The Machinery of Criminal Justice in England and the United States

William Burns Lawless

Notre Dame Law School

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Criminal Procedure Commons, and the International Law Commons

Recommended Citation

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1022

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
THE MACHINERY OF CRIMINAL JUSTICE IN ENGLAND
AND THE UNITED STATES

WILLIAM B. LAWLESS*

This article will lay side by side the major structures of the English and American criminal law procedures and will attempt to draw some conclusions helpful to strengthening American technique. Such a comparison is relevant at this time because of the mounting concern of the American people with the problem of crime and the particular feeling that, in some mysterious way, our courts or the men who man them have not properly responded to the cruel waves of lawlessness which engulf us. In other quarters, there is a feeling that the police are either inept or inadequate to the challenge of organized crime and to the breakdown of law and order in our society.

For the sake of order, general comparisons of the criminal law machinery will be made under four major topics: first, The Police; second, Pre-trial Problems; third, The Trial; and fourth, The Appeal. Focusing on each of these four major steps in a criminal prosecution will hopefully enable the comparison to be followed more easily. Within each category, an attempt will be made to sketch briefly the posture of our respective systems of law at this time and, where possible, suggest techniques for strengthening our process. American respect for the English courts appears graphically in a statement in one of the extra-judicial writings of the late Mr. Justice Jackson. He wrote:

[Compared with the dignity, simplicity and sincerity of a British trial, the tone of the average American trial is decidedly low. Some of wide publicity resemble in dignity and intellectual effort, the hog-calling contests that are popular at country fairs.]

* Dean, Notre Dame Law School. Former Justice, New York Supreme Court. The materials for this article were offered as the Robert H. Jackson Lecture, given before the National College of State Trial Judges, University of Nevada, Reno, Nevada, July 8 and 9, 1969.

At the outset, it should be emphasized that the topic chosen is a variation drawn from the study written by the distinguished Downing Professor of Laws at the University of Cambridge, England, Professor R.M. Jackson, entitled The Machinery of Justice in England. Also, to allay at the outset any possible inference of personal expertise in English law, the author would like to say that his understanding of the procedures of criminal justice in England is based, not upon actual practice in England, but upon the writings of a number of distinguished English scholars. More particularly, the following works proved most valuable: the Hamlyn Lectures of Glanville Williams entitled The Proof of Guilt, which present a comprehensive study of the English criminal trial; the thoughts on pre-trial criminal procedure of Lord Patrick Devlin, former justice of the High Court of England, in his Sherill Lectures entitled The Criminal Prosecution in England; and, most importantly, the comparison of the two systems contained in Anglo-American Criminal Justice, prepared by Professor Delman Karlen in collaboration with Geofrey Sawyer and Edward M. Wise.
England

Obviously, the functions of the police in England and the United States are essentially the same. In both countries the primary purpose of the police force is to maintain an orderly society, prevent crime and assist the community in times of crisis, riot or other emergency. Naturally, there are sharp differences in the political structures of our two countries. England is a unified nation, subdivided only in units of local government. In the United States, there are fifty state jurisdictions in addition to the federal jurisdiction. In England there are 122 separate police forces, including Wales, comprising in excess of 82,000 policemen and approximately averaging one to every 600 people. The forces in England range in size from the London Metropolitan police with over 20,000 men to the police in Dewsbury with somewhat over 100. The one or two man police force in a tiny community, which is common in some areas in the United States, has not existed in England for well over 100 years. Each of the English police forces is administered by a local police authority. There are 37 county constabularies, each headed by a local chief. In addition, 72 boroughs have their own self-contained police forces, each headed by a chief constable. Finally, there are 11 combined forces resulting from the merger of two or more formerly separate police forces. All these are locally controlled.

The Metropolitan Police Force which embraces most of Greater London is sometimes referred to by the name of its headquarters as “Scotland Yard”. Since its creation in 1829, Scotland Yard has been under the general control of the “Home Secretary”, a cabinet minister in the national government. It will be noted that Scotland Yard is not, therefore, directly under the Attorney General, as for example, the Director of the Federal Bureau of Investigation is in the United States. The Home Secretary is the police authority for the London force. He recommends to the Crown the appointment of its commissioner and is answerable generally for its operations. Over the past 100 years, there has been a growing centralization of the local police forces. This has resulted from the contribution by the central government to the cost of operating the local police. Further, since 1919, the Home Secretary has possessed power to make regulations governing the pay, allowances, pensions, discipline and conditions of service in all English police forces. His regulations have established uniform

---

1. Jackson, Advocacy as a Specialized Career, 7 N.Y.L. Rev. 77 (1929). It should be noted that this view was that of Robert H. Jackson, at the age of 37, when he was practicing law in Jamestown, New York. Although time and experience may have mollified his opinion in later life, it is interesting that Mr. Justice Jackson often cited English cases in his opinions, and enjoyed so much his association in the Nuremberg Trials with the British team of lawyers who represented the United Kingdom. The affection was mutual. Recently, Sir Elwyn Jones, former Attorney General in England, stated that Justice Jackson was clearly one of the most respected of the lawyers preparing for the trials at Nuremberg. Conversation between Sir Elwyn Jones and the author, May, 1969.

standards for the entire country. As a result, very few powers are left entirely in the hands of local police authorities. In 1962, the Royal Commission on the Police was urged to abandon the surviving elements of local control in favor of a single national police force, but the majority endorsed a continuation of local administration and this view was included in the Police Act of 1964.

United States

In the United States, police organization is highly decentralized in both theory and fact. American police systems are modeled on the English constable and sheriff and have continued to serve along these lines. There are an estimated 40,000 separate police forces in the United States, comprising well over 300,000 policemen. As in England, there is roughly one policeman to every 600 of population. The forces exhibit a wide range of types, with police organization paralleling that of government generally at the municipal, town, county, state and federal levels. There is considerable overlapping of jurisdiction and unevenness of performance.3

The federal government itself has a variety of police forces, with nearly every executive department and administrative board having an investigatory agency of its own. Perhaps the best known is the Federal Bureau of Investigation in the Department of Justice which investigates all the more important federal crimes. As is generally known, the FBI collects criminal statistics from the local and state governments. In addition, the Federal Bureau comes into regular contact with police forces at every level of the state government. The FBI is recognized world-wide as an elite, professional, police force. In some situations, however, its operations are handicapped by state and local jurisdictional problems.

In turn, each state has its own police force and, while the state police in the larger states such as New York, California, New Jersey, Pennsylvania and Michigan are outstanding, some are not of this high quality. However, in most states, the performance of the state police tends to be substantially better than that of rural and local forces. This is due to the more careful selection process and constant training in the major state police forces. Also, the lack of political interference is noteworthy in most state police departments when compared to county and local units.

A third layer of police operates in the United States, and this at the local level. In virtually every one of the more than 3,000 counties in the United States, there is a sheriff, usually with deputies. Generally, a sheriff is a political figure elected by popular vote for a short term, and invariably he and his deputies are inexperienced and untrained in the more sophisticated technique of twentieth century crime control. In the United States, the sheriff system has generally

3. Id. at 6-12.
broken down and the structure is at best an appendage from the nineteenth century, badly in need of state constitutional revision.\(^4\)

In over 20,000 townships and other rural subdivisions in the nation, the police power is again subdivided and many constables are retained as elective officers. In most cases the local constable is untrained, often incompetent and his law enforcement activities are virtually obscure.

In conclusion, the United States has a totally decentralized police system inherent with the handicaps that naturally follow such a fragmentation. Obviously, the smaller forces are inadequate to deal with modern crime. The criteria for selection is low; the degree of training is necessarily restricted and, above all, it lacks the unity of operation and the advanced technical training that is signaled in the British system. On the other hand, in the larger cities of the nation, particularly in New York and Los Angeles, the city police forces attain a very high degree of professional competence. The great difficulty is, however, that their operations are restricted many times by purely physical limitations. The American police corps are competing constantly for appropriations against other necessary community services; the paving of highways, the collection of garbage, the education of the young. In too many cases, a quality police system is sacrificed for the politically popular demand of the day.

In the American police system, perhaps the most self-destructive seed is the “second front”. Here police officers who are generally underpaid are permitted, in order to support their families, to take on a second job or position. Too often, it appears the second front becomes the primary basis for existence. Certain security attaches to the appointment to the police force and therefore, the policeman is critically concerned that he will be able to hold his second job, which is the margin of his existence.\(^5\)

This certainly points up the critical needs of our cities, counties and states to build better police forces through more attractive salary structures. It should be noted that in both England and the United States, there is a persistent struggle to recruit and retain competent policemen. The top salary for a London constable is approximately $3200 per annum, although he is given tax free accommodations, together with other allowances worth about $1,000 per

---

\(^4\) My criticism here is of the sheriff structure and not of the dedicated people who in many counties of the United States serve their community well.

