ENGLISH CRIMINAL JUSTICE: IS IT BETTER THAN OURS?

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I. INTRODUCTION

The least negative sentiment that seems to exist with respect to criminal justice systems in large American cities is uneasiness. Often the mood slides into angry condemnation and even despair. Though the conclusion is not often sharply articulated, Americans appear to harbor the impression that things are much better in England, the original exporter of most of the concepts and institutions of our legal system. But this judgment is hard to verify from the domestic literature since studies of the English criminal justice system are rarely published in the United States.[1] Curiously there has been more comment in America in recent years on the systems of western European continental countries, which are so different from ours in their provenance and legal heritage.[2] Yet what goes on in England ought to be a particularly fertile field for comparative criminological study. Not only is there no language barrier (or at least not an insurmountable one), but the English system is also at once familiar in its basic congruence with ours and yet, at the same time, studded with provocative differences.

The principal aim of this Article is to offer an introduction to the nature of the English system and to point to the need for more detailed comparative research on the two systems by scholars in both countries. Part II consists of some general observations on the difficulties and the potential

1. Books published in England and English journals are, of course, fairly easily available in the United States. The point is that American journals and American criminal justice studies rarely make any reference to English practices. An exception is the important study D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE (1967). This remains a useful work but has been somewhat overtaken by the subsequent institutional and procedural changes in England. M.H. GRAHAM, TIGHTENING THE REINS OF JUSTICE: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES (1984) is an important study of the English jury trial published too late to receive detailed citation in this Article.

2. Some of the literature on continental European procedure is cited *infra* at note 121.

profit of comparative work in criminal justice. Part III discusses police powers in England and, to some extent, compares them with those in the United States. Similarly, Part III describes the court structure, the role of lawyers in the system and the process of framing charges. Part IV explores the principal methods of disposing of criminal cases. Finally, Part V comments on courtroom styles in England compared with those in the United States. The material covered is necessarily selective and there is, for example, no discussion at all of such basically important topics as sentencing standards and practices. The aim is to give a concise picture of the ways in which the English system takes in and processes defendants and to speculate on whether the system is in any way clearly superior to American systems in ways which might reasonably be transplanted to American soil.

Since suspense is not required in scholarly work, it may be helpful at the outset to summarize some conclusions. There are ways in which the functioning of the English criminal justice system has great attractions to jaundiced American eyes. Principally, this has to do with an appearance of order, efficiency and civility. But there are three problems with transplanting these aspects to the American system. First, the English appearance of efficiency can sometimes only be purchased at the price of indifference to our developed understanding of the rights of defendants and suspects. Second, the English qualities of orderliness and comparative swiftness may often be factors of their much lower crime rate. Third, some features of the English system that may seem desirable are the product of slowly formed style and manners that cannot be imposed by legislative or judicial fiat.

But if quick remedies are not to be expected, patient study of the comparative workings of American and English practices may yield both new standpoints for theoretical criticism and practical dividends in the prospect of some profitable innovations on both sides of the Atlantic. The English may have at least as sharp a need to learn from us as we do from them.

II. THE NATURE AND USES OF COMPARISON

With patience and effort, it is not very difficult to give a useful description of a foreign criminal justice system, especially when we share a language and a legal history, but it is much harder to know how to make a general comparison of that system with our own. There are several reasons for this. In the first place, comparing criminal justice systems is very different from comparing criminal laws. A country's penal code is a statement of prohibitions and corresponding sanctions. A study of what is and what is not prohibited, an analysis of the definitions of crimes and of defenses and excuses, plus observation of what sanctions are regarded as proportionate are subjects for criminal law teaching and scholarship. To carry this to the comparative level can be very enriching in revealing the strength of conceptual arrangements or theories of liability and justification that have not been current in one's own culture.[3] This is a difficult

3. A leading example of this kind of work in recent years is G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

task because to do it properly requires deep knowledge of a foreign system with considerable mastery over its concepts. Still, for the most part, the necessary materials are written ones and rarely require venturing out of the library.

But a criminal justice system is practice and action as well as doctrine. To know a system well means knowing many things that are not written anywhere and often means discovering that many things that are authoritatively written are not important or not even observed much in practice. The relevant phenomena are manifold, involving methods of detection and procedures for arrest or summons, modes of interrogation and identification, initial appearance procedures and standards for determining whether a case must move forward for disposition. Questions of pre-trial detention and bail are vital as are modes of bargaining or other kinds of inducement to encourage swift disposition. The nature of trial procedures (the role of a jury, if any, the degree to which the proceedings may be thought of as adversarial or inquisitorial), the nature of the prosecutorial system, the nature of defense representation, all must be considered. Finally, the nature of dispositions and the actual execution of them are topics of fundamental importance.

Full consideration would involve much more, for a criminal justice system should not be thought of only in terms of relations between the state and criminals. It has an important impact on law-abiding citizens who may be subjected, by the workings of the system, to intrusions on their privacy, which may go so far as to take the form of investigation or attempts to interrogate. Threats of harassment are possible while the temporary confinement of some innocent people certainly takes place and, occasionally, conviction and sentencing of the innocent. Laws may to different extents impose duties of cooperation on the general public and may fix sanctions for failure to cooperate.

Given this scope and range of the subject, any comprehensive comparison of two criminal justice systems that have substantial differences would necessitate a very large work based on investigations of Herculean proportions. But the magnitude of the task is by no means the most stubborn source of difficulty: more fundamental are the conceptual and intellectual uncertainties connected with exactly what it is we are to compare and by what standards and with what ends in view.

Aspects of the organization of the two systems are likely to be strikingly different. For example, in large metropolitan areas of the United States, such as New York City, most criminal defense work is done by full-time salaried lawyers from Legal Aid or Public Defender offices. In England, even in London, there is no such full-time organized, salaried group of lawyers. All defense work, even for indigent defendants where the lawyer is to be compensated out of public funds, is done by private practitioners chosen by defendants. Furthermore, barristers who appear for the defense in the superior courts may on another day prosecute for the Crown, and in some parts of the country this would also be true of solicitors who appear in the magistrates' courts.

In one sense this certainly makes a striking "comparison" between the

two countries (in the sense of noting basic contrasts), but it also precludes comparison in the narrower sense of weighing the performances of people in identical roles. How should one compare the performance of a football player on a team that employs the same squad of players for both offense and defense with a player on a specialized defensive or offensive unit? We are driven here to a different level of comparison in which we ask which way of doing things is better in the light of broader standards and values which we take or assert to be those that should govern the measure of quality or success in the institution under study.

But these standards and values are themselves not free from obscurity. Uncertainty in our perceptions of the aims and purposes of social institutions besets any measurements of comparative worth or success. Suppose we were comparing two baseball teams. It might seem that there would be no doubt about what was to be compared and that there is not much room for disagreement about what are the general standards for worth and excellence in baseball. But even here the matter would not be entirely free from difficulty, for while most people would readily agree that winning games is the overriding, general aim of a baseball team (at least of a professional one), this might be qualified by adding that winning ought to be accomplished in a fair and sportsmanlike manner and that teams are also to be judged by how entertaining their style of play is, how well the organization treats its players and so forth. The weight accorded to these supplementary and modifying standards when set beside the principal aims might be crucial in a particular comparison, leading some to conclude that a team that has won more games than another is not after all the better team.

If this is so with baseball teams, how much deeper is the difficulty with criminal justice systems. What are the standards of accomplishment in this enterprise and what does it mean to effect an improvement or to do better?

A. *Reducing the Crime Rate*

To many, the answer to the question just posed may seem overwhelmingly obvious. Surely the proper aim of a criminal justice system is to keep the crime rate as low as possible, and the comparative success of different systems is to be judged by how well they meet this objective. But, in fact, if that simple affirmation were accepted, we might never compile very useful information since the measurement demanded is impossibly elusive. For a long time criminologists have pointed out the perilous complexities of available criminal statistics, how they depend on varying definitions of crime and uncertain and shifting practices of keeping records.[4] The gathering of statistics is now becoming more efficient though it can never eliminate a large element of unreliability. But even if statistics could be made perfect, there is a deeper problem about measuring the overall success of a criminal justice system in terms of crime reduction. This is that there is no

4. The fragility of criminal statistics is well displayed in the materials collected in F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM 46-81 (1980).

way of measuring the "natural" crime rate—the amount of crimes that would be committed if there were no operating criminal justice system of any kind.

If we had at one time lived in a state of nature and then moved sharply into a social phase including, among other matters, the inauguration of a criminal justice system, then in the early years of the new dispensation, we might have a clear picture of the extent to which the system was "containing" the natural crime rate, given the unlikely assumption that accurate records were kept in the state of nature. But as the system remains in operation over a long period of time, it becomes more and more difficult to assess its impact in reducing crime.

Suppose there appears to be a reduction in crime this year as compared with last year. This *might* be caused by the system's becoming more efficient in discouraging the commission of offenses and so allowing through the sluice gates fewer of the crimes that would have been committed if there were no criminal justice system or a less efficient one. But it also *might* be caused by a shrinking in the pool of crimes that would have been committed in the absence of any system. The latter explanation embodies reasons to do with general causes of crime that may be unconnected with the relative efficiency of the system this year as compared with last year. We can never know with any precision which set of reasons or combination of factors is at work.

This is only another way of making the point that any criminal justice system can never be anything but a more or less inefficient containing wall. We may be able to inspect our side of the dam and praise or criticize its seeming strength or apparent lack of sturdiness, but we have only the murkiest reports about the varying volume and turbulence of the water on the other side. If a trickle becomes a torrent, we can never know exactly whether it is because we built badly at that point or because pressure has mounted to a scarcely containable level. Occasional illuminations, such as the upswing in crime that may go along with a police strike, are not very informative, since a long period of time with a settled expectation of no law enforcement would be necessary to yield a picture of any clarity, and this is hardly an experiment that social scientists will be allowed to conduct. The efficiency of the system in the sense of how much it reduces the crime rate is thus dauntingly difficult to measure.

This basic difficulty is infinitely compounded when we try to make comparisons with other countries. In the first place, the definitions of crimes in different jurisdictions, whether within one federal system or between different countries, may vary widely. Second, ways of compiling statistics may be so dissimilar in different countries that one reads from the one to the other at great peril. But more important of all, even if we did have valid ways of comparing national statistics as to crimes reported or committed, there would never be any way of knowing the difference, as between the two countries, of the pool of potential crimes that would be committed if the criminal justice system were not in place. This inevitable lack of knowledge about the "containment ratio" in each country makes

unattainable any ultimate comparison about the overall "success" of their criminal justice systems in reducing crime.

These considerations do not rule out the possibility of modest illuminations through studies of different methods of approach to the enforcement of particular prohibitions. For example, if one country has mounted a careful experiment on the control of drunk driving through the imposition of the sanction of forfeiture or impoundment of the automobile involved, it is hard to imagine that we could not learn much from a thorough study of the program. We should have to be careful to take account of the variables that spring from a different population with different culture and habits. However, while this might dilute the lesson we could learn from the experience of another country, it would certainly not eliminate its worth.

The more general the comparison becomes, the more caution will be needed and the more reservations will grow. But the work may still be useful. Suppose, for example, that we found that the English make greater use of fines as a sanction than is customary with us and that they seem to hold down the rate of certain offenses with this sanction about as well as we do with other modes of enforcement. Such a host of variables clusters around the practice of imposing fines and executing the sentence that it would be rash to draw any very firm conclusions about the prospects of successfully transplanting the practice. The comparison may, however, encourage us to think about procedures we have not yet seriously considered.

It is when we move to classic crimes of violence, the murders, rapes and robberies that are included in the Uniform Crime Statistics and which are the largest element in the public's fear of crime, that the reservations expressed here come into play in the strongest fashion. The fact that there are about twenty-seven robberies in New York City for every one committed in London[5] does not tell us very much about the comparative successes of the two criminal justice systems because, as we have explained, it is very hard to know how much each respective system is impacting on the phenomenon of robbery and potential robbery. Here we should be very slow to reach judgments of superiority in any large sense.

B. *Crime Control and Due Process*

If precise counting (or even rather rough counting) of the comparative success rate is hardly within our reach at present, we might turn to another general foundation for comparison between different systems—the nature of the accommodation that they make between allegedly opposed "mod-

5. *See* H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT 16 Fig. 2 (1982). The figures cited by Zeisel are for London in 1975 and New York City in 1973. These figures are not based on victim surveys so it may be the case that the real figures would make the New York picture seem worse or better than these statistics of reported crime suggest. Since a large incidence of crime coupled with a low detection rate tends to discourage reporting, it is likely that the ratio is more unfavorable to New York than the Zeisel figure of 27:1. For discussions of the extent of unreported crime, see F. ZIMRING & R. FRASE, *supra* note 4, at 46-81 and 1980 CRIMINAL STATISTICS FOR ENGLAND AND WALES CMD. NO. 8376, at 208-09 App. 1 pars. 6-7, Supp. Tables Vol. 3 (1981). Zimring and Frase report that victim surveys suggest that less than half of all crimes against person and property are reported. ZIMRING AND FRASE, *supra* note 4, at 65.

els" of criminal justice. The late Herbert Packer suggested that in devising a criminal justice system or in evaluating one, we might be influenced by two sets of values that he called the crime control model and the due process model.[6] While his elucidation of these models was helpful, we must be careful to understand the contrast in a limited sense.

Crime control is simply not acceptable as a master ideal for a criminal justice system. Perhaps we could control crime better by submerging our concern for justice. Drum head executions, vigilante death squads, dragnets and preventive imprisonment, in short, the unleashing of terror without much concern about proof, might reduce the rate of serious crimes significantly, though it is by no means certain that it would have that result. But it is clear that to adopt such a system (if it could be thought of as a system at all) would be to turn our backs on the moral and constitutional foundations of our society. Whatever we would have would not be a criminal *justice* system. Our habitual and persistent use of that phrase points to a special commitment to doing justice and not to anything else.

But there remains a legitimate and inevitable tension in all criminal justice systems that is indicated by the contrast between the crime control and the due process models. It is not a clash *between* justice and crime control but rather a conflict in which crime control is perceived as one aspect of justice. It arises because injustice is done by failing to punish the guilty just as much as by punishing the innocent.

Perfect justice in the criminal process would make several demands—among others, that the guilty are punished, but not disproportionately, and that the innocent are not punished and not intruded upon unduly. But the accomodations necessary to the pursuit of these diverse aims makes perfect justice unattainable in practice. As we strengthen our precautions to insure that the innocent will not be punished (the due process model), so we may, in some instances, weaken our chances of convicting the guilty (crime control model). This is the well known source of tension that presents problems for all systems. The tension lends an aspect of economic calculation to the pursuit of the best justice, for any rule or practice in the criminal process must be weighed in terms of its tendency, on the one hand, to enhance chances of convicting the guilty and, on the other, to threaten the innocent.

In this context, comparisons of different criminal justice systems would be very instructive if they could arrive at some measurement of the impact of different institutions and different rules and principles upon the rate of convicting the guilty or the risk of convicting or deeply intruding upon the innocent. For example, we shall see that the English allow their police to conduct a limited interrogation of the suspect while, in practice, denying him access to a lawyer.[7] They also permit the court to comment in a very adverse fashion on the failure of a defendant to testify.[8] Both these practices violate the present understanding of the American Bill of Rights

6. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).
7. *See infra* text accompanying notes 55-81.
8. *See infra* text accompanying note 383.

and the fourteenth amendment and would be taken by some to enhance the chance of convicting the innocent. On the other hand, the English have nothing comparable with our highly developed system of plea bargaining which has been viewed by some commentators as posing considerable threats to the innocent. Can research tabulate a balance sheet from these divergent rules and practices with respect to the protection of the innocent, the conviction of the guilty and the suppression of unacceptable official conduct?

Any calculation of this kind, local or comparative, will be difficult, but productive attempts are not impossible. To offer another example, it must be the case that the strength of constitutional protections for the suspect and the accused in the United States leads to the dismissal of some cases that would be likely to end in a disposition of conviction in England. Research experiments could be constructed to try to measure this phenomenon and this beckons as a valuable field of inquiry for the future. It also must be the case that the shadow of looming constitutional issues plays a prominent role in plea bargaining in American prosecutions and must often be a relevant consideration in pleading cases down or with respect to agreed sentence recommendations. Efforts to measure the impact of this variable might be enhanced by comparative research.

Any such evaluations would be poised against a background of practices that will be more difficult to evaluate comparatively. The authoritative assertion of principles by the Supreme Court or the House of Lords and the rulings made by trial courts in contested cases have to be weighed in importance against the institutional practices and pressures that have accumulated in a system's slow growth. Constitutional considerations do not figure in English dismissals or decisions to allow summary disposition, but we shall see that the English system, either by choice or out of necessity, nevertheless displays considerable readiness to dispose of cases at a summary level with relatively light sentences.[9] A method for comparative studies of the dispositions of offenses of comparatively equal gravity could certainly be devised and should have good potential. A likely result would be a demonstration that the presence of strong constitutional guarantees is not necessarily calculated to produce a system that deals with the mass of its defendants more leniently than one which lacks these guarantees. Information of this kind is obviously impossible to obtain when looking at one system in isolation, and the possibility of illumination of this kind is one of the promises of comparative research. The starting point must be a general description of the English criminal justice system with emphasis on aspects that seem to diverge significantly from American patterns.

9. *See infra* text accompanying notes 257-89.

III. POLICE POWERS

A. *The English System*[10]

1. *Police Organization*

The organization of the police in England and Wales today rests largely on the Police Act of 1964[11] which, in turn, was a response to the Report of the Royal Commission on the Police published in 1962.[12] After successive consolidations over the last century, there are now 43 police forces in England and Wales.[13] For the metropolitan area of Greater London the force is the Metropolitan Police, the boundaries of whose jurisdiction were set in the nineteenth century by a calculation of the range of horse patrols from Charing Cross.[14] These boundaries remain somewhat more extensive than the boundaries of the area controlled by the highest tier of local government, the Greater London Council (GLC).[15]

While there is no unitary national police force, the powers and duties of the Home Secretary include the approval of many important decisions by local police authorities, such as the appointment of chief officers, the size of the establishment and the amalgamation of forces.[16] The Home Secretary also, after consultation, makes regulations which establish a national scale of pay, promotion procedures and a disciplinary code.[17] He may require a local chief officer to submit a report on any matter connected with the policing of the officer's area.[18] In exceptional cases the Secretary may require the local authority to remove a chief officer or may

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10. The jurisdiction that is being studied here is England and Wales, as opposed to Scotland, which has a separate legal system. For purposes of brevity, only the substantive "England" and the adjective "English" will be used for the most part. This should not be taken as any show of disrespect for Wales, an offense the author is supremely unlikely to commit. The account given here depends heavily upon the English literature, including academic works by lawyers and social scientists and the work of Royal Commissions and Departmental Committees, notably the recent *Report of the Royal Commission on Criminal Procedure* (1981) and its accompanying research studies. The author received his initial legal education in Britain and taught law there for some years, but familiarity with the English system at that time, more than twenty years ago, is not very helpful in commenting on the radically changed system that obtains in England and Wales today. A study of the literature was supplemented by the author's spending a month in London in the summer of 1982 and several weeks in the summer of 1983, during which time he observed the operation of courts, conducted interviews with barristers, solicitors, magistrates and members of the staff of the Office of the Director of Public Prosecutions, and conferred with English scholars.

11. Police Act, 1964, ch. 48.

12. REPORT OF THE ROYAL COMMISSION ON THE POLICE, CMD. NO. 1728 (1962).

13. The tendency to amalgamate police forces was accelerated by the consolidation of local government authorities into larger territorial units effected by the Local Government Act, 1972, ch. 70. This reduced the number of forces to 43 and, in many cases, removed much of their local character. For example, the city of Coventry with a city population of 339,000 and a metropolitan area population of 655,000 (RAND MCNALLY COSMOPOLITAN WORLD ATLAS (Census ed. 1981)) now has no separate police force. Its police have become a division of the West Midlands force with headquarters in Birmingham.

14. J.F. Moylan, Scotland Yard (1929) cited in the GLC Police Committee publication, A NEW POLICE AUTHORITY FOR LONDON 20 (Policing London; Discussion Paper No. 1, 1983).

15. The respective areas are delineated in a map at p. 11 of A NEW POLICE AUTHORITY FOR LONDON, *supra* note 14.

16. Police Act, 1964, ch. 48, §§ 4(2), 21(1) and (2) and the Courts Act, 1971, ch. 23, § 53(7)(b).

17. Police Act, 1964, ch. 48, §§ 33(2)(j), 33(2)(b), 33(2)(e). The Home Secretary's disciplinary powers were extended by the Police Act, 1976, ch. 46, § 10.

18. Police Act, 1964, ch. 48, § 30(2).

withhold the government grant towards local police expenditure.[19] While a listing of these powers makes them appear formidable, it is not the practice for the Home Secretary to exercise a close control over local police.

A controversial question in England and Wales, as to some extent it must be anywhere, is the nature and extent of governmental supervision of the police.[20] Historically this was carried out by local "watch committees." These have been reorganized by the Police Act of 1964 and now consist of two-thirds members of elected local government councils and one-third magistrates.[21] The relations between the police and these police authorities have been the subject of much debate in recent years. The Royal Commission on the Police discussed the powers of a chief constable (the English term outside London for a police commissioner or chief of police) and observed:

> [H]e is accountable to no one and subject to no one's orders for the way in which, for example, he settles his general policies in regard to law enforcement over the area covered by his force, the concentration of his resources on any particular type of crime or area, the manner in which he handles political demonstrations or processions and allocates and instructs his men when preventing breaches of the peace arising from industrial disputes . . .[22]

For all the apparent intention of the Royal Commission's recommendations that the local police authority should exercise a more intensive form of governance over the police,[23] it seems that the reorganization effected by the Police Act of 1964 has not changed matters greatly in this respect. For example, in a highly publicized conflict between the police authority of Merseyside and its Chief Constable in 1979, the Chief Constable refused to release to the authority the report of an internal police inquiry into the death of a civilian in an encounter with the police. He was reported to have told members of the authority to "keep out of my force's business."[24]

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19. *Id.* §§ 29 and 31 as amended by the Local Government Act, 1972, ch. 70, § 272 and sched. 30.

20. The relationship between the top police executive officer (police commissioner or chief constable) and elected officers of government is necessarily different from the corresponding relationship in other areas of administration. The Royal Commission on the Police put the matter this way.

> The relationship between a police authority and its chief constable will in this field giving orders differ from that between other council committees and their chief officers. In the latter case, the role of the official is to advise the committee and to implement its decisions on matters of policy; but the decisions themselves are the responsibility of the elected body. In the case of the police these positions will be reversed. The role of the police authority will be to advise the chief constable on general matters connected with the policing of the area but decisions will be the responsibility of the chief constable alone.

REPORT OF THE ROYAL COMMISSION ON THE POLICE, CMD 1728 (1962) para. 166.

21. Police Act, 1964, ch. 48, § 2(3). *See* T.A. CRITCHLEY, A HISTORY OF THE POLICE IN ENGLAND AND WALES (1967) and A NEW POLICE AUTHORITY FOR LONDON, *supra* note 14, at 17-25. Clearly there is room for debate about the propriety of including magistrates in a body that has governance powers over the police.

22. REPORT OF THE ROYAL COMMISSION ON THE POLICE, CMD. NO. 1728 (1962), para. 89.

23. *Id.* para. 93.

24. A NEW POLICE AUTHORITY FOR LONDON, *supra* note 14, at 28, citing THE ECONOMIST, Dec. 13, 1979.

Tensions between the police and local government have been particularly acute in London where the local authorities (at the lowest level the thirty-two borough councils and, for the metropolitan area overall, the Greater London Council) have historically had no control over the Metropolitan Police who are responsible directly to the Home Secretary, a minister in the national government. The Metropolitan Police is a huge force with over 26,000 officers and more than 10,000 civilian employees.[25] Local property taxes and other locally allocated taxes pay over forty per cent of its budget which for 1982-83 was 727 million pounds.[26] The exclusion of the local authorities from any control over the London police thus naturally gives rise to controversy, and for the last hundred years the issue has surfaced periodically in political debate. In recent years, with the escalation of tension between police and the minority segment of London's population and with a harsh political chasm between a Conservative national government and a socialist Greater London Council, the controversy has become inflamed.[27]

This strange spectacle of one of the world's great police forces under vehement and continuing attack from the elected authority of the city that it serves[28] is not fully explicable in terms of local government's resentment of its lack of power. It stems from a deeper unease about the practices of the English police in large urban areas which, in turn, is rooted in the nature of English law about police powers, a body of rules and principles dramatically different from those prevailing in the United States.[29]

2. *Arrest and Search*

The powers of arrest of the police are now codified in the Criminal Law Act of 1967, section 2,[30] which provides that a constable may arrest without warrant any person whom he has reasonable cause to suspect is guilty of or is about to commit any offense for which a first offender could be sentenced to five years imprisonment. These are known as "arrestable offenses." Arrest is also authorized for other specific offenses under partic-

25. *Id.* at 32. Also see THE POLICE SERVICE IN BRITAIN 1, (Central Office of Information, London, 1983).

26. A NEW POLICE AUTHORITY FOR LONDON, *supra* note 14, at 28.

27. *See* CIVIL DISORDER AND CIVIL LIBERTIES 20 (1981), evidence presented to THE SCARMAN INQUIRY ON THE BRIXTON DISORDERS, CMD. 8427 (1981) by the (English) National Council for Civil Liberties, citing minutes of meeting of Lewisham Council of June 16, 1981.

28. The Greater London Council's deep unease about its relationship with the Metropolitan Police is displayed in the G.L.C. publication, A NEW POLICE AUTHORITY FOR LONDON, *supra* note 14.

29. There may be portents of improvement in police-community relations in some urban areas of England and Wales. Police consultative committees have been set up in some areas in which community representatives and police officers discuss sources of tension and endeavor to agree on strategies and tactics for their reduction. Meetings of these groups do not always succeed in promoting harmony. For an account of such a meeting in Lambeth (a borough of Inner London), see NEW STATESMAN, July 19, 1983, at 4.

In recent years, several important studies have been made of police institutions and relations between the police and the public in England. Particularly useful are THE BRITISH POLICE (S. Holdaway ed. 1979); M. BROGDEN, THE POLICE: AUTONOMY AND CONSENT (1982); D.J. SMITH, S. SMALL, J. GRAY, I-IV, POLICE AND PEOPLE IN LONDON (1983) (a publication of the Policy Studies Institute).

30. Criminal Law Act, 1967, ch. 58, § 2.

ular statutes and for breaches of the peace and other offenses against public order, such as soliciting for purposes of prostitution. "Reasonable cause to suspect" does not ascend to the stricter American standard of "probable cause." The result is that while English judges have employed the same rhetoric as is familiar in the United States about the necessity for a proper basis for taking into custody,[31] cases on the legality of an arrest are not numerous in England, and the concept of "reasonable suspicion" has never been subjected to the fine analysis that the Constitution of the United States has required for the more demanding standard of probable cause. The lack of an exclusionary rule no doubt also contributes to the paucity of case law.

Until recently, there was a further extensive power of arrest that occasioned much controversy. This arose under the suspected persons offense (known colloquially and also in legal circles as "sus"), created by Section 4 of the Vagrancy Act of 1824[32] (with a power of arrest conferred under section 6), prohibiting "every suspected person or thief" from,

> frequenting or loitering about in any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any street, or any highway or any place adjacent to a street or highway, with intent to commit an arrestable offence.

Allegations were for long made that "sus" was abused by the police in a variety of ways. It was said that the police conducted dragnet operations in particular areas using "sus" as a basis for searching everyone, or simply as a device for harassing persons whom they believed to be of criminal disposition or against whom they had hostile feelings. The claim was made that the subjects or victims were, for the most part, minority group members.[33] The vigorous implementation of a statute that would be found unconstitutional by an American court, at least as applied by the English police, was condemned for years by civil liberties organizations and apparently aroused the strongest resentment in minority groups. According to the reports of several Parliamentary and Home Office committees, these charges against the administration of the "sus" law were to some extent well grounded. Several committees concurred that "sus" was unnecessary for efficient policing and that its vigorous invocation by the police in several cities, notably London, was one of the underlying causes of disorders in which minority group members participated. As a result of these reports, the "sus" law was repealed by Section 8 of the Criminal Attempts Act of 1981.[34]

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31. *See* Christie v. Leachinsky, [1947] A.C. 573. While stressing the requirements that the police observe the proper formalities of an arrest, notably informing the arrestee of the reason, *Christie* also made it clear that reasonable suspicion was a sufficient ground to justify arrest.

32. Vagrancy Act, 1824, 4 & 5 Geo. 4, ch. 83, § 4.

33. *See* CIVIL DISORDER AND CIVIL LIBERTIES, *supra* note 27, at 9-18; *see also* D. HUMPHREY AND G. JOHN, POLICE POWER AND BLACK PEOPLE (1972).

34. Criminal Attempts Act, 1981, ch. 47. The "sus" offense was considered in the Reports of the following committees: Home Office Working Party on Vagrancy and Street Offences, HMSO (1976); Select Committee on Race Relations and Immigration: Police/Immigrant Relations, HC471 (1972); Select Committee on Race Relations and Immigration: The West Indian Commu-

The disappearance of "sus" may not have poured enough oil on troubled waters. The "sus" law created an arrestable offense. But even after its repeal, the police have other powerful weapons on which to rely. Laws conferring powers of what the English call "stop and search" are abundant. In the first place, there is a series of statutes, ranging from the early nineteenth century to 1982, which confer powers on a national basis to stop and search persons whom an officer has reasonable grounds to suspect has one of a variety of objects in his possession. The designated objects under different statutes include firearms[35] and controlled drugs;[36] they also cover anything stolen by employees at certain special locations such as airports.[37] As with powers of arrest, these extensive powers of stop and search need not depend upon probable cause, but rest on the weaker foundation of reasonable suspicion.

In addition to these statutes of national application, there are also special statutes conferring more extensive powers upon the police forces of certain cities. It will be sufficient to notice the powers conferred upon the Metropolitan Police by section 66 of the Metropolitan Police Act, 1839.[38] The Act authorizes the police in London to stop and search any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained. This power extends to authorize on such suspicion the search of any vessel, boat, cart or carriage. The suggestion has been made that, deprived of "sus," the English police have simply fallen back on these stop and search powers conferred so generously (and to American ears unthinkably) by these statutes.[39] To what extent the statutes are invoked in circumstances of genuine particularized suspicion and to what extent they are used simply to harass those who are thought by the police to constitute the criminal classes is a matter of debate.

The Royal Commission on Criminal Procedure, reporting in 1981,[40] was charged with the broad mandate of reviewing the investigatory process and the prosecution system in England and Wales. The Commission considered the law and practice of arrest, taking note of criticisms that the law was complex, sometimes seeming too broad and at other times too narrow. In practice the police tended to arrest and detain for some length of time where either no arrest was necessary or where quick release after arrest would have been a reasonable response.[41] The Commission's recommendations sought to broaden and rationalize the law of arrest while at

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nity, HC180 (1977); Home Affairs Committee, Race Relations and Immigration Sub-Committee: Race Relations and the "Sus" Law. Nos. 1 and 2, HC559 and HC744 (1980).

35. Firearms Act, 1968, ch. 27, § 47(3).

36. Misuse of Drugs Act, 1971, ch. 38, § 23(2).

37. Airports Authority Act, 1975, ch. 78, § 11.

38. Metropolitan Police Act, 1839, 2-5 Vict., ch. 47, § 66.

39. C.F. WILLIS, THE USE, EFFECTIVENESS AND IMPACT OF POLICE STOP AND SEARCH POWERS (Home Office Research and Planning Unit Paper 15, 1983) at 2, citing Brodgen, *'Sus' is Dead but What About 'Sas'?* 9 NEW COMMUNITY No. 1, p. 44 (1981).

40. THE ROYAL COMMISSION ON CRIMINAL PROCEDURE: REPORT, CMD. 8092 (1981) [hereinafter cited as REPORT].

41. *See* SUBMISSION OF THE NATIONAL COUNCIL FOR CIVIL LIBERTIES TO THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, Part 2 (Arrest) (1979).

the same time endeavoring to soften its practice. Accordingly, it recommended that all offenses punishable with imprisonment should be arrestable, but that at the same time the practice of arrest and of detention after arrest should be exercised in the light of what it referred to as the "necessity principle."[42]

By the "necessity principle," the Commission had in mind a set of criteria that it took to be the proper governing standards that ought to be applied both on the initial decision whether to arrest and *a fortiori* at the second-stage decision whether to hold an arrested person in custody or release him on police bail or an appearance ticket. Arrest or detention should occur, in the Commission's view, only where at least one of the following circumstances is present: (1) the person will not identify himself; (2) there is a need to prevent the continuation or repetition of the offense; (3) there is a need to protect the arrested person himself or other persons or property; (4) there is a need to secure or preserve evidence or to obtain such evidence by questioning the suspect; or (5) there is a likelihood that the person will fail to appear in court to answer the charge against him.[43] The Commission recognized that ideally these criteria should be applied as a primary standard of arrest by the police officer on the street. However, the Commission took the view that this was too onerous and subtle a set of principles to impose upon the beat officer in the act of suppressing crime.[44] While the Commission exhorted police officers to keep these criteria in mind, it nevertheless not only retained the imprisonment criterion as the formal standard for justifying an arrest, but also broadened it considerably by reducing the general five-year threshhold standard to the more expansive one of any imprisonment at all. It is therefore at least possible that implementation of the Commission's recommendation would increase rather than decrease the number of arrests made by English police.

On "stop and search" the Commission recommended a simplification and rationalization of the existing law in a manner that certainly would not diminish the powers of the police.

> The power to stop and search persons on reasonable suspicion of being in possession of stolen goods should be available throughout England and Wales. The miscellany of other existing powers should be replaced by a single provision allowing stop and search for stolen goods or any item the possession of which is prohibited in a public place.[45]

By a majority, the Commission recommended that the last catch-all provision should include searches for offensive weapons, a loose and sprawling category that justifies countless instances of stopping and searching.[46] The Commission went on to recommend that the power to stop and search should be clarified expressly to include a power to "stop people and vehicles in the vicinity of a grave incident where this might lead to the preven-

42. REPORT, *supra* note 40, at 40-49, paras. 3.61-3.86 and 121 paras. 5.7-5.8.
43. *Id.* at 44-46, paras. 3.75-3.79.
44. *Id.* at 45, para. 3.77.
45. *Id.* at 120, para. 5.5.
46. *Id.*

tion or termination of a grave offence, the recovery of valuable property or the apprehension of the suspected offender."[47]

In summary, the recommendations of the Royal Commission on Criminal Procedure on arrest and stop and search enlarge rather than contract the formal powers of the police, though they are tempered by the submission of a set of supplementary standards that, if faithfully implemented, might reduce the actual incidence of arrests and detention after arrest in cases where a summons would suffice.

3. *Police and Criminal Evidence Bill*

Legislation building upon the provisions of the Royal Commission (the Police and Criminal Evidence Bill, 1982) was introduced in Parliament by the government, but lapsed with the dissolution of Parliament for the general election of June, 1983. A revised version of the Bill was reintroduced in Parliament in late 1983.

