

1958

## Book Review (reviewing Sir Patrick Devlin, *The Criminal Prosecution in England* (1958))

Philip B. Kurland

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Philip B. Kurland, "Book Review (reviewing Sir Patrick Devlin, *The Criminal Prosecution in England* (1958))," 26 *University of Chicago Law Review* 193 (1958).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

prevalent in America and Europe that no American can possibly digest the different and complicated political and intellectual problems of contemporary Europe. Indeed, it would seem that perhaps an outsider can grasp some problems of the political life of Germany more surely than the persons entangled in solving those problems.

Professor Golay's book belongs more to the field of political science than constitutional law. This, however, enhances rather than detracts from the merit of the book. The German legal experts and the courts, quite particularly the German Federal Constitutional Court, have carefully expounded many of the legal aspects of the constitution. Professor Golay's book sensibly did not duplicate the work of those jurists. Indeed, discussion of fine jurisprudential points would have obscured Professor Golay's most valuable observations.

Careful study of the book is recommended for constitutional lawyers and historians. The present newsworthiness of Berlin affairs adds another reason to those already given. The book is particularly recommended for those who must deal with the Berlin problem and, indeed, for all those who apply themselves professionally to the task of solving the many open problems of European politics.

DR. RUDOLF KATZ\*

\* Der Vizepräsident Des Bundesverfassungsgerichts.

† Translated by Mrs. Sybille Fritzsche, second-year student, the University of Chicago Law School.

---

THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND:  
SOME INVIDIOUS COMPARISONS

*The Criminal Prosecution in England.* By Sir Patrick Devlin. New Haven: Yale University Press, 1958. Pp. vi, 150. \$3.50.

*The law is not made by judge alone, but by judge and company.*—JEREMY BENTHAM.

For Mr. Justice Holmes, the cure "for most of the evil in the present state of the law . . . is for us to grow more civilized."<sup>1</sup> Mr. Justice Devlin, of Her Majesty's High Court of Justice, has recently provided us with further evidence of that proposition in the form of a small book based upon his Sherrill Lectures delivered at the Yale Law School in September, 1957. The size of the book belies the breadth and depth of its content, for like the younger Holbein, Sir Patrick seems to need little space in which to reveal his great talents. What emerges from this volume for the American reader is a picture which gives rise to feelings of chagrin and hope. Chagrin because we have not achieved in the administration of criminal justice in this country that level of civilization attained by our Eng-

<sup>1</sup> 2 Holmes-Laski Letters 1159 (Howe ed., 1953).

lish cousins; hope because history reveals that not long ago the English could claim for their system no more than we can now claim for ours.<sup>2</sup>

The Holmes dictum implies that we cannot rely on the enactment of new rules to secure the elimination of evils contained in the administration of law. Improvement in the capacity and character of the administrators is essential to success in approaching our goals. And it is the major theme of this book that the men rather than the rules are primarily responsible for the achievements of the English system. It is this theme with which the book opens:

[F]ew, if any, principles of law have been settled; and the enforcement of such rules as there are does not depend upon any formal sanction. How, then, are they rendered effective? The effectiveness depends upon three elements. First, there is the Englishman's tolerance of, and indeed affection for, the unwritten rule; his natural instinct is to act according to what he believes to be the general understanding among his fellows as to how he should behave rather than to look for a rule permitting or prohibiting what he proposes to do and to study its terms. The second element is the power and position of the judge, who can make his wishes felt in two ways: he has assumed the general power of excluding from the trial, whether it is legally admissible or not, evidence that is prejudicial to the accused, and he will include in this category evidence that has been obtained by means he thinks unfair to accused persons generally; the other way open to the judge is simply to express his disapproval, which because of his position carries great weight. The third element is the expectation by the public that the police will act fairly, coupled with a general desire among the police force as a whole to satisfy this expectation [p. 15].

It is the theme with which the book closes:

The English system depends, for its successful working, on a number of peculiarly English notions and in particular upon the English idea that unwritten rules about conduct and behavior are better than precise formulae and stronger protection for the citizen than a formal code. That is not the sort of notion that commends itself to all legal minds [p. 139].