\(^5\) The author distinctly recalls a situation which occurred some years ago in Buffalo, New York, where a young rookie patrolman apprehended a daylight hold-up man and courageously disarmed him. The Commissioner of Police immediately summoned the rookie patrolman to headquarters and announced publicly that he had been promoted to the position of assistant detective. The rookie was elated until he found that the hours of a young detective conflicted with his second front position as a night clerk. The increase in salary, modest as it was, would not compensate him for his loss of the second front. A day or two after the promotion was announced, the rookie requested return to the rank of patrolman so that he could continue to hold his second front.
annum, for a total annual pay of approximately $4,200. American salaries vary considerably and it is difficult to equate them with English salaries. However, allowing for differences in the cost of living and the level of pay, English salaries compare unfavorably with the best American salaries, which are approximately $8,000 per annum in New York and Los Angeles.6

A second problem is that of training the policemen once they are recruited. In England, eight regional training schools administered by the Home Office provide a uniform course of instruction for all recruits in the nation. A recruit attends an initial course of thirteen weeks duration and returns to his force to serve for about a year. Then he is brought back to a training center for an additional two week course. At this point, he is returned to his force for another year and, toward the end of his two year probationary appointment, returns for a final course of two weeks at the training school. In addition, the Home Office has established a national police college at which courses are provided for the training of young policemen of outstanding ability.

The situation in the United States is uneven. The New York City recruit must pass a four-month test. Most other large cities have some sort of police school, but these often present no more than unrelieved lectures to which there is no obligation to pay attention. It is distressing that many larger American cities do not have a truly well-planned police training program.7 A further problem is that inadequate numbers of men want to become policemen, particularly in an affluent society. They know that the work is dangerous, requires long hours and many times lacks public acceptance. Some feel promotion is based on political rather than ability standards. One American scholar, Pendleton Howard,8 observed that there is no feature of English criminal law administration which has given rise to more widespread favorable comment than its system of police. He has written that the country constable and the “London Bobbie” have become familiar as characteristic British institutions, exercising a helpful authority. He noted that the people have yielded to them a quality of obedience which militarized and despotic methods could not secure and would doubtless destroy. Howard further emphasized the fact that the great majority of prosecutions in England are instituted and carried on by the police. The English ideal of police administration may be described in general as a system of local control, coupled with strong national supervision. It is strikingly different, not only from the American system of unrestricted local autonomy, but from other continental plans. However, Professor Jackson’s more recent study concludes that the processes of the criminal law in England are far less effective than is generally supposed. He writes that the showy part is conviction and sentence, but that those sentenced are not ultimately deterred from a life of crime. He

---

7. Id. at 13.
urges regulatory procedures except in cases of serious crime. One can only hope that the federal supervision suggested in the Crime Control Act of 1968 will move forward to strengthen particularly our local level of enforcement.

Federal Training for Local Police in the United States: The Federal Bureau of Investigation

In 1935, the United States Department of Justice opened a police training school in Washington, D.C. for state and local police. The first class was comprised of 23 police officers from agencies throughout the country. The twelve-week course was tuition free to local governments which were required to pay only the expense of transportation and subsistence while officers were in Washington. The initial program has grown into what is now known as the "FBI National Academy". The Academy has trained 5,734 officers in the past thirty-five years including 183 persons from forty foreign countries. Believing that it is not feasible to accept and train all law enforcement officers in a twelve-week course in Washington, the FBI strives for the next best thing: it carefully selects applicants and endeavors to qualify every graduate as an instructor or administrator. Thus, when the officers return home they are prepared to organize their own police schools and share their knowledge of new techniques with other men on their home force.9

In 1972, the FBI plans to open a new facility now under construction at Quantico, Virginia. It will enable Justice Department personnel to train ten times as many officers a year—2,000 as compared to 200. In addition, 1000 other officers can be trained in shorter, specialized courses. The National Academy states that it is its solemn purpose to assist federal, state and local police officers, through training, to master the crime problem.10

Although the efforts of the FBI are certainly to be complimented in this phase of their activity, it is certainly discouraging to realize that even when the new facility at Quantico is completed in 1972, less than one percent of all state and local police will have been directly trained under federal auspices. Surely at a time when crime knows no state boundary it is imperative that Congress provide funds to guarantee that every local policeman receive the best possible schooling for his difficult career.

Proceedings Prior to Trial

England

In the normal process of a criminal proceeding, each accused in England and the United States passes through the same progressive legal stages. He encounters the "stop and frisk" situation, detention, arrest and arraignment.

11. Id. at 3, 26.
This article will attempt to paint in bold strokes a comparison. To do so, however, requires that there be an initial consideration of what are called the "English Judges' Rules". These are rules which have grown up since 1912 and which, to this day, control the action of police officers in the various stages of a criminal proceeding. The rules regulate police interrogation by outlining the circumstances in which suspects must be cautioned as to their rights before being questioned, and those circumstances in which they may not be questioned at all. In 1912, for the first time, the Queen's Bench Judges agreed on proper methods of interrogation which would assure the admission into evidence of confessions legitimately obtained. Later, in 1918 and in 1930 and again in 1964, the rules were revised and issued with the approval of the Home Office, thus making them, in effect, administrative regulations for all police forces in England. As Professor Karlen points out, they do not purport to cover police activity in general, and while they are not entirely free of ambiguity, they provide in compact and generally clear form, a practical guide to police conduct in much of its central and crucial aspects.

We have nothing comparable to the Judges' Rules anywhere in the United States. Rules governing police conduct are scattered through statutes, administrative regulations, judicial decisions and official and unofficial manuals of every variety. The result is that police officers in the front line of law enforcement are too often unsure of what the law is with respect to their duties and responsibilities. There is a lag in communication between the men who are on the firing line of crime enforcement and the judges who man the various courts throughout the nation. Each of our fifty states has a separate code of criminal procedure, a separate body of law opinions, a separate legislative response and a separate administrative response. Add these factors to the lack of a uniform approach to the problems covered by the Judges' Rules and one can only be but bewildered that the United States Supreme Court ever writes in fields other than criminal law procedure. The first of the Judges' Rules is:

When a police officer is endeavoring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

Lord Devlin states that it is true that the law which gives freedom to the police to question equally gives freedom to the suspect not to answer. Indeed, he says there is virtually no obligation on anyone to give the police helpful information. If a man positively knew that a felony had been committed and refused to give the police any information about it, he might be guilty of misprison of felony, but this offense is now practically obsolete. Otherwise, the policeman has no power or privilege; in the eyes of the law he is only an interested questioner seeking information. The English hold that, during this first phase of the inquiry, the policeman should be free of judicial interference,

since he is then performing the administrative task of detection and has not yet begun the legal work of prosecution. The second phase of the inquiry begins when the suspect becomes the accused. If thereafter questions are asked of the accused, the main object must be to obtain proof against him by means of admissions. This makes it a proper subject for judicial restraint. Control is exercised by means of the Judges' Rules. It is important to know when the suspect becomes the accused. The appropriate test is laid down by the second of the Judges' Rules in these terms:

Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions or any further questions, as the case may be.

It will be observed that the text of the rule, by its reference to "any further questions", anticipates that the decisive moment may arise in the middle of an interview. In practice, it quite often does. If the decision as to when that moment has come is made by the detective who was conducting the investigations, the question arises whether he can prolong the "free" period by delaying the charge. That is a course which would be practicable in some cases though not in all. A man cannot be arrested without being charged, and the arrest of a person who knows himself to be suspected cannot always safely be delayed. Such a delay would leave the suspect at liberty to escape, to continue his crimes, to suppress evidence, to influence witnesses not to come forward or otherwise to obstruct the prosecution. But the real answer is that the point cannot arise in quite this form, for the dividing line under the Judges' Rules is not expressed to be the moment when the suspect is actually charged, but is "whenever a police officer has made up his mind to charge a person with a crime". In a later criminal proceeding, however, the action of a police officer is itself passed upon, and his subjective decision is not necessarily controlling in the case if there is evidence to show that a reasonably prudent police officer would earlier have made that judgment. When the police officer attempts to testify, he is carefully cross-examined on this point and the court determines before the incriminating material is revealed whether proper warning has been given.

When the English police officer does give his caution, he expresses two things. First, there is the reminder that the accused is not obliged to talk and, secondly, there is a warning that if he does talk, what he says will be taken down in writing and may be given in evidence. From the lawyer's point of view, both are statements of the obvious. Just as an accused or suspect is never obliged to talk, so the police are always at liberty to take down what an accused or suspect says and give it in evidence. The real significance of the caution is that it is, so to speak, a declaration of war. By it, the police announce that they are no longer

13. Id.
14. Id. at 37.
representing themselves to the man they are questioning as the neutral inquirer, rather they are the prosecution and are without right, legal or moral, to further help from the accused. No man, innocent or guilty, need thereafter reproach himself for keeping silent, for that is what they have just told him he may do. By either of three things—the caution, the charge or the arrest—the police indicate that hostilities have begun and that the suspect has formally become the accused.

