

October 1979

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Delmar Karlen, *Civil Appeals: English and American Approaches Compared*, 21 Wm. & Mary L. Rev. 121 (1979), <https://scholarship.law.wm.edu/wmlr/vol21/iss1/5>

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CIVIL APPEALS: ENGLISH AND AMERICAN APPROACHES COMPARED*

DELMAR KARLEN**

INTRODUCTION

When American judges and lawyers take a vacation in England, they usually manage to slip away from the usual round of sightseeing and shopping expeditions long enough to take a look at one or two English courts. This is justified on the basis that the courts themselves are a spectacle, as much so as the Tower of London or Picadilly Circus or the Horse Guards at Buckingham Palace. It is also justified on the theory that an American lawyer may learn something useful about the administration of justice and the practice of law by watching an English court at work.

However, unless an American who visits an English court has some background in English legal institutions, he may come away disappointed. It is not enough for him to recognize that American law is built upon a foundation of English law. The separation between the two legal systems took place three to four hundred years ago and immense changes have taken place on both sides of the Atlantic since then. Nor is it enough that England and the United States have common traditions, common ideals, common problems, and a more or less common language. Without some understanding of the English legal system as a whole and of the judges and lawyers who operate it, a spectator is likely to come away from his visit to an English court shaking his head, marvelling at how similar problems can be handled so differently in the two legal systems, and with a blurred impression that English lawyers dress in a peculiar fashion

* This article is based upon two lectures given by Professor Karlen as the 19th Annual Edward G. Donnelly Memorial Lectures conducted at the West Virginia University Law Center on April 4, and 5, 1979.

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The author is greatly indebted to the Right Honorable Lord Diplock and to Professors Doug Rendleman and Frederick F. Schauer, both of the Marshall-Wythe School of Law of the College of William and Mary, for reading this article in manuscript form and offering many valuable suggestions. He has followed most of them. Needless to say, responsibility for the final product is his alone.

He is also grateful to two students, Ms. Linda Coppinger and Mr. Bradley Evers for their diligent help in research.

and speak with strange accents. If so, our American spectator might as well have been visiting courts in Paris, Moscow, or Peking. All he will carry back home is the remembrance of a spectacle. But if he starts with some preliminary understanding of what he is looking at, he will find his legal visits meaningful and thought-provoking. It is the purpose of this Article to supply some of the necessary background, much in the way that a tour guide on a sightseeing bus explains to the passengers what they are looking at as they pass this monument and that building.

THE COURT OF APPEAL

The most instructive appellate tribunal for the American judge or lawyer to visit is the Court of Appeal for two reasons. First, it is the closest English equivalent to the American appellate courts. Second, it occupies such a central place in the English system that if we look closely at it, we can hardly fail to gain a fair insight into the administration of English justice in general.

The Court of Appeal is housed in a building called the Royal Courts of Justice, located in the heart of legal London. It provides quarters not only for the Court of Appeal, but also for the English High Court whose judges handle the most important cases for the entire nation. Surprisingly, the building is not as big or as elegant as many local American courthouses which, instead of serving the entire nation or an entire state, serve only a single county or a single city.

The Court of Appeal is the basic appellate court in England. Its decisions are subject to further review in the House of Lords, but so few cases reach that tribunal that for almost all civil and criminal cases in England and Wales, the Court of Appeal is the court of last resort.¹ It consists of two divisions, civil and criminal. Until 1966 these were two separate courts, operating with different personnel and according to different procedures. Now they are merged into a single tribunal, but most of the old differences persist.²

1. The procedure for seeking review in the House of Lords is by applying for "leave to appeal," which is roughly the equivalent of asking for a writ of "certiorari" from the Supreme Court of the United States. In 1975 only twenty-seven appeals from the Civil Division of the Court of Appeal and seven from its Criminal Division were heard and disposed of in the House of Lords. K. EDDEY, *THE ENGLISH LEGAL SYSTEM* 45 (2d ed. 1977) [hereinafter cited as K. EDDEY].

2. Criminal Appeal Act of 1966. Compare, R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 206 (7th ed. 1977) [hereinafter cited as R. JACKSON].

In this country, we treat civil and criminal cases pretty much alike, but in England there are marked differences between the way the two types of cases are handled. Civil cases are tried by permanent, full-time, professionally trained judges. Those involving a small amount in controversy go to a County Court, which we would describe as a trial court of limited civil jurisdiction.³ Those involving a larger amount in controversy go to the High Court, which we would describe as a trial court of general jurisdiction.⁴ Review is available as a matter of right in the Civil Division of the Court of Appeal,⁵ also staffed by permanent, full-time, professionally trained judges.⁶

Criminal cases receive far less time and attention from professional judges. The vast majority of them, over ninety-five percent, are tried in the magistrate's court by part-time, unpaid judges who are not professionally trained as lawyers.⁷ Only the most serious prosecutions, comprising less than five percent of the total criminal case load,⁸ go before a professional judge sitting with a jury in what is called the "Crown Court."⁹ It is only from this court that appeals reach the Criminal Division of the Court of Appeal. But appeal is

3. A. KIRALFY, *THE ENGLISH LEGAL SYSTEM* 234-38 (6th ed. 1978) [hereinafter cited as A. KIRALFY].

4. Anyone who wants to bring a civil action has to consider whether the appropriate court is a county court or the High Court. A few special matters must be brought in a county court, but apart from such cases there is concurrent jurisdiction, the High Court being able to hear everything that can come before a county court as well as everything that is outside county court limits. But plaintiffs are discouraged from suing in the High Court when there is no reason why the county court should not be used.

R. JACKSON, *supra* note 2, at 35. See K. EDDEY, *supra* note 1, at 38-39. There are three civil divisions in the High Court: Queen's Bench, Chancery, and Family.

5. A. KIRALFY, *supra* note 3, at 239.

6. K. EDDEY, *supra* note 1, at 20. See D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* 83 (1963) [hereinafter cited as D. Karlen].

7. *But note*: "[R]egular provision is now made for courses of instruction for lay magistrates." A. KIRALFY, *supra* note 3, at 162-63, citing Administration of Justice Act 1973 § 3. In addition there are some stipendiary magistrates: "Such magistrates must be barristers or solicitors of not less than seven years standing. There is an upper limit of 40 stipendiaries." *Id.* at 163, citing § 2(1) and § 2(6) of the Act.

8. In 1974 a total of 55,005 persons were brought for trial in the Crown Court while 1,914,110 were proceeded against in the Magistrates courts. R. JACKSON, *supra* note 2, at 382-83. Thus actually only 3% of the prosecutions were in the Crown Court that year. See also R. WALKER, *THE ENGLISH LEGAL SYSTEM* 173-74 (4th ed. 1976) [hereinafter cited as R. WALKER]; K. EDDEY, *supra* note 1, at 57-58. See generally I. SCOTT, *THE CROWN COURT* (1972).

9. *Id.*

not allowed as a matter of right.¹⁰ A hearing on the merits is granted only as a matter of judicial discretion in about seventeen percent of the cases in which leave to appeal is sought.¹¹ Furthermore, the Criminal Division has a shifting membership, consisting partly of judges from the Civil Division and partly of High Court (trial) judges designated *ad hoc* to sit for the hearing of criminal appeals only.¹² The only judge who sits regularly in the Criminal Division is the Lord Chief Justice, but he has many other responsibilities to absorb his time. He is the administrative head of both the Queens Bench Division of the High Court and the Crown Court, and he sometimes sits as a trial judge.¹³

PERSONNEL

Our concern is with the Civil Division. In order to avoid awkward language, I shall refer to it simply as the Court of Appeal. A good starting point is to identify the cast of characters in a typical civil appeal.

The judges are easy to identify from their place in the courtroom. Three of them are seated behind the bench. The Court of Appeal sits in panels of three, not *en banc* with its full membership, as is the custom in many American courts.¹⁴ This means that four or five

10. A convicted person may appeal from the Crown Court to the Criminal Division of the Court of Appeal. He must give notice of doing so within 28 days of conviction or sentence. He may appeal against conviction on a point of law as a matter of right, but to appeal against conviction on a point of fact or a mixed question of law and fact he must have the leave of either the trial judge or the Court of Appeal. If he appeals against sentence he will always require the leave of the Court of Appeal and there are other restrictions upon his right of appeal.

K. EDDEY, *supra* note 1, at 72-73.

11. R. JACKSON, *supra* note 2, at 207.

12. A. KIRALFY, *supra* note 3, at 152. See K. EDDEY, *supra* note 1, at 58-59.

13. D. KARLEN, *supra* note 6, at 106-08. Cf. K. EDDEY, *supra* note 1, at 58-59; A. KIRALFY, *supra* note 3, at 152.

14. Kiralfy states:

A quorum consists of any three members of the 16 permanent judges of the court, i.e. the Master of the Rolls and 15 Lords Justices of Appeal. They are appointed by the Crown on the advice of the Prime Minister and must have been High Court Judges or be of 15 years' standing at the Bar. Members appointed since 1959 retire at the age of seventy-five. The Lord Chief Justice and the President of the Family Division sometimes sit in the Court. A High Court judge may be asked to sit as third judge if the court has a temporary spate of appeals. Hence the court may sit in five divisions at once, if necessary. It usually consists

other appeals may be going on simultaneously in other parts of the courthouse. The judges look pretty much like American appellate judges. They are men of mature years dressed in black robes, only slightly more elaborate than the American version. The only difference immediately noticeable is that the English judges wear wigs.

The lawyers are not so easily identifiable. Two of them, facing the judges and doing most of the talking, are dressed very much like the judges themselves—in black robes and grey wigs. These are barristers.

Seated behind them in the first row of spectator seats are other persons dressed in ordinary civilian clothes who appear to be involved in the proceedings. They do not speak out loud or address the judges directly, but they frequently whisper to the barristers and hand papers to them. They are solicitors.

In England there are no all-purpose lawyers like those in the United States. An English lawyer must be either a solicitor or a barrister; he cannot be both simultaneously.¹⁵ American lawyers tend to identify themselves with barristers, but most of them are mistaken in doing so. Functionally, the typical American lawyer is much more like a solicitor.

Solicitors

A solicitor is the closest English equivalent to what we would call a general practitioner.¹⁶ He can undertake any type of legal work, and, unless it involves litigation at a high level, follow it through to its conclusion. He drafts wills, contracts, and leases, organizes and dissolves corporations, conveys title to real estate, administers estates, and so forth.¹⁷ He also conducts civil litigation in the County

of three of the permanent members, occasionally five or seven. The Law Lords may sit and one court consisted of three Lords of Appeal in Ordinary.

