Tightening the Reins of Justice in America

A Comparative Analysis of the Criminal Jury Trial in England and the United States

MICHAEL H. GRAHAM

CONTRIBUTIONS IN LEGAL STUDIES, NUMBER 26

GREENWOOD PRESS
WESTPORT, CONNECTICUT • LONDON, ENGLAND

Tightening the Reins of Justice in America

A Comparative Analysis of the Criminal Jury Trial in England and the United States

MICHAEL H. GRAHAM

CONTRIBUTIONS IN LEGAL STUDIES, NUMBER 26

GREENWOOD PRESS
WESTPORT, CONNECTICUT • LONDON, ENGLAND

Tightening the Reins of Justice in America

Contributions in Legal Studies
Series Editor: *Paul L. Murphy*

The American Codification Movement: A Study of Antebellum Legal Reform
Charles M. Cook

Crime and Punishment in Revolutionary Paris
Antoinette Wills

American Legal Culture, 1908-1940
John W. Johnson

Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls
Daniel N. Hoffman

Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts
James Heath

Essays on New York Colonial Legal History
Herbert S. Johnson

The Origins of the American Business Corporation, 1784-1855: Broadening the Concept of Public Service During Industrialization
Ronald E. Seavoy

Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War
James F. Willis

The Network of Control: State Supreme Courts and State Security Statutes, 1920-1970
Carol E. Jenson

Drugs and Information Control: The Role of Men and Manipulation in the Control of Drug Trafficking
Jerald W. Cloyd

State Supreme Courts: Policymakers in the Federal System
Mary Cornelia Porter and G. Alan Tarr, editors

The Future of Our Liberties: Perspectives on the Bill of Rights
Stephen C. Halpern, editor

Library of Congress Cataloging in Publication Data

Graham, Michael H.
Tightening the reins of justice in America.

(Contributions in legal studies, ISSN 0147-1074 ; no. 26)
Bibliography: p.
Includes index.
1. Criminal procedure—Great Britain. 2. Trials (Robbery)—England—Birmingham. 3. Criminal procedure—United States. I. Title. II. Series.
KD8329.G7 1983 345.42'05 82-12029
ISBN 0-313-23598-8 (lib. bdg.) 344.2055

Library of Congress Catalog Card Number: 82-12029
ISBN: 0-313-23598-8
ISSN: 0147-1074

First published in 1983

Greenwood Press
A division of Congressional Information Service, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

Copyright Acknowledgment

Excerpts have been reprinted from Thomas A. Mauet, *Fundamentals of Trial Techniques* (Little, Brown & Co., 1980) with permission of Little, Brown & Co. and Thomas A. Mauet.

To my children Laura, Lisa, and Lee.

PREFACE

Beginning December 1980, I spent several months at the Institute of Judicial Administration, University of Birmingham, Birmingham, England, as a Hays-Fulbright Research Fellow. After seven years of practice as a litigator, principally in New York City, and seven years as a law professor concentrating on trial practice, evidence, and procedure at the University of Illinois, I intended to spend my sabbatical in England observing the criminal jury trial process in action. I wanted to pay particular attention to the relationship between the division of the bar into solicitor and barrister and the operation of rules of trial procedure, practice, and evidence. In addition, I planned to compare the English criminal jury trial process with the procedures employed in the United States and to observe the effect such variations in practice had upon the outcome of the trial. I also intended to note the fairness of the English process as a whole. Most importantly, I was hopeful that an in-depth study of the English criminal jury trial process would suggest reforms for a more effective and efficient criminal jury trial in America. In sum, I hoped the English criminal jury trial would provide an awareness of procedures for use in the United States to tighten the reins of justice. In the course of the project, I discovered that several American practices merited consideration for incorporation into the English criminal jury trial. This book is the result of my observations.

