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# CRIMINAL PROCEDURE IN ENGLAND AND THE UNITED STATES: COMPARISONS IN INITIATING PROSECUTIONS

IRVING R. KAUFMAN\*

THE legal institutions of Great Britain have long served as the well-spring of American law. In drafting the Federal Constitution, the framers embellished British conceptions of a government of separated powers,<sup>1</sup> and drew on the enactments of Parliament.<sup>2</sup> For many years after the Revolution, American courts sought rules of decision in the English common law.<sup>3</sup> In the intervening decades, American and English judges have not forgotten their common heritage—frequently looking to the development of legal doctrine in the other's country as fertile ground for comparative study. Over the years, this spiritual and legal cousinage has been fostered by Anglo-American Interchanges.

Since its inception in 1961, the Interchange periodically has gathered distinguished judges, practitioners, and academicians from both sides of the Atlantic to compare the legal systems of England and the United States.<sup>4</sup> The Interchanges stress practical observation, in the hope that efficient procedures of one country may be adopted and utilized in the other.<sup>5</sup> The latest program in this series

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1. Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671, 700 (1980).

2. For example, article III's two-witness rule in cases of treason, U.S. Const. art. III, § 3, cl. 1, derives from Parliament's Statute of Treasons of 1695, 7 & 8 Will. 3, c. 3, § 2. Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. Pa. L. Rev. 603, 608 n.11 (1980).

3. Their search was not unquestioning, however. Before early American courts would accept an English common law rule, they had to be satisfied it was consistent with American life and custom. See, e.g., *Commonwealth v. Pullis* (Philadelphia Cordwiners Case, 1806), in III A Documentary History of American Industrial Society 59 (1910).

4. For the past 20 years, the Institute of Judicial Administration has organized and sponsored the American half of the Interchanges. The British side enjoys the official blessing of Her Majesty's Government, with the British Foreign and Commonwealth Office providing much of the manpower and expertise to coordinate the exchanges.

5. The first Interchange convinced some American courts, notably the Court of Appeals for the Second Circuit, to adopt the English practice of disposing of some appellate cases from the bench. Karlen, *Anglo-American Interchanges: An Approach to the Comparative Study of Judicial Administration*, 57 *Judicature* 342, 346 (1974).

occurred during the summer of 1980, when an American team of jurists travelled to Britain to study English criminal practice. The program concluded in September with a return visit from the British. On these occasions, Lord Diplock directed the English group, while Chief Justice Warren Burger asked me to join him in leading the American team.<sup>6</sup>

Our firsthand observation of the British criminal justice system revealed several major differences in the procedures used in the two countries. Space constrictions permit citing only a few. For example, grand juries have been eliminated in England. Instead, all prosecutions are brought before a Magistrate, who takes evidence and decides cases involving certain minor offenses and commits the more serious matters for disposition in Crown Court.<sup>7</sup> In addition, British prosecuting counsel<sup>8</sup> may amend an indictment after the case is committed<sup>9</sup>—a practice that would violate the fifth amendment if at-

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As a result of the fifth Exchange, the British team proposed that English appellate courts abandon the custom of acquiring their knowledge of a case principally from oral argument. They recommended instead that such courts follow the American practice of reading documents in the case—the notice of appeal, the judgment appealed from, and pertinent parts of the transcript—in advance of argument. Kaufman, *The Fifth Anglo-American Exchange: Some Observations*, 61 *Judicature* 327, 331 (1978).

6. In addition to Chief Justice Burger and Judge Kaufman, the American participants were James E. S. Baker (then-President of the American College of Trial Lawyers), William Bryson (Chief of the Justice Department's Criminal Division, Appellate Section), Justice Winslow Christian of the California Court of Appeals, George J. Cotsirilos, Esq., Senator Howell T. Heflin of Alabama, Philip B. Heymann (Assistant Attorney General, Criminal Division), Dean Howard Kalodner (Western New England College School of Law), Judge Sandra D. O'Connor of the Arizona Court of Appeals, Professor Kenneth F. Ripple (Notre Dame Law School), Chief Justice Clement C. Torbert of the Alabama Supreme Court, Dean Ernst J. Watts (National Judicial College), and William H. Webster (Director of the Federal Bureau of Investigation and former Circuit Judge, United States Court of Appeals for the Eighth Circuit). The British team, led by Lord Diplock, Lord of Appeal in Ordinary in the House of Lords, included Lord Justice Watkins of the Court of Appeal, Judge West-Russell of the Crown Court, Judge Walker of the Circuit Court, Sir Wilfrid Bourne (Permanent Secretary to the Lord High Chancellor), D. R. Thompson (Registrar and Master of the Crown Office), Peter D. Robinson (Circuit Administrator, S. E.), and Richard DuCann, barrister.

