Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System

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RUMINATIONS RE REFORM OF AMERICAN CRIMINAL JUSTICE (ESPECIALLY OUR GUILTY PLEA SYSTEM): REFLECTIONS DERIVED FROM A STUDY OF THE FRENCH SYSTEM

George W. Pugh*

Dissatisfaction with the administration of criminal justice in the United States is everywhere evident; the persuasive powers of a Roscoe Pound are unneeded to establish it.¹ On this point, at least, the black militant, disaffected youth, police officer, and "law and order" advocate all agree, despite their differing as to both the bases of complaint and the tenor of remedy urged.²

Although subject to vitriolic criticism, administration of criminal justice in the United States is today by no means necessarily worse than it was fifteen or twenty years ago. However, because of socio-economic unrest and the increase in violent crime, the country is rightfully far more sensitive to the system's shortcomings. Since modern industrial societies generally share the same problems, the experiences of other countries should be considered as we seek further to reform our own.³

The French criminal justice system is somewhat of a prototype of those prevailing in continental Europe and it is submitted that much can be derived from a study of it.⁴

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2. The disenchantment is perhaps less prevalent among members of the legal profession, for having lived rather intimately with the system's shortcomings, we have tended to accept and accommodate ourselves to them.


4. The writer has had the opportunity to observe the French system first-hand on several occasions, having spent the summers of 1962 and 1964 in
stead of here attempting a detailed analysis or evaluation of the French system as it functions in France, the writer proposes instead to use the French system as a point de départ for ruminations re reform of our own. Hence, what is here attempted is in no sense an evaluation of the French criminal justice system or its various procedural devices; rather, the writer will try to ascertain what relevance certain aspects of the French system might have for reflecting on the American system. Whether or not a particular French institution works well in France, it nevertheless can properly stimulate insights about corresponding American institutions, and it is in this sense that the following remarks about the French system are offered. Rather than attempting to suggest specific changes for immediate implementation, the writer has the temerity (perhaps seeing through a glass darkly) to propose, for consideration, broader long-range directional changes.

GUILT ASCERTAINMENT UNDER THE AMERICAN SYSTEM: THEORY AND PRACTICE

In theory, the guilt or innocence of an accused in our system is to be determined at the trial. It is there that the defendant is accorded those major protective safeguards which characterize our system and are seen by us to validate the verdict—the presumption of innocence, right of confrontation and compulsory process, right to counsel, the jury, privilege against self-incrimination, etc. Realistically analyzed, however, in the light of how our system really functions today, is this an accurate perception? It has been reported that approximately 80 to 95 percent of convictions are obtained as the result not of trials but of guilty pleas, and guilty pleas are usually the result (either explicitly or implicitly) of plea bargains, or to use a nicer phrase—"plea discussions." It is therefore only in a very small percentage of

France as a Fellow of the Comparative Study of the Administration of Justice, and the spring semester of 1973-74 on sabbatical leave there.

5. For a discussion of how the French criminal system works in practice, see Pugh, Administration of Criminal Justice in France: An Introductory Analysis, 23 La. L. Rev. 1 (1962) [hereinafter cited as Pugh], and materials therein cited.


7. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION 301 (1974) [hereinafter cited as ABA STANDARDS].
our total cases that guilt is in fact determined by a trial, with all of its vaunted traditional safeguards protecting against an unjust conviction. Therefore, guilt is often determined by negotiation between defense counsel and the district attorney in light of the risks each must face if he undergoes the uncertainties of a trial.

Until quite recently, the validity of convictions obtained by plea bargaining was constitutionally suspect; the process is still often sub rosa and the subject of much criticism among the public and the police. However the institution was recently enthusiastically embraced by both the American Bar Association and the United States Supreme Court. Chief Justice Burger has warned of the evils that would befall the system if the guilty plea ratio were decreased. He noted that a decrease of approximately 10 percent would practically double the number of trials, with a concomitant impact on the number of jurors, prosecutors, courtrooms, etc.

In the French system, however great its failings in other areas, the guilty plea problem is generally unknown. With a minor exception, a defendant willing to admit guilt cannot thereby preclude or forego public trial. Thus there is generally no guilty plea available to short cut the system. The absence of the guilty plea is more comprehensible when it is realized that the trial in France is a much shorter, less expensive, less time-consuming institution than our own.


9. The National Advisory Commission on Criminal Justice Standards and Goals, in its Standard 3.1 on the Courts, p. 46 (1973), proposed the abolition of prosecutorial concession via guilty plea negotiation "as soon as possible, but in no event later than 1978."

10. ABA STANDARDS at 301.


13. See discussion in text at note 90, infra.
Further, the French trial serves the very valuable and much needed function of a pre-sentence hearing. Pre-trial investigation is much more complete, and pre-trial discovery and disclosure far more extensive.

The writer is not contending that in the present context plea bargaining and the guilty plea in the United States serve no useful purpose. To the contrary, it is submitted that under existing conditions, the negotiated plea must be retained, and I applaud the courage and openness of the American Bar Association\(^\text{14}\) and the United States Supreme Court\(^\text{15}\) in recognizing the institution and prescribing safeguards. However, if the existing structure is to be retained, it is submitted that much more regulation and judicial participation in the process is needed. Further, it is believed that an alternative to the present system should be considered. In addition, the entire process (trial and pre-trial) should be revitalized so that we are not forced to rely so heavily upon guilty pleas. It is proposed, therefore, that in this article we first examine ways of expediting and improving existing trial, pre-trial, and appellate procedures, and thereafter consider an alternative to the existing plea bargaining institution.