Clause 1 of the revised Bill adopted the general substance of the Royal Commission's recommendations on stop and search laws, specifically extending the present law so as to empower the police to stop and search persons or vehicles on reasonable suspicion that a person possesses or a vehicle contains stolen or prohibited articles. "Prohibited articles" means *inter alia* offensive weapons and burglary tools. This proposal has aroused criticism from civil liberties circles. In his evidence before the Royal Commission, Sir David McNee, then the Commissioner of the Metropolitan Police, gave the example of football hooliganism as showing the need for such searches, arguing that at present the police are handicapped in their efforts to prevent violence by lacking adequate powers to search football fans on their way to a stadium.[48] It is not clear whether the police take the view that simply attending or going to or from a football game is sufficient to arouse reasonable suspicion, but the dragnet searches of certain classes of football fans is clearly contemplated. In a wider context, members of minority groups believe these powers will be directed mostly against them. In the evidence submitted by the Institute on Race Relations to the Royal Commission, it was alleged that black people are often given no reason for being stopped and searched, that unnecessary violence is used against them, that black juveniles are harassed, and that assertion of any rights leads to arrest. Furthermore, it was alleged that repeated stops and searches are used to harass individuals, that black homes and premises are entered at will and that whole areas are periodically subjected to such treatment on a systematic basis with the setting up of road blocks.[49] It was feared that a power to stop and search for offensive weapons would exacerbate these alleged abuses. Presumably in an attempt to meet this

47. *Id.*

48. Written evidence of Sir David McNee to the Royal Commission on Criminal Procedure as quoted in NATIONAL COUNCIL ON CIVIL LIBERTIES COMMENT ON THE POLICE AND CRIMINAL EVIDENCE BILL 4 (1982).

49. GREATER LONDON COUNCIL POLICE COMMITTEE, THE POLICE AND CRIMINAL EVIDENCE BILL 9 (1983), citing *Police Against Black People*, evidence submitted to the Royal Commission on Criminal Procedure by the Institute of Race Relations.

criticism, Clause 2 of the latest version of the Bill provides that a police officer who proposes to make a search under Clause 1 must state to the subject his name and the name of the police station to which he is attached and must state the object of the search and his grounds for making it. Clause 3 requires officers to keep written records of all such searches.

The Royal Commission's recommendations on arrest were somewhat changed in the Police and Criminal Evidence Bill. Ignoring the Commission's recommendations for a general power of arrest for any imprisonable offense, the Bill retained the present standard of conferring arrest powers only for offenses carrying up to five years imprisonment, but introduced in its Part III (Clauses 21-30) a new power of arrest for any offense, no matter how minor, if one of a list of "arrest conditions" were satisfied. The "arrest conditions" given in the Bill were: (a) police inability to ascertain the suspect's name and address; (b) reasonable grounds to doubt whether a name and address supplied are genuine; (c) reasonable doubt that a person will reside at the address given long enough to be served with a summons; (d) reasonable grounds to believe the arrest necessary to prevent physical harm, loss of or damage to property, an affront to public decency, or an obstruction of the highway; and (e) reasonable cause to believe the arrest necessary to protect a child or other vulnerable person.

It will be noticed that these conditions are akin to the Royal Commission's "necessity principle,"[50] with the important difference that the Royal Commission employed these standards as modifiers to indicate where arrests should *not* be carried out in cases where the basic requirement of suspicion of an offense carrying a year's imprisonment was present. By contrast, the Bill uses the conditions as qualifications for an arrest, no matter how trivial the suspected offense.

It thus appears that there is no intention to cut back on arrest and stop and search powers, but rather a probability that they will be enlarged. In the balance between individual rights and crime control, the English have clearly made a decision in this respect that favors crime control much more decisively than American standards. The English position on stop and search is one that would not be permitted by almost any conceivable interpretation of the fourth amendment. But is the English practice effective even with respect to crime control and, if so, is it worth the price that may be paid in worsening relations with the public? One study reveals that in the London area arrests from stops authorized by statute make up more than half of all arrests and suggests that the removal or contraction of stop and search powers would certainly diminish the number of arrests for certain offenses.[51] But a significant number of these arrests are for offenses of breach of the peace, obstruction, or assault, which may, to an extent, be the product of the very stop itself. The same research study points out that frequent stop and search practices can have a bad effect on relations between the police and the public "to the point where any contact with the police comes to be seen by members of the public as intrusive or, worse, a

50. *See supra* notes 42-43 and accompanying text.
51. C.F. WILLIS, *supra* note 39, at 23.

sign of official hostility."[52]

4. *Detention and Questioning*

While the police have in law no "right to detain somebody to help with their inquiries,"[53] in practice this does not seem to be a great obstacle to detention for questioning. The English police may initiate detention for questioning with an arrest, or they may begin by simply "asking" a suspect to accompany them to the police station and then arresting him formally at some point in the interrogation when suspicion has hardened. Once in police custody (if he is not released altogether, given a summons, or released on police bail), an arrested person may be charged by the police (booked) and then, under present law, must be brought before a magistrates' court as soon as is practicable.[54] If the offense is not "serious," the suspect should be released on police bail. There is, however, no definition in the governing statutes of "serious offense" or "as soon as practicable."[55] English practice thus appears to live uneasily with the paradox of the formal recognition of a right to silence coupled with the practice of a period of detention for questioning that the police may invoke at their discretion.

The absence of a powerful and independent prosecuting authority confers upon the police in England and Wales a more extensive and unfettered role in the investigative and prosecuting processes than is the case in American jurisdictions. As in any system, the first critical encounter is always between the police and the suspect in circumstances of interview or interrogation. While English law recognizes the right of a suspect not to speak,[56] the requirements of *Miranda*[57] find their counterpart in England in the less stringent standards set forth in what are called the Judges' Rules.[58] Originating in formal advice given by the Lord Chief Justice to the Chief Constable of Birmingham in 1906, the Rules have since been several times expanded and revised. Their present form dates from a meeting of all the Queen's Bench Judges in 1964. The Rules are supplemented by Home Office Administrative Directives to the Police that are communicated to the police in Home Office Circulars.[59]

The principal Rules affirm the police right to question citizens in the detection of offenders, but require the police to administer a caution as

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52. *Id.*

53. Reg. v. Lemsatef, [1977] 2 All E.R. 835.

54. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 55, §§ 38(1), (2), (3) as amended by the Bail Act, 1976, ch. 63, § 12, sched. 2.

55. THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENCES IN ENGLAND AND WALES: THE LAW AND PROCEDURE, CMD. NO. 8092-1 at p. 24, para. 66 [hereinafter cited as LAW AND PROCEDURE]. *See* a discussion of the concept of a "serious offence" *infra* note 112. At common law, three days was held to be an unreasonable delay in bringing the accused before a magistrate. Wright v. Court, 4 B & C 596 (1825).

56. LAW AND PROCEDURE, *supra* note 55, at 26, para. 70 citing Rice v. Connolly, [1966] 2 Q.B. 414.

57. Miranda v. Arizona, 384 U.S. 436 (1966).

58. LAW AND PROCEDURE, *supra* note 55, at 153-56, app. 12.

59. *See, e.g.*, Home Office Circular No. 89/1978 reproduced in LAW AND PROCEDURE, *supra* note 55, 153, App. 12.

soon as the officer "has evidence which would afford reasonable grounds for suspecting that a person has committed an offence."[60] The essential portion of the caution is in the following terms:

> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.[61]

The Rules go on to require that a record be kept of the time when and place where any questioning begins and of the persons present. Further, the police officer must keep a record of the exact words of the responses made by the person being questioned. When the police officer has written down the response, the person being questioned is asked to read the statement and to make any corrections. He will then be asked to sign a certificate that the statement is true. If he refuses the officer must record this refusal.[62]

The Rules begin with a prefatory statement making it clear that police officers cannot compel any person to come to or remain at a police station except by arrest and affirming "that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor."[63] But the force of this last declaration is devastatingly reduced by the immediate qualification that when the suspect is in custody the right to see his solicitor only applies "provided that no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."[64]

The Royal Commission on Criminal Procedure (1981) concluded that with the enormous growth in the number of offenses committed and the number of cases processed, police interrogation has become the standard mode of securing evidence for use in court or inducing the defendant to plead guilty. In research done on Crown Court cases at the Commission's initiative, it was estimated that "13 per cent of cases would have failed to reach a prima facie standard without confession evidence and a further 4 per cent would probably have been acquitted."[65] In most of the cases reviewed, statements by the accused constituted a part of the prosecution

60. *Id.* at 154.

61. *Id.*

62. Judges' Rules III and IV reproduced in LAW AND PROCEDURE, *supra* note 55, at 154-56 app. 12.

63. Introduction to the Judges' Rules para. (b)-(c), LAW AND PROCEDURE, *supra* note 55, at 153 app. 12.

64. *Id.* para. (c). In a study conducted in 1972 of 134 randomly chosen persons who had appealed to the Court of Appeal, 74% (42 defendants) of the 57 defendants who requested a solicitor when they were first taken to the police station were refused such access by the police. Zander, *Access to a Solicitor in the Police Station*, 1972 CRIM. L. REV. 342. In a study conducted in Birmingham, six out of seven defendants who asked to see a solicitor while being interrogated by the police were denied that right. J. BALDWIN & M. MCCONVILLE, NEGOTIATED JUSTICE 69 (1977). In yet another survey of 200 defendants found guilty, half in the magistrates' court and half in Crown Court, it was found that the police had denied access to a solicitor three times as often as it was granted. "Further, a higher proportion of refusals occurred in the Crown Court, suggesting that those accused of the more serious offenses were at a greater disadvantage at the crucial arrest and charge stage." D. Seifman, *Plea-Bargaining in England* in PLEA BARGAINING 184 (W. McDonals and E.J. Cramer eds. 1980).

65. REPORT, *supra* note 40, at 19, para. 2.15.

case and, in half of these, the statement amounted to a full confession.[66]

Even more important may be the relation between statements obtained during interrogation and the huge number of cases disposed of by guilty pleas in the magistrates' courts. Bottoms and McClean, in their study of defendants in Sheffield, emphasize the importance in this context of admissions made by suspects to police during interrogation as a prime reason for guilty pleas.[67] This is not to suggest that the admissions were improperly extracted. Most defendants conceded that they made early admissions because they felt they were patently guilty.[68] But in cases where defendants complained to researchers of police misconduct this almost always had to do with allegations that the police had concocted or embroidered alleged verbal admissions by the defendants during interrogation. These will be cases where the defendant did not sign a written statement. In English police jargon, these statements are known as "verbals"[69] and the allegation that these have been invented or embroidered by the police is often expressed to researchers by the defendant's indignant charge that he was "verballed."[70]

It is not easy for researchers to verify or disprove any claims that might be made by participants on either side about the behavior of police during interrogation. Scepticism naturally attaches to claims made by convicted prisoners, and where researchers have been permitted to be present at police interrogations, we have a classic instance of study having a natural tendency to warp the object that is being studied. There has been and is likely to be no unobserved observation. The Home Office did commission a research study in the course of which trained observers attended police interrogations of suspects over a period of time in four police areas of England and Wales.[71] The study showed that the police failed to raise the question of access to a solicitor in more than 80% of the interviews observed[72] and that "they may on occasion have given suspects more encouragement to make verbal or written confessions than the strict criteria of voluntariness allow."[73] Only 12% of the suspects exercised their right to silence and most of those refused to answer only certain questions and responded to others.[74]

While the bare caution may be routinely administered, there is a question about the fidelity to the spirit of the declaration of principle in the

66. *Id.*

67. A.E. BOTTOMS & J.D. MCCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS 115-17 (1976).

68. *Id.* at 111-15.

69. "Verbals" have been described as "the remarks which are attributed to the suspect in the police officer's subsequent note of the interview but which the suspect is not prepared to endorse by making a written statement under caution." REPORT, *supra* note 40, at 70, para. 4.2.

70. *See, e.g.*, J. BALDWIN AND M. MCCONVILLE, *supra* note 64, at 73, and Cases numbered 13 and 75 given as examples, *Id.* at 91.

71. P. SOFTLEY, POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS (Home Office Research Study No. 61, 1980).

72. *Id.* at 21, Table 3.4.

73. *Id.* at 48. Softley records that on one occasion a constable asked a juvenile suspect why he had not answered any questions. The juvenile replied, "You said that I didn't have to say anything" to which the officer riposted, "But that would look suspicious, wouldn't it?" *Id.* at 28.

74. *Id.* at 28-29.

Judges' Rules that a suspect must be afforded free access to a solicitor. Numerous studies[75] in this area have suggested over the years that where such a demand is made by a suspect the police will often rely on the exception in the Judges' Rules for cases where allowing the suspect to see a solicitor would delay or hinder the investigation.[76] The most recent of these studies by Softley showed that in 84% of the observed cases involving adult suspects the suspect made no request for a solicitor. In 11% the suspect did make such a request and in the remaining 5% of the cases the police raised the matter.[77] The 11% of the cases where the suspect did request a solicitor amounted to nineteen cases out of the 168 observed and, in these cases, the police acceded to the request in thirteen cases and denied it in six.[78] Requests for a solicitor were more common among those with a criminal record and those charged with serious offenses.[79] In the outcome only nine of the 168 suspects in the cases observed saw a solicitor and in seven of these cases the solicitor arrived after the interrogation was completed.[80]

The relationship between the suspect and the police during interrogation is the most sensitive topic in the administration of justice in England and Wales as it will be in all places. It is the stage in the process that prepares the road in the great majority of cases for the swift disposition by guilty plea that may occur the next morning in the magistrates' court or the subsequent plea of guilty in the Crown Court. Whether or not certain formalities of interrogation are adhered to, observers have pointed out that in obtaining confessions central issues include police threats of prolonged detention, exaggeration of the strength of the evidence, belittling the gravity of the offense, and suggesting that cooperation would improve the suspect's posture before the court.[81] Not surprisingly, the Royal Commission on Criminal Procedure (1981) devoted the largest part of its Report to examining present arrangements in this area and to proposing some measure of change.

5. *The Commission's Recommendations*

The research conducted by the Commission's staff indicated that about 75% of suspects are held in police detention for no more than six hours and about 95% for no more than twenty-four hours.[82] However, a survey conducted by the Metropolitan Police covering three months in 1979 showed that 212 persons (0.4%) were held for seventy-two hours or

75. *See* J. BALDWIN AND M. MCCONVILLE, *supra* note 64, at 102; Baldwin & McConville, *Police Interrogation and the Right to See a Solicitor*, 1979 CRIM. L. REV. 145; Zander, *supra* note 64; *cf.* A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 59, 145-47.

76. J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 146-147; M. MCCONVILLE & J. BALDWIN, COURTS, PROSECUTION, AND CONVICTION 156-58, 173 (1981); Zander, *supra* note 64, at 346-348.

77. P. SOFTLEY, *supra* note 71, at 21, Table 3.4.

78. *Id.*

79. *Id.* at 22.

80. *Id.* The English police and courts do not take the view that interrogation should cease because the suspect has asked to consult a lawyer.

81. *Cf.* SOFTLEY, *supra* note 71, at 32-34.

82. REPORT, *supra* note 40, at 52, para. 3.96.

more before charge or release without charge.[83] It thus seems that the English police, in serious cases, have established a practice of virtually incommunicado interrogation that may stretch over an appreciable period, not unlike the regularized procedure known in France as the *garde à vue*.[84]

The Royal Commission proposed a general rule that an arrested person must be brought before a court within twenty-four hours.[85] In the case of those suspected of a "grave offense," the police would not be required to lodge a formal charge within twenty-four hours but might request at an initial appearance before the magistrate, where the suspect would be legally represented, a further twenty-four hour period of detention before charge or release. Subsequent applications for extensions could be made but the suspect would have to be brought before a magistrate every twenty-four hours.[86]

The Commission further recommended the creation of a code to govern the nature of the detention of a suspect after arrest or during interrogation and the keeping of a formal record of relevant events.[87] An officer should be designated as having responsibility for all aspects of the suspect's treatment while in custody. The suspect should be informed orally and in writing of his rights at the police station, and a "custody sheet" should be kept that records all events relating to his detention.[88] Generally, under the Commission's proposals, a suspect would have to be released (whether on bail or not) or charged within twenty-four hours. If he were charged he must be brought before a court either on the day he was taken into custody or the next day.[89]

An exception was proposed for a person suspected of a grave offense.[90] In such a case the police might bring the suspect (if they do not wish to release or immediately charge him) before a magistrates' court sitting in private within twenty-four hours, and this court would have the power to permit a further limited period in custody prior to charging or release.[91]

The Commission did not propose any change in the principle that a suspect is under no obligation to answer questions.[92] But they came to the conclusion that there ought to be improvements in the practice of record-

83. *Id.* at 52-53, para. 3.96.

84. The *garde à vue* is defined as follows in a French law dictionary: "A procedure under which an officer of the judicial police may order the detention in a police station for a period of from 24 to 48 hours of any person whose presence the police find necessary to assist them in their investigation." DALLOZ, LEXIQUE DE TERMES JURIDIQUES 175 (3rd ed. 1974) (translated by the author).

85. REPORT, *supra* note 40, at 55-56, para. 3.104.

86. *Id.* at 57, para. 3.106.

87. *Id.* at 107-10, paras. 4.109-4.116, 122-23, 5.12.

88. *Id.* at 59-60, paras. 3.112-3.113, and at 121, para. 5.9.

89. *Id.* at 55-56, para. 3.104, and at 121-22, para. 5.9.

90. The term "grave offence" covers the following crimes and, where appropriate, attempts or conspiracies to commit them: murder; manslaughter; causing grievous bodily harm; armed robbery; kidnapping; rape; arson; causing explosions; counterfeiting; corruption and burglary; theft and frauds, where major amounts are involved; the supply, importation or exploration of controlled drugs; perversion of the course of justice; and blackmail. *Id.* at 57, para. 3.106, n.1.

91. *Id.* at 57, para. 3.106, and at 121-22, para. 5.9.

92. *Id.* at 87, para. 4.53, and at 123, para. 5.13.

ing the product of police questioning.[93] If the suspect will not sign a written statement, the police officer should make a note of the main relevant points of the suspect's oral statements, read the note over to him and invite him to make any comment he wishes.[94] The Commission recommended the introduction of a system of tape recording of the reading back of a written statement or the summary of an interview and the responses of the suspect.[95]

The Commission rejected proposals that the police interview of suspects should only be conducted in the presence of a third party, perhaps a solicitor or a magistrate,[96] but stated that they wished to strengthen the right of access to legal advice presently affirmed in the Judges' Rules.[97] To make this right more effective they proposed the elaboration of a scheme of "duty solicitors," solicitors who would be on call to attend at a police station, and provision of adequate remuneration for this service.[98] The right to see a solicitor should, in the Commission's view, be unrestricted except "where a person is suspected of a grave offense and there is reason to believe that access to a solicitor may cause delay resulting in risk to life or property, or give rise to interference with evidence or witnesses, the disposal of the proceeds of crime or the escape of accomplices. . . ."[99] In these cases the police may withhold access. However, this should require the authority of a high ranking police officer and the recording of the specific grounds for denial of access. Even in these cases the suspect must be brought before a court or receive a visit from a solicitor within twenty-four hours.[100]

The Commission recommended that its proposals should be included in a statute regulating the treatment of suspects in custody and in a code of practice for the regulation of interviews.[101] Breaches of the statute or the code by the police should not lead to the automatic exclusion of proferred statements but should be relevant to the assessment by a court of the statement's reliability.[102]

6. *The Government's Response*

The Police and Criminal Evidence Bill (1983) proposed the enactment of some of the Commission's proposals in this area but with certain modifications.[103]

On police detention of suspects before charging, the amended version of the Bill would allow a senior police officer to extend initial detention up to thirty-six hours before an appearance before the magistrates would be

93. *Id.* at 72-80, paras. 4.9-4.31, and at 123, para. 5.14.
94. *Id.* at 73-74, para. 4.13, at 78, para. 4.27, and at 123, para. 5.14.
95. *Id.* at 78, para. 4.27, and at 123, para. 5.14.
96. *Id.* at 80, para. 4.32, at 103-04, paras. 4.99-4.100, and at 123, para. 5.15.
97. *Id.* at 99, para. 4.87, and at 123, para. 5.15.
98. *Id.* at 102-03, para. 4.97-4.98, and at 123, para. 5.15.
99. *Id.* at 123, para. 5.15.
100. *Id.* at 100-01, para. 4.91, and at 123, para. 5.15.
101. *Id.* at 109-10, paras. 4.115-4.116, and at 124, para. 5.18.
102. *Id.* at 116-17, paras. 4.131 and 4.133, and at 124, para. 5.18.
103. *See* 1983 CRIM. L. REV. 1.

required, compared with the twenty-four hours proposed by the Commission. Subsequent applications to the magistrates for further detention would be permitted, but an absolute cap of ninety-six hours would be placed on police detention.[104] The suspect would have the right to be legally represented before the magistrates.

The Government has accepted the Commission's view that a detailed Code should be attached to the primary statutory law, and the Home Office has published a draft Code to govern the questioning of suspects, which would be incorporated in the proposed legislation.[105] The Bill and the Code adopt the Commission's proposal for the keeping of a "custody record"[106] and afford the suspect a right to have a family member or friend informed of his being held in custody. However, this may be delayed where an officer of the rank of superintendent believes it may interfere with the investigation.[107] The Code affirms a general right to the advice of a solicitor. If the person detained does not know of a solicitor, he "shall be advised of the availability of a Duty Solicitor and shall be provided with a list of solicitors who have indicated that they are available for this purpose."[108] The custody officer must inform the suspect of these rights both orally and in writing. The required warning or "caution" is the old Judges' Rules formula: "You do not have to say anything unless you wish to do so but what you say may be given in evidence."

The Commission had proposed that the rights of access might be denied when a police officer of the rank of sub-divisional commander had reasonable ground to believe that affording the rights would lead to interference with or harm to evidence or witnesses, or where granting them might make it impossible to arrest other suspects or would hinder the recovery of the proceeds of the offense.[109] But the Commission had confined this power to deny access to cases where a detainee was suspected of a "grave offence." The proposed Code would confer the power to deny access to a solicitor on any police officer of the rank of superintendent or above. This change is significant since a superintendent is likely to be an investigating officer and more readily available.[110] Again, the Code broadens the category of cases in which this denial may be made to every "serious case of an arrestable offense" where there might be interference with the investigation.[111] This would be a much wider and much less precise group than the Commission's list of "grave offences"[112] and would

104. Police and Criminal Evidence Bill (1983) Clauses 38-40.

105. Home Office, Draft Codes of Practice for the Detention, Treatment, Questioning and Identification of Persons by the Police and for the Searching of Premises and Seizure of Property (1983) [hereinafter cited as Draft Codes].

106. Police and Criminal Evidence Bill (1983) Clauses 32-36; Draft Codes, *supra* note 105, at §§ 2.1-2.3.

107. Police & Criminal Evidence Bill (1983) Clause 50; Draft Codes, *supra* note 105, at §§ 4.1-4.6.

108. Draft Codes, *supra* note 105, at § 5.1.

109. *See supra* note 100.

110. Draft Codes, *supra* note 105, § 5.2; Police and Criminal Evidence Bill (1983) Clause 52; Mirfield, *The Draft Code on Police Questioning—A Comment*, 1982 CRIM. L. REV. 659, 660.

111. *Id.*

112. The term "serious offence" in English criminal procedure was traditionally synonymous with "felony." In 1967 the Criminal Law Act, 1967, ch. 58, § 1.2, abolished all distinctions be-

confer an enormous discretion on the police.

The Code departs from the Commission's proposals in other substantial ways. It permits questioning of a suspect to begin, even after he has requested a solicitor and before the solicitor's arrival, where the processes of investigation would otherwise be unreasonably delayed.[113] Further, when a solicitor is present during an interview, a superintendent of police may require him to leave if the superintendent considers that the solicitor is, by his misbehavior, preventing the proper putting of questions.[114] The Code thus preserves in a very large measure the practice of incommunicado interrogation at the choice of the police.

The proposed Code provides further that no police officer shall indicate, except in answer to a direct question, what action will be taken on the part of the police if the person being interviewed answers questions or refuses to do so. In response to a direct question the officer may inform the person what action he proposes to take provided the action is itself proper and warranted.[115] This would permit the police to promise quick release on police bail or to promise that they would make a recommendation of bail on the initial appearance before the magistrate, thus offering powerful inducements to persuade the suspect to answer questions. In addition, the Code provides elaborate rules with respect to providing food and drink for suspects, allowing them breaks in interviews, affording sufficient time for sleep, and providing access to medical care.[116]

Finally, the Code provides that statements and responses must be fully taken down in writing.[117] Initially the Government appeared unwilling to move decisively on the Royal Commission's recommendation to institute arrangements for the tape recording of the decisive portions of an accused's statement.[118] But the amended (1983) version of the Police and Criminal Evidence Bill contains a provision requiring the Secretary of State to issue a code of practice in connection with the taperecording of interviews of suspects and to make an order requiring such tape recording.[119] However, it is the government's intention to conduct field trials

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tween felonies and misdemeanors and conferred a power of arrest *inter alia* whenever an offense carries a possible sentence of five years imprisonment. *See* REPORT, *supra* note 40, at 23, para. 3.6. The Royal Commission on Criminal Procedure proposed a new concept of "grave offences." *See supra* note 90. Mirfield, *supra* note 110, at 659-60, points out that the Commission had recommended numerous instances of "enhanced powers" with respect to these grave offenses, e.g., the power to search intimate parts of the body, to take non-intimate body samples and the power of surreptitious surveillance, etc. Wherever one of these powers is dealt with in the new draft Codes the "serious arrestable offence" standard is used, conferring greater discretion on the police. The English do not seem to have been impressed by what some might view as the paradoxical or even perverse nature of the denial of access to a lawyer for those suspected of "serious" offenses.

113. Draft Codes, *supra* note 105, § 5.3.

114. *Id.* at § 5.4.

115. *Id.* at § 12.2.

116. *Id.* at §§ 8.1-8.7, 9.1-9.6, 11.1-11.8.

117. *Id.* at §§ 13.1-13.7.

118. 1983 CRIM. L. REV. 2, referring to the Home Secretary's answer to a Parliamentary question on November 15, 1982.

119. Police and Criminal Evidence Bill (1983) Clause 53. There is a considerable question about how much added reliability will be introduced by the use of tape recordings. McConville and Morrell, *Recording the Interrogation: Have the Police Got it Taped?* 1983 CRIM. L. REV. 158, give an account of a Scottish study (SCOTTISH HOME AND HEALTH DEPARTMENT, TAPE RECORD-

over two years before deciding what kind of recording program to introduce.[120]

B. *Comparisons and Comments*

All societies must confront the problem of how best to regulate the police with respect to their work in investigating crime, interrogating suspects, and their participation in the decision to file a charge. Three broad modes of regulation can be identified which may, of course, be mixed in varying degrees.

1. *Judicial or Prosecutorial Supervision*

At one extreme we find the structure and ideology of continental European systems, especially those deriving from the French model. Here the theory of the matter is that the police should ordinarily occupy only a very subordinate role in the investigation of crime. They are seen rather as a peace-keeping force charged with quelling disturbances, making immediate interventions with respect to crimes that are actually taking place, responding to calls for help or assistance and regulating traffic, etc. To confer upon the police any larger authority in the areas of investigating crime and charging citizens with crimes has been perceived by the French as dangerous to the liberty of the citizen. So delicate a business should, in the interests of fairness and liberty, be entrusted only to a judicial authority.[121]

For these reasons the French developed the widely imitated office of the investigating magistrate, the *juge d'instruction*, who with respect to all crimes of apparent gravity is, under the formal rules of the system, charged with the duty of superintending the investigation and fixing the charge.[122] The discharge of this duty may take place in several ways. The magistrate is ultimately expected to preside over a judicial taking of testimony from witnesses and suspects and, if it is appropriate, to make a committal for trial on the basis of this sworn testimony. This testimony is then forwarded with other relevant papers to the trial court and forms the foundation file (*dossier*) for the trial proceedings. If the magistrate is seized early

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ING OF POLICE INTERVIEWS: INTERIM REPORT—THE FIRST 24 MONTHS, 1982) which suggests that the police quickly adapt to the practice by delaying the arrival of the suspect at the police station during which time they conduct "unofficial" interviews, or by simply not switching on the recorder until they have completed those bits of the interview they would prefer not to have memorialized.

120. 1983 CRIM. L. REV. 2. Home Office, *Police and Criminal Evidence Bill: A Briefing Guide* 53-55.

121. For a criticism of American practices in the light of this kind of European model, see L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977). For a summary of central aspects of the French system, see Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (N. Morris and M. Tonry eds. 1980). For a disagreement over how to characterize the nature of the French criminal process, see Goldstein and Marcus, *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977) and Langbein and Weinreb, *Continental Criminal Procedure: 'Myth' and Reality*, 87 YALE L.J. 1549 (1978).

122. Weigend, *supra* note 121, at 389-94.

of the case, it will, however, often be necessary for further investigatory work of a conventional police nature to be undertaken before the judicial proceedings may begin. In such cases the magistrate may employ the investigating police who are under his authority (*police judiciaire*) and authorize them by warrants and commissions to proceed with further investigatory activities including searches and seizures and interrogations.[123]

But the apparent extreme contrast between the ideology of the French and Anglo-American systems is hardly borne out by the French practice. Most commentators take the position that in the reality of investigatory procedures in France and in other countries that follow the French model the role of the magistrate in the great mass of cases is considerably diluted or actually eliminated.[124] This is effected by exploiting certain large exceptions that allow for extended police investigations, such as the power to investigate crimes that have been freshly committed (*flagrants délits*),[125] and by the issuance of very general warrants by the magistrate to the police to carry on an investigation. The actual judicial taking of testimony as part of the investigatory phase in the case of serious offenses (*instruction*) is avoided in most cases by a decision taken by police and prosecutor after identifying the offender to scale the case down to a misdemeanor so that it may be tried summarily in the lower court without the intervention of the investigating magistrate. This practice is known as *correctionnalisation*.[126]

The great European attempt to bridle the police by a system of judicial monitors thus seems to have been largely abandoned. The French police in the investigatory phase are left pretty much to their own devices, and French theory, so dramatically different from that of England, turns out in the end to produce not very dissimilar practices. English theory and practice, indeed, are more frankly consonant with each other while the French system has been forced into strained constructions and even fictions in order to afford its police the amount of freedom and activity considered necessary for the detection of criminals.

But official supervision should not be thought of solely in terms of the judiciary. The prosecutor's office may have a powerful influence over police practices. This could occur, to some extent, during the investigation either by the police seeking advice from the prosecutor or through members of the prosecutor's staff participating in or actually initiating investigations. Their influence clearly may be decisive at the charging stage.

American jurisdictions exemplify the wide ranging influence of the prosecutor's office especially at the charging stage. Most crimes in the

123. *Id.*

124. *Id.* at 390-93.

125. *Id.*; Goldstein and Marcus, *supra* note 121, at 253.

126. Weigend, *supra* note 121, at 406-409; Goldstein and Marcus, *supra* note 121, at 250-53. Goldstein and Marcus suggest that the process of *correctionalisation* is a rough analogue of plea bargaining since prosecutors are more likely to charge a case down in this way when the accused is cooperative and will not contest guilt. Goldstein and Marcus, *supra* note 121, at 276-79. By contrast, Weigend doubts the validity of viewing *correctionalisation* as a crude form of plea bargaining and takes the position that the decision to charge down is governed by the prosecutor's view of the seriousness and complexity of the case. Weigend, *supra* note 121, at 406-09.

United States, even of the most serious kind, will be investigated by the police with little or no intervention by the prosecutor. But after the identification of the suspect, the prosecutor will begin to play a decisive role in weighing the appropriate charge. If the crime is one of considerable gravity, the initial charge will probably be determined by the prosecutor's office. In other crimes the initial charge may be set by the police but will, in many jurisdictions, be reviewed and possibly modified or the case dropped altogether by a prosecutorial decision between the initial appearance and the review of the charge by a magistrate and possibly a grand jury.[127]

In England the healthy impingement of these officers upon the police is much less evident. The English system has joined its historical rejection of the European institution of the investigating magistrate with a parallel rejection of the Euro-American office of public prosecutor. As we shall see, the English scene may in the future be substantially altered by the introduction of a corps of professional prosecutors,[128] but up to this moment the police have been subject to little monitoring in their selection of charges, at any rate in the lower courts.[129]

It is difficult to overemphasize the peculiar stamp placed upon the whole character of English criminal justice by the absence of an American-style office of prosecutor. This glaring void means that historically in England virtually total reliance has been placed on the hope that the police will police themselves. It may be asked why the English system threw up a strong and efficient police organization but failed to evolve any corps of professional prosecutors.

Any definitive answer to such a question is of course impossible, but a cluster of reasons present themselves as relevant, including the overwhelmingly obvious one that one can get along without professional prosecutors but hardly without professional police. Joined with this is the historical English view of the professional prosecutor as having all the marks of the oppressive "official" associated in English ideology and national spirit with the regimes of hostile European nations—notably, in history, Spain and France. In more recent times, from the nineteenth century onward, any movement to establish such a class of officials would also have, no doubt, encountered strong opposition from the enormously influential English private bar. While a prosecutorial bureaucracy would have furnished employment and offices for members of the profession, their natural inclination was probably to seek the same benefits in acting for the Crown in a private capacity, thus enhancing the power and camaraderie of the private bar.

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127. On the American prosecutor's exercise of discretion in fixing the charge, subject to possible revision by a committal procedure in a magistrates' court, see Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 LAW AND SOCIETY REV. 495 (1974); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STANFORD L. REV. 1036 (1972); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. OF COMPARATIVE LAW 532 (1970); *Symposium, Prosecutorial Discretion* 13 AM. CRIM. L. REV. 379 (1976) (bibliography at 533); ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Tentative Draft, 1970).

128. *See infra* text accompanying notes 178-82.

129. *See infra* text accompanying notes 215-49.

2. *Police Accountability*

If the idea of official supervision of police work by magistrate or prosecutor has so far been rejected in England, there remains the possibility that the police might be held more or less closely answerable to some governmental body, whether an elected political one or an administrative officer. This is a proposal that bristles with difficulty and controversy, and all that will be attempted here is to notice some of the issues and their relevance to the Anglo-American scene.[130]

Close political control of the police raises some of the same spectres as close political control of the courts. The police, it will be said, should follow the law and not politicians who change with each election and who may be swayed by considerations not relevant to the continuing and even-handed enforcement of the law. In addition, many police decisions of an operational nature are technical, specialized and even quasi-military and should not be subjected to over-the-shoulder scrutiny and intervention by civilians. Furthermore, if there were to be operational control of the police by some governmental body, should it be by a local authority, a regional one or a national one? Policies may differ dramatically at these different levels. A police force in Ulster might operate in very different ways if it were subject to the close control of (a) a county or city authority (b) some all-Ulster governmental body, or (c) the national government in London.

But some of this reasoning contains the seeds of cogent responses. Surely the police are servants of society and cannot be left without any governmental control. The only debate must be about how close that control should be. Police, in the course of their duties, inevitably exercise daily discretion at different levels, which must be seen as an expression of important policy decisions often grounded in ideas of social justice. Why should these decisions not be shaped directly by elected bodies rather than by police commanders? The policeman on the beat, in deciding whether to make an arrest or to take no action at all, and the divisional commander who decides how to deploy resources or how to respond to a threat of civil disturbance or riot are both making delicate decisions of social policy, which are only in some portion peculiarly within the expertise of the police. In the light of the need for informed policy directives and democratically validated standards, a strong case can be made for governmental control over the police.

While these responsive arguments clearly have a measure of validity, yet immensely difficult questions remain about the degree and nature of governmental control over the police and the appropriate body to exercise this authority. These arguments will not be pursued further here since it is enough for present purposes to note that, in addition to the absence of other forms of supervision, the civilian police authorities in England and Wales are severely limited in their powers over police policy and its execu-

130. For a further discussion of this topic, see H. GOLDSTEIN, POLICING A FREE SOCIETY 131-56 (1977); G. MARSHALL, POLICE AND GOVERNMENT (1965); M. BROGDEN, THE POLICE: AUTONOMY AND CONSENT (1982).

tion. The Metropolitan Police are not under the control of the Greater London Council at all but are responsible directly to the Home Secretary.

We have earlier noted deteriorating relations between the police and sectors of the public in certain parts of England and Wales.[131] Exacerbated by the intrusion of accusations of racism, these deteriorating relations have led to a recent crisis over governmental control of the police. The problem is not likely to dissolve in the near future, for it surely represents the ultimately inevitable surfacing of a danger inherent in the English criminal justice system for a century or more. The virtually untrammeled independence of the police and their sweeping powers are now perceived by many as a threat and a danger and are being subjected to challenge.