7. See Address by Peter Goldstone, A.B.A. Section of Criminal Justice Seminar, in London (Oct. 1976), reprinted in A.B.A., *English Criminal Law and Procedure: The Way a Briton Would Explain It to an American* 37, 40-41 (1978). For a discussion of the diminishing role of the Magistrate in certain criminal cases, see notes 68-71 *infra* and accompanying text.

8. This Article will follow the English practice of using the term "counsel" to refer only to barristers, not solicitors. The role of British prosecuting counsel is discussed below. See notes 27-30 *infra* and accompanying text.

9. Address by John Leonard, A.B.A. Section of Criminal Justice Seminar, in London (Oct. 1976), reprinted in A.B.A., *English Criminal Law and Procedure: The Way a Briton Would Explain It to an American* 62, 70-71 (1978) [hereinafter cited as Leonard Speech].

tempted in the United States, unless the case were resubmitted to a grand jury.

The most striking dissimilarity between the English and American criminal systems is their divergent methods of bringing prosecutions. This Article will discuss one aspect of that difference: the method by which prosecutors decide to commence actions against individuals suspected of criminal activities.<sup>10</sup>

### I. THE MACHINERY OF THE PROSECUTION

The rules governing the institution of criminal proceedings in the United States are well-known. All prosecutions are commenced by prosecuting attorneys—officials who are independent of the courts and police. The old common law principle that permitted private citizens to bring their own criminal actions is extinct in this country.

In contrast to the procedural simplicity of the American system, few rules are more complex or confusing than those governing the initiation of English criminal proceedings.<sup>11</sup> The British system is founded on the notion of private prosecution. Thus, with some qualifications,<sup>12</sup> anyone in England can institute a criminal action against an alleged offender.<sup>13</sup> This does not mean, however, that the dockets of the English courts are crowded with such prosecutions. On the contrary, the average British citizen is usually content merely to report a suspected criminal violation to the police and leave the matter in their hands.

Cost is one explanation for a private individual's reluctance to prosecute. The expense of bringing a prosecution in a serious case is significant and presents a major economic hurdle to most private citizens wishing to institute their own criminal proceedings.<sup>14</sup> Thus, it might seem surprising that Parliament has thought it necessary to further restrict an individual's exercise of this right. But, many statutes provide that before instituting a prosecution for a given offense, the

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10. The legal system of England and Wales differs from those of Scotland and Northern Ireland. Reference Division, British Information Services, *The Legal Systems of Britain 1-2* (1976). Only English and Welsh criminal practice will be discussed here.

11. Cf. Criminal Justice Committee, *The Prosecution Process in England and Wales*, 1970 Crim. L. Rev. 668, 668 [hereinafter cited as *Prosecution Process*] ("The machinery for the initiation and conduct of prosecutions in England and Wales presents a surprisingly complex and confusing picture.").

12. See notes 15-19 *infra* and accompanying text.

13. P. Devlin, *The Criminal Prosecution in England* 20 (1958). Without digressing into the difficult English concept of *locus standi*, it suffices to note that the private prosecutor need not have any special relationship to the victim.

14. See *Prosecution Process*, *supra* note 11, at 671.

complainant must first obtain the consent of either the court<sup>15</sup> or a governmental official<sup>16</sup>—frequently the Director of Public Prosecutions.<sup>17</sup> It is difficult to discern a pattern to these consent requirements because the offenses they cover vary greatly in severity. Some commentators, however, suggest that these restrictions are intended to increase uniformity in prosecuting policy and to minimize oppressive or vexatious prosecutions.<sup>18</sup>

Additional impediments on private prosecutions include the Director's complete discretion to assume control of any criminal case and the Attorney General's power to halt the prosecution of cases triable on indictment<sup>19</sup> by entering a *nolle prosequi*. Finally, the private prosecutor who brings a case maliciously may find himself liable for civil damages to the defendant.

