Lawyers and Rules: Some Anglo-American Comparisons

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LAWYERS AND RULES: SOME ANGLO-AMERICAN COMPARISONS

Sixth Annual Roy R. Ray Lecture*

by

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ONE frequently hears the observation that the United States is the most law-ridden country in the world. Law and lawyers play a far more important and pervasive role in American political and social life than they do anywhere else. It has often been remarked that almost any kind of controversy or dispute in the United States will ultimately end up in the courts. I do not dispute the truth of any of these facts, and yet I believe that any serious comparison of British and American law and society will show that there is a sense in which Britain is a much more rule-governed, as opposed to law- or court-governed, country than the United States. In this lecture, I shall first offer some general evidence in support of my belief that Britain is a more rule-governed country than America; and second, I shall inquire into the reasons for these differences.

Although a number of different factors are clearly relevant to the question of how extensively a society can be said to be rule-governed, I shall concentrate in this lecture on one set of factors in particular, namely those that relate to the courts. I shall begin by considering the extent to which courts and judges perceive themselves to be bound by rules, the extent to which they do in fact follow rules, and the extent of the institutional and other pressures on them to follow rules, including in particular the degree of control or regulation of those who seriously deviate from the rules.

I. COURTS

A. Courts of Last Resort

There is only one court of last resort in England; in the United States

* This paper was presented at Southern Methodist University School of Law on March 29, 1983. A fuller version of the lecture will eventually be incorporated in a collaborative work on which the author is engaged, together with Professor R.S. Summers of Cornell Law School.

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there are many, and the courts of the two countries have different traditions in various respects. Such evidence as is available suggests that, taken as a whole, there is probably little—perhaps surprisingly little—difference in the perceptions of the judicial role by English and American judges in courts of last resort. In both countries it seems likely that most such judges see their primary rule as one of loyalty to the law, and to rules, while acknowledging a secondary but more active role. This secondary role may be seen as one of keeping the law up to date, or of interstitial legislation, or of simply being a lawmaker. In both countries different judges place varying degrees of emphasis on the relative importance of the two roles, and some judges in both countries undoubtedly feel anxiety over the legitimacy of the second role. In England, the House of Lords usually includes some judges who see their role as being primarily that of law-interpreters or law-declarers and others who see a greater scope for judicial activism; sometimes one group seems more dominant, and sometimes another. In America, the United States Supreme Court almost invariably contains a similar mix of conservatives or strict constructionists and liberals or activists. State supreme courts appear more likely to have a particular tradition of conservatism or activism. Thus, one recent study of state supreme court judges found that four out of seven members of the New Jersey court saw their primary role as that of lawmaker while six members of the Louisiana court perceived themselves primarily as adjudicators and none as a lawmaker.[1]

Notwithstanding this appearance of transatlantic uniformity of views, I suggest that any study of observable behavior by courts of last resort will present a rather different picture. So also, the functions that are today thrust upon the courts in the two countries differ in very significant ways, and these differences tend to make United States courts of last resort less rule-governed than the English House of Lords. I will discuss a number of issues that appear to me both to demonstrate and to explain, at least in part, why this should be so.

I start with the fact that, compared with most United States courts, English courts are much less adventurous in law-making, that they are more wedded to stare decisis, and that they tend to favor a more literal approach to statutory interpretation. I believe at least one important reason for these differences is that English judges do generally believe that law is a system of rules, and act on that belief to a greater degree than most American judges, particularly in courts of last resort. No doubt the differences are of degree, but in some respects these differences are very substantial. Two types of judicial behavior seem to me particularly relevant in this respect; first, the reversal of prior settled doctrine, and second, the prevalence of dissent.

1. H. GLICK, SUPREME COURTS IN STATE POLITICS 34-35 (1971). For a similar study, with not strikingly different results, of the judges of three federal circuit courts, see J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM (1981).

Stare Decisis and Judicial Activism. Since the issuance of the "Practice Statement" of 1966[2] the House of Lords has reserved the right to overrule its own decisions. Thus the formal position on stare decisis is the same in England and in all United States courts of last resort. But the practical position still differs very significantly. The House of Lords has several times insisted that the power to overrule its own decisions is to be exercised sparingly, and must usually be justified either on the ground of a significant change in conditions, or on the ground that the previous decision was anomalous or contrary to principles in analogous fields. The House of Lords has insisted on one other point also: mere change of mind, whether on the part of individual law lords, or by reason of changing personnel, is not itself a ground for reopening a previous decision.[3]

It is scarcely necessary to say that the practice of the House of Lords in this respect differs markedly from that of most courts of last resort in the United States. Both in the United States Supreme Court and in many state supreme courts, prior decisions of the court itself are not generally treated as sufficient in themselves to prevent a reopening of the questions of law there decided. Naturally, those judges who agree with the prior decision will invoke the doctrine of stare decisis, but those judges who disagree with it often appear to feel quite free to vote to overturn it. There are, of course, variations in the traditions of the state supreme courts. Stare decisis quite clearly means more in the Supreme Judicial Court of Massachusetts than it does in the Supreme Court of California, but overall there can be no doubt that courts of last resort feel free to, and do, overturn their own decisions at a rate that would profoundly shock English lawyers if it happened in England.

