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Tightening the Reins of Justice in America: A Comparative Analysis of the Criminal Jury I England and the United States

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TIGHTENING THE REINS OF JUSTICE IN AMERICA: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES. By *Michael H. Graham*. Westport, Conn.: Greenwood Press. 1983. Pp. xii, 341. $35.

Commentators dismayed with the American criminal justice system have often looked to the English system for guidance.[1] In *Tightening the Reins of Justice in America*, Professor Michael H. Graham[2] uses this comparative technique to develop specific proposals for reform of the American criminal justice system. Graham follows a single English case from arrest to conviction, exploring in detail the English criminal jury trial process.[3] His reason for including the entire trial transcript illustrates his admiration of the English system: "[T]he flavor of the trial, its civility, and its effectiveness in convicting the guilty can best be appreciated by means of a transcript" (p. 3).

The English criminal justice system, as described by Graham, is "a well-oiled, cost-efficient, prosecution-oriented machine" (p. 228). As one illustration, Graham contrasts the dual standards for arrest and for charging a criminal defendant at a preliminary hearing in England with the single American standard. To arrest a suspected

1. *See, e.g.*, D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS (1973) (proposing, as the title suggests, reforms to the American criminal appeals process gleaned from the English system).

2. Michael H. Graham is a Professor of Law at the University of Illinois College of Law. Research leading to *Tightening the Reins of Justice in America* was conducted while Graham was at the University of Birmingham, Birmingham, England, as a Hays-Fulbright Research Fellow. Graham is also the author of HANDBOOK OF FEDERAL EVIDENCE (1981); THE FEDERAL RULES OF EVIDENCE IN A NUTSHELL (1981).

3. For a similar arrest through conviction description of the American criminal jury trial process, see J. POULOS, THE ANATOMY OF CRIMINAL JUSTICE (1976).

criminal, English police must only show reasonable grounds to *suspect* that the person has committed some crime (p. 13).[4] American police, on the other hand, must have reasonable grounds to *believe* the person guilty (p. 14).[5] According to Graham, the lower English standard of proof facilitates the apprehension of criminals.[6] After arrest, however, the English police must demonstrate, at a preliminary hearing called a committal proceeding, that they have enough evidence admissible at trial to prove a prima facie case against the accused. Graham contrasts the English "prima facie evidence" standard with the same "reasonable grounds to believe" standard used by American courts for both arrest and the preliminary hearing. According to Graham, the higher English standard at the preliminary hearing ensures that only those defendants likely to be convicted go to trial, a cost-efficient element of the English system (p. 39).

Graham traces the differing American and English criminal procedures to deeply held cultural attitudes about law and criminal justice. One American attitude is, according to Graham, that "as one develops [legal] analysis to the highest level of abstraction, each of the cases considered is more likely to be decided in a just fashion" (p. 243). But Graham argues that this complicated analysis produces instead the denial of justice.[7] The great complexity of the criminal law leads to "an increased disregard for the law by the police followed by confusion in ascertaining and applying the law on the part of counsel, court, and jury at trial" (p. 243). Graham advocates the adoption of simple, understandable legal rules, even if those rules may not produce the most analytically correct result in all situations:

> It is much better to have a rule of law that can be understood and applied uniformly in all cases, thus obtaining the correct result in the vast majority of cases, than to have a set of rules which, while analytically correct in all cases, cannot be readily applied in many cases, for whatever reason, by those called upon to administer them. [P. 244].

Graham attributes the lack of rigorous analysis of legal principles in

4. For example, in the case Graham recounts, the defendant was arrested solely because he was an unemployed worker in possession of an unusually large amount of money. P. 13.

5. Citing Carroll v. United States, 267 U.S. 132, 161 (1925) (describing the standard for arrest as information sufficient "to warrant a man of prudence and caution in believing that the offense has been committed," quoting Stacy v. Emery, 97 U.S. 642, 645 (1878)).

6. Although Graham admits that "[t]he practical result of the different standards applied in the two countries . . . is difficult to assess on a general basis," p. 14, he concludes that an American court would not have found the information held by the English police in the case he recounts sufficient to support arrest of the defendant. P. 14. *But see* A. BLUMBERG, CRIMINAL JUSTICE 27 (1967) (suggesting that the American standard for arrest approaches the lower English standard described by Graham: "Although prosecution agencies are bound by arrest standards of probable cause in connection with felonies . . . pressures of administrative efficiency too often resolve any doubts in favor of the organization.").

7. For another critique of the current complex criminal procedure rules, see L. KATZ, JUSTICE IS THE CRIME 219 (1972) ("The procedural steps that have been piled upon the system so preoccupy the partcipants that the means dominate the ends which the means are to serve.").

England to the English belief in their own capacity for fairness. That is, says Graham, the English fail to develop legal principles to ever greater levels of abstraction because they remain convinced that basic notions of justice can and will be applied fairly to the facts as they arise.

Another American attitude that Graham faults is the idea that committed advocacy on both sides will result in justice. The American attorney, says Graham, is so intent on winning that he "seeks to distort the truth by confusing and distracting the trier of fact in its search for the truth" (p. 250).[8] Graham traces the zealous nature of the American process in part to the actors involved. Both the prosecutor's and the public defender's offices are staffed by young recruits, eager to chalk up a victory and win promotion. Says Graham: "The depth of antagonism between prosecuting attorneys and public defenders should not be underestimated. Each motion, plea negotiation, and trial is a single battle in a never-ending war" (p. 262). Graham also criticizes American discovery procedures, which place emphasis on tactics rather than truth-seeking; American witness control techniques, which make the courtroom a stage; and the ingratiating method of voir dire used by many criminal attorneys: "The time has long since past when society should pay the salary of two attorneys who take turns smiling at number seven juror in the second row while inquiring what magazines she reads or whether she is a vegetarian" (p. 272).