In spite of these limitations, the English view a private citizen's right to bring a criminal proceeding as an important constitutional backstop against abuse of prosecutorial discretion by public officials.<sup>20</sup> In practice, however, private individuals exercise this right in less serious circumstances. Most private prosecutions are for simple assaults or shoplifting.<sup>21</sup>

The significance of the "private prosecution" should not be underestimated, however. The criminal proceedings instituted by the police, which constitute the vast bulk of English criminal actions, share several attributes of the prosecutions brought by private citizens. Thus, many of the restrictions placed on private prosecutions apply to those brought by the police.<sup>22</sup> Unlike the private citizen,

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15. See The Royal Commission on Criminal Procedure, Part II of the Written Evidence of the Commissioner of Police of the Metropolis 83-84 (1978) [hereinafter cited as Commissioner's Written Evidence].

16. See *id.* at 85-86.

17. See *id.* at 86-88. The office of the Director of Public Prosecutions will be discussed below. See notes 27-36 *infra* and accompanying text.

18. See, e.g., Address by Sir Norman Skelhorn, A.B.A. Section of Criminal Justice Seminar, in London (Oct. 1976), reprinted in A.B.A., English Criminal Law and Procedure: The Way a Briton Would Explain It to an American 32, 34-35 (1978) [hereinafter cited as Skelhorn Speech].

19. An indictment may be drafted by Police Solicitors or court personnel. For purposes of the different jurisdictions of the English criminal courts, offenses are divided into three categories: (1) indictable offenses, (2) summary offenses, and (3) offenses which are both indictable and summary. Indictable offenses, which are the most serious, are tried only in the Crown Court; summary offenses, which are relatively minor, fall within the exclusive jurisdiction of the Magistrates Court. Offenses in the third category may be adjudicated in either court. E. Friesen & I. Scott, English Criminal Justice 29, 35-37, 49 (1976).

20. See Skelhorn Speech, *supra* note 18, at 33-34. But see *Prosecution Process*, *supra* note 11, at 670-71.

21. Commissioner's Written Evidence, *supra* note 15, at 82, 93.

22. The police must obtain the consent of the Director of Public Prosecutions or of the Attorney General before prosecuting certain offenses, see, e.g., Protection of

however, a police constable wishing to take a criminal defendant to court does not face the formidable barrier of cost. Police prosecutions are publicly funded, and the police may refer difficult legal issues to Police Solicitors, whose fees are paid from the public fisc. Furthermore, bringing criminal actions is an integral part of a policeman's job. Consequently, one cannot equate police prosecutions with truly "private" actions.<sup>23</sup>

The police in England exercise their discretion to prosecute in a wide variety of criminal matters—from minor traffic offenses to cases of murder. In almost all these instances, the police make the initial decision to proceed against the defendant.<sup>24</sup> In specific serious cases, they are required to report to the Director of Public Prosecutions<sup>25</sup> and, in other important or legally complex matters, they will consult solicitors for advice.<sup>26</sup> But in both instances, the initial decision to take the suspect to court is made by the police. Accordingly, in the vast majority of criminal cases, no public official charged with making an independent evaluation of the need to prosecute stands between the police and the courts.

In the early nineteenth century, the British police played an even larger role in criminal proceedings, actually conducting prosecutions of individuals charged with serious offenses. Doubts concerning a policeman's competence to handle such matters gave rise to proposals for an independent prosecuting agency. In 1879, Parliament resolved this problem "by the characteristic English solution of a half-measure, . . . followed by a slow process of muddling through."<sup>27</sup> It created the office of the Director of Public Prosecutions. This office, which was reorganized in 1908, now has considerable authority to influence the administration of English criminal justice. Professor Delmar Karlen has concisely summarized the Director's responsibilities:

He is required to prosecute any case punishable by death, and any case where his participation is ordered by the Home Secretary. He may prosecute, if he sees fit to do so, any case referred to him

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Children Act, 1978, c. 37, § 1(3); Criminal Law Act, 1977, c. 45, § 4(1); Bail Act, 1976, c. 63, § 9(5), and they may have to relinquish control over certain prosecutions to the Director. Skelhorn Speech, *supra* note 18, at 34.