There are no doubt many reasons for this difference and indeed many different kinds of reasons—some psychological, some sociological, some institutional. One reason seems to me to be that English judges are more inclined than American judges to think of the law as a set of rules, to think of judicial decisions as enunciating those rules, and to see themselves as subject to the rules in the same way as everybody else. A judge's duty, an English judge would say, is primarily to apply the law, and previous judicial decisions in the courts of last resort *are* the law. The judge does, of course, have a secondary, lawmaking function where there are no prior decisions, but these gaps in the law are relatively few and far between. Only in quite exceptional circumstances, therefore, should the judge's secondary, law-making function be permitted to operate where a clear prior decision already determines the rules. These perceptions of law, rules, and gaps in the system are, of course, open to philosophical challenge, but few observers of the English legal scene would dispute that they are held by an overwhelming number of judges, and indeed by most practicing lawyers too. Conversely, equally few observers of the American legal scene would

2. [1966] 1 W.L.R. 1234.

3. *See generally* Paterson, *Lord Reid's Unnoticed Legacy—A Jurisprudence of Overruling*, 1 OXFORD J. LEGAL STUD. 375 (1981).

doubt that, though similar perceptions are widely found in American courts, alternative perceptions also may be found. I would hypothesize that many American judges regard rules as having less importance than do English judges; that they see judicial decisions as illustrations of underlying principles (often seen as drawn from morality or natural law) rather than as rules in themselves and of themselves; that they see the law-making function of courts of last resort as more important than English judges do; and that they do not in consequence feel bound by prior decisions to the same degree as English judges.

One significant explanation of these facts springs from the different constitutional position of courts of last resort in the two countries. There are many important political issues on which the judges have the last word in the United States but not in England. To be sure, it is rare for a judicial decision to be *retrospectively* overturned by the British Parliament—even the supreme and omnicompetent British Parliament—though it is far from unknown. But much more important is the fact that any House of Lords decision with seriously controversial political implications is open to subsequent modification or reversal by Parliament. Moreover, this is no mere ritual phrase in the British political system. It is a reflection of political reality. A decision with serious political implications will inevitably be studied by the Government, and if the Government does not like it, proposals to modify or reverse it will be laid before Parliament and passed.[4]

The position in the United States differs from that in Britain not merely in relation to constitutional decision-making. Ordinary United States judicial decisions are much more difficult to overturn by legislation even where the legislature has the competence to do so. Many of the reasons for this are well known. American executive governments do not control legislatures; party lines are much less strongly observed in practice; legislative procedures often give disproportionate influence to committees and chairmen of committees; and so on.

The result of all this is that courts of last resort in the United States know that their decisions are likely to be long-lasting and difficult to reverse even when they are not immune to reversal for constitutional reasons. Those factors lend some plausibility to a central assumption on which a certain amount of American political science research has been based.[5] This assumption holds that judges decide cases in accordance with their personal value systems and predilections, and that the reasons for their decisions contained in their opinions are merely rationalizations that do not actually propel the judges to their conclusions.

This kind of research and the assumptions on which it is based are antipathetic to traditional legal scholarship both in America and in England, but far more so in England. Indeed, it is scarcely possible to conceive of

4. For example, the decision in Rookes v. Barnard, 1964 A.C. 1129 (limiting immunity of trade unions to actions in tort), was overturned by the Trade Disputes Act, 1965, ch. 48.

5. *See, e.g.*, G. SCHUBERT, THE JUDICIAL MIND (1965); G. SCHUBERT, THE JUDICIAL MIND REVISITED (1974).

such research being conducted or taken seriously in England. It seems to me plausible to suppose that one reason for this is that, given the relationship between courts of last resort and legislatures in the two countries, English judges are more likely than American judges to feel (and act) as though they are bound by rules, and less free to achieve a result they personally favor. A second plausible reason for supposing that many American judges may be more willing to decide cases, within limits I do not doubt, in accordance with their personal value systems is that both their function and their personal backgrounds tend to be far more overtly political than those of their English counterparts. Almost by definition politicians tend to be either goal-oriented people or power-ambitious people. Such people are more likely to decide questions of law in legal disputes because they want to produce certain results in the legal system or in society at large. Judges who see their role as more professional and less political, and who have no political background (like most modern English judges), may be less likely to decide cases in accordance with their own private beliefs and desires.

Another set of institutional factors may also help to explain some of the reasons for the lower level of judicial activism in England, although it is sometimes difficult to disentangle cause from effect in these matters. English appellate judges, as compared with American appellate judges, rely far more heavily on the arguments of counsel, and far less heavily on their own researches, in deciding questions of law. In part this is forced on English judges by the lack of any research assistance and even of adequate secretarial assistance. English judges have no clerks able to do research for them; if they want to research a problem they have to do it themselves. Moreover, little time is available for such research, at least given the traditional English view that decisions ought to be handed down as soon as possible. In the English Court of Appeal, which is the final appellate court for the vast majority of cases, most appeals are still decided on the conclusion of the oral argument, and ex tempore oral opinions are delivered immediately.[6]

It seems clear that these traditions also encourage the judge to see himself in the role of passive arbitrator whose business it is to decide which of the rival contentions offered to him by opposing counsel is the better. These traditions naturally discourage judges from setting off on voyages of discovery of their own, rejecting the views of both parties and fashioning their own decree to match some private vision of the public good. Indeed many English judges regard it as improper for a judge to rely on precedents or arguments that have not been canvassed by counsel; the proper course for a judge who believes counsel have overlooked important cases or arguments is to relist the case for a further hearing.

