is a correspondence between the views of offenders and officials. At the very least, we suggest that the offender's view is logically consistent with the more "respectable" portrayals of the working of the criminal justice system in general and the negotiation process in particular.

While the benefits obtained by offenders and officials were sometimes more apparent than real, the deals themselves were none the less consistent with descriptions of the criminal justice system which emphasize the goals of crime control and bureaucratic efficiency.

We have discovered, from another perspective, a view of a complex process. In the course of considering the offender's view,

the reader has had the opportunity to have a glimpse of offenders as human beings with needs and desires which are not unlike those of persons with non-criminal identities. In most of the preceding accounts of negotiations there has been an implicit awareness of process, structure, and norms vis à vis the criminal justice system. It is out of this awareness that basic patterns of negotiations emerged.

From the standpoint of the offender, the kickback is generally the most beneficial type of deal. Deals involving the kickback of stolen property or materiel used in the commission of criminal acts may result in significant concessions to offenders while furthering the achievement of the legitimate goals of crime prevention and control. However, it was suggested that the benefits obtained by officials are sometimes more apparent than real. Taken to its logical conclusion, the possibility of making such a deal may actually encourage crime as offenders commit criminal acts to acquire the materiel needed to bolster their bargaining positions.

Information is the lifeblood of any police department. Offenders who can supply the police with information may be able to obtain worthwhile concessions from the authorities. However, most offenders perceive the costs -- both mental and physical -- of acting as an informer as outweighing whatever benefits they might accrue.

A deal in which the focus is a plea of guilty in exchange for concessions is the focus of most literature on negotiated

justice. Such deals are designed to increase bureaucratic efficiency in appearance or in actuality. While common, they are of questionable benefit to most offenders.

Deals for bail generally involve a kickback. The benefits to offenders making such deals are twofold: they are out of jail while awaiting trial and they may return to crime to raise money for their defence. When the latter is an offender's motivation for making a deal for bail, it is obvious that the official goal of crime prevention is not furthered.

The offender's perspective has drawn attention to some aspects of the negotiation process which hitherto have been generally ignored.

One such aspect is that of justice by negotiation as an ongoing process. For the offender who is aware of the possibilities for manipulation which are present in the system, the negotiation process may extend from the initial encounter with the police through the time of sentencing. This view of the negotiation process suggests that descriptions of this process which have been confined to the interactional boundaries of the role of the prosecutor may be analogous to the presentation of only the second act of a three act play.

Unlike previous descriptions of the negotiation process, the police emerged as frequent, and often significant, actors. The police are the gatekeepers to the criminal justice system. In large measure, their actions have a direct influence upon the stance taken by the prosecutor in dealing with a defendant and help to

define the boundaries of the disposition of a case. The police were involved in 79% of the 202 cases of bargaining described by our informants. In fact, they were the only officials directly involved in conducting the negotiation with the offender in 52% of these cases.

Some would maintain that it is in no way proper for the police to engage in any type of bargaining with an accused. Given the role of the prosecutor in the criminal justice system, prosecutorial bargaining may be more easily justified. However, it has been suggested in our analysis that if there is justification for bargaining by the police, such justification may reside in the need for crime prevention, law enforcement, and the conservation of limited resources.

As in other areas of human endeavor, offenders who enter into the negotiation process are characterized by differing levels of requisite knowledge and ability, as well as sources of power which may be used to effect a favourable deal. In general, those who have the ability to successfully manipulate the system have been a part of a criminal subculture and are systematic and reasonably successful in their criminal pursuits. In contrast, those who are at a disadvantage in the negotiation process are generally characterized as ignorant of the legal process and as unskilled, occasional or first-time offenders. This raises the possibility that the individual who is ignorant, powerless, and perhaps, the least blameworthy, will be subjected to disproportionately severe penalties as a result of his inability to manipulate the system and

the ability of the system to manipulate him. The assistance of competent legal counsel may help to compensate for such unequal bargaining abilities among defendants. However, it should be noted that it is often the case that such individuals are induced to accept the notion that a plea of guilty is in order before legal assistance can be obtained.