23. See Williams, *The Power to Prosecute*, 1955 Crim. L. Rev. 596, 603. Indeed, the Criminal Justice Committee saw enough of a distinction between police prosecutions and those brought by private citizens to recommend retaining the private individual's right to prosecute, while urging that the majority of prosecutions now brought by the police be handled by an independent public official. See *Prosecution Process*, *supra* note 11, at 680-81.

24. In exceptional cases—when someone suspected of a serious offense is not likely to attempt an escape—the Director of Public Prosecutions may make the initial decision to prosecute. Commissioner's Written Evidence, *supra* note 15, at 26.

25. The Prosecution of Offences Regulations, 1978 No. 1357 (L.33) § 6, 1978 Stat. Inst. 4111-12.

26. See Commissioner's Written Evidence, *supra* note 15, at 18.

27. Williams, *supra* note 23, at 601-02.

by any other government department. He may also prosecute any case that appears to him to be of such importance or difficulty that his intervention seems necessary . . . . There is a substantial list of offences which the police are required to report to the Director, so that he can decide whether or not to undertake prosecution from the outset, including . . . sedition, espionage, misconduct by public officials, counterfeiting, and most offences of an especially serious nature . . . . Finally, the director may, on request, give advice on the conduct of a case to any private or official prosecutor, and he may authorize any of them to incur special costs—as for scientific evidence—to be paid out of public funds.<sup>28</sup>

In addition, many statutes require the Director's consent as a necessary precondition to private prosecutions for certain offenses. Failure to satisfy this requirement nullifies the proceedings.<sup>29</sup>

Whenever the Director assumes control of a case, the prosecution is conducted by so-called Treasury Counsel in the Inner London Crown Court, the Old Bailey. These counsel are not public officials, but distinguished barristers who take the Director's cases for fees paid out of public funds. Although the Director has first call on their services, they are allowed to take other work, including the defense of criminal cases.<sup>30</sup> Nevertheless, Treasury Counsel are the closest English equivalents to American government prosecutors.

## II. THE EXERCISE OF PROSECUTORIAL DISCRETION

Neither English nor American statutes significantly restrict the national government's discretion to proceed against a defendant. Except for defining the parameters of criminal conduct, Congress has not sought to intrude on the Justice Department's power to prosecute. Similarly, the statutes creating the Director's office<sup>31</sup> and the regulations promulgated by the British Attorney General<sup>32</sup> do not confine the Director's prosecutorial discretion.

28. D. Karlen, *Anglo-American Criminal Justice* 22-23 (1967). See also *The Prosecution of Offences Regulations*, 1978 No. 1357 (L.33), 1978 Stat. Inst. 4111-12.

29. Moreover, if the clerk of the court has "some ground for suspecting" that a prosecution has been withdrawn or delayed for no satisfactory reason, he must report his suspicion to the Director. *The Prosecution of Offences Regulations*, 1978 No. 1357 (L.33) § 9, 1978 Stat. Inst. 4112.

30. Leonard Speech, *supra* note 9, at 62. Treasury Counsel are also briefed on cases by the Department of Solicitors of the Metropolitan Police Force. *Id.* at 63.

31. *Prosecution of Offences Act*, 1908, 8 Edw. 7, c. 3; *Prosecution of Offences Act*, 1884, 47 & 48 Vict., c. 58; *Prosecution of Offences Act*, 1879, 42 & 43 Vict., c. 22.

32. *Prosecution of Offences Regulations*, 1978 No. 1357 (L.33), 1978 Stat. Inst. 4111-12.

In exercising his discretion, the Director is completely free from political influence. Although appointed by and responsible to the Attorney General, who holds government office, the Director maintains his political independence. His ability to do so is explained by Sir Norman Skelhorn, a former Director.

[T]here is a dichotomy in [the Attorney General's] functions, and that part of his functions which consists of the overall control of the enforcement of the criminal law . . . is quite distinct from the political field. It is essentially a quasijudicial function and he is subject to direction from no one . . . as to the bringing or not bringing of criminal proceedings in any particular case.