It is the theme which is constantly repeated throughout the book (e.g., pp. 26-27, 34-36). For this reason and for the reason that the book's spirit and content do not lend themselves to summary, this review is concerned with some comments on two of the groups of individuals charged with the administra-

<sup>2</sup> "Necessary for an understanding of the legislative contest is the picture, however elementary may be its presentation here, of the prosecutorial system as it existed in England at the time that our tale begins, *circa* 1850. In the background one should note a most inadequate constabulary, largely non-professional, sometimes corrupt, usually uneducated, often incompetent, a long way indeed from the very efficient English police which we know today; both legal professions—the barristers as well as the solicitors—fallen from grace; the upper levels of the judiciary made up in large measure of faithful politicians; committing magistrates with no knowledge of the law, almost entirely dependent upon their clerks for instructions on the subject, and not entirely free from Home Office dictation; and the brooding omnipresence of "law reform" more effectively advocated by the public than by those most directly concerned. (The reader may draw his own comparison with the American scene, both past and present.)" Kurland and Waters, *Public Prosecutions in England, 1854-1879: An Essay in English Legislative History*, to be published in *Duke Law Journal* (Summer, 1959).

tion of criminal justice in England and Wales: the Bench and the Bar, on whom Sir Patrick dwells at some length.

#### THE BENCH

[T]here are some peculiar characteristics which distinguished the English legal system from those of other countries. First we must put the position of Her Majesty's Judges. . . . We need not dwell on their extraordinary prestige, though we believe that it has much to do with England's claim to special merit in the administration of justice.—*Final Report of the Committee on Supreme Court Practice and Procedure 12, Cmd. 8878 (1953).*

England and Wales have a population of about 45,000,000. The judiciary numbers about 150. A judge is a person of stature in England, if for no other reason, because he is so rare. Perhaps it is too late to suggest a similar approach in this country. But those who would solve America's problems of judicial administration by the multiplication of judicial officers<sup>3</sup> might do well to consider the English notion that Gresham's law is applicable to judges no less than to money.

Lord St. Aldwyn's Commission reported in 1913 as follows:

"No one will contend that more judges should be appointed than are really necessary. It must be remembered that the field of selection is limited, the more judges appointed the smaller it becomes, and therefore the less certainty of securing in those appointed the high level of ability, legal attainments, and mental and physical vigour, which are necessary to maintain the prestige of the English Bench. The smaller the number of judges the higher will be the standard of efficiency and the greater the prize for those selected."

In October, 1934, the then Lord Chancellor, when moving the Resolution for the appointment of two additional judges, spoke as follows:

"The maintenance of the prestige of the judicial Bench is an essential feature of our jurisprudence. There is no parallel in the civilised world to the authority which a judge of the High Court possesses when sitting in his own court. On that depends the discipline of the Bar and the maintenance of those traditions of fairness and impartiality between man and man which are the foundation stones of our system.

"I cannot conceal from myself or from you, my Lords, my belief that the prestige of the judges has been largely due to the small numbers of the Bench itself and to the very high standard which those who were responsible for advising on the appointment of judges have therefore been able to maintain upon the occurrence of each vacancy.

Any increase in the numbers must so far as it goes tend somewhat to lower the quality. . . ."<sup>4</sup>

<sup>3</sup> The Judicial Conference of the United States, for one, has made repeated recommendations for wholesale increases in the federal judiciary. See, e.g., Annual Report of the Proceedings of the Judicial Conference of the United States 1957, at 5, 268 (1958).

<sup>4</sup> Report of the Royal Commission on the Despatch of Business at Common Law, 1934-36, 98-99, Cmd. 5065 (1936).

But there are reasons other than their small number for the prestige of the English judiciary.