**IMPARTIAL GOVERNMENTAL INVESTIGATION AND FULL DISCLOSURE OF RESULTS**

The adversary system in its proper sphere (the courtroom) is a magnificent institution. In light of the arguments hereafter developed, however, it is submitted that the adversary concept has somehow extended itself much too pervasively into the criminal investigation area. A different approach than the present to criminal investigation, it is believed, should be taken.

Governmental investigation of crime should strive to be *impartial* in character, i.e., it should be apart from the adversary process. So envisioned, its aim would be to turn up all pertinent facts, those favorable to the defense as well as the prosecution; then, insofar as possible, the results of such investigation would be made available to both the prosecution and the defense.\(^\text{16}\)

\(\text{14. ABA STANDARDS at 301.}\)
\(\text{16. See in this connection Chief Justice Weintraub's discussion in State v.}\)
An historic mission of the police is to investigate crime. Despite the fact that the prosecution traditionally has full access to the results of police investigation, prosecutorial authorities have often found it desirable to develop supplemental investigative forces of their own.\(^{17}\)

Despite the availability today of broader discovery,\(^{18}\) and much greater obligations on the part of the prosecution to disclose,\(^{19}\) it is still very difficult for the defense to ascertain what evidence, favorable and unfavorable, has been turned up by the police and the prosecution in their investigation of a case. Defense counsel have therefore naturally felt it advisable to conduct as extensive an investigation on their own as can be afforded. Because of the usual poverty of persons accused of crime, however, investigation by the defense tends to be minimal in the average run of cases. Defendants, however, are gaining investigative and scientific support,\(^{20}\) for the spirit of *Gideon v. Wainwright*\(^{21}\) promised and is achieving far greater results than its mere holding—and it portends much more. *Gideon*’s progeny have vastly multiplied the number of indigents entitled to representation. No longer, as in pre-*Gideon* days, is a person often to be told of his right to counsel only if, without benefit of counsel, he has the temerity to plead “not guilty.”\(^{22}\) Now no indigent may be jailed for an

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\(^{17}\) See *The President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 72 (1967).


\(^{20}\) See in this regard 18 U.S.C. § 3006A. Of particular interest is subsection (e) which allows an indigent defendant to obtain investigative, expert and other services upon a proper showing of need.


\(^{22}\) See, e.g., *State v. Hilaire*, 216 La. 972, 978, 45 So. 2d 360, 362 (1950) wherein the Louisiana Supreme Court said: “For us to hold otherwise at this time, after the several courts of this state have been accepting pleas of guilty on arraignment without assigning counsel to the accused under the practice and procedure long prevailing, would only serve as an avenue for the release of a majority of the inmates of the Louisiana State Penitentiary who are now serving under pleas of guilty.

We therefore conclude that the defendant, having been convicted and sentenced on his own plea, without suggestion to the trial judge that he needed or wanted the assistance of counsel in making said plea, was not
offense, misdemeanor or felony, unless he has validly waived his constitutional right to counsel.\textsuperscript{23} It is submitted further that under the present system, for there to be adequate protection of indigent defendants, the indigent should be accorded meaningful investigative and scientific assistance.\textsuperscript{24} The full ambit of an indigent's rights in this connection are as yet by no means clear, but if the pattern continues, we will have three comprehensive investigative forces (that of the police, the prosecution, and the defense) all generally conducted at public expense—certainly a questionable allocation of societal resources. Instead of these three investigations, a single, impartial governmental investigation in the main should suffice.

What the writer advocates is different in concept from recent salutary developments in the United States towards greater discovery. Urging a variation on the French system,\textsuperscript{25} the writer proposes that governmental investigation of a crime be impartial—something \textit{apart} from the adversary process. Under this approach, the governmental officer charged with investigating a crime would be responsible for investigating all aspects of it, and all investigators would be required to keep full and complete records of every inquiry made. When a person is charged with a crime, both prosecution and defense would have access to the reports incidental to the investigation. During the course of further investigation both sides would be authorized to suggest (and when appropriate, insist upon) other lines of inquiry. In exceptional cases, under specific situations and subject to judicial supervision, certain aspects of the investigation might be subject to less than full disclosure, but such limitation on the rights of completely full disclosure are already part of our law.\textsuperscript{26} The

\textsuperscript{23} Argersinger v. Hamlin, 407 U.S. 25 (1972). The Louisiana constitution goes even further, providing that an indigent is entitled to counsel in any case "punishable" by imprisonment. L.A. CONST. art. I, § 13.

\textsuperscript{24} Goldstein at 1192. See comment in note 20, supra.

\textsuperscript{25} For a discussion of criminal investigations under the French system, see Pugh at 1; Anton, \textit{L'Instruction Criminelle}, 9 AM. J. COMP. L. 441, 443 (1960) [hereinafter cited as Anton]; Larguier, \textit{The Preliminary Investigation by the French Juge d'Instruction}, 19 No. IRE. L.Q. 32 (1968) [hereinafter cited as Larguier].

\textsuperscript{26} F.R. CRIM. P. 16.
role of the attorney, both as prosecutor and as defense counsel, then would return more to the traditional position—that of the advocate presenting his side of the case at trial\textsuperscript{27}—developing his case largely on the basis of facts initially turned up by this impartial investigation. Under this approach both prosecutor and defense counsel would still be free to make further investigations, but there would be less necessity for same, and the system should strive towards achieving a full initial impartial investigation that would be worthy of reliance by both sides.

The French aim towards achieving such an impartial investigation, and it seems to this observer, do so amazingly well. When an offense is reported, the police commence an inquest, making a full and detailed report of each interrogation and investigation. In more serious and complex cases, investigation is thereafter under the direction of an examining magistrate, as hereafter discussed. Whether or not in the United States we ultimately embrace the notion of the examining magistrate,\textsuperscript{28} the police, it is submitted, should be charged with making broad, impartial investigation of offenses and having their records and reports of such investigations available to both sides. Perhaps for anything like the proposed plan to work effectively we would need to develop a system of investigating magistrates\textsuperscript{29} to be in charge of the investigation, and this notion will be further explored later in this article.