Secondly, the old rules require that persons in police custody should not be questioned at all. Interestingly, this was settled in a Home Office circular issued in 1930 and has been followed regularly since that time.\textsuperscript{15} The Judges’ Rules were revised in 1964.\textsuperscript{16} The most important new provision is that which allows the police to interrogate a suspect whether or not the person in question has been taken into custody so long as he has not been charged with an offense, or informed that he may be prosecuted for it.

On its face, this rule may appear ambiguous in view of the English requirement that an arrested person must be told immediately of the reason for his arrest; it would seem that anyone held in custody against his will is in fact under arrest and “charged”. If such informal notice is the charge referred to in the new rule, then the questioning of persons in custody is still prohibited. However, it seems more likely that the intention of the new rule is to allow questioning after arrest. The “charge” referred to may be the formal charge made by the desk officer at a police station. On this interpretation, the new rules allow a period of questioning after arrest, and answers given by an accused during that period are admissible in evidence.\textsuperscript{17}

It seems to follow from the new rules that if the police detain a suspect for questioning against his will without making a specific charge, the answers he gives are admissible in evidence. In effect, this gives recognition to the practice of detention for questioning, although in some situations, the police may still be liable for false imprisonment if they hold a man without a specific charge. While the new rules allow questioning for a longer period of time than did the old rules, they may require a caution at an earlier stage of investigation. Under the old rules, the caution had to be given “whenever a police officer had made up his mind to charge a person with a crime”. If this was read literally, the need for a caution depended on the subjective state of the individual policeman’s mind, although in practice, the judges tended to make their own assessment of the information and to decide independently whether it was enough to justify the charge. The new rules embody a more clearly objective test, requiring in rule 2 that the caution should be administered “as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has

\textsuperscript{15} G. Abrahams, Police Questioning and the Judges’ Rules (1964).
\textsuperscript{16} Judges’ Rules and Administrative Directions to the Police, Home Office Circular No. 31 (1964).
\textsuperscript{17} D. Karlen, supra note 2, at 123.
committed an offense". Additionally, rule 3 mandates "that a second question should be administered where a person is charged with or informed that he may be prosecuted for an offense".

United States

Until recently, no equivalent to the English Judges' Rules existed in the United States. There were no statutory provisions specifically requiring the cautioning of suspects of their right to remain silent, and police practice did not ordinarily include such a caution. Prosecutors tended to give a caution when interrogating or at least before taking a written statement—not because they had to do so, but in order to ward off criticism and to anticipate a possible defense that the statement was made involuntarily. A few police forces also administered cautions, again as a matter of grace and for much the same reasons.

No American jurisdiction had a statutory rule requiring interrogation to cease at a particular point. Questioning took place until the accused was brought before a magistrate and sometimes continued afterward, especially when a prosecutor who had not previously been in on the case wished to take a hand in talking to the defendant.

The lack of uniform American statutory rules governing questioning prior to trial has now been remedied by decisions of the United States Supreme Court. Two lines of cases have developed—those dealing with prosecutions in the federal courts and those with prosecutions in the state courts.

Federal prosecutions are based on Rule 5(a) of the Federal Rules of Criminal Procedure which provides that an officer "shall take the arrested person without unnecessary delay before the nearest available commissioner..." The United States Supreme Court has held that confessions or admissions obtained in violation of this rule could not be received in evidence in federal courts. Some differences of opinion developed among lower federal judges as to what constituted "unnecessary delay", but these have now become largely academic as a result of *Miranda v. Arizona*.

The second line of Supreme Court decisions arises from state cases. Development began in a 1936 case in which a state court failed to exclude confessions obtained after a severe and brutal beating of the defendant, although it clearly could and should have done so under the common-law rule against involuntary confessions. The Supreme Court reversed the conviction, not on the basis of the common law of evidence, but on constitutional grounds because the confession had been obtained unfairly. This original approach has

---

received broad extension from two recent decisions of the Supreme Court, *Escobedo v. Illinois*\(^{22}\) and *Miranda v. Arizona*.\(^{23}\) The first is predicated upon the right to counsel, guaranteed in the federal courts by the sixth amendment and in the state courts by operation of the fourteenth amendment. In this case the Court reversed a state conviction based upon a confession obtained where the accused was the principal suspect. He had been arrested but had not been warned of his right to remain silent, and asked to consult his counsel who was present in the police station, but was denied this opportunity.

The *Miranda* case carried the restriction upon police questioning much further. This case is predicated upon the privilege against self-incrimination embodied in the fifth amendment and is bolstered by the idea that equal protection requires that indigent persons be offered the same safeguards as those who are able to employ counsel. It holds that no statement taken from the accused while he is in custody of the police can be used against him unless he has first been advised that he has a right to remain silent, that any statement can be used against him, and that he is entitled to the presence of counsel. Finally, his failure to ask for a lawyer does not constitute a waiver of these rights. If the prosecution wishes to use any statement by the accused, it has a heavy burden of showing that he knowingly waived his right to remain silent or his right to counsel.

The practical effect of the *Miranda* decision will be to halt police questioning in the United States at an earlier time than it is halted in England under the Judges' Rules. For if the accused must be furnished a lawyer before he says anything that can be used against him, absent a waiver, it seems highly likely that he will say nothing at all after the moment he is taken into custody. Further, there is language in both *Miranda* and *Escobedo* which looks unfavorably on a system of law enforcement based upon confessions resulting from incommunicado questioning by the police, rather than on evidence independently secured through skillful investigation.\(^{24}\)

It is difficult to measure the impact that the different rules have had, or will have, in areas of detention and interrogation, but certainly, the criminal rules of evidence in the British courts are more favorably disposed to the prosecution than they are in the United States. On the other side of the coin, however, one may say that the present Supreme Court standards in the United States require a greater respect for the civil rights of the accused.

Two additional topics may now be considered—unlawful search and seizure and wiretapping. Both the English and American law follow roughly the same conclusions with respect to the police power of the search and the method of the seizure. However, they differ sharply with respect to the admissibility in

\(^{22}\) 378 U.S. 478 (1964).
\(^{23}\) Supra note 20.
evidence of the fruits of an unlawful search. The English law in nearly every instance admits such evidence while American law now excludes it.\textsuperscript{25}

While this discussion still concerns the pre-trial phase of the criminal prosecution, it should be noted that the Americans exclude admissions not only of evidence obtained directly by an unlawful search but also of evidence obtained through leads supplied by such activity, unless it appears that the connection between the conduct of the police and the discovery of challenged evidence has become "so attenuated as to dissipate the taint" or unless the prosecution shows that it learned of the evidence "from an independent source". If neither of these circumstances is shown, the evidence is barred from use in the court as "the fruit of a poisoned tree".\textsuperscript{26}

Title Three of the Omnibus Crime Control and Safe Streets Act of 1968 permits electronic surveillance for thirty days by federal and state investigators under certain court controls.\textsuperscript{27} However, prior to its adoption, wiretapping had been widespread. New York County District Attorney Frank S. Hogan has testified that he seeks very few wiretap orders and that there are not abuses in New York County,\textsuperscript{28} although a New York State Legislative Committee which strongly favored wiretapping conceded that there had been serious abuses. From 1952 to 1954, for example, the New York City police alone tapped some 2,625 telephones, many of which were public facilities. This was at a time when they were averaging about 300 court orders for wiretapping per year. They were up to 451 court orders in 1963 and 671 in 1964. One would draw the conclusion from the data at hand that, in fact, wiretapping prior to the Omnibus Act of 1968 was fairly widespread in at least some of the state jurisdictions and probably was followed in some of the federal jurisdictions.\textsuperscript{29}

During 1969, the American Civil Liberties Union launched a constitutional challenge against the Justice Department's new doctrine that wiretapping of certain domestic groups can be justified on grounds of "national security". The

\textsuperscript{25} D. Karlen, supra note 2, at 129.
\textsuperscript{27} 18 U.S.C.A. § 2518 (Supp. 1970). However, it should be noted that very stringent requirements must be met before a wiretap will be authorized by the court. The papers must indicate that the wiretap will provide evidence to substantiate the commission of one of a number of listed serious crimes, e.g., espionage, sabotage, bribery, kidnapping, racketeering, dealings in dangerous drugs, murder, etc. 18 U.S.C.A. § 2516 (Supp. 1970). Additionally, there are strict procedural requirements. The application must include a full and complete statement of the evidence upon which probable cause is based, the information to be overheard, the identity of the offender, etc. There are also time limitations on such wiretaps and extensions of time are difficult to obtain. 18 U.S.C.A. § 2518 (Supp. 1970).
\textsuperscript{28} Senate Hearings on the Omnibus Crime Control Bill, 89th Cong., 2d Sess., at 1097 (1967).
suit was filed on behalf of nine anti-war and black power organizations and the
eight defendants in the Chicago conspiracy trial. These petitioners are
essentially seeking a ban on electronic surveillance of political dissenters and are
additionally asking for criminal prosecution of the Attorney General and the
Director of the Federal Bureau of Investigation. However, Judge George L.
Hart, Jr. has issued an order staying further proceedings in the case until all
aspects of the Chicago conspiracy trial, including appeals, have been
concluded.49

In England, the question of wiretapping evidence is unpredictable because
wiretap evidence itself has never been offered in an English court, but rather,
wiretapping has been used only to obtain leads, and English lawyers are not
agreed on whether such evidence would be admitted if offered.51 On the other
hand, the decisions which allow the products of unlawful search and seizure to
be admitted in evidence leave room for the courts to hold that the products of a
direct wiretap may be permitted in evidence.