The English Bench is made up largely—almost exclusively—of leaders of the Bar who have demonstrated consummate ability as advocates and, ordinarily, judicial temperament as well. Probably nothing qualifies a lawyer better for the trial bench than trial experience. (An appellate judge may require different abilities.) But that qualification is not enough to make a first-class judge: the experience should be coupled with superior intellect and intelligence. We are told by the greatest of our own judges, who has proved himself both on the trial and appellate benches, “that it is . . . important to a judge . . . to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant. . . .”<sup>5</sup> Of the English, Holmes wrote to Laski in the letter already quoted, “your lawyers are educated in a more civilized *milieu* and whatever the system of teaching, they show it—judging by the decisions that from time to time I read.”<sup>6</sup> Of our own judges, unfortunately, it must be said—acknowledging the existence of exceptions—that their reading is practically confined to legal literature and newspapers and almost never exceeds the necessities for speech-making; their culture seems to have been developed largely in the ward club room.

For the very good reason that there are no “public prosecutors” in England in the sense that we know them, the English judiciary is singularly free of those who succeed to the bench by getting the appropriate number of publicly acclaimed convictions. There are two good reasons why the bench ought not to be held out as prizes for prosecutors. First is the potential effect on their capacity as judges. “The whole mentality of a public prosecutor is necessarily different from that of a judge, and a man who had . . . exclusively performed the task of prosecuting can hardly be expected to become an absolutely impartial judge.”<sup>7</sup> Second is the potential effect on the capacity of prosecutors. A prosecutor looking toward promotion is out to make a record of convictions at all costs.<sup>8</sup> This means the rejection of trial for those whose guilt might be difficult to prove and the ruthless demand for conviction once trial has been initiated. Our own record reveals only too well the problems created by the use of judgeships as rewards for prosecutors.

Closely connected with these difficulties is a factor which might be considered the most important difference between the English and the American bench. Despite the fact that its members are appointed by a political officer, the Lord

<sup>5</sup> L. Hand, *The Spirit of Liberty* 81 (Dilliard's 2d ed., 1953).

<sup>6</sup> Op. cit. *supra* note 1.

<sup>7</sup> Mannheim, *Trial by Jury in Modern Continental Law*, 53 L. Q. Rev. 99, 112 (1937).

<sup>8</sup> See *Minutes of Evidence to the Report of the Select Committee on Public Prosecutions [1854-55]* XII Parliamentary Papers 188.

Chancellor, the English Bench is not usually a reward for political services; it is not treated as a sinecure for political work well done in the past. That this was not always so is revealed in such complaints as that of *The Economist* of one hundred years ago: "No doubt it is a sad thing to have fought elections, to have been staunch to one's party, and to have chosen it wisely at the outset, and yet to be quietly passed over, silently left on the way. But the sooner parliamentary services are altogether ignored in the appointment of judicial offices, except perhaps those which are the rewards of the highest legal officers of the Government, the better."<sup>9</sup> It was not one hundred years ago but only yesterday that Mr. Justice Harlan voiced a similar plea: "After all is said and done, the effectiveness of any judicial system will never rise above the level of the quality of judges who administer it. The core of the problem is not so much whether judges are appointed, elected, or chosen through a combination of both methods, as it is that the selection process, whatever it may be, should be divorced as far as possible from all political considerations. The rest would soon follow from the achievement of that ideal."<sup>10</sup>

The powers that could properly be exercised by a non-political judge, of high character, judicial temperament, and broad intellect are evident in some of the authority with which the English trial judges have been entrusted in the administration of the English criminal law. The control of the trial by the English judge would appear extraordinary to the American lawyer, in large measure because he would not be willing to trust his own judiciary with similar powers. Though the trial itself falls outside of the scope of Mr. Justice Devlin's book,<sup>11</sup> the function of the judge at the criminal trial is dramatically revealed in a recent book describing the *Adams* case<sup>12</sup> over which Devlin presided. Although an English trial judge is not permitted to interrogate witnesses so extensively as to prevent a fair scope for defendant's counsel,<sup>13</sup> "[i]f a judge thinks that the case has not been thoroughly explored he is entitled to put as many questions as he likes."<sup>14</sup> Time and again in the *Adams* case Sir Patrick examined a witness at length after counsel had finished with him.<sup>15</sup> At one time he brought out so different a response from the witness that he felt called upon to say to counsel for

<sup>9</sup> 17 *The Economist* 758 (1859); cf. Laski, *Studies in Law and Politics* 168 (1932).