3. *Judicial Sanctions*

The absence of an exclusionary rule in England and the relative timidity of English judges in curbing the activities of the police will be discussed later.[132] The Report of the Royal Commission on Criminal Procedure displayed uneasiness at the present lack of regulation over detention and interrogation practices, and the government's proposed Police and Criminal Evidence Bill is a response to this aspect of the Commission's Report. Even if there is justice in the opinion of many critics that the net result of the proposed bill would be to enhance police powers with respect to interrogation of suspects and search and seizure. Nevertheless, the proposed statute does reveal an acceptance of the need to clarify police powers and to embody them in a code of regulations. This development ought to assist any process of judicial review of the legality of police conduct. But if the English courts continue their virtually total rejection of the exclusionary principle,[133] it is doubtful whether this codification will result in any sharper curbs being imposed upon the police.

The fact is that the English simply have never made a commitment to the values of privacy and protection from self-incrimination with the strength and refined understanding of those interests developed in fourth and fifth amendment jurisprudence. The importance of entrenched constitutional provisions takes on great visibility in this context. The English, presumably out of devotion to a conception of crime control and law enforcement, permit, as we have seen, stops and searches on thinly articulable suspicion, and this has been accomplished simply by passing suitable

131. *See supra* notes 24-29 and accompanying text. The Greater London Council (GLC) has an active Police Committee which, being devoid of any power over the police, devotes itself to the publication of study papers, to a vigorous campaign to inform the public about what it regards as the vices of the present situation, and to lobbying for a statute that would place supervision over the Metropolitan Police in the hands of a locally based authority. A recent publication by the GLC's Police Committee states: "The question is a matter of urgency. The Metropolitan Police is facing a growing crisis both internally within its own organization and externally in its relations with the public. The idea of 'policing by consent' has come under increasing strain over the past decade, and we now have a situation where in many areas of London people have withdrawn their cooperation from police activity." GLC POLICE COMMITTEE, A NEW POLICE AUTHORITY FOR LONDON 4 (1982).

132. *See infra* text accompanying notes 412-27.

133. *Id.*

empowering legislation. Even if a similar degree of devotion to crime control should win the minds of the legislatures and the courts in the United States, the same result could not so easily be achieved if it were attainable at all.

If courts were interested in conferring on the police powers akin to the English or at least tolerating similar police practices, there are only two courses that could be followed in America. One would be the abandonment or substantial curtailment of the exclusionary rule which, at least as far as the federal constitutional understanding is concerned, is a process that may have been initiated.[134] The other possibility is a continuing dilution of the concept of probable cause and an extension of other justifications for searches. A movement along those lines is taking place in the decisions of the Supreme Court in recent terms.[135] But, even so, two important observations are appropriate. First, the passage of a statute that would brashly override probable cause requirements would be impossible in the United States. The subtler process of judicial distinguishing and diluting must be followed. Second, when that process is embarked upon, each decision must be justified in the light of the canonical text of the Constitution and a history of authoritative interpretation. It must seek to withstand the reasoned responses of colleagues on the bench and commentators in the profession. The English can do no more than criticize the policy of a statute or the impact of its implementation; in America, judges and lawyers are able to state with confidence that certain proposals have no conceivable legitimacy and to argue that certain judicial decisions are wrong and ought, when sufficient votes can be mustered, to be overruled. It is a different kind of debate, distinguished by an authoritative charter document that enriches arguments going generally to unfairness and imprudence.

4. *Summary*

In summary, American control of the police is characterized by the presence of a strong prosecutor who virtually takes over at the charging phase and by the recent emergence of a strong version of the constitutional rights of suspects and defendants backed by an exclusionary rule. Lacking these regulators and with growing tension between the police and some communities, the English appear to be in a period of turmoil with respect to judgments on police behavior and the proper response.

English libertarian sentiment for centuries focused on the rejection of an office of the prosecutor with great success. At the same time, the mis-

134. In United States v. Leon, 104 S. Ct. 3405 (1984) and Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), the Supreme Court adopted a "good faith" exception to the fourth amendment exclusionary rule with respect to cases where the police relied in good faith upon a warrant issued by a judicial officer.

135. Among other recent developments, the following are notable. Warrantless seizure of baggage on less than probable cause so that it may be subjected to a "canine sniff" has been approved in principle, United States v. Place, 103 S. Ct. 2637 (1983); requirements for finding probable cause based on an informant's tip have been relaxed, Illinois v. Gates, 103 S. Ct. 2317 (1983); and broader powers to make warrantless searches of automobiles have been recognized, United States v. Ross, 456 U.S. 798 (1982).

givings originally expressed about the foundation of an organized police force for a long time seemed unrealized, and the English seemingly came to accept their police with affection. But such judgments are difficult to verify. Much of the image of the police in England is derived from middle-class sentiment and writing, from popular literature, plays, and films and from tourist advertisements. The relationship of this partly spontaneous and partly fostered depiction to reality is difficult to assess in the absence of much scholarly study.[136] The English police have been used forcefully and indeed ruthlessly in times of industrial unrest, and there have been times in recent history when they enjoyed no great popularity in working class areas of England and Wales. With the vast increase of a minority population in Britain in the last few decades, allegations of police brutality have, for the first time, become widespread and received considerable publicity. This may, to some extent, have cracked the confidence of sections of the public in the fairness and decency of policy behavior.

A study of the role of the police and their relations with other institutions of the criminal justice system is informative about the correspondence between theory and ideology on the one hand and the reality of practice on the other. Both the British and American systems claim to be predominantly and preeminently accusatorial, yet they both tolerate unsupervised contact between police and suspect. The British do this in the strong sense of virtually permitting an incommunicado interrogation, while in America the confrontation is hedged about with constitutional principles. At the same time in America, the most powerful of inquisitorial engines, the grand jury, is accepted in many jurisdictions, including the federal one, as being somehow sanctioned by common-law history.

A comparable sea-change in institutional function has occurred in France. The French system claims to be imbued with the ethos of judicial supervision and to shelter the citizen from raw contacts with the police in an investigatory setting. Yet in practice this ideology is so regularly flouted that the French have had to give official recognition to the "unofficial" police interrogation of suspects, which has thus grown into a regulated practice known as the "*garde à vue.*"[137]

In order to combat crime and deal with its volume, modern systems seem to have felt irresistible pressure to allow the police considerable freedom to proceed with their arresting and investigative functions. The dilemma is how to attain reasonable efficiency in this regard without neglecting adequate safeguards against abuse. Saddled with an impotent or largely indifferent judiciary, the English are meeting criticism by an attempt to codify acceptable police practice in considerable detail with provisions that require the police to keep careful records of their compliance with the requirements of the code. But critics find the content of the pro-

136. *But see* D.J. SMITH, S. SMALL, AND J. GRAY, I-IV, POLICE AND PEOPLE IN LONDON (1983).

137. *See supra* note 84. Before 1958 the practice of *garde à vue* was unofficial and probably illegal. Apparently despairing of eliminating the practice or persuaded of its necessity, the French regularized and legalized it by amendments in 1958 to the Code de Procedure Pénale where it is now recognized in Articles 63 and 77.

posed code dubious and wonder about its effectiveness in the absence of any strong judicial doctrine of the exclusion of evidence. Beset by the problems of enormous diversity in organization and practice of a multitude of police forces in different parts of the country, and lacking any strong legislative impulse to impose regulatory codes, the American response has been an increasingly active assertion of judicial power in terms of developing constitutional theory.

The English code will lack enforcing teeth while American *Miranda* practice leaves open the waiver of rights and so, in fact, permits the continued practice of incommunicado police interrogation in a large number of cases. Perhaps neither country has dared to take steps that are likely seriously to restrict the tradition of police interrogation of suspects. The windows of the police station have been dressed with edifying proclamations (and no doubt this has considerably elevated the tone of what goes on in the inner rooms), but incommunicado interrogation remains an important mode of crime resolution. Many will think that this is necessary and justifiable. What is most striking is the roughly similar reality that the countries have reached by utterly different roads.

IV. COURTS, LAWYERS AND COMMITTAL FOR TRIAL

The foundation of the administration of criminal justice in England and Wales is the system of magistrates' courts that encompasses both cities and rural areas. These courts are staffed by justices of the peace (also known as magistrates) whose office dates back to Norman times[138] and is the source of the system of lay justices' courts that is found in many part of the United States. Justices are appointed by the Lord Chancellor,[139] and, over the greater part of England and Wales, they are lay persons who sit as a bench (usually of three)[140] and are advised on the law by a Clerk to the Justices (almost always a solicitor).[141] In a few cities, notably Inner London,[142] the larger part of the work is done by full-time lawyer-magis-

138. *See* R.M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 178 (7th ed. 1977); L. PAGE, JUSTICE OF THE PEACE 19 (3rd ed. 1967).

139. Justices of the Peace Act, 1979, ch. 55, §§ 6, 13.

140. Magistrates' Courts Act, 1980, ch. 43, § 121, mandates that "[a] magistrates' court shall not try an information summarily or hear a complaint except when composed of at least 2 justices . . . ." Although the number of justices composing a panel may vary from a minimum of two to a maximum of seven, three is considered the optimal number for a panel of lay justices in magistrates' courts. JACKSON, *supra* note 138, at 300.

141. The Justices of the Peace Act, 1979, ch. 55, § 26, mandates that clerks either be lawyers or have served an apprenticeship as a justices' clerk's assistant. For a full discussion of the role played by justices' clerks, see JACKSON, *supra* note 138, at 301-10.

142. Distinctions must be drawn between the City of London, Inner London, and Greater London. The City of London is the small area which developed on the site of the original Roman City, and which has served as the financial center of Britain from Roman times to the present. The term "Inner London" refers to the following twelve boroughs surrounding and including the City of London: Camden, City of London, City of Westminster, Greenwich, Hackney, Islington, Kensington and Chelsea, Lambeth, Lewisham, Southwark, Tower Hamlets, and Wandsworth. Greater London, which was created in 1964 to facilitate government of the metropolis on a regional basis, consists of the twelve boroughs of Inner London listed above as well as the following twenty boroughs: Barking, Barnet, Bexley, Brent, Bromley, Croydon, Ealing, Enfield, Haringey, Harrow, Havering, Hillingdon, Hounslow, Kingston Upon Thames, Merton, Newham, Red-

trates[143] who sit alone assisted by a Clerk and who are known as stipendiaries.[144]

All criminal prosecutions are begun in the magistrates' court, and the great bulk of these consists of "summary offenses" which must be tried or disposed of in that court.[145] The hundreds of thousands of motoring offenses that are processed annually pass through these courts. But the importance of the magistrates' courts to the system is far greater than simply being the mill that grinds away the vast pile of summary offenses. In addition, the great majority of indictable offenses are, with certain reservations, triable in these courts. The operation of this key procedure is described below.[146] Furthermore, when an indictable offense must or will go for trial to a higher court, it is again the magistrates' court that makes the order of committal for trial.[147]

Until 1972 the higher courts that tried cases on indictment were of a confusing, patchwork kind. Outside London the most serious cases would be tried by High Court Judges traveling a circuit and holding Assize Courts. (In Inner London the functions of Assizes were discharged by the Central Criminal Court popularly known as the Old Bailey.) Less serious indictable offenses would be tried by courts known as Quarter Sessions which in urban areas were staffed by a professional part-time judge known as a Recorder and in rural areas consisted of a large congregation of magistrates from the county with a legally qualified chairman.[148] As a result of the Courts Act of 1971, Assizes and Quarter Sessions were abolished and replaced by a single court known as the Crown Court, which became a branch of the Supreme Court of Judicature of England and Wales.[149] The Crown Court, which sits in many locations across England and Wales, is staffed by all the judges of the High Court (though in practice it is judges of the Queens' Bench Division who sit and hear cases of the gravity that would formerly have been heard at Assizes) and by a new class of judges known as Circuit Judges who form the bulk of the Crown Court judiciary. These judges are a creation of the 1971 Act and are appointed by the Crown on the recommendation of the Lord Chancellor and may be removed by him in case of misbehavior or incapacity.[150] In addition, there

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bridge, Richmond Upon Thames, Sutton, and Waltham Forest. *See* MICHELIN GUIDE, LONDON 20 (2nd ed. 1980).

143. Since 1949, solicitors of at least seven years' standing, as well as barristers of equivalent standing, have been eligible to serve as stipendiary magistrates. For areas outside London see Justices of the Peace Act, 1949, 12-14 Geo. 6, ch. 101, § 29(1), repealed and reincorporated in the Justices of the Peace Act, 1979, ch. 55, § 13(1). Similarly, the Metropolitan Stipendiary Magistrates who sit in Inner London must be either solicitors or barristers of at least seven years' experience. *Id.* at § 31(1).

144. Justices of the Peace Act, 1979, ch. 55, § 16(1). *See also* JACKSON, *supra* note 138, at 179, 311-315.

145. Magistrates' Courts Act, 1980, ch. 43, § 2.

146. *See infra* notes 257-280 and accompanying text.

147. Magistrates' Courts Act, 1980, ch. 43, § 6.

148. For a more detailed overview of the historical development of the courts of England and Wales, see JACKSON, *supra* note 138, at 178-211.

149. Courts Act, 1971, ch. 23, §§ 1-4, repealed by the Supreme Court Act, 1981, ch. 54, § 152(4) sched. 7, reenacted in part, *Id.* § 8.

150. Courts Act, 1971, ch. 23, §§ 16(1), 17(4).

are part-time judges at the Crown Court who are practicing members of the Bar and in their judicial capacity are known by the old title of Recorder.[151]

While English legal parlance still refers to an indictment and to offenses as being indictable, it is important to understand that the grand jury was abolished in England as far back as 1933.[152] The present-day indictment in England is thus only a formal charging paper drafted by officials of the Crown Court on the basis of the papers in the committal proceedings in the magistrates' court. We shall comment below on the significance of the absence of a serious screening process for offenses that go to trial at indictment.

A. *Prosecution and Defense*

It is often commonly supposed that there are no full-time professional prosecutors in England and that all prosecution work is carried on by private lawyers. If this were so, it would in a large industrialized society be a remarkable state of affairs, but it is in fact not quite the truth. There is indeed nothing in any English city or county that corresponds to the continuing and institutionalized office of the District Attorney or County Attorney or United States Attorney, but this hardly means that traces of a primitive prosecutorial machine cannot be found.

Many police departments across England and Wales now have staffs of lawyers who are solicitors either directly in the employ of the Police Authority or on the staff of the local government.[153] These solicitors are consulted when it appears to the police that there are legal questions about framing a charge. But they enjoy no status other than that of employees of the Police Authority or of the local government authority and have no decision-making power as to the nature of the charge that will be ultimately framed.[154] The original information in the magistrates' court will be laid in the name of an individual police officer[155] and in a case of importance, unless as we shall see later there is intervention by the Director of Public Prosecutions,[156] it is high ranking police officers who will decide the degree and nature of the charges to be brought.[157]

When a case comes for disposition in the magistrates' court on a guilty plea, there will often be no one present who appears to be in formal charge of the prosecution. The practice is that a police officer will inform the court as to the circumstances of the offense and the prior convictions of the

151. Supreme Court Act, 1981, ch. 54, § 8(1)(b).

152. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5 ch. 36, § 1(1).

153. As of June, 1980 thirty-one police forces maintained some form of a prosecuting solicitors' department. Additionally, Greater London's (defined *supra* note 142) Metropolitan Police Force has its own solicitor's department. The City of London (defined *supra* note 142), however, obtains its advice from the legal staff of the Common Council. LAW AND PROCEDURE, *supra* note 55, at 41, para. 141.

154. *Id. See* LAW AND PROCEDURE, *supra* note 55, at 49-59 (information regarding prosecution). *See also,* REPORT, *supra* note 40, at 127.

155. LAW AND PROCEDURE, *supra* note 55, at 50, para. 137.

156. *See infra* text accompanying notes 162-73.

157. LAW AND PROCEDURE, *supra* note 55, at 50, para. 139.

defendant. There may be a probation or "social inquiry" report.[158] When there is a plea of not guilty and a trial in the magistrates' court, the practice varies. In minor cases a police officer may conduct the prosecution in some courts. Where the case is more serious, the prosecution is conducted by a solicitor in the employment of the police authority or the local government authority. Where there are no such solicitors, a solicitor in private practice may be retained to conduct the prosecution. Occasionally a barrister will be briefed by the police authority.[159]

When a case goes for disposition at the Crown Court, the Crown must be represented by a barrister.[160] In English practice a barrister must be "briefed" or "instructed" by a solicitor, and it will be a solicitor employed or retained by the police or local authority who will most often perform this duty. The barrister in question will be in private practice and may also from time to time engage in criminal defense work. Speaking of English prosecutorial processes, the Royal Commission on Criminal Procedure, 1981, commented:

> [The] arrangements are characterized by their variety, their haphazardness, their local nature and, at least as far as the police are concerned, by the unitary nature of the investigative and prosecutorial functions, with primacy of responsibility for the decisions on prosecution being vested in the police and not in the legal profession. The present arrangements have grown gradually and piecemeal, adapting themselves to changing conditions, over the 150 years since an organized modern police service was first created. Since the late 1870s there has been no major legislative attempt to alter them and until recently little manifestation of public concern about them.[161]

1. *The Director of Public Prosecutions*

The one attempt to inject some element of national control and consistency has been in the creation and slow growth of the office of the Director of Public Prosecutions. This office was created in 1879 by a statute that appeared to confer the most sweeping powers upon the Director, for it provided that he might

> institute, undertake or carry on such criminal proceedings . . . and [may] give such advice and assistance to chief officers of police, justices' clerks and other persons . . . as may be prescribed or as may be directed in a special case by the Attorney General.[162]

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158. A "social inquiry" report is a document prepared by a probation officer relating whatever information about a defendant the probation officer determines will assist the court in arriving at a proper sentence. The report can, and often does, consist largely of hearsay. Also, it may, but need not, include the defendant's previous criminal convictions and may include specific sentencing recommendations. *See*, White, *The Presentation in Court of Social Inquiry Reports*, 1971 CRIM. L. REV. 629-37; Samuels, Book Review, 1972 CRIM. L. REV. 336; Comment on Reg. v. Smith and Woolard, 1978 CRIM. L. REV. 759. The Powers of Criminal Courts Act, 1973, ch. 62, § 46, requires the court to give the defendant or his representative(s) a copy of the social inquiry report.

159. LAW AND PROCEDURE, *supra* note 55, at 52, para. 144.

160. *Id.*, para. 145.

161. REPORT, *supra* note 40, at 127, para. 6.6.

162. Prosecution of Offences Act, 1879, 42 & 43 Vict. ch. 22, § 2(1) repealed by and currently reenacted in the Prosecution of Offences Act, 1979, ch. 31.

The most recent regulations (1978) that accompany the present statute provide that the above powers apply in cases "which appear to [the Director of Public Prosecutions] to be of importance or difficulty or which for any other reason require his intervention."[163]

Under this mandate the Director's Office has, in theory, the power to take over any prosecution that has been instituted in England and Wales, and the power to take it over includes the power to drop the case and proceed no further.[164] In fact, the Director does not operate in so lordly a fashion, but functions under a more modest set of sub-standards. First, under a variety of statutes creating specific offenses, the police must obtain the consent of the Director before proceeding with a prosecution for the offense. These offenses do not appear to be defined by any very clear set of principles. They include some offenses of public corruption and some sexual offenses. Apparently the aim has been to establish some consistency in a national policy of prosecution in these areas and to ensure, especially with sexual offenses, that local prosecution policies do not become too harsh. The greatest number of cases by far that have recently been reported to the Director as requiring his consent to prosecute are those involving certain sexual offenses such as incest and gross indecency between males, and the modern statutory offense of wasting the time of the police.[165]

In addition to offenses where the Director's consent is required, the regulations also permit him to require the police to report the occurrence

163. Prosecution of Offences Regulations, 1978, para. 3.

164. LAW AND PROCEDURE, *supra* note 55, at 56, para. 158.

165. *See Id.* at 56, para. 159, and at 208, app. 24, where the following table for 1977 shows the number of applications for the consent of the Director of Public Prosecutions for prosecutions under the statutes enumerated and the result of those requests.

of any other designated category of offense.[166] Currently the Director's policy on this point is codified in the 1978 Regulations, which require the police to report to the Director *inter alia* cases of homicide, large scale robbery, robbery where firearms are used and injury is caused, multiple rape, kidnapping, some cases of perjury and offenses of conspiracy or attempt to pervert the course of justice.[167] In many of these cases, the Director's Office will offer advice to the police as to the case and permit the police to proceed with the prosecution. In other cases, they will advise the police not to proceed though the Director has no power to stop such a prosecution. Finally, in a number of cases the Director's Office will assume control of the prosecution.

In 1980 there were 14,708 applications to the Director by the police for consent to prosecute or for advice in other cases. The Director assumed the control of 2,340 cases.[168] In the other cases, he gave advice or consented or refused permission to the police to prosecute. From these figures and the offenses involved, it will be obvious that the Director exerts a not inconsiderable influence with respect to prosecutorial policy in the most serious offenses. Even where the Director does not assume control of the prosecution, it will be a rare matter for local police authorities to ig-

Statute	Number of applications (cases) submitted	Number of applications when "No action" advised i.e. where consent not granted
BANKRUPTCY ACT 1914	31	15
CRIMINAL LAW ACT 1967, s.4(1) (assisting an offender)	82	28
CRIMINAL LAW ACT 1967, s.5(2) (wasting police time)	375	130
EXCHANGE CONTROL ACT 1947 (Fifth Schedule, Part II)	32	14
HEALTH & SAFETY AT WORK ACT 1974	5	4
INSURANCE COMPANIES ACT 1974	1	1
LOCAL GOVERNMENT ACT 1972, s.94 (failing to declare pecuniary interest)	28	25
MARINE ETC BROADCASTING (OFFENCES) ACT 1967	1	-
MENTAL HEALTH ACT 1959, ss. 126 and 128 (ill-treatment of/sexual intercourse with patients)	45	30
PROTECTION OF DEPOSITORS ACT 1963	6	3
REHABILITATION OF OFFENDERS ACT 1964, s.9(2) (unauthorized disclosure of spent convictions)	9	9
SEXUAL OFFENCES ACT 1956 (incest cases)	270	63
SEXUAL OFFENCES ACT OF 1967 (buggery; gross indecency etc.)	609	117
SOUTHERN RHODESIA ACT 1965 (breach of S. Rhodesia sanctions order)	3	3
SUICIDE ACT 1961, s.2(1) (aid/abet suicide)	13	9
THEFT ACT 1968, s.30 (theft of/damage to property of spouse)	161	68
	1671	519

166. The Prosecution of Offences Regulations 1978, para. 6.

167. *Id.*

168. 1980 CRIMINAL STATISTICS FOR ENGLAND AND WALES, *supra* note 5, at 59 n.(b) (Supp. Tables Vol. 4, 1980). LAW AND PROCEDURE, *supra* note 55, at 57, para. 180.

nore his advice.[169] Since 1964 the Director's Office has had the additional responsibility of reviewing the local investigation of any complaint alleging that a criminal offense has been committed by a police officer.[170]

The Director's Office is staffed by a complement of lawyers who in 1982 numbered seventy-one.[171] There are, in addition to the Director, a Deputy Director, two Principal Assistant Directors and nine Assistant Directors.[172] Assistant Directors will confer with local police or with solicitors representing the local police.[173] If the Director's Office assumes the control of the prosecution, private counsel will be briefed to conduct the case in the Crown Court. Outside London the Attorney General is asked to name counsel from a list kept for that purpose, and a clerk will be sent from the London office to assist counsel.[174] In London a permanent list is kept of barristers who are called "Treasury Counsel" and who are regularly briefed to conduct the Director's cases in the Old Bailey.[175] While these counsel are private members of the Bar and are paid fees for each brief rather than being regular, salaried prosecutors, they are, in fact, virtually in full time practice on behalf of the Director's Office, which stands toward them in the role of instructing solicitor. While Treasury counsel are technically free to accept private briefs, including private defense work, it is very rare that this will happen.[176] They thus constitute in the Central Criminal Court the closest example in England and Wales of anything corresponding to the institutional prosecutor, though their number is very small—only fifteen on the principal list and a number of others on a Supplementary list.[177]

It was with respect to the prosecuting system that the Royal Commission on Criminal Procedure (1981) offered its most radical proposal—to the effect that a nationwide system of prosecutorial offices should be established by building upon the present trend of having prosecuting solicitors employed by police authorities or local authorities.[178] The new officials would be known as Crown Prosecutors.[179] After examining options devised by a working party, the Government in a White Paper published at the end of 1983 accepted the Commission's proposal in principle and opted for an integrated national system with a network of local Crown prosecutors.[180] Under the Government's proposal, as stated in one comment,

169. If the police fail to heed the Director's advice to terminate proceedings, the Director can report the situation to the Attorney General who can stop the case by entering a nolle prosequi. JACKSON, *supra* note 138, at 221. *Cf.* Peter Barnes (Deputy Director of Public Prosecutions), Address To American Judges—Faculty of Law at Kings College, University of London 3 (June 27, 1977) [hereinafter cited as Address]. Copy on file at the office of the Arizona Law Review.

170. Police Act, 1964, ch. 48, § 49.

171. Interview with Peter Barnes, Deputy Director of Public Prosecutions (June, 1982).

172. LAW AND PROCEDURE, *supra* note 55, at 56, para. 156.

173. Interview with Peter Barnes, Deputy Director of Public Prosecutions (June, 1982).

174. Address, *supra* note 169, at 6.

175. *Id.*

176. *Id.*

177. *Id.*

178. REPORT, *supra* note 40, at 144, para. 7.3, and at 186, para. 9.2.

179. *Id.* at 146-47, para. 7.8, and at 186 para. 9.2.

180. AN INDEPENDENT PROSECUTION SERVICE FOR ENGLAND AND WALES, CMD. NO. 9074 (1983).

> The police will continue to take the decision whether or not to prosecute an individual, although they may seek advice from the Crown prosecutor; once the police have decided to prosecute, the case will pass out of their hands to the Crown prosecutor, who will decide whether charges should proceed or be dropped. . . . The local prosecutors, together with the staff of the Director of Public Prosecutions, will all be officers of a single national prosecution service. They will be controlled and directed by the Director of Public Prosecutions, and not accountable to the police or to any local body. The existing department of the Director of Public Prosecutions is to become the headquarters of the new service. The Director will continue to deal with cases of particular importance or difficulty; in this and in his administrative tasks he will be under the general superintendence of the Attorney-General, who will be answerable in Parliament for decisions which he or the Director takes on prosecution matters and for the general principles applied (but apparently not for particular decisions taken) by local prosecutors.[181]

The proposal in the White Paper will perhaps not be translated into legislation for some time and may suffer radical change in the process. But in some form or another it now seems fairly certain that a national system of official prosecutors will be in place in England and Wales within a number of years.

It is very difficult to predict whether the innovation will produce deep changes in the nature of the system. It seems inevitable that at the least the style and ambiance of the magistrates' court will change. The police will seem less evidently in charge while conferences between prosecution and defense lawyers, as legal aid services in the court become more conspicuous, will likely play a larger role in the disposition of business. It is possible that local prosecution policy will become more precisely reflective of national governmental concerns and that this will move Britain even closer to the centralized bureaucratic model of some continental European states.[182] For the daily workings of the criminal justice system, the vital questions will be the nature of the day-to-day relations that develop, first, between the Crown prosecutors and the police and, second, between the prosecutors and the legal-aid solicitors. If the prosecutors win real control of the charging process and at the same time establish close relations with defense solicitors, the English system would resemble American systems more than it does today.

2. *Defense Representation*

In the great majority of cases where a criminal defendant is legally represented, that representation is furnished through the legal aid system. Statistics for 1980 relating to representation in the Crown Court of defendants who went to trial show that only about 3.0% of those who had lawyers

181. Comment, 1984 CRIM. L. REV. 2.

182. By contrast, the Royal Commission had recommended that the Crown Prosecutors be responsible to a local authority rather than constitute a national corps. REPORT, *supra* note 40, at 146-47, para. 7.8, and at 186, para. 9.2.

were privately represented.[183] In the magistrates' court private representation is infrequent.[184] The nature and functioning of legal aid in criminal cases is thus a vital subject for an understanding of the operation of English criminal justice.

The granting of legal aid in criminal cases is now covered by Part II of the Legal Aid Act of 1974.[185] Criminal legal aid is administered quite separately from legal aid in civil cases, and the grant is in the hands of the court before which the defendant appears.[186] In the case of a first appearance this will always be the magistrates' court. Legal aid is available in criminal cases to anyone when it appears to the court that he might need assistance in meeting legal costs.[187] The scheme is contributory and a defendant may, on a full assessment of his means, be required to make some contribution to the costs of his representation, though the contributions levied are usually modest.[188]

Uneasiness about inadequate granting of legal aid in criminal cases had earlier led to the appointment of a Departmental Committee on Legal Aid in Criminal Proceedings, the Widgery Committee, which reported in 1966.[189] As to the higher courts (now the Crown Court), the Committee recommended that the general practice should be to grant legal aid to all financially eligible defendants except for "rare cases, where, for exceptional reasons, the court is of the opinion that it is not desirable in the interests of justice to grant it."[190] Concern had focused mostly on the magistrates' courts, and here the Widgery Committee listed what, in their view, were the chief considerations that ought to lead to the grant of legal aid:

(a) that the charge was a grave one in the sense that the accused was in real jeopardy of losing his liberty or livelihood or suffering serious damage to his reputation;
(b) that the charge raised a substantial question of law;

183. 1980 CRIMINAL STATISTICS ENGLAND AND WALES, *supra* note 5, at 182 para. 9.5 and Table 9.2 at 184 (1981).

184. This statement is based upon observation and interviews with solicitors and magistrates in London conducted by the author during June, 1982. *But see* Zander, *Unrepresented Defendants in the Criminal Courts*, 1969 CRIM. L. REV. 632, 637, reporting that 20-23% of defendants in magistrates' courts were privately represented. The Zander article was based on a study of 1,140 defendants in magistrates' courts in the London area in June, 1969. Perhaps the explanation for the discrepancy between Zander's finding and that reported by magistrates and solicitors in June, 1982 lies in part in the fact that the criteria for granting legal aid were greatly liberalized by the Legal Aid Act, 1974, ch. 4.

185. Legal Aid Act, 1974, ch. 4.

186. THE ROYAL COMMISSION ON LEGAL SERVICES FINAL REPORT VOL. 1, CMD. NO. 7648 at 155 para. 14.1 (1979) [hereinafter cited as LEGAL SERVICES REPORT].

187. *Id.* at para. 14.2.

188. *Id.* at 163, para. 14.27. While fiscally appealing, the requirement that a defendant contribute to the cost of his defense raises the spectre of chilling the exercise of the defendant's right to a trial by jury. Whether a defendant will be able to afford a trial is largely guesswork based upon the complexity of issues raised and the length of the trial, something not always determinable at the outset. A defendant, faced with the knowledge that, if he contests his guilt and loses, he will have to pay not only the fine or serve the sentence imposed by the court, but also an additional sum which is of an unpredictable amount, may well perceive the latter as a penalty for exercising his right to a jury trial. *See generally*, Hill, *Royal Commission on Legal Services (1) Benson and the Criminal Bar*, 1980 CRIM. L. REV. 75, 79.

189. REPORT OF THE DEPARTMENTAL COMMITTEE ON LEGAL AID IN CRIMINAL PROCEEDINGS, CMD. NO. 2934 (1966).

190. As quoted in LEGAL SERVICES REPORT, *supra* note 186, at 155-56, para. 14.4.

(c) that the accused was unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;
(d) that the nature of the defense involved the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;
(e) that legal representation was desirable in the interest of someone other than the accused as, for example, in the case of sexual offenses against young children in which it was undesirable that the accused should cross-examine the witness in person.[191]

In addition to these recommendations which were communicated to magistrates by Home Office Circular,[192] the Legal Aid Act of 1974 contains a general provision that legal aid must be granted where it is desirable in the interests of justice.[193] In spite of these declared standards, studies continued to indicate both inconsistency and inadequacy in the granting of legal aid in magistrates' courts.[194] Bottoms and McClean, in their study conducted in Sheffield in the early 1970s of defendants charged with indictable offenses or summary offenses where the maximum sentence was at least three months imprisonment, found that while all those who were committed to the Crown Court had legal representation[195] the picture was very different for those who elected to stay in the magistrates' court. Of those defendants dealt with summarily, only 19% were represented when they first appeared in court, and this rose only to 25% before the case was finally disposed of.[196] Thus, three quarters of the defendants dealt with summarily were left without any representation at all. Bottoms and McClean commented that "the majority of defendants tried summarily are unrepresented even when charged with serious offences, such as burglary, handling or possessing drugs."[197] Of the cases they studied, 54% of those given custodial sentences were unrepresented, a situation which they viewed as "contrary to both the letter and the spirit of the Widgery criteria."[198]

In a significant number of the cases studied by Bottoms and McClean, the reason for the lack of representation was that defendants had not asked for it[199] or had even declined an offer though they were informed of their rights in connection with legal aid by a leaflet handed to them at the time

191. *Id.* at 156, para. 14.6.
192. See A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 136, citing Home Office Circular No. 237 (1972).
193. Legal Aid Act, 1974, ch. 4, § 29(1).
194. *See* discussion *infra* in text at note 204 and 1980 figures on refusal of Legal Aid in Inner London Magistrates' Courts as a percentage of applications, *infra* note 204.
195. A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 142.
196. *Id.* at 136, 37 (Table 6.1).
197. *Id.* at 139-40.
198. *Id.* at 140. Not surprisingly, English research suggests that "defendants who are legally represented (1) have a greater chance of obtaining bail; (2) are less likely to make false pleas of guilty; (3) are more likely to exercise their right to elect trial by jury; (4) are twice as likely to be acquitted if they plead not guilty; and (5) believe that they would have received heavier sentences if they had not been represented." B. LEVENSON, THE PRICE OF JUSTICE 10 and n.11 (1981).
199. Seventy-eight per cent of the unrepresented defendants in the sample said they had not thought of obtaining legal representation. A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 160.

of booking and also by the magistrates.[200] However, a significant number of cases remained where the magistrates either made no offer of legal aid or declined the defendant's request.[201]

Since the Bottoms and McClean study, the Legal Aid Act of 1974 has underlined the duty of the magistrates to grant legal aid in the interests of justice. In addition, the Powers of Criminal Courts Act of 1973 now provides that a defendant who has not previously served a term in custody may not be given a custodial sentence unless he is represented or has declined the opportunity to be represented.[202] These statutes probably improved the picture but not sufficiently as is revealed in the Report of the Royal Commission on Legal Services (1979).[203]

The Royal Commission cites figures for the percentage of cases in which magistrates' courts in Inner London refused legal aid in summary proceedings. There are seventeen such courts, and the figures show an astonishing variation ranging from refusals in only 3% of cases in the Hampstead court to refusals in 42% of cases in the Highbury Corner court.[204] The Royal Commission generally summed up their study of the situation since the Widgery recommendations by writing:

> We have received compelling evidence, from various sources, that these non-statutory criteria, in so far as they relate to proceedings before magistrates' courts, are not working well.[205]

To ameliorate the situation, the Royal Commission on Legal Services recommended that there should be a statutory right to legal aid in all crim-

200. *Id.* at 166.

201. *Id.* (Table 6.16).

202. Powers of Criminal Courts Act, 1973, ch. 62, § 21(1).

203. LEGAL SERVICES REPORT, *supra* note 186, at 157. For a useful survey of some principal issues surrounding the delivery of legal aid in England and Wales, see Samuels, *Criminal Legal Aid: The Issues of Principle*, 1983 CRIM. L. REV. 223.