Id. at 239-40.

15. Webster, *The Bar of England and Wales: Past, Present and Future*, in *LEGAL INSTITUTIONS TODAY* 84, 91 (H. Jones ed. 1976) [hereinafter cited as Webster]. The situation is not likely to change within the foreseeable future. The report of the Royal Commission on Legal Services declared "it is in the public interest for the profession to be organized, as at present, in two branches." *Wall St. J.*, Oct. 4, 1979, at 14, col. 3.

16. See generally Bowron, *Solicitors and the Law Society*, in *LEGAL INSTITUTIONS TODAY* 109 (H. Jones ed. 1976) [hereinafter cited as Bowron]; K. EDEY, *supra* note 1, at 1-2, 7-9; R. JACKSON, *supra* note 2, at 419-26; R. MEGARRY, *LAWYER AND LITIGANT IN ENGLAND* 12-13 (1962) [hereinafter cited as R. MEGARRY]; R. WALKER, *supra* note 8, at 211-24.

17. *Id.*

Courts and criminal litigation in the Magistrates' Courts. These courts of limited jurisdiction, although at the bottom of the judicial pyramid, are extremely important because of the volume of litigation they handle. In these courts, the overwhelming majority of all cases, civil and criminal, are started and finished. We must be careful, therefore, not to think of solicitors only as office lawyers. They can and do try many cases.¹⁸

The only function a solicitor cannot perform is to conduct litigation in the higher courts, including the Court of Appeal. For this he needs the services of a barrister.¹⁹ But the client whose case is to be presented is the solicitor's, not the barrister's. A client cannot directly retain a barrister,²⁰ so he must bring whatever legal problems he has to a solicitor in the first instance. The solicitor makes it his business to know which barristers are competent to handle which kinds of cases, and if proceedings in the High Court or the Court of Appeal are necessary, he chooses a barrister whose skills and fees are suited to the case at hand.²¹ In short, the barrister is retained by the solicitor, not the client. Employment is on an *ad hoc* basis, case-by-case. There are no continuing retainer arrangements between solicitors and barristers.²²

The solicitor does more than retain the barrister who is to act as advocate. He also participates in the litigation. By the time a case reaches the stage of appeal, the facts are embodied in the record on appeal, but, originally, the facts were worked up by the solicitors on both sides. Barristers try cases but do not prepare them.²³ The job of interviewing witnesses and collecting relevant documents is done by the solicitors. They embody their data in a document called a "brief"²⁴—note the difference in English and American meanings of

18. *Id.*

19. Webster, *supra* note 15, at 91, 96.

20. *Id.*

21. *Id.* at 97.

22. *Id.* at 100.

23. Webster, *supra* note 15, at 96, 97.

24. Brief:

In English practice. A document prepared by the attorney and given to the barrister, before the trial of a cause, for the instruction and guidance of the latter. It contains, in general, all the information necessary to enable the barrister to successfully conduct their client's case in court, such as a statement of the facts, a summary of the pleadings, the names of the witnesses, and an outline of the evidence expected from them, and any suggestions arising out of the peculiarities of the case.

BLACK'S LAW DICTIONARY 240 (Rev. 4th ed. 1951).

this term—submitted to the barrister. The solicitors also sit in at the trial, feeding relevant documents, memoranda, etc. to their respective barristers and thus become intimately familiar with what the record contains. It is this knowledge which enables them to assist at the appellate level as well as at trial.

A person is trained to become a solicitor by a combination of apprenticeship and formal education. The apprenticeship is served in a solicitor's office, with the apprentice assisting in whatever needs to be done and being paid a salary. On-the-job training is supplemented by formal education in a law school run by the Law Society. A college degree is not a prerequisite to entering the school or to being admitted to practice, although one who holds a degree is allowed to serve a shorter period of apprenticeship and to take fewer formal courses.²⁵

The Law Society is the central professional organization for solicitors. Its headquarters building is located within a block of the Royal Courts of Justice. Membership in it is voluntary, but most solicitors belong.²⁶ It is a club offering dining rooms, a library, and various social facilities, but it is more than a club. It regulates not only the education of solicitors, but also their admission to practice and their discipline, whether they are members of the Society or not.²⁷ In addition, it administers England's well developed and publicly financed system of legal aid for indigents.²⁸

Once admitted to practice, a solicitor can set up an office for himself or enter into partnership with other solicitors, and he may specialize in particular areas of law. There are about 30,000 practicing solicitors at present, well-scattered throughout the cities and towns of the nation and, thus, readily available to clients who need their services.²⁹

25. Bowron, *supra* note 16, at 113. *But see* K. EDDEY, *supra* note 1, at 3: "[F]rom 1980 entry into the students ranks of the profession will be limited to those who have obtained a degree." *Id.*

26. 85% of the solicitors are members. R. WALKER, *supra* note 8, at 211.

27. The Solicitors Act of 1974. In some respects the Law Society functions like an integrated bar in some American states.

28. *Id.* § 36, Sch. 2; R. WALKER, *supra* note 8, at 212. *See also* Bowron, *supra* note 16, at 122-23.

29. Bowron, *supra* note 16, at 113.

Barristers

Turning to the other branch of the legal profession, barristers are very few in number compared to solicitors. There are only about 4,200 in all of England³⁰ and most of them, about seventy percent, have their offices, which they call "chambers," within a block or two of the Royal Courts of Justice.³¹ That is because the bulk of their work is litigation in the High Court and the Court of Appeal, where they have the exclusive right of audience. Most barristers are specialists in litigation. They spend day after day in court trying cases or arguing appeals, sometimes within a specialized area of law like torts or contracts.³² A few become so highly specialized in a particular branch of substantive law that they devote most of their time to advising solicitors, often rendering formal, written opinions.³³ Most barristers, however, are what we would call specialist courtroom lawyers.

Each barrister is a solo practitioner. He cannot form a partnership with any other barrister or with any solicitor. What he can and almost always does do, however, is to share office space and expenses with a half dozen or more other barristers.³⁴ Each case he handles comes to him from some solicitor, because the barrister cannot deal directly with lay clients.³⁵ This means that the choice of a particular barrister to handle a particular case is an informed choice, made by a professional who appreciates the skills needed for competent advocacy. In the United States, where any lawyer can handle any case at any level of court, and where the choice of an advocate is ordinarily made by the lay client who has no way of judging competence, we have a different situation. Some American judges, particularly those who sit on appellate courts, feel that they are not getting the help they need from the lawyers who appear before them and are

30. K. EDDEY, *supra* note 1, at 1, states the number of barristers in 1977 to be 3,646, but a recent letter to the author by Lord Diplock puts the present number "between 4100 and 4200."

31. The Inns of Court, where most barristers have their offices, are about one mile north of the Central Criminal Court (popularly known as "Old Bailey") where the Crown Courts in London sit. Barristers are also active in these courts, so that their offices are readily accessible to both criminal and civil courts where their services are performed.

32. See generally K. EDDEY, *supra* note 1, at 7; R. JACKSON, *supra* note 2, at 426-48; R. WALKER, *supra* note 8, at 224-30; Webster, *supra* note 15, at 97, 99-100.

33. "[T]his is known as 'taking counsel's opinion.'" K. EDDEY, *supra* note 1, at 7.

34. Webster, *supra* note 15, at 95.

35. *Id.* at 91; see K. EDDEY, *supra* note 1, at 1.

seeking ways to improve the quality of advocacy³⁶

A person who wants to become a barrister follows a path parallel to that of one who chooses to become a solicitor, but it is a separate path. Again, both formal legal study and apprenticeship are required; but the formal part of the training is conducted under the auspices of the Inns of Court, and the practical part takes place in a barrister's office. Thus, the training of members of both branches of the legal profession is firmly in the hands of practitioners, not professors.³⁷

The Inns of Court are four professional organizations,³⁸ and every barrister must belong to one.³⁹ Like the Law Society, they too are more than clubs. They control the education of barristers, their admission to practice, and their discipline. In addition to dining halls, libraries, and other facilities open to all their members, each has a number of buildings which are rented out for offices and apartments. Most barristers occupy office space in a building owned by one of the Inns of Court, all of which are within a few minutes' walking distance of the Royal Courts of Justice.

Before leaving barristers and solicitors, one should compare their numbers with the numbers of their American counterparts. Altogether England has about 35,000 lawyers for a population of about 55,000,000 or one lawyer per 1650 people. The United States has about 400,000 lawyers for a population of about 220,000,000 or one lawyer per 550 people. In other words, the United States has three times as many lawyers per capita as England.⁴⁰

36. *E.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 *FORDHAM L. REV.* 227 (1974); Kaufman, *Does the Judge Have the Right to Qualified Counsel?* 61 *A.B.A.J.* 569 (1975).

37. Webster, *supra* note 15, at 95-96; Bowron, *supra* note 16, at 113. *See also* K. EDDY, *supra* note 1, at 2-3; A. KIRALFY, *supra* note 3, at 276-77; R. MEGARRY, *supra* note 16, at 94-108. Because of England's system of legal education, there is a much wider gulf between practicing lawyers and law teachers than exists in the United States.

38. They are: Gray's Inn, Inner Temple, Lincoln's Inn, and Middle Temple.

39. R. WALKER, *supra* note 8, at 224. *See also* R. JACKSON, *supra* note 2, at 426-28.

40. "The Bureau of the Census reported in August that the U.S. population was 216,817,000 as of July 1, 1977." *THE WORLD ALMANAC AND BOOK OF FACTS* 34 (G. Delvry ed. 1978) [hereinafter cited as *WORLD ALMANAC*]. Population of United Kingdom (1977 est.) is 55,900,000. *Id.* at 585. There are 29,900 solicitors, *see supra* note 29; and 4,100 barristers, *see supra* note 30, for a total of 34,000. U.S. lawyers and judges total 413,000 (1978 est.), *U.S. INFORMATION PLEASE ALMANAC* (3d ed. 1978).