Prevalence of Dissent. Despite the difficulties of comparison, dissent appears to play a much more important role in the American than the Eng-

6. D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 98 (1963).

lish judicial scene. In the United States Supreme Court dissent has greatly increased over the years. In the 1930s, for example, the number of nonunanimous decisions was often less than 20% each year while in the 1950s it was common for more than 70% of full opinions to attract some dissent.[7] In the 1980 term 68.8% of full opinions attracted dissent and even 28.4% of memorandum orders did so. Fully one quarter of all votes were dissents.[8]

Because the House of Lords hears so few cases, comparisons with dissent rates in that court may not be very meaningful. In fact, dissent rates, in percentage terms, have varied over the last fifty years from 10% to as high as 46%.[9] These percentage rates are not low, indeed they are higher than those in many state supreme courts, but the absolute number of dissenting opinions is very low indeed, rarely more than ten in a year, and for present purposes this may well be the more significant factor.

In American state supreme courts dissent rates vary quite widely. In 1966, for instance, the highest rate was 46.5% (in Michigan) and the lowest was 1.2% (in Massachusetts).[10] Although the position of each state has varied over the years, the overall average has not changed much. In some states the supreme courts are racked by repeated dissents, and the judges may fall into clearly identifiable blocs, often closely correlated with their political affiliations. In other states a more socializing role is played by the court as an institutional whole, and such factionalism is unknown. Because so few cases are heard by the House of Lords it is worth adding a few comparisons between the intermediate federal appeals courts and the English Court of Appeal. Amongst federal circuit courts differing dissent rates have been noted, varying from 15.5% to 2.8% in 1961 through 1964[11] and from 13.2% to 1.4% between 1965 and 1971.[12] During this latter period five circuits averaged dissent rates of 7.4% or more.[13] It is not easy to compute such precise figures for the English Court of Appeal, but I have attempted to analyze the cases heard by that court in 1980, and this shows a total for the year of approximately 540 cases in only six of which there was a dissent, a rate of just over 1%.[14]

One final comparision may be of some interest. Lord Denning, who recently retired from the bench after what is believed to be a record tenure of thirty-six years, had a well-deserved reputation for idiosyncratic views

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7. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 203-09 (1959).

8. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 339-41 (1981).

9. Percentages calculated from figures drawn from the English Law Reports for 1916, 1941, 1966, and 1980.

10. H. GLICK & K. VINES, STATE COURT SYSTEMS 79 (1973).

11. Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374, 377 (1966).

12. *See* J. HOWARD, *supra* note 1, at 193.

13. *Id.*

14. I obtained this figure by taking the number of reported Court of Appeal decisions in the Law Reports for 1980 and adding to them the unreported cases noted in the *Current Law Yearbook 1981* (which relates to 1980).

that led him to dissent far more frequently than most English judges. Yet out of a total of 1742 cases in appellate courts in which he participated, Lord Denning dissented in only eighty-three, a dissent rate of 4.7%.[15] By comparison, Justice William O. Douglas, who was in some ways a comparable figure who also sat on the bench for thirty-six years, dissented in 1321 cases out of a total number of 6863, a dissent rate of 19.2%.[16]

I next draw attention to an even more striking contrast between patterns of judicial behavior in the courts of the two countries. In England a dissenting judge in the House of Lords regards the decision of the majority as creating binding law; the decision settles the applicable rule and even the dissenter is bound by that rule in future cases. All English judges, with the exception of Lord Denning who, especially in his later years, never really accepted the doctrine of stare decisis at all, respect this tradition.

A particularly striking example of judicial adherence to this practice can be found in the behavior of Lord Reid in two famous cases on the criminal law, *Shaw v. Director of Public Prosecutions*[17] and *Knuller (Publishing, Printing & Promotions) Ltd. v. Director of Public Prosecutions*.[18] In *Shaw* the House of Lords held that the common law recognized the extremely vague offense of "conspiracy to corrupt public morals."[19] Lord Reid delivered a spirited dissenting opinion on classic civil libertarian grounds. His dissent was widely approved by commentators, few of whom had a good word to say for the majority decision, which in any case seemed out of touch with the new sexual permissiveness of the sixties. After the issuance of the 1966 Practice Statement in which the House of Lords asserted the right to overrule their own decisions, *Knuller*, a similar case, was again taken on appeal. As Lord Reid was again sitting, there were confident hopes that *Shaw* would be overruled. In fact, the House of Lords, with Lord Reid in the majority, refused to do this; the 1966 Practice Statement was never intended, Lord Reid asserted, to enable decisions of this kind to be overturned by the House of Lords. Therefore, even though he himself continued to believe *Shaw* was wrong, he voted to follow it.

