ies...that result in custodial sentence is ... even smaller and has also been declining ... from 30 chances in 1966 to 20 in 100 in 1974." Figures published by the Home Office in 1974 indicate that 40 percent of reported robberies were "cleared up" - a phrase that covers a multitude of dispositions.

At the level of investigation and prosecutorial attention in the United States our situation requires unusual efforts to maximize resources to achieve the maximum deterrent effect. In the District of Columbia a computerized system has been developed to help prosecutors determine which cases need the most urgent attention. If this approach continues to be successful in the considerable number of cities in which it is now being tested, it could become an important tool.

But even when the system operates effectively in the individual case so that a crime is solved and the offender is arrested and convicted, there is still the matter of imposition of a sentence.

Plea bargaining has been criticized in our country but recognized as necessary to the survival of the criminal justice system. Reforms have been suggested. For example, the American Law Institute's Code of Pre-Arraignment Procedure would require a degree of formality and openness in the process of plea bargaining which is currently often informal and secret. It would allow the prosecutor and defense counsel

to discuss proposed agreements with the court and would require that all plea agreements be reported in open court and reviewed by the judge. The ALI Code would also require that the defendant be represented by counsel in plea negotiations and would put limits on what indictments a prosecutor might threaten in order to obtain a guilty plea.

In England, informal plea bargaining has been roundly condemned. Nevertheless some aspects of what Lord Parker described as the "vexing question of so-called 'plea bargaining'" remain - I am tempted to say "inevitably remain." My understanding is that prior to the incorporation of the charges in a formal indictment or indictments, it would be incorrect for the prosecution and defense to consult on a plea. After the indictment, however, there may be consultation in which the defense offers to plead to one or more of the charges. To be sure, the prosecutor in accepting a plea will have to be ready to justify in open court his failure to go forward with evidence as to those charges to which the accused pleads "not guilty." I understand there may be some difference of view as to the extent to which a judge may reject, or should attempt to reject, the prosecutor's acceptance of the plea.

Further, in the 1970 case of Regina v. Turner, the Court of Appeal, through Lord Parker, recognized the propriety of a discussion between the judge and both counsel for the defense and for the prosecution because, as a given example, "counsel on both sides may wish to discuss with the judge whether it would be proper in a particular case, for the prosecution to accept a plea to a lesser offence." There remains, of course, the question of what constitutes undue pressure upon an accused causing him to plead guilty. The Turner case itself involved a situation where the Court of Appeal found the communications

to the accused, which he believed came from the judge, deprived the accused of free choice.

According to the Court in the Turner case, the judge was never to indicate, even though it is common knowledge that a plea of guilty operates as a mitigating factor in sentencing, that, following conviction on a plea of not guilty, he would impose a severer sentence. "This could be taken to be undue pressure on the accused." Nor was the judge to indicate what he would do on a guilty plea. The judge was never to indicate the sentence he was minded to impose except to say -- if that be the case -- "whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g., a probation order, or a fine, or a custodial sentence." Whatever the discussion, however, counsel for the defense was to inform the accused of what had taken place. In February of this year, in Regina v. Cain, the Court of Appeal, in what seems to be a deviation from the Turner case, said it was proper for the judge to indicate to defending counsel what sentence the judge would be minded to impose on a conviction following a not guilty plea. But, to safeguard the accused against any pressure as to how he should plead, it was preferable that no disclosure of facts relevant to sentence should be made to the accused. This would seem to place a considerable burden upon counsel. I understand that some resolution between the two cases has recently been achieved through a practice direction.

Following the Turner opinion, R. M. Jackson warned, "There is a lurking danger, particularly when courts are overwhelmed with work, that too much pressure may be put on a defendant to plead guilty." He went on to say that this danger is minimized in the English system because the prosecution cannot make any recommendation as to the sentence imposed. Prosecuting counsel would not be asked publicly or privately by a judge as to his views on the appropriate sentence. A "bargained" sentence, in this particular sense, is thus not possible.

Beyond, but including, negotiated sentences, there have been complaints in both the United States and Great Britain about disparity in sentencing. But, as Peter Low has written, "disparate sentences in the United States are more often measured in years rather than the months that may more accurately describe the disparity problem in England."

Until recently in Great Britain there was a rather stable relationship between the sentence imposed by the court and the time served by an offender. One-third of a sentence could be taken off for good behavior, but there was no authority for parole. Then in 1967 the Criminal Justice Act provided a mechanism for discretionary release of any prisoner who has served at least one-third of his sentence or 12 months, whichever is longer. Perhaps part of the appeal of the parole system in England derives from the steady increase in the length

of sentences imposed. In 1913 only two percent of all male offenders received sentences of a year or longer. By 1951 this figure had increased to 15.6 percent and by 1969 to 27.2 percent. Another factor may have been overcrowding in prison facilities. Figures for 1970 -- when the prison population peaked at about 40,000 -- showed that at times as many as 14,000 inmates lived in circumstances prison officials deem to be overcrowded.