We Americans may be much too steeped in our own past fully to adopt such an approach. It is believed, however, that we should consciously aim towards some such full and complete impartial governmental investigation. In any event, it is submitted that such an impartial investigative approach could now be fully adopted relative to our crime laboratories and scientific investigations. The personnel conducting such investigations are presumably experts, and the fruits of their labors should be available alike to the prosecution and the defense.

The proposal for an impartial investigative system, if adopted, would greatly reduce the expense to the public of

\textsuperscript{27} See Pound, The Lawyer from Antiquity to Modern Times 98 (1953); Pollock & Maitland, History of English Law 190-96 (1895); Pugh at 1.

\textsuperscript{28} See Mueller at 29.

\textsuperscript{29} See id.
criminal investigation. Instead of society's financing three investigative forces—the police, the prosecution, and the defense—there would generally be only one, and that one an expert, comprehensive, impartial governmental investigation.

There would be a further benefit as to guilty pleas. Today, because of our sometimes inadequate investigative facilities, and the absence of full discovery and disclosure, the defendant is frequently unaware of what the prosecution knows or will learn. If there were adequate investigation before trial, and the results of same were made available to the defendant, often a guilty man subject to such an effective, exhaustive investigation would choose to admit his complicity and attempt to secure the most favorable treatment possible. More about this will be said later in the article.

UPGRADING, INTEGRATING AND COORDINATING POLICE WORK

To combat present-day crime and to conduct the kind of investigations suggested above, I am persuaded that we need a far more effective police force—one more integrated, coordinated and efficient. To control it, however, we will need many more safeguards. The French police force is a thoroughly trained, highly organized, completely centralized organization of professionals. I have great respect for its efficiency, but am frightened by its power. The French apparently have concluded that, to deal with crime, a very strong police force is needed: to control this force, they have developed a very detailed regulatory, administrative scheme.

Our criminal justice system, I believe, has been shaped and molded by our profound fear of governmental power, and hence we have shied away from the creation of strong, centralized, professional police forces—state or national. Under the stimulation of necessity, it is true that on the national scene we have relatively recently in our history established and developed the Federal Bureau of Investigation. Its

32. The Bureau of Investigation was created administratively within the Department of Justice in 1908. The agency was designated the Federal Bureau of Investigation by the Act of March 22, 1935, ch. 39, title II, 49 Stat.
ambit of authority, however, is, of course, limited to crimes against federal law.\textsuperscript{33} Also, under the stimulation of necessity, our large cities have developed professional police forces, but this too has been a relatively recent phenomenon.\textsuperscript{34} Outside the metropolitan areas our police are still often relatively untrained individuals under the direct control of a popularly elected sheriff or politically appointed chief of police.\textsuperscript{35} The pressure for "home rule" of the police is very strong,\textsuperscript{36} reflect-


34. In the 19th Century a number of states experimented with establishing state controls over the police forces of the largest cities within their jurisdictions. This approach, however, was shortly thereafter abandoned in favor of local control. See FOSDICK, AMERICAN POLICE SYSTEMS 58-159 (reprint ed. 1969); LEONARD & MORE, THE GENERAL ADMINISTRATION OF CRIMINAL JUSTICE 33-59 (1967). As late as 1931, the National Commission of Law Observance and Enforcement, (the Wickersham Commission) stated in its REPORT ON THE POLICE: "Proper qualifications, careful selection, scientific training, thorough police schooling, certain tenure of office, singly or together seem total strangers in the majority of our departments. They embrace the whole gamut of police work and raise the phantom of inefficiency to a creature of utter administrative laxity." Id. at 53-54.

35. In this connection, Leonard and More state: "Sheriffs' offices have always been the scene of a rapid turnover in personnel, primarily as a result of the concept of rotation in office. Some jurisdictions limit tenure to a specified number of terms while other jurisdictions do not allow the incumbent to succeed himself. This constant change of leadership has had a detrimental effect on the development of most sheriffs' departments as effective and efficient law enforcement agencies.

Efforts to remove the position of sheriff from the political arena have been unsuccessful and until this is done, it will serve as a barrier to professionalization of the sheriff's office. In the majority of states, the sheriff functions as the chief law enforcement officer of the county. Such responsibilities as this require a type of leadership which cannot be found in many departments.

Political aspirants to the position of sheriff seldom have the training, education, or aptitude which is required for such a position. In many departments, politics permeates the whole system and when the sheriff leaves office, there is a complete change of personnel. Partisan politics creates many problems for a sheriff's department." LEONARD & MORE, THE GENERAL ADMINISTRATION OF CRIMINAL JUSTICE 42 (1967). See also B. SMITH, POLICE SYSTEMS IN THE UNITED STATES 7, 8, 71-72 (2d ed. 1960) [hereinafter cited as SMITH].

36. See SMITH at 4; NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE POLICE 124 (1931); THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 109 (1967).
ing perhaps our citizenry's deep-rooted fear of centralized power, especially police power. The writer shares this fear of concentrated police power, very apprehensive as to whether we in America would be able to develop sufficient controls to make it responsive to the wishes of a democratic free society. Watergate and recent disclosures of CIA and FBI activity, of course, heighten this fear. On the other hand, it must in frankness be recognized that there is an inherent contradiction between effective investigation of crime in today's complex mobile society, and localized, often non-professional police forces. On balance, the writer is persuaded that we need a more integrated, centralized, professional police, and this is the direction in which we have been moving, but concomitant with it we need far more significant regulation and control. Under the stimulus of events and in light of inducements offered by Washington, we have greatly expanded and improved police training and developed means of informal integration and cooperation among the various police forces throughout the state and country. The progress in this connection, it is submitted, will and should continue. Although our police should continue to be under state and local supervision and control, the writer submits that there must be yet greater integration and overall direction of the police system at the state level. Further, satisfactory means should be developed on an administrative basis to control abuse of police authority and redress grievances, measures that were not as essential in an earlier, simpler day.