[The Director], likewise, [is] equally independent and [is] subject to directions from no one, save for the Attorney-General in that limited field.<sup>33</sup>

More neutral commentators also attest to the Director's political isolation<sup>34</sup>—as do recent events. In 1978, when a Labour government clung to power only through a fragile coalition with the Liberals, the Director prosecuted Jeremy Thorpe, a prominent member of the Liberal Party, for conspiracy to murder a man claiming once to have been his homosexual lover.<sup>35</sup> Although Thorpe ultimately was acquitted, the political ramifications of these proceedings were considerable.<sup>36</sup>

Former Attorney General Griffin Bell articulated well the uncertain position of the federal government's leading prosecutor. After reviewing the historical relationship between his office and that of the President, he concluded that "the independence of the Attorney General has only a general and uneven tradition to support it . . ."<sup>37</sup> Many commentators agree and have proposed insulating the head of the Justice Department from Executive influence.<sup>38</sup> Indeed, during his 1976 campaign, President Carter suggested that the Attorney General be appointed for a term of five to seven years.<sup>39</sup> The "Saturday-Night Massacre,"<sup>40</sup> however, and recent actions by the Justice De-

33. Skelhorn Speech, *supra* note 18, at 32.

34. See, e.g., Sigler, *Public Prosecution in England and Wales*, 1974 *Crim. L. Rev.* 642, 647.

35. See *N.Y. Times*, June 23, 1979, at 1, col. 2; *id.*, May 23, 1979, § A, at 8, col. 3; *id.*, May 9, 1979, § A, at 3, col. 2.

36. See *N.Y. Times*, June 23, 1979, at 1, col. 2; *id.*, May 23, 1979, § A, at 8, col. 3; *id.*, May 9, 1979, § A, at 3, col. 2.

37. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, Or One Among Many?*, 46 *Fordham L. Rev.* 1049, 1068 (1978).

38. See, e.g., Rogovin, *Reorganizing Politics Out of the Department of Justice*, 64 *A.B.A.J.* 855, (1978).

39. Bell, *supra* note 37, at 1065.

40. On October 20, 1973, President Nixon ordered Attorney General Elliot Richardson to dismiss Special Prosecutor Archibald Cox for refusing to limit his investigation of Nixon's involvement in the Watergate scandal. Richardson resigned rather than comply with the President's request, and Deputy Attorney General Wil-



partment have been interpreted by the media to indicate that the Department is not entirely insulated from the appearance of political pressures.

Thus far, I have drawn a comparison between the prosecutorial discretion of the United States Attorney General and that of the British Director of Public Prosecutions. But, comparing the Attorney General's liberty of action to that of London's Commissioner of the Metropolitan Police may be more fruitful. Despite his influence, the Director conducts only five to ten percent of the prosecutions brought on indictment in England and Wales.<sup>41</sup> The Metropolitan Force, however, brings a greater number of proceedings, involving a wider spectrum of criminal offenses.<sup>42</sup> The Metropolitan Police, which includes Scotland Yard, is the largest of England's forty-three police units, employing over one-fifth of the country's police officers.<sup>43</sup> Although English police departments are largely under local control, the Metropolitan Police, because of its size and expertise, exerts considerable influence over national prosecuting policy.

Both the Metropolitan Police and the United States Attorney General exercise their discretion to prosecute free of significant judicial control. In the leading English case on this point, *R. v. Metropolitan Police Commissioner ex parte Blackburn*,<sup>44</sup> Lord Denning stated:

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought.<sup>45</sup>

Similarly, the United States courts have repeatedly agreed that a prosecuting attorney has broad discretion either to institute or to forego proceedings.<sup>46</sup> In *Smith v. United States*,<sup>47</sup> for example, the

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liam Ruckelshaus was discharged when he failed to heed Nixon's order. Acting Attorney General Robert Bork eventually acceded to the President's demands. *Saturday-Night Survivors*, Newsweek, Oct. 20, 1975, at 14.

41. Reference Division, British Information Services, *supra* note 10, at 22.

42. See notes 24-25 *supra* and accompanying text.

43. E. Friesen & I. Scott, *supra* note 19, at 102.

44. [1968] 1 All E.R. 763 (C.A.).

45. *Id.* at 769. Lord Denning continued: "[B]ut there are some policy decisions with which, I think, the courts . . . can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £ 100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law." *Id.*; see Williams, *The Police and Law Enforcement*, 1968 Crim. L. Rev. 351, 357-58 & n.45.

46. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 454-56 (1962) (a prosecutor's "conscious exercise of some selectivity" does not violate constitutional rights); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 125 n.14 (5th Cir.) (the Attorney

Fifth Circuit held: "The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is *absolute*."<sup>48</sup>

Internal guidelines promulgated by the two institutions articulate more significant checks on their freedom of choice. The criteria for prosecution followed by the Metropolitan Police are contained in the Commissioner's Written Evidence to the Royal Commission on Criminal Procedure.<sup>49</sup> According to the Commissioner, once the police decide sufficient credible evidence exists to justify a prosecution,<sup>50</sup> they look to several considerations in determining whether to take the suspect to court: the age and health of the offender, the severity of an offense, its prevalence in a particular community, the punishment likely to be imposed, and, for trivial violations, the possibility of issuing a caution instead of resorting to criminal proceedings.<sup>51</sup> In addition, they take account of the victim's and the public's views concerning prosecution.<sup>52</sup>

The Justice Department's newly-issued Principles of Federal Prosecution (Federal Principles)<sup>53</sup> are both more detailed and express the Department's greater willingness to weigh difficult matters of culpability and deterrence, rather than leave those issues solely to the courts. In addition to the factors considered by the Metropolitan Police, the Federal Principles direct the prosecutor's attention to federal law enforcement priorities, the deterrent effect of prosecution, the suspect's culpability in connection with the offense, his history with respect to criminal activity, his willingness to cooperate in the prosecution of others, the possibility of prosecution in another jurisdiction, and the availability of noncriminal dispositions.<sup>54</sup> The Federal Principles go on to state that a government attorney is not to

General's wide discretion in the exercise of the prosecutorial function in civil cases comparable to his discretion in criminal cases), *cert. denied*, 414 U.S. 826 (1973).

47. 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

48. *Id.* at 247 (emphasis added); *accord* Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973) ("The Attorney General's prosecutorial discretion is broad, indeed, and ordinarily at least, is not subject to judicial review."), *cert. denied*, 416 U.S. 993 (1974).

49. See Commissioner's Written Evidence, *supra* note 15, at 1-15.

50. *Id.* at 1-3.

51. *Id.* at 6-14. Verbal and written cautions are noncriminal dispositions that the police usually reserve for trivial offenses. *Id.* at 12.

52. *Id.* at 9-10.

53. U.S. Dep't of Justice, Principles of Federal Prosecution (1980). "The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States." *Id.* Part A, ¶ 5.

54. *Id.* Part B, ¶¶ 2(b),(c), 3(a),(c),(d),(e),(f).

consider the person's race, religion, sex, national origin, or political beliefs in deciding to institute criminal proceedings.<sup>55</sup>

An English police solicitor would probably have little difficulty in accepting many of the Justice Department's guidelines. Thus, the Police Commissioner's Written Evidence contains no suggestion that his force bases its decisions on a suspect's race or sex. And, the Commissioner's failure to list the suspect's prior criminal history among his criteria may be explained by the English practice of "taking offences into consideration" in sentencing.<sup>56</sup>

Some of the distinctions between the two sets of guidelines, however, may reflect basic disagreements over a prosecutor's proper relationship with the courts. In defending the Metropolitan Police's refusal to consider noncriminal dispositions in all but trivial cases, the Commissioner stated: "[T]he seriousness or triviality of an offence is a subject more fit for consideration by a Court rather than a nonjudicial individual whether he be a police officer or an official prosecutor."<sup>57</sup> In contrast, the Federal Principles authorize a government attorney to contemplate noncriminal dispositions even in "response to serious forms of antisocial activity."<sup>58</sup> In light of this difference, an English policeman would doubtlessly disagree that the "deterrent effect of prosecution"<sup>59</sup> or the suspect's "culpability in connection with the offense"<sup>60</sup> are subjects he should consider in deciding whether to prosecute. He would pass that responsibility to the judge for consideration on disposition.

### III. DO THE ENGLISH OVER-PROSECUTE?

In deciding whether to institute criminal proceedings, a prosecutor must balance two competing responsibilities. He must vigorously

55. *Id.* Part B, ¶ 6(a). Paragraph 6 commendably provides that the government attorney's decision to prosecute should not be influenced by his personal feelings concerning the suspect, the suspect's associates, or the victim, nor should he be guided by the possible effect of his decision on his own professional or personal circumstances. *Id.* Part B, ¶ 6(b),(c).