As is well known, judicial behavior of this kind is not the norm in American courts. From the Supreme Court of the United States to the lower courts, dissenting judges usually behave as if they feel free to repeat their dissents over and over again, and the moment the composition of a court changes a previously dissenting judge will seek to convert his dissent into the majority opinion. Although examples of the English practice are not unknown in United States courts, they appear sufficiently noteworthy to attract comment when they do occur.[20]

What is the relevance to my theme of varying dissent rates and practices? One possibility is that such practices simply reflect the greater ho-

15. Figures obtained from LEXIS.
16. *Id.*
17. 1962 A.C. 220.
18. 1973 A.C. 435.
19. 1962 A.C. at 266, 287, 291.
20. H. GLICK, *supra* note 1, at 81.

mogeneity of English society and English judges on the one hand, and the greater diversity of peoples and values that exist in the United States on the other. Hence, it may be said in the United States there is more scope for reasonable disagreement among reasonable persons in deciding what the law is. This may well be part of the story, but I do not think it is the whole story. It seems evident to me that the differing prevalence and function of dissents in the United States and English courts is in part a reflection of differences in the judges' perceptions of the nature of the judicial role and indeed the nature of law itself. Perhaps these differences can be identified on two separate planes.

First, judges who are more concerned to impress the public with the idea that law in some sense represents neutral and eternal values of truth and right may be more concerned to present a united front, and suppress their differences of opinion. Hence the infrequency of dissent in a particular jurisdiction may reflect "acceptance of the notion that unanimity denotes precision and truth and, therefore, is more convincing."[21] I think English judges are more influenced than most American judges by a desire to promote this goal. By contrast, American judges often appear to have viewed dissent as a way of asserting "a personal, or individual responsibility . . . of a higher order than the institutional responsibility owed by each to the Court, or by the Court to the public."[22]

Second, as I have already suggested, judges who perceive the law as a system of rules binding on the judges as on everyone else are more likely to arrive at the same conclusion in a given case. For to put it at the lowest level, such a view of the nature of law and the judicial rule narrows the range of choice open to the judge and therefore makes unanimity more likely. This also appears to me to reflect a major distinction between English and American judges, speaking in general terms.

B. Intermediate Courts

I turn now to consider some of the more striking differences between the practices and functions of lower courts in the two countries, focusing in particular on distinctions that may throw light on the degree of rule orientation in the two countries. The English court structure is more centralized and more hierarchical than the American. In England lower courts are expected to—and do—conform without question to the rulings of higher courts. An English lawyer would probably regard this as so much a matter of course that he would be surprised at any inquiry into it. No explanations would be called for; it is simply a part of the system, accepted by all. If we are to venture any explanations, it seems to me clear that there are basically two reasons for the absence of any deviations from the accepted theory. First, judges and lawyers are socialized by their traditions to ac-

21. *Id.* at 3.

22. ZoBell, *supra* note 7, at 203.

cept this aspect of the system, and secondly, any sign of aberrant behavior by lower courts or judges is quickly dealt with by higher courts.

In a small centralized legal system like England's the higher courts can without difficulty correct all instances of deviant behavior brought to their attention, and given a small, and also very centralized, legal profession, it is highly unlikely that serious instances of deviant behavior would not be rapidly appealed and overturned. The fact that the publicity media are national in their coverage also contributes in some measure to the strengthening of these traditions. For example, when a judge took the highly unusual course of putting a convicted rapist on probation in 1982, the case was widely reported and commented on in the national press. No appeal is possible by the prosecuting authorities in such a case, but very shortly afterwards the Court of Appeal, hearing appeals in a number of other rape cases, took the opportunity to make a public pronouncement about the type of sentence it regarded as appropriate for that offense.[23] With minor judicial offenders such as magistrates seriously aberrant behavior would almost certainly be widely reported and in all probability would lead fairly rapidly to removal from post by the Lord Chancellor. So far as the higher judiciary are concerned, other factors also encourage loyalty to the system that I shall consider later.

I have said that all judges and lawyers in England accept the traditions of loyalty to higher court rulings, but I must admit that Lord Denning was an exception to this generalization as he was to so many others about the English judiciary. He does, however, provide us with an excellent illustration of what happens in the rare case when English judges throw over the traces. In *Cassell & Co. Ltd. v. Broome*[24] a jury had awarded the plaintiff £25,000 punitive damages (in addition to £15,000 compensatory damages) in a libel action. Only a few years earlier, however, the House of Lords had in *Rookes v. Barnard*[25] severely limited the circumstances in which punitive damages were to be recoverable in tort. In fact all the judges who heard *Cassell & Co. Ltd. v. Broome* ultimately agreed that punitive damages were properly awardable on the facts of this case in accordance with the ruling in *Rookes*, but when the case reached the Court of Appeal Lord Denning encouraged counsel to argue that *Rookes* was wrongly decided per incuriam on the question of punitive damages. Counsel accepted the invitation, and Lord Denning succeeded in persuading his two colleagues that *Rookes* had been decided per incuriam and should not be followed, and in addition, that trial judges should be instructed not to follow *Rookes* in the future.[26] In the English legal system this was little short of rank mutiny, and retribution followed, swiftly and inevitably. An unusually

23. Regina v. Roberts, 74 Crim. App. 242, 244 (1982). In fact there is no reference in the opinion in this case to the widespread publicity attracted by the earlier unreported case, but nobody in England at the time could have doubted the influence of the one event on the other.

24. 1972 A.C. 1027.

25. 1964 A.C. 1129.

