ESSAYS

Some Key Jurisprudential Issues of the Twenty-First Century*

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How cases are decided by courts depends not only on judges' views of the merits of the controversy but also on what they conceive their proper function to be and even on their views on the appropriate style and form of judicial decisionmaking. Because common-law judges use different techniques to interpret written instruments, such as treaties, than do civil-law judges, the same treaty provision may be interpreted differently in a common-law jurisdiction than it would in a civil-law jurisdiction. Similarly, because common-law appellate judges have traditionally taken a different view of the scope of discretion to be left to trial court judges than have civil-law judges, attempts to subject decisions rendered by judges trained in one of these traditions to review by supranational courts largely staffed by judges trained in the other tradition have presented some unexpected problems. Professor Christie discusses some recent situations in which both these sorts of situations have already arisen and can be expected to arise more frequently in the future with the increasing globalization of the world's economy. On the one hand, globalization would seem to require harmonization of legal outcomes; on the other the democratic urge encapsulated in the notion of subsidiarity seems to require deference by supranational courts to the judgments of national courts even if it means toleration of results that would not have been reached by a supranational court if it were to have decided the case on the basis of its own decisionmaking traditions. The conflict between these two imperatives is not easily resolved.

It is always hazardous to predict what the future will bring, and yet we are always obliged to anticipate what might be in store for us. It would be folly to enter the future unprepared. It is my submission that some of the greatest challenges that will be faced by the increasingly interacting legal systems of the world are ultimately jurisprudential in nature. To be more specific, the decisions in concrete legal cases will be influenced as much by what we believe to be the proper method for deciding legal disputes as by the views that we entertain on the merits of the controversies before us.

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Contemporary speculation as to what the future legal scene will look like revolves around two mantras: "globalization" and "subsidiarity." Let us consider globalization first. For many lawyers, globalization conjures up visions of multinational corporations, of business transactions that transcend national borders, of treaties on double taxation. This is not, however, the limit of the effects of globalization. The ramifications of globalization already affect the lives of ordinary citizens and can be expected to do so increasingly in the twenty-first century. I am not only referring to the increasing tendency to subject the activities of the citizens of the various nation-states to an international regime of human rights law, as, for example, in the current proposal to create an international criminal court[1] and the present ad hoc war crimes tribunals, but also to more mundane matters, like the regime governing recovery for personal injuries.

Almost all of this law is the product of treaties. And treaties, of course, must be interpreted. The first jurisprudential problem that I am going to discuss arises because different systems of law use different techniques in interpreting authoritative legal sources such as statutes and treaties.

I. DIFFERENT APPROACHES TO INTERPRETATION

In the United States, as in most legal systems, the same interpretive techniques are used to interpret both statutes and treaties. Statutory construction is, however, performed differently in common law countries than in civil law countries. This is recognized by all the commentators.[2] Admittedly, the judicial hostility towards legislative intervention into matters handled by customary law, a hostility that found expression in the old maxim that "statutes in derogation of the common law should be strictly construed," persisted longer in common law countries than it did on the European continent. But this does not sufficiently explain why different techniques of statutory interpretation are used in common law countries and in civil law countries. Today, even in the United States, no one can deny that statutory change in the law is accepted as a normal, rather than an exceptional, development. Nevertheless, differences in the techniques used for interpreting statutes and other legal instruments still persist. Why this is so is an interesting question upon which I and others have

1. Rome Statute for the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1988).
2. *See* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 117-46, 383-86 (3d Eng. ed. 1985).

often speculated.[3] It is not my purpose here to attempt an exhaustive treatment of the subject, which would require not only an examination of history, but also an inquiry into the purpose of government and the relation of the various branches of government to each other, as well as a host of other questions. I shall suggest some reasons for these differences in interpretive technique, but, for the most part, I shall accept the differences as a given and explore the problems that they entail in an increasingly globalized world legal order.