204. The figures referred to by the Royal Commission were for the year 1977. The inner London figures for 1980 were as follows:

Court	Total	Refused	Percentage
Highbury Corner	2,546	672	26.39
South Western	3,010	254	08.43
Woolwich	1,139	153	13.43
Horseferry Road	3,253	591	18.16
Tower Bridge	1,841	360	19.55
Old Street	1,207	107	08.86
Marlborough Street	2,464	295	11.93
Thames	1,528	126	08.24
Bow Street	3,223	634	19.67
Camberwell Green	3,585	265	07.39
Greenwich	2,099	366	17.43
West London	2,617	267	10.20
Inner London Juvenile	5,420	183	03.37
Marylebone	3,355	350	10.43
Wells Street	335	82	24.47
Clerkenwell	2,446	121	04.94
Hampstead	716	28	03.91

1980 CRIMINAL STATISTICS ENGLAND AND WALES, *supra* note 5, at 196-97, Table s3.9, Supp. Tables Vol. 3 (1981). As can be seen from the table, there is still a large fluctuation in the number of legal aid applications denied, ranging from a low (excluding the figure for the special court for non-adult offenders, i.e. Inner London Juvenile Court) of 3.91% in Hampstead Court to a high of 26.39% of requests refused by the Highbury Corner Court.

205. LEGAL SERVICES REPORT, *supra* note 186, at 157, para. 14.7.

inal cases except for those that are only triable summarily.[206] This would confer a right to legal aid for all proceedings that are grave enough to be triable in Crown Court even if they are actually disposed of in the magistrates' court. The same right would apply in any proceedings where the defendant is remanded in custody. Even for proceedings that are triable only summarily, the Commission recommended a similar right to legal aid unless there is no likelihood that a custodial sentence will be imposed or that there will be substantial damage to the livelihood of the defendant or his reputation.[207]

These proposals have not yet been given statutory force though they are probably already having a substantial influence on practice. Also very significant is the growing practice of having a "duty solicitor" present in the magistrates' court. Duty solicitors are solicitors in private practice who attend the magistrates' court in rotation from a panel and who answer defendant's questions or give advice on such matters as applying for bail, legal aid or an adjournment, or on making a plea in mitigation of sentence if the defendant wishes to plead guilty immediately.[208] Duty solicitors, while providing a wide range of first-contact assistance to defendants, "are, however, intended only to provide a first-aid service like a casualty station."[209] Their usefulness depends to an extent on whether they are allowed into the cell area to consult early with defendants before the actual court appearance. It seems that in some courts duty solicitors are routinely allowed into the cells, but it has been alleged that in others the police have denied or impeded access so that defendants are either unaware of the solicitor's presence or reach a firm decision not to consult with a solicitor.[210]

The Legal Aid Act of 1982 placed the duty solicitor program for the first time on a statutory footing, allowing arrangements for such solicitors' attendance at court to be made by local Legal Aid Committees. In an important provision, the Act empowers the Lord Chancellor to direct a

206. *Id.* at 158, para. 14.9. The prospect of such an extension of legal aid to all cases other than those triable only summarily has been sharply criticized as an extravagant "give-away" more suited to opulent times than those of the present. King, *Criminal Legal Services—Gifts or Milestones*, 1980 CRIM. L. REV. 84. King challenges the assumption that a criminal proceeding is so adversarial as to always require the courtroom presence of a lawyer for the defendant and argues that, as more defendants appear in court only to plead guilty or receive sentence, the lawyer's role is reduced to making ritualistic pleas in mitigation of sentence. King concludes, therefore, that the Royal Commission's recommendation of legal aid representation for all financially qualified defendants other than those triable summarily is a waste of the limited funds and attorneys available for legal aid work.

207. LEGAL SERVICES REPORT, *supra* note 186, at 157, para. 14.10. Michael Hill, in his article *Royal Commission on Legal Services (1) Benson and the Criminal Bar*, *supra* note 188, takes issue with this recommendation on the ground that many of the traffic offense cases can and will fall under the penumbra of "substantial damage to livelihood." To avoid a flood of such cases which might wash away the funds available for legal aid, Hill suggests that motoring cases be made an exception to the Royal Commission's general statement on the grant of legal aid in summary cases and that the cost of legal representation be provided by motorists through insurance, unions, automobile associations or through their own funds. *Id.* at 77.

208. Considerable information on the coverage of magistrates' courts by duty solicitors is given in an unpublished paper by Lee Bridges, Lecturer in Law at the University of Birmingham, England, on file with the Arizona Law Review.

209. LEGAL SERVICES REPORT, *supra* note 186, at 92, para. 9.3.

210. Samuels, *supra* note 203, at 232-33.

magistrates' court to comply with directions for setting up a duty solicitor scheme.[211] This is likely to broaden the coverage that such solicitors afford and to strengthen the general provision of legal assistance in the magistrates' courts.

Under the English program there are no permanent public defenders. All legal aid lawyers are solicitors or barristers in private practice and many solicitors will be found who specialize in criminal defense, legal aid work. The defendant has the privilege of choosing his own solicitor, though if he requests help, the court may suggest or assign a solicitor to him.

The costs of criminal legal aid in England and Wales are naturally rising sharply. For the financial year 1963/64, expenditures on criminal legal aid in the superior courts amounted to just under 1.2 million pounds. By the financial year 1977/78, the expenditure in the Crown Courts had grown to 23.6 million pounds. For this same year, expenditure for this purpose in the magistrates' courts was 21 million pounds.[212] This total expenditure of about 45 million pounds rose in 1979/80 to 62 million pounds[213] and in 1982 to about 100 million pounds. Criminal legal aid has been described as "the fastest growing social service in Britain."[214]

B. *Committal For Trial*

Virtually all cases that go for trial to the Crown Court must arrive there by committal from a magistrates' court.[215] Until 1968 this procedure was a laborious one in which a prima facie case was made out by the prosecution's presentation of evidence. The testimony of each witness was taken down in longhand, read over to the witness in the form of a continuous narrative statement and, when signed, became a deposition.[216] In this fashion, considerable discovery was often afforded to the defense,[217] and the magistrates acted as a screening body with a duty to dismiss the prosecution if a prima facie case had not been made out.[218] While the accused had the right to present evidence at such committal hearings, it was usual for the defense to "reserve" and use the proceedings primarily for purposes

211. Legal Aid Act, 1982, ch. 44, § 1(5).

212. LEGAL SERVICES REPORT, *supra* note 186, at 163, para. 14.28.

213. 1980 CRIMINAL STATISTICS ENGLAND AND WALES, *supra* note 5, at 182, para. 9.2.

214. Samuels, *supra* note 203, at 223. In June of 1982 it was reported in a London newspaper that in the Crown Courts alone the annual cost of prosecution plus legal aid defense costs now total approximately 93 million pounds. Consequently, judges are being urged to give their observations concerning possible reductions in legal aid defense costs to court taxing officials. The latter are the persons responsible for determining the legal aid fees to be paid to the lawyers at the end of a trial. *Judges Told to Cut Cost of Trials*, Daily Telegraph, June 16, 1982, at 2.

215. There are a few numerically insignificant exceptions to this procedure such as when the Court of Appeals orders a new trial. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 77, n.7.

216. The committal procedure described here is known as "full committal proceedings" or "old style committal." *Id.* at 78. *See also* LAW AND PROCEDURE, *supra* note 55, at 69, para. 190.

217. LAW AND PROCEDURE, *supra* note 55, at 68-69, para. 187. Note, however, that the prosecution was not required to reveal all its witnesses nor any witness in particular at the committal proceedings. All that was required of the prosecution was to present a prima facie case. *Id.*

218. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 79. It was very rare for English magistrates to refuse to commit.

of discovery.[219] These proceedings were the only screening stage in the English criminal process since the grand jury was abolished in 1933.

With a great increase in the volume of cases and the enlargement of the jurisdiction of magistrates to dispose of cases, committal proceedings of the old style evidently became an increasingly burdensome intrusion into the crowded schedules of these courts.[220] In a major change from centuries of practice, the Criminal Justice Act of 1967 provided that, with the consent of the defendant who must be legally represented, the prosecution in a committal proceeding may present its evidence in the form of written statements.[221] Unless the accused objects, the magistrates will then commit for trial without examining the written statements.[222] This amounted to the elimination of all screening and committal proceedings except in cases where the accused makes a demand.[223]

The accused, by refusing to permit written statements, may still compel an old-style committal in which witnesses must be called and depositions taken.[224] But such proceedings are now exceedingly rare since this demand is scarcely ever made by defendants.[225] Alternatively, the defendant may accept the introduction of the written statements but may submit that the statements disclose insufficient evidence, and so may compel the magistrates to make a ruling on the sufficiency of the summary of evidence presented.[226] The Royal Commission on Criminal Procedure (1981) comments: "However, if the accused is legally represented and, on the advice of his solicitor, accepts that there is a case to go for trial, he may waive this right and agree to be formally committed for trial, as the vast majority of accused persons do."[227] Thus all rights in this connection are commonly waived. This might be thought to be a curious state of affairs. While the prosecution's papers no doubt do disclose a prima facie case in the great majority of cases, still it seems surprising that defense lawyers pass up an opportunity to make a challenge and even more surprising that they do not seek to obtain the greater measure of discovery that might be secured from forcing the prosecution to call witnesses who might then be cross-examined. It cannot be the fear of prejudicial publicity against the defendant that deters these choices since, under English law, no details of the evidentiary content of a preliminary hearing (committal proceeding) may

219. *See* LAW AND PROCEDURE, *supra* note 55, at 73, paras. 206 and 207.

220. *See* the comments of Lord Devlin, Professor Glanville Williams and C. Allen quoted in M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 79.

221. Criminal Justice Act, 1967, ch. 80, § 1. This Section has been repealed and reenacted as Section 6(2) of the Magistrates' Courts Act, 1980, ch. 43. This type of committal proceeding is usually known as a "paper committal" or "section 1 committal." M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 80.

222. Magistrates' Courts Act, 1980, ch. 43, § 6(2). *See also* LAW AND PROCEDURE, *supra* note 55, at 69, para. 189.

223. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 83.

224. Magistrates' Courts Act, 1980, ch. 43, §§ 4(3), 6(2), 102. *See also* the Magistrates' Courts Rules, 1968, Rule 4.

225. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 81. Of the 2,406 cases sent to trial out of those reviewed in McConville and Baldwin's research, no more than four involved full oral committal proceedings.

226. Magistrates' Courts Act, 1980, ch. 43, § 6(2)(b).

227. REPORT, *supra* note 40, at 180, para. 8.24.

be published by the media.[228]

In the view of some observers, there is a fair number of cases where defense solicitors neglect reasonable opportunities to have the prosecution dismissed at the committal stage by not making a submission that the evidence is insufficient.[229] There is a high rate of acquittals in Crown Court trials, 50% nationally in 1980.[230] Of these, 42% were as a result of directed verdicts or judgments of acquittal by the court.[231] This suggests that almost 20% of the cases that go to trial in Crown Court cannot be supported by a sufficiency of evidence.[232] In a number of such cases, it is likely that the prosecution unexpectedly collapsed when a witness failed to appear or did not tell the story that the prosecution had been led to expect,[233] but this still must leave a suspiciously high number of cases where the original decision to prosecute may have been unwise.[234] These figures, combined

228. Magistrates' Courts Act, 1980, ch. 43, § 8.

229. *See* M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 56, 81-82. *See also Id.* at 52 (citing McCabe and Purves, *By-Passing the Jury* (1972) and Zander, *Are Too Many Professional Criminals Avoiding Conviction?—A Study of Britain's Two Busiest Courts*, 37 MODERN L. REV. 28-61 (1974)), and REPORT, *supra* note 40, at 181, para. 8.26.

230. In 1980, of the 28,671 defendants who pleaded not guilty to all counts, 14,238 were acquitted. In the same year, 3,285 defendants pleaded not guilty to some counts and 1,218 of those defendants were acquitted. 1980 JUDICIAL STATISTICS, CMD. NO. 8436, Table B.7(b) at 33 (1981).

231. Of the 14,238 acquittals in 1980, 3,140 cases were dismissed by the judge and 2,834 were acquittals directed by the judge. *Id.* Table B.7(d) at 34.

232. REPORT, *supra* note 40, at 130-31, paras. 6.18-6.22.

233. *Id.* at 131, paras. 6.19-6.21. The Royal Commission on Criminal Procedure based its findings on (1) the study of 88 Crown Court cases conducted by Baldwin and McConville in Birmingham in 1975-1976, (2) a 1978 study of 40 Crown Court cases done by the Prosecuting Solicitor's Department of Greater Manchester, and (3) a survey of acquittals in Crown Court during 1977 conducted by the Association of Chief Police Officers. The Manchester study revealed that "witness failure" accounted for the collapse of the prosecution's case a little more than fifty percent of the time whereas the ACPO and Birmingham studies found this to be true in only a third of the cases in their respective samples. McConville and Baldwin note however, that

> often no surprise was occasioned by what had happened: indeed, in as many as four out of ten cases in this category, the police feared from the outset that prosecution witnesses would present difficulties. In such cases, the prosecution is more open to criticism since it can be argued that a prosecutor should take into account the credibility of witnesses in deciding whether or not to institute charges. If a prosecution hinges upon the word of an untrustworthy or unreliable witness, there are strong reasons for not proceeding.

M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 41.

234. Although the evidence in a case where the prosecution is pressed may in retrospect appear thin, the police may have had a variety of reasons for proceeding. Perhaps they sought to prevent a suspect from shifting the blame to an absent and uncharged co-suspect; pressure may be applied by a complainant such as a department store in a shoplifting case; there may be a police policy to make an example of a given type of case. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 90-91. Additionally, "the prosecution . . . commonly proceeded because it was believed that, no matter how slender the evidence, the final decision must be that of the court, not the police." *Id.* at 92. This last reason is clearly a bad one where evidence is weak and it illuminates the danger of police discretion unassisted by legal advice. Apart from cases going through the office of the Director of Public Prosecutions, the only situation in which an attorney's opinion may be sought is when the prosecution is commenced by the information and summons procedure rather than by an arrest. Under this method the defendant retains his liberty until the police hierarchy has had ample time to review the evidence and decide whether or not to prosecute. The police in such cases may seek a lawyer's advice as to whether they should proceed. But only a small number of prosecutions are commenced in this manner. *Id.* at 85-86.

The vast majority of prosecutions are instituted by the arrest of a suspect and his subsequent charging at the police station. In these situations the only review of the evidence that occurs before the charge is laid is by the charge sergeant who relies on the facts as set forth by the arresting officer. There is thus no initial independent review to eliminate weak cases and no opportunity for an attorney to offer his opinion on the viability of the case. Once formal charges

with a reminder that the decision to prosecute in England is in most cases taken by the police, are disturbing and emphasize the strangeness of the acceptance by the defense of automatic, formal committals in virtually all cases.

Most observers of the English criminal justice scene agree that some blame is properly placed in this context on the shoulders of defense solicitors.[235] The usual explanation offered, especially by defense solicitors, is the simple overburden of legal aid work. A very heavy case load (presumably thought to be necessary to make an adequate income) combined with receiving the prosecution papers at the last moment[236] usually do not allow the solicitor sufficient study time to make a good determination about the prudence of a challenge to the prosecution case at this early stage. The practice may also owe something to the generally much less aggressive and less harshly adversarial style of English criminal practice compared with that found in many parts of the United States. But, while plea bargaining or making other accommodations with the prosecution in return for lenience may be prudent trading on behalf of one's client, concessions made without securing any advantage for the defendant would, of course, be a different matter. In cases where the prosecution's evidence is weak, there seems to be nothing to be gained by not demanding a review of the papers by the magistrates, if not a full preliminary hearing.

The Royal Commission on Criminal Procedure (1981) expressed concern about the general lack of an effective screening procedure in view of the fact that waiting periods for trial are lengthening both in the magistrates' court and in the Crown Court.[237] But the Commission was apparently not perturbed that someone might have to go to trial at all without a screening procedure. Indeed, it astonishingly recommended that where a speedy trial can be had there should be a complete abandonment of any

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have been laid, it is unlikely that a lawyer would advise their withdrawal regardless of the weakness of the case since such a withdrawal might render the police vulnerable to a suit for wrongful arrest. *Id.* at 89. Where a prosecuting solicitor is consulted prior to the laying of charges, there is no obligation for the police to follow his advice since the police are his clients and control the prosecution case. *Id.* at 87.

235. *See, e.g.*, M. McCONVILLE & J. BALDWIN, *supra* note 76, at 82; D. Napley, *The Case for Preliminary Inquiries*, 1966 CRIM. L. REV. 490, 491. This conclusion is supported by impressions gathered by the author in interviews conducted in 1982 with lawyers and magistrates in London.

236. Theoretically, a defense solicitor can seek an adjournment of the committal hearing when he receives the papers too late to make a thorough evaluation of the prosecution's evidence. But many defense solicitors dislike delaying the trial, particularly when the accused is in custody. M. McCONVILLE & J. BALDWIN, *supra* note 76, at 82.

Even if defense solicitors had ample time to review the committal papers, it is questionable whether most of them are sufficiently skilled and experienced to make a vigorous attack on the prosecution's case at a committal hearing. *Id.* at 81-82. The reputation of English magistrates for making virtually routine committals also has a chilling impact.

237. REPORT, *supra* note 40, at 181-83, paras. 8.28-8.31. Writing of the situation in the early 1970s, Bottoms and McClean reported that in 43 cases committed for trial in the Crown Court there was a delay of over eight weeks between committal and trial. A.E. BOTTOMS & J.D. McCLEAN, *supra* note 67, at 52, citing Lord Chancellor's Department's Statistics on Judicial Administration for 1972 (Table 3.4). The authors appear to have regarded this with alarm. But the figures for 1980 show that of defendants pleading not guilty, only 18% waited less than eight weeks and only 50% waited less than twenty weeks. 1980 JUDICIAL STATISTICS CMD. 8436 at 30 (Table B.4(c)) (1981). Of defendants held in custody, 54% waited less than eight weeks and 87% waited less than twenty weeks. *Id.* at 31 (Table B.4(d)). *See also* the figures given *infra* note 292.

committal procedure and that the defendant should lose his present right to challenge the sufficiency of the evidence in the magistrates' court.[238] However, where the trial cannot be had within a reasonable period, which the Commission did not fix precisely but suggested might be counted at eight weeks,[239] the accused, whether he would be tried in Crown Court or in the magistrates' court, might, under the Commission's proposals, make an "application for discharge," which would in effect compel the magistrates to decide based on the papers, whether there was a sufficient case for committal.[240] The Commission would abolish altogether the defendant's right to call for an old-style committal with witnesses giving oral testimony.[241]

The Commission would afford the defendant further protection by raising the standard to which police and prosecutors ought to look in deciding whether to charge or retain a charge. Traditionally in England, as in most American jurisdictions, this standard has been that of the prima facie case which, in the English version, is elucidated as the presence of sufficient admissible evidence to support a jury verdict of guilty.[242] Another way to put this would be to say that there must be enough admissible evidence to withstand an attack on grounds of insufficiency. In practice, according to testimony given to the Commission, the Director of Public Prosecution, in cases handled by his office, has looked rather to the question of whether a conviction would be more likely than not and will decline to prosecute even where the admissible evidence is legally sufficient if he takes the view that an acquittal is the more likely result.[243] The Commission recommends this as the standard that should be followed by its proposed Crown Prosecutors.[244]

C. *Comparative Observations*

To an American observer, English practice contains conspicuous gaps—the absence of a professional prosecutor and the virtual elimination of the preliminary hearing. A procedural stage viewed in modern times as having the purpose of dismissing unsustainable prosecutions has been discarded while the rigorous obligation of a unitary full-time prosecutor's office to review the charge and the evidence is divided thinly between a number of officials and other persons—the police, perhaps the Director of

238. REPORT, *supra* note 40, at 181-82, para. 8.28.

239. *Id.* at 182, para. 8.29.

240. *Id.* at 181-83, paras. 8.28, and 8.30-8.31. "A number of commentators have alleged that the advantages of full committals are frustrated by the timidity of magistrates who see their function merely as rubber-stamps for the prosecution and who, in any event, lack real confidence in their own ability to decide upon cases of importance." M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 82. Given this reluctance of magistrates to dismiss for failure to state a prima facie case, it is questionable whether the "application for discharge" procedure, recommended by the Royal Commission, will prove to be an effective method of weeding out weak cases.

241. REPORT, *supra* note 40, at 181-83, paras. 8.30-8.31.

242. *See* M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 54. REPORT, *supra* note 40, at 174, para. 8.8.

243. REPORT, *supra* note 40, at 174, para. 8.8 and LAW AND PROCEDURE, *supra* note 55, Appendix 25 at 210-211.

244. REPORT, *supra* note 40, at 174, para. 8.9.

Public Prosecutions and the private barrister who tries the case for the Crown.

American jurisdictions generally offer fuller review procedures than does England for cases that may proceed to trial in the higher courts. A full preliminary hearing is part of the procedure in many jurisdictions, and some alternatively, or in addition, require a grand jury indictment.[245] Yet American commentators sometimes argue in favor of even greater strengthening of the preliminary hearing or the grand jury procedure in the interest of more stringent standards of review. The argument has been made that a strong pre-trial review is necessary not only to prevent putting an innocent person on trial, but also, and perhaps more importantly today, to reduce the chance of imposing undue pressure on a possibly innocent person to plead guilty.[246]

"Innocent" may have two senses here—either that the defendant ought not to be convicted of any crime or that he ought not to be convicted of a crime as serious as the one with which he is charged. Either the absolute or the relative sense of innocence may intensify a defendant's confusion, particularly if he is unable to obtain release on bail, and may deepen his anxiety about the risk of substantial punishment after trial. Overcharging by a prosecutor may in this way work as an inducement to plead guilty to a lesser offense since it serves to invest the reduction of the charge that accompanies the plea with an illusory aura of relief. The availability of a serious preliminary hearing will hardly remove these pressures entirely from defendants, but it will modify them to an extent by allowing defendants to make a threshold test of the prosecutor's case without making an absolute commitment to any form of disposition.

In this way a cogent case can be advanced for making available a strong preliminary hearing to those who desire such review, while leaving waiver possible for those who do not wish it. Most American defendants who end by pleading guilty will have cooperated with the prosecutor in the interests of economy by waiving the preliminary hearing or grand jury indictment. The willingness to execute such a waiver is a trading counter, which can be offered in negotiations to help strike as favorable a bargain as possible. In this way the institution of the preliminary hearing serves as a valuable encouragement to settling charges at a rational level even in cases where no hearing is actually held. Admittedly this leaves the residual danger that the defendant who elects a preliminary hearing and fails to secure a reduction of charge or dismissal will then suffer from

245. The nature of preliminary hearings varies a good deal—from the brief *ex parte* hearing constitutionally necessary to establish probable cause in the case of a defendant in custody who was arrested without a warrant (*see* Gerstein v. Pugh, 420 U.S. 103 (1975)) to a full adversary hearing with the express purpose of ascertaining whether there is sufficient evidence for committal and where the defendant must be provided with counsel. *See* Coleman v. Alabama, 399 U.S. 1 (1970). "The effectiveness of the preliminary hearing in performing its screening role is a matter of considerable dispute." KAMISAR, LAFAVE AND ISRAEL, MODERN CRIMINAL PROCEDURE 963 (5th ed. 1980). About 20 states as well as the federal jurisdiction require grand jury indictments. *Id.* at 1015-22.

246. A powerful case to this effect has been made by Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463 (1980).

prosecutorial vindictiveness by finding unavailable the reduction that he might have secured through bargaining if he had been willing to waive the hearing. But criminal justice systems cannot be fully purged of such complications and, on balance, the availability of the hearing seems preferable.

While the American system throws up this complex of considerations demanding subtle assessment, the English posture in the context of reviewing charges is bleakly simple. In very serious cases, as we have seen, the office of the Director of Public Prosecutions will review the charging decision arrived at by the police who may already have taken the advice of prosecuting solicitors attached to the police department. But this process is of course *ex parte* with no opportunity for input from the defense. The preliminary hearing has virtually departed from the English procedural scene, and now, the Royal Commission on Criminal Procedure has recommended the abolition of the committal stage for all cases except where there is delay in going to trial and the defendant makes an application for review; even then review would only be on paper and would not involve a full adversary proceeding with the production of oral testimony.[247]

Joined with this virtual extinction of the hearing in England are the difficulties caused by the absence in the magistrates' court of a prosecutor whose office will continue to proceed with the case if it goes to trial in the Crown Court. The only time in England where any real contact takes place between the prosecution and the defense before a trial in Crown Court will be a last minute conference between barristers for the defense and the Crown, sometimes under the aegis of the judge. Such conferences may often lead to a guilty plea and may sometimes, even if the case goes to trial, lead to a decision by the Crown to withdraw some counts. However, they are very different from a preliminary, public proceeding where evidence must be presented before the decision to commit for trial is taken at all.

Thus a defendant in England in practice has no opportunity to contest a serious charge in an adversarial way at a threshold stage by demanding a committal review. Furthermore, the nature of the system's institutions makes it impossible for sustained contacts and exchanges to take place between prosecution and defense. These factors are quite likely in part responsible for the very high rate of acquittals (mostly directed) at Crown Court trials.[248] What is incalculable is the number of innocent defendants, in the absolute or relative sense, who are driven to elect a guilty plea summary disposition by discouragement over this lack of opportunity for early challenge to or informal discussion of the charges.

The judgment seems inescapable that English procedures with respect to pre-trial review of serious charges are defective and that, at least in theory and probably in practice, a healthier situation prevails in most American jurisdictions.

One possible reform for the English would be to revert to a mandatory full-scale preliminary hearing in all cases before there can be

247. *See supra* notes 238-41 and accompanying text.
248. *See supra* note 230.

committal for jury trial. But this approach appears unpromising. The English tendency to lift the burden of preliminary hearings from magistrates in order to increase their capacity to handle a large dispositional case load has been so marked that a reversal seems unlikely. A routinely required preliminary hearing would, of course, bring greater pressure to bear on the courts to offer summary disposition where possible, but it is not at all clear that this would be desirable. In any event, there would remain a large number of cases where Crown Court disposition is mandatory, so that the number of preliminary hearings would undoubtedly be onerous. Such routinely required hearings might also have a strong tendency to trivialize the proceedings and perpetuate the former position where English magistrates allegedly committed for trial routinely.

A non-required preliminary hearing, which could be elected by the accused, requires us to distinguish under the English procedures between two kinds of cases (to be discussed more fully below)—those that must be tried in Crown Court because of the gravity of the charge and those that are less serious and might be disposed of summarily but where the defendant has the right to elect Crown Court disposition. In the first kind of case, the defendant will automatically be assigned the legal aid services of a solicitor if he meets the financial tests and, therefore, can assess intelligently the advantages of a preliminary hearing. In the second kind of case, the defendant in the past might opt for summary disposition without any consultation with a lawyer. With the growth of the duty solicitor schemes, it is more likely today that some legal advice will be available.

In the most serious cases that must in any event go to Crown Court, a preliminary hearing may sometimes seem desirable. But if the accused is in custody, as he will be in most cases, and the case against him seems clearly at the least strong enough for a committal, and where perhaps a plea of guilty in Crown Court to the offense charged seems the almost inevitable outcome, the defendant's main goal may be the acceleration of the process so that a mandatory preliminary hearing would not be desirable. In lesser cases where there may be an option to elect summary disposition, the defendant is in acute need of legal advice. The complexity of the decision whether or not to elect summary disposition immediately would clearly be affected by the availability of a preliminary hearing in cases where the defendant and his solicitor believe the charge to be ill-founded or based on weak evidence.

Very relevant to the final shape of any imaginable English procedure in this area will be the nature of the system of prosecution. One of the great advantages of having a professional prosecutor is that a defense attorney can make informal contacts, point out weaknesses in the case and perhaps obtain a decision not to prosecute or at least a decision to reduce charges. The availability of a preliminary hearing would surely strengthen the position of the defense in such discussions. Without the possibility of such a hearing, the temptation in serious cases is strong for the prosecutor to let the matter go up for the Crown Court to take whatever action it finds appropriate.

The interests involved at this stage indicate the need for a confluence

of three features. The first is the provision of adequate legal aid; the second is the presence of a representative of the office of a professional prosecutor;[249] and the third is the availability of a serious reviewing procedure. The review hearing may not often be requested, but its availability will exert a healthy influence on the prosecutor in his discussions with the defense, while in some cases the defendant will make an absolute decision to test the case against him at an early stage.

There is a final aspect to the committal stage which casts a light on one important feature of the English system. The committal is the bridge between the magistrates' court and the Crown Court, but the English system has no personnel to carry the case across that bridge. The accused's solicitor will have to hand the defense over to a barrister for Crown Court proceedings, while the police or police solicitor will have to hand the case over to a barrister for the prosecution with perhaps some participation from the office of the Director of Public Prosecutions. In this way the English system resembles a relay race with the exchange of batons as compared with American systems where there is continuity of attorney or at least of office in representation on both sides. The investigation of the significance of the abrupt English transition is a matter for complex research, but it seems likely that, especially with regard to the lack of continuity in prosecuting officers, it introduces a special element of difficulty into the disposition of serious cases.

V. THE DISPOSITION OF CASES

All criminal justice systems in industrialized societies must cope with the pressing need to dispatch business. There is no obvious principle that requires that every alleged infraction should be subjected to the full panoply of adversarial inquiry, and even if we wished for such a universal standard, we could not have it without very great effort and expenditure. A typical English Crown Court trial may be significantly shorter than a typical American jury trial. Still, it is clear that the English would not be able, without a radical revision of expenditures, to extend this mode of trial, even to all those charged with offenses that might be counted fairly serious. The two countries have developed somewhat different but fundamentally connected sets of inducements to divert defendants away from claiming a jury trial.

As is well known and much discussed, the most conspicuous American solution, especially in heavily populated urban areas, has been to induce guilty pleas by the development of general sentencing practices that emphasize the hazards of going to trial and also by the more or less explicit striking of "bargains" in individual cases with defendants who are willing to plead guilty.[250] These practices have long been heavily criticized for a

249. Over the next few years this omission will presumably be supplied in view of the government's declaration of intent to implement the recommendation of the Royal Commission on Criminal Procedure (1981) to set up a national corps of prosecutors in the magistrates' courts. *See supra* notes 178-82 and accompanying text.

250. There is a vast amount of literature on the subject of plea bargaining. *See* Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System,*

variety of reasons, among which the most weighty may be that they have a tendency to pressure even the innocent into pleading guilty.[251] Other countries have been held up by some commentators as more virtuous or more efficient or more fortunate in that they are able to get through their criminal calendars either with no plea bargaining at all or with much less prominent or vicious modes of bargaining.[252] From time to time England and Wales have been included in the list of countries that do not engage in any widespread practice of plea bargaining.[253] A study of English practice as revealed and reviewed in recent literature and as observed, indicates that, while there are significant differences from practices followed in metropolitan American areas, the English also rely heavily on inducing defendants to waive jury trial in a superior court.

The beginning of any comparison must be the recognition that the British have developed one powerful device for easing the criminal calendars of the superior courts (Crown Courts) that is not typically employed in American jurisdictions. This has come about through the development of procedures by which offenses of quite substantial gravity[254] may be disposed of in the lowest level of courts with criminal jurisdiction, the magistrates' courts or courts of summary jurisdiction, without the necessity of a guilty plea. As we have noted,[255] these magistrates' courts are staffed in the greater part of the country by lay justices, advised by a lawyer-clerk, though in London and some other cities there are professional lawyer magistrates (stipendaries). A brief description of the jurisdiction of these courts is essential to an understanding of the daily workings of criminal justice in England and Wales

A. *Summary Jurisdiction*

Some offenses are, in all circumstances, excluded from the jurisdiction of the magistrates' court and can only be tried on indictment in the Crown Court. These are the most serious crimes, notably including murder, rape and robbery. On the other hand there is a large group of petty offenses, including many traffic infractions and such offenses as being drunk in public, which are only triable summarily before the magistrates.[256] Between these two natural extremes there has grown up an extensive hinterland of offenses which may be tried either summarily or on indictment before a

50 U. CHI. L. REV. 931 (1983); Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1 (1979); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753 (1981); Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979) [hereinafter cited as Langbein, *Land Without Plea Bargaining*]; Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979); Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70 (1967); Note, 90 HARV. L. REV. 564 (1977).

251. *See* the literature cited *supra* note 250.

252. *See* Langbein, *Land Without Plea Bargaining*, *supra* note 250 (as to Germany); Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, 1971 CRIM. L. REV. 150 (as to England).

253. *See* Davis, *supra* note 252.

254. *E.g.* Inflicting bodily injury, with or without a weapon; assault; arson.

255. *See supra* text accompanying notes 138-44.

256. Magistrates' Courts Act 1980, § 2(1).

jury. They are said to be "triable either way."[257] This division of offenses is accompanied by a body of overt and covert rules and practices that in most cases will strongly suggest to the defendant, who in any case must make his first appearance in the magistrates' court, the wisdom of staying in the summary jurisdiction.

The procedure for dealing with offenses triable-either-way is currently set out in the Magistrates' Courts Act of 1980,[258] a statute that reenacts with some reforms a process that has been developing since the mid-nineteenth century and was revealing its potential importance as early as the Administration of Criminal Justice Act of 1855.[259] Many, though not all, of the offenses in this group are listed in Schedule I of the 1980 statute and are sometimes referred to as "scheduled offences."[260] They include a very important group of crimes of violence under the Offences Against the Person Act of 1861, including inflicting bodily injury with or without a weapon and assault occasioning bodily harm,[261] as well as more exotic offenses such as damaging submarine cables.[262] Many crimes under the Perjury Act[263] and the Forgery Act[264] are included as well as such sexual

257. For an overview of the development of offenses "triable either way," see *infra* note 259 and accompanying text.

258. Magistrates' Courts Act, 1980, ch. 43, §§ 17-22.

259. Administration of Criminal Justice Act, 1855, 17-19 Vict., ch. 126. This statute established that an adult charged with certain indictable offenses could be tried summarily provided that the defendant consented, that the offense did not carry a sentence of transportation or penal servitude (as it might if there were a previous conviction), and that there were no other circumstances which would necessitate a trial on indictment. Thomas, *Committals for Trial and Sentence—the Case for Simplification*, 1972 CRIM. L. REV. 477, 478. The statute limited summary trial to cases of simple larceny of property valued at five shillings or less, attempted simple larceny or attempted larceny from the person. The statute also made a summary trial available in wider categories of simple larceny, larceny from the person or larceny by such employees as a clerk or servant provided the defendant pleaded guilty to the offense. *Id.* at 478.

Although the Summary Jurisdiction Act, 1879, 42 & 43 Vict., ch. 49, increased the number of indictable offenses triable summarily, the procedure remained available only in a range of comparatively minor cases of dishonesty. The first major expansion of summary jurisdiction over indictable offenses occurred in the Criminal Justice Act, 1925, 15 & 16 Geo. 5, ch. 86, which included many of the offenses listed under the Larceny Act, 1916, 6 & 7 Geo. 5, ch. 50, but without the earlier property value limits, several forgery offenses, malicious damage, certain forms of perjury and certain offenses against the person e.g. assault and occasioning actual bodily harm. Thomas, *Committals for Trial, supra*, at 478. When the enactments relating to magistrates' courts were consolidated in the Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 55 (the offenses listed in the Criminal Justice Act 1925) were also incorporated as Schedule I to the Magistrates' Courts Act, 1952, the foundation of the present statute. Since 1952, major additions have been made to Schedule I so as to include breaking offenses except those involving residences, indecent assault on persons in excess of sixteen years of age, concealment of birth, procuring private acts of buggery between adults and theft of a vehicle. Thomas, *Committals for Trial, supra*, at 479.