Judges

Almost without exception, the judges on the Court of Appeal have served previously as trial judges on the High Court and, before that, as litigating barristers for at least ten years. They are specialists in litigation with much experience.⁴¹ The same cannot be said of American appellate judges, who are drawn from a variety of backgrounds. Some have previously served as trial judges, but many come directly from general practice, others from non-judicial political office, others from academic life, and so forth.⁴² Moreover, English judges are not elected, but appointed from the ranks of barristers on the recommendation of the Lord Chancellor, a former barrister who occupies the highest judicial office in the land. Party politics plays no part in their selection.⁴³ What counts is a man's professional performance and reputation as seen by his fellow barristers and the judges before whom he practices. Together they constitute a small, close-knit community, for the judges remain members of the Inns of Courts which they joined as barristers, and they continue to eat, drink, and socialize with their former colleagues. Everybody within this community knows who's who and who would be likely to become a good judge.⁴⁴

Like barristers and solicitors in England, judges are few in number. There are only sixteen judges in the Civil Division of the Court of Appeal,⁴⁵ serving a population of fifty million people in all of

41. D. KARLEN, *supra* note 6, at 83-84. See R. JACKSON, *supra* note 2, at 461.

42. See Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L.J. 211.

43. R. JACKSON, *supra* note 2, at 470.

44. The English system of selecting judges is not without its drawbacks:

Criticism of the judiciary usually takes the form that the social and educational background of the persons appointed to be judges is so similar that the judiciary is inevitably out of sympathy with modern social tendencies, and has long failed to have any understanding of the working conditions, attitudes of mind and aspirations of the mass of the population. It is certainly true that most of the High Court and Appeal Court judges received a public school education followed by legal studies at Oxbridge and then call to the Bar.

K. EDDY, *supra* note 1, at 18. See R. JACKSON, *supra* note 2, at 471.

Generally speaking, barristers too, constitute an elite profession, not open as a practical matter to persons of humble origin and low economic status. The elitism of the bar from whence all the superior tribunal judges are chosen, is inevitably reflected in the English judiciary. Compare, N.Y. Times, March 18, 1979, at 38, col. 1.

45. See note 14 *supra*.

England and Wales. This compares with sixty-three appellate judges in the state courts of California alone,⁴⁶ serving a population of about twenty million.⁴⁷ If one divides the number of California judges by two on the assumption that they devote half their time to criminal cases, it becomes apparent that California has twice as many appellate judges hearing civil appeals as England. Adding together all appellate judges serving in the fifty states and all appellate judges in the federal system, leaving out of consideration only the Supreme Court of the United States, one arrives at a figure of 948⁴⁸ judges serving a population of roughly 220 million people.⁴⁹ Cutting that number in half, again on the assumption that they devote half of their time to criminal cases, there are 474 American appellate judges doing civil work compared to the sixteen on the English Court of Appeal; per capita the United States has six times as many appellate judges doing civil appeals as England has. This disparity in numbers cannot be explained in terms of population alone. One must seek further explanations in the different appellate procedures in the two nations and in their caseloads, which differ both in volume and nature.

APPELLATE PROCEDURE

To one observing an English civil appeal, the proceedings appear very slow and leisurely. There is no fixed time limit on oral argument.⁵⁰ On the average, a civil appeal lasts about a day and a quarter, but it could run for several days or several weeks.⁵¹ This is in marked contrast to the time allowed for oral argument on an appeal in the United States, where fifteen minutes, a half hour, or at most an hour is normally the maximum allowed for each side.⁵² Even in the Supreme Court of the United States, where the most significant and difficult cases are heard, each side is normally al-

46. COUNCIL OF STATE GOVERNMENTS, *STATE COURT SYSTEMS* 2 (1978); F. KLEIN, *FEDERAL AND STATE COURT SYSTEMS—A GUIDE* 14 (1977).

47. In 1970, the population of California was 19,953,134. *WORLD ALMANAC*, *supra* note 40, at 226.

48. *STATE COURT SYSTEMS*, *supra* note 46; see 28 U.S.C. §§ 44, 171, 211, 251 (1976); 10 U.S.C. § 867 (1976).

49. *WORLD ALMANAC*, *supra* note 40, at 34.

50. D. KARLEN, *supra* note 6, at 95.

51. *Id.*

52. See *FED. R. APP. P.* 34.

lowed no more than one half hour of oral argument.⁵³ Paperwork is the prime characteristic of American appellate procedure whereas orality is the hallmark of English appellate procedure.

The barrister we are observing reads aloud from time to time from the record of trial of the proceedings below—sometimes from the opinion of the judge below, sometimes chunks of testimony, sometimes a contract, lease, or other document that was admitted into evidence.⁵⁴ This would not be tolerated in an American appellate court, where one of the judges would almost surely stop the lawyer and remind him that judges are perfectly capable of reading for themselves. Each English judge has a copy of the record before him, but he probably has not looked at it in advance of oral argument,⁵⁵ and for reasons that will be discussed below, he will have no opportunity to look at it later. While counsel is reading aloud, the English judges may be simultaneously scanning the record themselves so that whatever is in it can enter their minds through ears or eyes or both.

One of the features of an English record on appeal not ordinarily found in an American record on appeal is a reasoned opinion by the judge below.⁵⁶ Trial by jury in civil cases has virtually disappeared in England. Cases are almost always tried before a judge, sitting without a jury.⁵⁷ The opinion of the trial judge summarizes the facts, defines the issues and how they were resolved, and cites the authorities he considers controlling.⁵⁸ In the rare case where a jury is used, the judge in his instructions summarizes the evidence and comments on it, in addition to explaining the principles of law to be applied.⁵⁹ Thus, both in jury and non-jury cases, appellate judges in England have the advantage of starting with a thoughtful judicial analysis of the case before them. American appellate judges, at least

53. SUP. CT. R. 44.

54. D. KARLEN, *supra* note 6, at 93-94. See also Leggatt & Williams, *Contemporary Litigation in England*, in LEGAL INSTITUTIONS TODAY 185, 202 (H. Jones ed. 1976) [hereinafter cited as Leggatt & Williams].

55. D. KARLEN, *supra* note 6, at 93.

56. *Id.* at 92.

57. There were 3 jury trials in 1976. A. KIRALFY, *supra* note 3, at 122-23, 238; and currently, less than 1% of the civil cases have juries. R. WALKER, *supra* note 8, at 207-08. About the only type of case tried by jury in England today are defamation cases, and there are precious few of those.

58. D. KARLEN, *supra* note 6, at 92.

59. R. WALKER, *supra* note 8, at 309.

those functioning at the first level of review like the English Court of Appeal, ordinarily have no such assistance from below.⁶⁰ If the case has been tried by jury, they have the judge's instructions, but too often these consist only of abstract principles of law not closely tied to the facts of the particular case. Most American trial judges cannot or will not comment on the evidence, or even summarize it for fear of unduly influencing the jury.⁶¹ If the case has been tried without a jury, the judge's decision is likely to be expressed in stilted "findings of fact and conclusions of law" so formal and abstract that they seldom give a clear and straight-forward picture of what the case is about.⁶² English appellate judges and the barristers who appear before them are given more help. They have a head start in the form of a readable judicial synopsis of the case to be decided on appeal.

From time to time, the barrister reads aloud from legal authorities upon which he is relying—a statute or a case or two. This also would not be tolerated in an American court. The judges would say in effect, "We will get those authorities from your brief and read them for ourselves." In England, there are no written briefs, so the judges must learn all they are going to learn about the case while the oral argument is in progress; this explains why there are bookshelves lining the courtroom walls. When a case is cited by counsel, a bailiff goes to the bookshelves and gets three copies of the volume containing the case and gives one to each of the judges. Again they may look at the case themselves while listening to counsel reading it aloud. Again they are able to absorb what is needed either through their eyes or their ears or both.

Fortunately not too many cases are cited. Partly this is because relatively few opinions are published, as will be explained below. Partly it is because the judges and barristers are always specialists in litigation, and some of them are also likely to be specialists in the area of substantive law under consideration.⁶³ The body of English

60. For some American civil appeals, there is a reasoned opinion from the court below, especially when there has been a written pre-trial or post-trial motion (e.g., a motion to dismiss, or for summary judgment, or for a new trial, or for judgment notwithstanding the verdict).

61. JUDICIAL COUNCIL OF THE STATE OF NEW YORK, 5TH ANNUAL REPORT 187 (1939); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 221 (1949).

62. Cf. *Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965).

63. Webster, *supra* note 15, at 100.

case law is so small that the judges are likely to know the relevant cases without having to be told about them.

The judges do not supinely accept whatever counsel has to say about the authorities on which he relies or about the record. They actively participate in the process of reasoning, seeking to understand the facts and the legal principles applicable to them as the argument proceeds, for they realize that as soon as oral argument is concluded they will have to announce their decision from the bench orally.

The judges question counsel extensively and freely discuss the facts and the law, not worrying about revealing the trend of their thinking.⁶⁴ They do not try to look or act like Sphinxes. Sometimes a judge directs questions or comments to counsel not so much to get their reaction as to get the reaction of the other judges. Sometimes the judges whisper between themselves on the bench, or, if there is a recess for lunch, they discuss the case as they walk together to or from one of the Inns of Court where they are dining. The whole proceeding is conducted informally. The method is Socratic, not unlike the dialogues that take place between professors and students in American law schools. Watching the judges and barristers at work, one has the impression that he is observing the meeting of a committee of five, only three of whose members—the judges—have voting power. The non-voting members, meaning the barristers, are not bashful about expressing their views, although they sometimes do so in a code language that is hard for Americans to follow. If, for example, a judge should pursue a line of reasoning that one of the barristers considered erroneous, the barrister might begin his response by saying, "With respect, my lord, I should like to point out _____," and then express a contrary line of thought. Translated, this would mean "I disagree." If the barrister prefaced his remarks by saying, "With great respect, my lord," that would mean he strongly disagreed. If he started with the words "With the greatest respect, my lord," that would mean that the barrister thought the judge had taken leave of his senses.⁶⁵

Although there are no fixed time limits for oral argument, the

64. D. KARLEN, *supra* note 6, at 93-94.

65. I am indebted for this description to the late Professor A. C. Goodhart, Master of University College, Oxford. American observers sometimes think that barristers are too deferential to the judges to the detriment of their clients. They may be right in so thinking.

judges, in an informal manner, see to it that time is not wasted. For example, if a barrister should cite a case for a proposition that was obvious, one of the judges would probably say, "We accept that proposition. Please proceed." Or if the barrister should begin to repeat himself needlessly, one of the judges might say, "Thank you, Mr. Smith. We understand your position and we won't trouble you to develop that point any further."⁶⁶

The most striking instance of informal control occurs when counsel for the appellant has completed what he has to say without convincing any of the judges that there is anything wrong with the judgment below. In such a situation, the judges would probably hold a whispered conference on the bench. If all three were convinced that there was no reason to reverse or modify the judgment below, the presiding judge would say to counsel for the opposing side as he stood up to make his argument, "Mr. Jones, we won't need to hear from you" and then proceed to deliver orally and extemporaneously his opinion, affirming the judgment.⁶⁷ Each of the other judges would state his concurrence, adding whatever additional remarks, if any, he considered appropriate. The case would be finished, and the next case on the list called for argument. This does not happen often, but the fact that it can and sometimes does happen illustrates the kind of control that the judges exercise over oral argument. Despite their leisurely manner, English judges are not prone to waste time in hearing and deciding appeals.