Detention, Preliminary Hearing and Grand Jury Proceedings

In both England and the United States, when the police arrest a suspect
they are required to take him promptly before a judicial officer.

Both the English and the American courts fail to recognize a distinction
between “arrest” and “detention”.52 The view in both countries is that the
police have no power to detain anyone for the purpose of questioning unless they
arrest. Police officers are free to ask questions and to request cooperation, but
whenever they take a person into custody or restrict his full liberty of
movement, their action may either constitute a lawful arrest or a false
imprisonment. Police authorities in both countries are not happy with this view.
The problem arises first with regard to on-the-street detention and secondly,
with detention for questioning. With respect to on-the-street detention there are
traces in England of a common-law doctrine which authorizes guards to
demand suspicious persons at night to give an explanation of what they are
doing. However, no modern English decision deals with this doctrine and it is
widely assumed that apart from special statutes conferring it, constables today
have no such power. Nor could a suspect’s refusal to stop and answer ordinarily
furnish the constable with grounds for arresting him.

In the United States, some state courts have upheld the lawfulness of on-
the-street detention, while an equal number have denied it. There is little doubt
that everywhere the police in fact stop and question suspects whom they would
not have power to arrest, but in most states it has not been decided whether this
practice is lawful.

appealed.
31. D. Karlen, supra note 2, at 133-34.
32. Id. at 135.
A statute similar to the Uniform Arrest Act was adopted in New York in 1964 as the so-called “Stop and Frisk” law, under which a police officer may stop any person in a public place whom he reasonably suspects of committing a felony or one of a group of serious misdemeanors, and may demand his name and address and an explanation of his actions. Unlike the Uniform Arrest Act, the New York law says nothing about detaining the suspect while his answers are verified; and unlike the British Act, it does not confer the equivalent power to arrest. These limitations were deliberately written into the statute for fear that anything broader would be unconstitutional.

The New York law further provides that when the police officer has stopped a person for questioning, he may, if he reasonably suspects that he is in danger of life or limb, search for a dangerous weapon (concealment of which is a crime in that state). Other states which have recognized a right to stop and question usually also recognize the right of the officer to search the suspect for a concealed weapon.

In the London Act, the English speak of “reasonable suspicion” and they are referring to grounds which a reasonable man would regard as justifying a decision to arrest.

Model Code provisions authorizing police officers to stop suspects and frisk them for weapons on less than probable cause were approved by the American Law Institute’s membership at the 46th annual meeting in Washington, D.C. in May, 1962. Provisions offered to the membership by the Reporters of the Model Code of Pre-Arraignment Procedure on questions of police requests for voluntary cooperation and police authority to stop persons emerged from the discussion on the floor somewhat bloodied but essentially unbowed.

American Law Institute members voted approval of a provision that authorizes police to stop and frisk for weapons where they “reasonably suspect” that the person stopped has committed or is about to commit “a felony or a misdemeanor involving danger of forcible injury to persons or appropriation of or damage to property”.

In five American states which have adopted Section II of the Uniform Arrest Act, the police may detain individuals for a few hours while they are questioned and while their answers are verified. However, decisions in these states have interpreted this as requiring the same degree of belief for detention as would be needed to justify an arrest.

In England, detention of this type is perhaps done more politely than in the United States. Consequently, in most instances of detention for questioning, it is not clear whether the suspect voluntarily complied with a police request or involuntarily yielded to police pressure. In this particular, the British police

34. District of Columbia Report and Recommendations of the Commissioner’s Committee on Police Arrest for Investigation, at 71-76 (1962).
appear to be more sensitive to the rights of the individuals and few litigations develop. In the United States, a technique developed whereby the police would hold suspects on some trivial charge while they investigated a more serious offense. Very often the charge placed was that of "vagrancy". However, a three judge panel in the United States District Court of Colorado has struck down "vagrancy" as the basis for a lawful arrest, under a Colorado statute. The court found the statute void for vagueness, denial of due process and denial of equal protection. Another police tactic occasionally used in the United States is the holding of a suspect as a "material witness". Nearly every state allows a witness whose testimony is material in a pending criminal proceeding to be held in custody or on bail awaiting trial. Of course, a showing that this technique was resorted to as a subterfuge may very well lay the foundation for a civil claim for false imprisonment.

English law also makes provision for insuring the appearance of a witness at the trial of an indictable offense. England has a device for legitimately holding a defendant in custody while the police build up their evidence against him, assuming there has been a valid arrest.

The foregoing discussion makes it apparent that each country has developed its own jurisprudence with regard to steps taken prior to the trial itself. Grand jury proceedings have not been mentioned because England abolished the grand jury in 1933. No American state has yet taken this step, although some states have constitutional provisions which would permit the legislature to do so. As was pointed out previously, immediately upon arrest in both jurisdictions, it is necessary that the accused be brought before a judicial officer. In England, this officer is usually a magistrate and generally one not formally trained for judicial service. In the United States, the arraignment may be made before a commissioner in the federal jurisdiction, or before a magistrate or judge of an inferior state court. In any event, it would appear that there is no basis for extended discussion of this phase of the criminal process. The distinct role which is played by the justice of the peace in England should, however, be emphasized. As Lord Devlin pointed out, there are about 20,000 justices in England and Wales, appointed by the Lord Chancellor on the advice of a committee presided over by the Lord Lieutenant of the County. In rural districts those are picked who are prominent in the life of the community; in urban districts appointments are made from people who take an active part in local politics. However, the Lord Chancellor attempts to insure that political elements on the bench are fairly balanced. There is no objection to the lawyer who is not in practice serving as a justice of the peace. In London, and the larger cities, the justice of the peace is really called magistrate or metropolitan magistrate and he is a stipendiary magistrate in that he is paid and employed full

time. 37 One might readily compare these men to the city judges in the larger American cities. 38

On balance it may be said that justices of the peace occupy a rather unique place in the English system not entirely comparable to the role of justice of the peace in the American jurisprudence where its offices are more narrowly restricted to petty offenses. The importance of these magistrates is shown by the fact that they deal with the great bulk of people charged with offenses. In 1964 the higher criminal courts in England disposed of 24,369 indictable offenses. During the same year the magistrates handled 1,398,012 offenses. 39 Hence, most of the offenses were disposed of by unpaid justices who have no legal qualifications. In the higher courts in 1964, where jury trial was provided, 20,397 were "found guilty", 3,882 were acquitted and 90 did not reach trial because of death, illness or other reason. 40

THE TRIAL

Under English law, crimes are divided into indictable and summary offenses. Indictable offenses are, as the name suggests, triable on indictment. This means that they are the more serious sort of crimes, triable by judge and jury at the assizes or quarter sessions. Crimes not triable by indictment are known as summary or petty offenses; they are triable without a jury by courts of summary jurisdiction, better known as magistrates courts or petty sessions, formerly called police courts.

In the case of quarter sessions, there is either a bench of magistrates, that is, justices of the peace, acting as judges, or where a borough has its own quarter sessions, a single paid judge called a recorder; in either case there is a jury as well. Appeal from the trial court lies to the court of criminal appeal, and thence, in important cases where leave is granted, to the House of Lords. 41 Petty sessional courts are usually comprised of two or more justices of the peace who are unpaid; but in some boroughs they are comprised of single paid magistrates called stipendaries (in London, metropolitan police magistrates). Many crimes, though falling within the class of indictable offenses, can, with the consent of the accused, be tried in magistrate's courts. Conversely, the more serious types of

---

37. Id. at 106-07.
38. Interestingly, Professor R.M. Jackson, who was mentioned earlier as the leading authority on the machinery of justice in England, occupies many pleasant Saturday mornings sitting as a justice of the peace in a township contiguous to Cambridge in England. He finds this one of his most rewarding experiences in the criminal law.
40. Id. at 113.
41. It will be understood that the House of Lords in connection with appeals, is not quite the same body as the House of Lords when the House sits as part of the Legislature. When the House sits to hear appeals, only law lords vote. The law lords, more formally called the Lords of Appeal, are the Lord Chancellor and up to nine Lords of Appeal in ordinary, that is, salaried-like peers and peers who hold or who have held high judicial office.
summary offenses must be tried on indictment if the defendant claims to be tried by jury.