Whether a particular negotiation corresponds to a model of the game on one extreme, or a model of coercion on the other, it still leaves much to be desired. For most informants, bitterness and cynicism were the result of having been a participant in the negotiation process. This attitude is consonant with a decrease in the perceived legitimacy of the criminal justice system. Such an attitude must surely militate against the rehabilitation of the offender.

B. Research Implications

This exploratory research suggests that the boundaries of previous research on the negotiation process have been unduly restricted. In doing so, it calls into question many of the assumptions in the literature about the nature of this process. Future research, whether its aims be explanatory or descriptive, should have as its scope the study of the offender's career from first contact with officials to the final disposition of his case. Obviously, there is no official record which will completely reflect the dynamics of this process.

Where a system of negotiated justice exists, and where

differential opportunites and abilities to negotiate are present, sentence disparity will be the inevitable outcome. While the existence of negotiated justice will not wholly explain away disparate sentences which have traditionally been accounted for in terms of such variables as the race of the offender, his previous record of criminal activities, and individual idiosyncrasies among judges, a more thorough understanding of the negotiation process should suggest additional variables which have explanatory power in accounting for disparate sentences.

Our findings have implications for those who employ official records and statistics in criminological research. They serve as a further warning that a record of convictions may not be an accurate indicator of an individual's pattern of criminal behaviour. They add a cautionary note to the assumption that length of sentence is necessarily an accurate index of the seriousness of one's criminal behaviour. The pattern of negotiation in which a male offender pleads guilty in exchange for the dropping of charges against a female co-accused should be considered in accounting for discrepancies between male and female crime rates.

Finally, our description of the negotiation process serves as yet another warning that it is an error to carry out research on the policing, prosecuting, defending, or judging process in the criminal justice system and to assume that these processes are decentralized and independent of each other.

C. Policy Implications

Before launching into a series of policy recommendations which are intended to serve as a panacea which will prevent future abuses of an individual's legal rights and bring the ideal and the reality of the criminal justice system into perfect alignment, it would be wise to ponder a few realities.

1. To the extent that the increased visibility of the negotiation process will result in greater control and procedural regularity in the administration of criminal justice, increased visibility is desirable. Such regularity is desirable in that it is basic to the philosophy which underpins the system of justice. However, it should be remembered that it is, in large measure, the lack of visibility and the lack of procedural encumbrances which permit the negotiation process to increase bureaucratic efficiency and control certain types of criminal activity. There is always the danger that if highly stringent procedural safeguards are created, the process may actually become less rather than more visible as officials attempt to preserve a practice which has become more or less institutionalized in some jurisdictions.

2. Most difficulties associated with the system of negotiated justice can be traced to the abuse of discretionary authority. Discretion, by its very nature, is subject to abuse. At the same time, a system of law which gives no discretionary authority to legal agents is a tyrannical system. As Judge Charles Breitel has written:

> If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable (quoted in President's Commission on Law Enforcement and Administration of Justice, 1967b:130).

Ours is a system of laws, but it is also a system of men. We may weed out some bad men from the system, but even good men sometimes use bad judgment. Judgment is, of course, necessary. Coming after the fact and often representing a higher moral plane than is reflected in the day-to-day arrangements among men in society, it sometimes appears harsh and hypocritical.

3. Many offenders were very unhappy with the system of negotiated justice. Some were also quite articulate when speaking of the ideal system of criminal justice. If an offender (or, for that matter, an official) fears unpleasant consequences as a result of a deal, the obvious solution is simply not to enter into negotiation. It is unlikely, however, that many offenders will do so for once an offender is again entangled in the web of the law, the ideals which he espouses will probably come into conflict with his immediate interests. So long as it is not to our advantage, the last thing most of us want is justice.