56. The police may advise the sentencing judge that they suspect a convicted defendant of other, as yet unproven, offenses. The judge may then take these offenses into account in passing sentence, although he may not exceed the statutory maximum for the crime of which the defendant stands convicted. Individuals who have had their sentences increased in this way cannot plead *autrefois convict* if they are subsequently prosecuted on the additional charges, but the police rarely seek such convictions.

57. Commissioner's Written Evidence, *supra* note 15, at 14.

58. U.S. Dep't of Justice, *supra* note 53, Part B, ¶ 5, Comment at 13. "Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations." *Id.*

59. *Id.* Part B, ¶ 3(c).

60. *Id.* Part B, ¶ 3(d).

prosecute individuals reasonably suspected of significant criminal activity, but must avoid harassing or disturbing innocent citizens. In weighing these factors, he is obligated to look beyond the immediate problem of winning a case and consider instead the fair and efficient administration of criminal justice.

A prosecutor's decision becomes more onerous if he weighs the serious costs of bringing unnecessary or unfounded criminal actions. Such prosecutions not only waste valuable judicial time and resources—and contribute to backlogs in the criminal courts—but they may bring public disgrace upon the innocent. Even a subsequent acquittal may do little to resurrect an accused's personal fortunes—or his faith in the law.

It is important to ask, therefore, whether the English and American prosecutorial systems are equally adept at screening out needless or ill-founded cases. Do the two systems produce comparable results? Or does one do a better job of prosecuting the guilty and leaving the innocent alone?

Comparisons of this kind are especially hazardous because acquittal rates<sup>61</sup> in criminal cases may be affected by several dissimilarities between English and American criminal practice. To cite one example, significant differences exist in the systems of jury selection used in the two countries. English juries in criminal cases are selected quickly. Defense objections are rare, and objections by the Crown are practically unknown. In contrast, potential jurors in the United States may be questioned extensively, and in highly publicized cases, both sides will carefully scrutinize a juror's predispositions toward the accused. Challenges to the racial composition of a jury are also common in the United States.

In spite of these differences, however, my observations of British criminal proceedings convince me that the English police do press a significant number of weak prosecutions. Two examples came to my attention while I participated in the Anglo-American Interchange. In the first, a newspaper deliverer, who carried a knife to cut the twine on bundles of papers, found himself in a scuffle. The police arrested him, discovered the knife, and prosecuted him simply for carrying it, although it was conceded that his occupation required its use. The second example involved a prosecution for possession of five milligrams of cannabis resin—an amount equal to five grains of salt. This case eventually reached the Court of Appeal, where Mr. Justice Wien reversed the defendant's conviction, declaring it "offensive that the whole machinery of law should be brought into operation"<sup>62</sup> over this insignificant violation.

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61. In this context, the acquittal rate equals the frequency with which defendants who plead not guilty are exonerated—either because the trier of fact finds them innocent, or because the court dismisses the case.

62. Daily Telegraph (London), July 18, 1980, at 3, col. 6.

British commentators confirm my observations. John Leonard, Former Chairman of the English Criminal Bar Association, reports that it is not unusual for prosecuting counsel to get cases lacking sufficient evidentiary support. "[Getting a bad case] is not theory; it happens in practice. It has happened to me a number of times, and it is much more likely to happen nowadays than it used to."<sup>63</sup> Similarly, Friesen and Scott, writing for the British Institute of Judicial Administration, state: "In recent times concern has been expressed that far too many 'weak' cases are committed for trial in the Crown Court . . . ."<sup>64</sup>

A complete explanation for the frequency of weak English prosecutions cannot rest in the differences between the prosecution guidelines of the Metropolitan Police and those of the Justice Department. As previously discussed,<sup>65</sup> these two sets of principles do not differ significantly, although the English criteria do show a greater willingness to pass borderline cases on to the courts. It is thus unlikely that changing those guidelines will effectively reduce the number of ill-founded British prosecutions.