Both in the United States and in England a more summary procedure is provided for minor cases than is used for cases of greater gravity. If the accused has been advised of his rights and demands trial by jury for one of the medium grades of offenses as he is privileged to do, his case will automatically be removed from the magistrate's court and sent to the court of sessions for trial. The magistrates have no power to impound the jury. In most cases the accused is willing to waive his right to trial by jury in the hope of receiving a lighter sentence and concluding the proceeding quickly. When this happens, the magistrates must decide whether they should handle the case themselves or refer it to a higher court. This is not true in the United States where no equivalent flexibility exists as to where a case will be tried or by what procedure. The jurisdiction of courts and the procedures followed in each case is ordinarily fixed by a fairly rigid statute and a particular case falls either within or without the competence of a particular court.

In the United States the minor courts are less uniform than in England. In relation to population there are fewer justices of the peace and more professional judges, these being found in all large cities and in most small cities as well. Today, in the United States, justices of the peace are seldom found outside rural areas. The quality of the American justice of the peace and professional magistrate varies greatly from state to state. Some are part time, others are full time; some are elected, others are appointed; some are legally trained, others are not.

The trials which are of concern here are those of the superior courts. In England, very great attention is given to decorum, barristers addressing the judge as "My Lord" and bowing to him when entering or leaving the courtroom. This is done not only by the barristers who are engaged in the case, but also by those who come into the courtroom as observers. Such ceremony, however, is reserved to the assize courts and the court of criminal appeals. In the court of sessions, which hears many more cases, the general style is less ceremonious. In the United States, of course, no wigs are used and counsel do not wear robes. English courtrooms generally provide for a more throne-like setting of the judicial bench than is customary in the United States. The English bench is also usually closer to the public seats than is the case in the United States, less space being reserved within the bar for counsel, witnesses, jury and court officials. Thus, the American judge is given a horizontal aloofness from the public, whereas the English judge is given a vertical aloofness through his elevation. It should be noted that the clerks and assistants in the English courtroom are very carefully trained and their conduct is proper at all times; not always the case in the American courts.42

42. D. Karlen, supra note 2, at 171.
Publicity Before Trial

An English trial is likely to be free of an atmosphere charged with prejudice. That is because English news media are rigidly controlled as to what they can publish about pending cases. In general, they cannot comment upon a defendant’s guilt or innocence, describe his deeds, or disclose his previous criminal record. Those who violate these rules do so at the peril of being held in contempt of court and subjected to heavy fines or imprisonment. The only exception to these prohibitions is that which allows full reporting of what goes on in open court, including what transpires at the preliminary hearing. As the jury hears the proof, the English public reads it for the first time. It would be fair to say that there could not be a Billy Sol Estes type trial in Britain, because of the prohibition of television and public disclosure. Similarly, it is likely that there would not have been a Dr. Sheppard case in England, because of the more rigid controls imposed on the press there.

Objectively viewed, it is difficult to disagree with the proposition that the British rule provides a more dispassionate coverage than does the American rule. In the United States, trial by newspaper, radio and television has been altogether too common.

The Role of Judge and Counsel

In England, the trial judge is the central figure in the administration of criminal justice. He has wide discretionary powers not only over the conduct of proceedings, but also over the admission of evidence and in summarizing and in commenting upon the evidence. Because the right of appeal is restricted, everyone assumes that what he does will probably be decisive and judgment entered will be final. In the United States, on the other hand, the tradition is equally strong that the discretionary power of a judge in a criminal case should be as restricted as possible and subject to appellate review. The prevailing idea is that every accused should have the right to at least one appeal. Consequently, underlying all the proceedings in an American trial is the knowledge that they are not final, but subject to review. This tends to shift ultimate control from the trial court to the appellate court, and what is worse, it encourages counsel to make a detailed record below.

The second dominant figure in an English trial is the defense counsel. The barrister who prosecutes is inhibited by tradition from vigorously seeking a conviction due to an overriding philosophy that the government, being as concerned to let an innocent man go free as to see a guilty man convicted, can

---

43. Id. at 173.
44. The author distinctly recalls several years ago being in London while the famous Profumo–Ward cases were being heard. Of course, there were several special editions of each of the London newspapers. Just as soon as a witness testified in court to some saucy or erotic event, a special edition of the press would come out on the streets and report it in detail.
45. D. Karlen, supra note 2, at 173.
neither win nor lose a criminal case. The English prosecutor is also barred by the discovery rules from the possibility of surprise. This leaves the advantage of surprise and vigor to the defense counsel. He decides what theory of defense to pursue, which witnesses to call, what evidence to adduce, what strategy to follow and what arguments to make. He must leave to the accused himself the decision whether to plead guilty or not guilty, and whether to take the witness stand, but otherwise the defense counsel has virtually complete control. He can go for the jugular.

The American defense counsel is less favorably situated. He is not protected against surprise because his client is entitled to little discovery of the prosecution's evidence. The net effect of American practices as compared with English practices is to shift ultimate power from the trial court to the jury and the appellate court. The counter-balancing factor tending to inhibit the American prosecutor has already been noted, i.e., the fact that his conduct during trial is subject to greater appellate scrutiny and reprimand than the defense counsel's.

Speed in Reaching Trial

In England, a case is reached for trial more quickly than is customary in the United States. The average time between arrest and commencement of trial is not much more than one month. If more than two months elapse, the delay is considered excessive. In the United States, on the other hand, many cases are delayed far longer. No national statistics can be cited, but an insight into the situation can be gained from the statistics in two American jurisdictions. In New Jersey, as of February, 1965, 25 percent of all active indictments were more than one year old. In Maryland, in 1964-65, an average of over three months elapsed between the date of indictment and the date of trial. The indictment stage, it should be noted, almost always follows the stage of arrest by a considerable period.

One reason for England's greater speed in bringing cases to trial is the fact that the criminal dockets are under tight judicial control. With a split legal profession and cases prepared by solicitors, but conducted in court by barristers, an adjournment is rarely granted, even if a conflicting engagement prevents a barrister from handling a case. Another reason why a trial is reached more quickly in England is that defense counsel needs relatively little time to prepare his case. During the preliminary hearing, he is accorded a full preview of all the prosecution's evidence. This renders largely unnecessary the extensive interviewing of potential witnesses which is necessary in the United States by reason of a lack of discovery there. Another factor that slows criminal justice in the United States is the extensive pre-trial maneuvering. A succession of separate motions entailing separate hearings can be made by the defense.

46. Id. at 177.
47. Id.
Furthermore, in many courts the arraignment takes place, not at the beginning of the trial, but at a separate hearing in advance.

Not only is there more delay in the United States than in England in reaching cases for trial, there is also more delay in disposing of them. A mail fraud case tried in the federal court for the Southern District of New York lasted from February 27, 1962, to February 7, 1963, almost a year. Another trial in the same court lasted seven months. Still another resulted in a mistrial after about five months. Indeed in the period from July 1, 1959, to June 30, 1962, one-sixth of the total of 500 criminal cases tried in that court lasted five days or more.48 In England, by way of contrast, protracted cases are rare. The trial of James Hanratty at Bedford Assizes in 1962 is the longest murder trial on record. It lasted twenty-one trial days.49 The famous trial with eleven defendants involved in the seven million dollar great mail train robbery at Aylesbury lasted forty-eight days, a record in England for a multiple trial.50

**Trial by Jury**

In both nations, the accused in a serious criminal case has a right to trial by jury.51 Methods of selecting juries in the two countries are markedly different. In England, very little attention is paid to the matter except to see that statutory qualifications for jury members are met. These are presently that a person be a qualified elector between the ages of twenty-one and sixty, and either the head of a household or a property owner. Women as such are not excluded, but since it is normally the husband who is head of the household, relatively few women are eligible for jury service.

Apart from requiring voting registrars to see that the statutory qualifications are met, the English system of selecting a jury involves virtually no screening of those who are called upon to serve. The challenge to the array has fallen into disuse, so that the method of making up the list of qualified jurors is factually never challenged in the course of a lawsuit.

There is no voir dire examination during which English prospective jurors can be questioned by counsel in an effort to determine their fitness to serve. If a prima facie case has been made out for a challenge for cause, in theory the juror in question can be examined on voir dire. In fact, challenges for cause have been all but forgotten, chiefly because there is no effective machinery for discovering any basis for their exercise. Peremptory challenges are available, but even these are seldom used. On the few occasions when a peremptory challenge is used, it is likely to be exercised on the basis of a hunch, rather than knowledge.

American methods of choosing a jury are far more elaborate than the English method just described. Although there are variations from state to state...

---

48. *Id.* at 178-79.
49. *Id.* at 179.
51. This right can be waived in either nation, but the manner of waiver is quite different.
The machinery of criminal justice in the qualifications for an exemption from jury duty and in the mechanics of selection, a composite pattern can be discovered. However, jury selection in more important criminal cases is a tedious procedure and in some jurisdictions may extend through fifteen trial days. Experience has demonstrated that many defense counsel use the voir dire examination for opening, summation and appellate argument.