26. [1971] 2 Q.B. 354, 384.

large panel of seven law lords was convened to hear the appeal in *Cassell & Co. Ltd. v. Broome*, and a solemn magisterial rebuke was administered to Lord Denning for this conduct, which was said to raise constitutional issues.[27] While Lord Denning himself was able to shrug off this rebuke—he was already the longest serving judge on the bench—it is safe to say that no other English judge will run the risk of such treatment from an appellate court.

The position in the United States differs from that in England in many ways and for many reasons. First, the federal system means that there is no simple hierarchical structure of courts throughout the country. Even within a single state the number and complexity of the relationships between the different courts is often such that "the actual operation of most state judicial systems does not make state judges part of a well-regulated, cohesive hierarchy."[28]

The sheer size of the country, and even the quantity of litigation and the number of lower courts in a particular state, may make it impossible for higher courts adequately to control deviant lower court behavior. For example, in California alone in 1979 there were 65,000 contested dispositions in state superior courts, 5750 in courts of appeal, and 123 in the supreme court.[29] One commentator has noted of the situation in California:

> In theory, whenever a trial or intermediate appellate court departs from the law as announced by the highest court, the decision can and should be reversed through the process of appeal. In fact, appellate review is an inefficient system for correcting error. Misapplications of law can be shielded from review, deliberately or otherwise, in any number of ways, and the sheer volume of cases makes it unrealistic to suppose that a supreme court itself, even with the willing aid of the intermediate appellate courts, can reach any significant percentage of what litigants think are possible mistakes by the trial courts.[30]

If this is the position even within a single state, the problems of federal control of aberrant state judicial behavior are obviously far worse. For one thing, the more political nature of the American judicial role means that judges, especially state judges, often have a political constituency to consider, and their loyalties to this political constituency sometimes outweigh their loyalties to the judicial hierarchy and even the constitutional supremacy of federal court decisions. The problem may be aggravated by the parochialism of much of the media, which means that local court decisions may receive little publicity outside the immediate locality.

In certain areas of the law, notably the desegregation and religious establishment cases, some state courts have waged a hard fought campaign against decisions of the United States Supreme Court. Although very few state judges have ever openly declared their refusal to implement Supreme

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27. 1972 A.C. 1027, 1053. It will, of course, be appreciated that in England a "constitutional" issue means nothing more than an issue of major political importance.

28. H. GLICK & K. VINES, *supra* note 10, at 33.

29. P. STOLZ, JUDGING JUDGES 408 n.* (1981).

30. *Id.* at 408 (footnote omitted).

Court decisions or abide by the terms of the Constitution, there has often been a long history of delay, evasion, and prevarication. Sometimes the line between evasion and outright defiance of Supreme Court rulings has undoubtedly been crossed despite judicial assertions to the contrary. One study of the impact of United States Supreme Court decisions on the religious establishment issue, for instance, identified fifteen clear cases of state supreme court noncompliance with United States Supreme Court rulings, out of a total of ninety-seven cases on this issue decided by the state supreme courts between 1967 and 1973.[31] Another study suggests that the initial reception by the Florida Supreme Court of the *Gideon*, *Escobeda*, and *Miranda* decisions was hesitant, "narrow," and "suspicious" and indeed in some cases seems to have gone well beyond a reluctant and "begrudging acceptance" to downright evasion.[32]

The United States Supreme Court simply cannot exercise adequate and effective supervision over the judicial system of the entire country. When widespread evasion of Supreme Court rulings takes place at lower levels of the judicial system there is absolutely no guarantee that a litigant, even if he has the time and money, can ultimately obtain a decision in accordance with those rulings. To an English lawyer, used to the strictly hierarchical structure of the English court system, such results are unthinkable, but the American judicial system does not fit a hierarchical model in the same way as the English system. There is also some evidence that lower state courts are on occasion even more prone than state supreme courts to pursue their own way, heedless of rulings of higher courts that are clearly binding upon them according to the accepted constitutional position. The reason for this appears to be that the further down the judicial hierarchy one goes, the more political is the function of the judge, and the less insulated he is from the local political constituency.

C. Trial Courts and the Judicial Process

Much of what I have said concerning appellate courts applies also to trial courts. There is no question that English trial judges are, for many of the above questions, more rule-governed than American trial judges; but, in addition, the continued use of the civil jury in America makes the American trial a totally different exercise from the English trial. Trial by judge is just not the same thing as trial by jury. Judges give reasons for their decisions, juries do not; judges cannot openly discard or flout the law, juries can; judges at least attempt to put aside prejudice and emotion, juries often do not. Nobody can doubt that jury trial is a less rule-governed and less predictable mode of trial than judge trial.

The contrast can be seen vividly by comparing a typical personal injury trial in English and American courts today. Although minor variations in doctrine exist, the substantive rules of tort law do not differ a great deal in

31. *See* G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS 35-55 (1977).