260. Magistrates' Courts Act, 1980, ch. 43, § 17, Sched. I.

261. Offences Against the Person Act, 1861, 24-26 Vict., ch. 100, §§ 20, 47.

262. Magistrates' Courts Act, 1980, ch. 43, § 17, Sched. I, No. 11; Submarine Telegraph Act, 1885, 48 & 49 Vict. ch. 49, § 3.

263. Magistrates' Courts Act, 1980, ch. 43, § 17, Sched. I, No. 14 includes "[a]ll offences under the Perjury Act 1911 [1 & 2 Geo. 5, ch. 6], except offences under—

(a) section 1 (perjury in judicial proceedings);

(b) section 3 (false statements etc. with reference to marriage);

(c) section 4 (false statements etc. as to births or deaths)."

264. The following offenses under the Forgery Act, 1913, 3 & 4 Geo. 5, ch. 27, are triable either way:

offenses as indecency between men,[265] unlawful sexual intercourse with a girl under sixteen,[266] and indecent assault.[267] Most notably, all indictable offenses under the Theft Act are included except for robbery, blackmail, assault with intent to rob and certain aggravated forms of burglary,[268] and the schedule also encompasses many offenses of malicious damage[269] and some forms of arson.[270] Other offenses (formerly known as "hybrid offences") are specifically declared to be triable-either-way by the statutes creating them and they include the great majority of drug offenses.[271]

In this way an enormous segment of crimes at the very core of the criminal justice system, not excluding many offenses of medium gravity involving violence, are at least potentially triable summarily. In deciding whether a particular offense may be tried summarily, the magistrates' court should consider "whether the circumstances make the offence one of serious character; whether the punishment which a magistrates' court would have power to inflict for it would be adequate; and any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other."[272]

If the court concludes that the offense is suitable for summary trial it must so inform the accused who may, however, reject the suggestion and demand trial on indictment before a jury.[273] Conversely, where the prosecution is "public," conducted by the Attorney General, the Solicitor General or the Director of Public Prosecutions, the court must accede to an application by the prosecutor that the offense be tried on indictment.[274] Thus, there is a small number of cases where the prosecutor can bar any possibility of summary trial. However, in the great majority of prosecutions that fall into the triable-either-way category the accused may elect summary trial if the magistrates find the case suitable for such a mode of disposition. The figures suggest that magistrates find scheduled offenses to be suitable for summary disposition in more than three quarters of the

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(a) Offences under paragraph (a) of section 2(2) (forgery of valuable security etc.) in relation to—

(i) any document being an accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal; or

(ii) any document being an authority or request for the payment of money or for the delivery or transfer of goods and chattels, where the amount of money or the value of the goods or chattels does not exceed 1,000 pounds;

(b) offences under section 4 (forgery of documents in general); and

(c) offences under paragraph (a) of section 7 (demanding property on forged documents), where the amount of the money or the value of the property in respect of which the offence is committed does not exceed 1,000 pounds.

Magistrates' Courts Act, 1980, ch. 43, § 17, Sched. I, No. 15.

265. Magistrates' Courts Act, 1980, ch. 43, § 17, sched. I, No. 23(b) (incorporating Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 13).

266. *Id.* at No. 23(a) (incorporating the Sexual Offences Act, 1956, 4 & 5 Eliz. 2, Ch. 69, § 6).

267. *Id.* at No. 32.

268. *Id.* at 28 (incorporating the Theft Act, 1968, ch. 60).

269. *Id.* at No. 29 (citing to the Criminal Damage Act, 1971, ch. 48, § 1(1),(2),(3)).

270. *Id.* at § 1(1), (3).

271. *See, e.g.*, Misuse of Drugs Act, 1971, ch. 38, § 25, sched. 4.

272. Magistrates' Courts Act, 1980, ch. 43, § 19(3).

273. *Id.* at § 20(2)(a), (3)(b).

274. *Id.* at § 19(4).

cases of this category that come before them.[275] The procedure is thus the fundamental technique for protecting the Crown Courts from inundation.

This, of course, can only be so because the great majority of defendants accept the offer of summary disposition. In order to secure this end the offer has been made so attractive that most defendants find it very imprudent to decline. The magistrates' court cannot impose a sentence greater than six months imprisonment for a single offense[276] and not more than a total of twelve months as an aggregate where consecutive sentences are imposed.[277] By contrast, the maximum possible for some of the scheduled offenses if tried on indictment may be many years in prison.[278]

The English system is without doubt extremely effective in protecting the Crown Courts from an avalanche of business and in confining the prospect of a full adversarial trial to a small percentage of cases. Late in 1975 the Report of an interdepartmental Committee of the Home Office and Lord Chancellor's Office (the James Committee) summarized the mode of disposition of indictable offenses from 1965 to 1974. The report showed that in that decade the number of indictable offenses for which prosecutions were initiated in a year rose from 235,143 in 1965 to 406,277 in 1974.[279] In 1965, 10.5% of these cases were committed for trial in the Crown Court, while in 1974 the percentage of committals for trial had risen to 13.1%, involving an actual increase in the number of cases going to a higher court from 24,590 in 1965 to 53,036 in 1974.[280]

It was this increase in the workload of the Crown Courts that led to

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275. In 1980, of the 506,669 defendants initially proceeded against in magistrates' courts for indictable offenses, 427,867 (84%) were dealt with summarily. *1980 Criminal Statistics England and Wales* Table s1.1(A) at 24-25 (Supp. Tables Vol. 1, 1981).

276. Magistrates' Courts Act, 1980, ch. 43, § 32(1).

277. *Id.* at § 133(2).

278. The following are examples of penalties which may be imposed for some of the scheduled offences if tried on indictment:

OFFENSE	MAXIMUM SENTENCE
Offences Against the Person Act 1861	
§ 16-Threats to Kill	10 years imprisonment
§ 20-Inflicting Bodily Injury With or Without a Weapon	5 years imprisonment
§ 47-Assault Occasioning Bodily Harm	5 years imprisonment
Theft Act 1968	
§ 7-Theft	10 years imprisonment
§ 12-Taking Motor Vehicle or Other Conveyance Without Authority	3 years imprisonment
§ 17-False Accounting	7 years imprisonment
§ 22-Handling Stolen Goods	14 years imprisonment
Sexual Offences Act 1956	
§ 6-Unlawful Sexual Intercourse with a Girl Under 16	2 years imprisonment
§ 13-Indecency Between Men If by a man 21 years or older with a man less than 21 years old:	5 years imprisonment
All other cases:	2 years imprisonment
Criminal Damage Act 1971	
§ 1(1) & (3)-Arson	Life imprisonment

279. REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE DISTRIBUTION OF CRIMINAL BUSINESS BETWEEN THE CROWN COURT AND MAGISTRATES' COURTS, CMD. NO. 6323 at 149, app. E (1975) [commonly referred to as and hereinafter cited as the JAMES REPORT].

280. *Id.*

the appointment of the James Committee. The Committee took the classical English path of recommending an expansion in the category of offenses triable-either-way[281] and an increase in the number of offenses that can only be tried summarily.[282] These recommendations were largely implemented in the Criminal Law Act of 1977[283] and are now, for the most part, to be found in the Magistrates' Courts Act of 1980. Under the expansion, offenses of unlawful intercourse with a girl under sixteen and offenses of burglary in a dwelling where entry was obtainable by force or fraud became, for the first time, triable-either-way. At the same time a substantial majority of offenses of criminal damage, previously triable-either-way, were converted into summary offenses.[284]

Between 1969 and 1977, the year in which the James Committee proposals were enacted, the number of defendants committed for Crown Court trial had doubled.[285] This was due not only to a general increase in the number of defendants, but also to a sharpening of the previously noted tendency for growth in the percentage of defendants committed for Crown Court trial which, by 1977, had risen to 19%.[286] In 1979, in part as a result of the new statutory classifications, the number of defendants proceeded against for offenses triable-either-way had declined by two thousand from 1977, and the percentage of these committed to Crown Court was down to 18%.[287] The commentary in the Annual Criminal Statistics for 1979 observes that "the Act [of 1977] seems to have halted the steady upward trend in the proportion of persons prosecuted who were committed for trial and to have brought about a small downturn . . . ."[288]

In spite of a renewed increase in the number of persons prosecuted for indictable offenses,[289] the result has been, at least for the moment, to reduce the rate of the constant buildup of the Crown Court calendar that had been a feature of the 1970s. We can therefore fairly perceive the cornerstone of the English system in the massive daily efforts of the magistrates' courts to dispose of the great majority of prosecutions for indictable offenses. The practice rests upon the boldly displayed inducement of an enormous sentence differential, one which does not depend upon a tacit

281. *Id.* at 123, Summary of Main Conclusions and Recommendations No. 28.
282. *Id.* at 122, Nos. 19, 20 and at 124, No. 29.
283. Criminal Law Act, 1977, ch. 45.
284. *See generally* Magistrates' Courts Act, 1980, ch. 43, Sched. I.
285. 1979 CRIMINAL STATISTICS ENGLAND AND WALES, CMD. 8098 at 72, para. 4.5 (1980).
286. *Id.*
287. *Id.* at 73, para. 4.7.
288. *Id.*
289. The overall total of persons proceeded against for the years 1977-1981 is as follows:

Year	Total No. Persons Prosecuted	Indictable Offences
1977	2,093,000	470,000
1978	2,019,000	461,000
1979	2,049,000	460,000
1980	2,378,000	507,000
1981	2,294,000	523,000

1981 CRIMINAL STATISTICS ENGLAND AND WALES CMD. 8668, Table 6.1 at 118 (1982).

understanding of different sentencing practices within the same court, but which is openly advertised in statutory punishment ranges that sharply mark off the powers of one court from those of another. If, for the American defendant, the crucial question is often whether to plead guilty, then for the English defendant it is the anterior question of which court to elect. This is so whether or not the defendant intends to plead guilty, which must be seen as a closely connected, yet rather different question.

1. *The Summary Disposition Decision*

At this point we should consider the calculus of considerations for the English defendant. Staying in the magistrates' court promises a very speedy disposition, in many cases that very morning or afternoon. If the defendant also wishes to plead guilty, the magistrate may be able to accept the plea on the spot and hand down an instant disposition. This is routine with, say, offenses of possession of small amounts of marijuana or even cocaine or heroin where the proceedings may take no more than about one minute for each defendant and where the disposition is likely to be a fine in the neighborhood of $100. If the magistrate wishes to learn more about the defendant, there may be a remand for the presentation of what the English call a "social inquiry report,"[290] but the defendant is likely to be released on bail or his own recognizance during this period.

If the defendant wants a summary trial, there will likely be a remand for a period of weeks or one month[291] at which time the trial will be held in a swift and informal fashion. All this is to be compared with the delay of waiting for a Crown Court trial,[292] the more chilling formality of such proceedings and the possibly much heavier sentence that the defendant might receive after a finding of guilty. If the defendant intends in any case to plead guilty, then the magistrates' court is surely the place he wants to

290. The "social inquiry report" is roughly the equivalent of a probation officer's report in an American court.

291. The average length of the remand period is based upon the author's observations and discussions with London magistrates. In England and Wales there are no statutes equivalent to the American "speedy trial" laws.

292. *See supra* note 237. According to a survey published in 1982, the interval of time between the committal proceedings and the opening of a defendant's trial at the Crown Court averaged 15.2 weeks nationwide for both custodial and bail cases. In London the pre-trial delay averaged 14.6 weeks for imprisoned defendants and 25.1 weeks for those out on bail. The foregoing figures referred only to the waiting period between the committal for trial by a magistrates' court and the start of the trial in Crown Court. If the time between the defendant's arrest or charge and the committal proceedings were added to the delay occurring between committal and trial, then the average wait between charge and trial in London's Old Bailey rose to 11.5 months. C. Hyman, *Defendants Languish in Queue for Courts*, NEW STATESMAN, July 16, 1982. Five Welsh separatists in custody since May, 1982 on charges of conspiracy to commit offenses under the Explosive Substances Act did not come to trial until October, 1983. A number of them were then acquitted. For a strong attack on the conduct of the police in this case, see J. OSMOND, POLICE CONSPIRACY (1984).

The vastly increased volume of crime and prosecutions is, of course, the prime explanation for this delay. The Lord Chief Justice of England, Lord Lane, recently wrote: "Immediately after the war when my generation of barristers started up in practice, crime in the country was a trickle. The Old Bailey boasted four courts . . . . [Criminal] appeals numbered about 700 per annum . . . . But then came the explosion. By 1980, the Old Bailey alone had 24 courts in operation. The Court of Appeal, Criminal Division, was dealing with 6,000 to 7,000 cases a year . . . ." 13 CAMBRIDGE 39, 40 (1983) [the magazine of the Cambridge Society].

be. Indeed, it may at first be hard to understand why a defendant would want to go to the Crown Court at all, even if he wishes to have a trial. Why not take advantage of the swifter procedure and lower penalty ceiling in the magistrates' court?

The defendant of course may have no option. Most of the cases that go to Crown Court are cases that cannot be tried summarily at all or cases where the public prosecutor has assumed control and demands a Crown Court trial. But there remain some cases where the defendant might have elected to stay in the magistrates' court but has declined that offer and elected to go to Crown Court. Such cases are usually explained by one of the following reasons.

First, it is accepted wisdom in the English legal profession and received lore in the criminal ranks that one has a better chance of an acquittal before a jury in the Crown Court than before a magistrate sitting alone (as a stipendiary) or a bench of magistrates in the summary court.[293] Those who are innocent or at least think the case against them is less than overwhelming may deliberately decide to accept the risk of a higher sentence if convicted in order to maximize their chance of an acquittal by getting to a jury.

Second, those who elect a summary disposition are not absolutely guaranteed the six months imprisonment ceiling, for the statute provides that after summary conviction the magistrates may commit the defendant to the Crown Court for sentencing if the court "on obtaining information about his character and antecedents . . . is of opinion that they are such that greater punishment should be inflicted for the offence than the [convicting] court has power to inflict."[294] The accused is informed of this possibility before he consents to summary disposition,[295] and in many cases the defendant may be able to make a good guess that committal to Crown Court for sentencing will be the likely outcome.

If the defendant believes that under this provision he is going to end up in Crown Court for sentencing anyway, he may elect to go immediately to Crown Court where his bargaining position may be stronger than if he had already pleaded guilty to the magistrate. These considerations are clearly of a delicate kind. Much turns on them and experience and skill are necessary to make the best decision for the defendant. The mode of delivery of legal aid is particularly crucial in these marginal cases where there is something to be said against staying in the summary court. In this connection there is an interesting passage in the Report of the 1975 James Committee.

> A significant part of the increase in the work of the Crown Court has therefore been due to an increase in the proportion of persons committed for trial. It is difficult to do more than guess at the reasons for this increase. . . . It is often suggested that the greater availability of legal aid has resulted in more defendants electing trial by jury on

293. JAMES REPORT, *supra* note 279, at 18, para. 37 and at 26, para. 53.
294. Magistrates' Courts Act, 1980, ch. 43, § 38.
295. *Id.* at § 20(b).

> legal advice. The survey of defendants gives some support for this view since it found that those who elected to go to the Crown Court were far more likely than those who agreed to summary trial to have discussed their choice with a solicitor: out of the 113 cases where the solicitor made a specific recommendation he recommended summary trial in only three. Whether or not the increase in committals has been due in part to more legal aid being granted, there is little doubt that the exercise by defendants of their right of election is a more potent, as well as a more unpredictable, factor in the situation than the practice of the courts; there is no evidence to suggest that there has been a general shift in recent years on the part of magistrates' courts towards committing a larger proportion of defendants for trial.[296]

From this it might appear that the better-advised defendants are, the higher the proportion of those who elect Crown Court disposition will be. This, of course, hardly means that the escalation will be dramatic since the vast majority of defendants in magistrates' courts undoubtedly would be excellently advised to make a swift plea of guilty on the spot. The comment does, however, contain the implication that the seductive aspects of swift disposition are so powerful that a number of defendants lacking legal advice would be likely to yield to them against what might be regarded as their better interests.

There are different kinds of mistakes that could be made by different kinds of uninstructed or unadvised defendants. At the extreme there will surely be some who are "factually innocent," but who are so intimidated by the thought of Crown Court trial and its possible outcomes that they elect to plead guilty in the magistrates' court. Observation suggests that some magistrates are alert to this danger and, when they perceive any doubt about factual guilt, are quick to advise the defendant to change his plea or to order a remand for the defendant to get legal aid or otherwise take legal advice.[297] There also may be defendants who are actually guilty but, lacking advice, fail to understand that the case against them is not without flaws and that they might have a stronger chance of acquittal before a jury. Some of these defendants may be further influenced by the disparity in maximum sentencing, not realizing that in a case such as theirs, when all the facts and their past histories come out, they will be remanded to the Crown Court anyway. Good legal advice might make this clear to them and thus make the idea of a Crown Court trial before a jury, or the opportunity to engage in the primitive plea bargaining available in the Crown Court, seem like a better risk.

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296. JAMES REPORT, *supra* note 279, at 11, para. 21.

297. One example of this was observed by the author in the Marylebone Magistrates' Court. A woman defendant who was without legal representation pleaded guilty to a charge of shoplifting. Concerned that the defendant might not in fact have had the requisite mens rea, the magistrate asked her whether she had intended to steal the merchandise. When the defendant replied that she had no intent to steal and merely forgot to pay for the item in question, the magistrate told her to withdraw her guilty plea and plead not guilty and remanded the case for her to obtain legal aid. The benevolent intervention by the court in a brief opportunity for observation is obviously not a proper substitute for independent legal counsel.

The upshot seems to be that with the best advice in the world, most defendants, given the fact that they are guilty and can be clearly shown to be so, ought to stay in the magistrates' courts. The percentage who are remanded later for sentencing in the Crown Court is currently only about 2.76.[298] It is unlikely that this percentage will increase much since any significant rise might threaten the status quo and lead to a decline in the number of defendants agreeing to stay in the summary court. Good early legal advice will probably lead to some small increase in the percentage of defendants opting for Crown Court disposition. If the crime rate rises even a small percentage, an increase of this kind could be a significant imposition leading to delays in Crown Court trials even more serious than at present.[299] If the history of English criminal justice projects consistently into the future, the response to such a development might well be a further expansion of the jurisdiction of magistrates' courts which, in effect, would mean a further enhancement of the range of attractive sentence differentials.

If the American system depends essentially on plea bargaining, then the English system in its first great sifting does indeed rely less on the bargain. But it will now be clear that this does not mean that the English rely any the less on inducements to abstain from demanding a full adversarial trial. Indeed, as we have seen, the English system is franker and bolder in its often well nigh irresistible sweetening of the summary procedure. Summary disposition does not, of course, logically entail a guilty plea since the defendant might elect a summary trial. But the percentage of such trials is small, and whether the defendant stays in the magistrates' court or goes to the Crown Court, guilty pleas are the preferred means of disposition. In any event, summary trial is much swifter and cheaper than a Crown Court trial.[300]

B. *Inducements to Plead Guilty*

1. *Magistrates' Courts*

So far, the discussion has been in terms of which court will dispose of a case and not explicitly in terms of whether the defendant will plead guilty or go to trial. In 1978 proceedings were initiated in 463,000 indictable cases and of these only 15% went to the Crown Court.[301] Of the cases

298. This figure was arrived at by the following formula. The number of defendants appearing at Crown Court for sentencing in 1980 after summary conviction at a magistrates' court (14,000) was divided by the total number of defendants in 1980 proceeded against for indictable offences at Magistrates' Courts (507,000). *1980 Criminal Statistics, supra* note 5, Table 6.6 at 114 and Table 6.1 at 111, respectively.

299. *See supra* notes 237 and 292.

300. In 1975 it was estimated that a contested case in magistrates' court, where the defendant was represented, would last no longer than a day. JAMES REPORT, *supra* note 279, at 14-15. In contrast, the average Crown Court trial took 10.1 hours, which constituted approximately two days of court time. *Id.* at 14. For 1980 the average duration of a Crown Court trial was given as 8.5 hours. JUDICIAL STATISTICS, 1980 CMD. 8436, 35 Table B.8 (1981).

301. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 6, Fig. 1 (1981). McConville and Baldwin do not cite the source for their figure of 463,000 cases of defendants charged with indictable offenses. According to the criminal statistics published by the Home Office, under the previous counting system (which employed the pre-Criminal Law Act 1977 definitions of crimes and which

that stayed in the magistrates' court, defendants pleaded guilty in 92%, while 60% of cases in the Crown Court ended in pleas.[302] In view of the vastly greater number of cases staying in the magistrates' courts, this of course means that by far the larger number of trials also takes place in these courts. As to the system as a whole, the figures indicate that in England, hardly less than in the United States, present arrangements depend essentially on the expectation of a guilty plea in the great majority of indictable offenses for which proceedings are initiated.[303]

If a defendant elects to stay in the magistrates' court, what are the incentives or pressures to plead guilty? Since he has already secured the lower sentencing range and escaped the worst dangers, why should the defendant not now try his luck at a trial which would probably be expeditious? There are several reasons why most defendants plead guilty, some of which are readily apparent and to be found in any modern criminal justice system, while others are special to the English way of doing things.

Most defendants are very demonstrably guilty and have no plausible defense.[304] To go through the charade of a trial would be tedious, embarrassing and might bring out the bad nature of their acts more vividly than would a plea procedure.[305] This might lead the magistrate to impose a heavier sentence, perhaps some prison time, whereas with an admission of guilt and the concession that a plea makes to the court's administrative needs, a lighter sentence might result.[306] As pointed out earlier, there is

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classified scheduled offenses as indictable ones while including hybrid offenses in the figure for non-indictable offenses) 407,000 defendants were proceeded against for indictable offenses in magistrates' courts in 1978. When summary and indictable offenses, as redefined by the Criminal Law Act, 1977, ch. 45, are counted under the current system of counting crimes (which includes offenses triable-either-way in the figure for indictable offenses), the Home Office reports a figure of 461,000 defendants proceeded against for indictable offences in magistrates' courts in 1978. 1981 CRIMINAL STATISTICS ENGLAND AND WALES, CMD. 8668, Table 6.1 at 118 (1982).

In 1980 of the 407,400 persons aged 17 and over who were proceeded against for indictable offenses, 18 percent (72,200) were committed for trial at the Crown Court. *Id.*

302. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 6.

303. *See id.* at 6-7.

304. When a group of defendants was surveyed as to their reasons for pleading guilty, 41% replied "Because I was guilty," another 11% said that they had confessed to the police, 20% responded that they were caught redhanded and 27% said the police case against them was good. (The defendants in the survey were not limited to a single reason and the figures quoted reflect their multiple reasons). A.E. BOTTOMS & J.D. MCLEAN, *supra* note 67, at 112, Table 5.7 (1976).

305. Ten percent of the defendants surveyed by Bottoms and McClean responded that they pleaded guilty "[t]o get it over with quietly [and] with less fuss." *Id.*

306. That judges, when sentencing, are increasingly influenced by the administrative concerns of the courts is evident from the following paraphrase of a 1976 opinion of the Court of Appeal (Criminal Division):

> [I]t was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better.

Reg. v. Cain, 1976 CRIM. L. REV. 464. *See also* Reg. v. Phillips (1976) (unreported, quoted in M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 197):

> It is counsel's duty, if the facts in his view justify it, to give firm and forceful advice to clients that, though the ultimate decision must be theirs, it may be to their advantage to anticipate the almost inevitable verdict of guilty by tendering the appropriate plea, knowing that in all probability credit will be given for saving public time and money by that plea of guilty.

Despite the foregoing, only 5% of the defendants questioned by Bottoms and McClean gave "to get a lighter sentence" as a reason for their guilty pleas. A.E. BOTTOMS & J.D. MCCLEAN, *supra*

the special danger under the English procedure that the magistrate might remand the defendant for sentencing to the Crown Court.[307] While this usually depends on the defendant's history and record more than on any other factor, it may be that placating the court with a guilty plea might sometimes avoid this dangerous development, whereas going to trial might increase the risk of it. This is at least likely to be a factor in the thinking of some defendants.

Very important in connection with guilty pleas in the magistrates' court is the role of the police. As we have seen, the police in England assume many of the functions and duties of the American prosecutor.[308] Before his first appearance in a magistrates' court, it is unlikely that the accused will have received the advice of a lawyer.[309] It is, though, very likely, in the opinion of most observers, that he will have received a good deal of unofficial advice from police officers and that this will almost always include the opinion that he should make a plea of guilty.[310] Only very rarely will this advice be sinister and it will often be the best counsel possible. But there may be a significant number of cases where the advice, even if not given in a malicious or improper spirit, still does not properly take into account the interests of the defendant.

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note 67, at 112, Table 5.7. However, 51% of the defendants interviewed by Bottoms and McClean did say that sentence considerations had been taken into account in their calculations of whether or not to plead guilty with 49% responding that they believed a plea of not guilty would lead to the imposition of a heavier sentence. *Id.* at 117-18.

307. *See supra* text accompanying notes 294-95.

308. *See supra* text accompanying notes 128-29.

309. *See supra* text accompanying notes 194-98. It is also unlikely that a defendant will be represented by counsel at his first appearance in magistrates' court. In their study of 1,672 defendants who passed before the Sheffield magistrates' court, Bottoms and McClean found that 59% of the defendants were unrepresented throughout the entire proceeding and a further 12.5% were unrepresented at their first appearance before the court. A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 167, at 137, Table 6.1. However, a brief conference with a "duty solicitor" who may then represent the defendant is now increasingly likely.

310. Softley reports that "[i]n 4% of initial interviews the police either told the suspect that in helping them he would be helping himself—since the court would take account of any cooperation he gave—or stressed the damage that the suspect might do in his own case by pleading not guilty and wasting the court's time." P. SOFTLEY, *supra* note 71, at 34. The police also gave defendants advice on the practice of having their other offenses "taken into consideration" along with the one for which they were being charged. *See infra* text accompanying notes 311-15. Police pointed out to defendants (in an attempt to elicit confessions) the weakness of their respective cases. P. SOFTLEY, *supra* at 32 and 34. Bottoms and McClean found that defendants who were unrepresented and who elected a summary trial at which they pleaded guilty, relied on the advice of the police "to quite an extent." A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 118. Seifman, in his study conducted in 1976-1977 of defendants convicted at magistrates' and crown courts, found that two-thirds of the defendants at magistrates' courts who originally pleaded not guilty later changed their plea to guilty. Further investigation revealed that police advice was responsible for over 18% of these changes. "Unlike the prisoners' legal representatives, who advised both guilty and not guilty pleas, the police advice was directed only toward pleading guilty." D. Seifman, *Plea Bargaining in England*, in PLEA BARGAINING, 179, 183 (W. McDonald & J. Cramer eds. 1980) Seifman quotes, as typical, the following responses of two defendants:

> After five days of intense questioning in custody the police pressured me into making a statement. I only signed it to expedite the case . . . Police urged me to plead guilty to all charges.
>
> The police several times said that things would go easier if I pleaded guilty, and I only signed the statement to get out of the police station.

Id. Such self-serving statements from convicted persons must obviously be treated with reservations.

Quite apart from the question of innocence and assessing the strength of the admissible evidence against the defendant, matters that the police can hardly be expected to weigh in a purely disinterested fashion, it is likely that in many cases the defendant may get an overly optimistic estimate from the police of the likely sentence if he pleads guilty before the magistrate. The police may simply underestimate the sentence in relation to the offense committed or, perhaps more likely, a particular officer will not be sufficiently informed as to the defendant's prior convictions and history that may emerge at the sentencing. This possibility is complicated by a peculiarly English practice in which the defendant on sentencing may, in effect, be sentenced for offenses with which he has not been formally charged.

This is known as asking for other offenses to be "taken into consideration." Such offenses are then known in the jargon as TICs.[311] The practice is attractive to everyone to some degree. The police approve of it since it clears their books of a number of crimes and much improves their statistics for "offenses cleared up."[312] The defendant may accept the suggestion because it clears up in one swoop a number of matters which might otherwise come back to haunt him in subsequent fresh charges.[313] And the courts presumably endorse the practice since it conveys the impression that they are disposing of a large number of offenses and sentencing the defendant

311. "Asking" may be a bit misleading, for it implies that the initiative rests with the defendant. The opposite is actually the case. The police, in preparing the charges against an individual who is suspected of having committed crimes in addition to those with which he is being charged, decide which charges shall be included in the formal complaint and which shall be enumerated on a list of charges outstanding against the accused. The defendant is then given a copy of this list and may admit to all or any of the offenses included therein. A copy of this list showing the date, location, and nature of each outstanding offense to which the defendant has admitted is filed with the court after conviction. Margrave-Jones, *Taking Other Offences into Consideration—The Present Law*, 1959 CRIM. L. REV. 108, 112. These other offenses to which the accused has admitted guilt then constitute the TICs—the offenses which the defendant asks the court to take into consideration at sentencing. Because TICs do not qualify as formal convictions (*see infra* note 312) the sentence imposed may not exceed the maximum prescribed for the principal offense charged, regardless of how many offenses are taken into consideration. Thus, in selecting the charges to be included in the complaint the police should bear in mind the nature of the offenses to be taken into consideration and ought to include sufficient formal charges to bear the weight of a sentence appropriate when looking also to the increment justified by the TICs. White, Newark & Samuels, *Offences Taken into Consideration*, 1970 CRIM. L. REV. 311, 325.

312. "Offences cleared up" are defined as those for which a person has been arrested or summonsed or cautioned as well as those taken into consideration by a court in sentencing an offender for another charge. 1980 CRIMINAL STATISTICS FOR ENGLAND AND WALES, *supra* note 5, at 36, para. 2.22. While TICs increase the number of "offenses cleared up" they depress the conviction statistics because offenses taken into consideration do not count as convictions. White, Newark & Samuels, *supra* note 311, at 313. Nonetheless, the police like the procedure. Not only is the power to initiate the TIC procedure within their control (*see supra* note 311), but the consent of the prosecution is also necessary before an offense can be taken into consideration by a court. Margrave-Jones, *supra* note 311, at 111. These aspects give the police additional leverage in inducing defendants to plead guilty. In evidence presented to the Royal Commission on the Police, the National Association of Probation Officers asserted that TICs serve as commodities in the plea bargaining process. *Id.* at 322.

313. Of the persons sentenced for indictable offenses at magistrates' courts in 1980, excluding those sentenced for indictable motoring offenses, 12.1% asked to have other offenses taken into consideration by the court. The following table shows the number of offenses that were taken into consideration at the request of persons sentenced in magistrates' courts in 1980.

on the basis of as much information about him as can be gathered.[314]

These are all, indeed, proper responses to a practice that may, itself, be entirely proper, but the danger for the accused is that the revelation of previous convictions or the presentation to the court of a number of offenses to be taken into consideration may lead to a much harsher disposition than the defendant had expected to been led to expect by unofficial police estimates. English practitioners suggest that in a number of cases the defendant is sentenced to imprisonment or remanded to the Crown Court for sentencing because of TICs, the significance of which he had not fully appreciated.[315]

	Persons sentenced	Magistrates' Courts Offences Taken into Consideration				
		0	1	2	3	4
Total	358,001	314,461	12,892	8,088	5,031	3,671
		5	6-10	11-20	21+	21+
		2,399	6,234	3,364	1,861	

1980 CRIMINAL STATISTICS ENGLAND AND WALES, *supra* note 5, 43, Table s4.3 (Supp. Vol. 4, 1981).

314. The courts assume the police have verified the defendant's admission(s) of guilt to the offense(s) asked to be taken into consideration. Opportunity to verify is one of the reasons for mandating the prosecution's consent to the TIC proceeding. White, Newark & Samuels, *supra* note 311, at 319. However, the police do not always check the authenticity of a defendant's admissions. It is reported that one mentally ill patient asked to have 143 crimes taken into consideration on the theory that if he admitted to being clever enough to commit all these offenses the court would not find him mentally ill and return him to a mental hospital. R. v. Forbes, 52 Crim. App. 585 (1968). Ultimately it was discovered that at least 88 of these "admitted" offenses had been committed by others. White, Newark & Samuels, *supra* note 311, at 320.

315. However, there may be hope for an accused who, after learning or realizing the seriousness of the offenses which he has asked the court to take into consideration, seeks to recant his admission. In Reg. v. Davies, 1981 CRIM. L. REV. 192, the defendant pled guilty in magistrates' court to charges of burglary, theft, and road traffic offenses and asked the court to take into consideration 24 additional offenses. Given the guilty plea to the principal charges and the numerous TIC offenses admitted, the court remanded him for sentencing at the Crown Court. There the defendant sought to withdraw his admission to some of the previously admitted TICs, but his application was denied. On appeal the Court of Appeal held that the defendant should have been permitted to rescind his request that certain offenses be taken into consideration. The court held that the appropriate forum for entertaining an accused's submissions regarding TICs is the court which is actually to sentence him. Furthermore, the question of whether an offense shall be taken into consideration must be put to the defendant personally, not to his counsel. The effect of this decision is that if a defendant who indicates a willingness to have offenses taken into consideration by a magistrates' court before which he has pled guilty is committed to the Crown Court for sentencing, he will not be bound by his earlier admissions and will have the option of refusing to admit any or all of the said offenses. *Id.* at 193.

Criticisms of the TIC process do not flow solely from disappointed defendants. Because separate punishments are not imposed for TICs and because they do not rank as convictions, a host of legal problems arise. The absence of a conviction not only leaves a defendant technically open to prosecution for the offense, but it also denies the victims of certain crimes, e.g., theft, the right to restitution because the court cannot issue a restitution order without a conviction. *See, e.g.*, Theft Act, 1968, ch. 68, § 28. From the prosecution's standpoint, it limits their ability in future prosecutions to cross examine an accused about his previous similar offenses.

The lack of a separate sentence for TICs seriously confuses the sentencing issue. For example, in *Davies, supra*, the defendant asked for certain traffic offenses to be taken into consideration. If the proper penalty would have been to suspend the defendant's license then clearly taking the offense into consideration avoided the imposition of the appropriate sanction. The same situation arises when breaches of probation or conditional discharges are asked to be taken into consideration.

The inability to impose separate sentences for TICs also strains the credibility of the judicial system because the courts, at times, must impose harsher sentences than appear appropriate for

It must be remembered that, at least until very recently, most of the time in the majority of magistrates' courts not only has there been no regular public defender present, but there is no lawyer-prosecutor either. The major participants have been the police, the magistrate and the accused. Most courts have now adopted the practice of having a "duty solicitor" present, and he will be available to offer quick advice to any defendant who requests to speak to him.[316] The magistrate will often suggest such a conference. This practice may soon be general, but even where it exists it affords an opportunity only for a hurried conference.

While an offender in England may not be imprisoned for the first time without receiving legal aid, this is not a requirement for imprisoning a person who has been imprisoned before nor for remanding a defendant for sentence to the Crown Court. Defendants who face any prospect of imprisonment will certainly receive legal aid if they request it, and when adjourning a case for sentencing or some other purpose, a magistrate will frequently advise a defendant to obtain legal aid before the next court appearance. However, there is as yet in England no legal aid lawyer always in attendance in all courts nor any practice of the court's appointing counsel for a defendant. The absence of a lawyer-prosecutor, the dominance of the police in the management of the magistrates' court, and the rather rough and certainly imperfect arrangements for the delivery of legal aid surely lead to a significant number of cases in which the defendant is unhappily surprised by the disposition that he receives after a guilty plea. Unhappy surprise does not, of course, mean that the defendant could have done better had he been counselled, though it does leave a number of defendants with that impression.[317] More important, it is impossible to calculate how many defendants might have changed their decision to plead guilty (or indeed to stay in the magistrates' court at all) had they received the opportunity for a full and serious conference with a solicitor.[318]

With respect to the magistrates, there appears to be virtually no participation of the court in any negotiating process that might be called "plea bargaining." But it would be mistaken to conclude that nothing takes

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the offenses charged in order to take account of the TICs. *See* White, Newark & Samuels, *supra* note 311, at 325-28.