Evidence

Some of the principal contrasts between the English and American rules of evidence have been mentioned, particularly the treatment of illegally obtained evidence and "the fruit of the poisoned tree" doctrine. A few other aspects are worth mention here.

One aspect relates to the position of the accused as a witness in his own behalf. Both nations recognize the privilege against self-incrimination but they implement it in quite different ways. In England, the accused is under substantial pressure to testify. If he does not, his failure to do so may be commented upon by the judge. The prosecutor may not comment, but the judge may suggest to the jury that it draw an adverse inference from the defendant's failure to explain away the evidence which is brought in against him. Until very recently a similar rule prevailed in a few of the states in the United States, including California. In 1965, the Supreme Court of the United States held it to be a violation of due process under the fourteenth amendment to allow either the judge or the prosecutor to comment on the accused's failure to take the stand.52

Another interesting difference in the rules is where the accused takes the stand in his own defense. In England, where he does so, he cannot by reason of that fact alone be cross-examined as to previous convictions. The rule, of course, is the contrary in the United States.53 Many an accused refuses to take the stand because he does have a prior criminal record and his counsel feels that disclosure of that record will be prejudicial. Another contrast between the two systems relates to the rules of evidence concerning statements made by the accused when first charged with having committed a crime. In the United States, if he makes an admission, that can be received in evidence as an exception to the hearsay rule, but if he makes a denial, that cannot be received because it does not fall within the exceptions to the hearsay rule. In England, with greater fairness and less logic, an admission or denial by the accused may be admitted.

One who observes an English trial in a criminal proceeding will be amazed to hear so few objections taken and, when taken, usually so objectively stated by counsel. As a consequence, the proof moves more rapidly in an English case than it does in the customary adversary proceeding in the United States. When

the proof is concluded, the jury is instructed in the law before counsel argues to them. The theory is that counsel ought to know how the judge instructs on the law before he argues the application of that law to the facts which the jury has heard. In most states, of course, the reverse is true. The summation takes place before the charge to the jury. Also the order of summation is a bit reversed. In England, pursuant to legislation passed in 1964, the prosecutor always speaks first and defense counsel always has the right to the last word. This helps to give greater force to the presumption of innocence and the requirement of proof beyond a reasonable doubt than do some of the American state patterns. Finally, as to the trial, in the style of oral argument itself there are vast differences in England and the United States. In England the summations are low keyed. They are analytical and intellectual, rather than emotional appeals as they often are in the United States. This is partly because of the style of the English bar and partly because of the split profession in England with its consequent lack of identification between barrister and client. Partly it is because today's jurists approach their task more analytically than emotionally. No counsel in England is allowed to say anything at all to the jury about sentence. That is regarded as completely out of bounds as it is in most jurisdictions in the United States.

The Verdict

Both in England and in the United States the unanimous verdict of all twelve jurors is required for conviction. If illness or other emergency necessitates the withdrawal of a juror, the trial ordinarily comes to an end and proceedings are recommenced at a later date. The same result follows the inability of a jury to agree. Some provision has been made, however, to deal with the problem of a juror becoming physically incapacitated during trial. In England, the Criminal Justice Act allowed the trial to continue so long as there remained at least ten jurors, provided both the defense and the prosecution agreed. In the United States, it is customary to swear alternate jurors who will sit with the twelve chosen and replace any juror unable to continue in the case. However, England has no parallel in this regard.

If the jury returns and finds the accused guilty, he then is held for sentence at a future date. The rules concerning sentencing are very much the same both in England and in the United States and a certain area of discretion is left to the trial court. In England, appellate review of sentencing provides some control over the discretion of trial judges and in the United States some of this discretion has been transferred to the administrative agencies. Nevertheless, in both countries the sentence is usually specified by a particular statute for a

55. It is worthy of note that the Supreme Court has recently held that a jury may consist of less than twelve members. Williams v. Florida, 399 U.S. 78 (1970).
56. 48 Criminal Justice Act of 1925, 15 & 16 Geo. 5, c. 86, § 15.
particular offense. The trial judge may assign a sentence in terms of the violation before him.\textsuperscript{57}

\textit{Capital Punishment}

In England the death penalty is now confined to treason, certain forms of piracy and arson. In case of treason, death is mandatory, although the accused may be reprieved and imprisoned. In the United States there are an increasing number of states in which the death penalty has been entirely or virtually abolished, or where it is virtually never used. In general, it may be said that American prison terms are longer than those imposed in England.\textsuperscript{58} This may be true, according to Professor Karlen, because the legislatures in various American states deliberately set penalties high in order to compensate for the chance that the prisoner may be granted an early release by the parole authorities.\textsuperscript{59}

\textit{The Scope of Legal Aid}

In the United States, legal aid to indigents is thought of largely as a consequence of the constitutional right to counsel. If the right is denied, then the defendant's conviction must be reversed. The sixth amendment of the Constitution has long been interpreted to require that an indigent defendant has the right to be assigned an attorney in a federal court, but until recently it was held that state courts were constitutionally required to assign counsel only in capital cases and in other cases where the absence of counsel would be a denial of fundamental fairness. In 1963 this position was overturned. In \textit{Gideon v. Wainwright},\textsuperscript{60} the Supreme Court held that a state court must provide trial counsel for an indigent, at least in every felony case, and, more probably, in every case of serious nature. In \textit{Douglas v. California},\textsuperscript{61} the Court held that a state must provide counsel for an indigent appealing as of right from his conviction. These decisions have triggered an enormous growth of legal aid systems throughout the United States. In effect, every community and every court of record now provides some technique for providing counsel.

Legal aid in England, by contrast, has not traditionally been regarded in terms of right to counsel, but rather in terms of judicial discretion. The test is whether defendant's means will allow him to provide for his own defense and whether it is desirable in the interest of justice that he should have free legal aid. This allows wide discretion, the exercise of which may even be influenced by

\textsuperscript{57} D. Karlen, \textit{supra} note 2, at 192.


\textsuperscript{59} A separate discussion on imprisonment, probation, sentencing, monetary fines and the like, and those post-trial aspects which generally resemble one another in both the American and British experience has purposely been omitted.

\textsuperscript{60} 372 U.S. 335 (1963).

\textsuperscript{61} 372 U.S. 353 (1963).
considerations such as the number of legally aided cases, the state of the calendar and the prospective cost to taxpayers. Recently, there has been a substantial rise in the number of grants made, but by and large the accused is not generally afforded counsel in magistrate’s hearings. However, Professor Jackson acknowledges that one of the deficiencies of the British system is the failure to provide counsel in some important hearings before magistrates.

Appeals and Post-Conviction Remedies

Substantial differences exist between the United States and England with respect to the right of review in criminal cases and the procedures which are followed. In both nations the right of the prosecution to appeal is limited. In England, the only situation which permits an appeal in the first instance is where a question of law is decided adversely to the prosecution in a magistrate’s court. Then the case may go to a divisional court of the Queen’s Bench Division on a “case stated”. If the divisional court reverses the decision below, it sends the case back to the magistrate’s court with directions to convict the defendant or to rehear the case. Any other acquittal is beyond appellate review. If a jury in an assize court or a quarter sessions court finds the accused not guilty, that is the end of the case, regardless of any error of fact or law that may have been committed. The prosecution in England is not allowed to appeal from rulings before trial upon questions of law dealing with such matters as the sufficiency of indictments.

In the United States much of the same procedure obtains. In the federal courts and the courts of all except three states, there can be no appellate reversal of a judgment of acquittal. In Connecticut, Vermont and Wisconsin, the prosecution is allowed to appeal from an acquittal, but only on the basis of errors committed by the trial judge in his rulings upon evidence, instructions to the jury and similar questions. No appeal is allowed on the claim that the jury erroneously acquitted the accused. In both nations, if the defendant takes the first appeal, the prosecution may seek further review without violating the concept of double jeopardy. In England, however, a second appeal is most rare.

For all except one or two cases a year which go as far as the House of Lords, the Court of Criminal Appeal is the final criminal appellate court for England and Wales. It has no civil jurisdiction. Appeals come up either from assize or from quarter sessions courts. The assize in London is held in the central criminal court, better known as “Old Bailey”. There, almost all trials are by jury.

The Court of Criminal Appeal in England has no judges of its own. Its

members are drawn from the Queen's Bench Division of the High Court. This is true even of the head of the court, the Lord Chief Justice. He also administers the Queen's Bench Division and sits there as a trial judge when time permits. Thus, the judges who hear criminal appeals devote less than full time to that task. Most who sit with the Lord Chief Justice are devoted to trial work; while in London they are engaged mainly in trying civil cases, and while traveling on circuit they are engaged more than half their time in trying criminal cases. They sit on the Court of Criminal Appeal only when designated for service by the Lord Chief Justice, just as they may be assigned by him to any other type of service within the Queen's Bench Division. The Court of Criminal Appeal does not sit *en banc*, but in panels. The usual number of judges is three, but it can be increased at the discretion of the Lord Chief Justice for important or difficult cases to a membership of five, seven or conceivably the full membership of the Queen's Bench Division.