32. Note, Gideon, Escobeda, Miranda: *Begrudging Acceptance of The United States Supreme Court's Mandates In Florida*, 21 U. FLA. L. REV. 346, 350-51 (1969).

the two countries. Far and away more important than any differences in the law are the differences in the mode of trial and all that flows from those differences. In particular, an English judge today makes a serious attempt to itemize the different elements in an award of damages in a personal injury case and to justify each item separately. Thus, judge awards of damages in England are far more predictable and also far lower than jury awards in America.[33]

II. THE JUDGES

So far I have been speaking of the courts as institutions. But courts are staffed with judges—men and women of particular qualifications, backgrounds, and characteristics. The way they decide cases in courts is affected by the kind of people they are, the socializing experiences they have had, and the conditions under which they hold office. I suggest that the differences in the character of the judiciary are again significant factors in producing a more highly rule-oriented English than American legal system.

Perhaps the most important difference between the judiciary of the two countries is one of the least observed, namely their relative size. The English judiciary is tiny by comparison with the American judiciary. The higher judiciary (High Court judges and above) comprises the Lord Chancellor, Lord Chief Justice, Master of the Rolls, eleven lords of appeal, eighteen lord justices of appeal, the Vice-Chancellor, President of the Family Division, and eighty other judges of the High Court, a total of 114. The next tier of the system comprises the circuit judges who try criminal cases in the Crown Courts and civil cases in the County Courts. There are some 350 circuit judges. These are the only people who are properly called judges in the English legal system.[34]

Not only is the number extremely small, but the judiciary is also a very centralized body. All important appellate work is done in London, and most High Court civil litigation is also conducted in London. Thus, all the higher judiciary are based in London, although some of the High Court judges are required to travel to other cities to hear criminal cases in the Crown Courts.

By contrast, the American judiciary is enormous. The federal judiciary comprises the nine Justices of the United States Supreme Court, 180 justices of thirteen circuits and 893 district judges all of whom rank, in terms of jurisdiction and power, with English High Court judges.[35] In the states the total number of judges exceeds 8000 although many of these may have a limited jurisdiction and powers similar, or less, than those of an English

33. For an account of the method of assessing damages in personal injury cases in England, see P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW ch. 7 (3d ed. 1980).

34. *See* Megarry, *Barristers and Judges in England Today*, 51 FORDHAM L. REV. 387, 388 (1982).

35. Except for bankruptcy judges, whose present status is a matter of constitutional uncertainty as a result of the United States Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

circuit judge.[36] Many of the larger states have a three-tiered judicial system like England's. In these systems, however, the number of judges greatly outnumbers those in England. California alone, for instance, has 694 judges, although the population of England greatly exceeds that of California.[37]

In addition, of course, American judges operate in a far less centralized system. Not only does each state have its own judicial system within its own borders, but even the federal system is decentralized and the states also have permanent courts in major cities. These factors naturally militate against homogeneity.

There are also many well known differences between the laws governing the qualifications, modes of appointment, and tenure of the judiciary in the two countries. All the higher judges in England have to be qualified barristers of at least ten years standing. This is a statutory requirement.[38] But it is today also a firm convention that nobody is appointed as a judge who has not had many years of active professional practice at the bar. Thus, the statutory requirement of ten years standing would not in practice be regarded as satisfied by someone who had not been in active practice for at least that length of time; in fact, few judges are appointed who have not been active barristers for at least twenty to twenty-five years. No law professor has, as such, ever been appointed to the English bench.

Until comparatively recent times—perhaps the Second World War marks the turning point—previous political service was a valuable assistance to securing judicial appointment. Indeed, until the early years of this century it was rare for the highest posts, Lord Chief Justice and Master of the Rolls, to be offered to someone who had not been active in politics on the side of the government making the appointment. But for the past thirty years or so this has no longer been the case. Fewer and fewer politicians now make the transition to the bench, except of course for the highly anomalous post of Lord Chancellor that violates all the rules by combining a high political and a high judicial office, and even those who do, it is now safe to say, are appointed on professional merit. Nominally all judges are appointed by the Queen, but the power to recommend appointment of higher judges lies, by statute, in the hands of the Prime Minister (in the case of appellate judges) and the Lord Chancellor (in the case of trial judges). Although appellate judges are not required by statute to have some experience as trial judges, it is today quite exceptional for anyone to be appointed to an appellate court straight from the bar. It would be unusual for a trial judge to be appointed to the House of Lords unless he has served some years in the Court of Appeal. Since the Act of Settlement of 1701 all of the higher judges are, of course, irremovable except on an

36. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1982-1983, at 254-55 (1982) [hereinafter cited as BOOK OF THE STATES].

37. *Id.*

38. Supreme Court Act, 1981, ch. 54, § 10(3)(c).

address by both Houses of Parliament, though there is now a compulsory retiring age of seventy-five.

In all these respects, of course, the situation differs fundamentally in the United States. First, the formal qualifications needed for appointment to the bench, so far as professional legal experience goes, are minimal. There are no constitutional or statutory qualification requirements for federal judicial appointments other than that district judges must be residents of the district to which they are appointed. About half the state constitutions have some modest requirement as to the minimum number of years of legal practice a person must have before appointment. Many states merely require judges to be learned in the law, and even the ABA Model Judiciary Act of 1962 only calls for the requirement that a judicial appointee be "licensed to practice law in the courts of the state."[39] Further, all judicial appointments in the United States are treated as political, and public or political service in some shape or form is far more important as a qualification for getting on the bench than the extent of professional experience. Some recent attempts to depoliticize the appointing processes of state justices have perhaps been more successful in improving the quality of the judiciary than in depoliticizing it.[40]