What are these differences in interpretative techniques? While there are important variations among the common law countries in how they interpret statutes and other legal instruments, it can be said that, on the whole, in the English-speaking world, the approach to interpretation is more narrowly-focused, literalistic, and, in the minds of some, less imaginative than the approach taken elsewhere. Professor Damaška has noted that statutory regulation in the civil law countries of the European continent is relatively general and abstract.[4] It exhibits a preference for what he calls "logical legalism."[5] He notes that, in contrast, even when inclusive statutory regulation is attempted in common law countries, it is "usually too detailed and insufficiently systematized from the perspective of logical legalists."[6]

The Warsaw Convention of 1929 provides a concrete example of how the use of different interpretive techniques might affect how concrete legal cases will be decided in different legal cultures, even when the courts in those two cultures are interpreting the same authoritative provision. The English translation of Article 17 supplied to the United States Senate when it ratified the United States' accession to that treaty, provides that an air carrier "shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger."[7] In *Eastern Airlines v. Floyd*,[8] decided in 1991, the United States Supreme Court was faced with the question of whether this language permitted recovery for psychic injuries unaccompanied by "physical injury or physical manifestation of injury."[9] The plaintiffs had been

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3. This is one of the topics discussed in GEORGE C. CHRISTIE, THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT (forthcoming 2000).

4. *See* Mirjan Damaška, *On Circumstances Favoring Codification*, 52 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 355, 356-59 (1983).

5. *Id.* at 358.

6. *Id.* at 359.

7. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3018 (1934).

8. 499 U.S. 530, 533 (1991).

9. *Id.* at 533.

passengers on an aircraft bound from Miami to the Bahamas when all three of the engines lost power.[10] As the aircraft rapidly lost altitude, the passengers were informed that the aircraft "would be ditched in the ocean."[11] Fortunately, the pilots were eventually able to restart one of the engines and the aircraft was able to return safely to Miami.[12]

The *Eastern Airlines* Court approached the case as if it were interpreting an act of Congress. Because the authoritative text of the Warsaw Convention is the French one, the case turned on whether the term "lésion corporelle," translated into English as "bodily injury," covered the plaintiffs' alleged psychic injuries.[13] As the negotiating history of the Warsaw Convention was silent on the issue, the Court embarked on an extended examination of domestic French law to determine how the expression "lésion corporelle" would have been construed by French lawyers in 1929. It concluded that French lawyers of that period would have construed the term to refer only to physical injuries.[14] The Court also inquired whether any French case prior to 1929 had recognized a right to recover under any provision of the French civil code for the type of injuries involved in the case before it.[15] It found that none had done so. The Court then noted that no such recovery was permitted at that time under the domestic law of many of the signatories to the Warsaw Convention, including the United States.[16] Because the Court conceived of its role as requiring it to give the words of the treaty a meaning consistent with the shared expectations of the contracting parties, it ruled unanimously that the plaintiffs could not recover for their psychic injuries under the Warsaw Convention.[17]

In marked contrast to the approach taken by the United States Supreme Court, the Israeli Supreme Court,[18] in a decision considered and rejected by the United States Supreme Court, has allowed recovery for purely psychic injuries. Israel follows a mixed civil law and common law legal tradition.[19] The Israeli case involved the

10. *See id.*
11. *Id.*
12. *See id.*
13. *See id.* at 536.
14. *See id.* at 537.
15. *See id.* at 538.
16. *See id.*
17. *See id.* at 540.
18. Cie. Air France v. Teichner (1984), 39 REV. FRANÇAISE DE DROIT ARIEN 232, 243 (1985), 23 EUROP. TRANSP. L. 87, 102 (1988). These are French translations.
19. *See* DAVID & BRIERLEY, *supra* note 2, at 25-26.

hijacking of an Air France flight to Entebbe, Uganda, in 1976.[20] In allowing recovery, the Israeli court, as noted by the United States Supreme Court, declared that "desirable jurisprudential policy" favored an expansive reading of Article 17.[21] It pointed out that both Anglo-American and Israeli law had evolved since 1929 to allow such recovery.[22] For the Israeli Supreme Court, the audience addressed by the treaty was not one whose development had stopped in 1929.

If the *Floyd* case had been decided in a continental court, and if that court had, like the United States Supreme Court, used the same techniques in interpreting treaties as it would use in interpreting statutes, I believe that the case would probably have been decided differently. For example, Article 1 of the Swiss Civil Code provides that where "no provision [of law] is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator."[23] Given the uncertainty as to the meaning of "lésion corporelle" in the Warsaw Convention, one could plausibly argue that there was a gap in the law, in which case a judge using a technique that focused on an idealized purpose rather than the language contained in a legal instrument might very well conclude that he, as a legislator, would follow the approach endorsed by the Israeli court. One wonders how the question would have been decided by a Louisiana court if this were not a situation where federal law is paramount. After all, Article 4 of the Louisiana Civil Code provides that "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason and prevailing usages."[24]