If, as is more commonly the case, counsel for the appellant has raised some doubt in the mind of at least one of the judges as to the correctness of the decision below, the case proceeds. Counsel for the appellee now makes his oral argument, trying to dispel whatever doubts were raised by opposing counsel and to convince the court that the decision below should stand. The same basic procedure is followed as was followed during the appellant's presentation: the record and legal authorities are cited and read aloud, the judges participate in the discussion, and the committee of five is at work again.

When counsel for the appellee has completed his oral argument, counsel for the appellant has the right to reply, which he is likely to exercise very briefly. In practice, however, oral argument in the

66. D. KARLEN, *supra* note 6, at 94-95.

67. *Id.*

Court of Appeal has little resemblance to a formal debate in which one side takes the affirmative and the other the negative. Instead, there is a running three-sided dialogue between the judges and counsel for both parties. Judges ask questions and make comments, switching back and forth between opposing counsel for their reactions.

As soon as counsel for both sides have finished speaking, the judges reach their conclusion in a whispered conference on the bench, and the presiding judge delivers his opinion, affirming, reversing, or modifying the judgment below. This is done orally and extemporaneously, the judge speaking only from whatever notes he has made during the argument. Then each of the other judges speaks, concurring or dissenting and giving his reasons.⁶⁸ This case is now finished. The judges have probably spent six or seven hours on it.

Occasionally, in a difficult case, instead of deciding immediately from the bench, the judges reserve decision until the following morning or, if a weekend intervenes, until the start of the next week—rarely longer than that.⁶⁹ This gives them time to reflect further, and if one of them thinks it useful, he may reduce his opinion or key parts of it to writing. When the court reconvenes the following day or the following Monday, each judge orally delivers his opinion. However, the usual procedure in a normal case is for the judges to deliver their opinions extemporaneously, immediately upon the close of oral argument.

English appellate procedure goes a long way toward avoiding two evils sometimes observed in American appellate courts. One is the failure of all judges to participate fully in all decisions. In England, where the judges are being observed while they work and where each is expected to express his own views, a "one man opinion," rubber-stamped by the other judges, is unlikely.⁷⁰ The other evil is basing a decision upon grounds or authorities not urged or subject to challenge by either side.⁷¹ This is possible in the United States,

68. *Id.* at 98-99.

69. *Id.* at 99.

70. *Cf.* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *JUSTICE ON APPEAL* 29-32 (1976).

71. *Id.*

72. For a judge to consult and rely upon authority not cited by counsel is considered improper by the English bench and bar generally. The English approach seems to be based on the unstated premise that counsel on both sides are fully and equally component—a very

where the judges work mostly behind closed doors, but hardly possible in England, where the judges reach their conclusions in full view of opposing counsel, their solicitors, their clients, and whatever other spectators may be present from the press or the general public.⁷² In short, English judges operate as if they were subject to a "sunshine law,"⁷³ whereas American judges act as if they had never heard of that peculiarly American invention.

What explains the differences between the way an appeal is handled in England and the way it is handled in the United States?

Scheduling Appeals

An important factor is the way appeals are scheduled for hearing. In the United States, the typical appellate court hears six or seven cases a day for four or five days running and then adjourns for about a month to write opinions disposing of those cases.⁷⁴ First, a closed conference is held to take a tentative vote on how each case shall be decided, and the cases are parceled out for opinion writing. Case #1 goes to Judge A, case #2 to Judge B, and so forth. The ideal is a single opinion for the entire court, but if that ideal cannot be attained, the next best thing is to have as few concurring or dissenting opinions as possible.⁷⁵ One of the judges who voted with the majority in a particular case will be assigned to write the opinion of the court for that case, and one who voted with the minority will be assigned to write the dissenting opinion.⁷⁶ Conferences are held between judges in person, by telephone, or by inter-office memoranda in an attempt to reach agreement both as to substance and language.⁷⁷ Sometimes, however, a draft that started out to become the unanimous opinion for the court ends up as a dissent; and one that started out to be a dissent becomes instead the opinion of the majority.⁷⁸

doubtful premise. To the extent that it is false, the quality of English judicial opinions is reduced to the quality of advocacy.

73. "As the popular name suggests, these laws are designed to open up governmental decision making to public view and participation." Little & Thompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975).

74. See, e.g., Brown, *State of the Federal Judiciary in the Fifth Circuit*, 8 CUMB. L. REV. 441 (1977); Hennessey, *State of the Judiciary*, 62 MASS. L.Q. 7 (1977).

75. See Moorehead, *Concurring and Dissenting Opinions*, 38 A.B.A.J. 821, 824 (1952).

76. See Haines, *Rolling Back the Top on Chief Justice Burger's Opinion Assignment Desk*, 38 U. PITT. L. REV. 631 (1977) [hereinafter cited as Haines].

77. *Id.*

78. In some jurisdictions the practice of rotation has been exalted to a cardinal principle; judges have been called upon to write an opinion for the majority

Sometimes the differences between the judges are so great that each judge ends up writing his own opinion.⁷⁹ However many opinions may be written, whether one or several, they are slow in coming.⁸⁰ When finally ready, they are not read aloud in open court or even announced there, but simply filed with the clerk of court.⁸¹ Then they are routinely published.⁸² Many months, sometimes years, elapse between the oral argument in a given case and the promulgation of the court's opinion disposing of it.⁸³

In England, the scheduling of appeals follows a very different pattern. Cases are heard and decided one at a time. English appellate judges sit on the bench five days a week, from 10 a.m. to 1 p.m. and from 2 p.m. to 4.15 week after week.⁸⁴ Unlike their American counterparts who spend most of their working hours in their chambers conferring with their law clerks and fellow judges, studying briefs, reading cases, dictating to secretaries, and revising drafts of opinions,⁸⁵ English judges spend almost all their working hours in open court. They have no law clerks and no secretaries, for none is needed. Conferences between judges take place on the bench or while walking to and from court. There is no pressure on them to agree on common language, because each is expected to speak his own mind.⁸⁶

Orality & Paperwork

Another explanation of why the English Court of Appeal operates as it does is that there are no written briefs.⁸⁷ In England, appellate

of the court with which they did not agree, but then they have been permitted to accompany such a majority opinion with a dissenting opinion of their own, expressing their true views.

Vanderbilt, *Improving the Administration of Justice—Two Decades of Development*, 26 U. CINN. L. REV. 155, 257 (1957).

79. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty case); *New York Times Co. v. United States*, 403 U.S. 713 (1971) ("Pentagon Papers" case).

80. In *Furman*, more than five months elapsed between oral argument and decision. 408 U.S. 238 (1972).

81. *E.g.*, 2D CIR. R. § 0.20. *But see id.* § 0.23.

82. *E.g.*, 3D CIR. R. 13.

83. See AMERICAN JUDICATURE SOCIETY, SOLUTIONS FOR APPELLATE COURT CONGESTION AND DELAY: ANALYSIS AND BIBLIOGRAPHY 2 (1963).

84. D. KARLEN, *supra* note 6, at 82.

85. See Haines, *supra* note 76.

86. See note 84 *supra*.

87. D. KARLEN, *supra* note 6, at 93.

procedure is primarily, almost exclusively, oral.⁸⁸ Dispensing with briefs has several important consequences. First, cases can reach the stage of oral argument more quickly in England than in the United States. The appellant is not required to draft a lengthy and elaborate written argument, serve it on the opposing party, and file it in court.⁸⁹ Neither is the appellee. Nor, of course, is there any occasion for a written reply by the appellant. The elimination of these steps reduces the time that elapses between the rendition of judgment in the trial court and the hearing of the appeal. In the United States, the interval can be very long, frequently a year or more.⁹⁰ The absence of written briefs also saves time for the lawyers and expense for their clients.⁹¹ Anyone who is accustomed to both speaking and writing realizes how much quicker and easier it is to prepare and deliver a speech from notes than it is to write it out and revise every word for publication. Writing is laborious and painful to most people. Speaking is faster, more natural, and often more effective. Furthermore, the lawyer writing an appellate brief in the United States is ordinarily subject to frequent interruptions while he attends to other cases for which he is responsible and other aspects of his law practice. Seldom can he give his undivided attention to an appellate brief alone.

The time of the judges too is saved by dispensing with written briefs. They consider an appeal only once in a single concentrated burst of effort and then they are finished with it. American judges, on the other hand, typically consider an appeal several times on isolated occasions. First, they read the briefs for a given case in advance of its oral argument. This is not a universal practice, but it is becoming more and more common, and today is accepted as the proper procedure for appellate judges.⁹² Second, they hear oral argu-

88. *Id.* The English tend to deplore the American approach: "We are implacably opposed to any further reduction in orality. It is an American disease which needs to be eradicated, particularly in appellate courts." Leggatt & Williams, *supra* note 34, at 203.

89. For an example of American practice, see, e.g., FED. R. APP. P. 28, 31.

90. See, e.g., Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW AND SOC. REV. 759, 791 (1977) [hereinafter cited as Heydebrand].

91. Whether written briefs, American style, result in a higher quality of *total* advocacy (written and oral combined) and ultimately in a higher quality of judicial decision (greater depth, more careful analysis) is debatable. Cf. D. KARLEN, *supra* note 6, at 149-50. But compare Leggatt & Williams, *supra* note 54, at 202-03.