A more plausible explanation for the incidence of deficient cases in the Crown Courts is that the English police make the decision to institute criminal proceedings. The 1970 Report by the Criminal Justice Committee<sup>66</sup> summarized the consequences of this form of decisionmaking:

The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution. . . . As Sir Alexander Cockburn [who served as Attorney General in 1856] put it . . . when the police "mix themselves up in the conduct of a prosecution . . . they acquire a bias infinitely stronger than that which must under any circumstances naturally attach itself to their evidence." In consequence, a senior police officer may be inhibited in refusing to prosecute in order not to damage police morale—whereas an independent prosecutor would not be influenced by such considerations.

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63. Leonard Speech, *supra* note 9, at 64. See Address by Derek Hodgson, A.B.A. Section of Criminal Justice Seminar, in London (Oct. 1976), reprinted in A.B.A., *English Criminal Law and Procedure; The Way a Briton Would Explain It to an American*, 101, 105-10 (1978) [hereinafter cited as Hodgson Speech]. But see Commissioner's Written Evidence, *supra* note 15, at 24, 33; Bowley, *Prosecution—A Matter for the Police*, 1975 *Crim. L. Rev.* 442. Leonard attributes the recent increase in "weak" prosecutions to the practice of "paper committal." Leonard Speech, *supra* note 9, at 65. See notes 68-70 *infra* and accompanying text.

64. E. Friesen & I. Scott, *supra* note 19, at 56.

65. See notes 49-60 *supra* and accompanying text.

66. *Prosecution Process*, *supra* note 11. The Criminal Justice Committee was formed by the Council of Justice, which subsequently endorsed the Committee's report. *Id.* at 683.

...  
 The police are ill-equipped by outlook, training and function to weigh [factors militating against a prosecution] objectively . . . . At the present time there are very considerable regional variations in prosecuting policy regarding certain types of offence—owing to the differing attitudes of individual chief constables. . . . [T]he risk of prosecution ought not to depend on this kind of chance.<sup>67</sup>

The unfortunate consequences of police over-prosecution have been exacerbated in recent years by a change in the procedure for committing cases to Crown Court. Formerly, all of the more serious criminal proceedings were screened by Magistrates, who scrutinized the prosecution's evidence before sending on the case. In 1967, however, Parliament authorized the process of "paper committal," whereby defendants could agree to bypass the full-blown committal process.<sup>68</sup> In the substitute proceedings, Magistrates rarely even glance at the prosecution's cases.<sup>69</sup> This change is significant, for in the English criminal justice system, the Magistrate is the first government official who makes an independent evaluation of the police officer's decision to prosecute. In spite of the reduced pre-trial screening in "paper committal," most defendants select this option.<sup>70</sup> Their reasons for doing so are practical; this procedure speeds disposition of their cases and saves money on lawyers' fees. What this procedure conserves in defendants' out-of-pocket expenses, however, may be more than offset by the increased human and social costs produced when individuals are needlessly forced to defend themselves in court.

#### IV. CONCLUSION

In the United States, the prosecutor bridges the gap between the police and the courts by exercising his independent judgment concerning the need to institute criminal proceedings in a particular case. His role is crucial to the fair administration of justice, for an ill-founded decision to prosecute can be disastrous—both for the accused and for the criminal justice system. His independence from governmental investigative agencies contributes to the impartial discharge of a prosecutor's responsibilities. In England, however, the police make the decision to prosecute in virtually all criminal cases. Without disparaging the dedication of British policemen, one must concede that their involvement in criminal investigations prevents

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67. *Id.* at 672-73; see Sigler, *Public Prosecution in England and Wales*, 1974 *Crim. L. Rev.* 642, 645 ("My own interviews with prosecuting officials tend to show great variation in prosecution policies from place to place, depending very largely upon the independent views of the chief constables.").

68. Criminal Justice Act, 1967, c. 80, § 1.

69. See Hodgson Speech, *supra* note 63, at 105.

70. *Id.* at 105-06; Leonard Speech, *supra* note 9, at 65.

their objective assessment of the many considerations for and against instituting criminal actions.

Admittedly, the American prosecutorial system may not provide the perfect model for the English. Adopting the Scottish system of the Procurator Fiscal,<sup>71</sup> or expanding the duties of the Director of Public Prosecutions are alternatives worth exploring. My experiences as a participant in the Anglo-American Interchange, however, suggest that the British police should carry a smaller share of the burden in deciding to prosecute criminal suspects.

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71. See Reference Division, British Information Services, *supra* note 10, at 55. See also *Prosecution Process*, *supra* note 11, at 676-79.