Formally, methods of appointment vary widely. Federal judges are appointed by the President, subject to Senate confirmation. State judges are appointed in a variety of different ways, commonly classified in five main groups: appointment by the governor (11 states), by the legislature (4), by nonpartisan election (10), by partisan election (12), and under some variant of the so-called Missouri plan (13).[41] But there are many variations within these classes; for example, in some states, judges are appointed in the first instance by the governor, but may have to seek electoral confirmation after a certain length of time. In addition, formal powers of appointment are significantly affected by political custom or convention; for example, federal district judges are usually appointed on the nomination of the governing party's senator, if any. In fact, many state judges who are in theory supposed to be elected are in the first instance appointed by a governor to an often carefully engineered vacancy and only subsequently required to submit themselves to electoral confirmation, with the advantage then of being incumbents.[42]

Finally, the position as to tenure also varies widely. Federal judges enjoy the same life tenure as English judges (without the compulsory retiring age), but few state judges enjoy life tenure. Many must seek reelection or reappointment after terms that vary from six to fourteen years for most

39. MODEL JUDICIAL ARTICLE § 5, ¶ 2 (1962).

40. Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 51, 55-56 (G. Winters ed. 1967).

41. *See* BOOK OF THE STATES, *supra* note 36, at 260-61.

42. Winters, *One Man Judicial Selection*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 120, 120-21 (G. Winters ed. 1967).

supreme court judges, but can be as short as four years for some state trial judges.

The conventions governing appointments differ from those followed in England almost as much as do the strict legal rules. For instance, United States appellate judges frequently have no prior judicial experience at all, and sometimes have very little trial experience even as lawyers. Such prior experience is not even thought to be very important by most American lawyers although the ABA, which has now acquired some influence in federal judicial selection, does regard prior trial experience as an important requirement for a trial judge.[43] Academics are not infrequently appointed to federal and state judicial posts, even where they have little or no experience as practising lawyers.[44] In some cases there is no doubt that political considerations lead to appointments of judges of low competence whose legal knowledge and training are inadequate by any professional standard. Even in the case of federal appointments, where higher standards generally prevail, a number of judges have been appointed over the protests of the ABA, which had rated them "not qualified" according to its own evaluation and criteria.[45]

Other important differences exist between the conventions governing the judiciary in the two countries. In England the position of High Court judge, or above, is regarded as the apex of a professional career, and as the end of any other career. Nobody with political ambitions would become a High Court judge in England; and almost nobody resigns from such a position in order to return to a political, or indeed any other, career. Instances of deviation from these traditions are rare indeed. In the United States, of course, judges can and do move from the bench back to politics, and sometimes to very aggressive and partisan politics. Even United States Supreme Court Justices have done this,[46] and many state judges do not regard their positions as lifetime jobs, indeed, lack of tenure often precludes such a view of their appointment.

One cannot exaggerate the importance of these differences between the qualification, modes of appointment, and tenure of the judges in the two countries. They have a profound influence on the law in a great many ways. In particular, I suggest that they play an important role in making the English judiciary more rule-oriented than the American judiciary.

Consider first the position of an English barrister who aspires to become a judge. He much catch the eye of one person above all others: the Lord Chancellor's; and he must impress two groups of persons with his professional skills: the existing judges and, to a lesser extent, his professional colleagues. The views of the political parties, the media, and the public are

43. J. GROSSMAN, LAWYERS AND JUDGES 111-13, 138-39 (1965).

44. Some of America's most distinguished judges have been former professors, both in federal courts (e.g., Felix Frankfurter in the United States Supreme Court) and state courts (e.g., Roger Traynor in the California Supreme Court).

45. J. GROSSMAN, *supra* note 43, at 47-48.

46. For example, Charles Evans Hughes resigned from the Supreme Court in 1916 to run for President.

of almost no consequence at all. Consider next the position of an English judge of the High Court. He has "arrived"; he holds office for life; he has social status and prestige. But most such judges would like to be promoted to an appellate court. The work tends to be more interesting, the pressure less, and there is no obligation to travel to other cities because all appellate work is done in London. How does a judge get promoted? Again, by impressing his colleagues and senior judges with his professional skills. Even when a judge is appointed to the House of Lords, his principal motivations probably derive from a desire to impress his colleagues and the judges in courts below. He has, anyhow, absolutely no need to curry support or favor with anyone else.

Given, then, this intense professionalization of the judicial role in England, it is not surprising that judges should be very rule-minded people, wedded to stare decisis, and strongly of the opinion that significant change in the law should be left to Parliament and the politicians. Lower court judges are unlikely to be candidates for promotion to appellate courts if they display deviant tendencies to reject or disregard appellate court precedents, just as barristers are unlikely to be candidates for appointment to judicial office if they have given any indication that they reject conventional ideas of stare decisis or embrace radical views of the judicial role. Appellate court judges, at least in the House of Lords, are, it is true, free from such constraints, but the conventional requirement for prior experience as a trial judge means that few judges reach the House of Lords before the age of sixty. By that time an English judge will have been exposed to upwards of thirty-five years of socializing pressure in the conventions of the judicial role. At such an age, the temptations of radicalism are apt to wane. Over several centuries only one judge, Lord Denning, can be said to have succumbed to them.