92. A.B.A. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION § 3.34 (1974).

ment in the case, but by this time they may have forgotten most, if not all, of what they learned from their initial reading of the briefs, because in the meantime they have been hearing oral arguments in other cases, reading briefs in other cases, and finishing up opinions in still other cases left over from their previous sitting. Third, when one of the judges is assigned to write an opinion on the case, he needs to study the briefs again, but by this time he may have forgotten both the oral argument and his initial reading. In the meantime, his attention has been distracted by other cases in which he has been hearing oral arguments and reading briefs, drafting other opinions of his own, and examining opinions drafted by his fellow judges.⁹³ Many months may pass between the time of oral argument and the time when the decision is handed down.⁹⁴

If one added the total amount of time spent by an American judge handling an appeal and compared it with the total amount of time spent by an English judge handling the same kind of appeal, the figures might be surprising. Assuming that a hypothetical English case takes a day and a quarter, or roughly seven and a half hours of court time, and that in a hypothetical American case of the same difficulty and complexity, oral arguments take one hour, the question arises as to how much additional time is spent before and after argument in the study of briefs and the writing of opinions. My guess is that it would be not less than six or seven hours. No one is sure, of course, because judges don't punch time clocks. If that guess is reasonably accurate, however, a judge on the English Court of Appeal does not spend any more time on a given case than does his American counterpart, and over the course of a year probably disposes of just as many cases. The leisurely pace of English appellate judges as they are observed in the courtroom is deceiving.

Deploying Judicial Manpower

Another factor making for English efficiency is the economical use of judicial manpower. Although the Court of Appeal as a whole is composed of sixteen judges, it sits in panels of three.⁹⁵ The three

93. American law clerks to appellate judges promote some continuity of attention to particular cases, but the fact remains that judicial attention is necessarily sporadic. See, e.g., Haines, *supra* note 76, at 633; COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 51 (1975).

94. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); Heydebrand, *supra* note 90.

95. See note 14 *supra*.

judges who hear a given case decide it finally, without any possibility of a rehearing and without involving other judges.⁹⁶ Some American appellate courts, notably the United States Courts of Appeal, also operate in panels of three.⁹⁷ However, in these courts rehearings are possible.⁹⁸ They are often sought and occasionally granted, sometimes not just before the original panel of three, but before the membership of the entire court, involving the energies of a dozen or more judges. Most American appellate courts do not operate in panels; all the judges sit *en banc*.⁹⁹ If the court is composed of five or seven judges, about twice the judicial manpower is needed to dispose of a given case as is needed in England; if it is composed of nine judges, three times the judicial manpower that England would devote to the case is needed. Furthermore, in the courts that sit *en banc*, rehearings are sometimes granted.¹⁰⁰ When this happens, the amount of judicial manpower devoted to the case is multiplied by two. These computations are conservative, because the English Court of Appeal lets each judge state his opinion in his own words, whereas American appellate courts attempt to secure agreement on the language of an opinion that expresses a consensus of the views of all the judges, or at least a majority of them. The more judges there are to consult, the more time it takes to attempt to secure agreement among them.

Before reaching any conclusion about the relative efficiency of English and American appellate judges, one should consider the kinds of cases they handle. Are the problems presented to the English Court of Appeal basically the same as those presented to American appellate courts or fundamentally different? In addressing this question, one should consider the legal authorities out of which the judges in each nation fashion their decisions and the way in which they conceive their role.

JUDICIAL REVIEW VS LEGISLATIVE SUPREMACY

In both nations, judges have to deal with statutes as well as a body of common law. However, in the United States there is an additional layer of legal authority which is not present in Eng-

96. D. KARLEN, *supra* note 6, at 158.

97. 28 U.S.C. § 46(c) (1976).

98. *Id.* See also FED. R. APP. P. 40.

99. Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 22-26 (1971).

100. See, e.g., FED. R. APP. P. 35.

land—constitutional law

The United States has a written federal constitution and is fully committed to the proposition that the law embodied in it is so fundamental that it overrides and renders null and void any inconsistent legislative enactments, administrative regulations, executive orders, or judicial decisions.¹⁰¹ Most of us are reconciled to the idea that the document does not necessarily mean what its framers intended but what the current membership of the Supreme Court of the United States thinks it should mean in the context of modern conditions in a changing society.¹⁰² The original text has been all but forgotten, and constitutional adjudication proceeds not from the text but from previous decisions of the Supreme Court.¹⁰³ One case builds upon another until the body of federal constitutional law we know today is almost wholly judge-made. This has been going on for more than a century and three-quarters, at least since *Marbury v. Madison* was decided in 1803.¹⁰⁴

In addition to the federal constitution, there are fifty state constitutions, which have spawned another impressively large body of constitutional law. These state constitutions are subordinate to the federal constitution and valid federal law but superior to the enactments of state legislatures, orders of state governors, and regulations of state administrative agencies. The highest court of each state is the guardian of the state constitution, and the document means what the current members of that court say it means.¹⁰⁵

In England, there is no written constitution and no conception of judicial supremacy. An opposite view prevails—the doctrine of parliamentary supremacy. What Parliament says, goes. No English court can frustrate its will. All it can do is to interpret the acts of Parliament.¹⁰⁶ If a judicial interpretation does not conform to the will of Parliament, Parliament can redraft the legislation to make

101. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

102. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 177 (1978) [hereinafter cited as BICKEL].

103. "The association of people is not mentioned in the Constitution or in the Bill of Rights. The right to educate a child in the school of the parents' choice is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

104. 5 U.S. (1 Cranch) 137 (1803).

105. *Shoener v. Pennsylvania*, 207 U.S. 188, 195 (1907); accord, *Mount St. Mary's Cemetery Ass'n v. Mullins*, 248 U.S. 501, 503 (1919).

106. K. EDDEY, *supra* note 1, at 107-08. See also A. KIRALFY, *supra* note 3, at 96.

it crystal clear.¹⁰⁷ After that, the judges have no choice but to apply the law as written. In other words, contemporary English judges are not regarded, by themselves or others, as lawmakers.¹⁰⁸ It is true that they can and do legislate interstitially, and it is true that the common law has been made by judges over the course of many centuries, but such judge-made law prevails only to the extent that Parliament allows it to continue.¹⁰⁹

In the United States, the combination of written constitutions and judicial review of legislation greatly complicates the work of appellate judges. They are required not only to interpret and apply statutes, but also to pass upon their constitutional validity. This forces them to look not only at the statutes themselves and previous decisions interpreting them, but also at relevant constitutional provisions and decisions interpreting them. Not infrequently, the judges must consider not only the specific facts of the case before them, but also the "legislative facts" which determine whether the legislature acted reasonably or unreasonably.¹¹⁰ Sometimes they even feel impelled to implement constitutional provisions by taking charge of institutions and activities that fail to comply with the constitutional norms that the judges have declared.¹¹¹ This is one aspect of "government by the judiciary."¹¹² It represents a material departure from the traditional judicial function of deciding disputes. Deciding a dispute between known individuals about a specific past event in accordance with established principles of law is one thing. Solving a broad social problem affecting large segments of the population for the indefinite future according to formulae still to be devised is quite another.¹¹³

107. R. WALKER, *supra* note 8, at 79.

108. A. KIRALFY, *supra* note 3, at 93-96. See generally K. EDDEY, *supra* note 1, at 108, 167; Templeman, *An English View of the Judicial Function*, in LEGAL INSTITUTIONS TODAY 6, 17 (H. Jones ed. 1976) [hereinafter cited as Templeman]; R. WALKER, *supra* note 8, at 79-110.

109. *Id.* Cf..

The work done by the Judges of England is not now as glorious as it was
I doubt if judges will now of their own motion contribute much more to the
development of the law. Statute is a more powerful and flexible instrument for
the alteration of the law than any that a judge can wield.

P. DEVLIN, SAMPLES OF LAWMAKING 6, 23 (1962).

110. See Aldisert, *An American View of the Judicial Function*, in LEGAL INSTITUTIONS TODAY 31, 41 (H. Jones ed. 1977) [hereinafter cited as *An American View*].

111. *E.g.*, Calhoun v. Cook, 430 F.2d 1174 (5th Cir. 1970) (planning of school sites); Davis v. Board of School Comm., 402 U.S. 33 (1971) (zoning, reassignment of teachers).

112. R. BERGER, GOVERNMENT BY THE JUDICIARY (1977).

113. Rifkind, *Are We Asking Too Much of Our Courts?* 70 F.R.D. 96, 103 (1976).

Constitutional law permeates the rest of our law and converts what used to be run-of-the-mill disputes into constitutional issues.¹¹⁴ It even converts into constitutional issues grievances that formerly were considered so trivial that they were ignored or suffered in silence. Here are a few examples. Formerly, if a policeman assaulted a prisoner, the prisoner could sue for assault and battery in a local court. Now, he can bring an action in federal court for deprivation of his civil rights.¹¹⁵ Formerly, if a soldier was told by his commanding officer to trim his beard, he might grumble, but he would trim the beard. Now, he is likely to sue his commanding officer and probably the Pentagon and the Secretary of Defense as well.¹¹⁶ Formerly, if a young girl wanted to play baseball, she would assemble a few playmates, go to a sandlot, and play baseball. Now, she is likely to bring an action to vindicate her right to join the Little League.¹¹⁷

Just as there is no grievance too small to justify judicial intervention, there is also no problem too big for the courts to tackle. If the schools of Boston are too slow in achieving desegregation, the solution is simple: turn their administration over to a judge.¹¹⁸ If the prisons and mental hospitals of Alabama are depriving some of their inmates of constitutional rights, the solution is the same: let the institutions be administered by a judge.¹¹⁹ If Senator Barry Goldwater cannot persuade his colleagues in the United States Senate to go along with him in blocking President Carter's abrogation of the treaty with Taiwan, he goes to court.¹²⁰

114. See Aldisert, *A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 ARIZ. ST. L.J. 557, 573-74.

115. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) (guard and warden sued).

116. *Anderson v. Laird*, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971).

117. *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975); *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (1974).

118. *Morgan v. Hennigan*, 379 F Supp. 410 (D.C. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *supplemented sub nom. Morgan v. Kerrigan*, 388 F Supp. 581 (D.C. Mass.), *cert. denied*, 421 U.S. 963 (1975); *Morgan v. Kerrigan*, 401 F Supp. 216 (D.C. Mass.), *stay denied*, 523 F.2d 917 (1st Cir. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976).

119. *Wyatt v. Stickney*, 344 F Supp. 387 (M.D. Ala. 1972), *enforcing*, 334 F Supp. 1341 (M.D. Ala. 1971), *aff'd in part, remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *James v. Wallace*, 382 F Supp. 1177 (M.D. Ala. 1974); *Pugh v. Locke*, 406 F Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

120. *New York Times*, Dec. 23, 1978, at 9, col. 1.