It was my desire to isolate, with the cooperation and assistance of those involved in the day-to-day operations of the criminal justice system in Birmingham, a representative case file (to the extent any case can be termed representative) and to study the case from arrest through verdict. I began the process in December 1980, spending many hours in the public gallery of the Victoria Law Courts, the Crown Court for Birmingham. During the same period, I thoroughly digested the few, and there are only a few, general works describing the jury trial system in England. I also carefully

reviewed both *Cross on Evidence* and Archbold, *Pleading, Evidence and Practice in Criminal Cases* (1979). In mid-January, with the cooperation of Mr. Ian Manson, Chief Prosecuting Solicitor of Birmingham, I spent several days with various members of his staff discussing and observing pretrial procedures in the Magistrates' Court and trial procedures in the Crown Court. For most of the time I consulted Robert Dean, the assistant in charge of the Crown Court Division. After completing my view of the practice of the prosecuting solicitor's office in Birmingham, I spent considerable time in the company of Mr. George Jonas, a prominent solicitor specializing in the defense of criminal cases, and his legal executive, Graham Wharton. I not only had the opportunity to discuss various matters with these gentlemen, I also accompanied them at the Magistrates' Court.

Following this two-month period of observation, questioning, and study, with the assistance of Messrs. Dean and Jonas, I selected the case of *Regina v. David Fisher* in late January 1981 for in-depth study. Mr. Fisher was accused of robbing a bank during March of 1980. His trial was scheduled to begin February 9, 1981. We made immediate arrangements, through Mr. Norman Jones, Clerk of 3rd set of Chambers in Birmingham (hereinafter referred to as Chamber 3), for me to meet counsel for both sides prior to trial. All three counsel, Mr. Escott Cox, Q.C., Mr. Coleman Treacy, acting as his Junior, representing Mr. Fisher, and Mr. David Jones, representing the Crown, are members of Chamber 3. At the same time, we made arrangements with the Courts Administrator for the Midland and Oxford Circuit, Mr. Clive Pratley, and with Mr. David Warner, Courts Administrator for the Victoria Law Courts, to make a transcript of all proceedings conducted at the trial of David Fisher. The court reporter transcribed all statements at trial, including matters not normally recorded in England, such as the jury selection process and speeches of counsel.

During the remaining months of my stay in Birmingham, and during the many months spent completing the manuscript upon my return, each and every one of the aforementioned individuals continued to display exceptional cooperation in all aspects of the project. Robert Dean of the Crown and Graham Wharton for the defense provided copies of files. Mr. David Warner provided copies of exhibits. In addition, numerous inquiries concerning both the case of *Regina v. David Fisher* and the general nature of criminal trials in England received prompt attention from Messrs. Cox, Dean, Jones, Treacy, and Wharton.

Three words of special thanks. First, to all three barristers, who not only cooperated with me fully, but went beyond expectation in agreeing to perform a mock examination of David Fisher, with Coleman Treacy portraying Mr. Fisher, at the conclusion of the trial. We did this for the sake of completeness after it was decided for tactical reasons that Mr. Fisher would not testify at trial. Second, to Professor Ian Scott, Director of

the Institute of Judicial Administration, University of Birmingham, whose support was instrumental throughout this research project. Finally, to Dr. Michael McConville of the Faculty of Law, University of Birmingham, whose knowledge and guidance with respect to the criminal justice system in England proved invaluable.

Tightening the Reins of Justice in America

CONTENTS

	FIGURES AND TABLES	ix
	PREFACE	xi
1.	Introduction	1
2.	The Crime	5
3.	The Investigation by the Police	9
4.	The Magistrates' Court	34
5.	Preparation for Trial	50
6.	The Structure of the Crown Court Trial	68
7.	The Trial Transcript	102
8.	Comments on the English Criminal Jury Trial	228
9.	Tightening the Reins of Justice in America	241
10.	Conclusion	277