While the foregoing are serious flaws in the TIC procedure, perhaps the strongest objection to the practice is that it "does not square with even minimal requirements of 'due process' of law." M. McCONVILLE & J. BALDWIN, *supra* note 76, at 153.

316. *See supra* text accompanying notes 208-09, 11.

317. Bottoms and McClean describe one case where a defendant made a claim of double dealing. The defendant was unrepresented at his summary trial in magistrates' courts where he pled guilty. He was remanded to Crown Court for sentencing and was offered legal aid. The defendant refused the offer and other offers of legal aid on the ground that the police had promised him that if he pled guilty they would "put in a good word to ensure that D [the defendant] did not go to prison," A.E. BOTTOMS & J.D. McCLEAN, *supra* note 304, at 163. The police allegedly made the bargain to avoid exposing a police informer who would have had to testify at the defendant's trial. Ultimately, the police made no public statements in his favor and the defendant received a sentence of 12 months' imprisonment. He is reported to have "regretted not having a lawyer." *Id.* at 164. In the United States the defendant could have had the plea vacated for a broken bargain if his allegations were proven. Santobello v. New York, 404 U.S. 257 (1971).

318. Interviews with solicitors revealed that they believed their advice influenced their clients' pleas in 22% of their cases. Seifman, *supra* note 310, at 185. It should be noted that in these cases the attorneys were persuading their clients to plead guilty.

place that might fairly be called bargaining. The police frame the charges against the defendant and it is likely that in police interrogation, usually as we have seen conducted in the absence of a solicitor, an indication is often given to a defendant that cooperation or confession and a subsequent plea of guilty may lead to helpful responses from the police. Such responses might take the form of reducing charges, dropping some possible charges, or, in the case of a guilty plea, presenting the circumstances of the offense to the magistrate in a less than harsh manner. At this early stage, police inducements may also include a promise not to oppose the granting of bail. "Bail bargaining" by the police may thus be a very important factor in inducing a guilty plea.[319]

In summary, inducements to plead guilty in the magistrates' courts are found in a general awareness of sentencing ceilings and practices combined with pressure and advice stemming from the police. With respect to the police influence, it would not be inaccurate to see elements of bargaining in the system. In the absence of a lawyer-prosecutor and with the accused usually unrepresented during his contacts with the police and often still unrepresented or perfunctorily represented in the court, it may be thought that this system carries considerable dangers of some improper and unjust outcomes.

2. *The Crown Courts*

The English Royal Commission on Criminal Procedure, 1981, considered the whole question of plea bargaining to be outside its terms of reference. However, it did make the following incidental comment:

> A substantial minority of those who submitted evidence to us voiced concern about the practice known as plea bargaining. In the sense that the accused might be given a promise by the court that he would receive a less severe sentence if he were to plead guilty, plea bargaining is forbidden. Any conviction obtained in this way will be quashed by the Court of Appeal. Only the court can determine the sentence so that no one else is in a position to guarantee what the sentence will be.[320]

The blandness of this statement is sharply called into question by the pio-

319. See defendants' statements quoted by Seifman and reproduced *supra*, note 310. The manipulation of bail to create an inducement to plead guilty is not limited to the police, but may also be employed by magistrates.

In Tarlochan Gata Aura v. Reg., 1982 CRIM. L. REV. 49, the Bradford magistrate seemingly decided to refuse all bail applications for that session and to release only those defendants who would plead guilty and could be dealt with that morning. The accused, who had intended to plead not guilty and request bail, decided, on the basis of the jailer's information concerning the magistrates' policy and his solicitor's observation of the courtroom proceedings, to plead guilty. On appeal the conviction was quashed on the ground that the magistrates' blanket approach to bail created undue pressure on the defendant to plead guilty thereby depriving him of his freedom to choose his plea.

This blanket policy of refusing all bail applications appears to have been adopted by a number of magistrates' courts to facilitate handling the flood of cases resulting from the 1981 summer riots in northern England. In the proceedings surrounding *Tarlochan Gata Aura*, the court had to process approximately thirty defendants in one morning, or two and a half times its normal caseload of people. *See also* correspondence on this case, 1982 CRIM. L. REV. 255-56.

320. REPORT, *supra* note 40, at 184, para. 8.36.

neering study, *Negotiated Justice*,[321] by Baldwin and McConville, based on a close survey of a sample of cases in Birmingham Crown Court where the defendants had made a late change to a guilty plea. At the Crown Court the defendant is represented by a barrister, "briefed" by the defendant's solicitor and who, like the solicitor, is in the great majority of cases compensated, at least in large part, out of public Legal Aid funds.[322] The prosecution will also be conducted by a barrister who will be a private practitioner briefed by the prosecuting authority (the local police department, some other public agency such as the Post Office or by the Director of Public Prosecutions). The absence of a prosecutorial bureaucracy whose officers appear regularly in an institutionalized manner obviously makes plea bargaining in the American sense of that term very difficult since negotiation is facilitated by regular institutional affiliation and the consequent development of practices and standards.[323] While discussions between prosecution and defense barristers as to a reasonable disposition undoubtedly go on in England, they are likely to be much less structured than in the United States. For example, as Baldwin and McConville point out "[w]hilst it is common in the United States for the prosecutor to promise to recommend to the court a particular sentence, an understanding of this nature cannot properly be given in England where a specific sentence recommendation by prosecution counsel would be unethical."[324]

But if negotiation between prosecutor and defense counsel is less developed in England, this hardly rules out the prospect of induced or negotiated pleas in the Crown Court. The Baldwin and McConville study suggests that the keenest pressure at the Crown Court level is brought to bear by defense barristers.[325] In many cases the barrister may have received the papers in the case only a short time before the appearance and may, in addition, be so busy that he has studied them only in a cursory way.[326] In the cases reviewed by Baldwin and McConville, a large proportion of the defendants asserted that strongly worded advice to plead guilty had been given to them by their barrister[327] who told them forcefully that

321. J. BALDWIN & M. MCCONVILLE, *supra* note 64.

322. Of the 80,764 persons facing trial on indictment in the Crown Courts in 1980, 78,077 were represented under a legal aid order. 1980 CRIMINAL STATISTICS ENGLAND AND WALES, *supra* note 5, at 93, Table s4.18(c) (Supp. Tables Vol. 4, 1980).

323. *See* M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979) for a discussion of the institutional pressures and practices concerning plea bargaining that have developed in at least one American city court system.

324. J. BALDWIN & M. MCCONVILLE, *supra* note 34, at 20.

325. *Id.* at 28.

326. Baldwin and McConville point out that barristers are reluctant to devote time to preparing a case for trial when there is the likelihood that they will be unable to appear in court on the requisite day due to other, equally pressing, trial commitments.

> The result is, as many solicitors have told us, that some barristers are often not sufficiently familiar with the brief properly to advise the defendant . . . . Another difficulty is that the barrister who ultimately undertakes the defence is quite often not the person initially selected. In such cases, the brief is commonly returned so late that it is almost impossible for a barrister to give a case adequate consideration.

Id. at 110-11.

327. *Id.* at 20.

a much more severe disposition would follow a trial.[328] Often this was because barristers deprecated the defendant's claim that the principal evidence against him, a police version of what the accused had said during an interrogation, was falsified.[329]

While the authors make every allowance for the caution with which statements made in interviews with convicted criminals must be judged,[330] they conclude that, at the least, there is no doubt that some defendants feel or believe that they have been roughly pressed into a guilty plea.[331] In most cases the defendant had believed that he had his solicitor's backing and support in his decision to plead not guilty. Solicitors are supposed to be present when the barrister interviews the client but, in view of the very low Legal Aid remuneration for solicitors' attendance at such interviews, it has apparently become a frequent practice for junior assistants or even articled clerks to be sent in their place.[332]

The fact that some defendants have a deep sense of dissatisfaction is in itself an important phenomenon but of course hardly suggests, taken alone, that barristers are giving bad advice, still less that they are acting improperly. There can be no doubt that in a large number of cases under discussion, the barrister's advice was the most prudent,[333] even if perhaps it was not communicated in a way calculated to give the defendant a sense

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328. For example, in Baldwin and McConville's Case 13 the defendant's description of his conversation with his barrister was quoted as follows:

> The barrister wanted to get it over with. He . . . told me that if I pleaded guilty, I would get a suspended sentence but if I fought the case, I'd be done for wasting the court's time and would get 3 years imprisonment, or if I was lucky, a suspended sentence. He left it up to me—so I pleaded guilty and got a suspended sentence.

J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 29-30. *See also* Baldwin and McConville's Case 75 in which the defendant claimed his barrister told him the following: " . . . 'We have our ways of doing deals and if you plead guilty now, the judge will be lenient—otherwise you'll get 4 years' . . . ." *Id.* at 35.

329. A defendant charged with wounding related his discussions with his barrister in the following terms:

> My barrister kept saying I had no chance and that it would be bad if I fought it in court. He said, "Well what I'll do, if you plead guilty . . ." and I said, "No way, I'm not having it; this copper has made up verbals." The barrister said, "If you stick to your plea of not guilty, it seems to me there is going to be some right mud-slinging towards the police. If you do get found guilty, as you will on something, the judge is going to say, 'You don't like the police—our blokes—and all these allegations were made to try and cover yourself up for striking this poor [victim],' and you'll get done very heavily."

Id. at 47. Similarly, in Baldwin and McConville's case 146 the defendant recalled his meeting with his barrister as follows:

> I pleaded not guilty right up to the Crown and the barrister came down to see me and said, "I've read these police statements and I don't think you've got much chance going not guilty against these." . . . He said, "Look at these, read these police statements." Well, they were a load of verbal, known what I mean, lies like . . . The barrister didn't seem to have any faith in me. . . . If I'd had a good barrister I'd have pleaded not guilty, because all it was was police verbals. I was not guilty really but, there you are, know what I mean?

Id. at 71.

330. *Id.* at 9-11, 42.

331. *Id.* at 56. It must be remembered that the subjects were all defendants who expected to plead not guilty until their last-minute interview with a barrister.

332. *Id.* at 46, 54-55, 57 n.10.

333. *Id.* at 42-43.

of participation in his own disposition.[334] What is more disquieting is that many of the defendants in question continued to protest in the interviews conducted during the research that they were fully innocent or at least guilty of a lesser offense than the one for which they had been convicted.[335] Such protestations are of course also familiar, but Baldwin and McConville attempted verification through a rough method of scrutinizing the validity of the defendants' complaints.

All the papers in the cases in question were submitted to two assessors, a retired Chief Constable and a retired Justices' Clerk, who were asked to predict the likely outcome of a trial on the basis of the summary of evidence submitted.[336] In 21% of the cases studied, the assessors expressed uncertainty about the outcome or were affirmatively of the opinion that an acquittal should result.[337] The results of the study lead Baldwin and McConville to comment that the present system "operates in only a crude way and that the injustices it brings about are both frequent and profound."[338]

The tough prosecutor turning the screws on the frightened defendant is a common-enough American image; but in Britain it appears that it is defense barristers who play this role. Why do they act in this way? Undoubtedly a major factor is the general atmosphere of flurry in which the defendant sees his barrister very briefly just before his case is due to be heard and when everything has to be decided in great haste.[339] Many barristers must feel an urgent impulse in these circumstances to make a dramatic impact on the defendant to do what is wise.[340] But Baldwin and McConville's study suggests that sometimes the barrister may urge the defendant to plead when this is very much against his best interests.[341] Perhaps, if this happens, it may be due to a barrister's overloaded work

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334. *Id.* at 83. Baldwin and McConville quote one defendant's perception of the criminal justice system as follows:

> I never made any decisions, they were all taken for me. I felt like I wasn't controlling things with the solicitor and barrister; I was just being dragged along. I just had no say in what was happening, I was just carried along on the tide of what they said. . . .

Id. at 85-86.

335. Fifty-seven of the 121 convicts interviewed by Baldwin and McConville made substantial protestations of innocence despite their convictions. *Id.* at 63.

336. *Id.* at 72-73.

337. *Id.* at 74-75.

338. *Id.* at 72.

339. The defendant's comments in Baldwin and McConville's Case 114 are telling:

> There were a million and one things I wanted to say to the barrister if only I could have had the time. There was a lot to say but when the barrister only comes in a few minutes before you go into court there's not a lot you can say, and, anyway, he just didn't want to know.

Id. at 55.

340. *See, e.g.*, Reg. v. Phillips, quoted *supra* note 306.

341. Or so it may appear to the defendant whose view is sometimes vindicated. For example, a defendant who was acquitted by a jury commented:

> When it came to discussing the plea, the barrister said, "You want to start thinking about your wife a bit—and you want to plead guilty. The evidence against you is overwhelming. . . . It's going to be hard to make out that 11 police officers are lying—I know you know they're lying but, let's be honest about it, proving it is a different thing. . . . [P]lead guilty to all three charges. If you do that, I think you'll get three or four years." So I said, "No—I'm not going to . . . ." He said, "Well, if you don't, you'll end up with six or seven years." I said I'd rather do six or seven years as a matter of principle. He

schedule or simple eagerness to be rid of a case.[342] Baldwin and McConville comment: "Our findings disclose evidence of questionable conduct on the part of a small number of barristers in advising defendants on plea . . . . Only about one in three barristers were criticized, though these tended to be the barristers who dealt with a relatively large number of cases."[343]

A later study was conducted by Seifman of two hundred recently convicted prisoners in London prisons, the great majority of whom had pleaded guilty, some in Crown Courts and some in magistrates' courts.[344] Seifman confirms the widely held belief that police pressure and advice is very important in persuading many defendants to plead guilty in the magistrates' courts. Of the prisoners who had been sentenced in the Crown Courts, Seifman found that while some had been urged by their barristers to plead guilty, very few complained that this had taken the form of overbearing pressure.[345] Seifman's study did not find the kind of evidence adduced by Baldwin and McConville of unethical conduct by some barristers, though it strongly confirms the conclusion that many prisoners viewed the disposition of their cases as a process in the hands of professionals from which they were excluded.[346]

So far, the picture presented is again one of a set of sharp inducements and perhaps some pressure to plead guilty, but it is not a picture of plea bargaining in the fullest sense, since no element of specific negotiation relating to the individual case has been noticed. Since prosecution barristers in England, as we have seen, have no institutional continuity and are forbidden from making open-court recommendations on sentence, plea-bargaining in its fullest form could not be possible in England without some engagement of the judges in a process of negotiation with defense counsel. The theory of English law on this point is set out in the leading case of *Turner*.[347]

Turner validates the propriety of pre-disposition discussions of the case between counsel and the judge. The Court of Appeal, however, insisted that the judge must not communicate what sentence he might impose, except to say that whatever kind of plea is made, the sentence will not take a particular form. When discussions have taken place between

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said, "Why don't you think about your wife and kids?" I said, "I am, that's why I'm not pleading guilty."

J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 78-79.

342. See *supra* note 326. *But see* Seifman, *supra* note 310, at 188 who writes, "Contrary to public belief, very rarely does a plea rather than a contested case benefit counsel." *See also* A.E. BOTTOMS & J.D. MCCLEAN, *supra* note 67, at 231. Whatever may be the best explanation, defendants often perceive the barrister's advice to plead guilty as being in the latter's interest, believing him to be indifferent to the merits of the case and simply in a hurry to get on to his next one. *See* defendants' comments quoted by Baldwin and McConville, in their cases numbers 15, 60 and 73, *supra* note 64, at 55-56.

343. J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 41.

344. Seifman, *supra* note 310.

345. *Id.* at 193.

346. *Id.* Seifman quotes one defendant as stating: "I think they [the prosecution and defense barristers and the judge] all chatted it over the night before, and the trial is only the icing on the cake." *Id.* at 188.

347. Reg. v. Turner, 54 Crim. App. 352 (1970).

defense counsel and the judge, counsel should inform the defendant of what has been said.[348] In this way, *Turner* appears to place severe restrictions on the development of a full form of plea bargaining in England.

But it seems likely that there is something of a gap between the rules embodied in *Turner* and the actual practice in some Crown Courts. In their study, published in 1977, Baldwin and McConville recount that in about one fifth of the cases examined by them the defendant alleged that a very specific sentence offer had been put to him by the barrister, often coupled with a specific reference to a much heavier sentence if he went to trial and were found guilty by a jury.[349] In many of these cases, the defendant alleged that the barrister had told him that the offer had been extended by the judge.[350] The writers draw the following conclusions:

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348. What counsel is supposed to do and what he or she actually does in practice frequently diverge. In interviews with 90 barristers in London only 43 percent responded that the plea discussions between the barrister and the judge should be fully disclosed to the defendant. Twenty-two barristers voiced the opinion that defendants should be told nothing about the conversations or that the client should only be told about "discussions in principle." Seifman, *supra* note 310, at 187. In Reg. v. Cain, 1976 CRIM. L. REV. 464, the judge sent for the defendant's barrister and told him that in his opinion the accused had no defense and that if the defendant persisted in pleading not guilty he would receive a very severe sentence. The judge also indicated, however, that if the defendant changed his plea it would considerably affect his sentence. On appeal Cain's guilty plea was vacated, the Court of Appeal holding that his plea was coerced given his knowledge of the judge's view.

Although the disclosure of judicial-barrister conferences mandated by *Turner* is acknowledged in *Cain*, the Lord Chief Justice seemed to suggest in the latter case that it is sometimes inappropriate for counsel to relate the substance of his conversation with the judge to the defendant. While only briefly and cryptically reported, *Cain* appears to stand for the proposition that conversations in which the judge indicates with any specificity the sentence he will impose if the accused does not plead guilty should not be imparted to clients to avoid the coercive effect that such a disclosure must have on a defendant.

Turner and *Cain* are not inconsistent if one interprets *Cain* in this way. But this rule would seem to impose an ethically dubious duty on counsel to conceal vital information from his client. *Cain* created so much confusion regarding the extent to which counsel must keep his client informed and counsel's competing duty to maintain the confidentiality of discussions between bench and bar that the Court of Appeal subsequently issued a Practice Direction that seemingly directs that any inconsistency between *Turner* and *Cain* should be resolved in favor of the former. Seifman, *The Rise and Fall of Cain*, 1976 CRIM. L. REV. 556, 559; J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 37, para. 19. *See also*, Reg. v. Bird, 1978 CRIM. L. REV. 237 in which the judge called counsel to his chambers pretrial and indicated that if the accused pleaded guilty he would go free but that imprisonment would follow a jury conviction. Counsel did not reveal this conversation to his client. During the trial a second, similar discussion occurred in the judge's chambers during which the judge also sought the prosecution's consent to have the defendant plead guilty to a lesser charge in the indictment. After referring to the *Cain* opinion, both prosecuting and defense counsel asked the judge if their conversation with him was confidential. An affirmative reply followed. Despite this, the defendant was ultimately told of the judge's position although the brief report of the case makes it impossible to discern whether the defendant was so informed during or after the trial.

Following the defendant's conviction, defense counsel asked for a suspended sentence apparently indicating in open court that that was all the judge would have imposed had the defendant pleaded guilty. Again, the report is unclear as to how explicit defense counsel was in his public sentencing statement regarding his "private" conversations with the judge. The defendant was sentenced to imprisonment.

On appeal the court held that defense counsel was correct in revealing what had been improperly expressed in the judge's chambers. The court quashed the sentence to "preserve the good face of justice," it being evident to everyone, including the defendant, that the only reason he was being imprisoned was his refusal to succumb to the bench's pressure. *Id.* at 238.

349. J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 29.

350. *See* the facts of *Cain*, *supra* note 348. *Cain* quotes with approval the statement in *Turner* that "a statement that on a plea of guilty he [the judge] would impose one sentence but that on a

> The assumed limitations on plea bargaining in England count for less in practice than one might suppose, and it is the involvement, real or assumed, of the judge that causes this. Of course the prosecution must be a party to these bargains but the prosecution's offer of, or consent to, a bargain would be redundant without the involvement of the judge: there can be a bargain only where adherence to its terms can be guaranteed, and in England that necessitates judicial involvement in the deal. Our study suggests that, at least as the defendant understands it from his barrister, there are in Birmingham a very small number of judges . . . who are not unwilling to involve themselves in such bargains.[351]

The study in question was of a small number of cases in one court and the authors are properly very cautious in the conclusions they draw for the system at large. But in a later work the same authors provide startling testimony to suggest a much wider incidence of the practice of judges engaging frankly in bargaining sessions. After observing that encounters between counsel and judge in chambers in the Crown Court "have been successfully shielded from all researchers in the field,"[352] Baldwin and McConville go on to quote the following account by a Crown Court judge in evidence given in 1979 to the Royal Commission on Criminal Procedure which reported in 1981.

> Bargains between judges and defendants as to sentence happen every day. It is in the interests of all concerned that they should . . . . The practice of Crown Court Judges varies widely. Some see counsel in their rooms whenever they are asked. Some refuse to see counsel at all. One judge . . . told me that he only sees counsel he can trust . . . . Some judges send for counsel before the case starts and virtually give directions for 'carving it up' . . . . Some judges negotiate more subtly, by sending and receiving messages through their clerks or the court clerks . . . . Judges miss life [at the Bar] and day after day see their former colleagues only across the formal courtroom. It is good to have a chat with the lads. How tempting to sit down and sort it all out sensibly, wigs off . . . . The tension of open court has gone. The shorthand writer is absent. No press or public. Even the

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conviction following a plea of not guilty he would impose a severer sentence is one which should never be made." Reg. v. Cain, 1976 CRIM. L. REV. 465. But *Cain* acknowledges and implicitly approves of sentence "discounts" being given to those who plead guilty and even states that "[e]very defendant should know that." *Id.* What was disapproved of in *Cain* was the "more precise offer" which emanated from the judge because "the judge was then inviting . . . [a] particular defendant to bargain with him." *Id. Cain* is thus reconciled with *Turner* (see *supra* note 348) and amplifies the dangerously coercive nature of "bench offers" recognized in *Turner.*

The fact that guilty pleas based on explicit offers are disapproved of and not infrequently overturned at the appellate level, does not make such offers uncommon according to Baldwin and McConville. In their study of 121 defendants they found that explicit bargains had been struck in 22 cases and tacit bargains had taken place in an additional 16 cases. J. BALDWIN & M. MCCONVILLE, *supra* note 64, at 35. In their example, Case 128, the defendant described what occurred when he ignored his barrister's advice to plead guilty and went to trial: "The judge sent for my barrister and the prosecution and said 'As the case stands at the moment I'll be more inclined to give your defendant a suspended sentence but if he goes on pleading not guilty he will go to prison.' So when my barrister told me this I pleaded guilty . . . ." *Id.* at 32.

351. *Id.* at 35-36.

352. M. MCCONVILLE & J. BALDWIN, *supra* note 76, at 11.

> accused—around whose fate it all revolves—is not there . . . . In this easy atmosphere [the formal rules] can be overlooked in a genuine effort to find a sensible short-cut, off the record.[353]

This remarkably frank statement, approaching parody, cannot of course be accepted as conclusive evidence of the general practice in the Crown Courts, though it certainly suggests the existence in some courts of a lively practice of plea bargaining in the fullest sense of that concept. The topic remains shrouded in some obscurity because of the very small amount of empirical research and the strong resistance of the English bench and bar to such inquiries.[354]

In addition to covert plea bargaining in which some judges may participate, there is an increasing incidence of open references by the Court of Appeal to proper discounts that may be or ought to be applied when a defendant pleads guilty. In *Davis*[355] the Court of Appeal held that a judge's statement to counsel that a sentence discount for a plea might be between 20 and 30% was improper, but refused to vacate the plea on the ground that the application of sentence discounts on pleading is so well known that the judge's statement did not constitute coercive pressure to plead. In *McPhee*[356] the court implicitly recognized the propriety of a 50% sentence allowance for a plea, and in *Vinson*[357] the court indicated that a 25%, reduction was appropriate. The frankest and strongest recognition came in 1983 in *Ross*[358] where the trial judge, who commented that he found both defendants equally responsible, passed the same sentence on each (fifteen months imprisonment) although one had gone to trial and the other had pleaded. The Court of Appeal held that the judge ought to have differentiated the sentences and allowed a discount for the guilty plea. Accordingly, they reduced the sentence of the defendant who had pleaded to nine months—a discount of 40%. The English courts have thus proclaimed and validated a substantial discount for pleading guilty or, if one pleases, a substantial increment of punishment for going to trial.

C. *Comparative Comments*

The absence of a professional prosecutor and the traditional reliance on magistrates for a variety of administrative and crime control tasks have converged to make the magistrates' courts the natural vehicle for the English response to the strains created by the volume of crime. Professor Langbein has shown that the criminal trial was a brusque enough procedure in the eighteenth century in England, largely run by the judge with little intervention by counsel and exhibiting a good deal of the inquisitorial aspect of the continental European version.[359] During the nineteenth cen-

353. *Id.* at 11.
354. Further documentation of covert plea bargaining practices is to be found in Baldwin and McConville, *Plea Bargaining and the Court of Appeal*, 6 BRIT. J. L. & SOC'Y 200 (1979).
355. Reg. v. Davis, [1980] 2 Crim. App. (S.) 168.
356. Reg. v. McPhee, 1980 CRIM. L. REV. 445.
357. Reg. v. Vinson, 1982 CRIM. L. REV. 192.
358. Reg. v. Ross, 1984 CRIM. L. REV. 53.
359. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978);

tury, the form of jury trial on indictment became more and more elaborate, and this development, together with the growth of a sophisticated police force who brought more and more criminals before the court, led to the urgent necessity for devising speedier modes of disposition. There may have been an appreciable rise in the real crime rate associated with the Industrial Revolution, but in all western societies the growth of more efficient policing was the decisive factor that rendered it impossible, or at least quite uneconomic, to offer an elaborate criminal trial to most offenders.[360]

Too much regret is often voiced over this development, as we deplore the perfunctory processing that we extend to many defendants who have possibly committed offenses of some gravity. If we elevate above all else the ideal of affording an elaborate adversarial trial to all those who are apprehended on serious charges, then we had better apprehend very few offenders, for that is the only way we could begin to fulfill this ideal. But such a course—the restriction of arrests to numbers that could be comfortably managed by the superior courts—would clearly be absurd.[361] It makes more sense to continue energetic policing while we tailor our judicial response to what can reasonably be managed. Of course this still leaves many vital choices to be made. There are many different kinds of possible modifications of the full adversarial trial or ways of avoiding a trial altogether, and there remains the underlying question of how much in the way of resources we are willing to devote to this area of criminal justice administration.

Within a restricted range of options, all systems are confronted with the necessity of allocating criminal dispositions, in some fashion or another, to a simpler mode than that of the fully contested trial in its most elaborate form. This allocation may be by the fiat of some official or it may be effected with some degree of election exercised by the accused person. If an official's discretion is decisive or even involved, then the relevant officials may either be a judge (magistrate) or the prosecutor or both. Obviously there must be either published or tacit standards for the identification of cases as appropriate ones for summary disposition or a guilty plea coupled with concessions. The appropriateness may consist in the character of the offense or the offender, or in some quid pro quo offered by the offender, or in a combination of these factors. Similarly, if the offender is permitted to exercise some power of election, then he must obviously be able to recognize some advantage in the choice he makes. Thus, if the system as a whole is interested in a large number of summary dispositions,

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Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983).

360. For a general survey of the change in the crime rate over several centuries, see Gurr, *Historical Trends in Violent Crimes: A Critical Review of the Evidence* in 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 295 (M. Tonry and N. Morris eds 1981).

361. While the number of persons in prison is increasing, there is presumably some limit to the number we can imagine imprisoning, and it is rather clearly the case that no rational standard could dictate actually sending to prison all of those who are charged with an offense that carries the possibility of a prison sentence. If it is the case that even many of those charged with felonies should not be sent to prison, then the economics of a system that afforded elaborate adversarial trials to hundreds of thousands of defendants when there was no realistic prospect of incarceration would surely be questionable, even if we could in some sense "afford" to abolish plea bargaining.

it must decorate this mode of procedure with what are, at the least, perceived by defendants and their advisers as substantial advantages. Some blend of these features will be found in every western jurisdiction confronted by swollen criminal calendars.

In France, for example, the decision is made by officials—by consultation between the police and the prosecutor. In cases that seem to the prosecutor to be appropriate, a felony offense (*crime*) will be reduced to a misdemeanor (*délit*) and sent for disposition to the lower court (*tribunal correctionnel*).[362] This court does not accept guilty pleas, but trials there are remarkably expeditious because in the great majority of cases the accused does not contest his guilt and will make an admission or confession in open court. It is generally taken to be the case that some prior indication by the defendant that he will cooperate in this manner is an important factor in the reduction of the charge.[363] Thus, while it might be asserted that technically there are no guilty pleas in France, and *ergo* no plea bargaining, this could well be thought of as the merest formalism, concealing the reality of a system not very different from that which we find in some American jurisdictions. French summary trials in the *tribunal correctionnel* may last no more than five or ten minutes,[364] while an American guilty plea, in a jurisdiction that follows a procedure akin to that laid down in Rule 11 of the Federal Rules of Criminal Procedure, may occupy an hour or more. In such circumstances, the boast that a system does not tolerate guilty pleas but always holds a trial rings somewhat hollow.

The American system of plea bargaining involves the active participation of officials, certainly the prosecutor and in some jurisdictions the judge, in discussion and perhaps negotiation with the defendant or his attorney. If we were to resort to stereotypes of national character, perhaps we might see this as the classically American operation of a free market economy compared with the regulatory system imposed in France by authoritative officials. The American system has indeed been defended as the intelligent creation of a free market in which the levels of concession and the numbers of trials will be determined by the choices of the parties in the light of their preferences, so that the ultimate mode of disposition will spell out the kind of result that society must be taken to find acceptable.[365] If we wanted different outcomes, we would have to reshape a variable as, for example, by spending enough money to create more prosecutors, more trial parts and more public defenders. While we maintain a current level of spending, this suggests a certain acceptance of the current situation, no matter what protests may appear on the surface.

This free market model of American plea bargaining is subject to some obvious criticisms. In the first place, a free market assumes that decisions will be made by persons capable of rational calculation of their inter-

362. *See supra* text accompanying notes 121-26.

363. This is not the universal view. *See supra* note 126.

364. This comment is based on the author's observation of French trials in *tribunaux correctionnels* in Paris and in Aix-en-Provence.

365. For a presentation of this kind, see Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

ests or preferences in the light of reasonably accurate information. For a criminal defendant, this would entail access to competent legal advice and the absence of oppressive coercion. It may be that most American defendants receive reasonably competent legal advice, and, in any event, that is a general question pertaining to all stages of the system and not one peculiar to plea bargaining procedures. But it is strongly arguable that American plea bargaining procedures are endemically subject to the intrusion of unacceptable forms of coercion, arising from the nature and degree of the participation in the process by officials. Once a defendant is subject to coercion, his decisions may still be rational, but the market is no longer "free." Part of the problem is to state the criteria by which certain "preferences" are characterized as legitimate aspects of a free market while others are stigmatized as unacceptably coercive.[366]

An American phenomenon that has raised charges of coercion involves cases where the judge participates in negotiations with the defendant. In the worst scenario, the defendant who refuses an offer may find himself put on trial before the very judge whose offer he spurned.[367] Even if this is not the case, the defendant will be tried by a judiciary earlier represented in negotiations by a member whose offer, perhaps not always extended in the tenderest fashion, was rejected. The possibility of vindictiveness at sentencing after a trial must surely loom before the defendant in such a case. By vindictiveness here we mean a degree of sentence beyond that which might be deemed appropriate for the offense and the offender in neutral circumstances. Vindictiveness is not used to indicate that the sentence will likely be higher than one which would have been imposed after a plea, since a plea bargaining system naturally entails the idea of an incentive in the form of a sentence discount after a plea. But the discount must descend from and be calculated in terms of a baseline sentence that is appropriate for this offense and this offender after a trial. A vindictive sentence, on the other hand, refers to one which ascends beyond the appropriate sentence and is imposed only because the defendant refused to cooperate by pleading. While it is impossible to assess the actual incidence of such vindictiveness, it may be enough to notice the natural appearance of this danger to an accused person.

Where the prosecutor participates in plea bargaining (and how could there be any such practice without his participation?), the danger of an appearance of vindictiveness looms even larger. This may arise in many ways, some blatant and overt, and others subtle and only to be feared or suspected. The blatant variety is illustrated by the facts of *Bordenkircher v.*

366. For a criticism of Easterbrook's free-market model, *supra* note 365, see Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEORGETOWN L.J. 185, 216-19 (1983).

367. *See* Frank v. Blackburn, 696 F.2d 873 (5th Cir. 1980) (en banc) reversing the panel decision reported at 605 F.2d 910 (5th Cir. 1979). In that case a judge had offered the petitioner a sentence of 20 years in exchange for a guilty plea. The petitioner refused the offer, went to trial before the same judge and was sentenced to a term of 33 years. In federal habeas corpus he argued that the sentence could only be understood as vindictive. A panel of the Fifth Circuit Court of Appeals agreed and quashed the sentence, but on rehearing before the court en banc the panel was reversed by eighteen judges, with five judges dissenting.

Hayes[368] where a defendant who had refused a plea offer was thereupon reindicted for the offense of being a habitual criminal, which carried a mandatory sentence of life imprisonment.

The Supreme Court, by a narrow majority, found that the practice followed in *Bordenkircher* did not constitute a species of prosecutorial vindictiveness that violated due process.[369] But even if *Bordenkircher* had been decided the other way, the enforcement of a ban on the broader concept of vindictiveness would be inordinately difficult. Prosecutors may "punish" a defendant for not pleading with a number of responses of commission or omission. Charges may be dropped, counts eliminated, consecutive sentences called for or not called for, adverse sentence recommendations made, or clement ones or none at all and so forth. In the great sweep of prosecutorial discretion, the task of singling out vindictiveness by a judicial inquiry is impossible except in the most blatant cases—though it appears from *Bordenkircher* that even in such cases the courts will be reluctant to take action. Well aware of this phenomenon, the defendant will rarely be able to feel free of the threat of counter measures if he refuses a plea.

Even more insidious is the possibility that the practice of trading infiltrates and contaminates the very baseline idea of the appropriate charge and the appropriate sentence for a particular act committed in a particular way. When the whole trial scenario becomes exceptional and the defendant who insists on it is thought of as "recalcitrant" in the sense of having refused what authority regards as a reasonable offer, then the very distinction between an appropriate sentence that would be discounted in favor of a guilty plea and a vindictive sentence that unreasonably rises above the appropriate one becomes blurred and is in danger of collapse. Beneath such practices lurks the further corrupting taint that the pervasive odor of vindictiveness will pressure an appreciable number of innocent defendants into pleading guilty.

Is the English system in any way superior with respect to dangers such as these? First it must be recognized that no system that depends upon sharp incentives to induce a summary mode of disposition can wholly escape the possibility that innocent people will sometimes renounce the opportunity for a deeper and more refined inquiry that would be afforded them with a jury trial in a superior court. But there are features of the English system that at least lessen the possibility of personal confrontational threats that so pervade the American system. We must distinguish here between (a) disposition in the Crown Court, (b) disposition in the magistrates' court, and (c) the way in which decisions are made as to which mode of disposition will be applied.

As we have noted earlier, there have been some suggestions that strong pressure to plead guilty is sometimes put on an English defendant by his own barrister immediately prior to Crown Court appearance.[370]

368. 434 U.S. 357 (1978).

369. For a criticism of the decision in *Bordenkircher*, see Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 762-63 (1981).

370. *See supra* text accompanying notes 325-43.

Even though this pressure does not directly emanate from a prosecutorial officer, it would be a disturbing phenomenon if there were indications that it were widespread in circumstances going beyond a vigorous attempt to awaken the defendant into perceiving what may be best for him. We have also seen earlier that in the Crown Court conferences between defense and prosecution counsel there may be a primitive charge and sentence bargaining in which the judge may sometimes participate. But this process appears to be much less structured than in the United States and much less consistent in bringing strong pressure to bear on the defendant.