The cases just discussed have been aptly described as "dinosaur" cases.¹²¹ They are big not only in the magnitude and complexity of the problems they present, but also in the number of persons and organizations that become involved in them, the voluminous data they engender, and the amount of judicial time they require.¹²² Some such cases are class actions, where a few named plaintiffs are suing on behalf of themselves and hundreds or thousands of persons similarly situated. Others are individual cases which start out from a narrow dispute but end up as "dinosaurs." One example is *Regents of the University of California v. Bakke*.¹²³ By the time *Bakke* reached the Supreme Court of the United States, no less than fifty-nine individuals and organizations had filed *amicus* briefs. The case settled the specific dispute presented by ordering the Medical School to admit Bakke, but it failed to solve the general problem of affirmative action. It merely discussed the problem and defined some of the issues, thereby raising hosts of questions to be answered in future cases.¹²⁴ A similar case was *Brown v. Board of Education*,¹²⁵ which indirectly gave rise to the *Bakke* case. It also settled the immediate dispute of whether certain black children should be admitted to an all-white school in Topeka, Kansas, but it failed to solve the general problem of securing educational opportunities for blacks equal to those enjoyed by whites. Now, twenty-five years after the decision was rendered, that general problem is still with us and in active litigation in both state and federal courts.¹²⁶

STATUTORY INTERPRETATION

In both England and the United States, appellate courts have the job of interpreting statutes. When those statutes are not challenged on constitutional grounds, as they cannot be in England and as they need not be in the United States, the task of English and American judges might appear to be substantially the same. That, however, is not the case.

English judges are confronted with only one set of domestic stat-

121. *An American View*, *supra* note 110, at 68.

122. *Id.* at 68-73.

123. 438 U.S. 265 (1978).

124. See, e.g., Margolis, *The Aching 'Bakke': Is There a Cure?* 51 CONN. B.J. 417 (1977).

125. 347 U.S. 483 (1954).

126. See BICKEL, *supra* note 102, at 143-51.

utes—those passed by Parliament.¹²⁷ Since England has a unitary rather than a federal government like ours, there are no state statutes to worry about. American judges, working in a system where sovereignty is divided between the nation and the fifty states, are often confronted with two or more sets of statutes. A state court is required under the Supremacy Clause of the Constitution to apply not only state law but also federal law.¹²⁸ A federal court is required to apply not only federal law but also, when its jurisdiction is based upon diversity of citizenship, state law.¹²⁹ When either a state or federal court is dealing with events that occurred at some place other than where the court is sitting, it may be obliged, under conflict of laws principles, to interpret and apply legislation that originated neither in Washington, D. C. nor the local state capitol.¹³⁰ English courts also are confronted with conflict of laws problems when the events they are called upon to deal with occurred outside of England—perhaps France, Germany, or the United States.¹³¹ However, the number of cases involving international conflict of laws rules is probably very much smaller than the number arising

127. *But note:*

The membership of the United Kingdom in the European Economic Community from January 1, 1973 introduced a system of supra-national law, in accordance with the provisions of the Treaty of Rome and the Treaty of Accession. Legislation has been passed, aimed at fitting these changes into our traditional system of legal sources and the existing framework of Parliamentary sovereignty.

Community law, future as well as present, is automatically binding in England in many cases without local enactment here. Judicial notice is taken by our courts of such community law. Orders in Council and Regulations may be used to implement Community law in matters of detail. In some cases Community law has no direct effect but requires the United Kingdom Parliament to pass specific enactments.

Decisions of the European Court as to the interpretation of the treaties and their effect on community law are binding in England and proved by certified copies of their judgments. There is also a need to refer some matters to the European Court.

The impact of these changes is most felt in a wide but limited field, such as the law of restrictive practices and company law. But the whole of existing English law inconsistent with the now incorporated Community law is repealed by implication. English courts have to decide, in the first instance, when this has happened, which entails their using continental sources.

A. KIRALFY, *supra* note 3, at 116-17.

128. U.S. CONST. art. 6, cl. 2.

129. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 Comments, Illustrations (1969).

131. See generally DICEY AND MORRIS, CONFLICT OF LAWS (8th ed. J. Morris 1967).

within a single nation and involving intranational conflict of laws rules.

Moreover, English appellate courts concern themselves only with the language of the statutes they are interpreting, not with their legislative history or the social, economic, and political policies underlying them.¹³² Whether this is wise or not,¹³³ it simplifies the work of the judges and is consistent with the English judges' conception of their limited role. The United States follows a different approach, partly because legislative history often determines the validity of statutes challenged on constitutional grounds, but partly also because it sometimes illuminates the meaning of legislative language. American judges are expected to understand the evils at which a statute is aimed and do their part toward helping to stamp out those evils. They are encouraged consciously to consider the broad social, economic, and political effect of their decisions.¹³⁴ This approach is consistent with the expansive American conception of the proper role of judges; we expect judges to participate in the process of making, as well as applying, law

Finally, English statutes tend to be more specific and detailed than American statutes. They usually try to spell out the intention

132. English judges do not look at the reports of proceedings in Parliament during the passage of a legislative act. The standard English approach was stated in *Magar & St. Mellons RDC v. Newport Corp.*, [1952] A.C. 189, 191:

The general proposition that it is the duty of the court to find out the intention of Parliament and not only Parliament but of Ministers also cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; these words may be ambiguous but even if they are, the power and duty of the court to travel outside them on a voyage of discovery is strictly limited.

(quoted in Templeman, *supra* note 108, at 22).

Since England joined the European Economic Community in 1973 a new approach to statutory interpretation has been added, at least insofar as the Treaties are concerned. In interpreting it the English courts:

[M]ust follow the European pattern No longer must they [the English courts] examine the words in meticulous detail, no longer must they argue about the precise grammatical sense. They must look to the purpose and intent

They must divine the spirit of the treaty and gain inspiration from it. If they find a gap, they must fill it as best they can, they must do what the framers of the instrument would have done if they had thought about it.

Id. at 29, quoting from Lord Denning, M.B., in *Bulmer v. Ballinger*, [1974] 2 All E. R. 1226, 1237.

133. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

134. See Friendly, *Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

of Parliament in such a way as to leave the judges little leeway in interpretation.¹³⁵ Some American statutes—for example, the Internal Revenue Code—follow the same pattern, but other American statutes are very different in nature. For example, the Sherman Anti-Trust Act simply outlaws “contracts and combinations in restraint of trade.”¹³⁶ Congress, by this statute, delegates to judges the whole problem of competition and monopoly, saying in effect, “We recognize that there is a problem here, but we don’t know how to deal with it ourselves, so we will pass the buck to the judges and let them decide.” Not surprisingly, this statute has spawned an immense amount of litigation of an extraordinarily complicated and prolonged nature.¹³⁷ The anti-trust action now pending in New York against IBM has been going on for ten years and is still a long way from decision at the trial court level.¹³⁸ Dozens of years may elapse before it is finally decided. Legal rules for its disposition are not in existence. They have to be invented. This is problem solving, not the kind of dispute deciding under known rules that Englishmen consider the normal work of courts.¹³⁹ American courts, besides having to do the kind of work English courts do, are saddled with the task of solving broad social problems in accordance with rules yet to be devised. Despite their law clerks and secretaries, American judges are not equipped with the personnel and facilities to do what is demanded of them. They cannot hold legislative-type hearings or, on their own initiative, conduct the kind of research needed to formulate intelligently broad policy.¹⁴⁰ Legislatures are better equipped to solve such problems, but they are so imbued with the idea of judge-made law that they often delegate their lawmaking functions to the courts. The anti-trust statute is but one example among many of legislation which merely furnishes a starting point for a large body of judge-made law. The original Civil Rights Act is another.¹⁴¹ It prohibits discrimination, but it does so in terms almost

135. Cf. Templeman, *supra* note 108, at 23.

136. 15 U.S.C. §§ 1-7 (1976).

137. *An American View*, *supra* note 110, at 69-70.

138. *Id.* at 70-71.

139. See note 132 *supra*; see also Friendly, *supra* note 134.

140. BICKEL, *supra* note 126, at 175.

141. 42 U.S.C. § 1981 (1976).

142. Constitutional rights, such as those guaranteed by the first ten amendments and the fourteenth amendment, are rights of individuals and minorities against the majority. Since the majority, as represented in Congress, ought not to be allowed to define and redefine the

as vague as the language of the equal protection clause of the Constitution itself. The job of defining discrimination in detail and devising means to deal with it is left to the courts.¹⁴²

THE COMMON LAW

Both English and American courts are guided by earlier judicial decisions. Here at last one might expect to find the raw materials basically the same in both countries, but again there are differences.

English case law is not nearly as voluminous as American case law. England has a single judicial system for the entire nation, whereas the United States has fifty-one, one for the federal government and one more for each of the fifty states. Each contains at least one appellate court, and many have intermediate appellate courts as well as a supreme court. The federal system has eleven such courts;¹⁴³ intermediate appellate courts also exist in California, New York, Illinois, Texas, Michigan, Pennsylvania, Ohio, and many other states.¹⁴⁴ The volume of decisional law emanating from all these tribunals is staggering compared to the volume of decisional law that the English Court of Appeal has to apply. It needs to be concerned only with its own decisions and those of the House of Lords.¹⁴⁵ Together, these constitute a binding body of national law.¹⁴⁶

The United States has very little truly national law. A court in one state is never bound by the decisions of a court in another state. This is true even when a question of federal law is involved, such as the interpretation of a federal statute or the meaning of a provision in the United States Constitution.¹⁴⁷ What the supreme court of one state has to say about such a question may be interesting and even persuasive to judges in another state, but they are entirely free to adopt a contrary view. The only court that can definitively settle a federal question is the Supreme Court of the United States.¹⁴⁸

scope of rights against itself, it is understandable that the courts should do so. But does not the legislature have some responsibility for an initial determination of the scope of such rights, subject to judicial review? See later civil rights statutes, e.g., 42 U.S.C. §§ 2000a-2005f which are narrower and more detailed than the earlier statute.

143. 28 U.S.C. § 44 (1976).

144. KLEIN, *supra* note 46, at 14.

145. *But see* note 127 *supra*.

146. *But see* A. KIRALFY, *supra* note 3, at 82-86, 116-17.