Compare now the position in the United States. A person who wishes to become a judge may have to court, and join, a political party; he may, if he seeks elective state office, need to attract public attention. Furthermore, because judicial office is itself more political and is often a further stepping stone to other political posts, more politically minded people are attracted to judicial office. On the other side of the coin, the leaders of the legal profession are often less attracted to judicial posts. By American standards, judges are not particularly well paid, and in the case of the state judiciary, the lack of life tenure may be a significant disincentive to more professional, or nonpolitical, lawyers.

Even after appointment to a judicial post, these factors may continue to influence behavior. A judge who sees the judicial post as a stepping stone to more openly political offices may need to maintain a high public profile. That is more likely to be achieved by doing, and saying, unusual things, rather than by being a safe, traditional minded judge, who adheres to stare decisis and settled doctrine. Even for those who see a judicial post as a lifetime career, there are pressures that may lead an American judge to adopt a more adventurous role than his English counterpart. Broadly

speaking, it is quite clear that American judges do not share the long years of professional experience that English judges do, and that American appellate judges have not experienced the years of sitting at first instance that nearly all English appellate judges have. On the other hand most American judges share a far more political background than do English judges. Almost without exception American judges, on appointment, are known to be adherents to, or at least supporters of, one of the major political parties; with few exceptions, appointed judges in America come from the same party as the appointing person.[47] The great majority of American judges have held political office of some kind or other during their careers.[48] Furthermore, requirements of electoral confirmation are by no means always a formality. Politics can enter significantly into this process; for example, Chief Justice Rose Bird of the California Supreme Court was confirmed by only 51.7% of the electorate in 1978 after a campaign in which she was accused of being "soft on crime."[49]

I am not merely suggesting that the background, qualifications, and experience of American judges differ widely from those of English judges. Just as relevant is the fact that American judges also vary widely among themselves with respect to those matters, while English judges share an exceptionally uniform socializing background experience. The homogeneity of the English judiciary and the senior bar in terms of background and values is of immense importance to the way in which questions of law are decided in England. To the extent that judges share the same inarticulate major premises, traditional legal reasoning is not nearly so bogus as American realism has been credited with demonstrating. When we bear in mind all the other institutional factors that I have discussed, it seems to me manifest that the indeterminacy of rules in the English legal system is far less acute than it is in the United States. English judges believe in rules more than American judges do partly because rules do have a greater objective validity in the English legal system.

It may well be that some American judges have a traditional perception of the judicial role that does not differ significantly from that of most English judges. But even the most traditional minded American judge operates in a different milieu from English judges; the rules of law—the raw material with which he works—differ from those with which English judges work. These factors must be borne in mind because there must inevitably be interaction between judicial perceptions of the judicial role and the nature of the rules of the system. Even a very traditional American state supreme court judge, for example, may have to ask himself whether he feels his court should stick rigidly to a prior decision when most other state supreme courts have followed a different line. No English judge ever has to face such a question.

Another question about which I need to say a little concerns the general

47. *See* D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 99 (1976).
48. H. CLICK & K. VINES, *supra* note 10, at 48.
49. P. STOLZ, *supra* note 29, at 119.

levels of competence of the judges. Judges who lack adequate legal understanding, judges who fail to devote adequate attention to the evidence or briefs (whether through laziness, inattention, or alcoholism), judges who totally lack a judicial temperament and seem incapable of fairly investigating the issues or arguments in a case, judges whose background or ideology predisposes them to think that, for example, policemen always (or never) give untrue testimony, and judges who suffer from other such failings well known to trial lawyers, necessarily have a bearing on the congruence between law in the books and actual decisions. In these respects, too, it cannot be denied that there is a significant difference between the situation in England and that in the United States. While the best American judges stand comparison with the best English judges in regard to integrity, competence, fairness, and acumen, it cannot be disputed that the worst American judges are a great deal worse than the worst English judges, nor can it be denied that there are more of them. Lawyers advising clients have to take account of such matters, which therefore must be considered as additional factors, adding to the unpredictability of decisions and the indeterminacy of the law.

III. CONCLUSIONS

As I indicated earlier, there are no doubt many other differences in the institutions of the two countries that contribute to produce these differing levels of rule orientation. A full picture would need to take account not only of courts and judges, but also of the legal profession, of legal education and the role of law reviews and textbooks, of the different traditions regarding legislation, of the impact of federalism on a legal system and a legal culture, and probably of many other factors as well.

When this exercise has been properly done, it will be time enough to open up for discussion a number of more theoretical questions concerning the nature of law, the relationship of law and morality, and so on. I do not propose to begin looking at these questions now. But I will say this, that it may be found in the end that differing protagonists in the seemingly endless jurisprudential debates may have had, and may still have, differing perceptions of law because they have been brought up and worked in legal systems with deep institutional differences. Perhaps the major differences between, for example, the theories of Professor H.L.A. Hart and the late Lon Fuller may turn out to be related to the fact that the former was an Englishman and thought of law in terms of the English legal system, while the latter was an American who thought in terms of the American legal system.[50] Theories of law may turn out to be more chauvinistic than the theorists have ever suspected.

50. *Compare* H.L.A. HART, THE CONCEPT OF LAW (1961) *with* L. FULLER, THE MORALITY OF LAW (2d rev. ed. 1969).