4. To the extent that the criminal justice system does, in fact, function as a system, a remedial measure which is directed at only one level of the criminal justice system will have an impact on other levels of the system. For example, should the prosecutor's office announce that it will no longer enter into negotiation with defendants, the police may feel forced to make adaptations to

insure a larger number of guilty pleas from those arrested so as to avoid an excessive amount of time being spent giving testimony in court.

The preceding comments are intended to suggest that it is highly unlikely that the system of negotiated justice will be eliminated or that safeguards can be implemented which will prevent the possibility of injustice being done. Those who are disturbed by such a pessimistic conclusion may hope for utopia or they may cope. Coping might include some of the following suggestions which are intended to encourage greater procedural regularity in the bargaining process and a greater sense of fairness for those who go thrcugh it.

1. The naive accused must be afforded greater protection in the negotiation process. This implies immediate access to competent legal counsel. Defence counsel -- not the prosecutor or the police -- should explain to him the nature of the charge and the alternatives which are open to him.

2. There should be greater recognition in actual practice of the distinction between factual and legal guilt. Too often, the prosecutor, because of overwork, relies too heavily on the charging recommendation given to him by the police. Since the police are not trained to make the legal distinctions which are necessary in laying an accurate charge, the result may be that an offender faces a charge which is out of proportion to the offence committed. The more active involvement of the prosecutor in the charging process may diminish the likelihood of this occurrence.

3. Perhaps most crucial is that the judge play a more active role in the negotiation process. At present, his role is little more than that of a rubber stamp, legitimizing that which has taken place outside of the courtroom. He is undoubtedly unaware of the nature of much, if not most, of what has transpired outside of the courtroom. This is unfortunate. In the name of social defence and the protection of the rights of the defendant, a judge should not accept a guilty plea until he has satisfied himself that there is evidence which would sustain a finding of guilt and establish that the charge to which the defendant is pleading is neither overly harsh nor overly lenient. Upon considering the case, the judge should then indicate his willingness or unwillingness to accept the plea. To this end, an amendment to the Criminal Code is in order. Such an amendment would recognize that it is the duty of the judge to inquire into the propriety of a plea of guilty with lack of such an inquiry constituting grounds for an appeal. Should negotiation be the basis for a plea of guilty, the terms of the negotiation should be recorded so as to help regularize that which is, to a great extent, an institutionalized practice. Finally, should the judge be involved in any negotiation, such involvement should take place in open court to avoid the appearance of collusion among the judge, other officials, and the defendant.

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APPENDIX I

GLOSSARY

B & E -- break and enter.

Beef -- a criminal charge.

Bit -- a sentence involving incarceration.

Bitch -- a sentence of preventive detention for one adjudged to be an habitual criminal.

Boost -- to shoplift.

Bucket -- a city jail.

Bug house -- a mental institution.

Bull -- a prison guard or police officer, depending upon context.

Can -- a safe.

Code -- the inmate code which emphasizes opposition to staff values.

Cop out -- to plead guilty.

Deuce -- a two-year sentence.

Deuce less -- a sentence of two years less a day. In Canada, this means that the sentence will be served in a provincial, as opposed to a federal, institution.

Digger -- a jail.

Fin -- a five-year sentence.

Grease -- nitroglycerine.

Harness bull -- a uniformed police officer.

Horseman -- a member of the RCMP.

Joint -- prison.

Kick in -- to gain entry into a building by means of smashing a door or window. This is considered by most to be an unsophisticated approach to burglary.

Laying track -- to lie to or con someone.

Patch -- to receive concessions in the disposition of a criminal case as a result of giving stolen property, materiel used in the commission of crimes, or other favors to the authorities.

Pinched -- arrested.

Provincial time -- a sentence of less than two years.

Sawbuck -- a ten-year sentence.

Smack -- heroin.

Solid con -- an inmate who adheres to the dictates of the inmate code.

Street, the -- the outside world as referred to by convicts.

Squarejohn -- a person with a noncriminal identity.

Straight goods -- the truth.

Strap -- see bull.

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