<sup>10</sup> Harlan, *Some Fiftieth Anniversary Remarks*, an address delivered at the fiftieth anniversary dinner of the New York County Lawyers' Association, November 25, 1958.

<sup>11</sup> "The book is concerned with the prosecution of crime from the time of arrest until the time of arraignment, and it deals with the rights and duties of the Crown and of the accused while the case for the prosecution is being prepared for trial." (P.v).

<sup>12</sup> Bedford, *The Best We Can Do: An Account of the Trial of John Bodkin Adams* (1958).

<sup>13</sup> *Regina v. Clewer*, 37 *Crim.App.R.* 37 (1953); *Rex v. Gilson*, 29 *Crim.App.R.* 174 (1944).

<sup>14</sup> Lord Chief Justice Goddard in *Regina v. Williams*, unreported (1955).

<sup>15</sup> Bedford, *op. cit. supra* note 15 at 44, 55-56, 80-81, 120-23, 146-51, 161-64, 171, 177, 202-203.

the defense: "You have heard me this afternoon ask a number of questions and get certain answers. . . . I do not regard it as part of my duty to cross-examine any witness. . . . I was struck by certain divergences between some of the answers given to me and answers given previously to you. If in these circumstances you were to make an application to cross-examine further, I would be inclined to grant it."<sup>16</sup>

Even more sweeping is the power of the English judge to summarize and comment on the evidence. This is a power which our federal judges have been given but which, for the most part, they are too timid to use. It is a power generally denied our state court judges,<sup>17</sup> and seldom used by them when they are allowed it. The American College of Trial Lawyers has printed and distributed Mr. Justice Devlin's charge in the *Adams* case. The American lawyer who reads it will be amazed at the authority exercised. A small quotation from the charge will suffice to make the point: "I dare say it is the first time you have sat in that jury-box. It is not the first time that I have sat in this chair. And not infrequently I have heard a case presented by the prosecution that seemed to me to be manifestly a strong one, and sometimes I have felt it my duty to tell the jury so. I do not think, therefore, that I ought to hesitate to tell you that here the case for the defense seems to me to be manifestly a strong one."<sup>18</sup> The reader may not be surprised, in light of this quotation from the charge, that after 17 days of trial the jury was out only 44 minutes before it brought in a "not guilty" verdict.

These are examples of the power of the English Bench at the trial of a criminal case; they must clearly be labelled judicial powers. But the judge's function in administering the criminal law goes beyond the function of governing trials. The authority exercised over pre-trial police interrogation practices is really legislative in nature. And it is on this that Mr. Justice Devlin concentrates in his book, after first reminding us that, Montesquieu to the contrary notwithstanding, "there has never been in England any doctrine of the separation of powers" (p. 2). It was in the legislative capacity that the judges promulgated the so-called "Judges' Rules." They are not judicial decisions nor do they purport to control only the admissibility of evidence at the trial. They are regulations intended to govern police conduct. Now nine in number, they derive from four which were originally "formulated by Her Majesty's judges in 1912" (p. 137). They "have been approved by Her Majesty's Judges of the Queen's Bench Division" and "are circulated for the information and guidance of the police" (p. 137). And they have been supplemented by eight rules on "taking statements" which were circulated by the Home Office after first being "Approved by the Lord Chief Justice" (p. 139). And it may be said that these regu-

<sup>16</sup> *Id.*, at 151. The ellipses are in the original.

<sup>17</sup> See Appendix at 203 *infra*.

<sup>18</sup> Bedford, *op. cit.* *supra* note 15 at 249.

lations are better received and observed by the police than the somewhat less stringent requirements which our Supreme Court has announced in its opinions on similar subjects.

The oft-quoted dicta of de Tocqueville and Bryce that the power of the judiciary is the power of public opinion is valid not only with reference to the United States Supreme Court, of which they were speaking, but of all judicial systems. And the English Bench offers an excellent example of how to secure the respect from which public support necessarily follows.

#### THE BAR

*It is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice.*—LORD COCKBURN.