It is not my purpose in this lecture to explore the strengths and weaknesses of the various theories of legal interpretation and arrive at a conclusion as to the preferable way to interpret statutes. However, it would be disingenuous of me to pretend that I do not have a strong personal preference for the restrictive style of interpretation employed by the unanimous Supreme Court in *Floyd*. The point I wish to make is that, when difficult questions of interpretation of international instruments arise, how they will be resolved will often be affected as

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20. *See* Eastern Airlines v. Floyd, 499 U.S. 530, 534 n.3 (1991).
21. *Id.* at 551.
22. *See id.*
23. THE SWISS CIVIL CODE (Siegfried Wyler & Barbara Wyler eds. & Ivy Williams trans., ReMak Verlag Zürich 1976).
24. LA. CIV. CODE ANN. art. 4 (West 1999).

much by the style of legal reasoning as by the deciding court's views on the substantive issues involved. There certainly is no indication that the United States Supreme Court had any substantive objection to the possibility of recovering for emotional distress unaccompanied by physical injuries in a tort action. By 1991, the year *Floyd* was decided, most state courts in the United States permitted a person threatened with physical injuries to recover for emotional distress even if he suffered no physical symptoms. Indeed, a few years later, the Court expressly held that damages for such emotional distress could be recovered in tort actions governed by the Federal Employers' Liability Act.[25]

Are the stylistic differences between civil law and common law legal systems nothing more than the result of two different courses of historical development? Without denigrating the importance of history or even suggesting that it is not a sufficient explanation of why different legal systems take different approaches to important legal questions, including questions of methodology, I believe there are more than historical explanations for these differences in approach. We have already noted the common observation that legislation in common law countries is usually more detailed and, to the eyes of continental scholars, "insufficiently systematized," to use Mirjan Damaška's words.[26] Damaška also notes that common law countries have on the whole less hierarchically organized governmental structures than do civil law countries,[27] which may help account for the differences in how legislation is made and interpreted.

I would submit that there are certain structural features of the United States system of government that reinforce and help explain the persistence of these stylistic preferences. The United States does not have a parliamentary system of government. The executive cannot control the legislative process. More often than not, in recent times, the same political party has not controlled the executive and the two co-equal branches of the American legislature. Even when the Presidency, the House of Representatives, and the Senate have been controlled by the same party, the lack of strong centralized parties, along the European model, has meant that the executive branch has not been able to control the legislative process to the same extent that its European counterparts normally can. Although there is a legislative drafting service available to help representatives and

25. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 549-50 (1994).
26. *See* Damaška, *supra* note 4, at 359.
27. *See* MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 16-46 *passim* (1986).

senators draft legislation, much legislation is not subjected to that professional screening. Indeed, many important elements of legislation are inserted as amendments in an *ad hoc* manner. In operation, the whole American system functions as a device for forcing compromises at every step in the legislative process, with the result that there are many compromises. What the United States Supreme Court may be doing is respecting the compromise-seeking nature of the legislative process. The almost obsessive search of U.S. courts for congressional intent as revealed in the committee reports and debates of Congress clearly reflects an appreciation of the fact that legislation is the product of compromise, and that the courts exist to make those compromises effective. In so doing, the courts, with good reason, presuppose that the American public accepts the fact that government in a democracy is government by compromise, and that this public applauds the courts' attempts to facilitate the compromises reached in the legislative forum. In short, the ideal legislature as conceived in American political theory is one committed to compromise, and not one always seeking to give voice to the highest standards of rationality and to further the most noble aspirations of the society for which it legislates.[28] This is an important philosophical difference which the proponents of the globalization of law cannot afford to ignore.

II. TOLERATION OF DISPARATE OUTCOMES

The second mantra which one hears with increasing frequency is subsidiarity. Subsidiarity embodies the notion that decisions affecting ordinary human beings should be made at the lowest possible level of government. Many of the most fervent supporters of globalization are also enthusiastic supporters of subsidiarity. Subsidiarity is seen as insuring that the increasing globalization of the world's economy and its political structure does not result in what is often called a

28. I owe much to conversation with my friend and colleague Professor Paul D. Carrington for helping me appreciate how the structure of government influences judicial techniques of statutory interpretation. I wish to stress that I have been considering legislation in the United States as the culmination of a process of *political* compromise. There has been considerable discussion in recent years of a different point—and one that I am not making here—that the legislation that emerges in the United States is very often really the end-product of a process of *private* compromise among various interest groups. For a good discussion of the literature, see William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988). Popkin accepts that "[c]ompromise is an accurate description of the legislative process," *id.* at 565, but concludes that the perspective of viewing legislation as the product of *public* deliberation, rather that of *private* bargaining, is a more satisfactory analytical tool. This is a position with which I would agree.