147. See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 243 (2d ed. 1921).

148. H. ABRAHAM, *THE JUDICIARY* 18 (2d ed. 1969).

The eleven United States Courts of Appeal are similarly powerless to settle authoritatively federal questions.¹⁴⁹ The United States Court of Appeals for the Fourth Circuit can make decisions that are binding on the federal courts within the Fourth Circuit, but they need be given no effect in the Second, or Fifth, or Ninth Circuits, and they are not binding even on state courts within the Fourth Circuit. The result is that at any given time, there are conflicting interpretations in various parts of the nation of what is, in theory, national law. In fact, it is not national law until the Supreme Court of the United States has spoken.¹⁵⁰

The Supreme Court of the United States, however, is not creating nor capable of creating an adequate body of truly national law. Despite its nine judges, its numerous law clerks, and its large staff of secretarial, clerical, and administrative helpers, it renders opinions in only about 125 cases a year on the merits.¹⁵¹ Hundreds of questions of federal law remain unresolved on a national level.¹⁵² A federal statute that means one thing in California may mean something quite different in New York. A federal constitutional provision that means one thing for the federal courts of the Fourth Circuit may mean the opposite in some of the state courts within that circuit and in federal courts located elsewhere. Unless and until radical changes are made, the United States will continue to suffer from the lack of a coherent and adequate body of national law such as England enjoys.¹⁵³

The fact that the English Court of Appeal concerns itself only with national law does not reveal fully how few decisions it has to worry about, compared with the number of decisions that can bedevil a typical American appellate court. That is because most English decisions are never published.¹⁵⁴ Almost all decisions of the

149. See Address by Shirley Hufstедler before Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 3, 1974), *partially reprinted in IV APPELLATE JUSTICE: MATERIALS FOR A NATIONAL CONFERENCE* (1975) [hereinafter cited as Hufstедler Address].

150. *But cf.* 1973 LAW & SOC. ORD. 543 (Arizona Supreme Court holds 4-3 decisions by United States Supreme Court not binding in Arizona.).

151. See Haines, *supra* note 76.

152. See Address by Senator Hruska to National Conference on Appellate Justice (Jan. 26, 1975), *reprinted in* 121 CONG. REC. S1,555 (1975).

153. See Hufstедler Address, *supra* note 149.

154. D. KARLEN, *supra* note 6, at 87; see also A. KIRALFY, *supra* note 3, at 79-82; R. WALKER, *supra* note 8, at 139-42.

Court of Appeal are delivered orally and extemporaneously. After being taken down in shorthand and transcribed, they are not automatically published, as they would be if rendered by an American court. If they merely apply well-settled principles of law to specific fact situations, they are not deemed of sufficient importance to be cited as precedents and hence are not considered worthy of publication in the Law Reports.¹⁵⁵ Only about twenty-five percent of the decisions of the Civil Division of the Court of Appeal and ten percent of those of the Criminal Division are published.¹⁵⁶ Not all of the decisions of even the House of Lords are published. The consequence is that the bulk of English case law increases at a much slower pace than the bulk of American case law. Published American case law grows at the rate of hundreds of volumes a year, whereas English case law grows at the rate of about three volumes a year.

The choice of which English decisions are to be published in the law reports is not made by the judges themselves, but by persons who are trained as barristers and called "law reporters."¹⁵⁷ Their job is to select and edit the opinions they think worthy of preservation as precedents. The editorial work they do on an opinion after it is announced is somewhat similar to that done by an American law clerk before an opinion is promulgated. They check citations, verify names, dates, and places, eliminate redundancy, and generally clarify and improve the style without changing the meaning of the original version. Then they submit the finished product to the judge who rendered the opinion for his approval and whatever changes he considers necessary. Often he makes no changes because he is satisfied that his views have been accurately and grammatically set forth.¹⁵⁸

STARE DECISIS

Once an English precedent has been established it carries a binding force greater than that of any American precedent. The doctrine

One copy of the transcript of the shorthand notes of every oral judgment is filed in the Bar Library and is available for inspection by the legal profession and the public, so that non-publication in the Law Reports is [unfortunately in the eyes of the English courts] not a guarantee that an unreported decision cannot be used. It is not very often that it is, but under the doctrine of stare decisis, it is theoretically as binding as a reported case.

155. D. KARLEN, *supra* note 6, at 88.

156. *Id.* at 87.

157. K. EDDEV, *supra* note 1, at 123. See also A. KIRALFY, *supra* note 3, at 79-80.

158. D. KARLEN, *supra* note 6, at 103.

of *stare decisis* is taken more seriously in England than in the United States. In the United States any appellate court can overrule its own previous decisions, and the power to do so is freely used by some courts. In England the Court of Appeal cannot overrule its own previous decisions.¹⁵⁹ They can be changed only by act of Parliament or reversed in the House of Lords.

Until 1966 the Law Lords felt similarly bound, but in that year the Lord Chancellor announced that henceforth they would feel free to depart from a previous decision when they deemed it proper and just to do so.¹⁶⁰ Despite this announcement, however, no great change has materialized.¹⁶¹ English judges, including those who comprise the Appellate Committee of the House of Lords, are still imbued with the idea that their function is not to make or remake the law, but simply to apply existing law.¹⁶²

The difference between the American and English doctrines of precedent is traceable in large part to the constitutional cases we have already discussed. Constitutional provisions are extremely hard to change by way of formal constitutional amendments. They are vague, consisting in large part of such undefined concepts as "due process" and "equal protection." This combination presents an almost irresistible challenge to American judges. They feel that they have no choice but to interpret constitutional language in a different way than they would interpret language found in a contract or lease or even a statute. Their function, they believe, is to give content to majestic and unchanging generalities as applied to concrete situations and to constantly reexamine old solutions in the light of new problems and new attitudes toward them.¹⁶³

Constitutional interpretation, in other words, leads to an erosion of the traditional doctrine of *stare decisis*. Precedent becomes less important than current policy. For this reason, the Supreme Court of the United States can be more easily understood as a legislative body than as a judicial tribunal. It operates according to judicial procedure but functionally it is more like a super legislature. This

159. *Young v. The Bristol Aeroplane Co.*, [1944] K.B. 718 (cited in R. JACKSON, *supra* note 2, at 13).

160. Statement of Lord Gardiner reported at [1966] 3 All E.R. 77, [1966] 1 W.L.R. 1234.

161. R. JACKSON, *supra* note 2, at 12. Cf. Templeman, *supra* note 108, at 19.

162. See note 108 *supra*; see also Templeman, *supra* note 108, at 19.

163. See, e.g., Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).

is revealed most vividly when it overrules a case prospectively, as it does occasionally, saying that the new rule it is announcing for the first time does not apply to the case at hand, but only to future cases.¹⁶⁴

The approach of the Supreme Court to constitutional issues is not confined to that court or to constitutional issues. It spreads to other appellate courts, both state and federal, and it is followed even when there are no constitutional implications. Although trial judges still feel obliged to abide by precedents established by tribunals above them, appellate judges generally feel free to depart from their own precedents whenever they seem to have outlived their usefulness. They are determined, it seems, to correct old errors and to adapt the law to new conditions and changing attitudes. Many examples could be cited, but I shall mention only two recent ones. In 1973, the Florida Supreme Court abolished the doctrine of contributory negligence and replaced it with the concept of comparative negligence.¹⁶⁵ This was a revolutionary change in the common law of torts. It could equally well have been accomplished by legislative enactment, as happened in many states.¹⁶⁶ In 1976, the Supreme Court of California decided that a woman who lived with a man without being married to him could sue him for half of his property (California is a community property state) and for future support on the theory of an express or implied promise that he would treat her as if they were married instead of "living in sin."¹⁶⁷ This was a very material change in the law of contracts and domestic relations. It went a long way toward abolishing in California the legal distinction between a wife and a mistress.

This is not to suggest that American law is in such a constant state of flux that it is totally unpredictable or that every decision is controlled by the passing whims of the judges. That would be far from true. Nevertheless, the fact remains that all of our law is con-

164. *Johnson v. New Jersey*, 384 U.S. 719 (1966). See Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967).

165. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

166. W. PROSSER, *TORTS* § 67 (4th ed. 1971).

167. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Cf. *Javins v. First Nat'l Realty Co.*, 428 F.2d 1071 (D.C. Cir. 1970) (construing lease as ordinary contract, disregarding certain real estate aspects); *MacPherson v. Buick Motor Co.*, 217 N.Y. 352, 111 N.E. 1050 (1919) (extending liability to manufacturer of objects reasonably certain to imperil safety when negligently made, creating duty to inspect components; first "products liability" case).

stantly subject to change by judicial decision.

Nor should one infer that English judges never make law or that they are confined in a strait-jacket of precedent.¹⁶⁸ Although they do not go in for major reconstruction and renovation of the law, they make law interstitially by filling in gaps to take care of situations not covered by legislation or earlier decisions. They distinguish earlier decisions and extend others by analogy.¹⁶⁹ They feel free to choose between earlier decisions that are in conflict with each other, and even between divergent opinions in the same case.¹⁷⁰ Since each judge ordinarily delivers his own opinion, there may be several statements from which, at a later date, the judges may select a *ratio decedendi* for the case at hand.¹⁷¹ Finally, the precedents with which they deal, being couched in terms of broad principles of law, rather than in terms of their application to particular fact situations, allow the judges considerable leeway in applying them to varying fact situations.¹⁷² In short, the common law of England is still changing and developing, but the rate of growth is gradual.

Compared to the relative stability of English law, American law is very fluid. It moves not so much like a glacier as like a river. The entire body of American law—every bit of it—is subject to constant change, and change can be effectuated by judicial decisions alone without the necessity of legislation or constitutional amendment. Many an American decision has turned out to be like an excursion ticket on a railroad—"good for this trip on this day only."¹⁷³

LITIGATION VS LEGISLATION

In England, where judges consider their job to be that of deciding specific disputes according to generally known rules, litigants and the lawyers who represent them act accordingly. They bring to court only disputes, not general problems of law reform. In the United States, where judges think of themselves not only as dispute deciders but also as lawgivers, policy makers, and problem solvers, lawyers and litigants bring them all the various kinds of work they have

168. See generally R. WALKER, *supra* note 8, at 117-27. E.g., K. EDDEY, *supra* note 1, at 118-22; D. KARLEN, *supra* note 6, at 86-87; A. KIRALFY, *supra* note 3, at 72-73.

169. D. KARLEN, *supra* note 6, at 82.

170. *Id.*

171. *Id.* at 86-87.

172. *Id.* at 86.

173. See *Smith v. Allright*, 321 U.S. 649 (1944) (Roberts, J. dissenting).

shown themselves willing to undertake.