If the judiciary is the main pillar of the English edifice of criminal justice, the Bar is its second pillar. Comparisons between the English and American legal systems here are made more difficult by the difference in structure. The division of the English legal profession into barristers and solicitors—roughly into courtroom advocates and office lawyers—does not exist in this country. Admittedly it must be considered a mixed blessing to the practitioner but of undoubted value to the administration of the law. The hardship on the practitioner is an economic one, for it is not easy to earn a living as a tyro at the Bar and there are no firms or partnerships permitted to help the young barrister receive income earned by others. But the Bar's prestige is far greater than that of the Solicitors. The barrister's is the gentleman's profession. It is independent of direction from clients. It is only the Bar from which the Bench is drawn. And talent as an advocate is the primary road to success. The small size of the group—there are only about 2,000 active practitioners at the Bar—also makes for distinct advantages which we do not enjoy.

One of the advantages of such size is the possibility of establishing a community of interest between lawyers and judges. Both are charged with the duty of seeing that justice is done.

The judge, by virtue of his office and of the tradition which supports it, exercises great power. The Bar not only transmits his power but also enables him to exercise it much more informally than otherwise he could. A judge is always appointed from the Bar; he will have worked with and against many senior men who appear before him and he continually meets them in the Inns of Court and at the Bar messes while on circuit. This makes for community of thought between Bench and Bar. In this sort of atmosphere the spirit of the law is often more important than the letter, and the practitioner readily makes himself familiar with principles which are not to be found in any textbook. This is why I said earlier that there was a channel through which judicial notions are swiftly and easily conveyed. What the judge disapproves of, the Bar is unlikely to do and if the Bar will not do it, the police must conform [pp. 26-27].



And this communion between Bench and Bar also makes possible the exchange of views in the opposite direction from that indicated by Sir Patrick, thus keeping the Bench in constant touch with the legal community and the people they represent.<sup>19</sup>

The small size of the Bar also permits, indeed commands, an adherence to ethical practices, which are far more stringently observed there than here. And there is a maintenance of traditions of duty which one should expect of a profession. Among these is the notion that it is the barristers' function to help attain a just result; the notion which is expressed here by saying that the lawyer is "an officer of the court" takes on much greater significance in England. "[A] barrister is not allowed to pick and choose his clients—he must, if available, accept any brief offered at a proper fee in a case of a type in which he normally practices. To destroy that principle would strike at the roots of the independence of the Bar and so (as Erskine claimed long ago in his classic defence of Tom Paine) put an end to liberty in England."<sup>20</sup> It is readily perceived that the inability of an unpopular defendant to secure adequate counsel is far less of a problem there than here. Finally, it should be noted that though the Bar of England continues to attract some of the best talent in the legal professions, it is the business lawyer's post to which most American lawyers aspire, for it is there that the big incomes are to be found. It cannot be said of the English Bar what Brandeis said of the American lawyer: "Law has ceased to be a profession and has become a business. . . . We feel today that the lawyer belongs to another and is no longer a free man."<sup>21</sup> "Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people."<sup>22</sup>

If there are differences, there are also similarities. Though there is less specialization in criminal law in England than here (p. 25), those who do specialize in the criminal law branch of the profession there also tend to be inferior to those choosing other specialties. "There are distinguished practitioners at the Divorce and Criminal Bars but it is difficult for a Common Lawyer to understand why anyone should want to go to either of them. So much of the work there is sordid or monotonous or both. The standard of learning required at those Bars is, however, lower than either at the Chancery or Common Law Bar, and only three High Court Judges have been appointed from the Divorce Bar and three from the Criminal Bar in the last 30 or 40 years."<sup>23</sup>

<sup>19</sup> See Griswold, Morrison Lecture, 43 Mass. L. Q. 98, 107 (Oct., 1958).

<sup>20</sup> Final Report of the Committee on Supreme Court Practice and Procedure 18-19, Cmd 8878 (1953).

<sup>21</sup> Lief, *The Brandeis Guide to the Modern World* 171 (1941).

<sup>22</sup> *Id.*, at 176.

<sup>23</sup> Cecil, *Brief to Counsel* 46-48 (1958).