In contrast, says Graham, the English barrister displays a far more detached attitude than his American counterpart. Since the barrister is a trial lawyer only, an English solicitor prepares the case. Because the barrister for both prosecution and defense reads the briefs and prepares for trial the night before it is to occur, he does not become as personally involved as an American attorney. This detachment is also physically evident in the courtroom. The English barrister does not stand by his client; rather, the barristers for defense and prosecution stand together, identically clothed in wigs and robes. Graham notes that distinctive elements of the British legal profession, such as the fact that barristers represent both prosecution and defense in different cases, may account for the less aggressive attitude of the British barrister. Nevertheless, according to Graham, the detached stance of the defense counsel is also a natural incident of a system that emphasizes factfinding rather than emotional persuasion.

Graham translates his critique of the United States criminal jus-

8. Examples of this behavior, according to Graham, include interjecting irrelevant matters into the case to confuse the jury, raising objections to break the flow of damaging testimony, convincing the jury of the defendant's innocence by selling the attorney's relationship to the accused to the jury. P. 236; *see generally* D. COHEN, HOW TO WIN CRIMINAL CASES BY ESTABLISHING A REASONABLE DOUBT (1970) (a handbook of American defense tactics).

tice system into concrete proposals (pp. 268-74).[9] Not surprisingly, his proposals borrow heavily from the English version. The primary thrust of his reform is to bring the court into the criminal procedure early through the mechanism of an expanded preliminary hearing, comparable to the English committal proceeding. In this hearing, the prosecution would be required to present a prima facie case. The defendant would be encouraged to testify, subject to cross examination, in order to rebut the prima facie case. The defendant would have an incentive to appear as a witness because relevant inferences from failure to testify could be presented to the jury at trial. After the expanded preliminary hearing, the court would be familiar with the case and thus able confidently to check overly zealous counsel and to guide the jury in its factfinding mission.

Graham recognizes that his proposals require substantial changes in existing law: "Only if reformers are willing to boldly alter existing procedures, and in the process make constitutional what is now unconstitutional, and vice-versa, will meaningful reform be possible" (p. 269). He characterizes any potential attack on his specific proposals as a "natural extension of reliance on overly complex legal analysis and, once again, a failure to see that the whole is both more and less than the sum of its parts" (p. 269). More important, according to Graham, is that a new system be judged by whether the integrated whole is efficient and fair, not by whether each aspect conforms to the current idea of procedural fairness. He proposes as a vehicle for change a Supreme Court advisory committee with broad discretion to revise criminal practice from arrest to appeal.

Graham attempts to attack current American procedures by looking to the beliefs that generated them, and by pointing out what he believes to be the fallacy of their underlying premises. However, because the tenets he attacks are so deeply rooted in the American legal system, his proposals remain controversial. Although many of his assertions have intuitive appeal, Graham presents no statistical data to support his conclusion that reform according to his suggestions would truly tighten the reins of justice. Furthermore, while Graham implicitly admits that some important values underlie the current American system of criminal justice, he does not explain how, or to what extent, they are to be preserved.

First, the adversary system is so central to the American criminal justice process that it is rarely criticized or even discussed.[10] Although he does not seek to abolish it, Graham does seek to circum-

9. One commentator has compared the English and American systems without suggesting reforms for the American system. *See* D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE (1967); D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND (1963).

10. *See* A. STRICK, INJUSTICE FOR ALL 19-21 (1977) (noting lack of discussion of the American adversary system in prominent legal works).

scribe "adversary" behavior significantly. Unlike other commentators, he is not troubled by the potential injury to defendant's rights resulting from limits on defense attorney behavior.[11] Furthermore, Graham appears convinced that a more active court will promote justice. This premise, too, is far from being well-established.[12]

Second, complex legal analysis forms the basis of American legal procedure. The Supreme Court has consistently expanded the analysis of defendants' rights. This tendency casts doubts on the Court's willingness to move toward the more streamlined administrative model of justice envisioned by Graham.[13] Graham admits that the price of more functional criminal procedure rules "will be that in a particular given instance a decision might be contrary to that if complex legal analysis were taken to the extreme" (p. 249). Still, he agrees that the level of abstraction chosen must "be high enough whatever the cost" to ensure that the accused receives a fair trial (p. 249). This statement, however, is inherently ambiguous because Graham, by focusing on the system as a whole rather than its specific procedural guarantees, fundamentally changes the definition of "fair procedure."[14]

In sum, Graham provides an interesting analysis of the differences between English and American criminal procedure. He thoughtfully points out the different assumptions that underlie the two systems and the consequent differences in procedure and outcome. Whether one ultimately accepts Graham's proposals depends upon whether one agrees with his premise that more simple rules and more limited advocacy may produce greater justice. As the title suggests, Graham proposes to *tighten* the reins of American justice. A move toward the English "prosecution-oriented machine" (p. 228) may be compatible with greater justice, but only if one believes that American criminal law now leans in the other direction.

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11. *Cf.* A. BLUMBERG, *supra* note 6, at 13-37 (questioning whether "adversary" behavior in the American criminal justice system even exists).

12. *See* K. MENNINGER, THE CRIME OF PUNISHMENT 58 (1968) (quoting discussions with Hans Zeisel).

13. *See* Packer, *The Courts, the Police and the Rest of Us*, in Y. KAMISAR, W. LAFAVE & J. ISRAEL, BASIC CRIMINAL PROCEDURE 188 (1980).

14. *See* A. BLUMBERG, *supra* note 6, at 21 (arguing that the American criminal justice system even as it now exists with all its procedural guarantees does not offer a defendant a fair trial).