APPENDICES

I.	Judges' Rules and Administrative Directions to the Police	281
II.	Text of Home Office Circular No. 74/1978 to Chief Officers of Police Concerning Section 62 of the Criminal Law Act 1977	295
III.	Witness Statements Submitted at Committal Proceeding	299
IV.	Police Report Prepared for Committal Proceeding	317
V.	Antecedent Report	321

VI. Comments upon Depositions 325
VII. Proofs of Evidence 329
VIII. Social Inquiry Report 333

BIBLIOGRAPHY 335
INDEX 339

FIGURES AND TABLES

FIGURES

1. Identikit Picture of the Robber 6
2. Pictures Taken of David Fisher upon His Arrest 8
3. Appearance of Courtroom 13 on February 9, 1981 70
4. Flow Chart of Appeals for All Criminal Courts 99

TABLES

1. Frequency With Which Defendants Dispute Statements in Contested Trials in the Magistrates' Court 29
2. Damaging Statements of Defendants Offered at Crown Court Trials in Birmingham and London, 1975-1976 81

1 INTRODUCTION

With increasing frequency during the last twenty years, elected officials, lawyers, and judges in the United States have all spoken out concerning the rise in crime on the streets and the need for society to respond by creating a more effective and cost-efficient criminal justice system. However, having once assumed this stance, potential reformers have generally been at a loss to suggest meaningful remedial action. Proposals almost invariably involve altering sentencing procedures, redefining crimes, creating new categories of custodial care, providing more money to hire policemen, providing job training in prison, and so on. One also finds jurisdictions previously favoring indeterminate sentences moving to fixed sentences, while other jurisdictions previously favoring fixed sentences move toward indeterminate sentences. Legislation to amend the federal criminal code has been before Congress for much of the period. None of these responses is new. Each has been tried over and over again. In addition to these traditional methods of supposedly tightening up on crime, occasional proposals are heard to eliminate the exclusionary rule barring introduction of illegally seized evidence.

Concern with the rising tide of crime has led many advocates of reform to look to the system of criminal justice in England for guidance. English visitors to America bring with them a great respect, and an even greater desire to communicate a great respect, for the quality of British justice and its effectiveness in punishing the guilty. They express the British belief that their system of justice is the best in the world, their policemen are the best, their barristers are the best, and, most fervently espoused, their judges are the best. The British discuss judges such as Denning and Devlin with a degree of admiration no current U.S. Supreme Court justice comes close to commanding in America. In addition, English visitors perceive America as a violent country, where the police cannot control crime in the cities and

where the court system, for reasons most often unknown and of little concern, often permits the guilty to be set free. Public media in England highlight American problems in dealing with crime at every opportunity. Since many Americans share the same feelings, citizens of both countries, whether lawyers or laymen, come to any discussion of the American response to crime on similar footing.

Of course, many of the Americans discussing comparative criminal procedure have traveled to London. They have asked directions of the London "Bobby" and have received a polite response in an appealing accent. One of the places to which American lawyers and judges frequently ask directions is the Old Bailey, the Central Criminal Court in London. Every year, hundreds of American lawyers and judges spend from five minutes to a couple of hours watching a criminal jury trial from the gallery of the Old Bailey in London. These lawyers, many if not most of whom are not trial lawyers and certainly not criminal trial lawyers by trade, are duly impressed by the majesty, dignity, and gentlemanliness of the proceedings they observe. They see the high court judge in a red robe and white wig high above several black-robed and white-wigged gentlemen taking turns eloquently addressing questions to witnesses in deep rich tones. They observe the defendant in the dock located at the far rear of the chamber. They are quite impressed. They ask, "Wouldn't it be nice if we in America could practice law, even criminal law, in such a grand manner?" These lawyers know that redesigning courtrooms and attiring participants in wigs and robes cannot be the whole difference. In light of these casual observations, they seize on an obvious difference in the practice of law between the two countries—division of the legal profession in England into solicitors and barristers. "Ah ha," they tell their friends upon their return, "we should consider adopting the division of the profession as a means of. . . . Well, ah, that is the way law was meant to be practiced."