Probably more important than the division of the legal profession into branches, or the small, elite, and learned character of the Bar, is the fact that the conduct of the prosecution at the trial is not in the hands of any special body of counsel dedicated to that particular class of work. . . . [T]here is nothing which corresponds to the District Attorney in the United States. The importance of this is that the policeman, like any other litigant, is to a large extent in the hands of his counsel; and to try to advance one's case by means of some unfair practice is not much good if one's counsel is not going to aid and abet. The barristers who have to decide what is fair and unfair are not prosecution-minded. I do not mean that counsel who always appear for the prosecution will consciously let themselves do something they know to be unfair, but just that the lawyer who is always on one side tends to see things from the point of view of that side exclusively. A barrister who appears as often for the defense as for the prosecution acquires no special sympathy for either [pp. 25-26].

It is thus particularly in the area of the administration of criminal justice that the English have made real the concept that the barrister—including prosecuting counsel—is an officer of the court dedicated to justice rather than victory. The English might well be disturbed by the attitude, expressed as politely as possible, that the “quasi-judicial” obligation of the prosecutor is dissipated by the time of the trial and from that point on his sole function is to secure a conviction.<sup>24</sup> How much more civilized is the English notion: “It is now well established that prosecuting counsel is to act as a minister of justice rather than as an advocate; he is not to press for a conviction but is to lay all the facts, those that tell for the prisoner as well as those that tell against him, before the jury” (p. 27).<sup>25</sup> This is a position which has at least a century of tradition behind it.<sup>26</sup>

Where prosecuting counsel fail to comport with the obligations of a “minister of justice” they are likely to be brought up short by the trial or appellate courts of England. Unlike our own courts, which seem to weigh the question of defendant's guilt or innocence rather than the seriousness of the transgression of the prosecuting counsel, the English courts have made it quite clear that misbehavior by prosecuting counsel calls for reversal regardless of the culpability of the accused. As put in an opinion for the House of Lords:

If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfor-

<sup>24</sup> See Seymour, *Why Prosecutors Act Like Prosecutors*, 11 *The Record* 302 (1956).

<sup>25</sup> Cf. Lord Chief Justice Hewart, in *Rex v. Sugarman*, 25 *Crim.App.R.* 109, 114-15 (1935): “It cannot too often be made plain that the business of counsel for the Crown is fairly and impartially to exhibit all of the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel of the Crown should refuse to stand on the real strength of his case and think he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. . . . The Court has no alternative in this case, whatever its merits or demerits otherwise may be, but to allow the appeal and quash the conviction.”

<sup>26</sup> See the testimony of Lord Cockburn, then Attorney General, before the Select Committee of the House of Commons, *op. cit. supra* note 8.

tunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed.<sup>27</sup>

This in a jurisdiction where the appellate courts are deprived of the opportunity of remanding a case for another trial: the conviction must either be affirmed or reversed.

#### CONCLUSION

These comparisons between England and this country are only implicit in Sir Patrick's book. Indeed, it may be that he would not think these inferences warranted, since he was doing no more than describing a portion of the English adjudicative process in criminal cases. He most charitably notes that the American problem of controlling criminal activity is a different and far more difficult one than that which faces the English:

The homicide rate in England, allowing for the difference in population, is about one-tenth of that in the United States. The number of the prison population is a good indication of the incidence of crime generally; in the United States, and again after adjustment for the difference in population, it is eight or nine times greater than in the United Kingdom. The English are a settled community, their ways of life are governed by understandings which are traditionally operative. Because of that they lack perhaps the initiative and enterprise which are part of the American birthright and the vigorous welcoming of new ideas; but perhaps also America has to pay for these assets by suffering a social restlessness which does not so greatly afflict the nations of the old world. Whether this is so or not—and I must venture no further into sociology—the point that I want to make is that the English system of criminal prosecution is designed for a fundamentally law-abiding country. The vast majority of criminals who come into the dock at Assizes or Sessions are pitiable creatures, a nuisance rather than a danger to the state. The English police are able to fulfill their difficult role because it is not necessary for them to develop a strong animus or sense of hostility against the criminal, as might well be the case if they had constantly to match themselves against violent and bitter enemies of society [pp. 134–35].