The French, and many other continental countries, have had the phenomenon of a strong centralized police force for a great many years. The vicissitudes of change and socio-economic unrest have probably necessitated it. Reflective of these changes, France has had ten constitutions since 1804.


38. For a discussion of Sir Robert Peel's efforts, beginning in 1829, towards adoption of his scheme for a unified professional police force for England, see 4 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 158-207 (1968).

The writer is not at all urging that we adopt as strong and centralized a police system as the French. The writer does suggest, however, that we can learn much from the tight regulatory schemes that the French and others have developed over many years to control a strong police force. Concededly, at times their control mechanism has been faulty and their police have become much too strong—even for continental taste, but these experiences too can be instructive. We can profitably consider mechanisms they may thereafter have developed to check such abuse of power and prevent its recurrence.

Efforts by the courts, such as *Mapp v. Ohio*, *Miranda v. Arizona*, etc., salutary though they may be, to impose judicial standards upon the police have by no means been sufficiently effective to provide the day-to-day regulation and control that is needed for a free society and modern, effective police force to co-exist. Study of the French may here be very helpful. If our police force is effectively to be controlled, we must have far more meaningful *internal* administrative regulations and sanctions.

**THE SCREENING PROCESS**

Traditionally in our system it has been the grand jury which has determined whether or not, at least as to all serious offenses, a suspect is to be put to trial. Historically it can act either on its own initiative or on suggestion of the prosecutor, and in exercising its authority it possesses broad

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40. For a splendid, detailed and chilling discussion of the organization, practices, and powers of the French police until the last half of the 19th century, see 3 RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 539-74 (1957). Radzinowicz states at 539: “By the year 1760, when London could muster hardly a dozen professional policemen, Paris had long grown accustomed to a *surveillance* so rigorous that to live without it seemed almost inconceivable.”
44. 1 WHARTON’S CRIMINAL PROCEDURE § 213 at 464-69 (12th ed. 1974); I
investigatory powers. The efficacy and desirability of the
grand jury in today's society is still much debated, but it is
this writer's conclusion that the grand jury as it functions
today is generally unsatisfactory both as an independent
body supposedly protecting the citizen from the long arm of
the overzealous prosecutor, and as an independent inves-
tigatory and accusatorial agency.

The role historically assigned the grand jury is extremely
important, however, and one naturally casts about for a pos-
sible alternative—an agency or institution that would be an
independent impartial investigative and accusatorial organ,
and adequately protect against abuse of prosecutorial discre-

tion. As an alternative to the grand jury indictment, many
states permit the prosecutor on his own information to put a
person on trial, with the preliminary examination or prelimi-
nary hearing as the buffer. It is submitted that the prelimi-
nary examination as we know it in the United States is an
insufficient safeguard for the suspect; it tends to be some-
what of a rubber stamp of the prosecutor's prior decision to
prosecute, much as the grand jury itself has come to be.

Arguably, this may be attributable in part to a feeling by

C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 101 at 150-52

45. A plethora of material has been written on the grand jury. For
bibliographical data see Bibliography of the Grand Jury, 10 AM. CRIM. L. REV.
867-78 (1972), and J. LUBBERS, ANNOTATED BIBLIOGRAPHY ON THE GRAND
JURY (1973). For current controversial Congressional proposals relative to
the grand jury, see the Grand Jury Reform Act, H.R. 1277, 94th Cong., 1st
Sess. (1975). For ABA reaction to the same, see Resolution 101B of the House
of Delegates of the American Bar Association (August 1975). See also Frankel
10, 1975).

46. For a discussion distinguishing preliminary hearing or examination
as here used from the judicial proceeding to determine probable cause for
arrest, see Gerstein v. Pugh, 420 U.S. 103 (1975), and Note 36 LA. L. REV. 1050
(1976). The Louisiana Constitution of 1974 expressly provides that, "The right
to a preliminary examination shall not be denied in felony cases except when
the accused is indicted by a grand jury." LA. CONST. art. I, § 14. For a
discussion of this provision, see Hargrave, Declaration of Rights of the
Louisiana Constitution of 1974, 35 LA. L. REV. 1, 48 (1974); Comment, The
Constitutional Right to a Preliminary Hearing in Louisiana, 35 LA. L. REV.
813 (1975); Note, 36 LA. L. REV. 1050 (1976).

47. For an analysis of the inadequacies of present procedures, as well as
arguments in favor of more flexible alternate procedures, see Anderson, The
Preliminary Hearing—Better Alternatives or More of the Same?, 35 MO. L.
defense counsel that often it is bad tactics to disclose the
nature of one's defense at this stage;\(^4\) further, the standard
by which the magistrate is to judge is by no means clear.\(^4\)
An important additional consideration is that it is questionable
whether, in applying whatever probable cause standard is
deemed applicable, the magistrate at the preliminary hearing
may properly exercise the kind of discretion traditionally
exercised by the grand jury, whether he may properly over-
rule the prosecutor's discretionary decision to prosecute.\(^5\)
If not, the system is deprived of a normative neutral deter-
mination as to whether or not prosecution should be
undertaken—a role traditionally performed by the grand
jury.\(^5\)
Further, because of the prerogatives of the prosecutor,
his decision not to prosecute is subject to little redress (unless
the press takes up the matter as a cause).\(^5\)
The prosecutor in most states is an elected official and the pressure upon him to
prosecute at times is great indeed. It is submitted that there
should be a better, more effective, independent buffer be-
tween the prosecutor and the defendant—to safeguard against
a citizen's being improperly placed on trial.