The United States has long had a system of parole. It has been attacked on all sides recently. Prison reformers condemn it, because of the uncertainty it adds to the lives of inmates. The uncertainty has also been condemned as operating to the detriment of the deterrent force of the criminal law. It gives a fictional cast to the sentences imposed by courts. For example, Federal Bureau of Prisons figures for fiscal years 1962 through 1972 indicate that during that period the average length of sentence imposed upon offenders imprisoned for the first time rose from about 29 to about 37 months, while the proportion of the sentence actually served fell from 63 percent to 51 percent.

All these aspects of sentencing -- disparities, the apparent unwillingness to send serious offenders to jail, and the uncertainties of the parole system -- have led us to a reconsideration of the entire area. President Ford has proposed legislation to the Congress to reduce judicial discretion in sentencing by establishing mandatory minimum sentences for persons convicted of especially serious crimes when specific mitigating circumstances are not present. The President has also instructed the Department of Justice to review the Federal sentencing structure. We have been giving consideration to the creation of a sentencing commission to draft guidelines setting forth narrow ranges of sentencing options for various crimes and various

sorts of offenders. Legislation has been proposed that would authorize Federal courts of appeals to increase or decrease the sentence imposed by the trial court. A recommendation is under study that would abolish parole and create a system in which an offender would serve the entire sentence imposed by the court except for a predetermined period taken off for good behavior. This recommendation would have to be coupled with a reduction in the level of sentences now meted out, so that the actual length of time served by offenders would not increase dramatically.

The problem of crime can feed on itself. A high incidence of crime can erode popular confidence in the law's ability to protect the person and property of individuals. A legal system that fails to generate the confidence of the people loses one of its most important strengths. If the criminal law is to be effective, individuals must conform their behavior to it voluntarily. This voluntary adherence -- which can and must be supplemented by the deterrence of the criminal law's sanctions but can never be replaced by it -- depends in large measure upon the faith people have in the efficacy and fairness of the legal process. For this reason it is extremely important

that attention be paid to those areas of the system which, for one reason or another and perhaps sometimes incorrectly, are thought to invite or enforce unfairness. The institution of the grand jury has lately come under this kind of an attack. The attack has centered largely on the absence of counsel for the witness in the grand jury proceedings, on the grand jury's secrecy, and on the grant of immunity to compel testimony. The fact that England has abolished the grand jury invites us to consider a different way of doing things.

In the modern setting in Britain, the protective function of the grand jury in determining whether to bring an indictment had become "superfluous, for it merely duplicated the formal inquiry that was being conducted by the justices" in hearings on committal to trial. The investigative work of the grand jury in England had been taken over by police. In general, the investigative function of the American grand jury in compelling the secret production of documentary evidence and the testimony of witnesses under oath does not exist in England. The power to compel testimony is available only in connection with proceedings undertaken in open court. There is no secrecy, though the news media are restricted in how much they can publish about the preliminary inquiry stage. And, in the English system, the defense can cross-examine at this stage. Thus, the advantage most

commonly asserted for the preservation of the grand jury in the United States -- namely, its usefulness in compelling secret testimony from witnesses who are either uncooperative or who fear reprisal -- is not available in the English system. Even the use -- commonly linked in this country with the grand jury -- of grants of immunity to induce testimony is exceedingly rare in England. A grant of immunity by the device of a pardon under the great seal or by agreement by the prosecution can only be made upon the approval of the Home Secretary, and the practice has been widely criticized. It must be noted that a witness at trial in England has no privilege against self-incrimination with respect to the matters at issue in the trial. Only the defendant has a privilege -- the privilege not to take the stand at all. Thus, the device of granting immunity by pardon is not legally required to overcome the exertion of the privilege against self-incrimination. It is useful only as a device for obtaining more complete and truthful testimony from a witness who feels in jeopardy. Even though no legal rule requires it, the general practice is that if a party to a crime is to be called to testify against his accomplices, he will be proceeded against first and only called to testify after he has been convicted.

American commentators who favor the American grand jury's broad powers of compulsion and secrecy generally criticize the English system as making it difficult to prosecute in cases of sophisticated criminal conspiracies. Be that as it may, the English experience ought to be closely examined as we consider

grand jury reforms. We should keep in mind, however, that to emulate the British experience would require for us quite a number of important changes.

Some recent proposals in this country for reform of the criminal justice system to avoid abuses recently discovered are distinctly American. In general, they would interpose a court between law enforcement officials and the techniques thought to have a potential for abuse. Thus, there are proposals for judicial warrants before investigations may begin, before informants may be used, and proposals to afford subjects of investigation the chance to go before the court to prevent investigators from obtaining bank and credit information and records of long distance telephone calls. It is perhaps paradoxical that such proposals come at a time when there is concern for the more effective investigation of organized and white collar crime.

In these proposals there has been little of what has been called "the Englishman's tolerance of, and indeed affection for, the unwritten rule; his natural instinct. . .to act according to what he believes to be the general understanding among his fellows as to how he should behave rather than to look for a rule permitting or prohibiting what he proposes to do and study its terms."