Without seeking to gainsay the truth of this observation, we are still faced with the question whether we should not be better able to cope with our more difficult problems were our bench and bar to approximate more closely the standards observed in Sir Patrick's country. The answer would seem obvious that in this regard we would do well to follow Holmes' mandate "to grow more civilized" and that would mean, on this score at least, to seek to emulate the English.

<sup>27</sup> *Maxwell v. Director of Public Prosecutions*, 24 *Crim.App.R.* 152, 176 (1934).

## APPENDIX

	I Power to Summarize Evidence	II Power to Comment on Evidence	I Power to Summarize Evidence	II Power to Comment on Evidence
Alabama.....	Permitted	Not permitted	Permitted	Not permitted
Arizona.....	Not permitted	Not permitted	Permitted	Not permitted
Arkansas.....	Not permitted	Not permitted	Permitted	Permitted
California.....	Permitted	Permitted	Permitted	Permitted
Colorado.....	Not permitted	Not permitted	Permitted	Not permitted
Connecticut.....	Permitted	Permitted	Permitted	Permitted
Delaware.....	Permitted	Not permitted	Permitted	Not permitted
Florida.....	Not permitted	Not permitted	Permitted	Not permitted
Georgia.....	Permitted	Not permitted	Permitted	Not permitted
Idaho.....	Not permitted	Not permitted	Not permitted	Not permitted
Illinois.....	Not permitted	Not permitted	Not permitted	Not permitted
Indiana.....	Not permitted	Not permitted	Permitted	Permitted
Iowa.....	Permitted	Not permitted	Permitted	Permitted
Kansas.....	Permitted	Not permitted	Permitted	Permitted
Kentucky.....	Not permitted	Not permitted	Not permitted	Not permitted
Louisiana.....	Not permitted	Not permitted	Permitted	Not permitted
Maine.....	Permitted	Not permitted	Permitted	Not permitted
Maryland.....	Permitted	Not permitted	Permitted	Permitted
Massachusetts...	Permitted	Not permitted	Permitted	Permitted
Michigan.....	Permitted	Permitted	Permitted	Permitted
Minnesota.....	Permitted	Not permitted	Not permitted	Not permitted
Mississippi.....	Not permitted	Not permitted	Not permitted	Not permitted
Missouri.....	Not permitted	Not permitted	Permitted	Permitted
Montana.....	Not permitted	Not permitted	Permitted	Not permitted
Nebraska.....	Permitted	Not permitted	Permitted	Not permitted
Nevada.....	Permitted	Not permitted	Permitted	Not permitted
New Hampshire...	Permitted	Not permitted	Permitted	Permitted
New Jersey.....	Permitted	Not permitted	Permitted	Permitted
New Mexico.....	Permitted	Not permitted	Permitted	Not permitted
New York.....	Permitted	Not permitted	Permitted	Permitted
North Carolina..	Permitted	Not permitted	Permitted	Not permitted
North Dakota...	Not permitted	Not permitted	Not permitted	Not permitted
Ohio.....	Permitted	Not permitted	Permitted	Not permitted
Oklahoma.....	Not permitted	Not permitted	Not permitted	Not permitted
Oregon.....	Not permitted	Not permitted	Not permitted	Not permitted
Pennsylvania....	Permitted	Not permitted	Permitted	Permitted
Rhode Island....	Permitted	Not permitted	Permitted	Permitted
South Carolina..	Not permitted	Not permitted	Not permitted	Not permitted
South Dakota...	Permitted	Not permitted	Permitted	Not permitted
Tennessee.....	Permitted	Not permitted	Permitted	Not permitted
Texas.....	Not permitted	Not permitted	Not permitted	Not permitted
Utah.....	Permitted	Not permitted	Permitted	Permitted
Vermont.....	Permitted	Not permitted	Permitted	Permitted
Virginia.....	Not permitted	Not permitted	Not permitted	Not permitted
Washington.....	Not permitted	Not permitted	Not permitted	Not permitted
West Virginia...	Not permitted	Not permitted	Not permitted	Not permitted
Wisconsin.....	Permitted	Not permitted	Permitted	Permitted
Wyoming.....	Permitted	Not permitted	Permitted	Not permitted

PHILIP B. KURLAND\*

\* Professor of Law, University of Chicago.