One consequence of the judges' serving both at the trial and the appellate level is that they sit in judgment on work of their immediate colleagues. Another consequence is that each judge quickly receives a well-rounded education in judicial technique. This is especially important for the newly appointed judge who may have little or no experience in criminal cases. What he learns while sitting on the Court of Criminal Appeal helps him when he is trying cases on assize and very likely when he is trying civil cases. What he learns at the trial level illuminates the problems he faces when hearing appeals.

Stability in criminal law enforcement seems to be an almost inevitable by-product of the English system. The judges stay in close touch with each other and keep abreast of the changing picture of crime throughout the country and are able to maintain a high degree of uniformity in their sentences. The only regular member of the Court of Criminal Appeal is the Lord Chief Justice. He ordinarily participates in the hearing of all appeals except those few in which he was involved below as trial judge. When he sits he invariably presides and generally delivers the first, and almost always, the only opinion.

More Serious Cases

In the more serious cases, those ordinarily tried by jury before professional judges, the practices of the two countries differ markedly. The American philosophy is that the accused in such a case is entitled to at least one appeal as a matter of right. This does not mean that the appellate review occurs automatically, but only that the defendant can initiate an appeal without securing permission from any court. While such a right is not guaranteed either by the state or federal constitutions, it is firmly established in practice and is regarded by the profession and the public as virtually inalienable. Further, the defendant, if indigent, is entitled to be given assistance of counsel without
expense and to be provided free of charge with any papers necessary to the
taking of the appeal.

In England a different philosophy prevails with respect to convictions in
courts presided over by professional judges. There an appeal as of right lies only
on questions of law as, for example, an improper charge on the burden of proof
or the interpretation of a statute. As was suggested earlier, relatively few such
appeals are taken in England. Likely, this is because the criminal law of
England is simpler, more stable, and better understood and accepted by the
profession, and by the public generally, than is the law of the United States.
Having no federal system, England is not troubled by the problems caused by
double sovereignty. Having no written constitution and accepting the doctrine
of parliamentary supremacy, English judges and lawyers proceed on the
assumption that they are bound by precedent and that if the law is to be
changed, that must be done by Parliament rather than by the courts. In
England, if the accused wishes to question the sufficiency of the evidence to
sustain his conviction or to raise a question of mixed law and fact, he must
obtain leave to appeal either from the trial court or from the Court of Criminal
Appeal. If he wishes to challenge the sentence, he must obtain leave from the
Court of Criminal Appeal. In such leave, he ordinarily does not have the
effective assistance of counsel. If he is indigent, he may theoretically be entitled
to advice as to whether and how to take his appeal. Sometimes trial counsel
advise the prisoner informally about an appeal, but most applications for leave
are prepared by the prisoners themselves, not infrequently in handwritten form.
Several major changes in procedure have recently been recommended by the
interdepartmental committee on the Court of Criminal Appeal. If accepted, the
time limit for applying for leave to appeal would be extended from 10 to 28 days
and defending counsel would be given the duty at the conclusion of trial of
providing the accused with a brief written statement of any possible grounds for
appeal. Few appeals receive more than one appellate review. The law lords of the
House of Lords have power to hear criminal appeals, but do so only in
exceptional cases.

In the United States numerous stages of appeal are much more frequent
than in England. Many states have not only a supreme court, but also an
intermediate appellate court. In such areas, cases go from the trial court to the
intermediary court of appeal as a matter of right and are subject to further
review in the state supreme court, ordinarily not as a matter of right, but as a
matter of discretion in that court. Similarly, in the federal court system, cases
go as a matter of right from the district trial courts to the United States courts
of appeals and then they are subject to further review by the Supreme Court of

---
No. 2755 (1965).
the United States, not as a matter of right in most cases, but as a matter of that Court's discretion. Because the United States has a federal system of government in which the Federal Constitution and laws are supreme, cases heard in the state courts are subject to further review in the Supreme Court of the United States where federal questions are presented.

The Scope of Review

Although the right of appeal in England is more limited than in the United States, the scope of appellate review is broader. That is because sentences as well as convictions are subject to review. The Court of Criminal Appeal has power not only to consider whether a sentence is within the limits specified by the legislature and within the jurisdiction of the court, but also whether it is fair and proper. The court possesses power to substitute for the sentence originally imposed either a lesser or a greater sentence. In the United States the power of appellate courts to deal with sentence is more limited than in England. The only question open to most of them is the legality of the sentence; whether it is within the statutory limits or is within the jurisdiction of the court to impose it.

It should be noted that appellate courts in the United States possess the power which is lacking in England. American courts are not limited to affirmance or reversal, but can grant a new trial whenever that appears to be appropriate in the circumstances of the case. If a purely technical error has occurred, not affecting the substantial rights of the accused, it is labeled harmless and disregarded and the judgment of conviction is affirmed. If an error has been committed of such a nature that it cannot be cured, the conviction must be quashed and the accused released. In short, the tendency on criminal appeals in the United States is exactly the reverse of that in England, namely, to upset convictions rather than to preserve them.

The procedure on appeal is quite different in America and in England. In England the record on appeal is a very abbreviated affair consisting mainly of the trial judge's charge to the jury. This is supplemented by the formal accusation, the plea, the verdict, the evidence as to the accused's previous record and character, the speech, if any, and mitigation of sentence, the sentence and any observation by the judge and any submissions by counsel as to the admissibility of evidence. If the appeal is based upon insufficiency of evidence to sustain the conviction, the other documents mentioned are supplemented by a transcript of so much of the evidence as the registrar of the Court of Criminal Appeal or the judge granting leave to appeal considers necessary for intelligent consideration of the problem. It is not the general practice, except in capital cases, for all the evidence to be obtained for the perusal of the appellate court.

More unusual to the American courts is the fact that written briefs, which are so well known in the United States, are simply not used in England. Since there are no written briefs in England, oral arguments assume primary

importance. They are not arbitrarily limited in duration, although they tend to be shorter in the Court of Criminal Appeal, averaging approximately twenty to thirty minutes per case for both sides. This is because the judges for the Court of Criminal Appeal customarily study the records before the oral arguments commence, sometimes in connection with application for leave to appeal. The papers that are used on an application for leave are used on the appeal itself. Counsel take it for granted that the judges are familiar with the governing legal principles. In the United States, of course, oral arguments are secondary in importance to written briefs and in some cases are dispensed with entirely, the judges preferring to have the cases submitted on the briefs alone.

The Decision

In the United States, substantially all decisions are reserved and rendered in written form. In England the judges follow a vastly different pattern. They hear and decide cases one at a time with judgment being rendered immediately upon the conclusion of oral argument. The practice is for a single opinion to be rendered and this is usually given orally by the Lord Chief Justice when he is sitting on appeal. The English judges spend most of their working time together on the bench listening and talking rather than reading and writing.

English criminal proceedings are concluded more quickly and with greater finality than American criminal proceedings. There is likely to be no appeal at all in England since few appeals are allowed as a matter of right and comparatively few even in the exercise of judicial discretion. If there is an appeal, it is a once only affair with almost no likelihood of further review in the House of Lords or at a higher level. The appeal comes quickly for there is no need to wait for the preparation of briefs or an elaborate record on appeal. However, there is a need to wait for the transcript of the judge's charge and the related materials described above, but this takes, on the average, only six or seven weeks. When the case is reached for hearing, the judgment is pronounced promptly, ordinarily immediately upon the close of oral argument. Finally, there are no rehearings and no further proceedings by way of collateral attack.

The American procedure provides a sharp contrast. There are many appeals as of right and many layers of appellate courts. Cases are long delayed while records on appeal and briefs are being prepared and further delayed while judges are reaching their decisions and writing their opinions. Finally, still further delays are occasioned by applications for rehearings and collateral attacks through writs of coram nobis, writs of habeas corpus and the like.