The French institutions in this area,\(^5\) it seems to me,
bear consideration. In the simpler and less serious cases,
French investigation is conducted exclusively by the police,
under the supervision of a prosecutorial magistrate (the Procureur de la République),
and his decision to put the defendant
on trial is final. Where the seriousness of the offense is of
intermediate gravity and complexity, in addition to the initial

\(^{48}\) See 1 WHARTON'S CRIMINAL PROCEDURE § 142 at 302 (12th ed. 1974).
\(^{49}\) See LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUS-
TODY 321, 322 (1965); Graham and Letwin, The Preliminary Hearing in Los
Angeles: Some Field Findings and Legal-Policy Observations, 18 U.C.L.A. L.
REV. 636, 689-692 (1971); Goldstein at 1166.
\(^{50}\) See HALL, KAMISAR, LAFAYE, & ISRAEL, MODERN CRIMINAL PROCEDURE 855 (3d ed. 1969), and authorities therein cited.
\(^{51}\) Id.
\(^{52}\) For a discussion of the existing legal restraints on prosecutorial
discretion, see Bubany & Skiller, Taming the Dragon: An Administrative Law
for Prosecutorial Decision Making, 13 AM. CRIM. L. REV. 473, 484 (1976). See
also Cox, Prosecutorial Discretion: An Overview, 13 AM. CRIM. L. REV. 383
(1976); Comment, Private Prosecution: A Remedy for District Attorneys' Un-
\(^{53}\) See generally Anton at 443; Larguier at 32; Ploscowe, The Investigat-
ing Magistrate (Juge D'Instruction) In European Criminal Procedure, 33
MICH. L. REV. 1010 (1935); Pugh at 1.
police investigation, usually an independent examining magistrate (juge d'instruction), at the request of the Procureur de la République, must conduct a full investigation. Thereafter, the decision to put the suspect on trial is to be made not by the prosecutor but by this independent investigating magistrate. Again, as with the initial investigation made by the police, a detailed record of all interrogation and investigations is to be made. In the most serious cases there is an additional review of the case by three judges of the court of appeal (Chambre d'Accusation), which incidentally is the panel to which appeals for alleged improper action of the examining magistrate during the course of his investigation is to be made.

There is much in this system, it seems to me, that we might consider adapting to our own purposes—having an independent magistrate supervise the investigation of serious crimes to determine whether a suspect is to be put on trial. Instead of being merely the referee, as is the magistrate at our preliminary examination, today the examining magistrate in the French system has the affirmative duty himself to direct the investigation. It seems to me appropriate, here as in France, for the investigation at this stage to be non-public in character, but for the prime suspect to have a wide range of well-defined rights. Further, in France the examining magistrate can act not only on the initiative of the prosecutor, but on that of the alleged victim as well, and we in the United States may well have gone too far in divorcing the victim and his family from the criminal process.54

We should, I feel, give serious consideration to instituting an examining magistrate system as an alternative to the grand jury. Perhaps, to introduce greater citizen participation than that found in France, we should have a small panel of citizen jurors (three or five) sit with the examining magistrate in both the investigating and decision-making processes, or perhaps only in the latter. Instituting an examining magistrate system would work well with the suggested alternative to the present plea bargaining or plea discussion system, discussed later. True, it would constitute a considerable departure from our traditional system. I should think, how-

54. See discussion on victim compensation and redress in text at note 77, infra.
ever, that its adoption by a state would be constitutional, and it might well bring with it both more protection for the accused and greater efficiency in investigation—a combination "devoutly to be wish'd."

SHORETER AND SPEEDIER TRIALS; BROADER AND SPEEDIER APPEALS

One of the most glaring deficiencies in the American system is the inordinate delay so often involved in bringing a person to trial. Unfortunately there seems to be undue delay in the French system as well as our own. The reason for the delay in France, however, appears to be somewhat different, for in France defense counsel are generally unable effectively to delay proceedings. The pre-trial delay there is largely attributable to insufficient personnel.

With us, in addition to the delay caused by docket congestion, insufficient personnel, etc., pre-trial delay is often attributable to the delay tactics of defense counsel, for it is very often in the interest of the defendant to postpone trial. Hence, pre-trial delay in our system is often a result of the excesses of the adversary system, and for us to permit defense counsel thus to provoke delay is to permit a perversion of the system. As Mr. Justice Powell has pointed out, it is the public which often has the most acute interest in the defendant's being brought to trial speedily whether he wants it or not. The trial court, it is submitted, should be given power and responsibility for moving the docket along and seeing to it that each defendant will have a fair and speedy day in court—unless the case is definitely dropped by the prosecution, or the defendant pleads guilty. This becomes especially evident when it is remembered that in many American jurisdictions defense of the indigent (the major criminal defense effort) is centered in a single public defender office. The power of the public defender to "gum up" the system by effectively intensifying delay tactics, must be radically curtailed.