"democratic deficit." But much of the discussion of the benefits of subsidiarity, as a way of providing legitimacy to governmental actions that affect ordinary people, tacitly presupposes that the decisions made at a lower level of government will be the same as the decisions that would have been made at a higher and more distant level of government. That assumption is unwarranted. And, it must be stressed, we are not talking simply about political decisions. The same type of tension can arise with regard to judicial decisionmaking. We have already seen, in our discussion of the interpretation of the Warsaw Convention, that courts operating in different legal cultures can reach different conclusions on the same issue, not necessarily because they take a different view of the merits of the issue involved, but because they have a different view of the judicial function and/or utilize different judicial techniques. In the *Floyd* case, as we have already noted, the United States Supreme Court gave no indication that it was opposed on philosophical or policy grounds to the plaintiffs' ability to recover for emotional distress in the circumstances of that case.

With the rise of international courts, there have been, and increasingly will be, instances in which the judgments of national courts will be reviewed by international courts. The international courts will, naturally, be expected to sometimes disagree with the decisions made by national courts. Sometimes these disagreements will be over the meaning of a treaty or other legal instrument. If the national court is a common law court and the international court that reviews the decision of the national court operates under civil law procedures, the *Floyd* case clearly indicates the sort of conflicts that might arise because of the different methods of interpretation employed in those two systems. There are, however, more important ways in which these conflicts can arise, and indeed have arisen in the past. It is to these that I now turn.

One major set of jurisprudential issues which has profound practical implications concerns the question of discretion. The question of discretion is a vast subject and one on which I have written extensively on a number of occasions.[29] For our purposes, we can take it as a given that if a superior tribunal has the authority to review the decisions of an inferior tribunal, it will be inclined to exercise that power. It is also undoubtedly true that a higher authority that is inclined to restrict the decisional authority of inferior

29. *See* George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747 (1986). Discretion is also discussed in CHRISTIE, *supra* note 3 *passim*.

authorities will take a more expansive view of the decisional authority, or discretion, that it is prepared to claim for itself. I wish to focus on the first of these two truisms; that is, the amount of discretion that a higher tribunal is prepared to accord to an inferior tribunal.

It has been noted that the rigid hierarchical organization of the judiciary in civil law countries is more antithetical to the dispersion of decisionmaking authority than is the case in common law systems.[30] Some of the greater tolerance shown by common law systems for the exercise of discretion by subordinate tribunals is undoubtedly due to the traditional common law use of trial by jury, even in civil cases, and the preference for presenting the case to the tribunal in a trial in which the parties, through their lawyers, and not the judges, shoulder the main responsibility for presenting the evidence. Although almost all common law jurisdictions, other than the United States, have now largely abandoned the practice of using juries in civil cases, some of the traditional deference to the determinations of juries has been transferred to trial judges sitting without juries. This was perhaps inevitable given the common law method of trial in which, compared to civil law systems, the trial judge is a relatively passive observer. The common law method of trial already manifests a willingness of officials with authority, namely trial judges, to defer to decisions of counsel. When this feature of common law adjudication is combined with a very strong preference for presenting the case through the testimony of live witnesses subject to cross-examination by opposing counsel, the ability of higher courts in a common law system to monitor and control the trial process is even weaker than the already weakened ability of a common law trial judge (as compared to his civil law counterpart).

The practical contemporary consequences of these structural differences between common law and civil law methods of decisionmaking can be quickly summarized. Although the use of juries in civil cases in the United States is still very common and is in no danger of extinction, a great number of civil cases are now tried to a judge without a jury. Focusing on only the federal courts—as this is not a legal treatise in which attention to legal detail is essential—these cases include not only those that at one time might have been tried to a judge and jury, but also cases in which, traditionally, juries were not used, such as those arising under the federal courts' equity jurisdiction and those arising under the exclusive federal admiralty jurisdiction.

30. *See* DAMAŠKA, *supra* note 27, at 16-46.