The American conception of the judicial function is a powerful stimulant to litigation, for it means that litigation becomes an alternative to legislation. For those who want some change in the law, it is an attractive alternative for several reasons.¹⁷⁴

First, courts are accessible to all, and they have no choice but to listen to grievances, no matter how outlandish they may seem at first glance. Legislative bodies are not equally accessible, particularly if the person asserting a grievance stands alone without popular support or money or political clout. No legislator is under any obligation to draft or introduce legislation which would cure the grievance. However, the aggrieved person himself, as a litigant in court, is able to introduce his own bill for relief in the form of a complaint.

Second, unlike a legislative body, a court cannot indefinitely postpone decision of a difficult question. It can never say the decision is too close to call or that it does not know the answer. It must decide one way or the other, right or wrong, speaking with a degree of confidence and authority that the judges may not feel in their hearts.

Third, the judicial process is more open to public view than the legislative process. To some extent, both courts and legislatures operate behind closed doors, but the arguments presented in court are always available for public scrutiny, and the opinions of the judges are generally required to express not only their conclusions but also the reasons for them.¹⁷⁵ The same cannot always be said about the legislative process. Lobbyists generally work in secret and the legislative enactments they achieve often do not spell out the real reasons behind them.

Finally, litigation, as expensive and burdensome as it has become, is probably still cheaper and less burdensome than lobbying to achieve the same result through legislative action. The risk of losing a lawsuit is probably no greater than the risk of an unsuccessful lobbying effort, and the financial consequences are less onerous.

174. Perhaps Americans need no stimulus. "[I]t has always been a peculiarity of Americans to turn to their courts for resolution of difficult problems. We go to great lengths to find ways to cast any and every problem into the familiar pattern of a two-party adversary trial and take it to court." Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767, 772 (1977).

175. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 92, at § 3.36 and commentary.

Under the American system of costs, which is almost the exact opposite of the English system of costs,¹⁷⁶ the losing party does not have to pay the expenses of the other party but only his own.¹⁷⁷ Even his own expenses may not have to come out of his own pocket, for the lawyer who represents him may be working on a contingent fee. In England, contingent fees are prohibited,¹⁷⁸ but here they are very common.¹⁷⁹ If a contingent fee is not involved, the litigant's expenses may be bankrolled by the American Civil Liberties Union, the National Association for the Advancement of Colored People, a labor union, a trade association, a consumer group, an environmental group, or some other form of publicly or charitably financed legal aid.¹⁸⁰ Some of the organizations that assist litigants exist mainly or even exclusively for the purpose of changing the law through litigation. They may have little interest in the particular cases in which they become involved, but great interest in the broad social, economic, or political problems they present, and in the possibility of achieving law reform through judicial decisions.

Because litigation has become a viable alternative to legislation, litigants and their lawyers are encouraged to assert claims and defenses that have no existing foundation in statute or case law and to persevere in their contentions through trial and appeal. If a statute or a prior decision stands in their way, they need not be disheartened. Perhaps the statute will be declared unconstitutional or the prior decision overruled.

In discussing dinosaur cases, the ones designed to make or remake

176. The American and English approaches are fundamentally different and are indeed irreconcilable. Because there is no system of civil aid in the United States, contingency fees are permitted. In England on the other hand, civil aid is available, subject to two important limitations. First, the litigant must be sufficiently poor to qualify financially, though he may be required to make a contribution to the legal aid fund as a condition of obtaining the assistance. Secondly, he must show that he has reasonable grounds for taking, defending or being a party to the action.

[I]n England costs normally follow the event, that is, costs are paid by the loser, although after the court has 'taxed' the costs (that is, decided which costs should be recoverable) the winner usually recovers about 80% of his actual costs.

Leggatt and Williams, *supra* note 54, at 189.

177. Rosenberg, *Contemporary Litigation in the United States*, in *LEGAL INSTITUTIONS TODAY* 152, 162 (H. Jones ed. 1977) [hereinafter cited as *Contemporary Litigation*].

178. R. WALKER, *supra* note 8, at 218 (citing *Wallerstein v. Moir*, (No. 2) [1975] Q.B. 373, [1975] All E.R. 849).

179. *Contemporary Litigation*, *supra* note 177, at 154, 164-65.

180. *Id.* at 154. Cf. note 176 *supra*.

the law, I did not mean to imply that American courts do not have their share of cases of human size. Proportionately, they have as great a share of such cases as the English Court of Appeal, but these ordinary cases too often have to be shoved aside in American courts to make room for the dinosaur cases.¹⁸¹ This contributes to public dissatisfaction with our courts. Litigants standing in line to have their ordinary disputes resolved sometimes have to wait so long that they go away in disgust.

Also contributing to popular dissatisfaction is the fact that judicial problem solving does not always yield happy results. Sometimes a general problem presented for judicial determination is not solved but is merely defined and discussed. Even if it is solved, one segment of the public is likely to be happy with the solution and another segment, perhaps equally large or larger, unhappy with it. Just as in ordinary litigation, the losing side is likely to be disappointed. Whether a general problem of law reform is solved or not, public expectations of the courts have been raised, only to be disappointed.¹⁸²

Despite dissatisfaction with their courts, Americans are ambivalent in their attitude toward them. They still rush headlong into them with all their problems and grievances.¹⁸³ Continually adding new judges and creating new courts does not seem to help much. The United States is in the midst of a law explosion which is shaking the foundations of the judicial system.¹⁸⁴

In England, too, there is popular dissatisfaction with the administration of justice,¹⁸⁵ but whether it is as deep and widespread as here is hard to say. Certainly one of the causes of American dissatisfaction is not present in England. Dinosaur problems that absorb so much of the American courts' time, and yet yield results that are so often disappointing, are not brought to the courts in England.

181. *An American View*, *supra* note 110, at 68.

182. *Id.* at 54; Rosenberg, *Devising Procedures That Are Civil to Promote Justice That is Civilized* in NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 86, 183 (1976).

183. "[I]t is a fact of life that in the United States all social and political issues sooner or later seem to become judicial!" H. ABRAHAM, *supra* note 148, at 18. See also Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 901 (1971).

184. Cf. Manning, *supra* note 174, at 767 ("we are drowning in law").

185. See generally K. EDDY, *supra* note 1, at 166-77; R. JACKSON, *supra* note 2, at 564-92; Leggatt & Williams, *supra* note 54, at 185-210. See also N.Y. Times, Mar. 19, 1979, at 38, col. 1.

They are brought instead to Parliament which has better facilities for handling them. Parliament cannot duck these problems by passing them on to the courts in the same way that legislative bodies can duck them in the United States. If Parliament fails to act or if it acts improperly, the English public knows exactly where to place the blame and how effectively to express its displeasure. Meanwhile, the English courts are allowed to carry on their normal work undisturbed.

CONCLUSION: IMPORTS FROM ENGLAND?

Now, with some background on the English Court of Appeal, we ought to consider whether there are any souvenirs to bring home, any ideas that might improve the functioning of American courts. Obviously the United States cannot adopt the English approach wholesale because that would revolutionize the system of government. The Constitution would have to be abandoned, the fifty states dismantled, the legal profession reorganized, the methods of selecting judges changed, and so forth. What we might do, however, is consider a few modest importations.

How about a little more orality and a little less emphasis on paper work? Might it not be possible to extend the time for oral argument, and in some cases to dispense with written briefs? Might it not be possible to decide simple cases from the bench without elaborate written opinions?

How about publishing fewer opinions than at present? That would slow the rate of growth in our case law and ultimately reduce the time spent in research and litigation and the costs to litigants.

How about raising the standards of advocacy? That would only require the restriction of the argument of appeals to lawyers who were able to demonstrate skills beyond those needed to pass bar examinations.

How about rendering unto the legislature the things that are the legislature's and unto courts the things that are the court's? Much law reform now undertaken by the courts can be accomplished by Congress and the state legislatures.

How about taking *stare decisis* a little more seriously?

The ideas mentioned are not alien to the American legal culture or incompatible with the goal of deciding appeals fairly and efficiently. Every one of them is presently being tried in some American

appellate court or being seriously urged by a respectable number of responsible members of the legal profession.¹⁸⁶

It is hoped that this examination of the English Court of Appeal has revealed something more than a colorful spectacle for there are indeed valuable examples of judicial efficiency and effectiveness presented which should not go unnoticed.

186. Retention and extension of oral argument practice is advocated in P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 16 (1976) [hereinafter cited as *JUSTICE ON APPEAL*], although the authors do favor voluntary waiver of oral argument when all parties agree to a waiver. Cf. A.B.A. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO MANAGEMENT OF APPELLATE COURTS* § 2.50, recommending denial of oral argument only if calendars are crowded, but allowing parties to show that oral argument is necessary.

The use of briefs is probably firmly entrenched in American practice, but their purpose could be served through other means. Less formal briefs, in terms of technical printing requirements and substantive requirements, could be as useful in informing judges of the issues. Professor Leflar suggests revision of briefing rules to allow letters from counsel in simple cases. R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 28 (1976) [hereinafter cited as *LEFLAR*].

Summary decisions have been the subject of experiment in several circuits, but the decisions are limited by rule to affirmances made after the judges study briefs, not after oral argument. See Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257 (1973). The Commission on Revision of the Federal Court Appellate Systems recommends the expression, "whatever the form" of the reasons for any decision, and suggests that in some cases informal memoranda would be sufficient. UNITED STATES COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 50-51 (1975). The step between "informal memoranda, intended for the parties themselves," *id.*, and oral opinions delivered from the bench seems a small one.

Related to the delivery of shorter opinions is the issue of publication. A standard for publication has been formulated by the Advisory Council for Appellate Justice and is recommended by LEFLAR, *supra*, at 57-58. Carrington, Meador, and Rosenberg combine the no-publication issue with the memorandum opinion suggestion, citing the difficulties attaching to the no-publication rules encountered by circuits attempting to utilize it. *JUSTICE ON APPEAL*, *supra*, at 35-40. The issue is further discussed in Joiner, *Limiting Publication of Judicial Opinions*, 56 JUD. 195 (1972) and Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975).

Advocacy standards are discussed in Burger, *supra* note 36, Kaufman, *supra* note 36, and suggestions for special examinations have been forwarded by a committee of the Judicial Conference of the United States.

The legislative activities of courts are criticized in BICKEL, *supra* note 102, at 175; Rifkind, *supra* note 113; and Cox, *supra* note 163, at 828, quoting J. THAYER, JOHN MARSHALL (1974).

A differing opinion of the usefulness of stare decisis is presented in Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043 (1975).