55. A defendant in a state court proceeding thus far has no Federal Constitutional right to a grand jury indictment. Hurtado v. California, 110 U.S. 516 (1884).
56. W. SHAKESPEARE, HAMLET, Act III, Scene 1.
58. Id. at 520. See also the discussion in the legislative history of the Speedy Trial Act of 1974, 4 U.S.C.C.&A.N. 7401, 7408 (1974).
To the extent pre-trial delay is caused by absence of prosecutorial or judicial personnel and facilities, these must be speedily provided as high priority items. Modern management methods are much needed. To the extent delay is attributable to creaky machinery and outmoded methods, we as a profession must accept responsibility and eliminate the delay. The courts, I feel, must insist on the early realization of this most fundamental aim. The United States Supreme Court by its 1972 promulgation of Rule 50(b) of the Federal Rules of Criminal Procedure\(^{59}\) took a very salutary step. Not content with this development, Congress by its Speedy Trial Act\(^{60}\) (enacted January 3, 1975) requires even stronger implementation. The influential American Bar Association Standards on Speedy Trial\(^{61}\) also provide stimulation to celerity, and there is movement in the states too in this direction.\(^{62}\)

In addition to the undue length of time involved in pre-trial maneuvering, it is submitted that our trial itself often consumes inordinate time. As noted above, the French trial is usually a very short, quick affair; for many well-rooted reasons, our trial must often be much longer and more elaborate. Recently, however, there has been a lamentable tendency to extend the length of our trials, especially in the so-called “big criminal cases.”\(^{63}\) If we consider the time, expense and drain on resources involved in two-week, month long or even nine-month long trials, it must be recognized that in fact such lengthy trials are absorbing the time and resources the system otherwise would be allocating to the run-of-the-mill cases—that because of these long drawn-out trials, the pressure on the prosecutor to plea bargain in other cases is concomitantly increased.

This is not to suggest that the trial judge should play the dominant role at trial that he does in France, but he should, I feel, accept responsibility for seeing to it that the framework for trial combat is fair, adequate, and reasonably speedy. The

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59. Amended Rule 50(b) went into effect Oct. 1, 1972.
61. ABA STANDARDS RELATING TO SPEEDY TRIAL (1968).
63. As an exaggerated example, the recent “Zebra” trial, which concluded in San Francisco recently, took over one year. New York Times, March 15, 1976 at 27, col. 2.
overall “system,” represented by the judge, has a responsibility, not only to those presently on trial, but also to those waiting in the wings, to see to it that jurors are quickly and fairly selected, and that the trial proceeds with dispatch. The presiding judge, it is submitted, should assume much more than the role of a passive referee, and doing so is in no sense in conflict with our Anglo-Saxon heritage. Within appropriate limits, the judge should be free to question witnesses and comment on the facts, to prevent repetitive and unnecessarily cumulative testimony. If, as suggested above, both defense and prosecution have copies of pre-trial impartial police investigative reports, this, coupled with broader responsibility upon the trial judge to see to it that trial time is not frittered away, would expedite matters.

It is surprising to an American to realize that for all except the most serious offenses, the French give a much broader right of appeal then do we. With this exception, the French afford a full appeal on fact, law and sentence—including the right to submit new evidence. The reason this is feasible in France is that except as to the most serious cases there is no jury, and trials and appeals are both very short.

The writer is in no sense suggesting that we give as wide a review as the French; it would seem quite infeasible in our system. Nonetheless, I feel a defendant should be able to secure a reversal on the facts if his conviction is clearly not supported by the record. Further, it seems unconscionable and most unwise for us not to afford an appeal as to sentence, and yet this is the traditional view in the Anglo-

64. See 3 WIGMORE, EVIDENCE § 784 at 188 (Chadburn rev. 1970).
65. This is fully authorized by FED. R. EVID. 614. See the discussion in the Advisory Committee’s Notes.
66. See ALI MODEL CODE OF EVIDENCE, Rule 8 and comment thereto. See also Rule 105 of Fed. R. Evid. as originally promulgated by the Supreme Court, 56 F.R.D. 183, 199 (1972), together with Advisory Committee’s Notes. The Rule as promulgated, however, was not adopted by Congress.
67. See FED. R. EVID. 611.
68. See Pugh at 45.
69. Chief Judge Sobeloff of the Fourth Circuit, United States Court of Appeals, has stated: “The United States stands alone in allowing a single judge to set the minimum sentence according to his own dictate.” United States v. Martell, 335 F.2d 764, 767 (4th Cir. 1964). For a discussion of the interrelationship between appellate review of sentence and the development of appropriate sentencing standards see Pugh and Carver, Due Process and Sentencing; From Mapp to Mempa to McGautha, 49 TEX. L. REV. 25, 42 (1970).
American system. About half of the states afford sentence review, and recent federal cases indicate greater willingness of federal courts to review federally imposed sentences. In considering our criminal appeals, one must necessarily consider the inordinate delays incidental thereto. For example, the average time lag involved in a criminal appeal in the California Court of Appeal for the First Appellate District in 1970 was over sixteen months, and the median time lag in the United States Court of Appeal for the District of Columbia in 1974 was over thirteen months. Such delays in criminal justice cannot properly be tolerated; sufficient personnel and resources must be allocated to resolve them.

**Victim Compensation and Redress**

One of the contributing causes, perhaps, of the increase in American crime is the depersonalization of modern urban life, so that to the offender the victim is often more a symbol or a thing than a person. Studies have indicated that an important aspect of rehabilitating the criminal is bringing him to realize the personal harm he has effected, and in addition, to feel that somehow he has thereafter made restitution for the

Of great significance, the United States Second Circuit Court of Appeals has recently approved rules providing for greater regulation of trial courts' sentencing procedure, including a requirement that a judge must explain on the record reasons for each sentence he imposes. The new rules suggest also that a presentence conference be held with the prosecutor, defense attorney and probation officer to consider both the relevant factors affecting the sentence and possible sentence alternatives. New York Times, March 18, 1976, at 37, col. 4.


74. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1974 at 376 (1975). The overall median the same year for United States Circuit Courts of Appeals in criminal cases was 7.8 months.
harm.\textsuperscript{75} We have perhaps gone much too far in separating the civil and criminal aspects of wrongful acts.\textsuperscript{76} It is very interesting that in France\textsuperscript{77} and in a number of other countries,\textsuperscript{78} the victim, if he chooses, may become a party to the criminal proceeding, and in the same proceeding be awarded damages for the wrong he has sustained. This is very common practice in France, and sometimes the interest of the civil party is clearly dominant over that of the state. It is said that French appellate courts reviewing criminal proceedings spend approximately 70\% of their time on the civil aspects of the criminal proceedings.\textsuperscript{79}

The writer does not go so far as to urge such fusion in the United States, but it might well be salutary to provide, for example, that before a defendant is sentenced, and especially before a plea bargain is finally arrived at, the victim should have the right to be heard. Perhaps there should be further development and utilization of restitution as part of the criminal sentence itself.\textsuperscript{80} Further, as in South Africa,\textsuperscript{81} it might well be that at the conclusion of a criminal proceeding (whether it be a trial or a proceeding at which a guilty plea is received) the victim should be permitted, at the discretion of


\textsuperscript{76} For a discussion of the historical development in Anglo-American law and Western Europe generally, see Schafer at 7-38; Wolfgang, Victim Compensation in Crimes of Personal Violence, 50 MINN. L. REV. 223 (1965) [hereinafter cited as Wolfgang].

\textsuperscript{77} See Howard, Compensation in French Criminal Procedure, 21 MOD. L. REV. 387 (1958); Larguier, The Civil Action for Damages in French Criminal Procedure, 39 TUL. L. REV. 687 (1965); Pugh at 1.


\textsuperscript{79} Larguier at 688.

\textsuperscript{80} See Schafer, Restitution to Victims of Crime—An Old Correctional Aim Modernized, 50 MINN. L. REV. 243 (1965); Wolfgang at 229.

the court, to introduce evidence pertinent to defendant's civil liability. Then after a hearing, and on the basis of the entire record, the victim could be awarded a judgment as to restitution and damages.\textsuperscript{82} In the usual run of cases this might be a very salutary, expeditious, inexpensive proceeding (for both defendant and victim)—enabling the victim to receive some sort of financial and psychological satisfaction.

Furthermore, perhaps we in the United States afford the victim insufficient means of controlling prosecutorial discretion not to prosecute.\textsuperscript{83} In France,\textsuperscript{84} England,\textsuperscript{85} and a number of other countries\textsuperscript{86} the victim himself, under certain circumstances, may institute criminal proceedings. It is submitted we should consider establishing more effective methods of controlling and reviewing a district attorney's decision not to prosecute.

A NON-ADVERSARY ALTERNATIVE TO TRADITIONAL TRIAL AND SENTENCING PROCEDURES

As noted above, the overwhelming majority of convictions result not from trials, but from guilty pleas. These guilty pleas in turn result in the main from negotiations between defense counsel and the prosecuting attorney. Although very important safeguards have recently been established to protect defendants against ill-considered guilty plea forfeiture of fundamental constitutional rights,\textsuperscript{87} much more, it is submitted, needs to be done. The plea bargaining process itself still remains relatively unregulated and unsupervised; the numerous procedural regulations that govern our trial and pre-trial motion procedures are absent here. Since trial and pre-trial motion practice are subject to public scrutiny, argu-

\textsuperscript{82} This, of course, is quite different from programs for governmental compensation to victims of crime. For a discussion of the latter see S. 300, 93d Cong., 1st Sess. (1973), and Yarborough, S. 2155 of the Eighty-ninth Congress—The Criminal Injuries Compensation Act, 50 MINN. L. REV. 255 (1965).


\textsuperscript{84} See Pugh at 12.


ably they need less detailed regulations than does the plea negotiation process. Further, rather than being subject to the contemporaneous guiding, neutral hand of the judge, as are the trial and pre-trial motion procedures, the plea negotiation process is generally left to defense counsel and the prosecutor. This, it is submitted, is especially dangerous where defendant himself is often quite uneducated, as he usually is, and both defense counsel and prosecuting attorney are woefully overworked, as is normally the case. One must question whether at present improper factors may well enter the bargaining process.

Presumably the goal of the judicial process is justice—justice in its fullest meaning—with the myriad philosophical and practical aspects that enter into crime and punishment. Instead of such ethereal factors, a prosecuting attorney often may have much more practical personal problems of immediate concern—not only his crowded docket, but also the pressures brought by the press, the victim and his family and friends, and the defendant and his. Similarly, defense counsel, especially the public defender, may be overcome by the press of numbers, the desire to establish a principle, or achieve a modus vivendi with his likewise overworked opponent. What I am trying to say is that in the practical bargaining process between defense counsel and prosecuting attorney, all of society’s legitimate interests may not be sufficiently represented. Extraneous inappropriate influences may too often inject themselves. This is not to question the motives and good intentions of the vast majority of the participating professionals; instead, it is to urge that if we are to be true to the notion that ours is a government of laws and not of men, then the plea negotiation process must be subjected to far more societal regulation. It is submitted that it is insufficient simply to regulate the judicial reception and scrutiny of a bargain previously arrived at via unsupervised negotiations. If society is to control the plea bargaining process, the process itself must be far more open. In addition, and here I differ in part with very forward-looking minimum standards proposed by the American Bar Association, and the generally salutary amendments to the Federal Rules of Criminal Procedure, I believe the entire bargaining process should be sub-

88. ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3 (1968).
89. See FED. R. CRIM. P. 11. Also, under the recently approved UNIFORM
ject to the active contemporary supervision and control of the judge. The judge as the neutral nonpartisan is less subject to public pressures, less harried by docket congestion, and hence generally able to be more concerned about even-handed abstract justice. What the writer wants is more, not less, judicial control.