Both these latter categories of cases were previously tried under what purported to be a civil law method of trial, with greater emphasis, particularly in equity cases, on written evidence. In such cases, when appeals were taken, the appellate courts were not bound by trial court determinations of fact; they could make their own factual determinations based upon an independent examination of the record. Over the years, however, rather than common law cases tried without a jury being assimilated to the equity and admiralty procedure, with a few exceptions, the opposite took place.[31] Under the Federal Rules of Civil Procedure that now apply to all civil litigation in the federal courts, a trial judge's findings of fact must be accepted by appellate courts unless these findings are "clearly erroneous."[32] There are no such limitations on the authority of civil law appellate judges to substitute their determinations of fact for those of the trial judge. I recognize that when civil law cases reach the level of *cours de cassation*, review is limited to questions of law; inferior civil law appellate tribunals are, however, subject to no such limitations on their reviewing authority.

Although England has largely abandoned the use of juries in civil cases—defamation actions being the principal exception—some of the traditional deference to trial court factual determinations persists, despite the fact that, under the Judicature Acts of the 1870s, appeals from decisions of trial judges are supposed to be "rehearings."[33] The House of Lords has expressly held that not all findings of fact made by trial judges are subject to reexamination in appellate courts.[34] Their lordships distinguished primary facts—what Lord Simonds called "the finding of a specific fact"[35]—from inferences based on those facts. With regard to factual questions turning on the credibility of witnesses, an appellate court should rarely, and then only in cases of clear error, substitute its conclusions for those of the trial court.

With this background in mind, we might ask what would happen if the decisions of a domestic court working in the common law tradition were to be reviewed by an international tribunal following civil law methods of decisionmaking. This possibility is not mere

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31. The history of these developments is traced in George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 16-17 (1992).

32. FED. R. CIV. P. 52(a).

33. *See* Arthur L. Goodhart, *Appeals of Questions of Fact*, 71 LAW Q. REV. 402, 406 (1955). For the current state of the use of juries in civil cases in England, see Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 13-14 (1999).

34. *See* Benmax v. Austin Motor Co., [1955] App. Cas. 370.

35. *Id.* at 373.

academic speculation. Such cases have in fact arisen. For example, in *McLeod v. United Kingdom*,[36] a decision of the English Court of Appeal was reviewed by the European Court of Human Rights, which follows a civil law method of decisionmaking. In *McLeod*, following the applicant's divorce from her husband, an English county court made an order for the division of personal property in the matrimonial home which, under the terms of the divorce, was to be transferred to the applicant upon her paying her ex-husband the value of his interest in their home.[37] The applicant failed to deliver the personal property listed in the court's order to her ex-husband's solicitors within the allotted time.[38] She was then again ordered, under threat of penal sanction, to deliver the property to her ex-husband. She again failed to comply.[39] An order committing her to prison was issued on September 28, 1989, but its operation was suspended for seven days to allow her to deliver the property in question on or before October 6, 1989.[40] At the close of the hearing, the ex-husband suggested that he come by and pick up the property on October 3.[41] She said that she would have to consult with her solicitor before agreeing to this proposal because she would want him to be present at the time.

Believing that the applicant had agreed to his proposal, the ex-husband arrived on the premises on October 3 with his brother and sister and a representative from his solicitors, together with two police constables whom his solicitors had asked to be present in case there was any trouble.[42] The applicant was not at home.[43] Her elderly, infirm mother opened the door and was informed by the constables of the court order.[44] Upon being thus informed, she stepped aside and the ex-husband and his siblings started removing the property mentioned in the court's order.[45] One of the constables checked the property being taken to make sure that only property mentioned in the list supplied by the ex-husband's solicitors was taken.[46] As the ex-husband was about to drive away with the second and last load of personal property, the applicant returned home and demanded that the

36. 27 Eur. Ct. H.R. at 493 (1998).
37. *See id.* para. 9.
38. *See id.* para. 10.
39. *See id.* para. 11.
40. *See id.*
41. *See id.*
42. *See id.* para. 12.
43. *See id.* para. 13.
44. *See id.*
45. *See id.* paras. 13-14.
46. *See id.* para. 14.

property which had been removed be returned to the house.[47] One of the constables intervened and insisted that she permit the property to be removed. He let her inspect the contents of the van.[48] The applicant subsequently instituted criminal proceedings against her ex-husband and his brother and sister.[49] These were dismissed.[50] The applicant then, together with her mother, brought civil actions against her ex-husband and his brother and sister, against the ex-husband's solicitors, and against the London Metropolitan Police.[51] The first two actions were tried in the county court and resulted in judgments in favor of the applicant for trespass to her land and property.[52] The judge found that there had been no agreement that the ex-husband could take the property on October 3.[53]

