Post 7/28/71

Justice Systems—I

Britain's Courts Aren't That Super

By James E. Clayton

LONDON—Talking to a group of American lawyers here last week, one British judge remarked that he always tries to keep in mind a book written some 40 years ago entitled, "The English: Are They Human?" Its author, a Dutchman named Reynier, purported to analyze the main vices of the English and alleged that one of the most irritating of all was the assumption that everything English was the best of its kind.

Such an assumption about English justice is widely held in America's legal community, of which some 7,000 representatives have just spent a week here meeting their English counterparts on the bench and in the bar. It is this assumption, perhaps, that lay behind the words of criticism about the American legal system spoken here by Attorney General Mitchell and echoed, to a lesser extent, by Chief Justice Burger and the Lord Chief Justice of England and Wales. Many of those who find serious ills in the American system look across the sea for solutions.

The writer, a member of the editorial page staff, has been attending the American Bar Association meeting in London. This is the first of two articles.

Yet, some of the observers here, including this one, were impressed as much last week by the similarities in the problems of the judicial systems in the two countries as they were by the lessons that Americans were supposed to learn here.

One prominent judge of the supreme court of a major state remarked, after spending a couple of days at Old Bailey (the affectionate name for England's major criminal court), "They've been trying to brainwash us."

TAKE, for instance, the vaunted speed with which English justice is supposed to occur. True, it comes quickly in some cases —often the next day in minor criminal matters and within two or three weeks in somewhat more serious cases—and thus sets a standard for which Americans can properly yearn. But the criminal courts which try London's major cases are crowded and a person released on a bond can wait for up to a year before his trial can be held; those held in jail without bond can wait four or five months. These statistics are somewhat better than those of the criminal courts in most major American cities but not that much better and the English judges concede that their delays are increasing. The real situation is far from that often described by American advocates of the English system who talk of trial being held here within three or four weeks.

The factors cited by English judges for these delays are indentical with some of those which have led to the crisis in American criminal courts. Increasing crime and the expansion of free legal aid to the poor play a major part on both sides of the Atlantic. In addition, Sir Frederick Lawton, who sits on the Supreme Court of Judicature, laid part of England's problem on the birth of the photo-copying machine which has increased substantially the number of documents used in trials.

The English appellate system, also long noted in America for its speed and efficiency, has also begun to show signs of slowing down. It, too, has been clogged by cases as a result, according to Sir Frederick, of expanded legal aid to the poor. In the last four years, for example, the total number of convictions appealed has matched that in the preceding 49 years. In an effort to stem the flow, the court has begun to use its power to refuse to let the time spent in jail awaiting appeal count as part of the sentence served in cases where appeals are regarded as frivolous.

BEHIND this problem in the appellate court lies a change in the British attitude toward appeals. The old attitude was expressed by Sir Frederick: "The judge and jury at a trial, like the referee in football and the umpire in cricket, were entrusted with the task of making a decision: it was not thought seemly for the contestants to question that decision. Game players weren't allowed to appeal against the referee or umpire. Why should accused persons be allowed to question the decision of their peers?"

Given that attitude, appeals were kept down in number and it was fairly easy for the English to handle them expeditiously, placing almost total reliance on oral argument with decisions often delivered immediately from the bench after argument was completed. It remains to be seen whether this system can operate so well once it faces the idea, now accepted in the United States, that almost every convicted person is entitled to one appeal as a matter of right. Yet this is the idea that seems to be getting a toe-hold in England now.

All this is not intended to indicate that there are no lessons for Americans to learn from English experience. Some American judges expressed great interest in the procedure of the Court of Appeal under which one judge screens appeals and eliminates those which he thinks are unworthy of the full court's time. Similarly, there is interest among American judges in cutting back the written material submitted to appellate courts, relying more on oral argument, but the success of such a move would probably depend both upon holding down the number of cases and in redirecting the efforts of the lawyers who have come to focus more and more on written rather than oral presentation. As far as this one aspect—speed and effiency—of English justice is concerned, it is hard to keep from getting the feeling that a good deal of the enthusiasm in the United States for learning from the English reflects now, although it may not have a few years ago, the adage that the grass always looks greener on the other side.

Systems of Justice—II

Post 7/30/71

Britain's Courts Accord Higher Status to Its Police

By James E. Clayton

LONDON—Perhaps the most striking aspect of the English system of justice, when it is compared to its American counterpart, is its attitude towards the police. The English policeman is respected and his word is trusted. As a result, the question of who polices the police—a question that lies behind some of the most controversial aspects of American criminal law—seldom arises.

This explains much of the difference, or so it seems to me, in the ways in which the English and the American courts deal with matters like confessions, searches, and lineups and, to a lesser extent, some other aspects of criminal procedure.

The writer, a member of the editorial page staff, has been attending the American Bar Association meeting in London. This is the second of two articles.

Take, for example, what are called the exclusionary rules in American courts. These rules sometimes bar evidence—confessions and material seized in searches—not because the evidence is untrustworthy but because the police have acted improperly in collecting the evidence.

American courts developed these rules largely because there seemed to be no other way to stop the police from conducting searches that violate the Fourth Amendment or from trying to overpower a suspect's desire not to incriminate himself. The English courts have developed no such rules and, indeed, to hear some of their judges talk, look upon the exclusionary rules as utter foolishness. For that matter, some American lawyers and judges do, too: Attorney General John Mitchell put their elimination high on his list of proposed projects when he addressed the American Bar Association here a few days ago.

If the American police were as proper in their conduct as the English are alleged to be, the case for elimination of these rules would be much stronger.

There are, of course, ways of controlling the police other than the exclusion of evidence. One is through internal disciplinary action against a policeman who does wrong. Another is through allowing those whose rights are abridged to recover damages in lawsuits.

Neither has worked particularly well in the United States in the past but the English contend they work quite well here. One of Scotland Yard's ranking officials, Assistant Commissioner P. E. Brodie, told the lawyers that the fear of dismissal from the force for misconduct was sufficient to ensure proper behavior by most policemen. Explaining that England and Wales have 100,000 policeman, he said, "occasionally somebody will let the side down but not often."

But the lawyers got a somewhat different view from David Napley, one of England's leading solicitors. He claimed the police sometimes arrest on suspicion and hold a suspect for several days illegally while they build their case. And he claimed that although the English rules say a suspect's solicitor must be called when he wants help, the call is usually not made until after he police have gotten from him what they want.

This view was somewhat substantiated by stories that appeared in the London papers during the Bar Association meeting about a man who had been convicted of indecent assault on the strength of a confession he made to police. It turned out that both the victim and a witness had denied before trial that he was the attacker and that after trial the victim identified another man who subsequently confessed to this assault along with a series of others. Based on this, the Court of Appeal freed the original defendant and ordered an investigation into his alleged confession.

Thus, it appears that the conduct of English police, although far better than that of many American police forces, may still be less than perfect. But that lack of perfection has not kept the English courts from granting to all police an extraordinary, by American standards, degree of confidence. Most lawyers visiting the criminal courts were impressed by the effectiveness of police as witnesses and by the protection they were given by the judges from the kind of cross-examination that implies misconduct, a protection they rarely enjoy in American courts.

All this leads one to suspect that those lawyers, who, like the Attorney General, came to England convinced that major changes in the criminal law are required before the courts can help curtail the increase in crime will go back to the United States with that conviction reinforced. Similarly, however, one suspects that those who came here with the opposite view have found sufficient evidence of frailties in the English system to provide comparible reinforcement of their view that the necessary changes must be made in law enforcement methods, not in the law itself.

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