In fact, for a long period there has been a concern in our country about the way law enforcement officials carry out their investigations. For decades our Supreme Court has declared with

some constancy that state and federal police and prosecutors alike are constitutionally bound to follow rules in investigating, interrogating, identifying, and prosecuting defendants. The penalty for overstepping the bounds has been to exclude evidence obtained in violation of the rules. For many years, this exclusionary prophylaxis, entirely enforced by the judiciary, has been accepted in the United States as the only feasible deterrent to police misconduct. This is of course a principal reason for the Miranda rule.

By contrast, in England the emphasis has been on the exercise of self-restraint and essentially self-monitoring by the police and the authorities.

The British do not require a judicial warrant for electronic surveillance. A 1957 Committee of Privy Councillors considered the question of such surveillance, as well as mail openings, and concluded that the Home Secretary had the power without a court order to authorize wiretapping as well as the interception of mail. This power, the councillors found, was used sparingly and subject to strict rules formulated by the authorities. Under standards established by the Home Secretary, electronic surveillance may be used in espionage and security cases, as well as cases involving serious crime, especially organized, professional criminal activity. Lord Devlin in an essay published in 1960 stated that "No evidence of any intercepted telephone conversation

has yet been tendered in a court of law." It may be that this is still so if the interception is made by governmental action. In a case in 1968, however, which came to the criminal division of the Court of Appeal, the Court approved the ruling of the trial judge, admitting into evidence in a criminal case material obtained through telephone taps placed by private individuals. The Lord Chief Justice pointed out that the tap had not been placed by police, security forces, and the like, but hardly in such a way as to establish a rule. It is perhaps significant that the taps were originally made in connection with a divorce proceeding where, as the Lord Chief Justice said, "Evidence is admitted daily which results from what many people would say is really outrageous conduct." But it seems clear, in any event, that there would be no doctrine as to the fruits of the poisoned tree to prevent the knowledge gained from the fruits of electronic surveillance from being pursued, and the further results used.

There is a certain relaxation in the approach that finds it possible and preferable to rely on responsible practice, and that contrasts to our greater preference apparently for sanctions and rules.

In England, rules promulgated by the judges of Queen's Bench, govern the conduct of police interrogations. The rules provide that a caution must always proceed an interrogation of the person in police custody. But unlike the practice in the United States, statements made by accused persons, who should havebeen but were not given the warning, may be used in evidence if the judge finds that they were made voluntarily. Similarly, there is no general rule in England automatically excluding evidence illegally obtained by police. As Lord Goddard wrote in Kuruma v. The Queen (1955) A.C.197, where illegal ammunition was discovered on appellant's person in a roadblock search, claimed to have been undertaken without proper authority, "When it is a question of the admission of evidence, strictly it is not whether the method by which it is obtained is tortious or excusable, but whether what has been obtained is relevant to the issues being tried." English judges, however, do have the broad discretion to exclude any evidence which they feel would be unfair to the defendant.

The contrast between the two systems is perhaps all the greater as it touches upon the trial stage and the use of evidence when it is realized that most often the function of prosecution in England is undertaken by the police themselves--not, as most commonly is the case in the United States, by prosecutors independent of the police hierarchy. Some police authorities have staffs of solicitors to handle work, but there is little of the

independent role the United States Attorney plays in making prosecutive decisions. Indeed in England and Wales there has been some criticism of the practice of police control of prosecutions. In recommending that England adopt the Scottish system of prosecutors independent of police, the Criminal Justice Committee of the Council of Justice wrote, "It is difficult for investigators to achieve the necessary detachment" in making prosecutive decisions "and unfair to expect them to do so."

But the extraordinary record of convictions, reprimands and resignations produced by their active internal inspection and enforcement of proper conduct by the police give Americans a glimpse of an alternative mechanism to assure lawful law enforcement. The police themselves have established in England elaborate mechanisms of internal inspection, and the number of police officers who stand trial for misconduct in England is extraordinarily high. For example, in 1974, 51 London police officers were convicted of criminal offenses and another 116 were disciplined for misconduct. In addition 90 officers resigned before completion of disciplinary proceedings.

The similarities and differences between the English and the United States systems for handling plea bargaining, or pleas to lesser offenses; for the control of investigations or the use of grand juries or substitutes for that institution; for the attempt to regulate the police through exclusionary rules or

through the understanding and self enforcement of essential rules of decency--these mark the road of our common problems. We do share a common tradition of a regard for fairness and the rule of law, and our criminal justice systems now continue to face unusual strains because of the rise in crime. Undoubtedly in many ways in response to these pressures we are moving in the same direction. Because we have felt that a rethinking of standards for conduct at the investigative stage was imperative, at the Department of Justice we have instituted guidelines of this sort covering a wide range of activities for the Federal Bureau of Investigation. Guidelines covering the FBI's domestic security, foreign counter-intelligence and foreign intelligence work are now in place. Because we have felt that the public requires reassurance, and should have that reassurance, we have favored legislation providing for a modified judicial warrant procedure for foreign intelligence wiretaps and microphone surveillance. I believe it is clear that our federal courts are concerned about the scope of the exclusionary rules and their effect both upon trials and police behavior. Overall we are moving, I believe, to a more rational and effective system of sentencing. In all of these endeavors we will continue to be indebted to the English experience--both on-going and in our common tradition.

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DOJ-1976-08