The third action—the one against the police and the one with which we are concerned—was tried in the High Court and ultimately turned on the question of whether the police, in entering the applicant's premises, did so in the exercise of the common law privilege of the police to enter private property over the objection of the owner to prevent a breach of the peace.[54] The trial judge found that the police constables had reasonable grounds for believing that a breach of the peace might take place and that therefore their entry was privileged.[55] Accordingly, he dismissed the case.[56] An appeal was taken to the Court of Appeal.[57] As we have already noted, since the Judicature Acts of the latter part of the nineteenth century, even though appeals from the decisions of trial judges sitting without a jury are considered rehearings, considerable deference is nevertheless accorded to the factual findings of the trial judges. In the Court of Appeal, Lord Justice Neill set out the trial judge's findings of fact and his reasoning in a judgment with which the two other judges concurred. Lord Justice Neill concluded, "I, for my part, can see no

47. *See id.* para. 15.
48. *See id.*
49. *See id.* para. 16.
50. *See id.*
51. *See id.*
52. *See id.* para. 19.
53. The applicant and the estate of her mother (who had been recovering from a stroke and had high blood pressure at the time of the events in question and died while the action was pending) recovered £1,950 with interest and costs. *See id*. at 499 para. 19.
54. *See id.* at 555-56.
55. *See id.* at 557-58.
56. *See id.* at 558.
57. McLeod v. Commissioner of Police of the Metropolis, [1994] 4 All E.R. 553 (Eng. C.A.).

basis for upsetting his decision on these facts."[58] The Court of Appeal refused permission to appeal to the House of Lords.[59] When the applicant sought leave from the appeals committee of the House of Lords, that body also refused her request for leave to appeal.[60]

Finding herself foreclosed from further relief in Great Britain, the applicant sought relief from the European Commission of Human Rights on the grounds that, *inter alia*, the actions of the police constables were in violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom.[61] Article 8 provides, in relevant part, that

> [e]veryone has the right to respect for his private . . . life [and] his home. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, [or] for the prevention of disorder or crime.[62]

By a vote of fourteen to two, the European Commission declared its opinion that there had been no violation of the applicant's rights under Article 8 of the European Convention. The case was then referred by the Commission to the European Court of Human Rights. That court, in a seven to two decision, noted the findings of the European Commission and the British courts and then made its own finding that, although British law could provide for entry into someone's property against that person's objections to prevent a breach of the peace, under the circumstances presented, the entry by the constables was not necessary. The applicant's rights under Article 8 were therefore violated.[63]

The English judge, Sir John Freeland, joined by one of his colleagues, dissented in an opinion which gave much greater emphasis to the findings of the British trial judge. The dissent chided the majority for giving "insufficient weight" to certain findings of the trial judge, such as the finding that, although the applicant had not been present when the initial entry was made to remove the property, the constables could not know that she might not return while the

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58. *Id.* at 560.
59. *See id.* at 561.
60. *See id.* at 561.
61. November 4, 1950, 213 U.N.T.S. 221, 230 [hereinafter European Convention].
62. *Id.*
63. The European Court of Human Rights declared that the finding of a violation of her rights was sufficient satisfaction for any nonpecuniary damage the applicant might have suffered. She was granted a judgment for £15,000 for costs and expenses. *See* McLeod v. United Kingdom, 27 Eur. Ct. H.R. 493, 517 para. 69 (1998).

property was being removed and therefore could conclude that they should remain in the driveway until the removal of the property had been completed.[64] The majority had concluded, in contrast, that upon being informed that the applicant was not at home, the constables should not have entered the home because there was "little or no risk of disorder."[65] According to the majority, the fact that an altercation occurred upon her return home was "immaterial in ascertaining whether the police officers were justified in entering the property initially."[66]

I am not concerned with the question of whether the constables were or were not justified in what they did. I merely use the *McLeod* case to illustrate my point that common law judges, even when they have the power to substitute their findings of fact for those of the trial court, might be much more reluctant to do so than civil law judges. That is, they are more prepared to tolerate the sort of variability of result which was inevitable when trial by jury was the norm in civil cases (as it still largely is in the United States) than are judges trained in the civil law tradition. This was the situation in the *McLeod* case, where the English Court of Appeal and the European Court of Human Rights were faced not with a challenge to any specific fact found by the trial judge but, rather, with an attack on the trial court's conclusions based upon a consideration of the largely uncontested specific facts in the record.