Apart from situations where convictions are subjected to collateral attack, the time that elapses in the United States between sentence and final disposition is much longer than in England. According to findings of a recent American Bar Association committee to study appellate delay in criminal cases, the average time between the imposition of sentence and the final disposition of an

68. Id. at 225.
appeal not under collateral attack varies from about ten to eighteen months in the United States. In England, the interval between sentence and final disposition in the Court of Criminal Appeal is on the average ten to twelve weeks. 40

Professor Pendleton Howard, in his study *The Criminal Process in England*, states that if, as many well-informed administrators, judges and prosecutors believe, the element of speed is one of the vital factors in the successful enforcement of the criminal law, it is unquestionably true that the English system of criminal courts, the distinguishing characteristic of which is its flexibility, is admirably suited to bringing about such an act. Of even greater importance is the spirit of cooperation which prevails among judges, counsel and administrative officials and the tradition which seems to obtain throughout England that neither evasion or subterfuge will be allowed to stand in the way of the prompt disposition of criminal cases at the courts of trial. Professor Howard further observes that the principal reforms in English criminal procedure during the first half of the 20th century have been in the direction of simplification. The technicalities of the common law have been discarded in favor of improved and simplified methods. There is very little, if any, of what has been termed the American sporting theory of justice in the trial of an English criminal case. He observes that the conduct of the English trial, both those taking place in courts of summary jurisdiction and before juries, is distinguished by order, dignity, urbanity and dispatch. He contends that professional standards of conduct on the part of the British bar are generally on a higher plane than in the United States. There are very few, if any, attempts on the part of either side to get improper testimony before the jury by suggesting it in the form of questions, virtually no attempts to conceal relevant evidence, no dilatory tactics, no bellowing at witnesses, no derogatory references to the accused, no judicial scolding, very little wrangling among counsel and relatively few objections to testimony. Speeches to the jury are confined to the issues raised by the evidence. The judge takes an active part in the proceedings, frequently comments on the evidence and attempts, in his summing up, to reduce the case to one or more simple issues of fact centering the attention of the jury upon the essential portions of the evidence that bear upon these issues. Professor Howard concluded his treatise by raising the question: May we not in the United States where there is widespread dissatisfaction with the administration of criminal justice, study with interest and profit this English substitute for the criminal jury, a substitute that is the product of both experience and experiment?

We must keep in mind that Professor Howard published his work in 1931 and it speaks to that period. Since that time, the administration of criminal justice in the United States has moved forward, if not with the speed typical of the British system, nonetheless with a sensitivity and response which brings credit to its people.

69. *Id.* at 228.
An interesting contrast to the views of Professor Howard is the excellent study by Professor David Fellman entitled *The Defendant's Rights Under English Law.* Professor Fellman takes the view that, in some respects, English solicitude for persons accused of crime has been oversold in the United States. He makes these comparisons:

1. **England:** English courts consider it “unadvisable to grant bail to a person who has a long criminal record unless there is a very real doubt as to his real guilt.”
   
   **United States:** The accused has a right to pretrial release on bail in all but the most serious cases.

2. **England:** Generally speaking, bail will not be granted to a prisoner pending his appeal.
   
   **United States:** Convicts are frequently freed on bail pending the outcome of an appeal.

3. **England:** English courts will not accept professional bailsmen.
   
   **United States:** Rightly or wrongly, the United States has accepted professional bail bondsmen since frontier days.

4. **England:** Evidence secured unlawfully is fully admissable.
   
   **United States:** The product of an unreasonable search and seizure is excluded from evidence at the accused’s trial.

5. **England:** In the discretion of the trial judge, a confession shown to have been voluntarily given may be received in evidence against the accused even though obtained in violation of the rules governing police questioning.
   
   **United States:** Such a confession would now be excluded from evidence.

6. **England:** When a police officer is trying to discover whether, or by whom, an offense has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks useful information may be obtained.
   
   **United States:** The recent decision in *Miranda* would not make this possible.

7. **England:** The English judge is free to comment on the failure of the accused to testify.
   
   **United States:** Any such comment is considered a violation of due process of law.

Professor Fellman’s provocative study supplied a needed reminder to those who would point uncritically to the criminal laws of England. At the same time, the author is careful to mention two factors that partially explain the differences between the approaches of the two nations to criminal process. In the first place, English courts are bound by no written constitution or bill of rights and second, in England the police and the courts are widely respected and admired by the general public.

---

70. **D. Fellman,** *The Defendant’s Rights Under English Law* (1966). Professor Fellman is a distinguished political scientist at the University of Wisconsin.
This view of competence is shared by the judges themselves and the political leaders. There is an old aphorism in Britain that “If justice had a voice, she would speak like an English judge.” Thus Lord Cockburn, the Lord Chief Justice, observed in an opinion rendered in 1861:

I have been some years at the bar and on the bench and have seen much of the administration of justice; and I never saw a judge from rashness, vanity, or impatience lend himself to oppression or do anything not right to his knowledge and belief between the Crown and the party accused.

Speaking to the House of Commons in 1954, Sir Winston Churchill said:

The British judiciary with its traditions and record is one of the greatest living assets of our race and people and the independence of the judiciary is a part of our message to the ever-growing world which is rising so swiftly around us.

Nonetheless, English criminal law has been criticized by competent authorities for its rambling formlessness and it has been emphasized that systematic review is today badly needed. The lack of scholarly interest in the law touching on civil liberties was noted by Professor S.A. de Smith, a distinguished professor of public law at the University of London, in his inaugural address in 1960. [1]

There has always been a great deal of criticism of the accusatorial nature of an English criminal trial and favorable attention has been called to the French system of justice which puts the investigative and preparatory function in the hands of a judge, rather than in the hands of the police, as in Britain.

CONCLUSION

The first segment of this article centered on a discussion of the role of the police and it was concluded that the quality of police work at the local level in England is generally superior to that found in the United States. This is true because an English cabinet officer, the Home Secretary, is empowered to make uniform regulations governing the pay, pensions, discipline, and conditions of service in all English police forces. In the United States there is no comparable officer because the police power is reserved generally to state and local authority. Although the Crime Control Act of 1968 authorizes the Director of the Federal Bureau of Investigation to conduct training programs for local police at the Bureau’s National Academy, it falls short of creating a national police school and requiring attendance of all local police as the price for federal law enforcement grants.

The Congress must coordinate both police training and police regulation in the Department of Justice if we are to achieve even and effective enforcement throughout the United States. The 1968 Crime Act wisely provides funds for state planning agencies to develop comprehensive plans for law enforcement.

---

throughout each state. But without impairing local autonomy of police forces, there can and should be a central training authority for policemen in the United States as there is in England.

Secondly, pre-trial problems were discussed and in the pre-trial area, while the English Judges' Rules again bring a greater uniformity to police operations, there are some areas in the English law which are not nearly as sensitive to the civil rights of the accused as those in the United States. From these Bill of Rights decisions, handed down by the United States Supreme Court, we should beat no retreat. Americans should be proud of their contribution to the dignity of man and urge that all freedom loving nations adopt the broad guarantees expressed in *Gideon*, *Escobedo* and *Miranda*.

In the third area of investigation, it was seen that there are certain techniques at trial which differ in England from those which are followed in the United States. Here again, the United States should retain its own identity and its own evolution of technique, but America can certainly draw from the British experience. It seems a total waste of time to spend five, ten or possibly fifteen trial days in the selection of a criminal jury, even in a capital case, when we might seriously consider importing the British technique for jury selection. At the same time, Britain should seriously reconsider the admission of illegally acquired evidence. It seems that the whole concept of justice is undermined when we approve techniques which are the products of law-breaking.

Fourth, in the area of appeals, we need very much to draw from the British procedure. Their successful rotation of high court judges at trial and appellate levels offers us a model. Many of the appellate judges in the United States lose touch with the trial court after they have been separated from it for five or ten years. Beyond that, there is merit to having a separate state court of criminal appeals where the judges understand the nuances and the complexities of the criminal law. Texas and Oklahoma have adopted this feature with a high degree of success. The docket of the United States Supreme Court for the 1968-69 term indicates a disproportionate number of criminal law and criminal procedure questions. Could not many of these questions be resolved in state courts of final criminal appeal and in a federal court of criminal appeal comprised along lines similar to the Tax Court or other special courts?

Further, it seems that in the area of criminal appeals, America can draw heavily from the British system in abbreviating the record on appeal, in leaving to application the matter of appeal in more cases, and finally, in virtually demanding that our appellate courts review only a short-form record and render their decisions more promptly than has been the case until now.

Finally, and perhaps most crucially, if this nation is to continue to progress and develop a first rate criminal judicial system, we must train men in the prosecution and in the defense of criminal cases in law school, in continuing legal education, in colleges for trial judges and in programs for appellate judges.

---

Indeed, a life sentence to continuing legal education must be the price we pay if the courts are to respond to the problems of our times. The rash assumption that admission to the bar alone truly qualifies an attorney to represent an accused charged with serious crime is both naive and cruel.

Aristotle was surely right when he said that members of the public look upon the judge as "living justice". That is the personification of the legal order. For better or worse, it is the trial judge upon whom primary responsibility falls. He is, as Professor Harry W. Jones has so well stated, the law for most people and most legal purposes. Whenever a trial judge fails in probity, energy, objectivity, or patience, his failure is observable and cannot but impair public fidelity to law. He may be at the bottom of the judicial totem pole, but it is at the trial that the exposure is often greatest and the strains of the judge's role manifest for all to see.

At this crucial hour in the life of the legal profession, if judges are to improve the "image of justice", then they must improve the "reality of justice" in the trial courts of the United States. That depends, above all, on the intellectual, moral and personal integrity of those men and women who are elevated to serve as trial judges.