This comparative study explores in detail the criminal jury trial process in England, including the role of the police, the functioning of the divided profession, and the operation of specific aspects of procedure, trial practice, and evidence. On the basis of the comparative analysis, specific suggestions are made for tightening the reins of justice in America. The vehicle chosen for this task is the case of *Regina v. David Fisher*, a trial which occurred in the Victoria Law Courts, Birmingham, on February 9, 10, and 11, 1981. Chapter 2 presents the basic facts surrounding the commission of a bank robbery on February 25, 1980. The subsequent arrest and interrogation of David Fisher, the search of his premises, and the denial of bail by the police are outlined for the convenience of the reader in Chapter 3. Chapter 4 sets forth the initial appearance by David Fisher in the Magistrates' Court, his remand, the selection of a place for trial, and the committal proceeding. Preparation for trial initially by solicitors for the Crown and the accused, and later by barristers briefed by both sides, is

discussed in Chapter 5. Chapter 6 outlines generally the structure of the Crown Court trial, while Chapter 7 contains the transcript of the trial of David Fisher. The next two chapters, 8 and 9, provide, respectively, comments on the English criminal jury trial, followed by observations and recommendations for reform of the American criminal justice system based upon the foregoing comparative analysis. Last, Chapter 10 summarizes the overall conclusions reached.

An actual trial transcript is incorporated for several reasons. Use of a transcript presents an actual trial for examination, not only by the author, but by the reader as well. From the transcript, together with accompanying pre-trial information in the possession of the solicitor and barrister set forth in the appendices, experienced trial lawyers and judges in America can evaluate the author's comments as well as draw their own conclusions. Full transcripts in England are rare. Records on appeal usually consist of the transcript of the judge's summation, sometimes accompanied by selected segments of witness testimony; the record rarely includes a transcript of the testimony of every witness. Moreover, in England the reporter does not record either jury selection, known as jury vetting, or the opening or closing speeches of counsel. Thus, even when a full transcript is prepared for appeal, such items are not included. Special arrangements were made for the recording and transcription of these matters in the trial of David Fisher. In addition, the flavor of the trial, its civility, and its effectiveness in convicting the guilty can best be appreciated by means of a transcript; the best way to judge how something works is to observe it at work. Finally, use of a transcript of an actual trial helps focus on what is important—the overall thrust of the English criminal justice system and the jury trial in particular.

The case of *Regina v. David Fisher* was selected with various criteria in mind. First and foremost, the trial had to be representative in the broad perspective of a typical English criminal jury trial, to the extent any single trial may be said to be either typical or representative. In addition, the trial had to be relatively short by American standards, approaching the average trial time of 8.5 hours consumed for jury trials in England. Any longer trial would make presentation of the full trial transcript unmanageable. The project also required the cooperation of the solicitor and barrister of both the prosecution and defense. Cooperation had to extend not only to providing copies of pre-trial and trial documents, but also to the opportunity to discuss the case with the solicitor and barrister for the defense before and during trial and with the barristers for both sides at its conclusion. Finally, a case that contained a statement of the accused was sought to highlight the operation of the Judges' Rules compared to *Miranda* warnings. As an extra bonus, the case selected also contained a search of the accused's room without a warrant leading to the seizure of relevant items. During the trial of David Fisher, counsel, in consultation with Mr. Fisher,

decided the accused would not testify. In this respect the trial cannot be said to be representative because the accused testifies in an overwhelming majority of cases in England. In order to remedy this situation to the extent possible, counsel conducted a mock examination of David Fisher at the conclusion of the trial.

At several points in this book, reference is made to statistics relating to English criminal justice. Unless otherwise indicated, the statistical information was derived from one of three sources: *Criminal Statistics*, England and Wales 1977; *Judicial Statistics*, 1978; or *Report of the Royal Commission on Criminal Procedure*, its *Law and Procedure Supplement*; and *Research Studies* 1981.