The *McLeod* case is an excellent example of what George Fletcher, a prominent contemporary student of comparative law, calls "a preference for pluralism in legal thought . . . in the thinking of Anglo-American lawyers," a quality which he finds lacking in civil law adjudication.[67] Fletcher notes that the "prominence of reasonableness" as a crucial category of legal thought in common law adjudication illustrates that, unlike the civil law, "the common law does not insist upon the right answer at all times but only a reasonable or acceptable approach" to a problem, that is, an approach that accepts that "there are many reasonable answers to any problem."[68]

The clash of legal cultures can arise even when the common law decision whose validity is being challenged is the result of a jury's

64. *See id.* at 519 para. 5.
65. *Id.* at 515 para. 57.
66. *Id.*
67. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 699 (1998).
68. *Id.*

verdict in a criminal case. In *A. v. United Kingdom*,[69] a nine-year-old boy had been "hit with a stick by his stepfather" on probably more than one occasion and sufficiently severely to leave a number of bruises on the boy's body.[70] The stepfather was charged with assault occasioning actual bodily harm and tried in an English court before a judge and jury.[71] The stepfather's defense was based on the admitted fact that the victim was a "difficult boy" and that the beating had been a necessary and reasonable exercise of parental discipline.[72] The trial judge instructed the jury that the burden was on the prosecution to prove, beyond a reasonable doubt, that the force used was unreasonable.[73] The jury thereupon, by a majority verdict, voted to acquit the defendant stepfather.[74] Subsequently, a proceeding on behalf of the boy against the United Kingdom was brought before the European Commission of Human Rights.[75] The case was eventually referred to the European Court of Human Rights. In reliance on Article 3 of the European Convention, which declares that "[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment," the European Court of Human Rights found that the stepfather's acquittal violated the European Convention because the boy had not been provided adequate protection against the "treatment or punishment" that he had received. It noted that children were "entitled to State protection, in the form of effective deterrence."[76] The boy sought compensation for the grave physical abuse he had suffered and for the emotional distress of enduring the trauma of criminal proceedings which resulted in the acquittal of his stepfather. The court awarded the boy £10,000 as compensation for nonpecuniary damages and up to £20,000 in costs.[77]

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69. 27 Eur. Ct. H. R. at 611 para. 8 (1998). This case was decided on the same day as the *McLeod* case. Both cases were heard by nine-member panels, with four judges sitting on both cases.

70. *See id.* paras. 8, 10.

71. *See id.* para. 10.

72. *See id.*

73. *See id.*

74. *See id.* para. 12.

75. *See id.* para. 16.

76. *Id.* at 629-30 para. 22.

77. *Id.* paras. 34, 37. In the course of proceedings, the United Kingdom promised to amend its domestic law, but the European Court of Human Rights' judgment does not indicate how it proposes to do so. By outlawing all forms of parental corporal punishment as a species of "degrading treatment" under Article 3 of the European Convention on Human Rights? By specifying in greater detail what constitutes unreasonable force? By placing the burden of persuasion on the issue of reasonable force on the defendant? By making the jury's determination no longer final?

This is not the place for an extended discussion of *A. v. The United Kingdom*. For our purposes, it is enough to note that, like the *McLeod* case, it evidences a predilection to assert hierarchical control over subordinate decisionmakers that is lacking in common law jurisdictions. More to the point, could the United States ever enter into arrangements under which it could be sued in an international tribunal by its own citizens because a jury was unwilling to convict a person who, we will assume, clearly deserved to be convicted? It seems doubtful. The theory of jury nullification is too deeply entrenched in our law.

As the process of globalization brings more and more law under the jurisdiction of international tribunals, the different methods of legal argumentation and judicial decisionmaking followed in common law countries and civil law countries may prove to be greater stumbling blocks than substantive disagreements. Most people in the western world accept that there are fundamental human rights and are generally in agreement on what those rights are. They are not, however, in agreement on how disputes as to the violation of those rights should be tried and, in particular, how much deference is to be paid to the conclusions of the bodies that made the initial decisions in those disputes. Achieving agreement on these questions may prove much harder than many people think. Matters such as the style of judicial reasoning, that may seem unimportant to those who think in terms of the big picture, can assume crucial importance in practical life. One ignores such factors only at one's peril.