Bordenkircher,[371] for example, could not happen in England since the charging process is settled in a way that offers no opportunity for negotiation, and the prospect of reindicting for a higher charge as a penalty for not pleading guilty hardly presents itself. This is, in part, because of the way in which English charging practices and negotiating practices are profoundly affected by the absence of a professional prosecutor's office that handles the proceedings from a very early stage to its conclusion. The presence of a professional prosecutor thus turns out to be a mixed blessing. We have earlier suggested that the English system has suffered quite seriously from the absence of such an office. At the same time it may have reaped the benefit of avoiding the excesses of the extreme version of plea bargaining that from time to time takes place in America. A fundamental problem in criminal justice systems is to secure the efficiency and rationality that a professional prosecutor's office can bring while fending off the dangers of a discriminatory or oppressive exercise of discretion. The introduction of a corps of professional prosecutors may soon confront the English with this problem.

If charge bargaining is rudimentary in Crown Court proceedings then sentence bargaining is also less advanced than in America. Recommendations for sentences are not made by prosecutors, and we have seen that there is a fairly clear tariff of reductions for guilty pleas that amounts to about 40% of the time that would be imposed as an appropriate sentence on a conviction after a jury trial.[372] The inducement to plead guilty in England may thus be very strong, but it is extended generally in the form of fairly reliable expectations of discount at the sentencing rather than bargained for confrontationally as may often happen in the United States in cases of some gravity.

If disposition in the magistrates' court is offered and elected, then there remains the choice between a guilty plea and a summary trial. Here, there is again the possibility of a sentence differential with some concession being offered for a guilty plea. This can no doubt be influential. But it is hard to see it as rising to the level of coercion since the magistrates are constrained by a low sentence ceiling, and no prior negotiations take place with any prosecuting official on whether or not to go to trial. An interesting question is whether this picture might change somewhat with the further professionalization and regularization of a prosecutor's office.

371. *See supra* note 368.
372. *See* the discussion of Reg. v. Ross, *supra* text accompanying note 358.

Another question is whether the magistrates evince vindictiveness by exercising their power to commit a defendant to Crown Court for sentencing more frequently in cases that go to summary trial than in similar cases where the defendant pleads. There does not appear to be a research study on this point. The extent to which police advice bears on the defendant's decision whether or not to plead guilty and how that can be counterbalanced by early legal advice, as with the expanding duty solicitor program, also await further research.

With respect to the basic decision confronting so many defendants in England, whether to accept the offer of summary disposition or insist on a Crown Court trial, it would seem difficult for coercive pressure to penetrate the English institutional structure. The sharp division between magistrates' court and Crown Court and the lack of any continuity of personnel means that the only pressure lies in the profound attractiveness of the low penalty ceiling in the magistrates' courts as compared with the much higher one that would be applicable after jury trial. This differential is, of course, built in as the heart of the system, and its benefits are available to every defendant whose case is certified by the magistrates as suitable for summary disposition. The practice cannot, therefore, be seen as coercive in the strong sense referred to earlier as sometimes characterizing the position of defendants in America, as permitting a prosecutor in negotiations to make a threat peculiar to the circumstances of the defendant's case. Such a personal confrontation simply will not occur in England. It may, indeed, be the case that the attractions of summary disposition are so great that some innocent people will be unwilling to take the risk of going to jury trial. But this danger is neutralized by the fact that this choice does not commit them to a guilty plea, for they may still opt for summary trial.

In summary, dangers of unacceptable coercive pressure being perceived by defendants with respect to fundamental decisions on modes of disposition seem markedly smaller in the English system than in American ones. This is the result of the absence of a professional prosecutor, the sharp division between the personnel who operate in the lower courts and those who operate in Crown Court, and the open and public nature of the English "triable either way" practice, which is the very cornerstone of their system. Even if defendants in England are in some measure pressured into electing summary disposition, they retain the option of putting the charge to trial and are not obliged to pay for their sentencing concessions in the currency of pleas.

VI. COURTROOM STYLES

A. *Trials in Superior Courts*

Legislation of the last two decades has had the aim of curbing the increase in the number of indictable offenses that go to trial before a jury in the Crown Court. Statistics may conceal this to some extent since one avenue of achieving this result (after the Report of the James Committee led to the Criminal Justice Act of 1976) was to make purely summary some

offenses that had previously been indictable and triable either way.[373] The other and principal technique, as we have seen, has been to reduce the number of offenses that were triable only in the Crown Court by making some important instances of them triable either way.[374] Thus, while the proportion of jury trials to prosecutions for indictable offenses has declined slightly, the absolute figure has continued to increase because of the growth in the overall number of prosecutions initiated for indictable offenses.[375]

When trial before a jury occurs (this will be in the Crown Court), its style is markedly different from its American counterpart. England may be the cradle of the adversary system, but the child it reared never grew to the giant proportions of the sibling who crossed the Atlantic. If the adversary model refers only to a mode of presenting evidence and the general recognition of the right of an accused person not to be subjected to questioning in the courtroom, then England unquestionably has such a system; however, the strongest aspects of the model found in the United States are absent in England. Notable among these is the relatively passive role of the judge in an American criminal trial.[376]

Either judge or lawyers must assume the dominant role in a criminal

373. The following are examples of offenses which were triable either way but which became purely summary after the passage of the Criminal Law Act, 1977, ch. 45 sched. 1: Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6 ch. 6, § 5 (conduct conducive to breaches of the peace); Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., ch. 86, § 9, 19 (intimidation of or violence towards others to abstain from doing what they have a lawful right to do). These offenses are often important in connection with industrial disputes.

374. Examples of offenses which were triable only in the Crown Courts prior to 1978 but which became triable either way with the implementation of the Criminal Law Act, 1977, ch. 45, sched. 2 are: Offences Against the Person Act, 1861, ch. 100, § 16 (threats to kill); Debtors Act, 1869, ch. 62, § 13 (transactions intended to defraud creditors); Sexual Offences Act, 1956, ch. 69, § 6 (unlawful sexual intercourse with a girl under 16).

375. For the period 1977-1981 the relevant figures for defendants aged 17 and over, expressed in thousands, are as follows:

	Proceeded Against for Indictable Offenses	Committed for Crown Court Trial	Committals as Percentage
1977	375	74	20
1978	364	72	20
1979	372	66	18
1980	409	72	18
1981	428	79	18

CRIMINAL STATISTICS ENGLAND AND WALES, 1981, CMD. 8668, at 119 (1982) (Table 6.3).

376. The passive role of the American judge in his relations with the prosecutor relating to charging, dismissals, and guilty pleas has been described in A.S. GOLDSTEIN, THE PASSIVE JUDICIARY (1981). The aspect of the judge's role discussed in the text relates to his conduct of the trial, his "umpireal" role of holding the ring for counsel to conduct the fight. *See* Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U.L. REV. 156 (1976). This mode of judicial behavior seems to have been a creation of the nineteenth century. *See* Langbein, *The Criminal Trial before the Lawyers*, 45 U. OF CHI. L. REV. 263 (1978). The analogy with games is often made. "We are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth but in order that they may answer the question, 'How's that?' This passive habit seems to grow on them as time goes on . . . . Even in a criminal cause, even when the king is prosecuting, the English judge will, if he can, play the umpire rather than the inquisitor." POLLOCK AND MAITLAND, 2 HISTORY OF ENGLISH LAW 667 (1895).

trial. The archetypal system of judicial dominance is the continental European one where the attorneys, both the state prosecutor and defense counsel, play a relatively passive role and may not directly question witnesses but only convey to the court supplementary questions that they think ought to be asked.[377] At the other end of the scale is the American model where, for all his formal power, the judge often dares not interfere lest he usurp the independence of defense counsel and thus expose a conviction to attack on the ground that the court rendered counsel ineffective by excessive interference. Sometimes, this is perversely put forward as a justification for the court's failure to intervene to protect the rights of the defendant, on the ground that defense counsel's failure to take steps to that end might have been a tactical ploy that the court would have upset by stepping in.[378]

The English style lies somewhere between these extremes. English judges worry little about reversal on appeal on the ground of their usurpation of counsel's role. The English tradition is of a strong judge and restrained counsel. The court will often question a witness vigorously in England and, at the end of the case, will present to the jury not the rigorously neutral "pattern" instructions that are characteristic in the United States, but a summary and marshalling of the evidence that may contain frank judgments on the credibility of witnesses and a view of the case that often comes close to a strong invitation to return a particular verdict. Appellate courts in England recognize the propriety of this practice and reversals on the ground of misdirection are rare.[379]

While judges are forthright and dominating, counsel in England for a variety of reasons are correspondingly restrained. As to the prosecution, a principal reason is the English tradition, echoed but hardly so devotedly observed in the United States, that the state is not particularly interested in conviction but only in doing justice. Thus, a prosecution conducted with great passion would be regarded as contrary to professional ethics and positively unseemly.[380] In this regard it is also important that there is no prosecutorial corps and all counsel for the Crown in Crown Court are private barristers. Second, points of evidence are not much debated in England and objections to the other side's examination or cross-examination are remarkably infrequent compared with American practice.[381] The reasons why this is so appear to be subtle. It has something to do with an informal practice of consultation and settling of potential sources of controversy before trial, either by counsel alone or in an informal meeting with the judge. Again, it is connected with the lack of a direct relationship between the barrister and the lay client (the defendant), so that there is no

377. *See* L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 97-109 (1977).

378. "[A court] must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system." United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc).

379. A summary of English criminal trial style and the appellate process is found in D. KARLEN, *supra* note 1, at 167-93, 209-28 (1967).

380. *Id.* at 176.

381. *Id.* at 186-87.

motivation to impress the client with forensic histrionics. But most of all it stems from the camaraderie of the small English bar where attempts to push too vigorously with an impermissible or doubtful line of questioning would simply result in a loss of esteem and reputation.

Third, counsel are much less preoccupied in England than in the United States with the insertion of objections or applications into the record for the purpose of preserving points for appeal. This is in part because reversal on appeal is so rare in England that such efforts would rarely carry even a speculative hope of success.[382] Another reason of great importance is that the English appellate courts do not insist in the way that American courts do on the preservation of points by way of objection. Procedural default is not a doctrine that has gained hold in England. As long as an error is apparent on the face of the record, the English appellate courts will consider it and give relief if it was sufficiently prejudicial to lead to a potentiality for a miscarriage of justice. Constant objections stemming from a desire to overlook nothing are therefore not a feature of English procedure. Occasions for them in any case would be less frequent than in the United States due to the absence of exclusionary rules based on constitutional rights on which we shall comment further below.

Another feature contributes to the comparative terseness of English trial procedure even in the Crown Court before a jury. The picking of the jury generally occupies no time at all and is never the subject of very protracted proceedings as it often is in the United States.

1. *The Defendant as a Witness*

In a French trial the accused will be questioned by the court and, while of course he cannot be physically compelled to answer, his failure to respond will be virtually tantamount to an admission of guilt. In England, as in the United States, no questions will be put to the accused unless he elects to take the stand, but a very important aspect of English trials is that the defendant is much more likely to testify than is the case in America. There are two principal reasons for this.

First, the English permit comment by the court, though not by prosecuting counsel, on an accused's failure to testify. Many English judges in cases where they consider it appropriate will make such a comment to devastating effect, so that a failure to testify may amount to a virtual act of suicide.[383] Second, in England, the decision to testify by a defendant in a

382. "In England the trial judge is the central and dominant 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 commenting upon the evidence. Because the right of appeal is very limited, everyone assumes that what he does will probably be decisive and that the judgment entered by him 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 limited 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 control from the trial court to the appellate court." *Id.* at 176.

383. *See* G. WILLIAMS, THE PROOF OF GUILT 58-63 (1958). The prosecutor's power to comment was removed by the Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, 1(b) which, however, left the judge's power undisturbed.

jury trial does not automatically expose him to impeachment on the basis of his prior record as it would in the United States. Only if he has put his good character expressly into issue or if he has attacked the character of a co-defendant or a witness for the prosecution is such evidence permitted and then at the discretion of the court.[384] This English balance of advantage—a deadly threat if the accused does not testify, but a large measure of protection if he does—has the result that the case in England where the defendant fails to testify is exceptional, whereas the defendant's silence is becoming the common practice in trials in the United States.

2. *The Jury*

The modern English history of jury trial is a chequered one. It is only very recently that the right to a jury selected from a random cross-section of the population has come to be realized or even recognized in the governing statutes. Until 1972 a juror had to be the occupier of a dwelling with a certain taxable value,[385] so that even the families of householders were not eligible, thus in effect incidentally disqualifying the great majority of women.[386] Since the Criminal Justice Act of 1972 and the Juries Act of 1974, jury panels have in theory been chosen at random from those listed on the electoral register.[387] This vast expansion of the jury pool has led over the last decade to rumblings of disquiet from the English legal establishment.

The democratization of the jury has been thought by some to have led to acquittals in cases where there should have been convictions.[388] In a few cases of trials of leaders of criminal gangs, jurors were bribed or suspicion was rife that this had happened.[389] More recently, the opinion has been

384. Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(f).

385. In London and Middlesex the valuation of the dwelling for property tax purposes had to be at least 30 and in other areas 20 pounds. H. HARMON AND J. GRIFFITH, JUSTICE DESERTED 14 (1979) [hereinafter referred to as JUSTICE DESERTED].

386. *Id.* In 1966 Lord Devlin described juries as "predominantly male, middle-aged, middle-minded and middle-class," P. DEVLIN, TRIAL BY JURY 20 (1966).

387. Criminal Justice Act, 1972, ch. 71, § 25; Juries Act, 1974, ch. 23, § 1.

388. Police organizations have made this claim. *See* J. BALDWIN AND M. MCCONVILLE, JURY TRIALS 9, n.27 (1979), citing the 1966 survey of the Association of Chief Police Officers, the 1973 Metropolitan Policy Survey and R. MARK, MINORITY VERDICT (1973). Nonetheless, no significant difference was found by the Home Office Statistical Department when it compared the rate of acquittals by juries over a three month period in 1974, after juror qualifications had been liberalized, with the rate of jury acquittals over a three month period in 1973. J. BALDWIN & M. MCCONVILLE, *supra* at 96, n.24.

389. Between September 1981 and June 1982, there were fourteen known approaches to jurors at the Old Bailey. F. Cooper, *London Letter* NEW YORK LAW JOURNAL April 1, 1983, at 2. Although Cooper reports that only five cases were stopped in trial, *id.*, the Daily Telegraph reports that twelve cases terminated in a mistrial due to jury tampering during that period. I. Henry, *Spate of Jury "Nobbling" May Lead to Inquiry*, Daily Telegraph, June 3, 1982, at 10. These stoppages are said to have wasted approximately 280 days of Old Bailey court time which is equivalent to the loss of one part's entire work load (there are twenty-three parts sitting at the Old Bailey) for a single year. Cooper, *supra.*

Perhaps even more troubling than the cost in court time and money is the degree of effort and organization involved in attempting the obstruction of justice. As one prosecuting counsel said in a perversion of justice conspiracy trial following a case in which four jurors were suspected of having accepted bribes:

> If you are going to try to nobble [bribe or corrupt] jurors, whose identities are selected and whose addresses are never disclosed, they have to be followed to their homes from

expressed that with prosecutions arising out of the convictions of members of Asian and black minorities as a result of urban riots, there have been perverse acquittals which have been ascribed to the presence of minority members on juries.[390] Perhaps because of this distrust there has been a series of steps in the last fifteen years that are seen by some commentators as tending to invade traditional concepts of the jury's function and role. The first was the Criminal Justice Act of 1967 which permitted majority verdicts of ten jurors in the traditional English twelve-person jury.[391] This applies where the jury has failed to come back with a unanimous verdict after at least two hours of deliberation.

In 1973 a Practice Direction was issued to all judges forbidding the practice of counsel conducting a voir dire inquiry of the jurors before empanelling.[392] The voir dire had never been entrenched with any depth in English practice, but in cases where they believed it was warranted, some judges had formed a practice of allowing a modest voir dire to take place.[393] This is no longer possible.[394] In the same year, the Lord Chancellor made an order that the jury list made available to both sides before the beginning of a trial should no longer contain a notification of jurors' occupations.[395] In so doing the Lord Chancellor was purporting to exercise a power conferred upon him by the Courts Act of 1971 giving his department the control of jury panels.[396] It is doubtful whether the statute contemplated the kind of change in practice effected by the Lord Chancellor, but the innovation succeeded; information which might always be of use to the two sides, perhaps especially in many of the controversial cases arising in England out of industrial labor disputes, is no longer available.[397] In 1977, as we have noted before, a number of offenses was either

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this court, inquiries made about their life styles and their approach to life. There may have to be copious inquiries made about their place of work, who their friends and neighbors are, where they drink, who their relatives are, so that a suitable middleman can be found willing to make a direct approach.

Cooper, *supra.*

390. It was reported in 1982 that government law officers were studying the transcripts of a trial in which the defense had successfully challenged the largely white composition of the jury panel and where the jury subsequently acquitted twelve young Bradford Asians of manufacturing bombs despite their admission of the relevant acts. *Deemed Unfit to Serve* NEW STATESMAN, July 2, 1982, at 10.

391. Criminal Justice Act, 1967, ch. 80, § 13, now to be found in the Juries Act, 1974, ch. 23, § 17.

392. JUSTICE DESERTED, *supra* note 385, at 15.

393. See Reg. v. Kray, 53 Crim. App. 412 (1965).

394. JUSTICE DESERTED, *supra* note 385, at 15; J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 91. *But see Juries on Trial,* THE ECONOMIST, May 8, 1982, at 50, which reported that at the trial of twelve Asian youths accused of manufacturing petrol bombs for use in the Bradford riots, the judge permitted both the prosecution and defense to ask potential jurors a set of four questions as a means of screening racially prejudiced jurors. This is the trial referred to *supra* note 390. Also a voir dire can sometimes be indirectly procured by challenging a juror for cause which requires the court to try the issue. Juries Act, 1974, ch. 23, § 12(1)(b).

395. See Reg. v. Drummond, 119 S.J. 575 (1975); JUSTICE DESERTED, *supra* note 385, at 15. Shortly after the Lord Chancellor's directive was issued the Bar Council publicly criticized it as not being "in the interests of the administration of justice" stating that the "new directive will hamper both the prosecution and defense." J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 90, n.7.

396. Courts Act, 1971, ch. 23, § 32(2). *See also* JUSTICE DESERTED, *supra* note 385, at 15.

397. JUSTICE DESERTED, *supra* note 385, at 15-16.

made triable only summarily or made triable either way. Important offenses against public order were in this category.[398] In the same year the Criminal Law Act also reduced the defendant's peremptory challenges from seven, to which they had shrunk over the years, to three.[399]

These changes in law and practice would be less open to question if it were clear that they were even-handed. But quite the reverse seems to be the case. In the first place, while jurors are now chosen from an untainted pool, there is no truly random procedure for selecting the venire from the pool. Court officials make this choice under the overall authority of the Lord Chancellor. Furthermore, Baldwin and McConville report instances of court clerks being ordered to select twice as many men as women.[400] They also point to the sharp underrepresentation of members of minority groups for which the system provides no explanation.[401] In the prosecution of members of the Welsh Language Society in 1978 for conspiracy to engage in acts of trespass, disorder, and damage, the jury in a very Welsh speaking part of Wales contained a minority of people with Welsh names and only two persons who spoke Welsh.[402]

The prosecution's power corresponding to a peremptory challenge, known in England as asking a juror to "stand by," is unlimited, at least until the panel becomes exhausted,[403] while the defense is allowed only

398. *See supra* text accompanying note 289.

399. Criminal Law Act, 1977, ch. 45, § 43. *See also* JUSTICE DESERTED, *supra* note 385, at 19-20. In 1965 a departmental committee, known as the Morris Committee, found that peremptory challenges were exercised in only a small number of cases. J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 91, citing MORRIS COMMITTEE ON JURY SERVICE, CMD. 2627 (1965). Baldwin and McConville's research in Birmingham in 1979 appears to confirm the findings of the Morris Committee. The authors found that

> . . . the right of challenge was exercised in no more than one trial in seven, and only exceptionally was there more than a single challenge in a case. In the vast majority of cases, the challenge was exercised by the defence.

J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 92. However, another study, examining the use of peremptory challenges in London, found that defendants there employed the procedure more frequently than did Baldwin and McConville's Birmingham subjects. *Id.* at 93. The defense is of course still permitted an unlimited number of challenges for cause. *Id.* at 91-92.

400. The Birmingham practice of summoning twice the number of men as women was apparently instituted in the expectation that large numbers of women would seek to be excused due to family commitments, though this might surely be thought a good reason for summoning twice as many women as men. This practice has since been discontinued. J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 97 and 97 n.25. In the United States any statute or institutionalized practice which systematically interfered with or impeded the right of women to serve on juries would be unconstitutional as a violation of the Sixth Amendment principle that the jury must aim at being representative of the community. *See, e.g.* Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

401. J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 97-98.

402. JUSTICE DESERTED, *supra* note 385, at 21-22. *But see* Reg. v. Benns, 1982 CRIM. L. REV. 522, 823 in which the judge, presiding over a trial of minority defendants accused of riotous assembly, contemplated the possibility of "standing by" jurors to achieve a racially balanced jury.

403. Reg. v. Parry, 7 C. & P. 836 (1837). In a survey conducted by the Metropolitan Police Force of 341 trials held in the Inner London Crown Court and in the Old Bailey during two months of 1976, it was found that very few jurors were asked to stand by by the prosecution. A larger number of peremptory challenges was exercised by defense counsel. J. BALDWIN AND M. MCCONVILLE, *supra* note 388, at 93 n.15. *But see* JUSTICE DESERTED, *supra* note 385, at 20, which notes that in a picketing case the Crown asked six jurors to stand by and asserts that the convention that prosecuting counsel exercise the right to stand by jurors sparingly is being increasingly ignored, particularly in cases with "political overtones." *Id.*

three peremptory challenges.[404] Inquiry into the background of members of the jury panel, known in England as jury "vetting," has occasioned controversy in recent years. In 1978, in response to allegations arising out of several trials, the Attorney General issued a statement in which he conceded that "a practice had grown up" whereby prosecuting counsel might ask the police "to check police records for information concerning potential jurors. The practice appears to have been followed in only a small number of important cases and was directed to producing an unbiased jury not likely to be subject to outside pressures."[405]

The case of *Mason*[406] in 1980 clarified that it was fairly routine procedure for local police to inform prosecuting counsel of any convictions recorded against members of the jury panel and that the prosecutor might sometimes "stand by" a juror with a criminal record although the convictions did not amount to a disqualification. To American eyes this might be a perfectly proper exercise of a peremptory challenge but the practice raises questions about the inequality of access to information about juror backgrounds.[407] After the *Mason* case, the Attorney General laid down guidelines providing that except for checks for previous convictions of jurors, no further checks should be made except with police "special branches," units which deal with potential subversion and terrorism. Furthermore, such a check may only be made after a recommendation by the Director of Public Prosecutions and with the authorization of the Attorney General. Authorization is only to be given when national security might be threatened or when the case involves allegations of terrorism. Both the court and defense counsel must be told if such a check is conducted and defense counsel may request assistance from the Attorney General to obtain information under the guidelines.[408]

In 1982 the government introduced an amendment to the Administration of Justice Bill, 1982,[409] which sought to bar from juries all persons convicted in the previous ten years of any offense which carries a possible jail sentence of over three months, regardless of what sentence was actually imposed. This would have been in sharp contrast with the present rules under which only persons who have actually served a prison sentence of more than three months are barred.[410] The change would have been far-reaching and would have applied to possibly millions of persons over a decade who are convicted of minor offenses against public order, minor drug offenses, or small thefts. Most of these people do not serve any prison sentence though the offenses carry a maximum of more than three months imprisonment. While the proposed amendment was not enacted, its very proposal is evidence of the strength of the movement to control the English

404. Juries Act, 1974, ch. 23, § 12(1), as amended by the Criminal Law Act, 1977, ch. 45, § 43. Where there are multiple defendants each one has three challenges.

405. Quoted in JUSTICE DESERTED, *supra* note 385, at 22.

406. Reg. v. Mason, [1980] 3 W.L.R. 626, 71 Cr. App. 157 (1980).

407. *See* Hamer v. United States, 259 F.2d 274 (9th Cir. 1958).

408. *See* 124 S.J. 547 and C. HAMPTON, CRIMINAL PROCEDURE 205-06 (1982).

409. Now the Administration of Justice Act, 1982, ch. 53.

410. Juries Act, 1974, ch. 23, § 1, sched. I, Part II, as amended by the Criminal Justice Act, 1982, ch. 48, § 77, sched. 14 para. 35(b).

jury—a movement that has a modest counterpart in the developments in several American states permitting majority verdicts.[411]

3. *Exclusion of Evidence*

It would be wrong to say that the English recognize no exclusionary rule, for it was in England that the common law developed the principle that a confession or admission must be excluded if it was involuntary in the sense of being obtained by threats or promises, and this standard is, of course, still followed by the English courts. But beyond this principle, which is essentially rooted in doubts as to the reliability of confessions obtained in such a manner, the English courts have taken only the very smallest step. Dicta in numerous cases have suggested a wide discretion in the courts to exclude evidence obtained in an oppressive or fraudulent manner, and some cases have raised the question as to the power of courts to exclude evidence obtained in violation of the Judges Rules. But hardly any cases exist where the exclusion of evidence has actually been ordered or upheld by an appellate court.

In *Reg. v. Payne*[412] the Court of Appeal quashed a conviction on the ground that the judge ought to have excluded otherwise admissible evidence because it had been obtained in a manner that amounted to the procurement of self-incrimination by fraud. On the other hand, in 1978 a Divisional Court (a court that can hear a first appeal from magistrates' courts) held that magistrates had exercised their discretion improperly in excluding evidence of drug possession obtained by the police in a blatantly illegal search of the defendant's room.[413] But, in spite of this reversal, the Lord Chief Justice, Lord Widgery, at the same time did recognize some discretion to suppress evidence tendered by the prosecution:

> [I]f the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial.[414]

The Lord Chief Justice's observations scarcely clarified the governing principle and perhaps introduced a somewhat perverse aspect. For it would seem that flagrant and open illegality is not a ground for suppressing the fruits of a search while underhand methods might not be tolerated. The general references in the remarks to the propriety of exclusion where the conduct of the police was "oppressive or . . . unfair" or "morally reprehensible" surely furnished little guidance for the lower courts.

It was against this background that the House of Lords addressed it-

411. A practice held by the Supreme Court not to be forbidden to the States by the fourteenth amendment though a majority of the Court took the view that the sixth amendment prohibits it federally. Apodaca v. Oregon, 406 U.S. 404 (1972).

412. [1963] 1 W.L.R. 637, [1963] 1 All E.R. 848.

413. Jeffrey v. Black, [1978] 1 Q.B. 490.

414. *Id.* at 498.

self to the problem in 1979 in the leading case of *Reg. v. Sang*.[415] In *Sang* the defendants, charged with possession of forged banknotes, contended that they had been led into acting illegally by the incitement of police agents. This would not be a defense in English law, but counsel argued that the conduct of the police agents might nevertheless be viewed as requiring the suppression of the evidence obtained as a result. To this end the defendant sought a hearing on his allegations. The trial court denied a hearing on the ground that it had no discretionary power to suppress the evidence.

The House of Lords affirmed the trial court's decision in language which took a very narrow view of Lord Widgery's earlier statement. Conceding the existence of a power to suppress confessions or admissions that had been obtained by trickery, as in *Payne*, Lord Diplock in *Sang* was unwilling to validate the seemingly wider standards sketched so lightly by Lord Widgery in the earlier case. Instead, he used *Sang* as a forum for emphatically declaring a general repudiation of an exclusionary rule except in the narrow sense of involuntary and fraudulently incited confessions. Lord Diplock concluded:

> It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.[416]

Lord Scarman began his speech with what seemed to be the promise of a broad and deep analysis, for he acknowledged that the case "raises profound issues in the administration of criminal justice" including the nature of the judge's role, the reach of his control of the criminal process, the idea of fairness in the criminal process, and the notion that the prosecution has rights.[417] This promise of a principled analysis was, however, immediately abandoned, and Lord Scarman's speech quickly developed into a simple reiteration of the narrow view of his brethren, including quoting with some relish the remarks of a nineteenth century English judge to the effect that "It matters not how you get [the evidence]; if you steal it even, it would be admissible . . . ."[418]

Several things are notable about the speeches of the members of the House of Lords in *Sang*. The first is the superficial, even trivial, quality of analysis from this highest appellate court, constituting a level of opinion writing that simply could not be offered by the Supreme Court of the United States to American legal commentators without humiliation for the judiciary. The opinions consist of little more than a cataloging of dicta from previous decisions in the style of an annotation, coupled with the barest conclusory references to ultimate views of the law, quite uncomplicated by any exploration of the difficult questions of principle that should

415. [1980] A.C. 402 (Court of Appeal); [1980] A.C. 425 (House of Lords).
416. [1980] A.C. at 436.
417. *Id.* at 450.
418. *Id.* at 451 (quoting Crompton J. in Reg. v. Leatham, [1861] 8 Cox Cr. Cas. 498, 501).

be canvassed in any discussion of an exclusionary rule. In this way, *Sang* constitutes a lamentable example of the less than elevated state of English judicial analysis. It displays the inability or unwillingness of English judges to identify difficult questions of principle and their readiness not only ultimately to defer to executive authority but even to pretend that no serious questions exist with regard to the exercise of that authority.

A particular spectre stalked the Lords in *Sang*. This was the prospect of trials being delayed or interrupted by the hearings that would be necessary if motions to suppress evidence were entertained for the kinds of reasons that are familiar in the United States. So repugnant was this idea that the Lords could not bring themselves to use the sensible term "hearing" for such a procedure, but rather kept referring to it cumbersomely and pejoratively as a "trial within a trial,"[419] as if its intolerable nature could somehow be demonstrated simply by employing so convoluted an epithet. Perhaps the dominance of such fears and the tepid interest in police illegalities have much to do with the absence of a written Constitution and a fundamentally entrenched Bill of Rights in England. As one commentator has observed:

> A constitutional text affects the quality of thought about civil liberties. It stimulates fine distinctions and litigation in which such distinctions can be drawn. It encourages judges to view their work as embodying a measure of national policy, vesting them with authority and responsibility to be bold in their pursuit of justice.[420]

But if this is part of the explanation of the difference between English and American law and English and American judges, it is hardly the whole of it. English judges seem to shy away from arguments relying on rights with an ingrained cultural repugnance. Their single-minded devotion in criminal cases to the question of factual guilt might seem excessive even in the eyes of much of the conservative opinion voiced in American legal circles. This may stem from characteristics of the English judiciary that also generally shape English public life. In the first place, the judiciary is still, for the most part, composed of or at least inherits the attitudes and manners of a governing upper middle class.[421] Judges indicate little consciousness of any responsibility to curb the actions of the executive, but rather exhibit a sense of an elitist mission to control crime by dealing briskly with people who can be proven to be criminals. They are not inclined to let other considerations stand in the way of this task. For example, in all the opinions in *Sang* there is no suggestion that people might have a right that illegally obtained evidence should not be used against them. It is not just that this position did not prevail, but that it was not even thought worth mentioning or perhaps indeed did not occur to their lordships at all.

It is true that the English have had less to worry about in the past

419. *See, e.g.* Lord Diplock, [1980] A.C. at 430.

420. D. KARLEN, *supra* note 1, at 105.

421. Lord Chief Justice Lane has denied in a recent article that judges are out of touch with ordinary people. "Many of them [judges]," he writes, "play golf with all sorts of people." 13 CAMBRIDGE 39, 52 (1983).

respecting police behavior than Americans have had. The revelations of widespread police brutality by the Wickersham Commission in 1931[422] eventually contributed to the Supreme Court's imposition of federal constitutional standards on the states, no doubt prompted by the apparent futility of seeking any other mode of reform given the fragmentary nature of American police authorities and the differing attitudes and impulses of local and state governments. In England and Wales, by contrast, there have been no correspondingly massive revelations of police brutality or grossly improper practices, while at the same time the police are more compactly organized and are ultimately subject to at least some degree of national supervision by the Home Secretary.

But this hardly accounts for the generally low level of sensitivity in England with respect to rights. The jurisprudence of individual rights in the United States may have mounted to prominence in the general theory of law only recently,[423] but it has always been conspicuous in American law and in the American exchange of ideas. England has relied much more on utilitarian notions. Judges who are famous for their insistence on individual rights often turn out not to be English, but Scottish (like Lord Mansfield) or Welsh (like Lord Atkin) and are sometimes deprecated by their English colleagues for this exotic penchant. The great debates on racism and sexism that have swept the United States have touched English society in a much less perceptible way in the last two decades. Any expression of concern on these issues in English middle class circles is usually treated with an ironic response and would fare even worse in white working class circles. The courts' short way of dealing with attempts to assert an exclusionary principle surely owes much to this general insensitivity.

The Royal Commission on Criminal Procedure gingerly dipped a toe into these icy waters. It regarded the "disciplinary principle"[424] or deterrence of police misconduct as the chief argument for the exclusionary rule. Looking at the American experience, it concluded that the exclusionary rule is an ineffective means of securing better compliance with legal requirements by the police, vouching for this with a quotation from the present Chief Justice of the United States Supreme Court.[425] But the Commission recognized that the exclusionary rule may also be defended by what they called "the protective principle,"[426] a reference to a claimed right by a citizen not to have introduced against him evidence obtained in an improper fashion. Even this principle seems to have made little impression on the Commission, which ultimately recommended an automatic exclusionary rule only for admissions obtained by violence, threats of

422. National Commission on Law Observance and Enforcement (Wickersham Commission) (1931).

423. *See, e.g.* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

424. REPORT, *supra* note 40, at 112, para. 4.123.

425. *Id.* at 114, para. 4.126. The quotation is from Burger, *Who Will Watch the Watchman?*, 14 AM. UNIV. L. REV. 1, 11-12, 23 (1964). The Commission also quoted from the survey of the exclusionary rule by Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970). *Id.* at 113, para. 4.125. No attention is paid to the extensive body of American literature and judicial pronouncements endorsing the principle of exclusion.

426. REPORT, *supra* note 40, at 115, para. 4.130.

violence or inhuman or degrading treatment.[427] Strangely, the English do not appear to have found any weight in the "judicial integrity" argument to the effect that the courts cannot tie themselves to an illegality by permitting improperly seized evidence to be used in a judicial proceeding.

This English excursion into debating the exclusionary principle, when compared with the American experience, reveals the dramatically different intellectual backgrounds in the two countries. The Royal Commission with its staff of researchers inquired into the American position, presumably in a serious fashion, and visited the United States to observe and to take evidence. Yet a reading of the Report demonstrates how far the Commission fell short of grasping the richness and complexity of the debate over the exclusionary rule in the United States. Its account of the American experience topples quickly into a facile acceptance of one extreme position in the debate without an adequate survey of the literature and without any searching analysis. English perceptions, or at least the perceptions of those whom an English government is likely to appoint to Royal Commissions, seem not to be equipped to recognize the strength of the arguments for an exclusionary rule.

In the end it is true that the exclusionary rule will hardly guarantee uniformly good behavior by the police and just as true that the absence of such a rule is not necessarily conducive to bad behavior on their part. In the past it may be that the English had a better behaved police than some American communities possessed, and perhaps there was a time when, for that reason, we needed the rule much more than the English. But if there is a measure of truth in allegations about the way in which the English police now harass members of minority groups and search them on the streets in an illegal or dubiously legal manner, then there may be a strong need in England for the educative impact of an exclusionary rule. But, whatever the truth may be in that respect, there still insistently rises the question of whether, quite apart from considerations of deterring the police and the reliability of evidence, the rule is called for by the best idea of what it is to have a system of criminal justice as opposed to a system of crime control. To the great credit of American jurisprudence, and perhaps in validation of the importance of a Bill of Rights, the full dimensions of that debate have been exhibited in the United States. On the other hand, in England, to the impoverishment of that system, these great questions have not even been identified in the studied reflections on the subject by that country's highest court.