If, as previously urged, we develop impartial, more effective investigatory procedures, and broad discovery and disclosure requirements, plea bargaining procedures would be much safer, provided the process is adequately supervised by the court. The factual basis for both the guilty plea and any lighter sentence imposed would be made more evident. Further, if we adopt something akin to an examining magistrate, he would be an ideal person to supervise or direct plea bargaining procedures.

Under our present system, when a person elects to go to trial and contest guilt, the system's energies naturally focus upon the question of guilt or innocence. For the majority of those convicted, however—most of those now electing the guilty plea route—the fact of guilt is relatively clear, and the critical question, both for the accused and society, is what should be done with the defendant, or to him, or more ideally, for him. The present plea negotiation approach is ill-adapted to resolve this question satisfactorily. The present bargaining process too often juxtaposes the wrong values. On the one hand, society gives up the opportunity for a harsher penalty, and defendant gives up his chance to go "scot free." How much each is willing to yield depends upon the strengths and weaknesses of the case and the adversaries. As fine as the adversary system is as a fact-finding device when the question is guilt or innocence, is it reasonable to believe that it yields equally salutary results where the question is what ought to be done with a guilty defendant? Are we to believe that the most just result is to be reached by bargaining as to whether the prosecution is to yield so many "pounds of flesh" for defendant's relinquishment of his constitutional right to a fair trial and all of its safeguards?

The writer doubts the efficacy of the adversary system in this context, and proposes instead that defendant be permitted to opt out of the traditional plea bargain/trial option sys-

RULES OF CRIM. P. 441 (1974), a judge is prohibited from participating in discussions re guilty plea agreements.
tem and into a judge-run proceeding in which the fundamental issue would be what in justice should be done with this human being. At such a hearing, defendant would, of course, be represented by counsel, as would the prosecution, but the role of counsel would be to develop—in an expedited public hearing—evidence and argument bearing on what should be done with the defendant.

A real problem in formalizing a non-adversary alternative to trial is that a defendant deciding whether or not to elect the non-adversary proceeding would be quite reticent to do so unless he first were assured of the benefits to be derived therefrom. Just as in existing plea bargaining, he would be unlikely to forfeit his right to trial without first being given an inducement—explicitly or implicitly. This real problem could be met if the broad pre-trial impartial investigation urged above were adopted, for in such event, a judge (the examining magistrate if such be ultimately accepted) could, after reviewing the file, state what would be the maximum penalty defendant would face if he elected the non-adversary route. This would, it is hoped, provide adequate inducement for many guilty defendants appropriately to elect the non-adversary alternative. This proposal is very similar to a recently adopted French procedure relative to certain minor criminal infractions. Although, as noted above, the French generally do not have plea bargaining or guilty pleas, in very minor cases there is now a procedure by which a judge, after having studied the investigative report, may stipulate the fine that would be imposed if the defendant chose to accept this non-trial option.

If the above proposal were adopted generally in this country, a defendant would not be forced either to buy a "pig in a poke" or go to trial. If he elected the non-adversary hearing, the maximum sentence initially indicated would not necessarily be the sentence later imposed; it would merely be the maximum possible sentence. The court, in a non-adversary hearing, unencumbered by technical rules of evidence, would seek as best it could to determine what should be done—not simply to the defendant, but for him and society.

91. The technical rules of evidence are not applicable in sentence proceedings. See Williams v. New York, 337 U.S. 241 (1949); FED. R. EVID. 1101.
If, on the other hand, a defendant elected the traditional adversary route, he would go to trial and there be accorded all the usual constitutional rights; if convicted, he should then be afforded a meaningful sentence hearing. 92

There is, of course, a danger that the proposed system might be used to bludgeon a defendant into forfeiting constitutional rights, but this danger under the existing system, it is submitted, is even greater. Admittedly the proposal contains a built-in inducement for a defendant to give up his constitutional right to trial, and this is clearly questionable. The writer feels, however, that the American Bar Association is right in suggesting that there is justification for "going lighter" on a defendant who is willing to admit his guilt 93 and forego trial. If the proposed non-adversary alternative approach be adopted, plea bargaining between adversary attorneys should be outlawed. In its place, a defendant choosing to admit his guilt and accept a non-adversary alternative to trial would have the benefit of a judicial inquiry as to what in justice should be done with him. Although the hearing would be non-adversary in the traditional sense, both the prosecution and the defense would be invited to bring forward as much pertinent data as they wished relative to the cause. The basic responsibility, however, for ascertaining pertinent facts and fixing the most appropriate sentence would be upon officials charged with making a pre-sentence investigation and upon the court. That the ultimate sentencing decision is properly a judicial prerogative is generally accepted in our system, and the institution of plea bargaining has, it is submitted, made inappropriate incursions upon this principle. Realistically and functionally viewed, the present system often permits the prosecution and defense counsel by plea bargaining to determine sentence. The proposal would return the sentencing determination to its proper place, the court.

CONCLUSION

For generations we in America were serene in the confidence that our criminal justice institutions were the best of all possible and that there was little to learn from others.

92. See in this connection the very important safeguards recently approved by the United States Second Circuit Court of Appeals discussed at note 69, supra.

93. ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.8 (1968).
Fortunately we are now shaken from that state of self-satisfaction. Whether or not the foregoing ruminations and proposals have merit, the writer is totally convinced that we should be spending more time considering the criminal justice systems of other countries. Parts of our own are much in need of re-examination, revitalization, and reform. Especially deserving of reappraisal, it is earnestly submitted, is our institution of plea bargaining and guilty pleas. Although the recent reforms in this area have been very helpful, much more fundamental changes are in order.