B. *Magistrates' Courts*

1. *Summary Trials*

A prominent and attractive feature of English procedure is that it opens up a middle way between the guilty plea and the stifling panoply of the full adversarial jury trial. If summary disposition is offered and elected, the defendant does not have to plead guilty but may opt for a

427. *Id.* at 116-17, para. 4.132.

summary trial before the magistrates. Such a trial is without a jury and, while the rules of evidence are not suspended, evidentiary objections are rare. Indeed such trials may be conducted for the prosecution by a senior police officer, though this practice would be discontinued if the system of Crown prosecutors were introduced.

Summary trials rarely last more than a day and sometimes can take as little as half an hour, yet usually seem careful and penetrating inquiries. In one observed case, the defendant was charged with attempted breaking and entering.[428] The prosecuting police officer testified that he had observed the defendant late in the evening walking down a street and trying the doors of parked cars and, on one occasion, apparently making an attempt to force an entry. The officer further testified that when the defendant was approached he seized a bicycle parked nearby and tried to ride away but fell off. The defendant, who was represented by a solicitor, testified that he had drunk a great deal at a public house and was walking home. He said that he had felt dizzy and nauseated from the drink and had stopped from time to time to lean against a car until he felt better. He denied that he had tried any car doors and denied that the bicycle incident had taken place at all. The defense solicitor brought out on the defendant's examination in chief that he had earlier been convicted and served time in prison for a series of breakings and thefts, but that he had not been convicted for five years since his release and was now working in a comparatively well paid job as a painter.[429] There were no other witnesses.

After a few minutes deliberation the magistrate acquitted the defendant, but was at pains to point out that he was not suggesting that the police had in any way acted improperly. He had come to the conclusion that there was sufficient ambiguity in the testimony for him to be unable to find the case proven beyond a reasonable doubt.

Such procedures provide a very important outlet for a defendant between a guilty plea and submitting to the delay, formality and more severe penalties of a Crown Court trial. For the defendant who has a strong sense of innocence, as seemingly did the defendant in the case described above, personal dignity can be crushed and respect for the system lost by the pressure of the election between a guilty plea and the risks of a jury trial. Though the facts are not sufficiently known to be certain, it is possible that in the case described above a prosecutor in an American jurisdiction could threaten the defendant with a habitual criminal indictment carrying mandatory life imprisonment if he did not make an acceptable plea of guilty.[430] For such a defendant, who knows that it will be difficult to gain an acquittal without taking the stand, which would expose him to im-

428. Observed by the author in Marylebone Magistrates' Court in the summer of 1982. This trial lasted less than one hour.

429. In many cases this information would not have been brought out on examination in chief since ordinarily it would not have been open to the prosecution to elicit it on cross-examination. However, the nature of the defense in this case, that the police officer was not telling the truth in some of his testimony, would expose the defendant to impeachment as to his character and credibility.

430. The defendant certainly had at least one previous felony conviction. A second previous conviction would, in many jurisdictions, expose him to the possibility of prosecution as a habitual

peachment by his prior criminal record, such a choice is a frightful one. In the English system, provided that the offense is seen as fit for summary trial in the first place, the defendant knows that asking for a trial will expose him to no worse risk than the small differential in punishment, if any, between those defendants who plead and those who are convicted after trial in the magistrates' courts.[431]

There is no reason why such summary trial procedures could not be explored more extensively in American jurisdictions. Indeed, in some jurisdictions or cities, for example Philadelphia, a comparable procedure is already the accepted mode with a consequent reduction in the number of plea bargains.[432] A combination of waiver and/or stipulation could overcome constitutional barriers. Under decisions of the Supreme Court, a jury trial is required in any case where the defendant is subject to a possible sentence of imprisonment of six months or more.[433] But the right to trial by jury is waivable.[434] A procedure is also conceivable by which prosecutors in lower courts might stipulate that they would not seek a sentence of more than six months if the defendant were convicted, thus arguably making a bench trial possible even in the absence of waiver.[435] More radical legislation would be necessary in some jurisdictions to approximate

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offender or special, dangerous offender. *See Bordenkircher v. Hayes*, *supra* note 368, discussed in the text accompanying notes 368-71.

431. As discussed *supra*, text accompanying notes 294-95, it is possible that after a conviction the magistrate will take a severe view of the case and commit the defendant for sentencing at Crown Court, where the penalty ceiling is much higher, but as also suggested *supra* text accompanying note 298, this course is not taken in many cases, presumably because a strong trend in that direction would take away much of the incentive to elect summary disposition and thus would overburden Crown Court calendars.

432. As the Supreme Court has pointed out, "several States [have] a two-tier system of trial courts for criminal cases. . . . Some States provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to bypass the first; and still others, like Massachusetts, do not allow an accused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second." In Ludwig v. Massachusetts, 427 U.S. 618, 620 (1976), the court upheld the constitutionality of the Massachusetts system on the ground that the right to jury trial was not unconstitutionally burdened since the defendant could reach the second tier expeditiously by making an admission of sufficient facts. At the second tier a trial by jury *de novo* is available. Four justices dissented on the ground that, in their view, the Massachusetts system imposed significant burdens on the defendant, which could be avoided by allowing him simply to waive the first tier. Double jeopardy aspects of the Massachusetts system are discussed in Justices of Boston Municipal Court v. Lydon, 104 S. Ct. 1805 (1984).

Recently Professor Stephen J. Schulhofer has drawn attention to the practice in the criminal courts of Philadelphia. In the Municipal Court, which can try cases carrying up to 5 years imprisonment, there is no jury, but a convicted defendant can automatically get a jury trial de novo by appealing. Appeals are said to be rare because prison sentences are rarely imposed. In the superior court (Court of Common Pleas) many cases are assigned to a part in which there is no jury. The defendant may waive jury trial and take a bench trial in this part where there is an expectation of a large sentencing concession if convicted. Professor Schulhofer, on the basis of his research, contends that there is little or no plea bargaining in this part. He also suggests that bench trials may consume little more time than the aggregate of time consumed in arriving at and taking a guilty plea. Generally Schulhofer's study suggests that there are sharp differences in the rates of guilty pleas and in the incidence of plea bargaining among American cities, and that one of the key factors may be the availability of an efficient bench trial option. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

433. Baldwin v. New York, 399 U.S. 66 (1970).

434. Patton v. United States, 281 U.S. 276 (1930); Singer v. United States, 380 U.S. 24 (1965).

435. The language in *Baldwin*, *supra* note 433, would seem to disallow such a maneuver, but in this regard, *Baldwin* may be ripe for reinterpretation.

a system more closely akin to the English. The jurisdiction of the lower criminal courts in American cities is generally defined in terms of misdemeanor as opposed to felony cases. In order to make a case eligible for trial in such a court, the change would have to be classified as a misdemeanor.

At present this can only be done, assuming the charge is initially in the felony range, by the prosecutor's dropping some charges and proceeding only with lesser included misdemeanors or substitute misdemeanor charges. But the practice in many American cities is that such concessions are made only in return for a guilty plea. Thus, the possibility of a summary trial is not generally available, as things stand, if the initial charges are in the felony category. This is quite like the French practice of *correctionnalization* by which cases are charged down to a level where they may be disposed of in a lower court in return for an "understanding" that the defendant will not contest factual guilt.[436] By comparison, the virtue of the English procedure is that, while it may be expected that not many defendants will wish to contest factual guilt if they are allowed to go forward in the magistrates' court, it is recognized that there will be some who will, and provision is made for such a procedure.

Deep changes in some American practices, breaking the mold of plea bargaining, would have to take place before such a mode of procedure could develop.[437] First, it is unlikely that prosecutors will turn over to a wholesale practice of charging down without receiving the traditional quid pro quo from the defendant. Second, it would not be an unalloyed improvement if they did. For the merit of the English "triable either way" concept is that it does not conceal what the accused is charged with doing. It merely characterizes the particular case as one that is suitable for summary disposition without concealing or in any way obscuring the gravity of the general category of the offense under which the conduct falls. This process retains a considerable degree of frankness and affords an opportunity for public scrutiny, which is largely lost in a background of prosecutorial charging down, whether this be as the result of bargaining or a unilateral expression of bureaucratic need to keep cases out of the superior courts. Simply charging down will often tend to trivialize the nature of the wrongdoing and shroud the kind of decision the system is making when it permits or compels summary disposition.

To achieve the openness of the English approach, legislation would be necessary to parallel the English classification of most offenses as triable either way. If the maximum penalty for a summary disposition were six months, then a bench trial could be had without constitutional objection. Maximum sentences would have to be annexed to alternative modes of disposition. Undoubtedly, complex equal protection arguments may be expected. In addition, the avoidance in lower courts of constitutional objections to evidence entailing lengthy hearings would probably be neces-

436. *See supra* note 126 and accompanying text.

437. But some American cities may have already worked out procedures which, while not quite on the same lines as the English one, embody many of the same advantages. *See* the account of the Philadelphia procedures taken from Schulhofer's study *supra* note 432.

sary and would present difficulties. Perhaps this might be achieved by the attachment of a compulsory waiver requirement for certain kinds of motions and objections as a condition for the election of a summary disposition. Again, a constitutional challenge would no doubt be raised to such a practice of annexing waivers of constitutional rights as a precondition for the exercise of an otherwise advantageous statutory privilege, but it seems possible that such arrangements could withstand constitutional scrutiny.[438]

One native difficulty might beset the effort to transplant the English "triable either way" concept to American soil. The English system works well because when trials are held in the magistrates' court, as indeed in the Crown Court to a large extent, there is virtually no argument over points of evidence. Matters move briskly with no lengthy engagements over such issues, and the style of examination and cross examination is terse and virtually free from objections. Historically this is no doubt in part attributable to the absence of a professional prosecutor, but it is likely more significantly connected with a general evolution of the trial style in England and Wales. If American counsel were simply to pick up their style of conducting a trial on indictment and transfer it to the lower courts, then even a small rise in the number of such trials might be more than could be digested.[439]

The volume and flow of cases would still be an urgent consideration under any restructuring. The attractions of summary disposition would have to be strong enough to draw off the vast majority of cases so that only a managable number reached the superior courts where jury trials would be available. But some cases would be absolutely precluded from disposition in the lower courts because of the gravity of the charge, while magistrates, if the system is working well, should refuse some cases that they might be empowered to deal with because the cases appeared too serious on the facts.

One dangerous practice that might arise would be that, in order to restrict the flow of cases to the higher court, prosecutors' offices would make an early practice of charging many cases down so that they need not be sent up to the higher court. In this way, charge bargaining might reenter through the back door, or disproportionately lenient charges might be filed. With the strength and powers that American prosecutors' offices enjoy, there is no easy way and perhaps even no practical way of eliminating this possibility. But the extent of its corrosive impact would be related to the capacity of the superior courts to handle cases of a degree of gravity

438. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978) which appears to suggest that interests in the efficiency of the system suffice to rebut the charge of imposing an unconstitutional condition even when a statutory advantage is given for pleading guilty. In the same vein, one could defend the proposition that constitutional rights relating to the exclusion of evidence or nonconstitutional features of adversary procedures familiarly associated with jury trials can be legitimately bargained away in return for lower penalty ceilings.

439. Encouragement is to be found in Professor Schulhofer's Philadelphia study, *supra* note 432. Schulhofer describes bench trials in the Court of Common Pleas in Philadelphia as being generally lean and brisk. In a part of the court dealing with less serious cases, trial time averaged 45 minutes, while in a part dealing with more serious cases a trial was typically completed in less than two hours. *Id.* at 1066.

that merited their attention. Most cases in the superior court would presumably still terminate in a plea of guilty because of the plain guilt of the defendant and the inducement to plead that could properly be offered under a discount tariff on sentencing.

Others might be disposed of quite swiftly in bench trials if a clear practice of sentencing discounts could be developed to encourage those who wished to go to trial to waive a jury.[440] The crucial question, as always, would be the nature of the inducements to be offered in order to regulate the number of jury trials so that it did not swamp capacity. In this regard, a system molded on the English may have the merit of promoting greater openness and frankness than the present dominance of plea bargaining in some American cities. Decisions by judges in lower courts as to when to permit a case to be disposed of summarily would be open and subject to scrutiny. A prosecutorial practice of charging down in most serious cases so that they would retain eligibility for summary disposition would be subject to a practical veto by the magistrates who would have the power to decide that the circumstances of the particular case made it unsuitable for the summary court. The exercise of or failure to exercise this power could also be scrutinized and measured. Ultimately the same decision of resource allocation that exists today would still have to be faced—how many superior court dispositions, especially how many superior court trials, to budget for. This decision cannot be avoided by any tinkering with the structure of the system, but we ought to favor procedures that publicize, in an open fashion, the nature and consequences of the choices to be made.

A similar resource question would have to be faced with respect to the capacity of the lower or upper criminal courts to offer summary or bench trials. The inability to offer many such trials is, indeed, one of the most deplorable features of some city criminal courts under the present system. The introduction of a system similar to the English in which the advantage of a low penalty ceiling may be combined with a summary trial would surely be likely to raise the number of trials in lower courts. A system of inducements would presumably still operate with discounts for guilty pleas, but within a general framework of low penalties that would temper its impact. But it is at this point that a criminal justice system confronts the absolutely irreducible demands it must meet or else abdicate the claim to be decently fair. A defendant who gives up the possibility of a full-scale trial with a jury and all the accoutrements of adversarial warfare *à l'outrance* has already done the system a considerable favor. What the system owes him in return is to make some form of trial available if the defendant wants such a test of the provability of his guilt and is willing, in order to obtain it, to pay the price of forfeiting the further discount that a guilty plea could secure. The system must be afforded the resources to make a simple form of trial available in such cases or else lose all respect. A procedure that mercilessly exposes this requirement of justice and tends

440. This is apparently the case is Philadelphia. *See supra* notes 432 and 439.

to concentrate the pressure for making such trials possible has much to commend it.

2. *Decentralization of Criminal Justice*

A topic that deserves investigation concerns the advantages that the English may enjoy from their relatively decentralized system of summary justice in large cities compared with the typical American pattern of accumulating huge calendars of criminal cases in a very small number of lower courts. For example, New York City has a criminal court for each borough, constituting five criminal courts in all, and four for the great mass of the city's population. By contrast, Inner London has seventeen magistrates' courts. Some potential advantages of the decentralized system are not difficult to catalog. The existence of a greater number of courts reduces the operation of each to more manageable levels and scales down the size of the calendar and the defendant population to more human dimensions. There is more of the feeling of moving around a town rather than roaming through a continent. Police and magistrates get to know each other and the population and character of the neighborhood in which they are located. A feel for the kind of crime that is endemic, with its frequence and violence, develops. Thus, the problems of a particular neighborhood can be focused on.

It would seem likely that decentralization may bring with it more flexibility so that resources could be shifted from time to time to cope with particular overloads or changes in the character of neighborhoods that bring about crime "waves." Perhaps even more important, decentralization is likely to bring home any shortage of resources or defects in the operation of the criminal justice administration immediately to a neighborhood, so that political pressure is likely to be organized much more effectively than when the problem is diffused through a borough containing several million people as in New York. Decentralization in London is not just a matter of the courthouse and the magistracy but also a matter of the prosecuting unit, whether that be seen as the local police, as at present, or the Crown prosecutor, as it may be in the future. Lack of court space, insufficient judges or police, or inadequate prosecutorial resources can thus be more quickly identified and responded to in a public or political fashion than they can be in New York. Where there are lay magistrates working either alone or in conjunction with professional lawyer-magistrates in local courts, a great sense of community participation in the administration of criminal justice is also possible.

Decentralization in the United States is often associated with negative images of local corruption and inefficiency. But physical decentralization need not be accompanied by the complete surrender of central administrative control. Which aspects should be decentralized may be a hard question in each case. For example, it may be a positive factor to have a system of local prosecutors elected locally by relatively small districts of a city, while the magistracy ought to continue to be appointed on a citywide basis

in order to remove the judicial arm from entanglement with excessively parochial politics.

Local criminal courts would bring the administration of justice squarely before the eyes of a local public. They would expose the activities of judges and prosecutors to a more detailed scrutiny by an audience that is not general and remote. Doing justice may be more suited to being a cottage industry than to the methods of mass production. The volume of crime in New York City makes it impossible to have as few courts handling as few cases as in London. However, the best response may be not to have a handful of courts covering the crime intake for the whole city, as is now the case, but rather to have *more* courts than in London so that the volume in any particular judicial district can be kept down to human proportions. However, in order for such a system to work efficiently, information would have to be readily transferable and retrievable from one judicial district to another via a computerized system that is routinely efficient.

3. *Courtroom Ambiance*

The formal rules of a system may be much less important to those who are caught within its maw than the informal practices it has developed, the attitudes displayed by its personnel, and the general ambiance of its locale and proceedings. In this regard, observers have not been very kind to any of the major criminal law systems, except perhaps the German system, and this may be because it taxes human nature to develop a criminal justice process that is both reasonably efficient and reasonably humane. But it is by such taxing tests that a civilization may fairly be judged, and if this is the case, the American system, at least at its lower levels where entry is made, has not fared well. The general tone of the description of a day in the life of the city criminal court in a large metropolitan area such as New York is familiar.

The physical plant is run down, sometimes filthy and graffiti imprinted, with sickening rancid bathrooms and perhaps even a danger of being mugged in the corridors. A general air of seething disorder, verging on chaos prevails. Officials appear harried and angry and information is almost impossible to obtain. Clerks are bored and patronizing, police are cynical and indifferent. In the courtrooms, themselves, things are no better. A hum of noise prevails, at times rising to a hubbub, and there is little or no attempt to quell it. Events taking place before the bench are meaningless to all except a few insiders. A series of rapid and muttered colloquies take place, quite inaudible to anyone else in the courtroom, between lawyers and judges with a mute defendant physically present but rarely involved. Some of these proceedings take a very few minutes and the prisoner is hustled away without anyone in the courtroom, beyond a few initiates, having any idea as to what has happened. When judges can be heard at all they often appear angry and at times abusive.

Surely much of the bad press that American courts receive stems from this typically repellent image that they generate. Perhaps the courts are a

good deal more efficient and humane than they seem to the casual observer. It is certain, however, that the lower courts in London appear almost majestic in comparison with those in New York.

London's magistrates' courts also have an air of great business and considerable bustle. Business indeed may often be transacted there a good deal faster than in New York in view of the absence of many procedural and constitutional constraints. But the business and bustle usually appear to be under firm control by the magistrates and the police who are in charge of the courts. Disorder is absent except for the occasional drunk defendant, usually well known to the courts and usually treated with some tolerance, unless of course he has been difficult with the police. The proceedings are conducted smoothly with some formality, a great deal of decorum, general civility and an air of considerable authority. The prevailing tone is one of benevolent paternalism coupled with recognition of defendants' procedural rights. Magistrates are almost unfailingly polite to defendants, and this appears a great deal of the time to transcend mere formality and to express itself in an institutional concern that the defendant is aware of the nature of his situation and can appreciate his choices and exercise his rights. The police behave in court with great deference to magistrates and in a strongly authoritative but not unkind way to defendants. The proceedings are easily audible and make sense to even the casual, untrained observer.

Also distinctive in London's courts is the general posture of defendants. There is much about English proceedings, as we have observed earlier, that appears to isolate the defendant and even to extrude him from participation in the proceedings, notably his being lodged in a prominently raised up dock at the back of the courtroom where he cannot have ready access to any legal adviser, if he has one at all, and where he is very much a cynosure. But, for all this blinding focus on the defendant's presence and status, he or she often appears to behave as a participant in a process, the validity and general fairness of which he acknowledges. Hostility or alienation is not often visible. In spite of their physical isolation, defendants participate in the process more than in a New York court. They are spoken to directly by the clerk and the magistrates in clear and simple language which is repeated until there is confidence that the defendant has understood. The defendant is listened to carefully and any ambiguities or uncertainties in his responses are usually examined and clarifications are sought. At the end of the proceeding, most defendants appear to be satisfied that they have taken part in a reasonably fair process in which they were treated in a dignified fashion and given an opportunity to express choices on significant questions.

VII. CONCLUSION

The English system is a good deal more bureaucratic than American ones. In the United States lawyers and judges dominate the system and essentially shape its nature. American lawyers are fiercely adversarial and very molded in their ideals and ideology by their professional training and

their image of themselves as individuals in a profession. Even the bureaucraticizing influence of a prosecutor's office or a large legal aid office does not overwhelm this essential quality. American judges are often elected and, whether elected or not, are likely to be more sensitive to professional traditions and popular feeling than they are to executive directives.

On the other hand, English lawyers have a more subordinate role in the process. In the mass of crucial dispositional decisions that assign cases to the magistrates' courts, lawyers at present may play little or no part since official decisions are frequently taken by the police and magistrates without the participation of lawyers. In this way the great central roles in English criminal justice have recently been played by the police and magistrates, who have worked together usually in a close and harmonious style. Both of these officials have a strong authoritative and establishment commitment. Compared with American modes of procedure, this English model has a tendency to promote smoothness and efficiency. It is impossible to assess what changes may come in the future through increased legal aid representation of defendants and the inauguration of a prosecutorial service.

In superior court dispositions, where lawyers do, of course, participate centrally, the English model is no doubt closer to the American one. However, at least in trial situations, the strongly authoritative, activist role of the judge combined with the traditionally respectful and only mildly contentious demeanor of English lawyers tends again towards smoothness and efficiency.

English procedures, as we have seen, are much less permeated with sensitivity to the rights of suspects and defendants than are American procedures. It would, of course, be absurd to characterize the English system as harshly repressive or grossly insensitive to defendants' rights, but it does lack the developed and sophisticated consciousness that many decades of constitutional exegesis have aroused in the United States. This is most evident in the practice of police questioning a suspect without a lawyer present and in the blank English rejection of any exclusionary principle.

American administration of criminal justice has had to contend with problems the English have never confronted so starkly. The essence of the present American dilemma is the clash of a tradition of unrestrained and ever more complicated adversary practice with a heavy court docket. The uncurbed coexistence of these two phenomena would soon have produced an intolerable situation if the crisis had not been uneasily resolved by developing a highly structured system of plea bargaining. In England, by contrast, the legislature has intervened decisively and, instead of the opportunity for private negotiation, offers an alternative state-imposed procedure which cleverly combines advantage for the defendant with the preservation of a degree of choice. These proceedings were, until recently, conducted without much participation from lawyers and under the firm authority of an avuncular magistracy drawn historically from elements of a socially superior ruling class.

The virtues of these English magistrates' courts are, in the end, those

of benevolent authority and paternalistic order. The strong control of the court by the magistrate, the firm control of the defendants and the public by the police, the relative dearth of lawyers and their deference and brevity of speech when they appear at all, converge to produce this picture. Questions of defendants' rights are certainly not absent, but raising them will often depend on the magistrate himself, and, if defendants are treated fairly and the norms of procedure and of substantive criminal law are followed with decent fidelity, it is often not because of the vigilance of any representative of the defendant, but because of the traditional behavior of the courts.

In sum, whether it be attributable to the mysterious workings of the *volksgeist* or, more mundanely, to a series of petty, historical accidents, the English criminal justice system, while being instantly recognizable and even familiar in some aspects to the American observer, is also in some ways strikingly different from ours. But is it better than ours? If that question in its largest terms is not susceptible of any definite answer, there are surely some sectors of comparison where we should be led decisively to reject the English model and to prefer our own. The undeveloped state of the jurisprudence of the rights of suspects, both as to search and seizure and police interrogation, ought to give the English no cause for pride. The imperfect delivery of legal aid and the great span of authority wielded by the police are further reasons for disquiet. In these important races in the criminal justice games, the English are far behind us.

Other features of the English system will seem much more attractive to some. The muted tone of adversarial clashes would not be admired by all, but it certainly expands opportunities for affording a larger number of trials. Also controversial will be the strong part played by the English judge, though again this may be a necessary condition for moving trials along. But, even if admired, such features would be difficult to copy. Successful transplanting is always a delicate process, and with social institutions the rejection factor may be especially high. Like American ones, English styles of advocacy and judicial behavior are not just the product of rules and principles but chiefly of an accumulation of experience with institutions.

But it is also the case that excuses, for some features of American big-city criminal justice may be proferred too glibly. The thought is often expressed that American metropolitan courts can hardly do better than they do because they are choked by the volume of crime. Raw figures of offenses known to the police may certainly convey this impression. In 1978 the London Metropolitan Police District, the population of which is presently about 7 million, had 114 homicides (of which 91.2% were cleared up), 275 rapes (of which 60.7% were cleared up); 51,329 burglaries in a dwelling (of which 12.9% were cleared up) and 6,608 robberies (of which 21.1% were cleared up).[441] These are, of course, totals for crimes known to

441. ANNUAL ABSTRACT OF GREATER LONDON STATISTICS (1982), Table J3.02a/78. The figures of crime are for the area covered by the Metropolitan Police which is somewhat larger than Greater London. *See supra* note 142.

the police. Actual crime figures which can be guessed at from surveys are no doubt much higher. The total of indictable offenses for the year was 552,810, a very significant leap from the 335,441 indictable offenses known to the police recorded in 1971.[442] Another tabulation puts violent crimes known to the police in the Metropolitan Police District as 17,374 for the year 1982.[443] In that same year, the number of persons proceeded against for indictable offenses and offenses triable either way in London for the first time passed the 100,000 figure.[444]

These figures indicate to the British a disquieting picture of an increasing incidence of dangerous crime,[445] but by New Yorkers they might be greeted with sighs of relief as an entry to Utopia. The number of homicides known to the police in New York City in 1980 was 1,812; forcible rapes are given as 3,711, robberies as 100,550 and aggravated assaults as 43,376.[446] While there are some difficulties in comparing these figures with those for London, a rough comparison suggests that London has an incidence of about 1.6 homicides per 100,000 people, while New York has 25.75; London has 4 rapes per 100,000 while New York has 53; London has 94 robberies per 100,000 while New York has 1,429.[447]

But too much can be made of the great disparity in the number of violent offenses known to the police between New York City and London. When we are interested in the process of criminal prosecution, what matters is not the number of offenses of certain kinds known to the police but the overall number of defendants who are arrested for serious offenses and brought into the system in that posture. Here the differences between the two cities may not be so startling. We have just seen that the number of defendants in London charged with indictable offenses or offenses triable either way topped 100,000 in 1982.[448] While offenses triable either way in England include many misdemeanors and, for this reason, close comparisons are impossible, still the figures raise a question whether the New York City courts are dramatically more burdened than are courts in London. The number of reported felony arrests in New York City in 1980 was 87,983.[449] Felony indictments in New York City in the same year numbered 18,782 as compared with 21,560 defendants in London who in 1982

442. *Id.* Table J3.03a/78.

443. ANNUAL REPORT OF THE COMMISSIONER OF POLICE OF THE METROPOLIS FOR 1982, CMD. No. 8928, at 44 (1983). For 1978 the figures given for such crimes is 14,727. *Id.* Again, these figures are for the Metropolitan Police Area, somewhat larger than Greater London.

444. *Id.*, at 88, Appendix 11.

445. The percentage increases over the previous year in violent crimes known to the police are given as follows: +10% (1978); +12% (1979); −2% (1980); +1% (1981); +1% (1982). *Id.* at 45.

446. These figures are taken from Uniform Crime Reports for 1980, Table 6, 118 (1983) and are based on a Bureau of the Census preliminary count giving the population of New York City as 7,035,348.

447. The comparative figures are imperfect because 1978 in London is compared with 1980 in New York. The London figures would be up some 10 or more percentage points for 1980, though this would not create a dramatic difference. Also, the definitions of homicide used are rather different, though this would tend, if corrected, to reduce the London homicide rate even further. As noted, *supra* note 443 and accompanying text, the total of violent crimes in London for 1982 was put at 17,374. The figure for New York is clearly close to 150,000.

448. *See supra* note 4.

449. NEW YORK STATE FELONY PROCESSING: INDICTMENT THROUGH DISPOSITION 1980, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES 7, Table 2-2 (1981).

were sent for disposition in the Crown Court.[450]

We are left with the impression that, whatever may be the defects of the English system, the smoothness and civility of the process, the range of options offered to defendants, including the election of a summary trial, and the absence of the worst excesses of advanced plea bargaining, are real merits. The extent to which we can learn from these meritorious features is eminently worth more investigation.

It is true that there is a fertile field of comparative work awaiting us in the United States, and it might be argued that it is unnecessary to travel overseas. What is to be gained from comparisons between England and the United States that cannot be derived from a comparison between New York and California? Or from comparisons between London and New York City that cannot be learned from comparisons between New York City and Los Angeles? Why not see America first? The answer has more than one dimension.

First, while there is considerable diversity within the United States there are also important basic uniformities. It is true that court structures vary substantially between the states; some use indictments a great deal, some a little and some not at all. In addition, the extent and nature of plea bargaining practices differ a good deal from one metropolitan area to another. But beneath these variations, the study of which can admittedly have great value, there runs a stratum of the same solid foundation materials. Chief among these are, of course, the guarantees and constraints of the Constitution that dictate a set of concerns and, to some extent, impose a style of proceeding which is not always found in other countries. Of perhaps equal importance is the American adversarial style which, in general shape, appears to have a national scope and, as we have seen, differs sharply from that in other countries. For these reasons, the broad nature of pretrial and courtroom procedures in cases which go to trial do not differ radically in different jurisdictions in the United States, perhaps with the exception of the use of the grand jury and preliminary hearing in some jurisdictions.

In addition many, though not all, American metropolitan areas have displayed a shared approach to the problems of court congestion. Massive plea bargaining, resulting in accepting pleas of guilty in return for considerations with respect to charge and sentence, has been the norm, though some cities have contrived to avoid surrender to this practice. A large and powerful prosecutorial bureaucracy is the standard pattern in big cities matched by a large and bureaucratic legal defense agency.

The attraction of looking hard at parts of the English system lies in its seemingly sharp contrasts with many of these basic elements. The absence of entrenched constitutional guarantees produces a startlingly different ambiance which is rendered even more vivid by the comparatively muted

450. *Id.* at 11, Table 3-2 and ANNUAL REPORT OF THE COMMISSIONER OF POLICE FOR THE METROPOLIS FOR 1982, *supra* note 443 at 89, Appendix 11. This is the number of indictments. The number of defendants was no doubt higher since an indictment may name several defendants.

adversarial tone. The English have a large system in a western industrial nation, including a huge metropolitan area, which has long functioned with reasonable smoothness without a formal prosecutorial service and without a legal aid bureaucracy. This has meant that the control of the charging process and the mode of delivery of defense services have been markedly different from those prevailing in large American cities. At the same time, the disposition of large numbers of cases with considerable speed has been effected by institutional concessions that do not rely as heavily on inducing guilty pleas as is the case in most American systems.

The point is not that international comparative research will frequently uncover some superior way of doing things that we can gratefully import or adapt. To believe this would be to display a quite unmerited inferiority complex. The English may have a great deal to learn from us and comparative research should certainly be seen as a two-way street which, among its other values, may assist the English to enrich what often seems to be their impoverished unawareness of the complexity of issues that they tend to take for granted. English criminal procedure scholarship lags far behind the analytical power and imaginative qualities that the practice of constitutional debate has developed within the American courts and academic community.

But, for American scholars and workers in the criminal justice system, a close study of English arrangements and practices can deliver that wrench of the mental neck that allows one to see things from an illuminating new angle. Different ways of doing things are sometimes hard to imagine, but even if one could imagine them, it is infinitely more valuable to observe how they are actually done and how they work out.

A large number of useful comparative projects can readily be conceived and it may be helpful to mention some possibilities that seem particularly fruitful. One would be a comparison of the defense function, including the delivery of defense services, between sample metropolitan areas in the United States and England. The complete English reliance on private practitioners could be compared for efficiency and other values with the frequent American practice, as in New York City, of having a mixed system, making heavy use of a corps of Legal Aid lawyers or public defenders supplemented by the services of appointed private counsel. Workloads, fee structures, the vetting of practitioners, the monitoring of performance and the quality of representation could all be compared—with an intriguing question mark attaching to the issue of how much the peculiar character of the English system depends on the division of the profession between solicitors and barristers. A comparative study of this kind is likely to raise more radical questions and identify deeper issues than internal comparisons within the United States where differences are not deep-scored enough to jolt the observer's mind out of traditional elements.

As this Article has tried to suggest, another area that calls for comparison is the English mode of disposition of cases in the magistrates' courts either by plea or by summary trial. Detailed study here may lead to the conclusion that the English system is not radically different from that al-

ready operating in some American jurisdictions, but at the outset it does appear interestingly contrasting in two important respects. First, the entrustment of vital dispositional decisions to the magistrate rather than a professional prosecutor seems eminently worthy of study. Second, the circumstances that a defendant may be offered a summary mode of disposition with very important sentence limitations without having to make a prior commitment to pleading guilty is strikingly different from the practice in many American cities including New York. The prospect of developing proposals for reforms of American practices beckons invitingly in this area.

A topic of fundamental importance concerns the ways in which change in the criminal justice system takes place in the two countries. England relies much less than do American jurisdictions on the courts as initiators of change. But if the English judges are rather static in their application of the law, the executives and legislative machinery for change can sometimes move in a swift and decisive way. Research on criminal justice questions in England and Wales is conducted by the Home Office Research and Planning Unit as well as by private scholars. While the Home Office researchers are government employees and therefore, to some extent, naturally yoked to the government's concerns and policies, still they have constituted a valuable, continuing research staff for such bodies as the Royal Commission on Criminal Procedure. Royal Commissions are convoked only for the largest questions or the grandest of reviews, but numerous Departmental and Inter Departmental Committees as well as the standing Law Revision Committee publish studies of aspects of the criminal justice system, which are often swiftly translated into legislation or practical changes.

In the last twenty years, legislation has brought the most radical changes to the system of prosecution of crimes in England and Wales. The old and cumbersome superior court system has been abolished and replaced by an efficient nationwide network of Crown Courts. An increasingly broad jurisdiction has been conferred on magistrates while the cumbersome procedure of preliminary hearings for committal for trial has been virtually erased. A system of legal aid has been instituted in the Crown Courts and great steps have been taken to bring legal aid more effectively into the magistrates' courts although much remains to be done in that direction. All of this and much else has been done by statute and regulation and has been effectively translated into reality. Further extensive changes are now being instituted as a result of the 1981 Report of the Royal Commission on Criminal Procedure.

One gains the impression, though it is certainly one that needs to be verified by more inquiry, that the English legal bureaucracy, court system and profession are more responsive to legislative and executive directives and less spongy and absorbent than their counterparts in many American jurisdictions. Many large and small reasons might be implicated in any differences between England and American jurisdictions in this respect. Is the quality of English criminal justice research significantly different from American? Is it perhaps more practically and empirically directed to the

immediate needs of the system as perceived by officials with power to promote change? Is the English legal profession less resistant to change in this area and, if so, for what reasons? Is the English court bureaucracy less resistant to change and, if so, for what reasons? Does the receptivity to change in England have anything to do with the absence of highly organized and very independent prosecutors' offices and highly organized Legal Aid or Public Defender offices? Is the English legislative process different from American ones in ways that affect the passage of legislation in this field? Is the character of the English civil service different from that of American federal and state bureaucracies in relevant ways? Are American judges so central because of American preoccupation with criminal procedure as a branch of constitutional law, and is English attention turned more easily to institutional reform because of the absence of the intellectually and morally demanding challenges of accomodating the process of prosecution to a Bill of Rights?

The questions listed above, with many others, constitute the framework for an important research agenda in comparative law and social science that will no doubt be tackled in years to come. Dr. Johnson recommended that we should "survey mankind from China to Peru."[451] For the comparative criminal justice scholar this may be too ambitious a proposal, but the trip to London should be a manageable journey.

451. S. JOHNSON, THE VANITY OF HUMAN WISHES (London, 1749).